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FEDERAL COMMUNICATIONS COMMISSION
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JUL 31 1998

FEDERAL COMMUNICATIONS COMMISS
OFFICE OF THE SECRETARY

In the Matter of)
)
Annual Assessment of the Status of) CS Docket No. 98-102
Competition in Markets for the Delivery)
of Video Programming)

COMMENTS

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

Its Attorneys

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") applauds the Commission's efforts over the past year to remove regulatory barriers that derail competition between incumbent cable operators and alternative multichannel video programming distributors ("MVPDs"). Most significantly, the Commission has recognized that access to programming continues to be a touchstone issue for cable's competitors, and thus has initiated a rulemaking proceeding (CS Docket No. 97-248) in which it proposes to (1) streamline the program access complaint process; (2) provide program access complainants with a limited right to discovery and a damages remedy; and (3) clarify that denial of programming as a result of satellite-to-fiber migration is an "unfair practice" that violates the Commission's program access rules. WCA urges the Commission to stay its pro-competitive course and issue final rules in accordance with WCA's comments in that proceeding as soon as possible.

WCA also believes, however, that full and fair access to programming ultimately cannot be achieved as long as the current program access rules apply only to networks in which a cable operator has an attributable interest and are delivered via satellite. As the Commission recently acknowledged to Congress, cable's market power, as opposed to "vertical integration," is the true source of the program access problem. Indeed, the Commission's last annual report to Congress reflects that 60% of all nationally-distributed cable networks are not "vertically integrated," and, not coincidentally, those networks are entering into exclusive distribution contracts with incumbent cable operators. Further, it is now abundantly clear that cable operators are reconfiguring their facilities to take advantage of the fact that the program access statute, as currently written, does not explicitly cover programming that is delivered via fiber. Accordingly, WCA submits that the time has now come for the Commission to ask Congress to amend the program access statute so that it applies to *all* cable networks, regardless of ownership or the method of delivery.

WCA also welcomes the Commission's recent decision to initiate a comprehensive review of its cable ownership attribution rules, which implicate program access and cross-ownership issues that are critical to the competitive viability of the wireless cable industry. Under the Commission's current program access rules, an "attributable interest" is defined solely in terms of whether a "cable operator" has an attributable interest in a satellite-delivered cable network. The current rules contain no explicit attribution rule that establishes when an entity has an attributable interest in a "cable operator," and thus it has been claimed that the rules exempt a cable network that is owned by an entity that has made a substantial investment in a cable MSO. For reasons to be explained in greater detail in WCA's upcoming comments in CS Docket No. 98-82, WCA submits that this loophole is inconsistent with Congressional intent and with the Commission's ownership attribution policies in general, and therefore should be eliminated immediately via an explicit cable ownership attribution rule that defines what

constitutes an attributable interest in a cable operator for purposes of the Commission's program access rules.

In addition, as pointed out in WCA's comments regarding the Commission's pending broadcast ownership attribution rulemaking (MM Docket No. 94-150), the attribution standards applicable to the cable-MDS and cable-ITFS cross-ownership and cross-leasing rules are proving to be contrary to the goal of promoting competition. Those rules are overly restrictive in that they often preclude investors from holding non-controlling stock interests in wireless cable operators and cable MSOs. Moreover, the current rules apply even where the number of subscribers in the prohibited overlap area is relatively small and thus has no material impact on competition. Relaxation of those ownership attribution standards as proposed by WCA would substantially enhance the wireless cable industry's ability to raise capital, *without* materially increasing the risk that wireless cable spectrum will be "warehoused" in an anticompetitive manner. Accordingly, WCA urges the Commission to liberalize its cable-MDS and cable-ITFS attribution standards in accordance with WCA's comments in MM Docket No. 94-150. Moreover, to ensure that the Commission has sufficient flexibility to waive the cable-MDS cross-ownership rule in *de minimis* situations, in cases of financial hardship or where competition will be advanced, WCA asks that the Commission recommend in its report to Congress that the statutory cable-MDS cross-ownership ban be amended to allow exemptions for "good cause."

The Commission also has taken a first step toward promoting competition in the MDU environment by establishing procedures through which an alternative MVPD may obtain access to cable inside wiring that is used to provide service to an individual tenant's unit. Those procedures, though helpful to some extent, remain seriously flawed in that they deny an MDU owner or a competing provider the opportunity to purchase the incumbent's wiring for depreciated value before it is removed. Though WCA maintains that the Commission already has jurisdiction to remedy this problem, any lingering doubts as to the Commission's authority in this area can be addressed simply by recommending that Congress amend Section 624(i) of the 1992 Cable Act to authorize the Commission to adopt rules requiring that the wiring be sold prior to removal if the MDU owner or the competing provider wishes to purchase it, and that the price of the wiring be no higher than its depreciated value.

