

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

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)	MM Docket No. 92-260
Home Wiring)	
)	
Clarification of the Commission’s Rules and)	
Policies Regarding Unbundled Access to)	WC Docket No. 01-338
Incumbent Local Exchange Carriers’ Inside Wire)	
Subloop)	

**REPORT AND ORDER AND
DECLARATORY RULING**

Adopted: May 31, 2007

Released: June 8, 2007

By the Commission: Chairman Martin and Commissioners Copps, Adelstein and McDowell issuing separate statements.

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I. INTRODUCTION

1. In this *Order*, we take steps to eliminate barriers to competitive entry in multiple dwelling units (MDUs) and in multiunit premises, when a new entrant seeks to compete against an incumbent provider. Part I of this *Order*, responds to a decision issued by the United States Court of Appeals for the District of Columbia Circuit regarding amendment of the Commission’s cable television inside wiring

rules.¹ In the 2003 order reviewed by the court, the Commission had modified its rules to provide that “home run wiring” located behind sheet rock is considered physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring.² The Commission then concluded that cutting and repairing sheet rock adds significantly to the physical difficulty and cost of wiring an MDU. In this *Order*, we conclude that cable wiring located behind sheet rock qualifies as physically inaccessible under the Commission’s rules for purposes of determining the demarcation point between home wiring and home run wiring. The record shows that accessing such wiring causes significant damage or modification to a preexisting structural element and generally adds significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring. This ruling will facilitate competition in video distribution markets by clarifying the circumstances under which the existing cable home run wiring in MDUs can be made available to alternative video service providers.

2. In Part II of this *Order*, we grant, as described below, a petition for declaratory ruling filed by Cox Oklahoma Telcom, L.L.C. (Cox) regarding the scope of requesting carriers’ right to access incumbent local exchange carriers’ (LECs’) inside wire subloops in multiunit premises. Specifically, Cox asks the Commission to clarify that incumbent LECs must allow requesting carriers to have direct access to the inside wire subloop in multi-tenant environments (MTEs) for the purposes of performing installations.³ As explained below, we grant Cox’s petition and conclude that state commission decisions denying requesting carriers direct physical access to incumbent LECs’ inside wire subloops in multiunit premises pursuant to section 251(c)(3) of the Communications Act of 1934, as amended (the Act) are inconsistent with the Act and Commission precedent and would frustrate the development of competition.

3. The *Order* that we adopt today takes important steps to ensure that the pro-competitive, deregulatory goals of the 1996 Act are realized. Our actions here remove both economic and operational barriers to infrastructure investment in the communications market. New entrants to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings based on regulatory technicalities or costly and inefficient industry practices. By removing these obstacles, we further the opportunities for consumers living in multi-unit buildings to enjoy the social and economic benefits of communication services competition.

¹ *National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished) (*Appeals Court decision*).

² *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (*Reconsideration Order*). Cable home run wiring in a MDU is the wiring that runs from the demarcation point to the point at which the multichannel video programming distributor’s (MVPD) wiring becomes devoted to an individual subscriber or individual loop. See 47 C.F.R. § 76.800(d). In contrast, “cable home wiring” is the internal wiring contained within the premises of a subscriber, which begins at the demarcation point and runs to the subscriber’s television set or other customer premises equipment. See 47 C.F.R. § 76.5 (II).

³ Cox’s Petition for a Declaratory Ruling for Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier’s Inside Wire Subloop, WC Docket No. 01-338 (filed Oct. 27, 2004) (Petition) at 1; see also 47 U.S.C. § 251; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The Petition was placed on public notice on November 4, 2004 with comments due by December 6, 2004, and reply comments due by December 21, 2004. *Pleading Cycle Established for Comments On Cox’s Petition for a Declaratory Ruling, for Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier’s Inside Wire Subloop*, WC Docket No. 01-338, Public Notice, 19 FCC Rcd 22040 (WCB 2004). See Appendix A for a list of commenters filed in WC Docket No. 01-338.

II. BACKGROUND

A. Cable Inside Wiring Rules

4. In 1993, the Commission first promulgated rules for cable home wiring and for the disposition of that wiring after termination of service.⁴ In 1996, the Commission addressed certain cable home wiring issues and sought comment regarding how the Commission should revise these rules to reflect new developments, and how to promote competition by ensuring that the Commission's rules would facilitate the use of new and diverse services.⁵ In 1997, the Commission sought further comment on and addressed issues regarding procedures for the disposition of home run wiring in MDUs⁶ when an MDU owner decides to terminate service for the entire building and when an MDU owner is willing to permit two or more video service providers to compete for subscribers in the MDU on a unit-by-unit basis.⁷ In 2003, the Commission resolved the issues presented on reconsideration in that proceeding.⁸

5. Central to any discussion on cable home wiring or cable home run wiring is the matter of the MDU demarcation point, which is the point at which a consumer's home wiring becomes the network's home run wiring. The Commission has previously stated that the cable wiring demarcation point serves such multiple purposes as defining (1) the location at which the subscriber may control the internal home wiring if he or she owns it; (2) the point at which an alternative multichannel video programming distributor (MVPD) would attach its wiring to the subscriber's wiring in order to provide service; and (3) the point from which the customer has the right to purchase cable home wiring upon termination of service.⁹ For purposes of this proceeding, a critical component of our discussion involves the location of the demarcation point because it is where a competing provider may access existing cable home wiring in an MDU building. The demarcation point for MDUs is set at (or about) twelve inches outside of where the cable wire enters the subscriber's individual dwelling unit.¹⁰ In the event that the cable demarcation point is "physically inaccessible" to an alternative MVPD, the demarcation point moves away from the individual dwelling unit to a point at which it first becomes physically accessible.¹¹ The Commission has concluded that, for the cable demarcation point to be "physically inaccessible," access to the wiring must

⁴ See Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.*; see also 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.5(l), (m) and 76.801, 76.802; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Rcd 1435 (1993) (*Cable Wiring Order*).

⁵ *Telecommunications Services Inside Wiring and Customer Premises Equipment*, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996) (*Inside Wiring Notice*); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996) (*First Reconsideration Order and Further Notice*).

⁶ An MDU is a building or buildings with two or more residences, such as an apartment building, condominium building, or cooperative. See 47 C.F.R. § 76.800.

⁷ *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 and Second Further Notice*).

⁸ See *Reconsideration Order*, 18 FCC Rcd at 1342 (2003).

⁹ *Inside Wiring Notice*, 11 FCC Rcd at 2750.

¹⁰ 47 C.F.R. § 76.5(mm)(2). The demarcation point for single unit installations is the same. See 47 C.F.R. § 76.5(mm)(1). The presumptive demarcation point was adopted in the *Cable Wiring Order*, 8 FCC Rcd 1435 (1993).

¹¹ *Id.*; see also *Report and Order and Second Further Notice*, 13 FCC Rcd at 3729.

(1) require significant modification or damage to preexisting structural elements, and (2) add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.¹²

6. The *Appeals Court decision* remanded that portion of the *Reconsideration Order* that amended the Note to Section 76.5(mm)(4) of the Commission's rules to indicate that wiring embedded in sheet rock would be considered physically inaccessible.¹³ Previously, the Commission provided examples of wiring that would be considered "physically inaccessible," including wiring embedded in brick, metal conduit, and cinder blocks with limited or no access openings.¹⁴ Wiring simply enclosed within hallway molding would not be considered inaccessible.¹⁵ The Court found that the Commission offered no reasoned basis for expanding the Note to include sheet rock and remanded the case to the Commission for further consideration.¹⁶ In response, the Commission sought comment on its conclusions in the *Reconsideration Order* with regard to Section 76.5(mm)(4) of the rules and the amendment of the applicable Note.¹⁷

B. Incumbent LEC Inside Wire Subloops

1. Cox's Petition

7. Cox filed its petition in response to a decision by the Oklahoma Corporation Commission (OCC) arbitrating a dispute over access to the inside wire subloop between Cox, a competitive LEC, and the incumbent LEC, Southwestern Bell Telephone Company (SBC).¹⁸ Cox seeks a Commission declaration confirming that: (1) requesting carriers have a right to direct physical access to incumbent LECs' inside wire subloops in MTEs; (2) this right allows requesting carriers to obtain direct access to inside wire subloops at incumbent LECs' terminal blocks in MTEs; and (3) this right exists regardless of any state law or regulation that would otherwise limit it.¹⁹ Cox asserts that the OCC arbitration decision denied it those rights.

8. Cox argues that the right of requesting carriers to access incumbent LECs' inside wire subloops is supported by the Commission's decision in the *Triennial Review Order*, as well as by the underlying principles of the Act and federal policy encouraging local competition for customers in

¹² 47 C.F.R. § 76.5(mm)(4); *see also Report and Order and Second Further Notice*, 13 FCC Rcd at 3730.

¹³ *See Appeals Court decision* at 1; Note to 47 C.F.R. § 76.5(mm)(4) (2003).

¹⁴ *Report and Order and Second Further Notice at 3730; Note to 47 C.F.R. § 76.5(mm)(4) (2002)*.

¹⁵ *Id.*

¹⁶ *See Appeals Court decision* at 3.

¹⁷ *See Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, Further Notice of Proposed Rulemaking, 20 FCC Rcd 1233 (2004) (*Further Notice*); *see also Further Notice*, 2004 WL 2187191(FCC). A list of parties filing comments and reply comments in these dockets is set forth in Appendix B.

¹⁸ Petition at 2-3. An inside wire subloop is defined as "all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter." 47 C.F.R. § 51.319(b)(2).

¹⁹ Petition at i. Although Cox uses the term MTEs, the Commission uses the term "multiunit premises" in the inside wire subloop rule. 47 C.F.R. § 51.319(b)(2).

MTEs.²⁰ Cox also claims that Commission action is needed “to resolve an emerging split” among state commissions over the manner that requesting carriers must be granted access to the inside wire subloop.²¹ According to Cox, the state commissions of New York, Washington, and Georgia have all adopted access rules more favorable to requesting carriers,²² but Oklahoma has varied by adopting a rule²³ that requires Cox “to employ burdensome ordering procedures, [and] undertake needless and time-consuming construction of new facilities.”²⁴ Cox further states that under two of SBC’s proposals, Cox would be required to construct, or pay SBC to construct, unnecessary intermediate facilities between SBC’s and Cox’s terminal facilities in each MTE.²⁵ Each of these options would increase both the cost of providing service to MTE customers and the time - sometimes as long as 120 days - it would take Cox to initiate service to a requesting customer.²⁶ Cox claims that SBC would maintain the enormous competitive advantage inherent in operating legacy facilities that can be used to initiate service in a matter of hours or

²⁰ See Petition at 2 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by *Errata*, 18 FCC Rcd 19020 (2003), *aff’d in part, remanded in part, vacated in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. National Ass’n Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S. Ct. 313, 316, 345 (2004). Cox also asserts that these rights are supported by the Wireline Competition Bureau’s *Virginia Arbitration Order. Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc. and AT&T Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (WCB 2002) (*Virginia Arbitration Order*)).

²¹ Petition at 1.

²² *Id.* at 17-18 (citing *Staff’s Proposal to Examine the Issues Concerning the Cross-Connection of House and Riser Cable*, Order Granting Direct Access Cross-Connections to House and Riser Facilities, Subject to Conditions, Case No. 00-C-1931 (NY Pub. Serv. Comm’n rel. June 8, 2001) (*New York Order*); *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation*, Second Supplemental Order, Docket No. UT-003120 (Wash. Pub. Util. and Trans. Comm’n rel. April 5, 2001) (*Washington Order*); *Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Order, Docket No. 11853-U (Ga. Pub. Util. Comm’n rel. Mar. 6, 2001) (*Georgia Order*)).

²³ Petition at 6-7 (citing *Report and Recommendations of the Arbitrator*, Docket No. PUD 200300157, Report and Recommendations of the Arbitrator (OCC rel. April 2, 2004) (*Arbitrator’s Report*); *Final Order Adopting and Modifying the Arbitrator’s Report*, Order No. 491645, OCC Docket No. PUD 200300157 (OCC rel. June 28, 2004) (*OCC Order*)).

²⁴ Petition at 2; *see infra* para. 9 (describing SBC’s proposed options). Cox asserts that under all three options, Cox must “rely on [SBC] technicians to establish service connections for MTE customers wishing to subscribe to Cox’s telephone service.” Petition at 2. Cox adds that during the time its petition has been pending before the Commission, the Kansas Corporation Commission “issued an order that parallels the Oklahoma decision in all material respects.” See Letter from J.G. Harrington, *et al.*, Counsel to Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 2 (filed June 2, 2006).

