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Scott Wiggins
Walden Residential
Christopher Volgenau
WSNet
Cary Ferchill

June 6, 2000

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, DC 20554

RE: Ex Parte Communication in CS Docket No. 95-184

Dear Madam Secretary:

On Wednesday, May 31, the undersigned had a telephonic discussion with Mr. Carl Kandutsch and Ms. Royce Dickens of the Cable Services Bureau.

Also participating on this call were members of the ICTA Board of Directors, including the following: Laurie Baker, Camden Properties; Gen Bauer, Forest City Residential; Rick Conner, Equity Residential; Drew Pierson, Town & Country Trust; Lyn Lansdale, AvalonBay Communities; Steve Beltran, EPT Management and Sue Ansel, Gables Residential.

The discussion related to Cable Services Bureau Docket No. 95-184 – The Second Further Notice of Proposed Rulemaking, In the Matter of Telecommunications Services and Inside Wiring and addressed perpetual contracts, exclusive contracts and state mandatory access statutes. The substance of our comments was consistent with and did not go beyond previous written and oral communications with Mr. Kandutsch and other staff members of the Cable Services Bureau. However, the attached iterates materials relevant to questions discussed in the referenced conference call.

Sincerely yours,

William J. Burhop
Executive Director

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Ex Parte Filing in the Matter of:

Telecommunications Services, Inside Wiring, Customer Premises Equipment
CS Docket No. 95-184

Implementation of the Cable Television Consumer Protection and Competition
Act of 1992; Cable Home Wiring
MM Docket No. 92-260

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I. VIDEO V. TELEPHONY

The record in this proceeding, and in the related proceeding involving WTB, includes complaints by wireless CLECs about their inability to gain access to the multi-tenant environments ("MTE") which are to the office/commercial market what MDUs are to the residential market. However, the market to provide video services to residential users in MDUs is far different from the market to provide telecommunications services to commercial enterprises in office buildings.

Commercial tenants tend to be significantly larger, more robust users of telecommunications services than are individual residential users. Thus, one commercial customer may alone generate enough traffic to warrant investment by a CLEC in telecommunications facilities on an MTE property, thus making an exclusive arrangement for the entire property unnecessary; a single residential customer, on the other hand, simply cannot. For that reason, efforts to provide competitive telephone service in residential MDUs have been few and far between.

Commercial real estate managers also may be less sensitive to the immediate needs of their tenants than are MDU owners because commercial leases tend to be significantly longer than residential leases, and the costs of moving a commercial enterprise generally will be far greater than the costs of moving an individual or family. It is, as a result, less likely that a tenant will vacate an MTE because of its dissatisfaction with the telecommunications services in the MTE than it is that an individual will leave an MDU if the video and communications services on the property are not comparable to those available in other nearby buildings.

The market for telephony services also is quite different from those for video services. ILECs typically may invoke state eminent domain laws to gain access, at no or little cost, to private property for the purpose of providing telecommunications services. CLECs rarely enjoy similar rights. As a result, MTE owners often demand compensation from CLECs seeking access to MTE properties (the ability to charge for access is one of the fundamental rights of property ownership). The issue in the MTE context, however, is not exclusivity *per se*, but whether CLECs and ILECs are competing on a level field.

However this dispute is resolved in the telecommunications context, the ILEC/CLEC model cannot simply be grafted onto the MVPD marketplace. Because of the Commission's actions implementing Section 251 of the Telecommunications Act of 1996, CLECs now can compete with no facility investment of their own through the use of unbundled network elements ("UNEs"). Everything from the ILEC switch, all the way up to, but not including, the customers home wiring, must be made available to CLECs as UNEs.

There is no comparable right for competitive MVPDs to access the incumbent franchised cable operator's headend facilities and distribution plant. The only part of the franchised cable operator's system that may be available to a competitive MVPD is the MDU inside wiring. Everything else, including headend and/or transmission and reception equipment, and MDU outside plant, must be constructed by a competitive MVPD for each building served. As a result, the capital investment required to provide competitive video services to any customer on an MDU property far exceeds the investment required to provide competitive telecommunications services.

In short, whatever the advantages of exclusive contracting in the context of commercial/office MTEs with respect to the market for competitive telephone service, limited-term exclusive contracts for video services in MDUs can promote competition among providers. The evidence is not in yet as to whether the CLECs that are complaining about MTE access will provide telephone service to residential users in MDUs on any widespread basis. It may be, in fact, that MVPDs providing service under an exclusive video contract will be in a better position to add tiers of telephone and other services for *residential* subscribers who, today, still are not seeing the telephone competition promised by the Telecommunications Act of 1996.