WCA also notes that the competitive viability of some wireless cable operators is implicated by the Commission's inquiry as to whether the Balanced Budget Act of 1997 requires it to employ competitive bidding to resolve mutually exclusive applications for new stations, notwithstanding the statute's exemption of "noncommercial educational broadcast stations" from the auction process. As set forth in the comments recently filed MM Docket No. 97-234, WCA and virtually every other interested party has demonstrated that Congress did not intend to include ITFS stations in the competitive bidding process. Again, however, to the extent that the

Commission has any doubts about this issue, they can be resolved by recommending that Congress amend the statute to clearly exclude ITFS from any competitive bidding requirements.

Finally, WCA is highly appreciative of the Commission's efforts to complete its pending rulemaking in MM Docket No. 97-217, which will establish comprehensive regulations permitting MDS and ITFS licensees to use their channels to provide two-way services such as high-speed Internet access and data transmission. Given the cable industry's substantial head start in testing and developing two-way services over cable plant, WCA submits that the public interest and considerations of equity militate strongly in favor of expeditious resolution of that proceeding.

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COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.^{1/}

I. INTRODUCTION.

First and foremost, WCA believes that the Commission can report to Congress with confidence that it has laid the foundation for a new regulatory environment that will promote *bona fide* competition between incumbent cable operators and alternative multichannel video programming distributors ("MVPDs"). Most important, the Commission has recognized that program access continues to be a critical issue for cable's competitors, and thus has recently

^{1/} WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless cable transmission and reception equipment.

proposed to adopt rules that would streamline the program access complaint process, give program access complainants both a right to discovery and a damages remedy, and clarify that denial of programming by virtue of satellite-to-fiber migration is an “unfair practice” and thus a violation of the program access rules.^{2/} In addition, the Commission has initiated a comprehensive reexamination of its cable ownership attribution rules, which implicate program access and cross-ownership issues critical to alternative MVPDs and wireless cable operators in particular;^{3/} adopted comprehensive cable inside wiring rules which clarify when and how a competing provider may obtain access to the wiring used to serve an MDU resident’s individual unit;^{4/} and commenced a rulemaking proceeding in which it proposes to adopt regulations permitting wireless cable operators to use their channels to provide two-way services such as high-speed Internet access and data transmission.^{5/}

Nonetheless, as implied by the Commission in prior statements to Congress, much work remains to be done. For example, though adoption of WCA’s proposals in the *Program Access*

^{2/} *Implementation of the Cable Consumer Protection and Competition Act of 1992*, 12 FCC Rcd 22840 (1997) [the “*Program Access NPRM*”].

^{3/} *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Review of the Commission’s Cable Attribution Rules*, CS Docket No. 98-82, FCC 98-112 (rel. June 26, 1998) [the “*Cable Attribution NPRM*”].

^{4/} *Telecommunications Services - Inside Wiring; Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring*, 13 FCC Rcd 3659 (1997) [the “*Inside Wiring R&O*”].

^{5/} *Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, 12 FCC Rcd 22174 (1997) [the “*Two-Way NPRM*”].

NPRM will improve the competitive environment for cable's competitors, full and fair access to programming ultimately cannot be achieved as long as the current program access statute applies only to networks in which a cable operator has an attributable interest and are delivered via satellite, which constitute not even 50% of those currently available in the marketplace. Also, under the Commission's current program access rules, an "attributable interest" is defined solely in terms of whether a "cable operator" has an attributable interest in a satellite-delivered cable network. The current rules contain no explicit attribution rule that establishes when an entity has an attributable interest in a "cable operator," and thus it has been claimed (wrongly, WCA submits) that the rules exempt a cable network owned by an entity that also holds a substantial ownership interest in a cable MSO.

As to cross-ownership, though the Commission can promote investment in the wireless cable industry by liberalizing its attribution standards that apply to the cable/wireless cable cross-ownership and cross-leasing rules, the Commission will continue to have virtually no authority to waive the cable-MDS cross-ownership rule absent an amendment to the statutory cable-MDS cross-ownership ban.

Finally, though the Commission's new cable inside wiring rules represent a critical first step toward defining the obligations of incumbents and competitors in the MDU environment, they are seriously flawed to the extent that they do not permit a competing provider to purchase an incumbent's wiring at depreciated value *before* it is removed from MDU property. The Commission has already suggested that this problem should be addressed via an amendment to

the cable inside wiring provision of the 1992 Cable Act, and that suggestion should be reiterated in the Commission's report to Congress in this proceeding.^{6/}

Accordingly, WCA submits that consumers will not realize the full benefit of the Commission's pro-competitive agenda unless the Commission's actions are accompanied by legislative relief that conclusively eliminates the loopholes described above. This year's Annual Report to Congress therefore must go beyond a factual analysis of marketplace trends and include specific recommendations that the 1992 Cable Act be modified to bring the current statutory framework into line with the existing competitive realities in the MVPD arena. To that end, WCA urges that the Commission do the following:

- resolve the *Program Access NPRM* as soon as possible in accordance with WCA's proposals therein;
- recommend in its Report to Congress that Section 628 of the 1992 Cable Act (47 U.S.C. § 548) be amended to impose program access obligations on *all* cable networks, regardless of ownership or the method of delivery;
- amend Section 76.1000(b) of the Commission's Rules (47 C.F.R. § 76.1000(b)) to clarify when an entity will be deemed to hold an "attributable interest" in a "cable operator" and thus will be subject to program access requirements with respect to any satellite-delivered cable network in which it holds at least a 5% voting or nonvoting stock interest;
- liberalize its ownership attribution standards applicable to the cable-MDS and cable-ITFS cross-ownership and cross-leasing rules as already proposed by WCA, *and* recommend that Congress amend Section 613(a)(2) of the 1992 Cable Act (47 U.S.C. § 533(a)(2)) to allow the

^{6/} See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1144-5 (1998) ["If the Commission had more explicit authority to address wiring transfer and compensation issues, policies could be adopted to further facilitate competition in MDUs."] [the "*Fourth Annual Report*"].

cable-MDS cross-ownership rule to be waived for "good cause," and to include a "rural exemption" within the rule itself;

- recommend that Congress amend Section 624(i) of the 1992 Cable Act (47 U.S.C. § 544(i)) to clarify that the Commission has jurisdiction over the disposition over "home run" wiring, and may adopt rules stating that where an MDU owner or competing provider wishes to purchase inside wiring prior to removal, the incumbent must sell the wiring to the MDU owner or competing provider at a price no higher than depreciated value;
- recommend that Congress amend the 1992 Balanced Budget Act to explicitly exclude new, mutually exclusive ITFS applications from the competitive bidding process; and
- adopt rules in response to the *Two-Way NPRM* as soon as possible.

II. DISCUSSION.

A. *The Commission's Program Access Reforms Must Be Accompanied by an Amendment to the Program Access Statute To Impose Program Access Requirements On All Cable Networks, Not Just Satellite-Delivered Networks In Which a Cable Operator Has An Attributable Interest.*

As Rep. Billy Tauzin succinctly put it, "[h]e who owns the programming rights [rules] the marketplace."^{7/} In a similar vein, Chairman Kennard recently observed that "[n]ew entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively."^{8/} As WCA noted in its comments on the *Program Access NPRM*, many of the program access difficulties experienced by cable's competitors are attributable to anomalies in

^{7/} Glick, "Tauzin Concerned About Cable Consolidation, Program Exclusivity," *Cable World*, at 1, 43 (Jul. 7, 1997).

^{8/} Separate Statement of Chairman William E. Kennard re: *Fourth Annual Report*, 13 FCC Rcd at 1239.

the Commission's procedural rules that give cable programmers every incentive to delay selling their product to alternative MVPDs for as long as possible.^{2/} Moreover, the accelerating trend toward migration of programming from satellite to fiber has now become a reality, and, absent a statutory amendment that expands the scope of the program access statute to programming delivered via fiber, it is absolutely essential that the Commission clarify that such migration is an "unfair practice" that "hinder[s] significantly or . . . prevent[s] any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."^{10/} WCA thus urges that the Commission stay its pro-competitive course and resolve the *Program Access NPRM* in accordance with WCA's comments thereon as soon as possible.^{11/}

^{2/} See Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-248, at 7-19 (filed Feb. 2, 1998) [the "*WCA Program Access Comments*"].

^{10/} 47 U.S.C. § 548(b). See also Umstead & Forkan, "*Rainbow Keeps New Services Exclusive, Multichannel News*, at 1 (July 6, 1998) [discussing Rainbow Media Holdings' launch of cable-exclusive regional channels to be distributed via fiber in the New York tri-state area]; Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 6 (Jan. 23, 1998) ["Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . . [T]here . . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are not much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service."]; "The New Establishment - - Vanity Fair's Fifth Leaders of the Information Age," *Vanity Fair*, p. 166 (Oct. 1997) [discussing Comcast's migration of local cable sports programming from satellite to fiber]; Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *New York Times*, Financial p. 1 (April 27, 1997) ["Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission."].

