Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Exclusive Service Contracts for Provision of	**)**	MB Docket No. 07-51
Video Services in Multiple Dwelling Units and	**)**	
Other Real Estate Developments	**)**	

COMMENTS OF COX COMMUNICATIONS, INC.

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Cox Communications, Inc. ("Cox"), by its attorneys, hereby files comments in response to the most recent *Further Notice of Proposed Rulemaking* ("*Further Notice*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] The central issue in the *Further Notice* is whether the FCC's prohibition on cable operators having exclusive access agreements with multiple dwelling unit ("MDU") owners should be expanded to other, non-cable multichannel video programming distributors ("MVPDs").[2]

Summary. As explained in detail below, continuing to permit non-cable MVPDs to enter into exclusive access agreements, while prohibiting the same such agreements for cable operators, creates a fundamental and unnecessarily asymmetric regulatory regime for video services competition. As importantly, because many non-cable MVPDs do not provide a full

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[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, MB Docket No. 07-51 (rel. Nov. 13, 2007) ("*Exclusive Access Order and Further Notice*" or "*Further Notice*").

[2] *Further Notice*, paras. 61-62.

range of communications services (voice, video, and broadband), permitting them to enter into exclusive access arrangements will affirmatively undermine competition in MDUs for important non-video services such as competitive voice and high-speed Internet access and thwart the ability of MDU residents to purchase, and thus achieve the substantial cost benefits of, a bundled offering from a cable operator such as Cox. An imbalanced MDU access policy also will exacerbate the continued consumer and operator confusion that has been created by the lack of Commission clarity over the application of any of the hodgepodge of existing wiring disposition rules to wiring installed and used by a provider for multiple services, and the process that applies when disposition of wiring is warranted.

Accordingly, the Commission immediately should extend its exclusive access prohibition to non-cable MVPDs to ensure regulatory parity and promote full-service competition in MDUs. To ensure that this and other measures intended to increase competition actually benefit instead of harm MDU consumers, the Commission also should promptly address three interrelated issues that are causing considerable confusion among service providers and consumers alike:[3]

(i) the appropriate constraints for competitor access to existing cable home run and cable home wiring when multiple services (video, voice and broadband) are provided over a single cable to an MDU customer;

(ii) the process for determining the first point of "physical accessibility" in an MDU when access to another provider's wiring is required; and

(iii) the compensation that should be paid when another MVPD uses the wiring to provide services.

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[3] Cox advised the Commission of similar concerns in an October 24, 2007 *ex parte* submission but the Commission did not address Cox's concerns in the *Exclusive Access Order and Further Notice*.

I. ANY EXCLUSIVE ACCESS PROHIBITION MUST BE APPLIED TO ALL MVPDS TO ENSURE REGULATORY PARITY AND TO ENABLE COMPETITION ACROSS ALL SERVICES, INCLUDING VIDEO, VOICE, AND BROADBAND

In the *Further Notice*, the Commission asks whether it should prohibit non-cable MVPDs, such as DBS providers and private cable operators, from using exclusive access clauses in agreements with MDUs.[4] The Commission also asks whether these non-cable MVPDs use exclusivity clauses and what the effects of such clauses are on consumer choice, competition and broadband deployment.[5]

As the Commission is aware, its authority, both prospectively and retroactively, to prohibit exclusive access arrangements for the provision of video services in MDUs is currently on appeal.[6] To the extent that an FCC prohibition on the use of such exclusive access arrangements exists, however, that prohibition must be applied uniformly to all MVPDs in order to promote regulatory parity and preserve competition across services for MDU consumers.

As Cox noted earlier in this proceeding, because it typically does not use exclusive access arrangements, it is used to competing with other providers in the same MDUs. Some of these competing providers (such as DBS) offer a single service – multi-channel video programming – to MDU residents. Cox, of course, offers multiple services in MDUs (voice, video and broadband), often over the same internal wiring.

A rule that forbids some MVPDs – but not others – from entering into exclusive MDU access arrangements obviously skews unfairly the video programming playing field in favor of certain competitors over others. But it also raises another specter: undermining the provision of competitive voice and broadband services in MDUs. Imagine, for example, that Cox is currently

[4] *Further Notice*, para. 62.

[5] *Further Notice*, para. 61.

[6] *NCTA v. FCC*, Case No. 08-1016 (D.C. Cir. filed Jan. 16, 2008); *National Multi-Housing Council v. FCC et al.*, Case No. 08-1017 (D.C. Cir. filed Jan. 16, 2008).

providing video, voice and broadband services in an MDU pursuant to a non-exclusive contract. As a result of the FCC's failure to extend the exclusive access prohibition to all MVPDs, Cox might conceivably find itself in the untenable position of facing a demand to hand over much of the very inside wire that it installed (without, as explained below, adequate compensation) to a video-only competitor that has secured an exclusive access arrangement with the building owner. Should such a scenario be allowed to play out, Cox would in essence be precluded from offering to any resident of that building any type of communications service over the very wire that it went to considerable expense to install in the MDU – and consumers in that MDU would be precluded from purchasing Cox's competitive lifeline phone and broadband services. Surely, given the Commission's commitment to promoting phone and broadband competition as well as video competition, it would not embrace a policy that would affirmatively diminish competition for other critical services in MDUs in the name of enhancing video competition.