²⁵ *Id.* at 7.

²⁶ *Id.*

a few days. Cox also contends that the *OCC Order* inappropriately applied state law to questions the Commission has already settled.²⁷

2. Oklahoma Proceedings

9. In October 2002, Cox and SBC began negotiating an amendment to their existing interconnection agreement (ICA) that would govern the rates, terms, and conditions of inside wiring subloop access. After failing to reach an agreement, Cox submitted the issue to arbitration before the OCC pursuant to section 252(b) of the Act.²⁸ In the arbitration proceeding, Cox asserted that the Act and the Commission's rules and orders mandate that competitive LECs' technicians must be given direct physical access to SBC's inside wire subloops at existing SBC terminals for the purposes of accomplishing installation and service changes.²⁹ SBC denied that Cox had a right of direct physical access to its inside wire subloops.³⁰ Instead, SBC proposed three options, each of which would require Cox to use SBC technicians to provide access to the inside wire subloop: (1) an intermediate cross-connect device that SBC would place or construct, own, and manage; (2) an intermediate cross-connect device that Cox would place or construct, own, and manage; (3) SBC's provisioning of inside wire subloops by extending jumper/cross connect wire from its existing accessible terminal, left coiled up near Cox's terminal.³¹

10. On April 2, 2004, the arbitrator issued a report adopting, in its entirety, SBC's proposal.³² In reaching that conclusion, the arbitrator accepted SBC's assertions that denial of direct access was essential to the integrity of SBC's network.³³ Specifically, the arbitrator found that "direct access" to the terminal block "is not in the public interest," and "may seriously jeopardize SBC-OK's ability to maintain network integrity, security and control, as well as accountability for damage and substandard engineering and operational practices."³⁴ Cox appealed the matter to the full OCC, which affirmed the *Arbitrator's Report* on this issue.³⁵

11. Cox challenged the OCC's decision in the U.S. District Court for the Western District of Oklahoma. Cox then asked the court to stay the proceeding pending Commission resolution of the instant petition for declaratory ruling.³⁶

²⁷ *Id.* at 12-15.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 6-7.

³² *Arbitrator's Report*.

³³ *Id.* at 45.

³⁴ *Id.*

³⁵ Petition at 7-8. The *OCC Order* affirmed the *Arbitrator's Report* without detailed discussion, and with only slight modifications. *OCC Order* at 1-2. Accordingly, our discussion of the *Arbitrator's Report* also applies to the *OCC Order* adopting it.

³⁶ The court granted the stay on January 18, 2005. Petition at i. More recently, on February 23, 2007, SBC filed a motion to vacate the stay on the grounds that more than two years have passed and the Commission has not acted on Cox's petition. *Cox Oklahoma Telcom, L.L.C., v. Corporation Commission of the State of Oklahoma and*

(continued....)

III. DISCUSSION

A. Cable Inside Wiring Rules

12. The Court asserted that the Commission did not adequately support its conclusion that wiring behind sheet rock is “physically inaccessible” for purposes of the inside wiring rules.³⁷ The Commission in 2003 had stated that it considered sheet rock to be a “structural element” and reasoned that it was “more like ‘brick or cinder block,’ materials also commonly used to form ceilings and hallways, than molding, which is not.”³⁸ The Court found that the Commission had not explained why or how accessing wiring behind sheet rock requires “significant modification of, or significant damage to” the sheet rock.³⁹ The Court also found that the Commission failed to explain the relative nature of the “damage” or “modification” related to accessing wiring behind sheet rock, and therefore that the Commission’s conclusion regarding physical inaccessibility lacked adequate evidentiary support.⁴⁰

13. The Court also criticized the Commission’s assessment of whether accessing cable wire behind sheet rock would “add significantly to the physical difficulty and/or cost” of accessing the subscriber’s home wiring.⁴¹ The Court stated that while the Commission acknowledged that cutting through sheet rock is easier than boring through brick, metal, or cinder block, it did not support the conclusion that the lesser physical difficulty and cost are “significant.”⁴²

14. In response, the Commission sought additional comment with respect to whether cable wiring behind sheet rock should be considered physically inaccessible.⁴³

(Continued from previous page) _____
Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma, Case No. CIV-04-1282-M, Motion of AT&T Oklahoma to Vacate Stay (filed Feb. 23, 2007). In its motion, SBC states that at the time of the filing of this case, Southwestern Bell Telephone, LP was doing business as “SBC Oklahoma” but now it is doing business in Oklahoma as “AT&T Oklahoma.” On March 22, 2007, the court denied SBC’s motion to vacate the stay, and directed Cox to file status reports every three months until the Commission issues its decision. *Cox Oklahoma Telcom, L.L.C., v. Corporation Commission of the State of Oklahoma and Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma*, Case No. CIV-04-1282-M, Order (W.D. Okla. Mar. 22, 2007).

³⁷ See *Appeals Court decision* at 3. The term “inside wiring” incorporates both cable home run wiring and cable home wiring. See n.2, *supra*.

³⁸ *Reconsideration Order*, 18 FCC Rcd at 1362.

³⁹ See *Appeals Court decision* at 3; see also 47 C.F.R. § 76.5(mm)(4)(i).

⁴⁰ See *Appeals Court decision* at 3.

⁴¹ 47 C.F.R. § 76.5(mm)(4)(ii).

⁴² See *Appeals Court decision* at 3, citing *Reconsideration Order*, 18 FCC Rcd at 1362.

⁴³ *Further Notice*, 20 FCC Rcd at 1235. In the *Further Notice*, the Commission set forth its premise that what preexisting structural elements should be included for purposes of determining the demarcation point and what is considered to be an accessible or inaccessible location should be based on practicality. In the *Reconsideration Order*, the Commission incorporated its response to a Request for Letter Ruling from RCN-BeCoCom, L.L.C. (*RCN Request for Letter Ruling*) asking the Commission to address the issue of whether cable wiring behind sheet rock is “physically inaccessible,” such that the demarcation point should be located not at the twelve inch mark, but rather at the operator’s junction box. Based on the *RCN Request for Letter Ruling* and responses to that request, the Commission incorporated sheet rock as one of the examples of materials to be considered as a “preexisting structural element” in its definition of physical inaccessibility. See *Reconsideration Order*, 18 FCC Rcd at 1362. Our analysis on this issue was based, in part, on the *RCN Request for Letter Ruling*. See *Notice*, 20 FCC Rcd at n.21.

1. Would accessing the demarcation point behind sheet rock require significant modification of, or significant damage to, preexisting structural elements?

15. As explained below, we find that sheet rock is a preexisting structural element and that accessing inside wiring behind sheet rock would cause significant modification and damage to that structural element.

16. The Commission specifically sought comment on whether sheet rock qualifies as an example of a preexisting structural element that is an integral and permanent part of an MDU.⁴⁴ The Commission also asked if it is likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order for installers to complete their work.⁴⁵ The Commission asked whether the damage to or modification of ceilings and walls made by alternative providers in accessing inside wiring should be considered significant.⁴⁶

17. The majority of commenters in this proceeding, comprised of alternative providers and trade associations that service the MDU communities, agree that cable inside wiring located behind sheet rock is physically inaccessible because access to such wiring would involve significant modification of, or damage to, a preexisting structural element.⁴⁷ These commenters offer what they term their “real world” experiences and urge the Commission to continue to support the expansion of the definition of “physically inaccessible” to include sheet rock for purposes of the inside wiring rules.⁴⁸ They argue that this is not a theoretical analysis, but rather a reflection on the world of day-to-day competition, contract negotiation and installation of equipment to provide service to MDU residents.⁴⁹ Some assert that these rules serve to stimulate competition and have made it possible for hundreds of thousands of residents to subscribe to the services provided by alternative providers.⁵⁰ These commenters argue that it is essential that the current definition of “physically inaccessible,” which includes wiring behind sheet rock, be maintained in order for the inside wiring rules to be effective.⁵¹

18. NCTA argues that wiring behind sheet rock does not meet the test of “physical inaccessibility.”⁵² NCTA asserts that the practical questions surrounding the issue of the physical

⁴⁴ *Further Notice*, 20 FCC Rcd at 1235.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4-5; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

⁴⁸ See IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

⁴⁹ *Id.*

⁵⁰ See IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

⁵¹ See IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

⁵² See NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

inaccessibility of wiring behind sheet rock do not naturally occur within the regulatory or policy expertise of the Commission.⁵³ NCTA contends that the existing record in this proceeding already contains a variety of affidavits and declarations that support its position submitted by commenters who engage in this line of work.⁵⁴ NCTA also submits additional declarations and affidavits in support of its position.⁵⁵

a. Sheet Rock as a Preexisting Structural Element

19. The Commission previously concluded that the term “structural elements” encompassed sheet rock.⁵⁶ The majority of commenters here assert that it is well-established that sheet rock is a preexisting structural element that is an integral and permanent part of the building structure of MDUs.⁵⁷ RAA & CAI state that sheet rock is installed as part of the construction of the building and it is integral to the overall structure: without sheet rock, some other material – such as brick or cinder block – would have to be used to form walls and other building elements.⁵⁸ Moreover, sheet rock is permanently fixed to the framing structure of the building and is not readily removed or designed to be removed.⁵⁹ RAA & CAI further assert that sheet rock is not a mere surface finish or decorative flourish and, for that same reason, it is clearly “preexisting” because it is not added after the building is completed.⁶⁰

20. RCN states that to access facilities behind sheet rock, whether it be wiring, ducts, pipes or other types of utility conduit, the opening up and closing of sheet rock is not as simple a matter as opening and closing an electrical panel.⁶¹ Moreover, RCN asserts that sheet rock is not easily removed or replaced in the same manner as removable hallway molding.⁶² RCN argues that the only alternative to cutting holes in sheet rock to access facilities would be to remove and replace an entire wall or ceiling.⁶³ From a materials point of view, RCN acknowledges that while it is not difficult to cut through sheet rock, the cost and damage associated with accessing a demarcation point behind sheet rock are significant

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 4; NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

⁵⁶ *Reconsideration Order*, 18 FCC Rcd at 1362.

⁵⁷ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

⁵⁸ *See* RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Exhibit D (Declaration of Greg O’Berry, President of AMLI Management Company, a subsidiary of AMLI Residential Properties Trust, at para. 3); *see also* IMCC Reply Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See* RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 5).

⁶² *Id.*

⁶³ *Id.*

enough to render it physically inaccessible.⁶⁴ RCN contends that these factors of inaccessibility are exacerbated by the integral and permanent nature of sheet rock.⁶⁵

21. NCTA counters that sheet rock is not considered to be a structural element because it is easy to cut and repair.⁶⁶ According to NCTA, installers commonly need to make cuts and/or holes in sheet rock walls and other nonstructural building materials in order to access home wiring.⁶⁷ NCTA contends that such procedures are neither difficult nor expensive for experienced installers to perform and there should be no adverse impact on the structural integrity of the sheet rock.⁶⁸

22. We agree with those commenters who contend that sheet rock is a preexisting structural element and not merely a surface finish or decorative finish like molding. Sheet rock is not added after a building is completed. Sheet rock is a fundamental component of the construction of the building. Thus, sheet rock is more like “brick or cinder block” because it is commonly used to form ceilings and walls in MDUs and other structures. We believe that ceilings and walls are an integral and permanent part of the building structure of MDUs, and therefore, sheet rock used to form ceilings and walls qualifies as a preexisting structural element for purposes of the Commission’s rules.⁶⁹

b. Assessing Significant Modification of, or Significant Damage to, Sheet Rock

23. The Commission sought comment on whether the modification of, or damage to, sheet rock ceilings and walls by alternative providers accessing inside wiring behind those ceilings and walls should be considered significant.⁷⁰ The assessment of significant modification or damage must be made regarding a preexisting structural element before that location is deemed to be physically inaccessible.⁷¹ When characterizing the modification of or damage done to sheet rock in efforts to access inside wiring, the majority of commenters agree that the modification of or damage done is significant.⁷²

24. Several commenters explain that cutting through sheet rock involves careful, difficult, and labor-intensive work. RCN explains that when it is required to access the demarcation point through sheet rock, its actions result in significant modification and damage to the walls and ceilings of the MDUs.⁷³ RCN attests to the fact that it must cut a hole in the sheet rock that is at least 12” by 12” in

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attachment A (Declaration of David Jordon, Construction Coordinator, Bright House Networks at para. 2).