^{11/} In its comments WCA requested that the Commission amend its rules to (1) allow program access complainants to obtain discovery as a matter of right; (2) require that program access be resolved within a specific period of time from the close of the relevant pleading cycle; (3) impose a damages

The fact remains, however, that it will not be possible for the Commission to fully realize its ultimate goal of full and fair access to programming unless Congress expands the coverage of the current program access statute to cover *all* cable networks, regardless of ownership or method of delivery. As reflected in the Commission's 1997 Annual Report to Congress, the statute's focus on networks in which a cable operator holds an "attributable interest" has been outdated for some time: of the 172 national satellite-delivered cable programming services, 104, or 60%, are *not* "vertically integrated" and thus are not covered by the program access statute.^{12/} More important, however, Congress's limitation of the statute to networks in which a cable operator holds an attributable interest misperceives the true source of the program access problem. The Commission itself recently noted to Congress that "[i]t is probably fair to say that the general conclusion is that any analysis *should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself.*"^{13/} It is therefore no coincidence that a number of cable networks that arguably do not qualify as "vertically integrated" under the statute are behaving *like* vertically integrated programmers and refusing to sell their product to alternative MVPDs.^{14/}

remedy in program access cases; and (4) declare that denial of programming to an alternative MVPD in conjunction with satellite-to-fiber migration is an "unfair practice" under Section 628(b) of the 1992 Cable Act and thus is actionable under the Commission's program access rules. *WCA Program Access Comments* at 7-24.

^{12/} *Fourth Annual Report*, 13 FCC Rcd at 1122.

^{13/} Kennard Letter, Responses to Questions at 3 (emphasis added).

^{14/} As identified by the Commission, such services include Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television, and TV Land. Kennard Letter, Responses to

Given the now well-documented program access difficulties alternative MVPDs are still having in the wake of the 1992 Cable Act, and given the ongoing threat that migration of satellite-delivered networks to fiber will exclude even more cable programming from the scope of the law, WCA believes that the Commission must act now to bring the statute into line with competitive and technological realities which Congress clearly did not contemplate six years ago. Accordingly, for the reasons set forth above and in WCA's comments in the Commission's various other program access-related proceedings, WCA requests that the Commission include in its Report to Congress a recommendation that Section 628 of the 1992 Cable Act be amended to apply the statute's program access requirements to *all* cable network programming, regardless of ownership or the method of delivery.

Questions at 1. As discussed in WCA's pleadings with respect to the Commission's ongoing review of Fox's proposed investment in Primestar, Fox News is a particularly telling example of how large cable MSOs are able to "persuade" a programmer into signing cable-exclusive contracts even where the MSOs hold no stock ownership in the programmer. *See, e.g.*, WCA Petition to Deny or, Alternatively, Request for Imposition of Conditions re: FCC File No. 106-SAT-AL-97, at 14-15 (Sept. 25, 1997). Also, *see* Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 6 (Dec. 18, 1997) ["[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS which create exclusivity, and cable and satellite programmers (Murdoch) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagramed with all of its equity, licensing, carriage agreements, and *quid pro quo* relationships, creates a web which has the effect of ensnaring all competitors."].

B. The Commission Should Modify Its Cable Ownership Attribution Rules To Eliminate Loopholes in its Program Access Rules and Eliminate Unnecessary Restrictions on Investment in the Wireless Cable Industry.

In the *Cable Attribution NPRM*, the Commission initiated a comprehensive review of its various cable ownership attribution rules to determine whether they should be conformed or modified in light of current market conditions. The Commission's review implicates the cable ownership attribution rules that apply with respect to program access and cable/wireless cable cross-ownership, and thus is of considerable importance to the wireless cable industry. WCA intends to address these matters in greater detail in its upcoming comments on the *Cable Attribution NPRM*, and is raising them here only to highlight the pertinent issues and suggest a recommendation to Congress that WCA believes is necessary to give wireless cable operators adequate relief from the current cable/wireless cable cross-ownership restrictions.

As discussed above, the program access statute, and thus the Commission's program access rules, cover only those satellite-delivered cable networks in which a "cable operator" holds an "attributable interest."^{15/} Section 76.1000(b) of the Commission's Rules, however, only defines an "attributable interest" with respect to a cable operator's level of ownership in a programmer. More specifically, the rule states that a "cable operator" will be deemed to have an "attributable interest" in a cable programmer (thereby subjecting that programmer to the program access rules) where it holds 5% or more of the programmer's voting or non-voting stock. Significantly, the rule specifically notes that this is the cable/broadcast ownership

^{15/} 47 U.S.C. 548(b), (c)(2); 47 U.S.C. § 76.1002(a)-(c).

attribution standard (47 C.F.R. § 76.501), albeit without that rule's exceptions for single majority stockholders and non-voting stock.

