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

JAN 1 3 2003

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

FIRST ORDER ON RECONSIDERATION AND SECOND REPORT AND ORDER

Adopted: January 21, 2003 **Released: January 29,2003**

By the Commission: Commissioner Copps issuing a statement; Commissioner Martin approving in part. dissenting in part and issuing a statement.

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I. INTRODUCTION

1. In the Report and Order and Second Further Notice of Proposed Rulemaking in this proceeding (*"Report and Order"* and *"Second Further Notice"*), the Commission amended its cable television inside wiring rules for the purpose of facilitating competition in video distribution markets.[1] The new rules were intended to foster opportunities for multichannel video programming distributors ("MVPDs") to provide service in multiple dwelling unit buildings ("MDUs")[2] by establishing procedures regarding how and under what circumstances the existing cable home run wiring would be made available to alternative video service providers?[3] By facilitating the entry of new providers into MDU

[1] *In the Matter of Telecommunications Services, Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring;* CS Docket No. 95-184, MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking,* 13 FCC Rcd 3659 (1997); appeal docketed sub nom. *Charter Communications, Inc. v. FCC,* No.97-4120 (8" Cir. 1997).

[2] An MDU is a building or buildings with two or more residences, such as an apartment building, condominium building, or cooperative. *See* 47 C.F.R. § 76.800.

[3] 47 C.F.R. § 76.800(d). Cable home run wiring in an MDU is the wiring that runs from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop. In contrast, "cable home wiring" is the internal wiring contained within the premises of a subscriber, which begins at the demarcation point and runs to the subscriber's television set or other customer premises equipment. The demarcation point is the point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises, or where the wire is physically inaccessible at such point, the closest practicable point that does not require access to the subscriber's dwelling unit. *See* 47 C.F.R. § 76.5(mm)(2). Cable home wiring does not include (continued...)

communities, the Commission advanced Congress's objective in the Telecommunications Act of 1996 ("1996 Act") to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[4]

2. The rules adopted by the Commission in the *Report and Order* establish specific procedural mechanisms requiring the sale, removal or abandonment of home **run** wiring in MDUs where the incumbent provider no longer has an enforceable right to remain in the building or serve particular units and the MDU owner wishes to: (1) terminate service for the entire building and use the home **run** wiring for an alternative video service provider; or *(2)* permit more than one MVPD to compete for the right to use the home **run** wiring on a unit-by-unit basis.[5] The Commission also determined in the *Report and Order* that it would not preempt state mandatory access laws **nor** establish a federal mandatory access requirement.[6]

3. In response to the *Report and Order,* the Commission received eight petitions for reconsideration and ten oppositions or responses to the petitions for reconsideration. The Commission received *17* comments in response *to* the *Second Further Notice,* 16 replies to the comments filed and eight surreply filings.[7] **In** this Order, we grant in part and deny in part the petitions for reconsideration!

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active elements such as amplifiers, converters or remote control units. See *Report and Order,* 13 FCC Rcd at 3712-13, ¶ 113.

[4] *See 1996* Conference Report at 1, Telecommunications Act of *1996,* Pub. L. *No. 104-104,* 110 Stat. *56, codified of 47* U.S.C. §§ 151 et seq. The *1996* Act amended the Communications Act of *1934.*

[5] Generally, in non-loop-through configurations, each cable subscriber in an MDU has a dedicated line or "home run" line running to his or her premises from a common "feeder line" **or** "riser cable" that serves as the source of video programming signals for the entire MDU. The riser cable typically runs vertically in a multi-story building (e.g. up a stairwell) and connects to the dedicated home **run** wiring ***at*** a "tap" *or* "multi-tap." In loop-through configurations, a single cable provides service to multiple subscribers, and every subscriber on the loop receives the same cable service. *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 Order"), 8* FCC Rcd 1435 *(1993).*

[6] *Report and Order,* 13 FCC Rcd at 3742, ¶ *178.*

[7] Parties submitting petitions for reconsideration, responses, and oppositions to petitions for reconsideration are listed in Appendix C. Parties submitting comments, replies, and surreplies to the *Report and Order* and *Second Further Notice* and ***ex*** parte filings are listed in Appendix D.

[8] *See also Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition* ***for*** *Rulemaking to Amend Section I.4000 of the Commission's Rules io Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed* ***Io*** *Provide Fixed Wireless Services, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104 and 68.2I3 of the Commission's Rules Concerning Connection of Simple Inside Wiring to Telephone Networks,* First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. *99-217,* CC Docket Nos. *96-98, 88-57,* 15 FCC Rcd *22983* (2000)("*Competitive Networks Order and NRPM*"). The *Competitive Networks Order and NPRM* adopted measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments ("MTEs") and raised issues similar to those discussed herein. Areas of overlap include the regulation of exclusive contracts and mandatory or equal access to buildings. We briefly address the relationship between these two proceedings where relevant below. In addition, the *Competitive Networks Order and NPRM* sought comment on whether the rules should be amended **to**
(continued.. ..)

Specifically, we modify our rules to provide (1) that, in the event of sale, the home run wiring be made available to the MDU owner or alternative provider during the 24-hour period prior to actual service termination by the incumbent, and (2) that home run wiring located behind sheet rock is physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring. We believe that these modifications will promote competition and reduce entry barriers into MDUs for MVPDs.

4. We also resolve issues raised by the Commission in the ***Second Further Notice.*** We decline to restrict exclusive contracts for the provision of video services in MDUs, finding that the record does not demonstrate a need for government intervention with marketplace forces and privately negotiated contracts. Similarly, we decline to ban perpetual contracts for the provision of video services in MDUs or subject such contracts to a fresh look window. The record does not demonstrate that banning these contracts would significantly improve the competitive situation for multi-channel video services. In addition, we conclude that the cable home wiring and cable home run wiring rules should apply to all MVPDs in the same manner that they currently apply to cable operators. We also adopt a limited exemption for small non-cable MVPDs from our signal leakage reporting requirements (47 CFR § 76.1804), and we decline to adopt DirecTV's proposal to allow MDU owners to require sharing of incumbent-owned cable wiring.

5. We expect these modifications of our home wiring rules to increase their effectiveness and simplify their use. We recognize, however, that there may be situations in which questions arise regarding proper application of the rules. We note that, pursuant to 47 C.F.R. § 76.7, parties may file petitions for declaratory rulings on questions regarding the proper application and interpretation of our rules and complaints alleging violation of our rules.

II. ISSUES RAISED IN THE PETITIONS FOR RECONSIDERATION

A. Legal Authority

6. Several petitioners question the Commission's authority to regulate : disposition of cable home run wiring in the first instance? We carefully considered these arguments at length in the ***Report and Order*** and concluded that the Commission has authority under Sections 4(i) and 303(r) of the Communications Act of 1934 ("Communications Act"), in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly Section 623, to establish

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permit an MDU owner to designate a telecommunications carrier to negotiate cable home run wiring when the incumbent no longer has a legally enforceable right to remain on the premises. ***Id.*** at 23056-58, ¶¶ 171-175.

[9] Tele-Communications, Inc. ("TCI"), for example, argues that the Commission may not undertake any regulatory initiative for which it lacks specific statutory authority. TCI Comments at 1-2 (filed prior to TCI's acquisition by AT&T). The North Carolina Cable Television Association ("NCCTA) believes that the Commission lacks jurisdiction to adopt rules regulating home run wiring because it does not constitute wiring "within the premises" of a subscriber pursuant to Section 624(i) of the Communications Act. NCCTA Petition for Reconsideration at 7-8. Section 624(i) directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of subscriber." 47 U.S.C. § 544(i).

procedures for the disposition of MDU home **run** wiring upon termination of service.'" The petitioners present no new or compelling arguments that would warrant a contrary finding.

7. We reiterate that our home run wiring rules are consistent with the stated goals of the 1992 Cable Competition and Consumer Protection Act ("1992 Cable Act"), as codified in the Communications Act. Those goals include: "establish[ing] a national policy concerning cable communications"; "assur[ing] that cable communications prbvide and are encouraged to provide the widest possible diversity **of** information sources and services to the public"; and "promot[ing] competition in cable communications."" The inability of alternative MVPDs to access existing wiring in MDUs at the end of incumbent service providers' service contracts tends to undermine competition in the MDU marketplace and thereby deprive MDU tenants of choice. Accordingly, by facilitating competitive entry by providers offering diverse information sources and services, our home run wiring rules serve the statutory goals set forth in the 1992 Cable Act.

8. Nor are our home run wiring rules "inconsistent" with other provisions **of** the Act, as some petitioners assert.'* Those commenters note that section 624(i) expressly grants the Commission authority to regulate **the** disposition of cable home wiring but ;issilent regarding its authority to regulate cable MDU home **run** wiring.[13] We responded to these arguments in the ***Report and Order*** and see no need to do so again here." Petitioners have made no new arguments or presented new evidence. As we previously stated, by permitting subscribers to use their existing home wiring to receive an alternative video programming service, the Commission's home tun; wiring tules promote Section 624(i)'s underlying purpose **of** promoting consumer choice.

B. Application **of** Building-by-Building Disposition Procedures

9. The ***Report and Order*** adopted procedures for two categories of home run wiring disposition: building-by-building and unit-by-unit. An MDU owner may invoke the building-by-building disposition procedures when the incumbent MVPD owns the home run wiring, but no longer has a legally enforceable right to remain in the building, and the MDU owner wants to use that wiring

[10] ***Report and Order,*** 13 FCC Rcd at 3700-3709, ¶¶ 83-101. Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), permits the Commission to "perform any and **all** acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Likewise, Section 303(r) of the Act, 47 U.S.C.§ 303(r), gives the Commission authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with **law,** as may be necessary to cany out theprovisions of this Act." Section 623, 47 U.S.C. § 543, requires the Commission to ensure, by regulation, that the rates for the basic service tier are reasonable. Our home **run** wiring disposition procedures, by facilitating MVPD competition, are an appropriate and reasonable method of fulfilling Section 623's mandate.

[11] 47 U.S.C. § 521(1), (4), (6).

[12] ***See*** NCCTA Petition for Reconsideration at 7-8; Time Warner Cable Opposition to Petitions for Reconsideration at **12.**

[13] 47 U.S.C. § 544(i) (Stating that "[w]ithin 120 days after the date of enactment of this subsection, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber':).

[14] ***See Report and Order,*** 13 FCC Rcd at 3705-3708 ¶ **92-99** (concluding that Section 624(i) of the Communications Act mandates that the Commission adopt rules regarding the disposition of wiring installed within the subscriber's premises, but **does** not limit the Commission's existing authority with respect to wiring outside those premises).

for service from another provider. Under the building-by-building procedures, the MDU owner must give the incumbent MVPD a minimum of *90* days written notice that the provider's access to the entire building will be terminated. An MDU owner may invoke the unit-by-unit disposition procedures when the incumbent MVPD owns the home run wiring, but no longer has a legally enforceable right to maintain its home run wiring dedicated to a particular unit or units, and the MDU owner wants to permit multiple service providers to compete to serve individual units in the building and to use the existing wiring. Under the unit-by-unit procedures, the MDU owner must provide the incumbent with at least *60* days written notice that it wishes to permit multiple service providers to compete to serve individual units.

10. Time Warner suggests that the Commission's home run wiring disposition procedures should only apply where an MDU owner agrees to allow unit-by-unit competition and not where the owner seeks to contract with a new MVPD to serve the entire building.[15] According to Time Warner, building-by-building conversions from one MVPD to another do not empower MDU residents to choose between competing providers.[16] Time Warner asserts that by limiting the home run wiring rules to unit-by-unit dispositions, the Commission would create incentives for MDU owners to allow unit-by-unit competition and thereby foster expanded choice for MDU residents among competing providers.

11. We reject Time Warner's proposal that the home run wiring rules should apply only where an MDU owner allows unit-by-unit competition, as opposed to selecting a new MVPD to service the entire building.'' We addressed the competitive merit of building-by-building dispositions in the ***Report and Order*** and disagreed with the argument that the building-by-building procedural mechanism does not benefit consumer choice because it merely substitutes one MVPD for another.[18] This argument, we concluded, wrongly assumes that any MVPD that serves the entire building has the ability to act like an entrenched monopolist, without regard to the quality and quantity of the video service provided.[19] We observed, however, that MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace?' The petitioners have presented us with **no** new arguments that might warrant a reversal of our view in the ***Report and Order.***

12. Our building-by-building disposition procedures enhance competition by facilitating competitive entry in the MDU market, including where the market could only support another competitor that serves the entire building. The record indicates that some alternative video service providers may not be able to serve a building at all if they must compete on a unit-by-unit basis with other providers?' As one commenter observed, in many cases, the only way an alternative MVPD can justify undertaking the expenses associated with replacing the cable incumbent is to obtain exclusive

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[15] Time Warner Petition for Reconsideration at **12.**

[16] ***Id.***

[17] ***Id.***

[18] ***Report and Order,*** **13** FCC Rcd at **3682,142.**

[19] ***Id.***

[20] ***Id.***

[21] ***See,*** *e.g.*, DIRECTV Opposition and Comments at **4-6;** GTE Service Corporation ("GTE") Opposition and Comments at 9-10.

access to the building?' That commenter also suggested that the building-by-building procedures facilitate switching to alternative MVPDs because they provide MDU owners with flexibility in determining the best way in which to offer their residents video programming services and thereby make their buildings more attractive to prospective residents.''