⁶⁷ *Id.* and Attachment A (Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 4).

⁶⁸ *Id.* at 6 and Attachment A (Declaration of John Kuhn, President and CEO for Prince Telecom, Inc. and William J. Kelly, Executive Vice President for General Fiber Communications at paras. 3-5).

⁶⁹ 47 C.F.R. § 76.5(mm)(4)(i).

⁷⁰ *Further Notice*, 20 FCC Rcd at 1235.

⁷¹ 47 C.F.R. § 76.5(mm)(4)(i).

⁷² IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

⁷³ RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

order to gain access to wiring behind sheet rock.⁷⁴ RCN further notes that cutting through sheet rock with a knife or similar tool results in the creation of considerable dust and debris and an effort must be made to avoid damage to elements behind sheet rock, such as electrical wiring, insulation, duct work and plumbing.⁷⁵ RCN states that although cutting through sheet rock is relatively easy, the process results in permanent damage to MDU walls or ceilings and the holes that remain must be repaired.⁷⁶ RCN states that in order to repair the damage, subcontractors must “plug” the hole by cutting another piece of sheet rock that is large enough to fill the hole.⁷⁷ The hole must be spackled, taped and sanded and the area around the hole must later be repainted or re-wallpapered to the satisfaction of MDU managers and owners.⁷⁸ RCN contends that the whole wall or ceiling may need to be repainted or re-wallpapered in order to restore a uniform appearance.⁷⁹

25. Commenters also note that they must pay careful attention to aesthetic considerations. IMCC states that each penetration or hole in the wall or ceiling must be patched twice, sanded twice, primed and painted to match the prior paint.⁸⁰ IMCC also comments that the work requires a minimum three-day time period and requires several hours of labor, and that part of the job in many “upscale” properties involves entire hallways being repainted or re-wallpapered.⁸¹ Similarly, RAA and CAI state that property owners are concerned with the appearance of their buildings, and that as a result, any work involving cutting into sheet rock requires meticulous restoration.⁸² These commenters assert that this is no small task because obtaining access to wiring behind sheet rock requires the removal of sizable pieces of sheet rock, not only at the demarcation point, but at times at other places along the corridor or inside different units.⁸³ RAA & CAI argue that property owners do not know exactly where wiring is located and finding hundreds of demarcation points within a building is not a precise science.⁸⁴

⁷⁴ *Id.* and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 8). *See also* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 (explaining that in order to connect to home run wiring at the demarcation point, a 6” to 18” square or rectangle must be cut into the wall or ceiling); *Ex Parte* Verizon filing at 4 (Declaration of Daniel VanRoekel, Senior Engineer, Outside Plant Engineering dated June 22, 2005) (stating that an installer would need to cut approximately a 9” x 9” hole in the ceiling or wall because a smaller hole would not be large enough to permit the installer to perform the work required to attach the new home run wire to the home wiring).

⁷⁵ RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4 and Attachment A (Holbert Affidavit at para. 8).

⁷⁶ *Id.*

⁷⁷ *Id.* and Attachment A (Holbert Affidavit at para. 9).

⁷⁸ *Id.*

⁷⁹ *Id.* Moreover, RCN argues that repeated access to the sheet rock may eventually lead to the disintegration of the structural element and may require that a whole wall or ceiling be replaced. *Id.*

⁸⁰ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

⁸¹ *See Id.*; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment F (Declaration of Michael T. Tremmel, Manager of External Infrastructure of Forest City Residential Management, Inc., at para. 4) (noting that restoring the smoothness and texture of a wall and matching paint and wallpaper are difficult tasks).

⁸² RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

⁸³ *Id.* and Attachment D (Declaration of Greg O’Berry, President of AMLI Management Company, at para. 4).

⁸⁴ *Id.* and Attachment B (Declaration of Lyn Lansdale at para. 5).

26. Commenters also raise safety issues. RAA & CAI state that any action that affects the structural integrity of a building is considered significant by property owners.⁸⁵ RAA & CAI explain that there are special types of sheet rock for specific applications and cutting into these different types of sheet rock to gain access to wiring may result in a degradation of a building's resistance to moisture, or its sound or temperature insulating capability, as well as its resistance to fire.⁸⁶ From a safety perspective, RAA & CAI assert that the use of sheet rock in firewalls means that any breach of a sheet rock surface poses a safety risk to residents and may involve a code violation for which property owners are liable.⁸⁷ RAA & CAI state that cuts in specialty types of sheet rock that affect the building's resistance to water damage, or its sound or temperature insulating capacity, will concern building owners and may lead to damage to the "fabric" of the building over time.⁸⁸ Similarly, Verizon states that cutting into or patching sheet rock walls and ceilings compromises the integrity of fire resistant sheet rock and may pose a safety hazard for MDU residents if such work is not done properly.⁸⁹

27. Finally, RAA and CAI argue that under the National Electric Code (NEC), wiring behind sheet rock is not considered accessible because it cannot be removed or exposed without causing damage to the structure or finish of the building.⁹⁰ While not binding on the Commission, RAA & CAI assert that NEC's definition should be instructive to the Commission because it represents the judgment of experts in the field of building safety.⁹¹

28. NCTA, however, argues that the existing record establishes that wiring located behind sheet rock does not meet the test of "physically inaccessibility."⁹² NCTA points to a previously filed declaration that it is not difficult to access the demarcation point of each unit through a 2" x 4" hole cut

⁸⁵ RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

⁸⁶ *Id.* at 4. RAA & CAI explain that any gaps or holes in a firewall can allow heat and flame to penetrate a firewall and any penetrations must be repaired carefully to restore the fire rating of the breached element of the structure. *Id.* and Attachment B (Declaration of Lyn Lansdale, Vice President of AvalonBay Communities, Inc. at para. 3) and Attachment E (Declaration of Henry Pye, Director of Resident Services and Technology for JPI Partners, LLC para. 5). *See also* <http://www.nhci.com/sheetrock.html>. The information on this web site is supplied by the National Home Centers, Inc., a commercial building materials supplier.

⁸⁷ *Id.* at 5. *See also* International Building Code (IBC) (2003 ed.) § 712 (addressing penetrations in firewalls). RAA & CAI note that 44 states and the District of Columbia have adopted the IBC. *See* <http://www.iccsafe.org/government/adoption.html>. RAA&CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at n.5.

⁸⁸ RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5-6.

⁸⁹ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6. Verizon argues that if cable installers cut into sheet rock walls and ceilings, additional precautions must be taken and additional expenses incurred to ensure that the sheet rock is properly repaired in accordance with building code standards. *See id.* and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue, at para. 9.

⁹⁰ *See* RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 9 (noting that NEC defines "accessible," for purposes of wiring methods, as "[c]apable of being removed or exposed without damaging the building structure or finish or not permanently closed in by the structure or finish of the building," and that such wiring is permanently closed in by the structure or the finish); *see also* NEC Art. 100 (2005 ed.). The NEC is promulgated by the National Fire Protection Association.

⁹¹ *Id.*

⁹² NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

into the hallway sheet rock wall.⁹³ That declarant stated that after the cut in the sheet rock is made and the old MVPD's wiring is taped off, the hole is repaired either by patching and repainting or adding a wall plate that matches the interior of the building; a procedure the declarant described as not difficult and one having no adverse impact on the structural elements or integrity of the building.⁹⁴ NCTA also resubmits an affidavit from an industry representative that states that cutting, drilling opening, plugging, spackling, taping, sanding, painting and repairing sheet rock are insignificant and commonplace procedures that do not result in significant modification of or damage to a building's structural elements.⁹⁵

29. NCTA also offers more recent declarations and affidavits to support its position that cable wiring behind sheet rock can be readily accessed without incurring damage to structural elements.⁹⁶ For instance, NCTA submits the declaration of an independent contractor that states that in the typical MDU building, it is not difficult to access the demarcation point through a small cut in the hallway sheet rock, that installers can interconnect wires quickly and cheaply and that the repair work for an experienced installer is not difficult and has no adverse impact on the aesthetics or structural integrity of the building.⁹⁷ NCTA also argues that the procedure for accessing wiring behind sheet rock is not significantly more difficult or expensive than accessing wiring that is behind molding.⁹⁸ With regard to the issues of structural integrity and fire safety, NCTA states that while sheet rock walls do provide shear resistance and fire protection, there is nothing about cutting and properly repairing a small hole in the sheet rock that should affect its structural integrity or fire resistance.⁹⁹

30. When analyzing this issue we are faced with two substantially different points of view on whether significant modification or damage to preexisting structural elements occurs when efforts are made to access cable wiring behind sheet rock. Most commenters, consisting of alternative providers and trade associations, contend that large holes – 12"x 12" or 6"x 8" – must be cut into the sheet rock in order to access wiring, while NCTA asserts that only a 2"x 4" inch hole must be made. Most commenters also emphasize the difficulty of locating demarcation points and making numerous cuts into the walls, and contend that the repair and restoration of the common walls and ceilings frequently require extensive and time-consuming work. Most commenters also focus on fire and other safety issues including the possible degradation of a building's resistance to moisture and potential problems associated with its sound and temperature insulating capability once the process of accessing wiring begins.

⁹³ *Id.* and Attachment B (Declaration of Al Costanzi, Time Warner Cable Vice President/Northeast Ohio at para. 6, filed with Opposition of Time Warner Cable on Oct. 22, 1998).

⁹⁴ *Id.*

⁹⁵ *Id.* at 4 and Attachment B (Affidavit of John Donahue, Vice President of Engineering for Comcast Cable Communications, Inc. at para. 4, filed with Comments of Comcast Cable Communications, Inc. filed on Oct. 22, 1998).

⁹⁶ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

⁹⁷ *Id.* and Attachment A (Declaration of John Chamberlain, President of JC Communications, at para. 4); *see also* Declaration of David Jordan, Construction Coordinator for Bright House Networks at para. 2 and Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at paras. 4-7.

⁹⁸ *Id.* at 6 and Attachment A (Affidavit of John Kuhn, President and CEO for Prince Telecom, Inc. at para. 6 and Affidavit of William J. Kelly, Executive Vice President for General Fiber Communications at para. 6).

⁹⁹ *See Id.* at 6 and Declaration of Joseph Dano, Vice President of Midtown Express, Inc. at para. 9.

31. We believe the record supports the conclusion that accessing inside wiring behind sheet rock causes significant modification and damage to structural elements, i.e., walls and ceilings, albeit modification and damage that may be repairable. MDU resident owners and their managers are not only concerned with the condition of individually-owned units or apartments, but also with the condition of the common elements in these structures. For example, the record reveals that MDU resident owners and their managers will sometimes require an entire wall or ceiling to be repainted or re-wallpapered even where the hole cut in the sheet rock is significantly smaller than the wall or ceiling in order to restore the area to its original appearance. Requiring such extensive repair is a strong indication that there has been significant modification or damage to the pre-existing structural area. Unlike with single family residences, MDU residents share common walls and ceilings and have an interest in the condition and treatment of those common elements. With regard to the issues of fire safety and possible degradation of a building's resistance to moisture, we take a conservative approach and give credence to the commenters who argue that cutting into sheet rock may pose a safety risk or affect a building's resistance to moisture and thus may lead to significant modification or damage to such structural elements. Consequently, we conclude that penetration of sheet rock for purposes of accessing inside wiring constitutes significant modification and damage to structural elements under the Commission's rules.

c. Access of New Service providers by MDU Owners and Managers

32. We conclude that the refusal of MDU owners to permit competitive providers to cut into sheet rock walls attests to the significance of the work involved. The Commission asked if it is likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order for installers to complete their work.¹⁰⁰ The majority of commenters agree that competition from new service providers in MDUs is impeded because MDU owners and managers do not want new providers on the premises cutting and repairing sheet rock because it causes damage to a preexisting structural element in the building and the process is disruptive to building residents.¹⁰¹

33. RCN asserts that it has been clearly demonstrated in the Commission's earlier proceedings on this issue that many MDU owners are reluctant to permit overbuilders to cut holes in their walls and ceilings.¹⁰² In referring to its own past experiences, RCN contends that MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint ceilings and walls in order to install new lines because it is disruptive and could eventually require the replacement of entire ceilings and walls.¹⁰³ RCN argues that if an MDU owner prohibits a competitive provider from cutting holes in a building's walls and ceilings in order to access the home run wiring then it is physically impossible to access these

¹⁰⁰ *Further Notice*, 20 FCC Rcd at 1235.

