COX ENTERPRISES

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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation, MB Docket No. 07-51, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*

Dear Ms. Dortch:

The central issue in the above-referenced proceeding is whether exclusive access contracts between multichannel video programming distributors ("MVPDs") and owners of multiple dwelling units ("MDUs") promote or impede competition in the delivery of video programming services.[1] As the Federal Communications Commission ("FCC" or "Commission") assesses how best to ensure that consumers of video programming services living in MDUs can benefit from competitive forces,[2] Cox Communications, Inc. ("Cox") strongly urges the FCC to simultaneously address certain operational and implementation issues that are having a direct impact on the ability of service providers both to ensure a positive

[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, MB Docket No. 07-51, 22 FCC Rcd 5935, ¶1 (2007) ("*Exclusive Contracts NPRM*").

[2] Cox typically does not use exclusive contracts for access to MDUs, notwithstanding the Commission's reference in the *Exclusive Contracts NPRM* to a particular Cox system in its list of perpetual contracts. *Exclusive Contracts NPRM*, n.21. The referenced contract was a single pre-existing contract assigned to Cox when it purchased the cable system that originally entered into the agreement. Further, although it is a length-of-franchise agreement, this contract merely gives Cox the right to serve the property; it is not an exclusive access agreement, and does not preclude access by others.

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customer experience and to continue investing in the deployment of broadband infrastructure in MDUs. These issues include processes for access to inside wiring and related implementation and compensation procedures.

As a company that increasingly faces competition from other service providers in MDUs, Cox has been concerned for quite some time about the potential for customer confusion that can result from the transition of inside wiring from one service provider to another. Several months after the Commission released its "sheet rock ruling" in June of this year ("*Sheet Rock Order*"),[3] the actual complexity associated with implementation of the new rules has truly become apparent. Not surprisingly, competitors do not always communicate with the clarity necessary to avoid confusion and ensure a smooth transition for customers, and this already difficult situation became further complicated with the adoption of the *Sheet Rock Order*. Additionally, Commission action on the exclusive access issue is likely to further exacerbate this confusion unless the FCC provides further clarification on a number of implementation issues outlined below.

As noted by other parties, this proceeding offers a timely opportunity for the Commission to take a holistic approach in addressing the current state of cable inside wiring. For example, the implementation problems identified by Cox also have been raised by building owners, and we support their request that the Commission review the scope and application of its inside wiring rules in this proceeding and resolve any potentially confusing inconsistencies between the cable and telephony wiring regimes.[4] Accordingly, Cox asks that the Commission provide additional clarification in the following three general areas where further guidance will better ensure a smooth transition for customers taking advantage of new competitive alternatives: (i) the process that applies for access to existing wiring when multiple services (video, voice and

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[3] *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992—Cable Home Wiring; Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640 (2007) ("*Sheet Rock Order*").

[4] *See* Comments of the Real Access Alliance, MB Docket 07-51, at 44-45 (urging the Commission to consider other issues beyond exclusive contracts in order to promote competitive options). Among the issues that the Real Access Alliance considered intertwined with exclusive contracts were "the cable inside wiring rules, the telecommunications inside wiring rules, and the intersection between those sets of rules in an environment in which both types of providers are now providing both types of services." *Id. See also* Comments of Comcast Corporation, MB Docket 07-51, at 9 (explaining that "because of the way the cable inside wiring rules are currently designed and interpreted," an MDU resident cannot "pick and choose separate providers for video, voice, and broadband Internet services in the same manner as detached dwelling residents in overbuilt communities"); Reply Comments of the National Cable & Telecommunications Association, MB Docket 07-51, at 11 (noting that "differences in the cable and telephone inside wiring rules" affect cable operators' ability to compete).

data) are provided over a single cable to an MDU customer; (ii) the process for determining the first point of "physical accessibility" in an MDU and developing procedures for the transition of wiring to prevent service disruptions; and (iii) appropriate compensation that reflects substantial investment in wiring infrastructure when significant portions of an MVPD's wiring are transferred for use by another MVPD.