Another Way Of Stating The Differences

What are the differences between telephony and video that would justify the use of exclusive contracts for video while simultaneously prohibiting any type of exclusive access agreements for telephony?

Telephone and video, while both telecommunications services, vary dramatically in the physical form of their infrastructure. A video system offered by alternative providers has a number of components that, in most instances, must be newly constructed in order to make traditional satellite and or cable television services available.

Video Service Infrastructure Components

The components of a typical PCO system are as follows:

- A facility of multiple satellite dishes to receive C band and/or L band satellite transmissions from multiple satellites.

- A central signal processing facility known as a “head-end”. This includes the electronics which process satellite signals, as well as local and any other video signals made available to the subscriber.

- Outside Plant (OSP) which is the cable and/or fiber technology that carries signals from building to building in garden style MDUs or in the case of high-rise properties from floor to floor. This is typically done via coaxial cable and fiber or hybrids of coaxial and fiber.

- Inside wiring which consists of two parts. The first component is the cable that runs from the demarcation point (where it connects to the fiber or cable, discussed above) to the exterior of a tenant’s living unit. The second component is the cable that is contained within a single living unit (apartment or condominium).

- In the case of serving multiple properties, a single head-end can, with the use of capital intensive microwave transmission links including transmitters and antennae, essentially duplicate the head-end which otherwise would have to be placed on each building.

The alternative television provider must either construct each of the components indicated above, and/or, to a limited extent, acquire the inside wiring from the incumbent provider under FCC regulations. Regardless, every component must either be constructed and/or purchased from the incumbent provider, at considerable cost. These costs vary but are in the range of $500 - $700 per resident door passed. It is common that an alternative provider’s initial capital expenditure per MDU building is several hundred thousand to several million dollars.

Telephony Service Infrastructure Components

Telephony infrastructure consists predominantly of paired copper wires which run from a resident’s unit back through various facilities, (which are almost always owned by the local telecommunications provider, the LEC or RBOC), to the central office switch where it is connected to the public telephone network (PTN). The competitive telephone provider can in virtually all cases lease these elements from the local incumbent provider. Virtually all of the physical plant required to compete in the telephony business is available with minimal capital outlay, other than lease payments, by the competitor.

Given the differences in the two technologies, a cable operator always has substantial capital expenditures, 100% of which must be made prior to obtaining the first subscriber. As a competitor, an alternative video provider must invest substantial capital in each of the components listed above. Given the need for such substantial capital outlays, few video competitors could or would make such investments without a period of exclusivity which provides an adequate time to at least recoup the capital costs provided by equity investors and/or financial institutions. Lending institutions will not make funds (debt or equity financing) available to alternative providers without the assurance of a revenue stream over a substantial period of time.

Under FCC regulations, competitive telephone providers can lease virtually 100% of the required plant/equipment needed to provide telephony services without such capital expenditures. Additionally, the leased components (unbundled network elements) are generally scalable in the sense that the lease payments increase as customers are added and at no time is substantial capital plant required in advance to begin the competitive process. In video, the alternative provider must wire all units in a building even though sales penetration only averages 60%.

Current FCC policy enables telephony competitors to use virtually all of the incumbent provider’s physical plant to spur competition in the telephony marketplace. While FCC MDU inside wiring rules have recently permitted a somewhat orderly and reasonably priced transition of the video inside wiring, there is no federal regulation which permits a competitive video provider to utilize the bundled or unbundled network elements of the incumbent franchised operator.

As a further matter, the nature of the telephony plant currently in place permits many competitive providers (through multiple resale agreements) to utilize the telephony plant/equipment for a single living unit. However, each competitive video provider must duplicate all of the capital costs involved (except for the inside wiring which, in some cases, may be purchased from the incumbent provider).

Additionally, FCC regulations adopted in 1999 permit a franchised cable operator to lower their rates for services in an MDU where a competitor appears without lowering the rates in other MDUs that do not have competition. It should be noted that incumbent local exchange carriers (LECs) are regulated by the state and cannot lower rates in a given building when competition arrives but must set uniform rates throughout a service area. This is a further reason why alternative video competitors, and their banks, will not make the required capital investments to provide alternative video services since incumbent franchised cable operator can lower rates on a unit-by-unit basis only where competition does exist. On the other hand, a competitive local telephony service provider can lower its rates with virtual assurance that telephony services will not be priced lower on a building-by-building basis to thwart competition.