¹⁰¹ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2, 6; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6-7; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2-3.

¹⁰² See Letter to Deborah A. Lathen, Chief, Cable Services Bureau, from William L. Fishman, Swidler, Berlin, Shereff & Friedman, LLP, Inside Wiring – Request for Letter Ruling (September 23, 1998). See also *supra* para. 31.

¹⁰³ *Id.* and RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment A (Affidavit of John Holbert, Construction Manager for RCN-BecoCom, LLC at para. 9). RCN gives an example of being foreclosed from serving 209 units in a building in Boston because the owner of the apartment building refused to allow RCN to cut through walls and ceilings in order to access the demarcation point twelve inches outside each unit. RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment A (Holbert Affidavit at para. 4).

lines.¹⁰⁴ RCN argues that if MDU owners won't allow access to home run wiring through sheet rock and the incumbent cable operator won't allow a competitor access at the junction box, then new entrants are precluded from providing competitive video service to consumers.¹⁰⁵ Verizon agrees that the refusal by MDU owners and residents to allow competing providers to cut into sheet rock to access home run wiring makes such wiring inaccessible for practical purposes.¹⁰⁶ Verizon argues that meaningful competition for cable services for millions of Americans living in MDUs is inhibited because MDU owners and residents consider cutting and repairing sheet rock a significant inconvenience and new entrants are placed at a competitive disadvantage.¹⁰⁷ RAA & CAI agree and add that any action that harms the appearance of the building presents significant problems.¹⁰⁸ They state that cutting and repairing drywall is a messy process and is the kind of disruption that residents want to avoid whenever possible.¹⁰⁹ IMCC asserts that the resistance of MDU owners and residents to physical degradation of their property and the associated inconvenience and cost are the reasons contract negotiations between MDU owners and alternative providers fail and the incumbent cable provider remains entrenched.¹¹⁰

34. NCTA argues that whether building owners choose to allow cable operators to access wiring behind sheet rock is not and should not be relevant to the determination whether such wiring is physically inaccessible.¹¹¹ NCTA asserts that there is nothing in the Commission's definition of physical inaccessibility that suggests that the owners' willingness to allow a service provider to access wiring at a particular point should determine whether that point is, in fact, accessible.¹¹²

35. Although the Commission's rule defining physical inaccessibility does not specifically take into account the willingness of MDU owners and managers to allow new service providers to cut and

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.* at 6-7. We disagree with Time Warner Cable that our ruling today effectively concludes that the demarcation point is located at the incumbent's junction box. Specifically, Time Warner Cable expresses concern that allowing competitive access to the junction box will cause security and signal leakage issues. *See* Letter from Arthur Harding, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 95-184, MM Docket 92-260 at 2-3 (filed May 23, 2007). We note that this argument was made and answered in the *Report and Order and Second Further Notice*, where the Commission stated that "[t]he procedures we are adopting, however, do not grant alternative providers, subscribers, or MDU owners access to the incumbent provider's riser cable or lockbox and therefore do not pose the safety concerns about which Congress was concerned." *Report and Order and Second Further Notice*, 13 FCC Rcd at 3707. We note that exactly where the wiring will become accessible (because it is no longer behind brick, cinderblock, or sheetrock) will vary building by building. As the Commission noted in the *Report and Order and Second Further Notice*, "[t]he incumbent provider must disconnect the home run wiring from its lockbox and leave it accessible for the new provider within 24 hours of actual service termination." *Id.* at 3688.

¹⁰⁶ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

¹⁰⁷ *Id.* and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue at para. 2. Verizon Avenue is an affiliate of Verizon Communications, Inc. that focuses on providing communications and video services to residents of MDUs. Dunne Declaration at para. 1.

¹⁰⁸ RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Exhibit B (Declaration of Lyn Lansdale, Vice President of AvalonBay Communities, Inc. at para. 4); *see also* Exhibit E (Declaration of Henry Pye, Director of Resident Services and technology for JPI Partners, LLC at para. 4).

¹⁰⁹ *Id.*

¹¹⁰ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

¹¹¹ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

¹¹² *Id.* and NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

repair sheet rock, the refusal by building owners to permit competitive providers to cut into building walls, even sheet rock walls, suggests that the consequences of doing so are significant to the building owners.¹¹³ This fact supports the proposition that accessing wiring behind sheet rock exposes the walls to significant modification or damage.

2. Would accessing the demarcation point behind sheet rock add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring?

36. As explained below, we find that accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

37. The majority of commenters agree that accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and cost of accessing the subscriber's home wiring.¹¹⁴ NCTA disagrees and argues that there is no significant expense or difficulty associated with such work.¹¹⁵ The Commission has acknowledged that while cutting through sheet rock is neither as physically difficult nor as costly as boring through brick, metal or cinder block, it was satisfied that the process added significantly to the physical difficulty and cost of wiring an MDU.¹¹⁶ The Commission stated that the examples listed in the original Note to Section 76.5(mm)(4) regarding various materials that can be considered structural elements capable of concealing a coaxial cable was not meant to be exhaustive.¹¹⁷ Moreover, the Commission sought comment on the costs associated with cutting through sheet rock. The Commission further stated that it would seem that the difficulty and costs associated with cutting through sheet rock are significantly more than what is involved in accessing wiring behind removable molding, and sought additional comment on the costs of accessing wiring behind molding. The Commission previously determined that wiring enclosed within hallway molding is not physically inaccessible.¹¹⁸

a. Assessing the Physical Difficulty Involved in Accessing Wiring Behind Sheet Rock

38. In assessing the physical difficulty involved in accessing cable wiring located behind sheet rock, many commenters describe a process that involves more than simply cutting through the material. For example, IMCC states that once a hole is cut in the sheet rock and the wire connection is made at each unit, the wire must either be "fished" through the hallway and back to the junction box or pedestal or it must be installed in some form of molding.¹¹⁹ RCN states that once it has cut a hole in the sheet rock there are no guarantees that where it cuts the hole it will actually be able to locate and retrieve the inside

¹¹³ See 47 C.F.R. § 76.5(mm)(4).

¹¹⁴ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; RAA & CAI Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

¹¹⁵ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

¹¹⁶ *Further Notice*, 20 FCC Rcd at 1236; see also *Reconsideration Order*, 18 FCC Rcd at 1362.

¹¹⁷ *Id.* at 1236.

¹¹⁸ See Note to 47 C.F.R. § 76.5 (mm)(4).

¹¹⁹ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

wiring for interconnection with its own subscriber lines.¹²⁰ If this is the case, RCN explains that it must then cut additional holes in the sheet rock until it can locate and retrieve the existing subscriber line.¹²¹ RCN states that once the line has been retrieved, it must then connect its own subscriber line to the existing subscriber line at the demarcation point.¹²² Thereafter, RCN describes the ensuing difficulty of running its own subscriber line back to the junction box to its network interface.¹²³ RCN states that this process can be extremely difficult to undertake behind sheet rock, particularly in MDUs where, RCN asserts, it faces unknown obstacles such as heating ducts, water pipes, and other facilities.¹²⁴ When encountering such obstacles, RCN states that it may be necessary to cut additional holes in the sheet rock to avoid them.¹²⁵ Verizon asserts that when MDUs are constructed, inside wiring is generally run without concern for the path that the wiring will take to get to a particular unit.¹²⁶ Moreover, Verizon states that attention is rarely paid to ensuring post-construction ready-access to wiring for particular units, such as through “chase-ways.”¹²⁷ As a result, Verizon argues that running cable wiring behind sheet rock is invasive and often requires access not only to the particular unit seeking service, but also to one or more of the abutting units.¹²⁸ Verizon argues that established industry practice in the context of telephone wiring confirms that many of the practical difficulties of installing or accessing wiring behind sheet rock walls or ceilings make such wiring inaccessible for all practical purposes.¹²⁹ Verizon asserts that in order to avoid the problems with accessing wiring that is behind sheet rock in an MDU, Verizon’s state telephone tariffs generally provide concealed telephone wiring in MDUs where “reusable means” for accessing the wiring are installed.¹³⁰

¹²⁰ RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attachment A (Affidavit of John Holbert, Construction Manager for RCN-BecoCom, LLC at para. 7). RCN describes home run wiring as “subscriber lines.” See RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue at para. 3.

¹²⁷ *Id.*

¹²⁸ *Id.* and Dunne Declaration at para. 4. As an example, Verizon states that in order to run cable wiring to a unit on the second floor of a three-story MDU, an MVPD installing the wiring might require access to units above, below, or beside the unit seeking service in order to “fish” the wire through walls and floors. Verizon asserts that this process could require cutting into a neighbor’s sheet rock walls and ceilings and may become more difficult if the adjoining units don’t correspond, thereby requiring additional modification to these structures in order to accommodate the wiring. *Id.*

¹²⁹ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7.

¹³⁰ *Id.* As an example, Verizon points to its tariff in Massachusetts which addresses “concealed wiring” by stating: “For the initial establishment of service, the Telephone Company installs concealed wiring in residential buildings during construction where post-construction wiring is not feasible and where, if riser cable plant is required, the customer or builder provides conduit or other *reusable means satisfactory to the Telephone Company to reach each floor and each suite on each floor . . .*” New England Telephone and Telegraph Company, Tariff DTE MA No. 10, Exchange and Network Services, § 2.2.2(A) Concealed Wiring (emphasis added). *Id.* at n.3.

39. NCTA counters that commenters have confused the difficulties and costs of accessing home run wiring at the demarcation point with that of installing their own home run wiring behind sheet rock.¹³¹ NCTA argues that the comments of RCN and Verizon are not on point when they assert that running new cable wiring behind sheet rock is invasive and that new service providers must “fish” wire through interior walls and ceilings.¹³² NCTA argues that the rules governing the disposition of home run wiring do not allow alternative providers to acquire and use such wiring simply because it is easier and less costly than to install their own.¹³³ NCTA notes that once an alternative provider is able to access the wiring at the demarcation point, the home run wiring rules provide procedures for the disposition of such wiring if the incumbent finds it is too difficult or costly to remove.¹³⁴ NCTA argues that whether a demarcation point located behind sheet rock is physically inaccessible does not depend on whether installing new home wiring behind sheet rock is difficult, expensive or causes damage to the building.¹³⁵ All that matters, NCTA asserts, is whether accessing wiring at such a point would cause significant structural damage, difficulty, and expense.¹³⁶

40. As an initial matter, we note that a finding of “physical difficulty” is not required because our rule requires that we find that cutting through the sheet rock would add significantly to the physical difficulty **and/or** costs of accessing the subscriber's home wiring. Nevertheless, we conclude that the record supports a finding of significant physical difficulty in accessing the subscriber's home wiring.¹³⁷ Accessing such wiring requires some level of physical harm to the property – *i.e.*, access holes cut in the sheet rock – and that the property be restored to its original integrity and appearance. As we have recognized throughout this decision, the repair is not always limited to the hole(s) cut; it can include repainting and/or re-wallpapering necessary to restore the premises. Those tasks can add significantly to the physical difficulty involved in accessing the wiring, certainly as compared to accessing wiring behind hallway molding (the example in the Commission’s rules of wiring that is not physically inaccessible).¹³⁸ In any event, we need only find that cutting through sheet rock significantly increases the physical difficulty **or** cost of accessing the wiring and, as described below, we find that the additional costs are typically significant.

b. The Cost of Accessing Wiring Behind Sheet Rock

41. We conclude that the cost of accessing wiring behind sheet rock is significant. The majority of commenters agree. IMCC submits two letters from private cable operators (PCOs) expressing their views. A letter from a PCO in Atlanta states that the work involved in accessing wiring at the demarcation point takes between two to four hours per unit and one hole cut would add \$150.00 to

¹³¹ NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

¹³² *Id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 4.

¹³⁶ *Id.*

¹³⁷ We disagree with NCTA that commenters are confusing accessing existing home run wiring with installing their own. Each of the commenters cited above refers to the difficulty of accessing existing wiring and states, in addition, that the installation of new wiring itself is a difficult and damaging process. Regardless, our analysis here is based on the comments only to the extent that they discuss the difficulty of accessing existing wiring.

¹³⁸ *See* note to 47 C.F.R. § 76.5(mm)(4).