Section 76.1000(b) does not define what constitutes an "attributable interest" in a *cable operator*, and thus some have said it excludes a satellite-delivered cable network owned by an entity that also holds a significant ownership interest in a cable operator. The most prominent example of this is MSNBC, which is 50% owned by Microsoft; as the Commission is aware, Microsoft also holds a \$1 billion, 11.5% non-voting stock interest in Comcast, one of the largest cable MSOs in the United States. Were MSNBC owned directly by Comcast, MSNBC clearly would be covered by the program access rules, since Comcast is a "cable operator." The question here, however, is whether Microsoft's investment in Comcast is "attributable" and therefore renders *Microsoft* a "cable operator" for purposes of the program access rules. Since Section 76.1000(b) does not explicitly define what constitutes an attributable interest in a "cable operator," it has been claimed that MSNBC is not subject to program access obligations irrespective of Microsoft's enormous financial stake in Comcast. This "gap" in Section 76.1000(b) is especially anomalous given that every other cable ownership attribution rule adopted by the Commission provides a definition as to what constitutes an attributable interest in a cable operator.^{16/} Accordingly, as will be requested in WCA's upcoming comments on the *Cable Attribution NPRM*, WCA urges the Commission to close this loophole by applying Section 76.1000(b)'s definition of "attributable interest" to any ownership interest in a

^{16/} See, e.g., 47 C.F.R. § 21.912, note 1(A), and 76.501, note 2.

programmer *or* a cable operator, so that networks like MSNBC are explicitly covered by the Commission's program access rules.

As to cable/wireless cable cross-ownership, WCA's comments in MM Docket No. 94-150 explain how the Commission's current ownership attribution standards for the cable-MDS cross-ownership rule (47 C.F.R. § 21.912(a)), the cable-MDS cross-leasing rule (47 C.F.R. § 21.912(b)) and the cable-ITFS cross-leasing rule (47 C.F.R. § 74.931(h)) unduly restrict investment in the wireless cable industry, and urge the Commission to adopt more relaxed ownership attribution standards that will promote an infusion of capital into the industry without creating a material risk that MDS or ITFS spectrum will be "warehoused" in an anticompetitive manner.^{17/} WCA also pointed out, however, that the statutory cable-MDS cross-ownership ban (47 U.S.C. § 533(a)(2)) cannot, as currently interpreted by the Commission, be waived for "good cause."^{18/} This generally is not the case with respect with to any of the Commission's other cable-related cross-ownership restrictions (including the cable-MDS and cable-ITFS cross-leasing rules), and there does not appear to be any valid public interest reason for according

^{17/} WCA's comments are a matter of public record and are incorporated herein by reference. See Comments of The Wireless Cable Association International, Inc., MM Docket Nos. 94-150, 92-51 and 87-154 (filed Feb. 7, 1997) [the "*WCA Cross-Ownership Comments*"]. As explained therein, in the cable-MDS context a prohibited cross-ownership is created by a 5% or greater voting *or* non-voting stock interest in a wireless cable operator, and thus chill potential investment in the wireless cable industry by institutional investors or venture capital firms who have already invested in or would like to invest in the cable industry. *Id.* at 7-8. WCA thus requested that the Commission apply its proposed broadcast ownership attribution criteria to the cable/MDS cross-ownership and cable-MDS and cable-ITFS cross-leasing rules, so that only voting stock interests of 5% or greater are attributable. *Id.*

^{18/} *Id.* at 16-18.

cable-MDS cross-ownership different treatment. Moreover, unlike the cable-ITFS cross-leasing rule and the cable-telco buyout restrictions set forth in the Telecommunications Act of 1996 (47 U.S.C. § 572(c)(4)-(5)), the cable-MDS cross-ownership ban does not include a “rural exemption” that addresses the special needs of communities located outside of urban areas. Accordingly, to lend greater consistency to the Commission’s cross-ownership rules and serve the larger objective of promoting competition, WCA reiterates its request that the Commission recommend to Congress that the statutory cable-MDS cross-ownership ban be amended to allow waivers for “good cause” and to include a rural exemption applicable to any nonurbanized area of fewer than 10,000 persons.^{19/}

C. The Commission Should Recommend That Congress Adopt a Clarifying Amendment to Section 624(i) of the 1992 Cable Act That Removes Any Doubts As to The Commission’s Jurisdiction Over “Home Run” Wiring and Its Authority To Adopt Rules Giving MDU Owners or Alternative MVPDs An Opportunity To Purchase Inside Wiring at Depreciated Value Before It is Removed.

WCA applauds the Commission’s efforts to establish comprehensive cable inside wiring rules, since resolution of inside wiring issues is absolutely necessary if MDU owners and alternative MVPDs are to have any kind of certainty as to the “rules of the road” when a building owner or an individual tenant wishes to switch service providers. In this regard, there is little question that the Commission’s new rules and policies governing “home run” wiring (*i.e.*, the wiring specifically dedicated to providing service to an individual tenant’s unit, running from

^{19/} *Id.* at 11-12, 15-20. WCA’s proposed language for such an amendment is attached hereto as Exhibit 1.

the cable home wiring demarcation point (twelve inches outside the tenant's unit) to the junction box) represent a critical first step toward achievement of full and fair competition in the MDU environment.^{20/}