C. Control of Home Run Wiring

13. Both the building-by-building and unit-by-unit home run wiring disposition procedures allow the MDU owner, rather than individual subscribers, the option to acquire the home run wiring of a departing MVPD. MAPICFA submits that Section 624(i) expresses Congressional intent to give subscribers--rather than landlords or candominium associations—a right to choose among MVPDs.[24] According to MAPICFA, the Commission's inside wiring **rules** fail to recognize that "citizens have the primary First Amendment interest at issue here" and that "[t]heir right to choose among a diverse array of information sources is the 'paramount goal' of the public interest standard which governs the Commission's decision-making."" MAPICFA contends that by giving landlords and condominium associations the exclusive power to choose MVPDs **for** an MDU, the disposition procedures deprive MDU residents of the ability to participate equally in the new competitive video programming marketplace simply because they do not own free-standing homes.[26] MAP/CFA argues further that the Commission's decision on this issue will cause an inequitable distribution of the benefits of competition because racial and ethnic minorities, lower income households, and single mothers make up a large part of the renting population." Even in those cases where the owner does allow an alternative MVPD to provide service, MAP/CFA believes that MDU residents will be subject ***to*** the owner's choice of providers. MAP/CFA also urges the Commission to consider the inside wiring rules in conjunction with Section 207 of the 1996 Act,[28] which requires the Commission to "prohibit restrictions that impair a viewer's ability to receive video programming services" by means of antennas and DBS dishes."

14. The MAPICFA argument is not new to this proceeding. In the ***Report and Order,*** the Commission addressed comments from at least six parties contending that MDU owners do not act in the best interest of residents and therefore should not have the authority to choose among service providers.[30] The Commission concluded that many MDU owners are tenant-based condominium associations and cooperative boards that cannot be presumed to be non-representative of their tenants' interests.)' In

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[22] DIRECTV Opposition and Comments at 4-5.

[23] *Id.* at 5.

[24] ***See 47*** U.S.C. § ***544*** (i); Media Access Project and Consumer Federation of America ("MAPICFA) Petition for Reconsideration at 7.

[25] MAPICFA Petition **for** Reconsideration at 3.

[26] *Id.* ***See also*** Letter dated December 22, ***1999*** **from** Jordan Clark, President, United Homeowners Association to William E Kennard, Chairman, FCC, tiled ***Ex Parte*** in CS Docket No. ***95-184*** at 1-2.

[27] MAPICFA Petition for Reconsideration at 18, and notes ***13, 14,*** and ***15.***

[28] ***47*** U.S.C. § ***303*** note.

[29] MAPICFA Petition **for** Reconsideration at ***12-13.***

[30] ***Report and Order, 13*** FCC Rcd at 3689-3690, ¶ ***60,*** n. ***159.***

[31] *Id.* at 3690-3691, ¶ 61.

promulgating the home run wiring rules, the Commission sought to enhance competition in the MDU market, and thereby to ensure that tenants in MDUs are offered a diverse choice among providers of video services. The Commission had to determine, from among a range of possible approaches, the method by which that result could be best achieved, in a way that is legal, fair to all interested parties, and efficient. The record contains no evidence that the decisions MDU owners make with regard to video providers are depriving their tenants of diverse sources of information. The Commission concluded in the ***Report and Order*** that the property owner should have the ability to control the wiring because the property owner is responsible **for** the common areas of a building?' Property owners have safety and security responsibilities, maintain compliance with building and electrical codes, maintain the aesthetics of the building, and balance the concerns of the residents.[33] Individual subscribers will not be disadvantaged by having the MDU owner own or control the home run wiring.[34] Considerations of fairness and efficiency persuade us to leave this aspect of our rules intact, rather than adopting the petitioner's proposals.

15. We believe that market forces will, in most cases, provide incentives **for** MDU owners to recognize tenants' interests in selecting a provider. The building-by-building disposition procedures recognize that in some cases an acceptable alternative to the incumbent MVPD may be another MVPD to provide service to the entire building. Further, our decision with regard to MDU owner control of home **run** wiring is not inconsistent with the intent of Section 207. Section 207, as implemented by our over-the-air television reception devices ("OTARD") rules, enables MDU residents to install individual satellite or wireless antennas within their own leasehold. MDU owner control of home run wiring should not adversely impact that right.

D. Removal of Wiring by Incumbent Providers

16. Under our current rules, when an incumbent MVPD does not have a legally enforceable right to remain on the premises of an MDU, the MDU owner may decide to permit alternative MVPDs to provide service, consider using the existing home run wiring, and/or terminate further right **of** access of the incumbent to the MDU.[35] After the MDU owner provides the incumbent with the requisite notice **of** *its* intentions, the incumbent has the option to abandon, remove, or sell its home run wiring to the MDU owner or the alternative MVPD. If the incumbent elects to sell the wiring, the price is determined by negotiation, and if negotiations are unsuccessful, it may choose to submit the price determination to binding arbitration.[36]

17. Several petitioners ask the Commission either to eliminate entirely an incumbent's option to remove its home run wiring or to qualify that option by requiring the incumbent first to offer to sell the wiring to the MDU owner or an alternative MVPD at replacement cost or salvage value." Petitioners

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[32] ***Report and Order,*** 13 FCC Rcd at 3689, ¶ ***58***

[33] ***Id.***

[34] *Id.* at ¶ 59.

[35] 47 C.F.R. § 76.804. In the ***Competitive Networks Order*** *and NPRM*, the Commission sought comment on whether, as an additional alternative, an MDU owner should be permitted to designate a telecommunications carrier to negotiate the purchase of the home run wiring. **Seen.** 8, ***supra.***

[36] 47 C.F.R. § 76.804(a)(2)

[37] DIRECTV Petition for Reconsideration at 2-5; MAP/CFA Petition **for** Reconsideration at 16-17; Wireless Cable Association International, Inc. ("WCA") Petition for Reconsideration at 5-8. ***See*** *also* Ameritech Comments in (continued....)

indicate that an incumbent's removal of its home run wiring is disruptive, because of the demolition and restoration involved, with the result that MDU owners are reluctant to change MVPDs out **of** fear that the incumbent will choose to remove the wiring rather than abandon or sell it.[38] One petitioner suggests that an incumbent's choice to remove the wiring is inherently anticompetitive, because the costs of demolition, removal, and restoration are significantly higher than the salvage value of the home run wiring.[39] Petitioners thus urge the Commission to require incumbents to offer to sell their home **run** wiring at a predetermined price, such as replacement cost or salvage value, in order to prevent incumbents from demanding inflated prices and manipulating the negotiation and arbitration process." In opposition, some cable interests state that eliminating the right to remove home run wiring or qualifying it by requiring the incumbent first to offer to sell at replacement cost or salvage value would require the incumbent to transfer property involuntarily without just compensation and therefore result in an unlawful taking of property in violation of the Constitution?'

18. We decline to eliminate or qualify an incumbent's right to remove its home run wiring. We appreciate Petitioners' concerns that, in many instances, incumbents may not have a *bona fide* business reason to elect to remove their wiring, given that the costs of exercising that option often significantly exceed the value of their property.[42] An incumbent's actual removal of wiring, in lieu of abandonment or sale, would appear, in such cases, to he anti-competitive on its face and would appear, likewise, to be inconsistent with the pro-competitive policies behind the communications laws and implementing regulations. The record, however, reveals almost no concrete examples of incumbents removing their wiring rather than abandoning or selling it." We are not inclined to make such a decision to qualify or eliminate an incumbent's right to remove its property without a compelling record of the need to do so. Should such a record **of** abuses develop, we may reconsider our decision on this issue.

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Response to Petitions for Reconsideration at 2, 5-6; GTE Opposition & Comments at 14-15. As some petitioners explain, ***see,*** *e.g.,* DIRECTV Petition for Reconsideration at 3-5, such a change would conform our home run wiring rules to our home wiring rules, where we require incumbents to offer to sell their home wiring to their subscribers at replacement cost before they may remove it. 47 C.F.R. § 76.802. ***See also*** Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, ***Report and Order,*** 8 FCC Rcd at 1437-1438, ¶¶ 16-20

[38] DIRECTV Petition for Reconsideration at **3;** MAP/CFA Petition **for** Reconsideration at 16-17; WCA Petition for Reconsideration at 5-6. ***See*** *also* Ameritech Comments in Response to Petitions for Reconsideration at 5-6; GTE Opposition & Comments at 15.

[39] WCA Petition for Reconsideration at 6-7

[40] DIRECTV Petition for Reconsideration at 4-5; WCA Petition for Reconsideration at 8-10. ***See*** *also* Ameritech Comments in Response to Petitions for Reconsideration at 6-7.

[41] National Cable & Telecommunications Association ("NCTA") Opposition to Petitions for Reconsideration at 3-6; Time Warner Petition for Reconsideration at 9-12.

[42] *See, e.g.,* WCA Petition for Reconsideration at 6.

[43] None of the petitions for reconsideration cited actual examples of incumbents removing their wiring; indeed, WCA indicated **that it** was not aware of *any* example of an incumbent removing its wiring in order to use it in another building. ***See*** WCA Petition for Reconsideration at 6. At least two parties subsequently filed letters with the Commission providing concrete, though limited, examples of incumbents effectively removing their wiring or threatening to remove it. ***See,*** *e.g.,* Letter from James T. Davenport, President, Worldgate Condominium Unit Owners Association, to William E. Kennard, Chairman, FCC, at 2-3 (February 15, 2000); Letter from Jean L. Kiddoo, Counsel for Grande Communications, to William Caton, Acting Secretary, FCC at 2-3 (January 29, 2002).

19. We likewise decline to require an incumbent that elects to sell its home run wiring to do so at replacement cost or salvage value. In the ***Report*** and ***Order,*** the Commission stated that it did not believe it was appropriate to establish a default price or formula for the sale price of home run wiring, due to widely varying circumstances throughout the country.'' The Commission stated that "market forces will provide adequate incentives for the parties to reach a reasonable price, particularly in these circumstances where the incumbent has no legally enforceable right to remain on the premises."[45] Again, the record contains no concrete examples of incumbents engaging in pricing activities that the negotiation and arbitration process cannot accommodate. Accordingly, we find no reason to reconsider our prior decision, and therefore reaffirm it.

E. **Arbitration**/ Independent Pricing Experts

20. Time Warner asks the Commission to require the MDU owner to agree to purchase the home run wiring at a price set through binding arbitration as a precondition to entering into negotiations with the incumbent regarding the sale price of the wiring in case those negotiations fail.[46] Time Warner recommends that, upon notification to the MDU that the incumbent has elected to sell its home run wiring, the MDU owner should be required, within five days of the incumbent's election, to commit to purchasing the wiring at a price determined through negotiations or arbitration!' Under this arrangement, Time Warner suggests, both sides would have an increased incentive to bargain in good faith during the 30-day negotiation period, because both parties would be committed to binding arbitration if negotiations are unsuccessful!'

21. WCA supports the idea of requiring the MDU owner to purchase the wiring but in a different context.[49] WCA argues that, under the Commission's current rules, if the MDU owner refuses to participate in binding arbitration, the cable operator is no longer subject to the Commission's procedures, and by implication, may remain on the property indefinitely or until the MDU owner submits to arbitration.[50] WCA states that because the Commission has provided arbitrators no guidance on appropriate pricing of inside wiring, the Commission has created a significant disincentive for MDU owners or alternative service providers to agree to binding arbitration!] WCA proposes that, after the MDU owner has invoked the home run wiring disposition procedures and the incumbent has elected to sell, the MDU owner should be required to purchase the wiring, but the purchase price should reflect the depreciated value of the wiring?' Arbitration, if used at all, should be limited to deciding the depreciated

[44] ***Report and Order,*** 13 FCC Rcd at 3684, ¶ 46 (building-by-building context); ***id.*** at 3687-3688, ¶ 53 (unit-by-unit context).

[45] ***Id.*** at 3682, ¶ 43.

[46] Time Warner Petition for Reconsideration at 18.

[47] *Id.* at 19.

[48] Id.

[49] WCA Petition for Reconsideration at 8-11.

[50] WCA Petition for Reconsideration at 8.

[51] Id. at 9.

[52] *Id.* at 10

value of the wiring. WCA argues that such a price would satisfy the just compensation requirements of the Fifth Amendment."