\$250.00 to the cost of wiring a unit.¹³⁹ The PCO further states that in a typical 200-unit building this work would cost approximately \$40,000.00.¹⁴⁰ A Manager from a PCO in California asserts that accessing the home run wiring in an MDU 12 inches outside each residential unit is virtually impossible in most instances because that location would be 12 inches inside the neighboring MDU residence.¹⁴¹ This PCO Manager asserts that this means it is then necessary to install a completely separate home run wire from the junction location to an access point within the residence at a cost of a minimum of \$200.00 per unit.¹⁴² RCN contends that the costs associated with accessing wiring behind sheet rock can range from \$450.00 to \$1,000.00 per unit, depending on the degree of difficulty that is encountered in efforts to locate, retrieve and connect the cable home run wiring to its own subscriber lines at the demarcation point and run it back to the junction box in the MDU.¹⁴³ Verizon asserts that the high costs to competing providers and consumers of accessing wiring behind sheet rock discourage competition.¹⁴⁴ Verizon asserts that restoration of sheet rock is the most labor-intensive and expensive part of the whole process because it requires multiple visits.¹⁴⁵ Verizon contends that time must be permitted for the repair work to set and dry before additional steps can be taken in the restoration process.¹⁴⁶ Verizon states that prices to restore the sheet rock to an acceptable condition may vary from \$200.00 for an uncomplicated situation to \$1,000.00 or more for high-end MDUs or in instances where larger sections of sheet rock must be repainted or wallpapered.¹⁴⁷ Verizon also notes that these costs reflect work on a single unit and that they multiply with additional units, although cost savings may be available when an entire MDU switches to an alternative provider.¹⁴⁸ Verizon also argues that most cable installers are not currently trained or qualified to perform the necessary repair and restoration work.¹⁴⁹ In that regard, Verizon contends that significant costs must be expended to train installers or to hire additional employees or contractors and these costs are passed on to cable subscribers and are likely to keep competing providers out of MDUs.¹⁵⁰

¹³⁹ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attached Letter from Bryan J. Rader, President/CEO, MediaWorks, to Bill Burhop, IMCC (October 27, 2004).

¹⁴⁰ *Id.*

¹⁴¹ IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attached Letter from Richard K. Baxter, Consolidated Smartsystems to Bill Burhop, IMCC (November 15, 2004).

¹⁴² *Id.*

¹⁴³ RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 13). In referring to an MDU that contained 209 units, RCN asserts that, at a minimum, it would cost \$60,000.00 to accomplish the job. *Id.*

¹⁴⁴ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4. In referring to replacing wiring embedded in sheet rock, Verizon contends that the costs are high because all of the cutting and repairing of sheet rock must be done to the satisfaction of MDU owners and managers. *Id.* and Attached Declaration of P. Kelley Dune, Executive Director for Network Operations for Verizon Avenue at para. 6.

¹⁴⁵ *Ex Parte* Verizon filing at 5 (June 22, 2005).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Verizon notes that this cost would be in addition to the roughly \$50.00 required to locate the wiring and cut the initial hole in the wall for access. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4 and Attached Declaration of P. Kelley Dunne at para. 6.

¹⁵⁰ *Id.*

42. RAA & CAI state that they can offer no reliable cost information because this type of work is rarely done, but they maintain that, whatever the cost, it would be prohibitive.¹⁵¹ RAA & CAI state that because property owner resistance and the practical challenges of doing the job right are so obvious that drywall installations are not given enough consideration by responsible management officials to warrant any serious cost analysis.¹⁵²

43. NCTA counters by arguing that there are no significant costs involved in cutting and repairing sheet rock. NCTA resubmits a declaration already on the record from a Time Warner employee that states that cutting into sheet rock “is not difficult for an experienced MVPD provider to perform and is relatively inexpensive (\$25.00).”¹⁵³ Another previously submitted declaration offered by NCTA from a Comcast employee referring to the “installation of cable television inside and home run wiring” states that the “[r]estoration of sheet rock subsequent to such installations is accomplished easily and inexpensively.”¹⁵⁴ NCTA also submits more recent affidavits and declarations in support of its contention regarding the costs of accessing wiring behind sheet rock. One independent contractor asserts that after the demarcation point is accessed, repair of the hole can be accomplished “quickly and cheaply.”¹⁵⁵ Another contractor asserts that accessing wiring behind sheet rock is a common procedure and “is not difficult for an experienced installer to perform, is relatively inexpensive and should have no adverse impact on the structural elements or the structural integrity of the building.”¹⁵⁶ In addition, NCTA submits two affidavits that point out that accessing wiring behind sheet rock “is not significantly more difficult or expensive than accessing wiring that is behind molding.”¹⁵⁷

44. In reply, IMCC argues that NCTA’s views are not reflective of what occurs in the real world of providing video services in MDUs. IMCC disputes NCTA’s view that connecting to the wiring outside each unit can be accomplished easily and inexpensively. IMCC argues that NCTA ignores the process of finding the exact place in the ceiling or wall to make the connection; ignores the fact that the process usually requires using electrical taping at the connection; and, that service to each unit must be tested after the connection is made. IMCC argues that NCTA is wrong when it says that the process of accessing the wire only costs \$25.00. According to IMCC, the estimates of \$150.00-\$250.00 presented in its comments by PCOs are more realistic numbers.¹⁵⁸ RCN replies that even if NCTA is correct with

¹⁵¹ RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 8.

¹⁵² *Id.* at 8-9.

¹⁵³ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Attachment B (Declaration of Al Costanzi, Time Warner Cable Vice-President, Engineering/Northeast Ohio at para. 6 filed with Opposition of Time Warner Cable – Oct. 22, 1998).

¹⁵⁴ *Id.* at 3-4 and Attachment B (Declaration of John Donahue, Vice President of Engineering for Comcast Cable Communications, Inc. at para. 4 filed with Comments of Comcast Communications, Inc. – Oct. 22, 1998). NCTA also submits two other previously submitted declarations in support. These declarations attest to the fact that drop pre-wiring at the time of new building construction and the *installation* of coaxial cable in pre-existing facilities, using such methods as *wall fishing*, do not disrupt the structural integrity or aesthetics of the building; however, they do not discuss the costs involved. *Id.* at 4 and Attachment B (Declarations of Christopher P. Patterson, Vice President of Suburban Cable and Jack Rockwell, System Engineer, Adelphia Communications at paras. 2-3).

¹⁵⁵ *Id.* at 4 and Attachment A (Declaration of John Chamberlain, President of JC Communications at para. 4).

¹⁵⁶ *Id.* at 5 and Attachment A (Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 6).

¹⁵⁷ *Id.* at 6 and Attachment A (Affidavits of John Kuhn, President and CEO for Prince Telecom, Inc. and William J. Kelly, Executive Vice President for General Fiber Communications at para. 6).

¹⁵⁸ IMCC Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

its \$25.00 cost estimate, this does not complete the analysis.¹⁵⁹ RCN argues that the fact is that placing the demarcation point behind sheet rock impedes competitors' access to cable inside wiring and, accordingly, deprives consumers of access to competitive MVPD services.¹⁶⁰

45. In reply, NCTA argues that it is highly misleading that experienced installation technicians require additional training in order to access MDU wiring at demarcation points.¹⁶¹ NCTA maintains that in the performance of their normal duties, installers routinely cut holes in sheet rock walls.¹⁶² NCTA also argues that cutting and repairing sheet rock in order to access wiring almost never involves the disruption of adjacent units or units on other floors.¹⁶³ Moreover, NCTA states that installers commonly use inexpensive cable locator devices to pinpoint the location of wiring.¹⁶⁴ NCTA states that contrary to the calculations set forth by some commenting parties, the per-unit MDU cost where multiple units are accessed is much lower than the cost to cut and repair only a single unit.¹⁶⁵ NCTA specifically addresses IMCC's comments that contend that cutting and repairing sheet rock is a process that consumes two-to-four hours and involves between \$150.00-\$250.00 in labor costs.¹⁶⁶ NCTA argues that in a two-to-four hour scenario, much of the time would have to be attributed to downtime involving the drying of the patching and repairing material used.¹⁶⁷ According to NCTA, experienced technicians would not work on one unit at a time, sitting and waiting for the patching to dry before painting and moving on to the next unit.¹⁶⁸ NCTA argues these installers would "multi-task" and create an assembly line process which would greatly reduce the downtime and overall cost of the project.¹⁶⁹ NCTA further contends that because most of the expense of accessing wiring at demarcation points behind sheet rock is associated with the cost of the labor involved, this cost is about the same as it would cost to access wiring in hallway molding.¹⁷⁰ NCTA notes that the Commission's rules specifically provide that wiring at a demarcation point located behind molding is not physically inaccessible.¹⁷¹ NCTA argues that it follows that if the costs and difficulty of accessing wiring at a point located behind sheet rock are comparable to the costs of accessing wiring behind molding, then wiring behind sheet rock is also not physically inaccessible.¹⁷²

¹⁵⁹ RCN Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

¹⁶⁰ *Id.*

¹⁶¹ NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attached Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 4.

¹⁶² *Id.*

¹⁶³ NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Danno Declaration at para. 10.

¹⁶⁴ *Id.* and Danno Declaration at para. 11.

¹⁶⁵ *Id.* and Danno Declaration at para. 8.

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.* and Danno Declaration at para. 7.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* and Danno Declaration at para. 8.

¹⁷¹ *Id.* at 9.

¹⁷² *Id.*

46. In analyzing the costs involved in accessing wiring behind sheet rock, we recognize that the record reveals a wide divergence among the estimates offered by commenters – ranging from \$25.00 to \$1,000.00 – as the appropriate sum needed to accomplish the job.¹⁷³ Although we find that we cannot pick a precise monetary figure that fairly reflects the costs associated with accessing cable inside wiring, we believe it is reasonable that costs estimates could include factors such as how difficult it may be to satisfy the MDU owner and manager with repair work and whether a single unit or many units are worked on in one time period. Taking these factors into consideration, we conclude that we should not rely on the lower costs estimates, such as the \$25.00 estimate by NCTA, because they do not include some of these factors. We believe that the estimates that do take into account these factors, which range significantly above \$25.00, are closer to reasonable cost estimates for accessing wiring behind sheet rock. For example, as Verizon and other commenters note, the cost of repairing sheet rock can often include repainting and re-wallpapering entire walls or ceilings. Although we do not have specific quotes for restoration work, it seems likely that repainting and/or re-wallpapering entire ceilings and walls can, at a minimum, run into the hundreds of dollars, particularly for more high-end MDUs that use more expensive surface finishes. These figures appear significant, especially when compared to the estimates we received for accessing wiring behind hallway molding.

47. We received little comment on the costs involved in accessing wiring behind removable wall molding. Verizon states that, at most, the cost of accessing wiring located behind molding would likely be a third of the costs of accessing wiring behind sheet rock.¹⁷⁴ Additionally, Verizon asserts that the costs of going behind molding would never approach the costs associated with repairing sheet rock in expensive, high-end MDUs.¹⁷⁵ Verizon explains the cost differential by asserting that accessing wiring behind molding requires no modification of a preexisting structural element, as would be the case with sheet rock, and does not require multiple trips to an MDU to make the kind of restorations involved with sheet rock.¹⁷⁶ Verizon describes the accessing of wiring behind molding as a simple process that generally only requires snapping molding off its retainer in order to access the embedded wiring and snapping it back on once work is completed.¹⁷⁷ NCTA contends, however, that the cost of accessing wiring behind sheet rock is about the same as accessing wiring behind molding.¹⁷⁸ We are persuaded that removing and replacing molding is generally less intrusive and less expensive than cutting into sheet rock, locating the wiring, and then repairing the wall or ceiling to the satisfaction of MDU owners and managers. While there may be cases in which the cost of accessing wiring behind sheet rock may be comparable to removable molding the record demonstrates that the cost for sheet rock generally will be higher, and often significantly so.

B. Incumbent LEC Inside Wire Subloops

48. We grant Cox's request as described below. The Commission's rules and precedent make clear that competitors have the right of direct access to an incumbent LEC's unbundled inside wire subloops at any "point of technically feasible access," and we clarify that the terminal block to a

¹⁷³ See *supra* paras. 39-40, and 42.

¹⁷⁴ *Id.* at 5-6.