Nonetheless, as set forth in WCA's Petition for Reconsideration with respect to the *Inside Wiring R&O*,^{21/} WCA believes that the Commission's inside wiring rules still do not give MDU owners sufficient certainty as to their rights upon termination of the incumbent's service, and thus will not materially improve competition in the MDU environment unless the Commission adopts WCA's suggested rule modifications. In WCA's view, the heart of the problem is the Commission's failure to recognize that the cost of cable inside wiring lies primarily in installation and not in the wiring itself, and that the salvage value of coaxial cable pales in comparison to the cost of removing the wiring and restoring the premises to their former condition. Structural limitations, fear of property damage, and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used. Thus the marketplace reality is this: *if MDU owners fear that incumbent cable operators will elect to remove their home run wiring and force*

^{20/} For example, consistent with a proposal put forth by WCA, the Commission will now require an incumbent cable operator to enforce its "legal right to remain" by obtaining a court order or injunction within 45 days of receiving notice that the MDU owner intends to give a competitor access to the building. *Inside Wiring R&O*, 13 FCC Rcd at 3698. In addition, incumbents must now decide how they want to dispose of their "home run" wiring within a specific period of time after notice of termination from the MDU owner and, more generally, must cooperate with the MDU owner and the competitor so that a seamless transition of service may take place. *Id.* at 3680-89.

^{21/} WCA Petition for Reconsideration re: CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997) [the "WCA *Inside Wiring Petition*"].

a competitor to postwire the premises, the MDU owner often will deny access to competing service providers.

The “postwiring” problem will continue to burden cable’s competitors for the foreseeable future as long as incumbents are permitted to remove their wiring before the MDU owner (or, if he or she so designates, the competing provider) has an opportunity to purchase it. Accordingly, WCA has recommended that the Commission adopt a rule stating that if the MDU owner or successor MVPD wishes to purchase the incumbent’s home run wiring, it should have the right to do so at a price equal to depreciated value.^{22/} It should be noted that WCA is *not* suggesting that an incumbent should not receive just compensation for its wiring. To the contrary, in this case “just compensation” equals the wiring’s depreciated value, since the wiring amounts to little more than scrap once it is removed from the building.^{23/} That is all that

^{22/} See WCA Reply to Oppositions to Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 7 (filed Jan. 28, 1998). Conversely, if the MDU owner or the successor MVPD elects not to purchase the incumbent’s home run wiring, the incumbent should be free either to remove the wiring and restore the premises to its prior condition, or abandon the wiring. *Id.*

^{23/} Indeed, the record before the Commission is devoid of any evidence that inside wiring is ever re-used or otherwise has any value to the incumbent cable operator once it is removed from MDU property. As the Commission has noted with respect to telephone inside wiring: “[W]e see no essential difference between [inside] wiring installed by the telephone companies who may claim a continuing ownership interest and inside wiring installed by other nonregulated parties who do not claim a continuing ownership interest and inside wiring installed by other nonregulated parties who do not claim a continuing ownership interest. In both cases, *the costs considered in terms of time, labor and materials have been recovered.* In both cases, *the investment is labor intensive and the value of the wire itself is low in relation to the total cost of installation;* and with respect to the wire itself, the physical in-service characteristics are the same with respect to low salvage value and location — on the premises of someone other than the telephone company and, in many cases, permanently affixed. In such circumstances, prudent business practice would dictate abandonment of the wire. In view of full recovery and the absence of any characteristics which would distinguish it from wiring installed by others, valid ownership claims already seem to have been surrendered.”

incumbent cable operators are entitled to under the Fifth Amendment, and thus WCA's proposal does not raise any Fifth Amendment "takings" issue.^{24/}

The Commission has already ruled that it has jurisdiction to regulate the disposition of an incumbent cable operator's home run wiring, and WCA believes that ruling is correct.^{25/} The cable industry, however, has argued otherwise, and has already appealed the *Inside Wiring R&O* to the United States Court of Appeals for the Eighth Circuit, where it is likely to raise a direct challenge to the Commission's finding of jurisdiction.^{26/} Furthermore, as noted above, the Commission has suggested that it may *not* have jurisdiction to adopt WCA's proposal absent explicit statutory authority to do so.^{27/} WCA submits that to the extent that any lingering doubts remain as to the Commission's authority to regulate the disposition of "home run" wiring and direct a sale of that wiring prior to removal, the Commission can resolve them simply by recommending to Congress that Section 624(i) of the 1992 Cable Act (47 U.S.C. § 544(i)) be

WCA Inside Wiring Reply at 8-9, quoting *Second Report and Order* in CC Docket No. 79-105 (Detariffing the Installation and Maintenance of Inside Wiring), FCC 86-63, 51 FR 8498, ¶ 46 (rel. March 12, 1986) [emphasis added]; see also *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987) (compensation based on "fully allocated cost" determined not to constitute an unconstitutional taking).

^{24/} Moreover, WCA has also stated that it does not oppose arbitration where the only issue before the arbitrator is the correct depreciated value of the wiring. See *WCA Opposition to Petitions for Reconsideration*, CS Docket No. 95-184 and MM Docket No. 92-260, at 13 and n.35 (filed Jan. 15, 1998). WCA's proposal thus satisfies the requirement that the precise amount of "just compensation" be determined via adjudication rather than legislative fiat. See, e.g., *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987).