Were the FCC to grant alternative video providers the use of virtually all of an incumbent franchised cable provider's plant, then similar rules for phone and video could be considered. Since current regulatory framework does not permit such use of the entire franchised operator's equipment (nor is it technically feasible to do so), physical construction and capital costs associated with competing in the video marketplace will continue to require substantial capital investment. Such capital investment is not likely to be made on a non-exclusive basis against an imbedded incumbent franchised cable operator for business reasons stated.

Also to be considered is the fact that most franchised cable operators have already had de facto exclusive access to the MDU customer for many, many years.

For these legal, regulatory, technical and financial reasons, Private Cable Operators will not be in a position to enhance competition against the entrenched incumbent franchised operators without some period during which their services can be provided on an exclusive basis to the MDU.

Capital Costs To Construct A Plant

The costs to construct video systems for an MDU generally range between $500 and $700 per unit passed, i.e. the number of units in the building. This cost per unit is determined by taking the entire capital cost discussed above and dividing it by the number of units on the property. All the costs cited above, including satellite dishes, receiving stations, head-end, outside plant and inside wiring are covered in this $500 - $700 estimate. Of this amount, approximately $50 to $75 is utilized for the actual unit wiring itself and the rest of the money is spent on the capital cost components previously discussed above.

In rewiring apartment units for telephony service (which rarely occurs since the paired copper wire has extremely long life), the costs are slightly higher for wiring a unit, and ranges from $75 to $125. Please note however that there are other important costs associated with providing video, which are not required for the provision of telephony services.

In any financial comparison, the cost issue is one side of the equation and the revenue, which it generates, is the other. The alternative video provider's investment of $500 to $700 per unit, is offset by $40 to $60 monthly revenue from some of the residents. Usually 50 – 65% of residents are subscribers.

In telephony, the cost for wiring a telephony unit is offset by 99% of the units purchasing telephone services with average revenues in the $50 to $60 a month range.

II. EXCLUSIVE CONTRACTS

Of What *Positive* Value Are Exclusive Agreements?

The value of gaining exclusive access to residents on MDU properties creates a situation in which MDU residents collectively, through their landlord or ownership association, have more bargaining power vis-à-vis MVPD providers than residents of single family homes; a single resident cannot demand very much in terms of enhanced services or pricing discounts, but a thousand residents in an MDU complex can. See Michael D. Whinston, Report on the Competitive Effects of Exclusive Contracting for Video Programming Services in Multiple Dwelling Units.

This collective bargaining power is of little value, however, if there are no alternative providers of service; in order to have leverage, the residents of the MDU must have a credible claim that they will take service from a competitive MVPD. The number of such alternatives is increasing so that the market today is much more sophisticated than it was a few years ago when the only option on most MDU properties was the MATV system provided by the MDU itself. Today, MATV no longer is a factor, and competitive providers large and small are exploring alternative means of providing service to MDU properties.

Some of these models do not depend on the availability of an exclusive arrangement with the MDU. For example, because the marginal cost of adding a new DBS subscriber anywhere within the satellite footprint is near zero, DBS providers have no reason to seek an exclusive agreement This is not a situation, however, in which the Commission should ensure that any one solution "wins" in the competition to provide video services to MDUs. DBS has many advantages, but the market will decide whether those advantages should prevail, or whether they exclude all others.

In fact, other solutions that do depend on the use of limited-term exclusive contracts often result in superior services to MDU residents. The record indicates that the exclusive contracts used by PCOs, for example, include provisions that require the PCO to provide comparable or better products and services than the franchised cable operator, at the same or a lower price. PCOs also universally offer channel selection guided by the demographics of the building population (Hispanic programming, senior programming, etc.) and channels dedicated to in-house security and community distribution. Such contracts promote the efficient delivery of quality video and communications services to residents of MDUs at competitive prices.

Isn't Revenue Sharing Distorting Competition In Favor Of New Entrants?

The record indicates that competitive MVPDs are not alone in compensating building owners for access. Although franchised cable operators usually do not pay for access in "mandatory access" states, franchised operators, including TCI, Comcast, Cox, and Jones, among others, all routinely engage in revenue sharing with MDU owners or provide other forms of cash compensation in exchange for access to customers on MDU properties.

There is little indication, however, that such payments distort competition. To the contrary, MDUs compete vigorously with each other to attract and retain tenants. Because video and communications services no longer are viewed by the public as amenities, but rather as necessities, it is this competition for residents that drives competition in the MVPD market. The residential market demands that building owners satisfy residents; that is how the market system works in this country. By and large that system works well.

The record does reflect isolated incidents, including incidents involving MDUs here in the District of Columbia, in which an MDU owner has refused to meet the video service needs of the MDU's residents. The market should, in the run of cases, "punish" such MDU owners. In the meantime it is worth noting that the District of Columbia is a mandatory access state. Mandatory access, however, is a right, not a responsibility, and the franchised operator has not moved to meet the unmet needs of the tenants in those MDUs.

III. PERPETUAL CONTRACTS

All contracts of unlimited duration ("perpetual" contracts), and exclusive contracts of excessively long duration (of which more below), can inhibit the development of competition. For that reason, perpetual contracts under common law generally are void as against public policy. See generally Option to Purchase as Violation of Rule Against Perpetuities or Rule Forbidding Restraints on Alienation, 162 A.L.R. 581, 590 (1946) (common law disfavors terms of unlimited duration).

However, because litigation can be long and costly, and because the outcome of such litigation always includes great uncertainty, property owners have been reluctant to challenge individual perpetual contracts in court. This is a situation, therefore, in which a single federal solution is appropriate.

One approach would be to apply of the Commission's "fresh look" policy to perpetual service contracts nationwide. Usually, the "fresh look" doctrine is applied in markets in which competition is imminent.[1] As competitive alternatives emerge, the Commission requires the monopolist to permit its customers to take a fresh look at the market and, with little or no termination liability, terminate their long-term contracts. This approach "makes it easier for an incumbent provider's established customers to consider taking service from a new entrant…. [and] obtain…the benefits of the new, more

[1] See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992); Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd 7341, 7342-43 (1993), vacated on other grounds, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (1994).

competitive…environment."[2] Application of fresh look in these circumstances is well within the Commission's authority. See Western Union Tel. Co. v. FCC, 815 F.2d 1495 (D.C. Cir. 1987) (finding that the Commission has the authority under the Communications Act "to prescribe a change in contract rates when it finds them to be unlawful ... and to modify other provisions of private contracts when necessary to serve the public interest").

Given that perpetual contracts inhibit competition, and that there are an ever increasing number of choices among video service providers, the MVPD market is one in which application of the fresh look doctrine would be effective and appropriate.

In the alternative, another device for addressing the perpetual contract problem would be to terminate MDU/MVPD perpetual contracts at the end of some fixed time period, *e.g.*, after ten years (applied retroactively from the date the contract was executed). Thus, a perpetual contract that was executed fifteen years ago would be deemed to have terminated on the effective date the item in this docket, and a perpetual contract that was executed five years ago would be deemed to have five years remaining on its term.

A difficulty with either approach arises in defining "perpetual" contracts. Aside from contracts that lack a specified term, contracts that run for the "length of a cable franchise and any renewals or extensions thereof" are effectively perpetual. In addition, establishing a conclusive presumption that any contract with an unspecified term which has run longer than for example 10 years is "perpetual" would capture contracts of extremely long, but fixed duration, *e.g.*, 99 years.

IV. CONTRACT DURATION LIMITATIONS

Essential Provisions For Duration Limitations On Exclusive Contracts And Perpetual Contracts

The intent of the proposed regulations is to foster competition in the video marketplace to benefit MDU residents. To attain this objective, if contract duration limitations are adopted, the following are essential regulatory provisions:

A) The duration limitation should be applied only prospectively--not retroactively--to exclusive contracts entered into after the date of the Report and Order. It should be made clear that the duration limitation is not to be applied to existing exclusive contracts so that they can run for the duration stated in the existing contract.

Unless there is evidence to the contrary, contracts entered into freely between willing parties were based on a business negotiation and a financing plan. That negotiation and financing plan resulted in a contract which is generally the result of a business model for the time period specified. Action by the FCC which would alter that business model, without taking into consideration the originally negotiated terms and financing, would be unfair to the contracting parties and could violate the lending covenants upon which the original contract was based. Of all the MDU contracts, it is in all probability a relatively small percentage which fall into this

[2] Expanded Interconnection with Local Tel. Co. Facilities, 9 FCC Rcd 5154, 5207 (1994).

category. Once the new FCC rules limiting exclusive contract duration are in place, PCO and MDU negotiations will be limited to that duration and appropriate business models will be built.

In other words, the duration limitation for exclusive contracts should be prospective only, not retroactively applied to existing contracts.

B) The duration limitation should be applied to all exclusive contracts whether held by the incumbent franchised provider or the competitor.

Both incumbent franchised providers and Private Cable Operators benefit from exclusive contracts. Exclusive contracts of unlimited duration, it is asserted by the FCC, can be impediments to enhanced competition in the MDU environment. There is no good legal, infrastructure or business model reason to differentiate between the application of an exclusive contract duration limitation for either type of cable service provider. Therefore, the exclusive contract duration limitation should be applied no matter what company is utilizing these contract provisions.

C) The duration limitation – for both exclusive and perpetual contracts —should be applied to the entire contract and not simply the exclusivity provision or the perpetual provision in the contract.

The purpose of the FCC regulations is to stimulate more robust competition in the MDU marketplace. If the duration limitation is not applied to the entire contract, rather simply to the exclusivity or the perpetual provision within the contract, incumbent providers could continue on the property utilizing several tactics which are presently all to common.

Because incumbent providers have been given the authority by the FCC to offer lower rates in one MDU where an alternative provider has sought to provide competitive service, while maintaining higher rates for the MDU property across the street, and because incumbent providers have repeatedly frustrated MDU owner's desire to sign contracts with alternative providers in lieu of the incumbent, the entire contract, not simply the exclusivity or perpetual provisions, must be subject to the duration limitation.

These incumbent provider tactics include asserting to the MDU owner that even if that provider no longer enjoys exclusivity or perpetuity, because it is on the property, it can remain on the property. They have also asserted to MDU owners that if an alternative provider is brought onto the property, that will then allow the incumbent to remove all its wiring with inherent dislocation and disruption to the property, which naturally inures to the disbenefit of the building's residents.

D) The duration limitation should be applied retroactively to all perpetual contracts, exclusive or not.

Because the incumbent franchised operator has, in virtually all instances, provided service to the MDU for numerous years, commonly 10 – 20 years, the incumbent has enjoyed its monopoly for a duration sufficient to recover its entire capital cost investment. Beyond that, if the perpetual contract duration limitation is adopted with a "fresh look window" provision, there will be no requirement that the MDU owner terminate the service agreement with the incumbent provider. That regulatory provision would then simply provide to the MDU owner the opportunity to renegotiate the contract with the incumbent provider. If the MDU residents and owner are pleased with the incumbent company's products and services, the MDU will then continue its contract with the incumbent provider. Only if the MDU residents and owner are displeased with the incumbent provider's products and services will the fresh look window be utilized to terminate the incumbent provider's service agreement and allow the MDU owner to sign a new service agreement with an alternative provider.

Today, no such opportunity exists to improve products and services for residents in buildings that are controlled by perpetual contracts. In other words, in today's world, in buildings controlled by perpetual contracts there is little incentive for the incumbent provider to improve products and services to benefit the residents. The application of the perpetual contract duration limitation and fresh look window opportunity, therefore, should be applied retroactively as of the date of the adoption of the Report and Order. This is justified because the incumbent provider has, in all likely hood, received a full return on its invested capital and unless the control afforded by perpetuity is broken, residents have little hope for improved products and services.

V. MDU WIRING

In Purchasing Inside Wiring, Depreciated Book Value Not Replacement Cost Should Be The Determining Factor

The value of the cable as sold by an incumbent provider to a new entrant on the property should be based on depreciated book value of the cable itself for the following reasons:

- Statutory law and FCC regulations have addressed single family home wiring and indicated that depreciated book value, without regard to labor cost, should be the pricing method to determine the value of wiring. There is no reason not to use the same pricing method in a multifamily dwelling merely because it is a multifamily dwelling.

- The difference between replacement cost and depreciated book value is of major significance. It is common for Private Cable Operators (PCOs) to spend large amounts of capital to refresh the plant that probably had been in use by the incumbent provider for 5, 10, or 15 years. Such expenditures are in addition to the payments made to the incumbent selling the wire. Therefore, substantial costs are borne by PCOs to acquire the wiring from the incumbent and to make improvements after it is purchased to improve product delivery to the MDU residents. If the purchase price of the wire is driven higher due to the use of replacement valuation, fewer business models will make economic sense and fewer competitors will be able to compete in the MDU environment.

– The incumbent has depreciated the wiring and its total, original cost over numerous years, thereby having recovered its investment. Beyond that, wiring within the walls of a building has no value to the incumbent operator once it ceases to provide service to that building. It is physically impossible to "unwire" a building and, even if one could do so, used wire has no market value. Therefore, payments based on depreciated book value represent funds the incumbent operator would not otherwise receive, but for the FCC inside wiring rules.

– It would be unfair to require a competing company entering a property to pay for the cost of brand new installed wire (replacement costs) when in virtually all cases the competitor is receiving a substantially less valuable asset which needs substantial upgrading to meet resident desires.

MDU Inside Wiring Behind Sheet Rock Or Cinder Block Is "Inaccessible"

While it is physically possible to cut through sheet rock and cinder block and find the wiring outside each individual subscriber's unit it is not a simple matter. Building owners generally object to such substantial physical impact on their properties for a number of reasons.

a) Each unit, often several hundred units in a single building, must have the sheet rock/cinder block opened up providing enough access to complete the required installation. Generally this requires a six to 18 inch square or rectangle being cut in each unit, and/or in the hallway ceilings.

b) Once the installation is completed, the wire must either be "fished" through the hallway, back to the junction box and/or installed in some form of molding where the ceiling and wall meet.

c) Each such penetration of each unit must then be patched, sanded, primed, and painted to match (if possible) the prior paint. Drywall repairs require creating perfect seams and sanding which requires repairs over 2 days. Or, in the case of many upscale properties, entire hallways have to be re-wallpapered to restore the original finish.

d) If the resident has been there for more than a year or is a smoker, touch up painting will not work. The entire apartment may need to be painted.

e) Most property owners will not allow a contractor to enter a resident's unit without a property representative. This means that the property owner must incur the cost of one or more representatives to accompany the cable installer.

The difference between penetrating and repairing sheet rock and cinder block is not major. Penetrating cinder block is a relatively simple matter with today's construction tools. However, this too, results in disruption to virtually every unit, on every floor of every property.

Move The Demarcation Point

Moving the demarcation point to the lock box would only require the co-location of a competitor's lock box next the incumbent operator's lock box. Then, when customers change service from the incumbent to the competitor, a wire is simply moved from lock box A to lock box B with no destruction to the property; therefore, no need for any sort of repairs, and painting/re-wallpapering with consequent significant cost savings due to reduced work hours involved. This savings inures to the benefit of the resident in lower monthly rates and to the alternative provider that can then use the savings to finance other MDU projects.

This problem is significantly more egregious in urban environments which are generally characterized by hi-rise buildings that prohibit placement of wiring on the outside of buildings and is generally associated with significantly higher costs for any such construction.

The demarcation point is commonly referred to as that point where the larger cables are divided into a number of smaller wires which run to each unit. A "lock box" is a metal box in which the equipment to split the cable is located. While lock boxes vary in size, a typical lock box is a metal cabinet 30 inches high by 18 inches wide by 10 inches deep with a key lock door.

Would the above, change ownership of the "home wiring"? Perhaps. Is that a problem?

Not in the real world. If there is a legal difficulty, perhaps the demarcation point can be moved to the junction box, the wire from the box to the 12-inch point would continue to be "home run wire" owned by the provider or the MDU and the unit ownership of "home wire" would remain only to the 12-inch point.

Sabotage Of Wiring When Abandoned By The Incumbent Cable Operator Is A Substantial Problem

The large franchise cable companies have long operated as de facto monopolies. Until significant competition began in recent years, cable companies acted as if they were the equivalent of the power company or the phone company. When video competitors beat out an incumbent provider, this process frequently results in ill will on the part of the losing party. Although the current FCC inside wiring rules do prohibit the sabotage of the inside wiring, additional language should be adopted to reinforce the FCC's intent. Statements such as "left in normal working order, normal wear and tear excepted", or "left in a condition suitable for the use intended" or "left intact, precisely in the physical condition that existed on the date the incumbent operator receives notice of a change of provider" would all reinforce the Commission's position on this matter.

It is recommended that the FCC also adopt provisions which provide to the MDU owner, residents and / or alternative providers additional legal remedies to enforce the above, if and when the incumbent provider does in fact sabotage the inside wiring.

VI. MANDATORY ACCESS

Franchised cable operators, which hold *de facto* monopolies in 98 percent of communities nationwide, have a number of natural advantages over new entrants into the MVPD markets.

- They have a broad customer base that no other provider can match, which allows them to spread costs, advertise more efficiently, and obtain other inputs of service on better terms (*e.g.*, a single headend can serve tens-of-thousands of customers).
- They are able to obtain programming at substantially lower prices than their would-be competitors, either because they are affiliated in some way with the programmer or by virtue of their monopsony buying power.
- They have financial resources that few can match.
- They have better name recognition and other marketing advantages by virtue of scale economies (*e.g.*, they can advertise through mass media).

If a new MVPD is to compete it must have a means of countering the franchised cable operator's advantages. Exclusive contracting is the single most important means of doing so. In mandatory access states, however, new entrants cannot negotiate and enforce limited-term exclusive agreements with an MDUs. Mandatory access laws, therefore, compound the franchised cable operator's advantages and slow the development of competition.

If a competitive MVPD nonetheless attempts to compete on an MDU property in a mandatory access state, the franchised cable operator, with all of the above advantages, can overbuild the competitive MVPD's facilities and, because it can spread its costs over its entire franchised area, it can offer targeted discounts to any subscriber who might choose the alternative provider's service. Such targeted discounts violate the Commission's rules only if the discount is "predatory" in the antitrust sense, see Implementation Of Cable Act Reform Provisions Of The Telecommunications Act Of 1996, 14 FCC Rcd. 5296 (1999), which is a very high standard.

The franchised cable operator also may take the position that the FCC's inside wiring rules do not apply in mandatory access states, and it may threaten the MDU owner and/or the competitive MVPD with litigation of either attempts to invoke the inside wiring rules. Although the franchised cable operator ultimately may not prevail in such a suit, the mere threat of litigation usually dissuades an MDU owner from allowing an alternative MVPD to compete on the property.

Thus, the problem with mandatory access laws is not that they are discriminatory (which they are because they typically only apply to franchised cable operators), but that they discourage entry which not only limits competition in MDUs, but to *residents of MDUs* as well because investors will not finance competitive MVPDS, and competitive MVPDs will not build facilities that may end up providing service to a very limited number of subscribers.

In Combination With The Inside Wiring Rules, Isn’t Mandatory Access Enough?

The inside wiring rules do not in any way change the economics that require exclusive contracting. The prospect of competing unit-by-unit with an incumbent franchised cable operator is not one that attracts investors or savvy business people. Even if an alternative MVPD can obtain the inside wiring under the FCC’s rules, a substantial investment still is required in order to provide service to the property, including headend facilities, receiving equipment, and outside plant, which can run into the hundreds of thousands of dollars. Assuming that the property owner will allow the competitive MVPD to install these facilities, the return on investment simply will not be sufficient in many, if not most, cases.

Don’t Mandatory Access Laws Promote Franchise-Wide Overbuilding?

There is no evidence that overbuilding, either at the franchise level or at the MDU level, ever will be widespread. Even where large, well-financed telephone companies have attempted to build competing franchised cable systems, the results have been less than satisfactory. For example, according to press reports, when SBC purchased Pacific Bell, it sold-off or closed-down most of Pacific Bell's video operations. It now is in the process of doing the same with the franchised cable systems it acquired in its transaction with Ameritech. Similarly, RCN, which has significant financial resources, has not yet proven that it can abide in the market over a sustained period of time.

In any event, the optimal solution is not one in which only a few of the largest and most well-capitalized entities can compete and survive. The Commission's rules should leave room for a wide variety of MVPDs, using different business models, to compete in the market.

VII. TECHNOLOGY OBSOLESCENCE CLAUSE

During recent years, particularly given the rapidly evolving state of technology, it has become commonplace for MDU owners to be concerned about technological obsolescence of the plant and services provided by any cable operator. To address this concern, a number of approaches have been taken. Alternative video providers frequently adopt contractual obligations with the MDU/REIT stating that it will provide competitive technology subject to the following conditions:

- Such competitive technology is not owned on a proprietary basis by another company.
- Such services are not experimental (beta test) in nature.
- Such competitive services are generally available to similarly situated MDUs.
- The residents and/or management/owners of the property have determined that such services would be desirable.

Assuming that these requirements are met, many alternative providers commit to provide such technological advancements comparable to its competitors within a stated period of time, usually 3 to 6 months. If the video provider is unable to provide such services, the nature of the exclusive contract is altered to permit another service provider to enter the property and provide such services.

Because of the importance of this issue, ICTA has included such provisions in its Program of Excellence, an industry-wide set of technology and service standards developed by MDUs and PCOs.

VIII. UNIT-BY-UNIT COMPETITION

It is not that unit-by-unit competition is better or worse than MDU-by-MDU competition. In a perfect world one might wish that every subscriber could chose between numerous MVPD service providers. The problem is that the MVPDs must have an economic incentive to invest in the facilities necessary to provide service to each hypothetical subscriber. Exclusive contracting in MDUs provides that incentive by giving MVPDs some assurance that they will recover the investment required to provide service. That is, because of the economics of the marketplace, the same economics that make overbuilding such a risky and hard to finance proposition, see, e.g., Cable World (Mar. 20, 2000) (SBC trying decide what to do with Ameritech's competitive cable business); Broadcasting & Cable (Mar. 13, 2000) (same), the choice really is between MDU-by-MDU competition or no competition in the vast majority of MDUs.

The Commission need not "decide" between the two, however, because (aside from the case of perpetual contracts) this is not a situation in which there is a market failure such that regulatory intervention is required. The residential real estate market is highly competitive: MDU owners and managers have hundreds of millions of dollars invested in properties, which can only be made profitable through the maintenance of high occupancy rates, low tenant turn-over, and timely remittance of lease payments.

Providing residents with high-quality, low-priced communications and video services is one way in which property owners keep their residents happy, which in turn helps to maintain high occupancy rates, encourage longer term leases, and reduce the number of billing disputes. Although MDU owners may also receive some compensation from those that will provide these services on the property (just as property owners receive compensation from those that provide washing machine, vending machine, and other services on the property), the amount of money involved is a small fraction of the capital investment in the property, and far less than the income to be realized from leasing or selling units.

In short, the residential real estate market will not, over the long run, allow MDU owners to sacrifice the needs and desires of their tenants by providing sub-standard video and communications services. The market will, as markets do, ensure that the most efficient business model prevails.

Inside Wiring Disposition In Instances Where The Owner Elects To Permit Unit-By-Unit Competition Between Two Or More Competitors

The FCC inside wiring rules as written – with some clarification – can adequately address this instance. In the case of unit-by-unit competition, the incumbent operator, upon proper notification from an MDU owner, would be required to make a one-time election to either sell, abandon, or remove and restore, during the time period that such competition exists.

- **SELL**. In the case of an election to sell the inside wiring, the price of the wiring would be established through the existing mechanism. In application, each time a resident elects to switch from incumbent provider to competitor, the competing company would owe the incumbent the agreed upon amount to be paid to the incumbent operator – for instance $50. If a new resident or the same resident, who later chooses to switch services back to the incumbent provider and away from the competitor, the incumbent provider would then owe the competitor $50. While this sounds somewhat tedious it can be a simple matter of determining monthly or quarterly how many residents have made such an election and a bill would be issued by the incumbent provider for each wire delivered to the competitor and subsequently by the competitor to the incumbent for each wire sold back to the incumbent.

- **ABANDONMENT**. Again, the incumbent operator is provided a one time election to determine if he wishes to abandon the wires. In each case in the future, if the resident wishes to purchase the competitors service, the abandoned wire is to be abandoned without sabotage or destruction leaving the wire suitable for the purpose intended. Subsequently, if a resident wishes to switch service back from the competitor to the incumbent provider the wire then would be left by the competitor and handed over to the incumbent in the same state it received it. This is similar to the sales scenario cited above except that no funds change hands as the wire moves back and forth.

- **REMOVE AND RESTORE.** If an incumbent elects, on a single election basis, to remove the wire and restore the property, it does so on the same terms and conditions as those that exist where there is a single service provider. When the incumbent removes its wire within the timeframes established under the rules, the competitor must replace that wire. Which is then subsequently owned by the competitor.

  While these procedures may sound somewhat tedious they are simple to implement. The important feature is that the incumbent provider elects once and once only what the disposition of the wiring is to be. Having made that election, both parties live with that decision for the duration of the term when both competitors serve the property on a unit-by-unit basis. Billing back and forth in the event of a sale is a fairly simple bookkeeping matter. In the case of abandonment, there in fact is no bookkeeping. In the case of remove and restore, each time the incumbent loses a customer the competitor provides its own facilities to serve that customer which is what a competitor would do on those properties where there was no prior cable service (or wires) on the property.

It is recommended that the FCC adopt provisions which provide to the MDU owner, residents and / or alternative providers additional legal remedies to enforce the above, if and when the incumbent provider does in fact sabotage the inside wiring.

IX. MDU DEFINITION

An MDU or multiple dwelling unit building is any facility in which 2 or more dwelling units are located under one roof. While this definition could include hotels, prisons, marinas, hospitals, nursing homes (as opposed to retirement communities) and a few others, the overwhelming majority of the estimated 32 million MDUs consist of resident(s) living units in apartments or condominiums.