Cox asks that the Commission promptly consider and resolve these issues. Delaying consideration of these issues could have a direct, harmful impact on the consumers most likely to embrace MDU competition. For example, without clear Commission guidance regarding how service providers should cooperate to identify the first point of "physical accessibility" in an MDU and then transfer the use of the wiring, some competing MVPDs are disconnecting a consumer's data and/or lifeline phone service in order to effectuate a change in provider for video service.[5] Others are cutting off the consumer's existing MVPD service prior to the consumer actually requesting a service change.[6] Although Cox embraces competition across the services it provides, it also prides itself on strong customer service and satisfaction. In our experience, the types of service disruptions that stem from confusion regarding cable inside wiring frustrate, rather than promote, consumer satisfaction. Cox believes that this harm is not limited to Cox customers, but is widespread across the MVPD industry. Thus, in order to better

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[5] For example, in the New Orleans market, an MVPD seeking to switch three Cox customers to its competing video service cut and disconnected every one of the 88 cables coming from Cox's network (which were cable-sheath protected and running up the side of the MDU under conduit), disrupting phone, Internet and video services for many Cox customers. The Cox cables cut were new because Cox had replaced them after damage from Hurricane Katrina. In at least three instances in the Cox Oklahoma City market, the competing MVPD opened Cox's auto control box, which contains both drop wiring and inside wiring, and incorrectly connected its network to Cox's drop wiring instead of the customer's inside wiring. By connecting its network to Cox's wiring, the competing MVPD prevented all Cox customers on that node from communicating with Cox's network, which effectively terminated their service. In order to repair these outages, Cox had to track the interference caused in the return path before it could disconnect its drop from the competing MVPD's service and restore service. Problems like this are not limited to a single market. In another market, a customer's phone service was disrupted when a competing video provider accessed the coaxial cable feeding the unit to provide video. Similarly, an MVPD installation in yet another market resulted in the resident being unable to purchase Cox's broadband Internet access service.

[6] Premature terminations of service have occurred on many occasions in one of Cox's New England systems. Specifically, customers are not being told of the consequences of their decision in terms of impact to other services, and Cox is not being given notice to ensure that access to the wire is coordinated appropriately.

realize the goals of improved competition, choice, and service for MDU consumers, the Commission should address the issues discussed below.[7]

1. Clarifying Process for Access to Existing Wiring When Multiple Services (Voice, Video, and Data) are Provided over a Single Cable.

The first issue that the Commission should clarify for the benefit of service providers and building owners is the process to be used when an existing MVPD provides multiple services using the same wire. Specifically, it is increasingly common for an MVPD to offer voice, video programming, and broadband data services to an MDU customer over a single coaxial cable. If an MDU household that initially receives a combination of services from a single provider later decides to change its video service provider, the new MVPD must terminate video service from the previous MVPD in order to commence its service. However, because a single cable can be used to provide all three services (video, voice and data), the new MVPD's "cutting of the cable" for video programming often results in inadvertent termination of the customer's voice and data service as well, and also forecloses the possibility of data or voice competition from the incumbent MVPD in the future. Because a consumer generally is unaware of inside wiring issues and simply seeks to exercise her choice in video service provider, the affected MDU household typically has no prior notice that its voice and data services may be terminated. This result understandably is frustrating to MDU households and also costly to the voice and data provider, because the provider urgently must attempt to restore its customer's service, which may or may not be possible without interrupting the new provider's video service.[8]

In order to avoid these service disruptions, which are costly to providers both financially and in terms of customer goodwill, the Commission should address what the appropriate rules and processes should apply when a single coaxial cable is used to provide multiple services to an MDU customer. This matter is particularly germane to the instant proceeding as the Commission evaluates how best to increase competition in the provision of services in MDUs.[9] Without clear guidance on this critical issue, the number of MDU households whose voice and data services

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[7] The Commission has grappled successfully over time with similar issues relating to inside wiring in the telephony context, thus underscoring the need for and demonstrating the value of Commission guidance in these areas.

[8] This also creates a customer relations issue because the customer often blames its voice and data provider for the service loss even though it was the new MVPD's error that terminated the service. In records collected by Cox in one Oklahoma market, a little more than half of these new installations by alternative MVPDs were completed correctly (*i.e.*, without damage to wiring infrastructure).

[9] These issues are further intertwined because existing exclusive access contracts may have encouraged operators to install precisely the type of sophisticated wiring that is most capable of delivering multiple services.

inadvertently are terminated without notice or whose options of providers for these services are restricted could dramatically increase. Such a result would seriously undermine the Commission's longstanding efforts to promote competition across communications services for the benefit of MDU consumers.

2. Establishing Processes for Identifying the First Point of "Physical Accessibility" in an MDU and Developing Procedures for Smooth Transition of Applicable Wiring to Prevent Service Disruptions to Consumers.