^{25/} *Inside Wiring R&O*, 13 FCC Rcd at 3700-09.

^{26/} *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Cir., filed Nov. 24, 1997).

^{27/} See note 6, *supra*.

clarified to state unequivocally that the Commission has the requisite jurisdiction and the discretion to modify its rules as proposed by WCA.^{28/}

D. The Commission Should Ask Congress to Clarify That the Balanced Budget Act of 1997 Does Not Require The Commission To Employ Competitive Bidding To Resolve New, Mutually Exclusive ITFS Applications.

In the Balanced Budget Act of 1997 (the “Balanced Budget Act”), Congress amended Section 309(j) of the Communications Act of 1934 to expand the Commission’s competitive bidding authority to include mutually exclusive applications for initial licenses or construction permits in a variety of radio services that previously had not been subjected to competitive bidding procedures.^{29/} In so doing, however, Congress exempted “non-commercial educational broadcast stations” and “public broadcast stations” from competitive bidding requirements.^{30/} Notwithstanding the fact that the ITFS service has never been subject to competitive bidding, and the fact that there is no indication whatsoever that Congress did not intend for ITFS stations

^{28/} WCA’s proposed language for such an amendment is attached hereto as Exhibit 2. In addition, for the reasons set forth in the *WCA Inside Wiring Petition* and in WCA’s subsequent pleadings related thereto, WCA urges the Commission to preempt discriminatory state mandatory access statutes that give incumbent cable operators but not their competitors a right to enter MDU property. WCA also asks that the Commission (1) prohibit an incumbent cable operator from disconnecting my wiring unless and until the new provider has entered the property, connected its own wire and is ready to provide service; (2) adopt a shorter procedural timetable for disposition of home run wiring where an MDU owner allows the incumbent and the new entrant to compete head-to-head in the same building; and (3) clarify that existing contractual provisions regarding disposition of home run wiring are *not* grandfathered to the extent that they are less favorable to cable’s competitors than the Commission’s rules.

^{29/} See Pub. L. No. 105-33, 111 Stat. 251 (1997) [hereinafter cited as “Balanced Budget Act”].

^{30/} See 47 U.S.C. §§ 309(j), 367(6).

to fall within the scope of the exemption for “non-commercial educational broadcast stations,” and “public broadcast stations,” the Commission has suggested that it may be obligated under the Balanced Budget Act to resolve mutually exclusive applications for new ITFS licenses through auction.^{31/}

To date, WCA and virtually every other interested party has overwhelmingly supported the view that Congress simply either overlooked the case of ITFS (intending to leave in place the prior exemption of ITFS from competitive bidding) or intended that ITFS stations fall within the description of “noncommercial educational broadcast stations” and “public broadcast stations” that are exempt from auction authority.^{32/} Indeed, it is highly significant that the only

^{31/} *Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, 12 FCC Rcd 22363, 22405-5 (1997).

^{32/} See Comments of the National ITFS Association, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 2 (filed Jan. 26, 1998) (“... Congress never contemplated the use of competitive bidding for any noncommercial services.”)[hereinafter cited as “NIA Comments”]; Comments of the Board of Education of the City of Atlanta *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 8 (filed Jan. 26, 1998) (“The imposition of auction procedures upon ITFS applicants is nowhere specifically mandated by the Balanced Budget Act of 1997 and is entirely inappropriate for this educational service.”) [hereinafter cited as “SW&M/Atlanta Comments”]; Comments of the Association for America’s Public Television Stations, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 16 (filed Jan. 26, 1998) (Balanced Budget Act “precludes the use of auctions where ITFS applications are involved”); Comments of the Arizona Board of Regents for the Benefit of the University of Arizona *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 2 (filed Jan. 26, 1998) (“The ITFS Parties believe that, in the Balanced Budget Act of 1997, Congress did not intend for the Commission to require mutually exclusive ITFS applications to go to competitive bidding.”) [hereinafter cited as “ITFS Parties Comments”]; Joint Comments of the Board of Trustees of Community-Technical Colleges (Connecticut) *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 3 (filed Jan. 26, 1998) (“The imposition of auction procedures upon ITFS applicants is nowhere specifically mandated by the Balanced Budget Act of 1997 and is

party which has promoted the use of auctions for ITFS is Hispanic Information and Telecommunications Network, Inc. (“HITN”), a non-local (or “national”) entity that fares poorly under the Commission’s current “point” system that favors local ITFS applicants, and thus has long opposed the Commission’s policy of promoting localism in the ITFS service.^{33/}