22. DIRECTV argues that under no circumstances should an MDU owner be required to purchase wiring that an incumbent has elected to sell; nor should an MDU owner that seeks to purchase wiring be forced to submit to arbitration to establish the purchase price?' DIRECTV believes that an MDU owner will not invoke the inside wiring rules if it faces the prospect of being obligated to purchase wiring at a price established by a third party over which the owner has no control.[55]

23. We decline to adopt the Time Warner proposal. The record provides no evidence that MDUs have not or would not bargain in good faith under the current rules. We question whether a commitment by the parties to engage in binding arbitration prior to the onset of negotiations will improve the chances for successful negotiations. Instead, such a requirement could act as a disincentive for MDU owners to invoke the inside wiring rules as asserted by DIRECTV.[56] Accordingly, we will not amend our rules to require that the MDU owner commit to binding arbitration if negotiations are not successful. Similarly, we will not adopt WCA's proposal to impose upon the MDU owner an obligation to purchase home run wiring once an incumbent has elected to sell it. WCA's proposal is dependent on our establishing a default price, which WCA suggests should be depreciated value. We have already concluded not to reconsider our decision regarding a default price or formula for the sales price of the wiring?' WCA provides no support for the suggestion that MDU owners have no incentive to enter into arbitration in the event negotiations between MDU owners and incumbents fail. MDU owners have neither more nor less "guidance" on the appropriate pricing of wiring than do the incumbent MVPDs. We continue to believe that market forces will provide adequate incentives. Finally, we reject WCA's suggestion that an incumbent will have a federally-created right to remain in an MDU if the MDU owner fails to agree to binding arbitration. If negotiations fail and the MDU owner refuses to enter into binding arbitration, the home run wiring disposition procedures no longer apply.[58] Under such circumstances, the parties' rights are governed by their contract terms and state and local law.

F. **MDU** Owner Compensation

24. In the ***Report and Order,*** the Commission declined to adopt the suggestion of several cable operators that the building-by-building home run wiring disposition procedures should not apply where the MDU owner receives compensation for allowing an alternative provider onto the premises.[59] Two parties renew the argument that MDU owner decisions are improperly influenced by the level of consideration offered by an MVPD to the MDU owner, rather than by which MVPD offers the widest array of programming, most attractive prices, or best customer service." These petitioners contend that

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[53] ***Id.*** at 9-10.

[54] DIRECTV Opposition and Comments at **15,** note **34.** DIRECTV advocates a Commission-established purchase price for home run wiring based on depreciated value, salvage value, or replacement cost of the wiring.

[55] ***Id.***

[56] *Id.*

[57] ***See*** ¶ 19, *supra.*

[58] *See* **47** C.F.R. § 76.804(a)(3).

[59] ***Report and Order,*** **13** FCC Rcd at **3685, ¶ 48.**

"***See*** *e.g.*, Time Warner Petition for Reconsideration at **13; NCCTA** Petition **for** Reconsideration at **5.**

the Commission's home run wiring disposition rules should not apply in any situation where the MDU owner has received any form of "excess" consideration from the MVPD seeking entry, above and beyond the "just compensation" paid for allowing broadband distribution facilities to occupy the MDU property."'

25. In contrast, the Building and Managers Association International ("BOMA"), along with several other real estate associations, disagree.[62] BOMA maintains that such payments are not a material inducement to building owners in the vast majority of cases.[63] BOMA states that in most cases, MVPDs make no such payment and that, even in those instances where MVPDs do make payments to MDU owners, the payments are relatively small, especially when compared to the MDU owners' rental incomes.[64]

26. For the reasons discussed in the *Report* and *Order*,[65] we reject the proposal that the building-by-building procedures should not apply to MDUs where the owner has accepted "excess" compensation. We note that the petitioners have not suggested definitions or even guidelines as to what payment amounts they consider "excessive." Nor have petitioners produced evidence that any such "excessive" payments have resulted in competitive harms. Accordingly, we are unable to conclude that such payments are anti-competitive and warrant exclusion of MDU owners who accept them from the protection of the home run wiring rules.

G. Notice Period and Transition Period for the Unit-by-Unit Disposition Procedures

27. In the ***Report*** and ***Order,*** the Commission recognized that MDU owners may permit service providers to compete head-to-head in a building for the right to use the individual home run wires dedicated to each unit in an MDU.[66] Our unit-by-unit disposition procedures apply when the incumbent service provider does not have (or will not have at the conclusion of the notice period) the right to maintain its home run wiring dedicated to a particular unit in an MDU. If the MDU owner wishes to permit alternative MVPDs to compete for the right to use the individual home run wires dedicated to each unit, the MDU owner must give the incumbent 60 days written notice that it intends to invoke the home run wiring procedures!' The incumbent MVPD will then have, with respect to all of the incumbent's home run wiring in the MDU, 30 days to elect to remove, abandon, or sell the wiring dedicated to individual subscribers who may subsequently choose the alternative MVPD's service.[68]

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[61] *Id.*

[62] BOMA Opposition to Petitions for Reconsideration at 3.

[63] *Id.*

[64] *Id.*

[65] ***Report and Order.*** 13 FCC Rcd at 3685, ¶ 48.

[66] Id. at 3685-3686, ¶ **49.**

[67] ***Id See*** 47 C.F.R. § 76.804(b)

[68] ***Report and Order,*** 13 FCC Rcd at 3685-3686, ¶ **49.**

28. Several petitioners argue that the 60-day notice period is inordinately long.[69] They suggest that the notice period will discourage vigorous unit-by-unit competition by allowing incumbents time to develop a "competitive counterattack" in response to the arrival of an alternative MVPD, to reprice or restructure their service offerings, and to lock individual subscribers into long-term service contracts.[70] WCA and GTE urge the Commission to shorten the notice period to 15 days.[71]

29. We are **not** convinced that a notice period for unit-by-unit transitions of less than 60 days would allow enough time to facilitate a smooth and timely transition when an alternative provider enters a building. Pursuant to the existing rules, after receiving notice, the incumbent must make its election within the following 30 days and, if the incumbent elects to sell its wiring, the price must be established within 30 days thereafter. The procedures adopted in the ***Report and Order*** are intended to provide all parties sufficient notice and certainty regarding how existing home **run** wiring will be made available to the alternative MVPD so that a change in service can be made efficiently. The suggestion that the incumbent could use part of the notice period to develop a "competitive counterattack" does not convince us to shorten the notice period. The home run wiring disposition rules were adopted for the purpose of facilitating competition between and among MVPDs. Competition is welcome. While a 60-day notice period may provide an opportunity for the incumbent to organize a competitive response to the alternative provider's service offering, we have no reason to believe the incumbent will necessarily have a market advantage over the alternative provider. The incumbent has an existing relationship with its subscribers, but that relationship may or may **not** be a positive one. Where subscribers are eager to obtain the services of an alternative provider, due io part to the failings of the incumbent, the existing relationship may hurt rather than help the incumbent. Where subscribers are more than satisfied with the service provided by the incumbent, that existing relationship should help the incumbent in its efforts *to* retain subscribers in the face **of** an alternative provider's competitive efforts. Beyond the fact of an existing relationship, an alternative provider possesses many **of** the same competitive **tools** available to the incumbent, such as pricing and designing service offerings attractively and attempting to induce subscribers to enter into long-term service contracts. We therefore decline to shorten the notice period.

30. **On** a related concern, Ameritech suggests that in cases where the incumbent has elected to sell or abandon its home run wire, our rules should be modified to eliminate an existing ambiguity with respect to when the incumbent provider will make the home **run** wiring accessible to the alternative provider." The current rule provides that such access will be provided to the alternative provider "within **24** hours of actual service termination."[73] Ameritech states that it is unclear if access is required within 24 hours before service termination or within **24** hours after service termination.''

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[69] The petitions and oppositions received by the Commission raised the length of the notice period as an issue only as it relates to unit-by-unit conversions. ***See*** Ameritech Petition for Partial Reconsideration at 4; WCA Petition for Reconsideration at 16; GTE Opposition and Comments at 13.

[70] Ameritech Petition for Partial Reconsideration at 4 (noting that, in contrast, under the Commission's single dwelling-unit rules, if the occupant of a single family home calls to cancel cable service, the incumbent must make its election while the caller is still **on** the line). ***See*** 47 C.F.R. § 76.802.

[71] WCA Petition for Reconsideration at 17; **GTE** Opposition and Comments at 13.

[72] Ameritech Petition for Partial Reconsideration at 6-9.

[73] 47 C.F.R. § 76.804(b)(3).

[74] Ameritech Petition for Partial Reconsideration at 6-9.

31. We agree with Ameritech that the requirement that an "incumbent shall make the home wiring accessible to the alternative provider *within* 24 hours of actual service termination" is ambiguous.[75] Accordingly, we will amend the language of Section 76.804(b)(3) to provide that where the MDU owner or the alternate provider chooses to purchase the home run wiring, the incumbent must provide access during the 24-hour period prior to actual service termination to enable the new provider to avoid a break in service. We believe that this change makes the rule easier to understand and provides some assurance to MDU residents that, should they select a competing service provider, they will not be penalized by an extended interruption in service.

32. On a related issue, NCTA argues that where the incumbent has offered the home run wiring for sale and the MDU owner or the alternative provider has agreed to purchase the wiring and has agreed to a purchase price, the incumbent should receive the compensation for the home run wiring prior to the actual transfer of ownership of the wiring.[76] Our rules provide that the sale of the home run wiring will become effective upon actual service termination or upon the requested termination date, whichever occurs first." It would seem that compensation should he paid at that time as well, or as otherwise agreed by the parties. NCTA offers no evidence that compensation is not being paid at the time of sale or as otherwise agreed. If the parties have agreed to the price, they should be able to agree to the time of payment. If the parties have not agreed to a price and have agreed to submit the question to binding arbitration, they should be able to agree to the timing of the purchase price payment. Accordingly, we reject NCTA's argument.

H. Unauthorized Transfer of Customers

33. With regard to the unit-by-unit disposition procedures, Time Warner urges the Commission to amend its home run wiring rules to include an express prohibition against unauthorized customer transfers,'* The Commission, it argues, should not allow either the MDU owner or the competing MVPD to act as the agent of the MDU resident unless the incumbent MVPD and affected subscriber have expressly agreed to such an arrangement in writing.[79] Ameritech contends that such rule modifications are not necessary because MVPD service does not present the same opportunities for "slamming," or the unauthorized transfer of customers, as telephone service transfers. Ameritech reasons that slamming is possible in the telephone business because a change in telephone providers is almost invisible to the end user.[80] In the case of cable services, however, Ameritech contends that there is almost always a need for a visit to the customer's premises (primarily to change the converter box), and it is unlikely that an unauthorized change in cable providers would go unnoticed?'

34. We decline to adopt Time Warner's proposals. The record does not contain allegations of unauthorized customer transfers. Nor is the Commission aware of any such complaints filed within the

[75] See 47 C.F.R. § 76.804(b)(3) (emphasis added).

[76] NCTA Petition for Reconsideration at 7.

[77] 47 C.F.R. § 76.804(b)(3).

[78] Time Warner Petition for Reconsideration at 24.

[79] *Id.*

[80] Ameritech Comments in Response to Petitions for Reconsideration at 7-9

[81] Id.

more than four years that the home run wiring disposition rules have been in effect. Absent such complaints, we find no basis **for** modifying **our** rules.

I. Mandatory Access

35. Several states and the District of Columbia have enacted some form of "mandatory access" law.[82] Mandatory access laws generally provide franchised cable operators with a legal right to install and maintain cable wiring in MDU buildings, even over MDU owners' objections. Mandatory access statutes were generally enacted to ensure that MDU tenants would have cable programming service and to prevent MDU owners from denying access based on aesthetic *or* other considerations.'' In states with such laws, however, the application of the Commission's home run wiring rules may be compromised because the incumbent provider may have a continuing "legally enforceable right to remain on the premises."[84] Typically, mandatory access laws grant only the franchised cable operator the right **of** mandatory access.[85]

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[82] ***See,*** *e.g.,* Connecticut (Conn. Gen. Stat. § 16-333a)(1975), Delaware (26 Del. C. § 613)(1983) (only if utility easements also exist), District of Columbia (D.C. Code § 43-1844.1)(1981), Florida (Fla. Stat. § 718.1232)(1982) (condos only), Illinois (55 ILCS 5/5-1096)(1993), Kansas (K.S.A. § 58-2553)(1983), Maine (14 M.R.S.A. § 6041)(1987), Massachusetts (Mass. Ann. Laws ch. 166A, § 22)(1995), Minnesota (Minn. Stat. § 238.23)(1983), Nevada (Nev. Rev. Stat. Ann. § 711.255)(1987), New Jersey (N.J. Stat. § 48:5A-49)(1982), New York (NY Pub Ser § 228)(1995), Pennsylvania (68 P.S. § 250.503-B)(1993), Rhode Island (R. I. Gen. Laws, § 39-19-10)(1993), West Virginia (W. Va. Code § 5-18A-1)(1995), Wisconsin (Wis. Stat. § 66.0421)(2001), and Virginia (Va. Code Ann. § 55.248, 13:2)(1997). Several states have considered initiatives in the past few years relating to mandatory access issues. Although mandatory access laws are by no means uniform in structure or language, we quote relevant portions of Pennsylvania's mandatory access statute as an example of such laws:

> The tenant has the right to request and receive CATV services from an operator or a landlord provided that there has been an agreement between a landlord and an operator through the negotiation process outlined in section **504-B** *or* through a ruling of an arbitrator as provided for in this article. **A** landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring CATV services from an operator of the tenant's choice provided that there has been an agreement between a landlord and operator through the negotiation process outlined in section 504-B or through a ruling of an arbitrator as provided for in this article. A landlord may not prevent an operator from entering such premises for the purposes of constructing, reconstructing, installing, servicing *or* repairing CATV system facilities *or* maintaining CATV services if a tenant of a multiple dwelling premises has requested such CATV services and if the operator complies with this article. The operator shall retain ownership of all wiring and equipment used in any installation *or* upgrade of **a** CATV system in multiple dwelling premises. An operator shall not provide CATV service to an individual dwelling unit unless permission has been given by *or* received from the tenant occupying the unit. PA Stat. 68 § 250.503-B (enacted December 20, 1990).