Another source of confusion that is leading to unanticipated service disruptions for consumers is determining the "demarcation point" which, for MDUs, often is defined as the first point of "physical accessibility."[10] Clarity regarding the point of "physical accessibility" is important because it is the point at which the alternative MVPD attaches its wiring to the household's wiring in order to provide service.[11] In its most recent ruling regarding physical accessibility, the Commission confirmed that an individual, fact-based analysis should be used to determine the point at which inside wiring becomes physically accessible in a particular MDU.[12] Because that proceeding was limited to responding to the court's remand on whether the Commission adequately supported its conclusion that wiring behind sheet rock was physically inaccessible, the Commission did not address issues surrounding how service providers should interact with their customers and each other when identifying the first point of physical accessibility and transferring the use of the wire.[13] In Cox's experience, the unintended result is that some MVPDs appear to be attaching their wiring at the first point that is convenient instead of at the first point of physical accessibility. In many cases, this "most convenient" location is the existing MVPD's lockbox.[14] This practice is inconsistent with Commission precedent

[10] Typically, the demarcation point is set at "twelve inches outside of where the cable wire enters the subscriber's individual dwelling unit." *Sheet Rock Order*, ¶5 (citing 47 C.F.R. § 76.5(mm)(2)). However, if this point is "physically inaccessible," the demarcation point moves away from the household "to a point at which it first becomes physically accessible." *Id.* The Commission previously has determined that wiring is physically inaccessible if it is embedded in brick, metal conduit, certain cinder blocks and, most recently, sheet rock. *Id.*

[11] *Sheet Rock Order*, ¶5.

[12] In the *Sheet Rock Order*, the Commission clarified that "exactly where the wiring will become accessible...will vary building by building." *Sheet Rock Order*, n.105.

[13] *Sheet Rock Order*, ¶12.

[14] Cable theft is a significant issue, especially in MDUs. In addition, the video network provider has responsibility for signal leakage. Therefore, cable operators terminate their wiring into a locked box, or "lockbox," to minimize these problems.

concluding that the lockbox is not a default demarcation point.[15] It also is inconsistent with the Commission's declaration that it was not granting alternative providers access to such lockboxes.[16]

When a new MVPD breaks open a lockbox, the result may be a service disruption for the customer because the installer does not have the information about which wire serves which customer or cluster of customers. Lockbox breaking also is costly to the lockbox owner because it results in significant repair costs and possible signal leakage threats to public safety.[17] In addition, breaching the security of a lockbox in an MDU makes it very easy for nonsubscribers to steal service.[18]

Accordingly, as the Commission strives to promote competition in MDUs, it should provide further guidance regarding the processes and procedures that service providers should use to identify the first point of physical accessibility. Such guidance, perhaps through specific examples of physical accessibility, would improve the transition of customers from one provider to another, prevent service disruptions, and minimize disputes between MVPDs.

3. <u>Providing Compensation that Reflects Substantial Investment in Wiring Infrastructure when Significant Portions of an MVPD's Inside Wiring are Transferred for Use by Another MVPD.</u>

Section 76.802 of the Commission's rules currently provides a procedure for an MVPD to transfer ownership of, and receive minimal compensation for, its "cable home wiring" in certain

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[15] *Sheet Rock Order*, n.105 ("We disagree...that our ruling today effectively concludes that the demarcation point is located at the incumbent's junction box.").

[16] Specifically, the Commission stated that "[t]he procedures we are adopting, however, do not grant alternative providers...access to the incumbent provider's riser cable or lockbox...." *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) ("*Report and Order*") (cited in *Sheet Rock Order*, at n.105). The Commission anticipated that the lockbox owner, and not the alternative provider, would disconnect wiring from its lockbox and make that wiring accessible for the new provider. *Report and Order*, 13 FCC Rcd at 3688.

[17] For example, signal leakage from improper termination of cable service through lockbox tampering may threaten aircraft navigation systems.

[18] With an open lockbox, the nonsubscriber (a previous customer or someone who has never been a customer) may need only to reattach a properly disconnected home run wire to the tap in order to receive video services without authorization.

circumstances.[19] Cable home wiring in an MDU is wiring that runs from the demarcation point to the subscriber's television set or other customer premises equipment.[20] The cable home wiring transfer and compensation scheme was adopted at a time when cable home wiring consisted primarily of a small amount of wiring within a particular apartment or condominium. Since that time, however, the FCC's *Sheet Rock Order* potentially has subjected a much larger amount of wiring to the cable home wiring transfer and compensation scheme.[21] Because Cox does not rely on exclusive access contracts, Cox naturally is concerned about its ability to fully recoup its investment in wiring a building. Protecting these investment incentives is critical to the Commission's goal of promoting facilities-based competition for video, voice, and data services. Yet, without further action by the Commission updating its cable inside wiring rules to reflect the changed circumstances after the *Sheet Rock Order*, the practical effect of that decision could be to divest MVPDs of home run wiring assets and instead replace them with home wiring, which is freely accessible for competitors to use without adequate compensation.[22]

Based on its own experience, Cox believes that if many MVPDs conclude that the cable home wiring compensation scheme is inadequate, they also may conclude that they will be unable to recoup their investment in cable home wiring if such wiring is transferred to the customer, MDU owner, or an alternative MVPD. As a result, MVPDs will be less likely to invest in MDU wiring than they are to invest in single dwelling unit wiring. This result is contrary to one of Chairman Martin's stated goals in this proceeding, which is to ensure that MDU residents enjoy the benefits of competition as much as non-MDU residents.[23]

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[19] 47 C.F.R. § 76.802.