¹⁷⁵ *Id.* at 6.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 9.

multiunit premise is such a technically feasible access point. We find any decision that does not allow for such direct access to be contrary to the Commission's rules and policy of promoting telephone and broadband competition.¹⁷⁹ While the Commission provided for these rights to be enforced through the state section 252 process, we further clarify the applicability of Commission precedent precluding certain approaches like those adopted by the OCC.

1. Competitors Have the Right to Direct Access to Inside Wire Subloops at Any Point of Technically Feasible Access.

49. The text of the *Triennial Review Order* makes clear that competitors may directly access inside wire subloops at any technically feasible point.¹⁸⁰ In contrast, the *OCC Arbitrator's Report* stated that "direct access" to the terminal block "is not in the public interest." A state decision, such as this one, denying direct access is at odds with Commission precedent.

50. The notion of forcing access through an intermediate terminal is fundamentally inconsistent on its face with the right to direct access.¹⁸¹ The governing rule gives competitors the right of access at "any point" where a technician can access wire or fiber.¹⁸² This rule allows a requesting carrier to select the point of feasible access, and we conclude that a reading of the word "any" to narrow the number or definition of access points, or to shift this discretion to an incumbent LEC or a state commission, would be unfounded and incompatible with our rules. In the *Triennial Review Order*, the Commission made clear that it is the competitor's right to choose by emphasizing that "[c]ompetitive carriers are able to access these subloops at any technically feasible terminal point at or near the building in any technically feasible manner," and that the imposition of at least one form of indirect access – a collocation requirement – is impermissible.¹⁸³ Consequently, we reject any interpretation of the Commission's rules that would allow only indirect access to inside wire at technically feasible points.¹⁸⁴

¹⁷⁹ We reject Verizon's request that a grant of the Petition could only be accomplished through a Commission rulemaking. Letter from Dee May, Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 6 (filed May. 17, 2007) (Verizon May 17 WC Docket No. 01-338 *Ex Parte*). We are not adopting new rules, but interpreting the Commission's existing rules and precedent.

¹⁸⁰ In the underlying Oklahoma proceeding, "direct access" was defined as follows: "Direct access means that Cox technicians enter SBC-OK terminals at MTEs, identify UNE Subloops that Cox seeks to use, disconnect those UNE Subloops from the SBC-OK network and connect them to the Cox network by cross-connect procedure." *Arbitrator's Report* at 45.

¹⁸¹ In other contexts, the Commission has expressly barred intermediate arrangements or devices where it has required "direct access." See, e.g., 47 C.F.R. § 51.323(k)(2) ("Incumbent LECs must permit collocating carriers to have direct access to their equipment. An incumbent LEC may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network if technically feasible."); *Amendment of Part 90 of the Commission's Rules Concerning the Interconnection of Private Land Mobile Paging Systems with the Public Switched Telephone Network in the Radio Spectrum Below 900 MHz, Report and Order*, Report and Order, PR Docket No. 86-335, 2 FCC Rcd 2379 (1987) (indicating that removing the need for an intermediate person or device is equivalent to permitting direct access).

¹⁸² 47 C.F.R. § 51.319(b)(2)(i) (emphasis added).

¹⁸³ *Triennial Review Order*, 18 FCC Rcd at 17191, para. 350 (emphasis in original). Although both Cox and SBC cite to the *Virginia Arbitration Order* to support their respective positions on direct access, that decision is a Bureau-level order resolving an interconnection arbitration, and deals with a fundamentally different architecture where the requesting carriers were seeking access to inside wiring at the NID. See, e.g., Petition at 11; SBC Opposition, WC Docket No. 01-338 at 17. However, we recognize in that order, the Bureau did interpret Commission precedent as

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2. The Terminal Block of a Multiunit Premise Is a Point of Technically Feasible Access.

51. The language and intent of the rules that the Commission adopted in the *Triennial Review Order* make clear that a terminal block of a multiunit premise is a point of technically feasible access to inside wire subloops.¹⁸⁵ The Commission defined “point of technically feasible access” as “any point in the incumbent LEC’s outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device (NID),¹⁸⁶ the minimum point of entry (MPOE), the single point of interconnection, and the feeder/distribution interface.”¹⁸⁷ The terminal block fits squarely under the rules defining a point of technically feasible access – there is no real dispute in the record that a technician is capable of accessing the wires in the multiunit premises at the terminal block.¹⁸⁸ In fact, as Cox explains, “most incumbent LECs permit a competitive LEC to disconnect the inside wire from the incumbent LEC terminal block and connect it to the competitive LEC interface without any interference by the incumbent LEC.”¹⁸⁹ As one incumbent LEC states, “[c]learly, the Commission’s *Triennial Review Order* requires that CLECs have physical access to an ILEC’s NID or terminal block, and is intended to preempt excessive and unnecessary costs and burdens.”¹⁹⁰ The approach we take here is also consistent with the Commission’s broader goals of removing disincentives for facilities-based competitors to deploy their own loop infrastructure and providing competitors with the greatest flexibility in network design.¹⁹¹

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establishing that competitors should have direct access to all wire on the customer side of the NID. See *Virginia Arbitration Order*, 17 FCC Red at 27243, para. 421.

¹⁸⁴ Thus, we reject the arguments of commenters that, for example, “CLEC access [to inside wire] at an incumbent’s terminal block may be technically feasible where CLECs have access to an intermediate access terminal at that terminal block, thus permitting ‘direct access’ at that point while adequately protecting network facilities.” Verizon Reply, WC Docket No. 01-338 at 3 (citing BellSouth Comments at 7-15).

¹⁸⁵ Section 51.319(b)(2) defines subloops for access to multiunit premises wiring as “any portion of the loop that it is technically feasible to access at a terminal in the incumbent LEC’s outside plant at or near a multiunit premises.” 47 C.F.R. § 51.319(b)(2). The rule then defines inside wire to be “all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC’s network as defined in § 68.3 of this chapter.” 47 C.F.R. § 51.319(b)(2).

¹⁸⁶ A NID is defined “as any means of interconnection of customer premises wiring to the incumbent LEC’s distribution plant, such as a cross-connect device used for that purpose.” 47 C.F.R. § 51.319(c). Apart from a competitor’s obligation to provide the NID functionality as part of an unbundled loop or subloop, an incumbent LEC must also provide nondiscriminatory access to the NID on an unbundled basis. 47 C.F.R. § 51.319(c).

¹⁸⁷ 47 C.F.R. § 51.319(b)(2)(i).

¹⁸⁸ See Petition at 8 (describing the “terminal block” at issue).

¹⁸⁹ *Id.* at 4.

¹⁹⁰ Qwest Comments, WC Docket No. 01-338 at 6.

¹⁹¹ *E.g.*, *Triennial Review Order*, 18 FCC Red at 17190, para. 348 (“For all requesting carriers, especially carriers constructing facilities-based networks, the ability to access subloops at, or near, the customer’s premises in order to reach the infrastructure in those premises where they otherwise would not be able to take their loop the full way to the customer, is critical.”).

3. Implementation of Access to Inside Wire Subloops

52. The alternative access arrangements adopted by the OCC, whereby either SBC or Cox would place or construct, own, and manage an intermediate cross-connect device, conflict with prior Commission determinations on the scope of reasonable access. In circumscribing the scope of reasonable access in the other contexts, the Commission prohibited “a lengthy and burdensome process at the customer premises to collocate a separate terminal facility in order to gain access to the inside wire subloop, or other inside wire used by the LEC to access customers in multiunit premises.”¹⁹² The Commission also prohibited “an incumbent LEC requirement to have its technician present and to impose an associated charge on the [requesting carrier] for such contact on the non-network side of the NID.”¹⁹³ Incumbent LEC impositions of such requirements would be contrary to the competitive goals of the NID and inside wire unbundling rules and thus were precluded by the Commission. These limitations reflect Commission balancing of interests to ensure competitive access to inside wire, which the Commission found important because competitors may be able to construct and provision a local loop using their own facilities all the way to a customer premises, yet still remain unable to reach the end user in that premises.¹⁹⁴ As such, consistent with prior Commission findings in a similar context, we find that the alternatives adopted by the OCC requiring an intermediate cross-connect device are unreasonable access requirements and inconsistent with our inside wire subloop rules.

53. Further, in explaining how a competitor will access a subloop at a technically feasible location, the Commission expressly recognized that that the physical work necessary for competitive access does not need to be provided by the incumbent LEC, but rather may be performed by the requesting carrier itself: “Accessible terminals contain cables and their respective wire pairs that terminate on screw posts which enables a *competitor’s technician* to cross-connect its terminal to the incumbent LEC’s to access the incumbent LEC’s loop from that point all the way to the end user customer.”¹⁹⁵ Although we do not address the question of whether the terminal block is a NID under our rules,¹⁹⁶ we do find some support from the *Triennial Review Order’s* authorization of competitors to use

¹⁹² *Id.* at 17199, para. 358. This decision makes clear that no collocation requirement exists for subloops used to access the infrastructure in multiunit premises. Incumbent LECs are required to provide subloops for access to multiunit premises without collocation. *Id.* at 17192, para. 350.

¹⁹³ *Id.* at 17199, para. 358.

¹⁹⁴ *Id.* at 17193, para. 351.

¹⁹⁵ *Id.* at 17184-84, para. 343 n.1013 (emphasis added). In light of the Commission’s explicit identification of the rights of the technician of a competitor to perform the cross-connect, we are not persuaded by the assertion that the Commission meant to limit its intent to indicate technical details rather than substantive obligations. *See, e.g.,* SBC Opposition, WC Docket No. 01-338 at 14 (claiming that it is more reasonable to interpret this sentence “as merely describing the characteristics of accessible terminals, rather than establishing a national right on the part of competitive LECs to unfettered access to such terminals.”).

¹⁹⁶ Under Oklahoma law, NIDs at multiunit premises are “always defined to be inside, at the first jack within the individual tenant customer premises.” SBC Opposition, WC Docket No. 01-338 at 18. We agree with SBC that access to terminal blocks for the purposes of gaining unbundled access to incumbent LEC subloops is distinct from the issue of direct access to NIDs as separate UNES. *Id.* at 16. The Commission clearly indicated in the *Triennial Review Order* that competitors have the right to direct access to the NID. *Triennial Review Order*, 18 FCC Rcd at 17199, para. 358. We therefore do not reach Cox’s request that the Commission also clarify state law classifications regarding the locations of the points of demarcation and NIDs. *See* Petition at 12-15.

their own technicians to access the NID.¹⁹⁷ All three options adopted by the OCC would require Cox to use SBC technicians, and thus are also at odds with our holdings in the *Triennial Review Order*.

54. We conclude, however, that *factors* such as network security may be considered in section 252 proceedings, subject to the constraints enumerated by the Commission. Several commenters point to the OCC's reliance on network integrity concerns and ask that we defer to state-specific analysis of technical feasibility to prevent potential network damage and degradation.¹⁹⁸ However, the OCC did not undertake an analysis of technical feasibility under our regulations, and we emphasize today that any issue of network security must be addressed within the two-step framework of those regulations. Specifically, where there is a dispute as to whether it is technically feasible to unbundle at a given point in the network, under our rules the incumbent LEC then has the burden of demonstrating insufficient availability of space or technical infeasibility to a state commission.¹⁹⁹ Under the Commission's "best practices" rule, since at least one other state has determined that multiunit premises terminal block unbundling is technically feasible, an incumbent LEC has this evidentiary burden for terminal blocks in all other state proceedings.²⁰⁰ We expect that states, acting pursuant to section 252 of the Act, will continue to consider interconnection, access, and pricing issues, especially those affecting the safety or integrity of consumer services, but emphasize that states must do so consistent with the Commission's framework and directions.²⁰¹

55. The record before us indicates that in many instances incumbent LECs willingly allow direct access to terminal blocks pursuant to different arrangements,²⁰² and we do not mandate unconditional

¹⁹⁷ *Triennial Review Order*, 18 FCC Rcd at 17199, para. 358 ("a competitive LEC seeking to make contact with the incumbent LEC's NID . . . so that the competitive LEC can reconnect such customer wiring to its own NID is not accessing the incumbent LEC's NID as a UNE").

¹⁹⁸ See, e.g., SBC Opposition, WC Docket No. 01-338 at 12 (contending that "Cox's technicians caused pervasive damage to SBC-Oklahoma's network, including damage to 7,100 of SBC-Oklahoma's terminals, caused more than 3,000 recorded instances of trouble on SBC Oklahoma's network and over 9,000 hours of service outages to SBC Oklahoma's customers"); Verizon May 17 WC Docket No. 01-338 *Ex Parte* Letter at 3 (stating that the OCC resolved the dispute between SBC and Cox in a section 252 arbitration based on extensive record evidence.)