entirely inappropriate for this educational service.”) [hereinafter cited as “SW&M ITFS Joint Comments”]; Comments of the Indiana Higher Education Telecommunications System, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 7 (filed Jan. 26, 1998) (“Certainly, there is nothing in the 1997 statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgement that ITFS ... should be exempt from competitive bidding policies.”) [hereinafter cited as “IHETS Comments”]; Comments of the Rocky Mountain Corporation for Public Broadcasting, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 1 (filed Jan. 26, 1998) (“[I]t is clearly Congress’ desire to exempt noncommercial licensees engaging in noncommercial services from the auction process ...”)[hereinafter cited as “Rocky Mountain CPB Comments”]; Comments of the School District of Palm Beach County, Florida, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 6 (filed Jan. 26, 1998) (“Certainly, there is nothing in the statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgement that ITFS ... should be exempt from competitive bidding policies.”) [hereinafter cited as “Palm Beach Comments”]; Comments of the WCA, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 5 (filed Jan. 26, 1998) (“There is absolutely no evidence in the Balanced Budget Act or its legislative history that Congress intended to reverse course and subject mutually exclusive applications for new ITFS stations to competitive bidding.”) [hereinafter cited as “WCA Comments”].

^{33/} Comments of Hispanic Information and Telecommunications Network, Inc., MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264 (filed Jan. 26, 1998). Under the Commission’s current system, points are awarded as follows:

- four points for applicants that are “local”;
- three points for accredited schools (or their governing bodies) applying within their jurisdiction;
- two points for seeking licenses for no more than four channels within a locality;
- one or two points depending upon the quantity of educational programming the applicant anticipates transmitting; and
- one point for a grandfathered ITFS licensee migrating off of spectrum subsequently allocated to the Multipoint Distribution Service.

See 47 C.F.R. §74.913(b).

WCA reiterates that the Commission must take pains to ensure that the local foundation of ITFS is not undermined. The current comparative point system has been designed to advance the Commission's objectives for the ITFS, *i.e.*, "to grant licenses to those applicants that are most likely to best meet the educational and instructional needs of the various communities."^{34/} The record before the Commission reflects that while awarding licenses to those who value them the most (as evidenced by their willingness to bid the most at auction) may encourage growth and competition in commercial services, the use of auctions is simply inappropriate and would be downright destructive when it comes to the awarding of specialized licenses to non-commercial entities for the purpose of providing educational and instructional telecommunications services.^{35/}

Moreover, the application of competitive bidding to the ITFS service ultimately will undermine the Commission's overriding objective of promoting competition, since it creates a substantial risk that *bona fide* applicants ready and willing to initiate local ITFS service and lease excess channel capacity to wireless cable operators will be cast aside in favor of "national" filers who have a history of allowing ITFS channels to lay fallow or, in some cases, have lost their

^{34/} *ITFS Point System Order*, 101 F.C.C.2d at 69. Significantly, while the comparative hearing processes for broadcast services have long been controversial and led to the Balanced Budget Act's revision of Section 309(j), the comparative selection procedures for ITFS have long been settled and have not raised similar constitutional concerns.

^{35/} See SW&M/Atlanta Schools Comments, at 8; SW&M ITFS Joint Comments, at 3; NIA Comments, at 7; BellSouth Comments, at 7-9, 16; CPB Comments, at 6; Palm Beach Comments, at 3-4; ITFS Parties Comments, at 5-6; North Carolina Joint Comments, at 3; Rocky Mountain CPB Comments, at 2; IHETS Comments, at 3-5; WCA Comments, at 11-14; Smith Comments, at 14.

ITFS authorizations for failure to construct. In this regard, it should be noted that HITN appears to fall squarely within the latter category.^{36/}

Nonetheless, if notwithstanding the above the Commission still harbors any doubt as to whether Congress intended to exempt the ITFS service from competitive bidding, WCA again submits that the Commission can resolve the matter definitively simply by asking Congress to amend Section 309(j)(2)(C) of the Communications Act of 1934 to specifically exclude ITFS licenses from competitive bidding requirements. WCA's proposed draft language for such an amendment is attached hereto as Exhibit 3.

E. The Commission Must Act Expeditiously To Conclude the Two-Way NPRM.

To date the Commission has been very supportive of the wireless cable industry's attempt to expand into the arena of two-way services, and the agency now appears to be on the verge of adopting formal rules in response to the *Two-Way NPRM* that will allow wireless cable operators and ITFS licensees to develop and market interactive services which take full advantage of digital technology. WCA commends the Commission's efforts, but notes that expeditious

^{36/} See, e.g., Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File Nos. BMPLIF-980321DX and BMPLIF-980312DY (June 8, 1998); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File No. BMPLIF-980129DU (June 4, 1998); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File No. BMPLIF-950523DV (Sept. 9, 1996), *recon. denied*, Letter from Barbara J. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Gerald Zuckerman, Esq. and Paul J. Sinderbrand (Dec. 4, 1996).