[20] 47 C.F.R. § 76.5(ll); *see Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (contrasting cable home wiring with "home run wiring," which 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).

[21] *Sheet Rock Order*, at ¶56 (finding that cable wiring behind sheet rock is physically inaccessible and thus extending scope of cable home wiring to include wiring behind sheet rock).

[22] Notably, Cox believes that many MVPDs have long concluded that too little value is attributed to the home wiring, even as it was traditionally defined, and that the administrative burdens associated with tracking the amount and value of wiring outweighed the benefits of the existing compensation regime.

[23] *See* Statement of Chairman Kevin J. Martin ("This Notice of Proposed Rulemaking demonstrates the Commission's commitment to ensure that all consumers—including those living in apartments—benefit from video competition. Through this Notice, the Commission seeks to further cable competition and help ensure that lower cable prices are available to as many Americans as possible as quickly as possible."). Other commissioners share Chairman Martin's desire to ensure equal treatment for MDU residents. *See, e.g.*, Statement of

In order to better achieve the goal of providing equal services to MDU residents, Cox accordingly asks that the Commission consider revising the current transfer/compensation scheme for cable home wiring. Ultimately, the Commission should craft a framework that ensures fair compensation, the ability to recoup investment, and no undue delay when a customer decides to seek service from a new competitor. The revised framework should account for all costs incurred to invest in, install and maintain an efficient network.[24] In addition, such a framework could also include the type of non-cost based elements factored into the rates paid for access to telephone wiring, such as administrative costs. In crafting this framework, the Commission could look to its wireline compensation procedures for guidance, of course taking into account the relevant differences between the two technologies and regimes.[25]

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Commissioner Michael J. Copps ("There is no reason why Americans who happen to live in multiple dwelling units (MDUs) should have a narrower range of choices when it comes to video and broadband service than Americans who live in free-standing buildings.").

[24] Specific costs to be covered could include the fair market value of the wiring, payment for use of the wire, recurring costs such as those for repairs, costs of labor and truck rolls for installation, costs of creating and maintaining property records, and return on capital.

[25] Pursuant to Section 252 of the Communications Act, the price paid by a new competitor to the incumbent wireline provider for an unbundled network element ("UNE") is based on the Total Element Long Run Incremental Cost of the UNE ("TELRIC"), as set by state regulatory agencies. *See generally Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003). TELRIC employs a "forward-looking cost methodology that calculates the cost today...as opposed to the cost of an existing facility at the time it was built." *Id.* at ¶2. Under TELRIC, regulators estimate recurring monthly charges based on the sum of three separate cost components—operating costs, depreciation expense, and return on capital. *Id.* at ¶10. In addition, regulators establish non-recurring charges that allow a carrier to recover the cost of certain labor activities. *Id.*

Cox is not proposing that the Commission apply TELRIC to cable inside wiring. Telephone wiring and cable wiring regulatory regimes have developed from separate statutory bases, and there are significant differences in network architecture that weigh against identical regulation in these two areas. Nevertheless, the considerations that the Commission has undertaken in the wireline context may still provide a useful reference in the context of this proceeding.

Cox respectfully requests that the Commission consider in the context of this proceeding the three general areas discussed herein. Resolution of these issues is critical if the Commission is to achieve its goal of promoting competition across communications services for MDU customers. This proceeding offers an opportunity for the Commission to provide additional clarity and guidance before further confusion and customer dissatisfaction result. Establishing clear "ground rules" now may prevent future disputes and confusion that could undermine the Commission's goals in the exclusive contracts proceeding. Only by promptly considering and resolving these issues will the Commission be able to ensure that the ultimate policy goal of this proceeding—better service for MDU residents—is realized.

Respectfully submitted,

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DECLARATION OF SHANNON BOYLE

I am Director of MDU and Single Family Development of Cox Communications, Inc. I hereby declare, under penalty of perjury, that to the best of my knowledge, information, and belief, the factual information collected from field operations personnel that is contained in the foregoing written *ex parte* presentation is true and accurate.

Shannon Boyle
Director of MDU and Single Family Development
Cox Communications, Inc.

Dated: October 23, 2007