Accordingly, recognizing that parties in this proceeding have made policy arguments both for and against exclusive access arrangements, Cox believes that one public policy outcome must be embraced if robust competition across communications services in MDUs is to thrive: either every video competitor should be permitted to use exclusive access arrangements or no video competitor should be permitted to use exclusive access arrangements.

II. THE COMMISSION MUST ADDRESS THREE CRITICAL IMPLEMENTATION ISSUES TO ENABLE FULL COMPETITION BENEFITING CONSUMERS IN MDUS

As noted by other parties, there are several implementation issues implicated in this proceeding that make it imperative for the Commission to use a holistic approach to address the current state of cable inside wiring in order to ensure competition across all services for consumers in MDUs.[7] The need for the FCC to quickly take up and resolve these implementation issues is only exacerbated by the tilted playing field it has created by prohibiting the use of exclusive access arrangements for some video competitors but not others. The Commission can no longer ignore the need to establish a comprehensive framework for cable inside wiring that promotes competition across the full range of wired communications services in ways that preserve the safety and integrity of the services consumers rely upon. Only by addressing the operational issues described below will the Commission be able to conclude that its MDU wiring policies not only promote video competition but also protect important investment incentives for cable operators to provide competitive voice, broadband and other advanced services to MDU customers. In particular, Cox urges the Commission to provide clarification in the following three areas:

(i) the appropriate constraints for competitors requesting access to existing wiring when multiple services (video, voice and broadband) are provided over a single wire;

(ii) the process for determining the first point of "physical accessibility" in an MDU when access is warranted; and

(iii) the compensation that should be paid when another MVPD uses the wiring to provide services.

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[7] *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).

Prompt consideration of these issues in the instant proceeding is critical because further delay will harm the very consumers the Commission hopes will embrace and benefit from 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 E-911 phone service in order to effectuate a change in provider for video service.[8] Others are cutting off the consumer's existing MVPD service prior to the consumer actually requesting a service change.[9] Although Cox embraces competition across the services it provides, it also prides itself on strong customer service and satisfaction. In Cox's 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 realize the

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[8] 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. Additionally, 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 drop 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. 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.

[9] Premature terminations of service have occurred on many occasions in one of Cox's New England systems. In these cases, 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.

goals of improved competition, choice, and service for MDU consumers, the Commission should address the three important issues discussed below.

A. As a Threshold Matter, The Commission Should Recognize that its Cable Inside Wiring Rules are Inadequate to Address Situations Where Competing Providers Seek Access to a Single Cable Owned and Used by an MVPD to Provide Multiple Services (Video, Voice and Broadband)

The first issue the Commission must address is the inherent tension in its new cable inside wiring rules when a competing provider seeks to invoke them to access wiring that the owner MVPD uses to provide multiple services in an MDU. It is increasingly common for an MVPD to offer voice, video programming, and broadband 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 first must terminate video service from the previous MVPD. However, because a single cable can be used to provide all three services (video, voice and broadband), the new MVPD's "cutting of the cable" for video programming, under the guise of the cable inside wiring rules, often results in inadvertent termination of the customer's voice and data service as well. The sudden termination of service is particularly harmful because the affected household typically has no prior notice that its voice and data services may be terminated. And the loss of vital E911 phone service in these situations creates a dangerous safety issue. This result understandably is also frustrating to MDU households and costly to the voice and broadband provider, because it urgently must attempt to restore its customer's service, which may or may not be possible without interrupting the new provider's video service.[10]

[10] This also creates a customer relations issue because the customer often blames its voice and broadband 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, only a little more than half of these new installations by alternative MVPDs were completed correctly (*i.e.*, without

In order to avoid these costly and harmful service disruptions, the Commission should address the necessary constraints on competitors seeking to access cable inside wiring 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 considers whether to extend to its exclusive access prohibition to non-cable MVPDs.[11] Without clear guidance on this critical issue, the number of MDU households with voice and broadband services inadvertently terminated without notice, or whose options of providers for these services are restricted, could dramatically increase. Such a result would undermine the Commission's longstanding efforts to promote competition across communications services for the benefit of MDU consumers.

B. The Commission Should Establish Processes for Identifying the First Point of "Physical Accessibility" When Competitor Access to Wiring is Warranted

Another problem leading to unanticipated service disruptions for consumers is confusion over the first point of "physical accessibility."[12] Agreement regarding the first point of physical accessibility is critical because it is the point at which the alternative MVPD attaches its wiring

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damage to Cox's wiring infrastructure or inadvertent service terminations) in the wake of the new inside wiring rules.

[11] 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.

[12] Typically, the demarcation point is set at "twelve inches outside of where the cable wire enters the subscriber's individual dwelling unit." *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, ¶5 (2007) ("*Sheet Rock Order*") (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*.

to the household's wiring in order to provide service.[13] 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.[14] 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 use of the wire, or the public safety signal leakage impact when wiring is transferred back and forth between providers serving an inherently more transient customer group.[15]

In Cox's experience, the unintended result of the current ambiguity is that some MVPDs are not engaging in any fact-based analysis of the first point of accessibility, as the Commission directed. The practical result is that they often are 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.[16]

When a new MVPD breaks open a lockbox, the result often is a service disruption for the customer because the installer does not have information about which wire serves which customer or cluster of customers. Lockbox breaking also is costly to the MVPD lockbox owner because the owner must spend time and money to repair or replace the lockbox. Resulting signal

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[13] *Sheet Rock Order*, ¶5.

[14] 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.

[15] *Sheet Rock Order*, ¶12.

[16] A "lockbox" is a locked box in which a cable operator terminates its wiring in order to protect the wiring from theft and prevent signal leakage.

leakage also can be a threat to public safety.[17] In addition, breaching the security of a lockbox in an MDU makes it very easy for nonsubscribers to steal service, which results in further costs.[18]

The Commission previously concluded that the lockbox is not a default point of accessibility[19] and that it was not granting alternative providers direct access to lockboxes.[20] Nevertheless, confusion concerning these statements, or intentional disregard of them, is causing significant harms, as described above. Given these significant harms, the Commission should act promptly to clarify when and how providers should cooperate to identify the first point of physical accessibility. Such guidance, perhaps through specific examples of physical accessibility in certain common circumstances, would improve the transition of customers from one provider to another, prevent service disruptions, minimize disputes between MVPDs and, ultimately, promote competition.

C. The Commission Should Ensure that Wiring Compensation Adequately Reflects an MVPD's Investment in its Wiring Infrastructure

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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[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 never has been a customer) often only needs to reattach a properly disconnected wire to the tap in order to receive video services without authorization.

[19] *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.").

[20] 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.

circumstances.[21] 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.[22] 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* and other decisions potentially have subjected a much larger amount of wiring to the cable home wiring transfer and compensation scheme and essentially gutted the compensation scheme in Section 76.804 that was designed to compensate the MVPD for this large segment of wiring if the MVPD *chose* to sell the wiring to the building owner or alternative provider upon termination of the incumbent MVPD's rights to serve the building.[23] As noted above, cable operators have begun to use a single wire to provide multiple types of services. If the Commission does not act quickly to update its cable inside wiring rules to reflect these changed circumstances, the practical effect could be to divest MVPDs of home run wiring assets and replace them with home wiring, which competitors will treat as freely accessible for their use without compensation.[24] 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

[21] 47 C.F.R. § 76.802.

[22] 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).

[23] *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).

[24] Notably, Cox believes that many MVPDs long have 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.

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 which will affect both "new build" properties and upgrades to existing properties. Indeed, under the current patchwork of rules, it would be more attractive for an MVPD to have its right to serve an MDU terminated, where there is an associated compensation scheme, than it would be to continue to seek to serve a building using cable home run wiring that could in an instant be transferred to another provider without any compensation. 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.[25]

In order to better achieve the goal of providing equal services to MDU residents, the Commission promptly should consider revising the current transfer/compensation scheme for cable inside 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.[26] In addition, such a framework could 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

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[25] *See Further Notice*, Statement of Chairman Kevin J. Martin ("All consumers, regardless of where they live, should enjoy the benefits competition in the video marketplace. Exclusive contracts between incumbent cable operators and owners of 'multiple dwelling units' (MDUs) have been a significant barrier to competition. Today's order removes this barrier."). Other commissioners share Chairman Martin's desire to ensure equal treatment for MDU residents. *See, e.g., Further Notice,* Statement of Commissioner Michael J. Copps ("Thanks to this item, Americans who live in multiple dwelling units (MDUs) will be able to reap the benefits of competition and consumer choice just like those who live in single-family homes.").

[26] 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.

could look to its wireline compensation procedures for guidance, of course taking into account the relevant differences between the two technologies and regimes.[27]

[27] 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.

III. CONCLUSION

Cox urges the Commission to ensure parity and promote competition by prohibiting non-cable MVPDs from using exclusive access arrangements. Further, in order to ensure that consumers actually benefit from competitive forces, Cox urges the FCC to address the above operational and implementation issues as soon as possible. Prompt resolution of these issues is critical if the Commission is to achieve its goal of promoting competition across communications services for MDU customers.

Respectfully submitted,

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