The term "operator" as used in the Pennsylvania statute is defined as "the operator of a CATV system holding a franchise granted by the municipality or municipalities in which multiple dwelling premises to be served [are] located." PA Stat, 68 §250.501-B(5). Thus, the Pennsylvania mandatory access statute benefits only franchised MVPDs and not their unfranchised competitors.

[83] ***See Report and Order,*** 13 FCC Rcd at 3744, ¶ 182.

[84] *See* 47 CFR § 76.804(a).

[85] ***See,*** *e.g.,* n. **82,** ***supra,*** (setting out the Pennsylvania statute and definition of "operator" as a franchised operator).

36. The Commission has long recognized the anti-competitive effects of such discriminatory mandatory access statutes. In 1990, for example, the Commission stated that "discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services."[86] More recently, in the ***Report and Order,*** the Commission acknowledged its concern about "disparate regulation of MVPDs that unfairly skews competition in the multichannel video programming marketplace."[87] Nonetheless, the Commission declined to preempt state mandatory access laws, concluding that the record provided an insufficient basis for doing so.[88] Accordingly, the Commission encouraged jurisdictions with mandatory access to consider and evaluate the competitive effects of their access statutes!'

37. Several parties urge **us** to reconsider our decision not to preempt state mandatory access laws, while others (principally, cable operators) urge us not to do so.[90] Many parties assert that less competition exists in the MDU marketplace in states that have mandatory access statutes, and the evidence we have on the record supports these assertions?'

38. We continue to believe that mandatory access laws may impede competition in the MDU marketplace and that they tend to preclude alternative (non-cable) MVPDs from executing MDU contracts. This is due to the fact that most mandatory access laws give the franchised cable operator a legal right to wire and remain in an MDU.[92] The predictable result is that competitive providers are less likely to take the financial risk of entering, or to secure the necessary financial backing to enter, the MDU marketplace in a mandatory access state.[93]

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[86] *In the Matfer of Competition, Rate Deregulation and the Commission's Policies Relating fo the Provision of Cable Television Service,* **5** FCC Rcd **4962,5034-5035** (1990), ¶¶ 137-140.

[87] *Report and Order,* **13** FCC Rcd at 3748, ¶ **190.**

[88] ***Id.***

[89] ***Report and Order,*** 13 FCC Rcd at 3748, ¶ **189.**

[90] Arguments in favor of preemption can be found in the following **filings:** Independent Cable & Telecommunications Association ("ICTA") Reply Comments at **4** (ICTA, now known as the Independent Multi-Family Communications Council, conducted a survey of some of its members, demonstrating that those independent operators are significantly less likely to provide service to MDUs in states with mandatory access statutes than they are in states without such statutes); WCA Petition for Reconsideration at **12-14;** CEMA Petition for Reconsideration at 2-4; GTE Opposition and Comments at **7, n.** 10; RCN Comments at 8-10. Arguments against preemption can be found in the following filings: Adelphia Reply Comments at **2-3** (Adelphia asserts that mandatory access laws were intended to promote competition and increase consumer choice in the MDU market by preventing landlords from excluding franchised cable operators from their MDUs. Adelphia also points out that a mandatory access statute does not prevent alternative providers from accessing MDUs); Time Warner Reply Comments at **9-1** I; Time Warner Opposition to Petitions for Reconsideration at **2-9;** Ameritech Comments in Response to Petitions for Reconsideration at **5;** NCTA Petition for Reconsideration at **2-5;** NCTA Opposition to Petitions for Reconsideration at 6-9.

[91] Certain commenters deny that there is a lack of competition in mandatory access states but offer no supporting evidence. ***See*** Time Warner Cable Opposition to Petitions for Reconsideration at **6;** NCTA Opposition to Petitions for Reconsideration at 8.

[92] ***See,*** *e.g.,* PA St. § **250.503-B,** ***quoted, supra.*** It follows that where there **is** mandatory access, only franchised cable operators have the practical ability to form exclusive MDU contracts.

[93] On this point, OpTel, Inc., states that apart from Illinois and Florida,

(continued.. ..)

39. Although we recognize the negative impact that mandatory access statutes can have, we cannot ignore the possibility that, but for the existence of mandatory access statutes, some MDU owners would refuse to allow their buildings to be wired for cable programming. Federal preemption of mandatory access laws could, conceivably, leave some MDU tenants without access to non-broadcast video programming altogether. States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws, as described above. Therefore, we urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers.

40. The Commission made **no** finding or determination in the ***Report and Order*** regarding which particular state statutes foreclose application of our home run wiring rules. Instead, the Commission adopted a presumption that the home run wiring disposition procedures will apply in each state "unless and until the incumbent obtains a court ruling or an injunction enjoining its displacement."[94] The presumption was designed to allow the home run wiring rules to "apply in mandatory access states to the extent state law does not permit the incumbent to maintain its home run wiring . . . . against the will of the MDU owner."[95] We received comments objecting to the presumption and to the assumption underlying it. Some commenters argue that the home run wiring rules should not apply at all in states with mandatory access statutes. NCTA argues that the Commission should not presume that an incumbent cable operator has **no** "legal right to remain'' in an MDU located in a mandatory access state, and therefore it is wasteful of resources to require operators in right-of-access states to initiate court proceedings where they have a statutory right to remain **on** the premises.[96] Yet, the presumption properly relies on the state courts to interpret the scope of the state statutes. As the Commission stated in

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> OpTel has no current intention of expanding its services into any other mandatory access states. Indeed, OpTel has decided to avoid certain otherwise attractive urban markets precisely because they are located in mandatory access states. For example, within the last two years, OpTel attempted to initiate cable service to MDUs in Las Vegas, Nevada; a market that is currently underserved. Largely in response to threats by the incumbent operators to overbuild any properties served by OpTel and to sue OpTel and the related property owner based on the state mandatory access statute if OpTel displaced any incumbent operator or any existing MDU wiring, OpTel withdrew from the market at a significant cost to OpTel. Declaration of Louis Brunel, ***Ex Parte*** submission of OpTel, filed June **22, 1999.**

ICTA relates similar experiences:

> Property owners and associations have proven reluctant or unwilling to contract with alternative multichannel video programming distributors where forced access via condemnation is available to the cable franchisee. Property **owners** and associations simply will not suffer an overbuild of their properties even under circumstances where the cable franchisee's service and rates are less than optimal. Comments of ICTA at ***50.***

[94] ***Report and Order,*** **13** FCC Rcd at **3697-3698,177.**

[95] *Id.* at ¶ 79.

[96] NCTA Petition for Reconsideration at 3-4.

the ***Report and Order,*** "we do not believe that this presumption interferes with the incumbent's state law rights. **A** court applying state law will continue to be the ultimate arbiter of whether the incumbent has a legally enforceable right to remain on the premises, and possesses the ability to take any necessary and appropriate steps to make the parties whole under the state law."[97] Accordingly, we will retain the presumption.

41. Other commenters asked that the Commission reconsider the 45-day time period for obtaining an injunction following the initial notice period.[98] **In** the ***Report and Order*** the Commission stated that it had no reason to believe that state courts would not respond expeditiously to requests by incumbents for determinations of whether it has a legally enforceable right to remain on the premises?' We note that no commenters have introduced any evidence to the contrary. We will therefore maintain our decision to allow our home **run** wiring disposition procedures to apply in the absence of a state court ruling or injunction obtained within 45 days of the initial notice.

J. Signal Leakage

42. In the ***Report and Order,*** the Commission adopted a rule extending the signal leakage requirements to MVPD providers other than cable systems, including telephone companies and other telecommunications services providers that deliver video services. The Commission concluded that this change was necessary insofar as those broadband providers utilize the same aeronautical and public safety frequencies, at similar levels of power, as do cable systems."' The Commission granted a five-year exemption from these requirements, however, for non-cable MVPDs that were "substantially built" **as** of January 1, 1998, in order to allow those MVPDs sufficient time to bring themselves into compliance.[101] "Substantially built" was defined as having 75% of the distribution plant completed.[102]

43. WCA challenges the terms of the exemption as it applies to wireless cable systems. Explaining that a wireless cable system delivers programming to subscribers via a direct microwave link between a transmitter and a rooftop antenna installed at the subscriber's home, WCA asserts that the "75%" criterion for "substantially built" is difficult to apply to wireless cable systems. WCA suggests that we adopt a rule providing that a wireless cable system is "substantially built," for purposes of the

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[97] ***Report and Order,*** 13 FCC Rcd at 3697-3698, ¶ 77.

[98] Time Warner concludes that the requirement that an incumbent obtain an injunction within **45** days effectively destroys any presumption of the validity of an incumbent's legal rights, and only serves to increase the likelihood of litigation. Time Warner Petition for Reconsideration at **15.** NCTA argues that if a state court rules in favor of the incumbent more than 45 days after the initial notice, it should be presumed that the incumbent had a right to maintain its wiring on the premises and no further steps to transfer control should he implemented, pending a final outcome of the litigation. NCTA Petition for Reconsideration at 5-6. In response to NCTA. if the incumbent were to obtain a ruling from a state court establishing its right of mandatory access more than 45 days after the initial notice, under our rules the **MDU** owner would no longer have the right to exercise the home **run** wiring disposition procedures, unless or **until** the court ruling were changed. ***See*** 47 C.F.R. § 76.804(a)(1), (b)(I), and (c). Pursuant to such a state court ruling, the incumbent would then control the wiring.

[99] ***Report and Order,*** 13 FCC Rcd at 3697-3698, ¶ 77.

[100] ***Report and Order,*** 13 FCC Rcd at 3766, ¶ 231.

[101] WCA Petition for Reconsideration at 21.

[102] ***Report and Order,*** 13 FCC Rcd at 3770, ¶ 239.

five-year exemption from our signal leakage testing and reporting requirements, when its headend/transmitter facilities are constructed and operational.

44. We note that the headend and transmitter of a wireless cable plant do not constitute distribution plant. The receiver and down-converter and associated cable strand, amplifiers, etc., constitute distribution plant subject to signal leakage. It is the deployment of such equipment that is relevant for purposes of the exemption. Accordingly, we reject WCA's proposal that the definition of "substantially built" be applied to wireless systems' headend and transmitter facilities.

K. Sharing **of Molding**

45. In the ***Report and Order,*** the Commission adopted a rule permitting an alternative MVPD to install its wiring within an incumbent cable operator's existing molding, even over the incumbent's objection, where the MDU owner agrees that there is adequate space in the molding and the MDU owner gives its affirmative consent. The Commission concluded that this new rule could promote head-to-head competition among MVPDs by overcoming the resistance of MDUs to the installation of redundant wiring.'"'

46. Under our rule, the alternative provider is required to pay any and all installation costs, including the costs of restoring the property to its former condition and the costs of repairing any damage to the incumbent's wiring or other property.[104] The rule does not apply where the incumbent has an exclusive contractual right **to** occupy the molding or where the incumbent has contracted for the right to maintain its molding on the MDU property without alteration by the MDU owner.'" If the MDU owner does not agree that there is sufficient space in the molding for the additional wiring, and the MDU owner is willing to permit the installation of larger molding, the MDU owner is permitted to remove the existing molding and replace it with larger molding at the cost of the alternative MVPD.'"

47. Time Warner argues that our rule effects an unconstitutional taking **of** private property "[w]here an incumbent provider owns the molding or has contracted with the MDU owner **for** the exclusive right **to** occupy the moldings or conduits."[107] The Commission has explicitly said, however, that the rule does not apply where the incumbent retains an exclusive contractual right to occupy the molding or a right to maintain molding without alteration by the MDU owner.[108] Accordingly, our rule does not interfere with the incumbent's property rights and does not constitute a taking, and, therefore, no compensation need be paid.

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[103] ***Report and Order,*** 13 FCC Rcd at 3712, ¶ 109.

[104] ***See*** 47 C.F.R § 76.805(c).

[105] 47 C.F.R. § 76.805(a) and (b).

'"47 C.F.R. § 76.805(b).

[107] Time Warner Petition for Reconsideration at 20-21.

[108] ***See*** 47 C.F.R. § 76.805(a) and (b). And to the extent that state law provides that an incumbent's outright ownership of molding carries with it the right to exclude others (absent a contrary agreement), we would consider such provision to be part of the exclusive contractual rights held by the incumbent MVPD.

L. MDU Demarcation Point

48. Our rules prohibit an incumbent MVPD from interfering with a competitor's access to existing MDU wiring at the demarcation point."' The demarcation point for MDU installations is defined as "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit."[110] A location is "physically inaccessible" when accessing the wire at that point "would require significant modification of, or significant damage to, preexisting structural elements, and would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring."'' The rule provides examples of wiring that is "physically inaccessible," such as, "wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings."[112]

49. In the ***Report and Order,*** the Commission considered and rejected various proposals to relocate the demarcation point."' Location of the demarcation point is significant because, under our rules, the demarcation point is the place where competing providers may access existing home wiring in an MDU building.[114] A demarcation point that allows relatively unimpeded access to existing wire is likely to foster competitive entry into the MDU marketplace.