¹⁹⁹ 47 C.F.R. § 51.319(b)(3)(i).

²⁰⁰ 47 C.F.R. § 51.319(b)(3)(ii). See Letter from Thomas W. Snyder, Corporate Counsel – Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 (filed May 29, 2007) (Qwest May 29 WC Docket No. 01-338 *Ex Parte* Letter); Letter from Jay Bennett, Executive Director – Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 (filed May 25, 2007) (SBC May 25 WC Docket No. 01-338 *Ex Parte*). Thus, contrary to Verizon's concern, we are not overriding the rules governing state determinations regarding technically feasible access to subloops, but are ensuring that the states rely upon these rules and our precedent regarding technical feasibility. Verizon May 17 WC Docket No. 01-338 *Ex Parte* at 4.

²⁰¹ 47 C.F.R. § 51.319(b)(3)(i). The record indicates a controversy regarding the responsibility for prior damage to SBC's terminals, and the declaration we make here has no bearing on the resolution of that dispute, or on any incumbent LEC's rights to seek damages against any party for past or ongoing damage to its network and for compensation for the work it performs. *Arbitrator's Order* at 45 (finding that direct access "may seriously jeopardize [SBC's] ability to maintain network integrity, security and control, as well as accountability for damage and substandard engineering an operational practices); SBC Opposition, WC Docket No. 01-338 at 11; SBC Reply, WC Docket No. 01-338 at 4.

²⁰² For example, Qwest indicates that "it is not necessary for an ILEC to perform all of the connections and rerouting of inside wire subloop themselves, and that Qwest has no objection to CLECs using their own personnel." Qwest Comments, WC Docket No. 01-338 at 11. Qwest adds that state regulators in all fourteen of the states in Qwest's incumbent LEC territory require notification when a requesting carrier accesses the incumbent LEC's inside wire

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access, or otherwise seek to specify the details of any arrangement so long as a competitor has direct access, consistent with the principles described above. The *Triennial Review Order* established a framework within which state commissions would govern the process for interconnection negotiations and related disputes pursuant to section 252 of the Act, and nothing we do today is designed to disturb that basic role.²⁰³

IV. CONCLUSION

56. In view of the foregoing, we find that that cable wiring located behind sheet rock qualifies as physically inaccessible under our rules for purposes of determining the demarcation point between home wiring and home run wiring. Specifically, we conclude that (1) accessing such wiring causes significant damage or modification to a preexisting structural element, and (2) accessing wiring behind sheet rock generally adds significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring. The Commission's cable inside wiring rules are intended to facilitate competition in video distribution markets. This ruling will foster opportunities for competing MVPDs to provide service in MDUs by clarifying the circumstances under which the existing cable home run wiring in MDUs can be made available to alternative video service providers. Finally, we grant Cox's petition and conclude that state commission decisions denying requesting carriers direct physical access to incumbent LECs' inside wire subloops in multiunit premises pursuant to section 251(c)(3) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition.

V. PROCEDURAL MATTERS

57. *Final Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act (RFA),²⁰⁴ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice*.²⁰⁵ The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Further Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Flexibility Analysis is contained in Appendix C.

58. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

(Continued from previous page) _____

subloop. *Id.* at 10; *see also* Verizon May 17 WC Docket No. 01-338 *Ex Parte* Letter at 7 (stating the New York Public Service Commission requires, for example, that a requesting carrier seeking direct connection to a terminal block in multiunit premises must first identify itself to the owning carrier and indicate, in writing that it intends to access directly the owning carrier's subloop facilities); SBC May 25 WC Docket No. 01-338 *Ex Parte* at 2 (stating that such safeguards also could include requirements that a requesting carrier is responsible for ensuring that its technicians complete training in the engineering standards and practices used by the owning carrier.)

²⁰³ *Triennial Review Order*, 18 FCC Rcd at 17198, para. 358. Just as we do not bar states from adopting legitimate network security safeguards, we also reject requests that we set forth safeguards that states should or must adopt. *See* SBC May 25 WC Docket No. 01-338 *Ex Parte* at 2; Letter from Thomas W. Snyder, Corporate Counsel – Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 4 (filed May 24, 2007); Qwest May 29 WC Docket No. 01-338 *Ex Parte* at 1.

²⁰⁴ *See* 5 U.S.C. § 603.

²⁰⁵ *Further Notice*, 20 FCC Rcd at 1239, App.

59. *Congressional Review Act*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

60. Accordingly, **IT IS ORDERED** that, pursuant to authority found in Sections 1, 4(i), 601, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 521, 543, 544 and 552, the Commission's amendment of the Note to Section 76.5(mm)(4) of the Commission's rules to include sheet rock as an example of one of the materials that would likely be considered physically inaccessible for purposes of the Commission's cable television inside wiring rules **IS AFFIRMED**.

61. **IT IS FURTHER ORDERED**, that in light of the United States Court of Appeals for the District of Columbia's Circuit's decision in *NCTA v. FCC*, No. 03-1140, 2004 WL 335201, which remanded but did not vacate the decision adopted in *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003) ("Home Wiring Decision"), the note to 47 C.F.R. § 76.5(mm)(4) adopted in the Home Wiring Decision shall remain in effect.

62. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel of the Small Business Administration.

63. **IT IS FURTHER ORDERED**, pursuant to sections 1, 3, 4, 201-205, 251, and 252 of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, that the petition for declaratory ruling filed by Cox in WC Docket No. 01-338 **IS GRANTED** to the extent described by this Order.

64. **IT IS FURTHER ORDERED**, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Declaratory Ruling **SHALL BE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters in Docket 01-338**

<u>Comments Filed By:</u>	<u>Abbreviation</u>
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Real Access Alliance	RAA
SBC Communications Inc.	SBC
Sigecom, LLC	Sigecom
The World Company, d/b/a/ Sunflower Broadband	Sunflower
Qwest Communications International Inc.	Qwest

List of Replies

<u>Replies Filed By:</u>	<u>Abbreviation</u>
BellSouth Corporation	BellSouth
Cox Oklahoma Telcom, L.L.C.	Cox
New Jersey Division of Ratepayer Advocate	NJ Ratepayer
SBC Communications Inc.	SBC
Verizon Communications Inc.	Verizon

APPENDIX B**List of Commenters in CS Docket No. 95-184 and MM Docket No. 92-260**

<u>Comments Filed By:</u>	<u>Abbreviation</u>
Independent Multi-Family Communications Council	IMCC
National Cable & Telecommunications Association	NCTA
Real Access Alliance and the Community Association Institute	RAA & CAI
RCN Telecom Services, Inc.	RCN
Verizon	Verizon

List of Replies

<u>Comments Filed By:</u>	<u>Abbreviation</u>
Independent Multi-Family Communications Council	IMCC
National Cable & Telecommunications Association	NCTA
Real Access Alliance and the Community Association Institute	RAA & CAI
RCN Telecom Services, Inc.	RCN

Ex Parte filings

Verizon Declaration of Daniel VanRoekel, Senior Engineer, Outside Plant Engineering (June 22, 2005).

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the “RFA”)²⁰⁶ an Initial Regulatory Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking* in CS Docket No. 95-184 and MM Docket No. 92-260 (hereinafter referred to as the *Further Notice*).²⁰⁷ The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the *Further Notice*, including comments on the IFRA. This Final Regulatory Flexibility Analysis (FRFA) in this *Report and Order (Report and Order)* conforms to the RFA.²⁰⁸

A. Need for, and Objectives of, the Proposed Regulatory Approaches

2. This *Report and Order* is issued in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules.²⁰⁹ In its *First Order on Reconsideration and Second Report and Order* in this proceeding, the Commission modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring in multiple dwelling units (MDUs).²¹⁰ Specifically, the Commission amended the Note to Section 76.5(mm)(4) of the rules to include wiring behind sheet rock as an example, along with wiring located behind brick, metal conduit or cinder blocks, as wiring considered to be “physically inaccessible” as that term is used in Section 76.5(mm)(4) of the rules and the appended Note. The consequence of that conclusion is to move the point at which a competing multichannel video programming distributor (MVPD) can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between MVPD providers to serve an MDU. The Court of Appeals found that the Commission offered no reasoned basis for the amendment to add sheet rock as an example of material to be considered as a “preexisting structural element” in defining physical inaccessibility and remanded the case to the Commission for further consideration. The *Further Notice* was issued to seek comment on this matter. This *Report and Order* finds that the record adequately supports our finding that home run wiring located behind sheet rock is physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring.

B. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

²⁰⁶ The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁰⁷ *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 1233, 1239, Appendix (2004)

²⁰⁸ *See* 5 U.S.C. § 604.

²⁰⁹ *National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished).

²¹⁰ *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003).

3. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.²¹¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²¹² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²¹³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²¹⁴

4. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”²¹⁵ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.²¹⁶ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.²¹⁷ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.²¹⁸ Thus, under this size standard, the majority of firms can be considered small.

5. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.²¹⁹ Industry data indicate that,

²¹¹ 5 U.S.C. § 603(b)(3).

²¹² 5 U.S.C. § 601(6).

²¹³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²¹⁴ 15 U.S.C. § 632.

²¹⁵ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²¹⁶ 13 C.F.R. § 121.201, NAICS code 517510.

²¹⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

²¹⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²¹⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

of 1,076 cable operators nationwide, all but eleven are small under this size standard.²²⁰ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²²¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²²² Thus, under this second size standard, most cable systems are small.

6. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²²³ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²²⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²²⁵ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²²⁶ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

7. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.²²⁷ This definition provides that a small entity is one with \$13.5 million or less in annual receipts.²²⁸ Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four

²²⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²²¹ 47 C.F.R. § 76.901(c).

²²² Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²²³ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²²⁴ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²²⁵ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²²⁶ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

²²⁷ 13 C.F.R. § 121.201, NAICS code 517510.

²²⁸ *Id.*

currently offer subscription services. Two of these four DBS operators, DIRECTV²²⁹ and EchoStar Communications Corporation (EchoStar),²³⁰ report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.²³¹ The fourth DBS operator, Dominion Video Satellite, Inc. (Dominion), offers religious (Christian) programming and does not report its annual receipts.²³² The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

8. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$13.5 million or less in annual receipts.²³³ Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.²³⁴ Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.²³⁵ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

9. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all

²²⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; *see 2005 Cable Competition Report*, 20 FCC Rcd at 2793, para. 55.

²³⁰ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

²³¹ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

²³² Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

²³³ 13 C.F.R. § 121.201, NAICS code 517510.

²³⁴ *See 2005 Cable Competition Report*, 20 FCC Rcd at 2816, para. 110. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, para. 90 (2004) (*2004 Cable Competition Report*).

²³⁵ *See 2005 Cable Competition Report*, 20 FCC Rcd at 2816, para. 110.

such companies generating \$13.5 million or less in revenue annually.²³⁶ HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003 and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.²³⁷ The Commission has no information regarding the annual revenue of the four C-Band distributors.

10. *Wireless Cable Systems.* Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"),²³⁸ and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"),²³⁹ to transmit video programming and provide broadband services to residential subscribers.²⁴⁰ These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.²⁴¹ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²⁴² As described below, the SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5

²³⁶ 13 C.F.F. § 121.201, NAICS code 517510.

²³⁷ See *2005 Cable Competition Report*, 20 FCC Rcd at 2798, para. 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. See *2004 Cable Competition Report*, 19 FCC Rcd at 1654-55, paras. 73-74.

²³⁸ MDS, also known as Multichannel Multipoint Distribution Service (MMDS), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004) (*MDS/ITFS Order*).

²³⁹ ITFS systems are regulated by Part 74 of the Commission's rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

²⁴⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565, para. 131 (2006) (*2006 Cable Competition Report*).

²⁴¹ *Id.*

²⁴² See *Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997).

million or less in annual receipts, appears applicable to MDS, ITFS and LMDS.²⁴³ Other standards also apply, as described.

11. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,²⁴⁴ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.²⁴⁵ This definition of a small entity in the context of MDS auctions has been approved by the SBA.²⁴⁶ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.²⁴⁷ MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

12. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).²⁴⁸ We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

13. In the 1998 and 1999 LMDS auctions,²⁴⁹ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.²⁵⁰ Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.²⁵¹ These definitions of "small business" and "very small business" in the

²⁴³ 13 C.F.R. § 121.201, NAICS code 517510.