50. The demarcation point issue was not raised in any petition seeking reconsideration of the ***Report and Order,*** but we received a Request for Letter Ruling from RCN-BeCoCom, L.L.C. ("RCN")[115] raising the issue. Several parties filed replies to RCN's letter, and we address the matter herein.[116]

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[109] ***See*** 47 C.F.R. § 76.802(j) ("[I]ncumbent cable operators must take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point").

[110] 47 C.F.R. § 76.5(mm).

[111] 47 C.F.R. § 76.5(mm)(4).

[112] ***Id.***

[113] ***Report and Order***, 13 FCC Rcd at 3721-3722, ¶ 133, 134. Proposed alternate locations for the demarcation point included the "minimum point of entry" (such as is used in the telephony context); a location near the entry to the building, such as a basement, telephone vault, or frame room; and a location within the MDU's common areas where existing wiring is first readily accessible to competitors. 47 C.F.R. § 68.105(b) defines "minimum point of entry" as the "closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings.

[114] ***See,*** e.g., 47 C.F.R. § 76.802(j) (incumbent cable operator must take reasonable steps to ensure that competitors have access to home wiring at the demarcation point). In addition, the operation of our rules governing the disposition of cable home wiring (47 CFR § 76.802) and home run wiring (47 CFR § 76.804) is in part determined with reference to the demarcation point.

[115] Letter dated September 23, 1998 from Attorney William L. Fishman (Counsel for RCN) to Deborah A. Lathen, Chief, Cable Services Bureau, FCC, CSR-5311 ("RCN Letter").

[116] Ameritech New Media, Inc. filed comments in CSR-5311 supporting RCN's request. ICTA also asked that the Commission modify its rules to make wiring physically inaccessible when it is behind plaster, wallboard, sheet rock or molding. *Ex* ***Parte*** Letter from William J. Burhop, Executive Director, ICTA to Magalie R. Salas, Secretary, FCC, Docket No. 95-184 (December 13, 2000)("ICTA December 13,2000 *Ex* ***Parte")*** at 1. ***See also*** Cablevision Comments at 3-9; Comcast Comments at 3-10; Joint Opposition of Adelphia and Suburban Cable at 3-6; NCTA Comments at 5-9 filed in CSR-5311 opposing RCN's request.

51. RCN's letter describes difficulties RCN encountered when trying to provide service to MDU residents in the Boston, Massachusetts area. RCN reports that it typically installed all facilities necessary to provide service (except subscriber lines), including feeder or riser cables running vertically between floors and junction boxes located in the utility closets used by the incumbent cable operator. RCN states that, in most cases the incumbent operator's facilities were located behind sheet rock walls, ceilings or other structures. RCN asserts that from its own junction boxes, it theoretically could reach individual subscribers' units either by installing its own home run wiring and connecting to the individual units or by connecting with the existing wiring at the operator's junction boxes, but that neither of these options proved to be viable. RCN asserts that the overbuilding option was not feasible because MDU owners objected to the disruptions caused by installing a second wire.'" Nor was connecting to the operator's existing wire an option, according to RCN, because the operator refused to cooperate in allowing such a connection.[118] RCN urges the Commission to find that cable wiring behind sheet rock is "physically inaccessible," such that the demarcation point should be located **not** at the twelve-inch mark, but rather at the operator's junction box."' ICTA supports the RCN proposal.[120]

52. We conclude that cable wiring behind sheet rock is "physically inaccessible," as that term is used in Section 47 C.F.R. § 76.5(mm)(4) of the Commission's rules. **As** stated above, our rule defines "physically inaccessible" as "requir[ing] significant modification of, or significant damage to, preexisting structural elements."[121] We believe that the term "structural elements" encompasses sheet rock, otherwise known as wallboard. The "Note" appended to Section 76.5(mm)(4), which helps define "inaccessibility," states that "wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring within hallway molding would not." Sheet rock and other similar materials are not identified specifically. In our view, sheet rock is more like "brick or cinder block," materials also commonly used to form ceilings and hallways, than molding, which is not.

53. The definition of "physically inaccessible" also requires that accessing the wiring at that point would "add significantly to the physical difficulty and/or cost" of connecting.[122] While we acknowledge that cutting a hole through and repairing sheet rock is neither as physically difficult **nor** as costly as boring through brick, metal or cinder block, we are satisfied that it adds significantly to the physical difficulty and cost of wiring an MDU. For this reason we conclude that wiring that is hidden behind sheet rock in a MDU wall or ceiling is "physically inaccessible" as the term is used in the Commission's rule. Accordingly, we will amend the "Note" appended to Section 76.5(mm)(4) to include sheet rock.

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[117] RCN Letter at ***3*** (stating that "[t]he MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint the ceilings and walls in order to install new lines because it is disruptive and eventually could require the replacement of entire ceilings and walls").

[118] ***Id.***

[119] RCN Letter at **4.**

[120] ICTA December 13, **2000** *Ex* ***Parte*** at **2.** ICTA states that MDU owners frequently object to competitive MVPDs removing sections of walls in order to access wiring at the demarcation point, as currently defined, because of the disruption and possible damage to walls. The result, claims ICTA, is that competition is suppressed, which is directly contrary to the goals ***of*** the Commission's rules.

[121] 47 C.F.R. § 76.5(mm)(4)

[122] ***Id.***

M. Open Video System Providers

54. In the 1996 Act, Congress recognized the open video system (OVS) as a means by which a local exchange carrier may provide cable service to subscribers within its telephone service area.[123] The Commission concluded that Congress did not intend to restrict OVS service to telephone companies alone, and permitted non-local exchange carriers and cable operators to operate and to obtain carriage on open video systems.[124] Although subject to streamlined regulation as compared to their cable counterparts, OVS operators have clearly defined obligations and responsibilities, such as offering up to two-thirds of their channel capacity to unaffiliated programmers on a non-discriminatory basis.[125]

55. Time Warner argues that OVS operators should not be eligible to avail themselves of the home run wiring rules, concluding that OVS operators have no basis to claim a right to use pre-existing MDU home run wiring because they are legally required to construct end-to-end facilities all the way to end user MDU residents.[126] Without such a restriction, Time Warner argues, unaffiliated programming providers would have no opportunity to provide programming to MDU residents without installing their own wiring because the existing home run wiring would likely be allocated exclusively to the OVS operator's affiliated programmer.[127] OVS operators, concludes Time Warner, therefore have an obligation to construct end-to-end facilities to the demarcation point of each subscriber residence and MDU unit within its service area. [128]

56. Bell Atlantic[129] asserts that Time Warner's argument that OVS operators are legally required to construct end-to-end facilities all the way to end user MDU residents has no basis in law or policy.[130] Bell Atlantic argues that the 1996 Act requires only that OVS operators carry the programming of both affiliated and nonaffiliated programmers on a non-discriminatory basis.'" As long as the home run wiring carries programming from affiliated and nonaffiliated programmers on a non-discriminatory basis, regardless whether the OVS operator uses existing wiring or wiring newly constructed by the OVS operator for this purpose, Bell Atlantic believes that the statutory requirements are met.[132] GTE states that nothing in the statute prohibits an OVS operator from completing its delivery platform through the

[123] Section 653 of the Communications Act, 47 U.S.C. § 573

[124] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* Order on Remand, CS Docket No. 96-46, 14 FCC Rcd 19,700 (1999).

[125] *Id.* at 19,701, ¶ 3.

[126] Time Warner Petition for Reconsideration at 21

[127] *Id.*

[128] *Id.*

[129] Bell Atlantic and GTE combined to create Verizon Communications in 2000, but we will continue to refer to the commenter as Bell Atlantic.

[130] Opposition of Bell Atlantic at 1.

[131] *Id.* at 2.

[132] la!

acquisition of home run wiring, and that Time Warner fails to explain how the statute supports its conclusion.[133]

57. It is not clear how an OVS operator's obligation to carry affiliated and nonaffiliated programming on a non-discriminatory basis would interfere with the operator's eligibility to avail itself of the home run wiring rules. Time Warner assumes an OVS provider will consume all capacity with affiliated programming, and that, in some way, a requirement that **OVS** operators must install new home run wiring in MDUs will prevent that from happening. **Yet** the statute prohibits an OVS provider from consuming all capacity with affiliated programming, and whether the OVS operator acquires existing home run wiring in an MDU or installs the wiring itself is irrelevant to the question of statutory compliance.'"

III. RESOLUTION OF ISSUES RAISED IN THE *SECOND FURTHER NOTICE*

58. The ***Second Further Notice*** sought comment on whether to: (1) limit the length of exclusive contracts between MVPDs and MDUs; **(2)** subject perpetual contracts to caps or fresh look windows; **(3)** apply the Commission's rules regarding the disposition of cable home wiring and subscriber termination rights to non-cable, in addition to cable, **MVPDs;** (4) exempt small **MVPDs** from the annual signal leakage reporting requirements; and *(5)* adopt DirectTV's proposal to establish a "virtual demarcation point" from which alternative providers could share cable wiring.[135] The following discussion resolves these issues.

A. Exclusive and Perpetual **MDU** Contracts

59. Exclusive and perpetual contracts between MDU owners and MVPDs grant incumbent MVPDs the legal right to remain on MDU properties and thus limit application of the Commission's inside wiring rules. For purposes of this discussion, exclusive contracts generally refer to those contracts that specify that, for a designated term, only a particular MVPD and no other provider may provide video programming and related services to residents of an MDU. Perpetual contracts generally refer to those contracts that grant the incumbent provider the right to maintain its wiring and provide service to the MDU for indefinite or very long periods of time, or for the duration of the cable franchise term, and any extensions thereof.

60. According to commenters, most long-term exclusive and perpetual MDU contracts were executed at a time when local competition for the provision of multi-channel video programming was scarce or non-existent.[136] **As** the Commission has observed, recent advancements in video and

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[133] GTE Opposition and Comments at 11-12.

[134] In support of its argument, Time Warner cites ***Metropolitan Fiber Systems,*** 12 FCC Rcd 6901 (1997), which involved an entity claiming to **be** providing video dialtone service as a basis to transition to an open video system. In that order, the Commission discussed two aspects of video dialtone service (i.e., a common carrier platform and sufficient capacity to serve multiple customer programmers) and concluded that the petitioner provided insufficient evidence to permit the Commission to conclude the petitioner was operating a video dialtone service in the **first** place.'" The Commission's **OVS** rules were not at issue.

[135] ***Second Further Notice,*** 13 FCC Rcd at 3778-82, ¶¶ 258-71.

[136] ***See*** *e.g.,* Declaration of Lyn C. Lansdale, Director **of** Resident Services for Avalon Properties, Inc., in support of the Joint Surreply of Building Owners and Managers Association International, Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National (continued....)

communications technology have contributed toward a more dynamic, evolving marketplace with cable and new alternative providers competing for MDU subscribers.[137] It appears that some property owners who might now prefer to choose other providers' services may be bound by exclusive or perpetual contracts.[138] Given that MDUs represent a significant segment of the MVPD market,"' the ***Second Further Notice*** sought to examine whether exclusive and perpetual MDU contracts may thwart competition and ultimately may deprive tenants of the benefits that flow from such competition, such that regulatory action would be warranted.[140] As discussed below, we find that the record is inconclusive regarding anti-competitive effects of exclusive and perpetual contracts and does not support government intervention with such privately negotiated contracts.

61. We note that the regulation of exclusive contracts has been considered by the Commission in the ***Competitive Networks Order and NPRM.***[141] In that Order, the Commission determined that a ban on exclusive contracts for telecommunications service in commercial multiple tenant environments (MTEs)[142] would foster competition in that market. The Commission limited the ban to commercial properties because the record in that proceeding was insufficient to address a ban in residential properties.[143] No party supported exclusive contracts in the commercial setting, yet parties did support such contracts in the residential setting.[144] In that proceeding, the Commission has requested additional

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Multi-Housing Council, and the National Realty Committee (BOMA) ¶ 4 ("Most of the video programming providers serving **our** existing properties are franchised cable operators. **Our** agreements with these companies generally date hack to when owners had no choice and therefore **no** leverage with franchise providers: as a result, **our** contracts typically grant exclusive easements, in perpetuity, concurrent with franchise renewals."). ***See also*** Michael D. Whinston, Report on the Competitive Effects of Exclusive Contracting for Video Programming Services in Multiple Dwelling Units (March 2, 1998), in support of Reply Comments of ICTA, Attachment A ¶ 24 ("***Whinston Report")*** ("[F]ranchised cable operators signed many MDUs to very long-term, and even perpetual, exclusive contracts well before any alternative providers were on the scene. At the time these contracts were signed, the owners of these MDUs may well not have foreseen ***any*** possibility of future competition in the video programming distribution, and so it would have been particularly easy for the franchised cable operator to induce an MDU owner to accept an anti-competitive agreement.").

[137] ***Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,*** CS Docket No. 01-129, Eighth Annual Report ***("Eighth Annual Report"),*** 17 FCC Rcd 1244, 1301-1302, ¶¶ 124, 126.

[138] ***See*** Letter from Matthew C. Ames, **Esq.** to William Caton, Acting Secretary, FCC, "*Ex* ***Parte*** Presentation in CS Docket No. 95-184," (February 6, 2002) (enclosing "The National Multi-Housing Council/National Apartment Association Joint Legislative Program, Apartment (MDU) Video Survey, The Extent of Perpetual Video Contracts in **an** Apartment Market") ("RAA survey").

[139] There are an estimated 21.4 million MDUs currently in the United States, with 23.3 million projected by 2005. ***Eighth Annual Report,*** 17 FCC Rcd at 1301, ¶ 123.

[140] 13 FCC Rcd at 3754, ¶ 203.

[141] Seen. ***8, supra.***

[142] MTEs, or multiple tenant environments, include both multi-unit residences and multi-establishment commercial buildings. MDUs, or multiple dwelling units, include multi-unit residences only.

[143] ***Competitive Networks Order and NRPM, 15 FCC Rcd*** at 22999, ¶ 33.

[144] *Id.* Real Access Alliance argued that potential revenue streams in residential MTEs are not enough *to* attract competitors without exclusive contracts, and that commercial customers generally demand higher levels of service than do residential customers, thereby generating higher revenue per customer in commercial MTEs. This permits
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comment on whether the ban on exclusive telecommunications contracts should be extended to residential settings.[145]

62. The market for MVPD video services is primarily in residential MTEs. In the Competitive Networks proceeding, the record was inconclusive regarding the anti-competitive effects of exclusive contracts in the residential setting versus their usefulness as an incentive for new entrants to expend capital on the construction or upgrade of distribution systems.[146] Parties argued in that proceeding that the revenue stream generated from telecommunications services offered in residential buildings is not enough to attract competitive services without the added inducement of exclusive contracts.[147] Also, the inherent differences in design between telecommunications and MVPD inside wire distribution systems create different market conditions and hence necessitate a separate examination. Thus, although we conclude here not to forbid exclusive contracts for MVPD service, market conditions may not compel the same result for residential telecommunications service. We will address whether to limit exclusive residential MTE contracts for telephony services in the Competitive Networks proceeding.[148]

63. Exclusive Contracts: In the *Second* Further Notice, the Commission recognized that exclusive contracts for video services in MDUs may have competitive consequences.'" In this connection, the Commission noted arguments that exclusive contracts bar alternative MVPDs' access to, and thus inhibit competition for, MDUs.[150] The Commission also noted arguments that exclusive contracts enable alternative providers to recoup the investment required to enter MDUs and thus to become or remain viable. The Commission asked commenters to address whether it would be appropriate to cap exclusive contracts to open up MDUs to potential competition on a building-wide or unit-to-unit basis, and, if so, what would represent a reasonable cap."'

64. Commenters identified with real estate interests, private cable operators ("PCOs"), and some telecommunications entities tend to support exclusive contracts for video programming services as enabling alternative MVPDs to gain a foothold in the MDU market. Specifically, Community Associations Institute (CAI),[152] WCA, ICTA, Real Access Alliance, BOMA, Intelicable Group, Inc. (Intelicable), and OpTel assert that exclusive contracts enable alternative and new MVPDs to procure financing, recoup their costs, expand operations, and enter in and compete *for* the MDU market.[153] They

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telecommunications providers to recoup their facilities' investments even if they serve only a subset of tenants within a property, allowing multiple providers to exist viably in the building.

[145] *Id.* at 33052, ¶¶ 161-162.

[146] *Id.* at 22998-22999, ¶¶ 32-34

[147] Id.

[148] *Id.* at 22999, ¶ 33.

[149] ***Second Further** Notice*, 13 FCC Rcd at 3754 and 3778, ¶¶ 203 and 258.

[150] *Id.* at 3748-50, ¶¶ 191-202.

[151] Id. at 3778-79, ¶¶ 259-60.

[152] CAI represents more than 160,000 community associations, cooperatives and planned communities throughout the United States.

[153] CAI Comments at 2; WCA Comments at 1-8; Real Estate Alliance Ex *Parte*, May 24, 2000 at 1-3; BOMA Further Joint Comments at 2-6; lntelicable Ex Parte, June 16, 2000 at 1-3; OpTel Comments at 4-6; GTE at 3. See (continued....)

also claim that exclusive contracts give property owners leverage, the opportunity to obtain better service options and rates, and the possibility of offering an alternative to the incumbent cable provider, which ultimately benefits residents.[154] ICTA, Real Access Alliance and Intelicable contrast business models and statutory regulatory environments governing the provision of MVPD services in residential MDUs with that of the provision of telecommunications services in commercial multi-tenant environments ("MTEs"). They contend that the costs incurred in providing video services to MDUs exceed those incurred in providing telecommunications services in commercial MTEs, because MVPDs must construct each component of their systems, whereas telephony providers can interconnect with the incumbent provider and share access.[155] Additionally, they contend that revenues generated from MDU video programming services are substantially lower than revenues generated from MTE telephony.[156] These commenters assert that such differences justify allowing the use of exclusives for MDU video programming service contracts, while prohibiting such contracts for MTE telephony services.[157] These commenters advocate long-term or no caps on exclusive contracts.

65. ICTA, OpTel, and WCA assert that caps generally are impractical because MVPDs' investments vary depending upon the services offered and the characteristics, location, and size of the buildings being served.[158] They conclude that the term of exclusives should be determined by and negotiated between MDU owners and MVPDs.[159] If caps are to be adopted, however, ICTA, OpTel, and WCA endorse long-term caps of ten to 15 years, which they assert are needed to ensure sufficient time for MVPDs to recoup and justify their investments.[160] As discussed below, CAI and BOMA acknowledge that exclusive contracts may represent the only way other MVPDs may enter the MDU market and present a competitive alternative to the incumbent MVPD.[161] CAI and BOMA do not favor government-imposed caps of any length. They contend that caps impinge upon free market negotiations and upon established rights of property ownership, and they urge government restraint.[162]

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ICTA Comments at 2, 9, 13 (asserting that long-term exclusive contracts are not anti-competitive and that such contracts are necessary to protect high-cost alternative MVPDs that cannot effectively compete either in the current or future overbuild environment). *See also Whinston* ***Report*** (referring to, but not providing, the results of a survey conducted by ICTA, which presumably served as a basis for the Report's conclusions that absent exclusives, PCOs cannot compete with incumbents or overbuilders; that overbuilding is inefficient because it might discourage PCOs' investment in MDUs; and that PCOs' costs exceed cable operators' costs, but that nevertheless PCOs' service is more competitive than cable operators' service).

[154] *Id.*

[155] ICTA Ex ***Parte,*** June 6, 2000 at 1-5; Real Access Alliance ***Ex Parte,*** May 24, 2000 at 2-5; Intelicable Ex ***Parte,*** June 16,2000, at 1-3.

[156] ***Id.***

[157] *Id.* ***See Competitive Networks Order and NRPM,*** 15 FCC Rcd at 22998-23000, ¶¶ 30-36.

[158] ICTA Comments at 4-9; OpTel Comments at 6-7; WCA Comments at 3-11. ***See*** also Time Warner Comments at 2-4.

[159] ***Id.***

[160] ICTA Comments at 4-9; OpTel Comments at 6-7; WCA Comments at 3-11.

[161] CAI Comments at 2-4; BOMA Comments at 2-4

[162] ***Id.***

66. Bell Atlantic, Cablevision, MAP/CFA, MCI, RCN and UTC are critical of exclusive contracts and, if they are permitted at all, support very short caps of three to five years on such contracts which, they claim, is sufficient time for MVPDs to recoup their investments in MDUs.[163] Cox Communications (Cox) argues that exclusive contracts are inherently anti-competitive and discriminatory, because such contracts effectively lock up MDUs and favor incumbent providers.[164] Cox cautions the Commission not to adopt regulations designed to protect the viability of certain niche providers, and urges the Commission to ban exclusive contracts. Cox challenges "the assertion that exclusive arrangements are critical if MDU service providers are to survive,'' saying it is "belied by Cox's own experience with non-exclusive contracts and by the experiences of other cable operators that offer service in direct competition with alternative providers in the same building."[165] Ameritech and Winstar echo Cox's arguments by claiming that exclusive contracts are inappropriate and only serve to insulate certain niche providers from business risk.[166] Winstar adds that exclusive MDU contracts defy the spirit of both the 1992 Cable Act and the 1996 Act, which were intended to promote competition.[167]

67. Finally, BOMA, Charter Communications, Inc. (Charter),[168] NCTA, Time Warner, Telecommunications, Inc. (TCI), and US West contend that the Commission lacks statutory authority to abrogate or interfere with privately negotiated contracts.[169] NCTA and TCI further contend that regulation of MDU contracts for video programming services is inconsistent with Section 301(b)(2) of the 1996 Act, which excepted MDU bulk discounts from the uniform rate structure requirements.[170] According to TCI, "far from finding any competitive problem with cable operators' MDU contracting practices, Congress afforded cable operators *greater* flexibility (by removing the uniform rate structure requirement) to enable them to respond more effectively to the lower prices and sizable competitive pressure posed by alternative MVPDs."[171]

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[163] *See* Comments of Bell Atlantic at 3-4; Cablevision at 4; MAP/CFA at 4-6; RCN at 3-4; UTC Reply Comments at 2-3.

[164] Cox Comments at 2-8

[165] Cox Comments at 5

[166] Ameritech Comments at 2-3; Winstar Comments at 5-10

[167] Winstar Comments at 4-7.

[168] Charter tiled joint comments with Greater Media, Inc., Jones Intercable, Inc., Marcus Cable Operating Company, L.P., Benchmark Communications, and Century Communications Corp.

[169] *See* BOMA Further Joint Comments at 5-6; Charter Reply Comments at 13-16; NCTA Comments at 1-5; Time Warner Comments at 2-4; TCI Reply Comments at 1-4.

[170] Section 301(b)(2) of the 1996 Act amended section 623(d) of the Communications Act, codified at 47 U.S.C. § 543(d), which provides, in pertinent part:

> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to . . . . a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition . . . . Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.

[171] TCI Comments at 2

68. As discussed above, in the Competitive ***Networks Order*** *and* ***NPRM,*** the Commission banned exclusive contracts between telecommunications providers and commercial MTE owners as anti-competitive.'" The Commission there noted that "most commenters on this issue, including both LECs and CLECs, support[ed] a ban on exclusive access contracts."[173] **In** contrast, the record developed in this proceeding indicates little support for government interference with privately negotiated exclusive MDU contracts. As discussed below, we do not find a sufficient basis in this record to ban or cap the term of exclusive contracts.

69. The record does not indicate the extent to which exclusive contracts have been utilized, and, more importantly, does not demonstrate that such contracts have thwarted alternative providers' entrance into the MDU market, so as to warrant imposition **of** limits on such contracts. Although the 1990s witnessed the bankruptcy of several large SMATV operators, which may have weakened the competitive strength and viability of alternative MVPD providers,[174] other new entrants have begun to compete with incumbent MVPD providers by offering bundled video, telephony and data services.[175] Overall, the percentage of subscribers receiving their video programming from a franchised cable operator declined from **80%** to 76.5% between 2000 and 2002.[176] It thus appears that marketplace forces, spurring incumbent and alternative providers to innovate and improve service offerings, may determine providers' viability, without the need for government action on exclusive contracts.

70. Additionally, we note that the current record is insufficient to justify government-sanctioned caps of any length. Proponents of allowing exclusive contracts of limited duration contend that caps would limit the anti-competitive effects of such contracts, while simultaneously affording alternative MVPDs the opportunity to enter into and recoup their investments from MDUs. Only ICTA and OpTel attempt to substantiate **or** justify a particular period of exclusivity needed for an alternative MVPD to recover costs.[177] Other commenters merely make conclusory statements in support of particular time periods. ICTA argues that the Commission should not establish a particular cap on the length of exclusive contracts, because the appropriate period of exclusivity will vary by property, but that if **a** cap is deemed necessary, it should not be shorter than 15 years.[178] OpTel's data summary attempts to demonstrate that MVPDs need seven to 15-year exclusivity arrangements to recoup their costs of entering an MDU, depending on the level of penetration within a particular MDU and the availability of existing inside wiring.'" OpTel's submission, however, falls short of providing certain

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[172] *See* ¶¶ 62-63, ***supra.***

[173] ***Competitive Networks Order and*** *NPRM,* 15 FCC Rcd at 22996, ¶ ***26.***

[174] See ***Eighth*** *Annual Report,* 17 FCC Rcd at 1301-1302, ¶¶ 125-26.

[175] ***Id***

[176] ***Eighth Annual Report,*** 17 FCC Rcd at 1248, ¶ 5, and ***Annual Assessment*** *of* ***the Status*** *of* ***Competition in the Market for the Delivery*** *of* ***Video Programming,*** MB Docket No. 02-145, **Ninth** Annual Report ***("Ninth Annual Report'?,*** FCC 02-338 (released December 31, 2002), ¶ **4.**

[177] ICTA Comments at 4; OpTel Further Reply, Attachment B.

[178] ICTA Comments at 4.

[179] ***See*** OpTel Further Reply, Attachment B.

critical cost recovery information.'" In any event, the record suggests that specific cost recovery periods may vary and are tied to the unique attributes of MDU buildings, as well as MVPD providers.