²⁴⁴ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

²⁴⁵ 47 C.F.R. § 21.961(b)(1).

²⁴⁶ See *ITFS Order*, 10 FCC Rcd at 9589.

²⁴⁷ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

²⁴⁸ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

²⁴⁹ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

²⁵⁰ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁵¹ *Id.*

context of the LMDS auctions have been approved by the SBA.²⁵² In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

14. *Open Video Systems ("OVS").* In 1996, Congress established the open video system ("OVS") framework, one of four statutorily recognized options for the provision of video programming services by local exchange carriers ("LECs").²⁵³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁵⁴ OVS falls within the SBA small business size standard of Cable and Other Program Distribution Services, which consists of such entities having \$13.5 million or less in annual receipts.²⁵⁵ The Commission has certified 25 OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.²⁵⁶ As of June, 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.²⁵⁷ Affiliates of Residential Communications Network, Inc. ("RCN"), which serves about 371,000 subscribers as of June, 2005, is currently the largest BSP and 14th largest MVPD.²⁵⁸ RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

15. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁵⁹ According to Commission data,²⁶⁰ 1,307 carriers have reported that they are engaged in the provision of incumbent

²⁵² See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁵³ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2549, para. 88 (2006) (*2006 Cable Competition Report*).

²⁵⁴ See 47 U.S.C. § 573.

²⁵⁵ 13 C.F.R. § 121.201, NAICS code 517510.

²⁵⁶ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 88. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁵⁷ See *id.* at 2507, para. 14.

²⁵⁸ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June, 2005. The third largest BSP is Knology, serving approximately 170,800 subscribers as of June, 2005. *Id.*

²⁵⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

²⁶⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (Feb. 2007) (*Trends in Telephone Service*). This source uses data that are current as of October 20, 2005.

local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

16. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶¹ According to Commission data,²⁶² 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

17. *MDU Operators.* Under the Commission’s Rules, an MDU is a residential “multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative).” 47 C.F.R. § 76.800(a). The Census Bureau has created two broad Economic Census categories that appear pertinent. The first category, Lessors of Residential Buildings and Dwellings, is described as follows: “This industry comprises establishments primarily engaged in acting as lessors of buildings used as residences or dwellings, such as single-family homes, apartment buildings, and town homes. Included in this industry are owner-lessors and establishments renting real estate and then acting as lessors in subleasing it to others. The establishments in this industry may manage the property themselves or have another establishment manage it for them.”²⁶³ The SBA has developed a small business size standard for Lessors of Residential Buildings and Dwellings, which is: all such firms having \$6.5 million or less in annual receipts.²⁶⁴ According to Census Bureau data for 2002, there were 44,165 firms in this category that operated for the entire year.²⁶⁵ Of this total, 43,031 firms had annual sales of under \$5 million, and 671 firms had sales of \$5 million or more but less than \$10 million.²⁶⁶ Thus, the majority of firms in this category can be considered small.

18. The second category is that of Residential Property Managers, which “comprises establishments primarily engaged in managing residential real estate for others.”²⁶⁷ The SBA has

²⁶¹ 13 C.F.R. § 121.201, NAICS code 517110.

²⁶² “Trends in Telephone Service” at Table 5.3.

²⁶³ U.S. Census Bureau, 2002 NAICS Definitions, “531110 Lessors of Residential Buildings and Dwellings; <http://www.census.gov/epcd/naics02/def/ND531110.HTM#N531110>.

²⁶⁴ 13 C.F.R. § 121.201, NAICS code 531110.

²⁶⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Real Estate and Rental and Leasing, Table 4, Revenue Size of Firms for the United States: 2002, NAICS code 531110 (issued November 2005).

²⁶⁶ *Id.* An additional 463 firms had annual sales of \$10 million or more.

²⁶⁷ U.S. Census Bureau, 2002 NAICS Definitions, “531311 Residential Property Managers”; <http://www.census.gov/epcd/naics02/def/ND531311.HTM#N531311>.

developed a small business size standard for Residential Property Managers, which is: all such firms having \$2 million or less in annual receipts.²⁶⁸ According to Census Bureau data for 2002, there were 19,359 firms in this category that operated for the entire year.²⁶⁹ Of this total, 16,057 firms had annual sales of under \$1 million, and 2,141 firms had sales of \$1 million or more but less than \$2.5 million.²⁷⁰ Thus, the majority of firms in this category can be considered small.

C. Description of Proposed Reporting, Recordkeeping and other Compliance Requirements

19. The retention of the word “sheet rock” to the Note to Section 76.5(mm)(4) of the Commission’s rules will not impose any additional reporting or recordkeeping requirements. With regard to other compliance requirements, we note as indicated above, that the *Report and Order* is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules. The Court seeks support for the Commission’s decision to add wiring behind sheet rock as an example of wiring considered to be “physically inaccessible” as that term is defined by Section 76.5(mm)(4) of the Commission’s rules and the appended Note. As stated, the consequence of the Commission’s underlying decision is to move the point at which a competing video provider can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between video providers to serve an MDU. This poses no negative impact on smaller entities. This decision may save competing video providers, including small entity providers, some costs in accessing wiring, as we have described *supra*.²⁷¹

D. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

20. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁷²

21. We believe that this *Report and Order* will have a positive impact on small entities. This determination will foster opportunities for competing MVPDs to provide service in MDUs by providing the needed support for amendment of our rules addressing circumstances under which the existing cable home run wiring in MDUs could be made available to alternative video service providers. This determination will also be helpful to small MDUs that compete for tenants because they will be able to provide the potential to offer multiple MVPD service to building subscribers. In addition, the interior of

²⁶⁸ 13 C.F.R. § 121.201, NAICS code 531311.

²⁶⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Real Estate and Rental and Leasing, Table 4, Revenue Size of Firms for the United States: 2002, NAICS code 531311 (issued November 2005).

²⁷⁰ *Id.* An additional 1,161 firms had annual sales of \$2.5 million or more.

²⁷¹ *See Order*, paras. 45-46.

²⁷² *See* 5 U.S.C. § 603.

the building structures will not be subject to damage because of access to home run wiring at the junction box. The alternative of determining otherwise on this issue would not be helpful to small entities.

E. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

22. None.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: 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, Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, WC Docket No. 01-338, Report and Order and Declaratory Ruling

Today we take action to ensure that the pro-competitive, deregulatory goals of the 1996 Act are realized by removing economic and operational barriers to infrastructure investment in the communications market. Competition is ultimately the best protector of the consumer's interest. It is the best method of delivering the benefits of choice, innovation, and affordability to American consumers.

Consistent with my commitment to fostering a competitive marketplace and consumer choice, I have and will continue to encourage new entrants trying to break into both the voice and video markets. Today we take an important step to facilitate competition in both markets by addressing the ability of new competitors to use the internal wiring of both incumbent telephone and cable operators in a consistent fashion.

Specifically, we are granting Cox's petition for declaratory ruling regarding the scope of access to incumbent telephone companies' inside wire in apartment buildings. This decision allows a new entrant competing to provide telephone service to gain access to inside wiring, thereby facilitating competition between telephone providers to serve customers who live in apartment buildings.

Similarly, the Order also finds that a new entrant competing to provide cable service can gain access to inside cable wiring that is "physically inaccessible." This ruling thereby facilitates competition between cable providers to serve customers who live in apartment buildings.

The action we take today seeks to foster competition across different platforms and is competitively and technologically neutral. Importantly, we are seeking to support all new entrants and do not favor one technology or industry over another. Moreover, we achieve regulatory parity by applying a consistent regulatory framework across platforms. This Order demonstrates the Commission's commitment to ensure that all consumers—including those living in apartment buildings—benefit from competition in the provision of voice and video services.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *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, *Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, WC Docket No. 01-338, Report and Order and Declaratory Ruling

This item brings together two sets of inside wiring rules in the multi-tenant environment – the rules that apply to common carriers under Title II, and the rules that apply to cable operators under Title VI. But while the lineage of the rules is different, the underlying goal is very much the same – to bring the fruits of phone and cable competition to consumers who live and work in multi-unit buildings. The clarification of our inside wiring rules on both the telephone and cable sides address the legal and practical bottlenecks that may currently stand in the way of fledgling competition. I see no reason why Americans who happen to live or work in multi-unit buildings should have a narrower range of choices when it comes to phone, video and broadband services than Americans who live in single-family homes.

But while the underlying policies are important, I want to stress that they are not before us today. That is, the basic rules themselves are not at issue. Rather, this item deals with narrow implementation questions. On the phone side, the issue is the logistics of physically transferring the wiring from one provider to another. On the cable side, the issue is even narrower – whether wiring behind sheet rock is “physically inaccessible” under the specific standard set forth in our rules. In each case, today’s Order interprets our rules in a way that promotes competition and more choices for phone, internet and video customers. I am pleased to support it.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *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, *Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, WC Docket No. 01-338, Report and Order and Declaratory Ruling

We often hear about the challenges of providing “last mile” connections for competitive video, voice, and broadband services, but for residents of multi-tenant buildings (referred to as MDUs) another significant challenge is often that of the last 100 feet. I support this Order which clarifies the Commission’s rules for inside wiring used to serve MDUs because it should reduce the barriers of those last 100 feet and promote choice for customers of these buildings, including renters, homeowners, and small businesses.

Consumers are starved for more choice in video, telecommunications, and broadband services. Competition in these markets is critical as a means to constrain prices. I’ve often said that this Commission should do what it can within the scope of the law to facilitate increased competition because it benefits American consumers, promotes deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society. Americans living in MDUs – which often contain a disproportionate number of persons with disabilities, seniors, minorities and low income citizens – deserve to benefit from a choice of providers, too. Similarly, these citizens, like their counterparts in single unit dwellings, stand to benefit greatly from the expanded educational, career, and health opportunities that are available through broadband. Although this Order addresses two distinct legal frameworks – one for inside wiring owned by incumbent telephone companies, the other for inside wiring owned by cable system operators – the effect of both decisions is to advance the ability of new entrants to access multi-tenant buildings to provide competitive voice, video, and broadband offerings.

Even as we take these worthwhile steps, I must highlight my concern that our consumer notice rules for the use of cable inside wiring may be in need of an overhaul. Under our current rules, consumers or alternative cable providers have the option to purchase cable home wiring when the customer terminates its cable service. These rules, as written, contemplate a scenario in which only one service – a video service – could be provided over any given cable wire, and only one provider would seek to use that wire. However, technological innovations and cross-platform competition are now allowing multiple services to be provided over that same wire. Commenters have observed that, unless consumers only purchase bundles of services from either their cable or telephone company, customers may need to make decisions about which provider is entitled to use the existing wire, and which provider must install new inside wire. Just as many customer have been “slammed” by misleading long distance providers, it is easy to imagine customers being misled or confused by providers seeking to use inside wiring to provide their services. We should make revisiting our consumer notice rules a priority, so that customers do not find themselves charged expensive installation fees or unnecessarily locked into bundles.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: 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, Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, WC Docket No. 01-338, Report and Order and Declaratory Ruling

To help create an environment where investment, innovation and competition can flourish, it is imperative that government treat like services alike, preferably with a light regulatory touch. Today's order is a pro-competitive, deregulatory decision and is our latest effort to achieve regulatory parity between incumbent telephone companies, incumbent cable companies and new entrants into the voice, video and data markets.

Today's action takes necessary steps to assure that new entrants seeking to compete with incumbent cable and telecommunications providers in multiple dwelling units (MDUs) and multi-unit premises have appropriate access to inside wiring.

In this Order, we conclude that wiring installed by incumbent video providers behind sheetrock is physically inaccessible under our rules for determining the demarcation point between home wiring and home run wiring. Our ruling will help spur competition among video distributors in MDUs by making existing cable wiring available to alternative providers at a point that is not physically difficult and costly to reach.

Similarly, by granting the Cox Oklahoma Telcom petition for declaratory ruling, we make certain that competitors have the right of direct access to incumbent local exchange carriers' unbundled inside wire subloops at the terminal block to a multi-unit premise. At the same time, all parties bear a responsibility to make sure their actions do not harm their competitors' facilities in multi-unit premises. Such anti-competitive and tortuous behavior will not be tolerated.

As I have said before, as regulators we need to make sure that competition for all services, and across all platforms does not stop, literally at the doorstep of multi-unit buildings across the country. I thank both the Media and Wireline Competition Bureaus for their work and I support this Order.