71. In sum, we find that the record does not support a prohibition on exclusive contracts for video services in MDUs, nor a time limit, in the nature of a cap, for such contracts. The parties have identified both pro-competitive and anti-competitive aspects of exclusive contracts.[181] We cannot state, based on the record, that exclusive contracts are predominantly anti-competitive. With respect to capping such contracts, there appears to he little agreement over the length of term. Again, based on the record, we cannot discern the "correct" length. We note that competition in the MDU market is improving, even with the existence of exclusive contracts."' Accordingly, we decline to intervene. Because we are not banning or capping exclusive contracts, we also decline to address arguments pertaining to the Commission's authority to do so.

72. Perpetual Contracts: The ***Second Further Notice*** also sought comment regarding whether it would he appropriate to restrict perpetual contracts between MDU owners and MVPDs.[183] Although several commenters question the Commission's authority to act in this area, most commenters addressing the issue assert that perpetual contracts effectively bar alternative and/or new MVPDs' entry into the MDU market and are inherently anti-competitive.[184] Nonetheless, the record does not demonstrate the existence of widespread perpetual contracts nor support the need for government interference at this time.

73. MAP/CFA maintains that perpetual contracts are anti-competitive, because such contracts ensure incumbent MVPDs' right to remain and thus preclude operation of the Commission's building-to-building and unit-to-unit home run wiring rules.[185] In this connection and as noted previously, the Commission's home run wiring rules only apply once the incumbent provider does not have a contractual, statutory or common law right to remain.[186] RCN, ICTA, OpTel, WCA, and CAI urge the

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[180] For example, OpTel's submission does not account for depreciation of tangible assets and does not address the fact that private cable operators' investments are short, compared to cable operators' "long-lived" investments. Moreover, it appears that OpTel's cost recovery estimates exceed recovery periods afforded cable operators, which cover the costs involved in serving an entire franchise area, not select MDUs within a franchise area. ***See Media General Cable of Fairfax County,*** 11 FCC Rcd **3655 (1996)** (finding through a cost of service filing, that a cable operator justified and thus was allowed to recover start-up losses incurred during the first eight years of operation); see ***also*** Comments of CATA and Carolina Broadband. Both CATA and Carolina Broadband claim that, unlike PCOs that are able to "cream skim" desirable MDUs, cable operators are obligated to serve entire franchise areas and further are subjected to additional regulatory restraints, such as must carry, PEG and leased access, and franchise fees. Indeed, Carolina Broadband characterizes the need for exclusives to recoupirealize a sufficient return on investments as a myth, noting that exclusives are neither advocated nor required for single-family residences where the costs per subscriber are far greater.

[181] *See ¶¶ 65-67, **supra.***

[182] CAI Comments at 2-4; BOMA Comments at **2-4.** ***See** also **Eighth Annual Report,*** 17 FCC Rcd at **1248** and 1301-1302, ¶¶ 5 and 125-126.

[183] *See **Second Further Notice***, 13 FCC Rcd at 3780, ¶¶ 263-65.

[184] RCN Comments at **IS-16;** ICTA Comments at **11-15;** OpTel Comments at **7-9;** WCA Comments at 11-17; CAI Comments at **5-6.**

[185] MAP/CFA Comments at **9.**

[186] ***See*** **47** C.F.R. § 76.804(a)(1) and (b)(1).

Commission to adopt a fresh look window, to enable MDU owners the opportunity to reassess and renegotiate their existing contracts.[187] Bell Atlantic does not support a fresh look window, but instead favors an open access approach that would allow alternative providers access to MDUs contingent upon and following incumbent providers' recoupment of inside wiring costs.'"

74. BOMA claims that although perpetual contracts are anti-competitive, most real estate owners nevertheless prefer private marketplace negotiated solutions over government interference with contracts.[189] Additionally, BOMA, along with NCTA, Time Warner and **US** West contend that the Commission is not authorized to regulate or interfere with privately negotiated contracts.[190] NCTA, Time Warner, and Charter also argue that both a ban on perpetual contracts and a fresh look window would result in a "taking" of private property without just compensation in contravention of the Fifth Amendment."'

75. As the Commission has noted, perpetual MDU contracts may discourage or limit alternative providers' entry in the MDU market[192] and thus restrict head-to-head competition in and for MDU markets. Head-to-head competition has been shown to benefit both consumers and providers by constraining subscription rates and spurring innovative and diverse offerings.'" Since existing perpetual contracts grant incumbent providers the legal right to remain indefinitely or for very long periods of time, such contracts would therefore frustrate the pro-competitive goals of the Commission's home run wiring rules. As discussed below, however, it appears that perpetual contracts are neither prevalent nor currently being entered into. Accordingly, such contracts do not represent a significant harrier to competition in the MDU market warranting government-imposed restrictions.

76. The majority of commenters that urge the Commission to restrict perpetual MDU contracts offer only conclusory statements regarding the prevalence of such contracts in the marketplace.[194] The limited evidence on the record suggests that perpetual contracts are not prevalent and, in fact, are no longer being widely negotiated. **In** an attempt to provide some empirical data, the RAA submitted the results of a survey conducted by the National Multi-Housing Council and the National Apartment Association, which attempts to quantify both the extent and nature of any problems posed by perpetual

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[187] RCN Comments at 15-16; ICTA Comments at 11-15; OpTel Comments at 7-9; WCA Comments at 11-17; CAI Comments at 5-6. OpTel advocates a nationwide window of three to five **years** from the date of the Order. WCA and CAI did not endorse a single fresh **look** window, and instead advance a flexible approach triggered by the presence of competitive MVPD providers.

[188] Bell Atlantic Comments at 4-5

[189] BOMA Comments at 7-8.

[190] BOMA Comments at 4-9; NCTA Comments at 2-5; Time Warner Comments at 5-8; US West Comments at 2-5.

[191] NCTA Comments at 2-5; Time Warner Comments at ***5-8;*** Charter Joint Reply Comments at 16.

[192] ***See Eighth Annual Report,*** 17 FCC Rcd at 1250,1282, ¶¶ 12, 77.

[193] ***Id.*** at 1324-1327, ¶¶ 196-207

[194] For example, StarCom claims, without substantiation, that "approximately30% - 40% of apartment properties are tied up in perpetual contracts today." Letter from Christopher L. Day, Chief Executive Officer, StarCom Satellite Technologies, LLC, to William **E.** Kennard, Chairman, FCC (December 13, 1999) (comparing the financial models of PCOs and cable operators, and discussing the impact of cable perpetual contracts on PCOs).

contracts ("RAA survey").[195] The RAA survey solicited responses from a cross-section of MDU owners of large (100 and more units) and small (more than 5, hut less than 100 units), high-end, middle-income and lower-income MDUs across the country. The RAA survey suggests that only a small percentage of MDUs are currently subject to perpetual contracts for video programming services. Specifically, the RAA survey results indicate that only between **3.8** and 4.8 percent of the total properties surveyed are covered by perpetual contracts.[196] Moreover, the RAA survey suggests that MDU contracts currently are not being negotiated. None of the property owners surveyed had entered into a perpetual contract in the last five years.[197]

77. Given the results of RAA's survey and the lack of other data reflecting the prevalence of perpetual contracts, we cannot conclude that such contracts represent a significant barrier to competition in the MDU market. Accordingly, we do not find that the current record provides a basis for restricting perpetual contracts. Because we are not banning or otherwise restricting perpetual contracts, we decline to address arguments pertaining to the Commission's authority to do so. We note that remedies for MDU owners who seek to renegotiate or terminate existing perpetual contracts may lie in state court.[198]

B. Application of Cable Inside Wiring Rules to all MVPDs

78. In the *Second Further* ***Notice,*** the Commission proposed to modify its rules governing home wiring for single-unit installations and subscribers' pre-termination rights,[199] so that they would apply to

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[195] *See* Letter from Matthew C. Ames, **Esq.** to William Caton, Acting Secretary, FCC, ***"Exparte*** Presentation in CS Docket No. 95-184," (February 6, 2002) (enclosing "The National Multi Housing Council/National Apartment Association Joint Legislative Program, Apartment (MDU) Video Survey, The Extent of Perpetual Video Contracts in an Apartment Market") ("RAA survey").

[196] The survey of large MDUs covered a total of 4,795 member properties, which represented a total of 1,207,184 units. Of those, only 241 properties, which represented 58,208 units or 4.8 percent of the total 1,207,184 units surveyed, were subject to perpetual contracts. The survey of small MDUs covered a total of 74 randomly selected properties. Of those properties, only 2 properties, or 3.8 percent of the total properties surveyed, were subject to perpetual contracts. ***See*** RAA survey at 2-4. The RAA survey further indicated that approximately 75 percent of owners of large MDUs subject to perpetual contracts would renegotiate or terminate the contracts if given the opportunity. The RAA survey asked such owners also to rank the reasons they would want to renegotiate or terminate the contracts (ranging from "1" as least important to "5" as most important reason), and then weighted and averaged the responses (in terms of the number of units covered by the perpetual contracts). The responses indicated that the most important reason cited was the low level of MVPD compensation to the owner (4.6 ranking), the second most important reason was the incumbents' lack of new services or technology (3.8 ranking), and the third most important reason was poor programming options (3.2 ranking). Reasons of lesser importance included **poor** service (2.6 to 2.9 ranking), residents' expressed interest in competition (2.7 ranking), and high subscription rates (2.6 ranking). ***See*** RAA survey at 4.

[197] RAA survey at 5

[198] Because perpetual contracts potentially could bind parties indefinitely and ultimately restrain and/or negatively impact commerce, such contracts generally have not been favored in law. ***See, e.g., Madisonville*** *Boatyard, Ltd.* ***v.*** *Poole*, No, Civ. A. 01-970, slip op. (E.D. La. 2001) (finding that a lease for realty that purported to grant unlimited renewal options took property out of commerce indefinitely and thus was void as against public policy); ***Branch v.*** *Mobil Oil Corp.*, 772 F. Supp. 570 (W.D. **Ok** 1991) (finding that a contract that purported to release heirs and assignees from liability in perpetuity was void as against public policy).

[199] ***See*** 47 C.F.R. §§ 76.802(a)(1) and 76.806

non-cable MVPDs, in addition to cable MVPDs.[200] The Commission suggested that such modifications "would promote competitive parity and facilitate the ability of a subscriber whose premises was initially wired by a non-cable MVPD to change providers." Moreover, the Commission opined that the modifications would "promote the same consumer benefits as in the cable context: increased competition and consumer choice, lower prices and greater technological innovation."[201] The Commission sought comment on the proposal to extend its rules to all MVPDs and on its authority to do so.[202]

79. The commenters that address this issue all support the Commission's proposal.[203] US West and RCN maintain that the proposal will eliminate regulatory disparity between cable and non-cable providers and, more importantly, will protect subscribers whose termination rights would otherwise hinge on which entity initially installed their wiring.[204] According to CAI, the proposal will enable residents and residents' associations to effectively negotiate and execute agreements with competing providers and, further, will "level the playing field and expedite the development of integrated telecommunications networks and infrastructures to deliver varied and competing services."[205] In addition, CAI asserts that the proposal "will provide more certainty in the marketplace by establishing a uniform approach to the disposition of inside wiring."[206] Finally, Ameritech states that, under Sections 4(i) and 303(r), the Commission has authority to modify its rules to apply to all MVPDs, and should do so because the same "competitive concerns that led the Commission to adopt these [cable home wiring] rules pertain regardless of who installed a subscriber's or MDU's inside wiring."[207]

80. The Commission's home wiring rules for single-unit installations and subscriber pre-termination rules implement Section 624(i) of the Communications Act,[208] the objective of which is to enable subscribers to subscribe to services offered by an alternative MVPD without incurring additional installation costs or experiencing disruption in programming.[209] In 1993, at the time these rules were adopted, the Commission stated that although it was "rare" that subscribers terminated cable service in order to take service from an alternative video provider, it expected such instances to increase as competition to cable developed?" The trend in recent years has been increased competition in the MVPD market. We anticipate this trend to continue with alternative MVPDs increasingly gaining market share, such that the entity responsible for the initial installation in a home could be a cable or a

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[200] *See Second Further Notice,* 13 FCC Rcd at 3780-81, ¶¶ 267-68. The proposed rule modifications only address extending the home wiring rules, which currently only apply to cable operators, to all MVPDs. For a definition of MVPDs, see 47 U.S.C. § 522(13).

[201] *Id*

[202] *See Second Further Notice,* 13 FCC Rcd at 3780-3781, ¶¶ 267-268

[203] *See* MCI Comments at 3; US West Comments at 3; CAI Comments at 7; RCN Comments at 18; Time Warner Reply Comments at 11; Ameritech Comments at 12.

[204] US West Comments at 13 and RCN Comments at 18

[205] CAI Comments at 7.

[206] *Id*

[207] Ameritech Comments at 21.

[208] 47 U.S.C. § 544(i).

[209] *See Cable Home Wiring Order,* 8 FCC Rcd 1435, ¶ 2.

[210] *Id.*

non-cable provider. We thus find it necessary to broaden our rules to ensure that a subscriber's ability to terminate existing service and accept alternative service is not contingent on whether the wiring was installed by a cable, as opposed to a non-cable, provider. We further find that the proposed rule modifications will promote regulatory parity and enhance competition among **MVPDs.** Accordingly, we will modify our rules governing the disposition of home wiring and subscriber pre-termination rights to apply uniformly to all MVPDs.

81. The Supreme Court has recognized that Sections 2(a), 4(i) and 303(r) of the Communications Act[211] confer upon the Commission broad jurisdiction to adopt rules and regulations that are consistent with and further the goals of its specific grants of authority under the Act?" **As** a threshold matter, the Commission's jurisdiction under Section 2(a) over "communication by wire *or* radio"" is a broad grant of regulatory power, not limited to those activities and forms of communication that are specifically described by the Act's other provisions.[214] If, as is the case with the non-cable **MVPDs** at issue, the subject of regulation falls within the broad parameters of Section 2(a), the Commission may impose regulations in the absence of an explicit statutory mandate if the regulations protect or promote objectives of the Act's substantive provisions. For example, in ***Midwest Video I***, at a time before the Commission had received any express statutory grant of regulatory authority over cable television, the Supreme Court upheld – as a proper exercise of the Commission's authority – the adoption of regulations that prohibited cable carriage of local stations unless the cable operator locally originated some of its own programming. The Court stated that "the critical question in this case is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field **of** television broadcasting.'"[215] The Court further explained that the Commission's authority over cable, as previously upheld in ***Southwestern Cable,*** permitted the agency "to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[216] In a later

[211] 47 U.S.C. §§ 152(a), 154(i) and 303(r).

[212] ***See, e.g., United States v. Midwest Video Corporafion,*** 406 U.S. 649 **(1972) ("Midwest Video I").** ***See also United States v. Southwestern Cable Co.,*** 392 US. 157 (1968) (upholding certain FCC regulations over cable television systems prior to the enactment of Title **VI,** where the regulations were deemed to be necessary to prevent the undermining of the Commission's explicitly authorized mandates in the broadcasting area). Moreover, Section 1 of the Communications Act, 47 U.S.C. § 151, specifically states that the Commission was created for the purpose of, ***inter alia,*** "regulating interstate and foreign commerce in communications by wire and radio ***so*** as to make available, so far as possible, to all the people of the United states, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 1 goes on to state that the Commission shall execute and enforce the provisions of the Act. ***Id.***

[213] 47 U.S.C. § 152(a).

[214] ***See Southwestern Cable,*** **392** U.S. at 172 (stating that "[n]othing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions"); ***Midwest Video I,*** 406 U.S. at 660 (explaining that ***Southwestern Cable*** stands for the proposition that "§ 2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply").

[215] ***Midwest Video I,*** 406 U.S. at 667-68 (quoting ***First Report and Order,*** 20 FCC 2d 201,202 (1969)).

[216] ***Midwest Video I,*** 406 U.S. at 667.

decision, however, the Court made clear that any such regulation cannot be inconsistent with the other basic parameters of the Act."'

82. For the reasons set forth above,[218] we believe that modification of our rules to include all MVPDs is reasonably connected and necessary to effectuate the explicit mandate and underlying objective of Section 624(i) of the Communications Act to preserve subscribers' choice. Moreover, this modification will further the principles of the 1992 Cable Act by enhancing competition in the MVPD marketplace.[219] Furthermore, our action here does not contravene any provision of the Communications Act. Accordingly, the modification of our rules to include all MVPDs is a proper exercise of our jurisdiction.

C. Exemption from Signal Leakage Reporting Requirements

83. In the ***Report and Order,*** we extended the application of our signal leakage rules, which had applied only to traditional cable operators, to non-cable MVPDs such as satellite master antenna services ("SMATV"), multichannel multipoint distribution services ("MMDS"), and OVS operators.[220] A transition period **for** compliance was established for certain non-cable MVPDs.[221] **In** particular, all **non-**cable MVPDs were directed **to** comply with the reporting requirement set forth in 47 CFR § 76.1804(g) by January **1,**2003.[222] In the ***Further*** *Notice,* we sought comment on whether we should exempt small MVPDs, including small cable operators, from these requirements.[223] Section 76.1804(g) of the Commission's rules requires cable operators to file annually with the Commission certain information relating to their use of the aeronautical radio frequency bands.[224] We sought comments in an effort to determine whether the annual reporting requirement may impose undue burdens **on** small service providers, including small cable operators.

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[217] *See* ***FCC v. Midwest Video Corporation,*** 440 U.S. 689 (1979 ***("Midwest Video II")*** (holding that, in the absence of an express mandate under the Act, the Commission did not have the authority to impose common carrier-type obligations on cable systems because such regulation was antithetical to a basic parameter established for broadcasting under then-Section 3(h) (now 3(10)) of the Act, which barred common carrier treatment of broadcasters).

[218] ***See,*** *e.g.,* ¶ 80, ***supra.***

[219] See, *e.g.,* 47 U.S.C. § 521(6) (stating that the purposes of Title **VI** include "promot[ing] competition in cable communications"). In addition, the Commission's action is supported by its Section I mandate to regulate wire and radio communications "so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

[220] ***Report and Order,*** 13 FCC Rcd at 3765-3770, ¶¶ **23** 1-237.

[221] ***See*** 47 CFR § 76.620.

[222] *Id.*

[223] The ***Second Further Notice*** used the term "broadband service providers" to mean all **MVPDs.** The ***Report and Order*** expanded application of the signal leakage testing and reporting applicable to all non-cable **MVPDs,** in addition to the cable MVPDs then subject to the regulations. 13 FCC Rcd at 3765-3770, ¶¶ 231-237. The ***Second Further Notice*** asked whether certain such providers should be exempted from complying with the reporting regulations. 13 FCC Rcd at 3781, ¶ 269.

[224] 47 CFR § 76.1804 was formerly 47 CFR § 76.615(b) - (g).

84. Commenters voiced both support and opposition to creating an exemption for small MVPDs. Supporters argue that an exemption would be consistent with congressional directives to reduce regulatory burdens on small MVPDs where feasible.[225] They argue that there is no evidence that a small MVPD exemption will result in abuses of the signal leakage rules or otherwise prompt small MVPDs to be less attentive to their signal leakage obligations.[226] They state that small MVPDs can ill-afford to violate the Commission's rules and risk assessment of forfeitures.[227] They note that the testing requirements will continue to apply.[228]

85. Opponents of an exemption argue that the proposal does not relieve MVPDs of the obligation to conduct tests and that the filing of signal leakage test results is a simple task once the testing is complete.[229] They state that the signal leakage rules represent a Commission effort to protect life and property, and, if reporting is helpful in the oversight of signal leakage, then all MVPDs should report?" NCTA notes, however, that if any small MVPDs are exempted, small cable operators should be included in that exemption.[231]

86. After carefully considering the comments on the proposed relief for small MVPDs, we adopt a very limited exemption to the annual reporting requirement of 47 CFR § 76.1804(g) of our rules?" This exemption will apply to non-cable MVPDs with less than 1000 subscribers or serving less than 1000 units.[233] Such an exemption furthers congressional directives to reduce the regulatory burden on small entities where feasible?" We have no reason to believe that such an exemption will affect enforcement of the Commission's signal leakage rules. We are not exempting MVPDs subject to existing reporting requirements. The annual reporting requirement is scheduled to become effective for all non-cable MVPDs on January 1, 2003.[235] With this exemption, that requirement will not become effective for the smallest non-cable MVPDs. Relief from the annual reporting requirement will allow small non-cable MVPDs to focus on the prevention of leaks by devoting their scarce resources primarily to maintenance, leakage detection, and repair. The exempted systems will continue to perform all signal

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[225] WCA Comments at 19; ICTA Comments at 16; USWest Comments at 9

[226] ***Id.***

[227] ***Id.***

[228] *Id.*

[229] Time Wamer Comments at 18; NCTA Comments at 7; Summit Communications Comments at 2.

[230] ***Id.***

[231] **NCTA** Comments at 7.

[232] The exemption is made effective through an amendment to 47 C.F.R. § 76.620(a).

[233] **MVPDs** with less than 1000 subscribers are provided regulatory relief in other contexts as well. For example, cable operators with fewer than 1000 subscribers are not required to conduct semi-annual performance tests which are intended to ensure compliance with technical standards. ***See*** 47 C.F.R. §§ 76.601(d) and 76.605. The Commission also has provided certain regulatory rate relief to cable operators owning systems that averaged less than 1000 subscribers. ***See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,*** **MM** Docket Nos. 92-266 and 93-215, ***Sixth Report and Order and 11th Order on Reconsideration ("Small Systems Order"),*** 10 FCC Rcd 7393, 7396 (1995), ¶ 7.

[234] ***See Small Systems Order,*** 10 FCC Rcd at 7395, ¶ 4

[235] ***See*** 47 C.F.R. § 76.620(a).

leakage tests required by our rules and must make the results of those tests available to Commission agents upon request. We believe it is sensible to treat small cable and non-cable MVPDs differently in this regard because of the different environments in which each is likely to operate. Small cable systems have wiring that connects individual residences, is strung on utility poles, and is subject to all of the stresses associated with the outside environment, including temperature fluctuations, wind loading, rain, and ice. Small non-cable MVPDs predominately serve MDUs and thus have their wiring and associated electronics protected from exposure to the weather and the risk of damage that could result in signal leakage.

87. Testing will remain an important part of our enforcement program. It is only the future obligation to report results by the smallest non-cable MVPDs which we are changing here. Our signal leakage monitoring and enforcement program, conducted pursuant to 47 CFR § **76.613,** which includes **a** vigorous program of field inspections and the imposition of forfeitures, remains unaffected. The Commission's field operations staff conducts routine monitoring for signal leakage and, of course, will continue to respond to aeronautical complaints to ensure the safe operation of aeronautical frequencies.

D. Simultaneous Use of Cable Home Run Wiring

88. In the ***Second Further Notice,*** we solicited comments on whether we should adopt a proposal from DirecTV to give MDU owners the right to require that incumbent MVPDs allow competitors to share their home run wiring.[236] Most of the comments we received on this issue agree that there are or may be significant unresolved technical problems with the DirecTV proposal, notwithstanding its merits from a public policy perspective.[237] Most of the technical objections to the DirecTV proposal relate to the possibility of interference when amplified signals are transmitted on a single wire and the possible lack of bandwidth capacity in existing cable plant.[238] We are unable to resolve this issue based on the record before us.[239] Accordingly, we decline to adopt DirecTV's line-sharing proposal at this time.

IV. PROCEDURAL MATTERS

A. Supplemental and Final Regulatory Flexibility Analyses

89. A Supplemental Final Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act of **1980,** 5 **U.S.C.** § **604,** are attached **as** Appendix A.

B. Paperwork Reduction Act Analysis

90. This ***Report and Order*** contains new or modified information collection(s) subject to the Paperwork Reduction Act of **1995** (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general

[236] ***Second Further Notice,*** **13** FCC Rcd at **3781**, ¶¶ 270-271.

[237] ***See,*** *e.g.,* Ameritech Reply Comments at **22-24;** GTE Reply Comments at **13-15.**

[238] ***Id.***

[239] Parties also argue that the Commission lacks statutory authority to require shared use. Time Warner Comments at **22-23;** NCTA Reply Comments at **8.** Because the record points to unresolved technical problems which prevent **us** from implementing the DIRECTV proposal, we will not address possible legal impediments to the proposal.

public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

C. Report to Congress

91. The Commission will include a copy of this ***First Order*** *on* ***Reconsideration and Second Report and Order,*** including the Regulatory Flexibility Analyses, in a report to Congress pursuant to the Congressional Review Act. A copy of this ***First Order*** *on* ***Reconsideration and Second Report and Order,*** including the Regulatory Flexibility Analyses (or summaries thereof) will also be published in the Federal Register.[240]

C. Document Availability

92. This document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, **S.W.,** Room CY-A257, Washington, D.C. 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 12th Street, **S.W.,** Room CY-B402, Washington, D.C. 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail aualexintiii,aol.com. This document is available in accessible formats (computer diskettes, large print, audio recording, and Braille) to persons with disabilities by contacting Brian Millin in the Consumer & Governmental Affairs Bureau at 202-418-7426. TTY 202-418-7365, or at bmillin@,fcc.gov.

V. **ORDERING** CLAUSES

93. Accordingly, IT **IS** ORDERED that, pursuant to the authority granted in Sections 1, 4(i), 201-205, 214-215, 220 303, 623, 624 and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 214-215, 220, 303, 543, 544 and 552, the petitions for reconsideration filed in response to the ***Report and Order*** are GRANTED IN PART and DENIED IN PART, as provided herein.

94. IT **IS** FURTHER ORDERED that, pursuant to the authority granted in Sections 1, 4(i), 201-205, 214-215, 220, 303, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 **U.S.C.** §§ 151, 154(i), 201-205, 214-215, 220, 303, 543, 544 and 552, the modifications to the Commission's rules, as described herein and in Appendix B, are HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this ***First Order*** *on* ***Reconsideration and Second Report and Order*** in the Federal Register.

[240] ***See*** 5 U.S.C. § 604(b).

95. IT **IS** FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this ***First Order*** *on* ***Reconsideration and Second Report and Order*** (or summaries thereof) including the Supplemental Final Regulatory Flexibility Analysis and the Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary