COLE, RAYWID & BRAVERMAN, L.L.P.

A PRACTICAL GUIDE TO CABLE INSIDE WIRING UNDER THE FCC RULES

MAY 1998

COLE, RAYWID & BRAVERMAN, L.L.P.
A PRACTICAL GUIDE TO
CABLE INSIDE WIRING UNDER THE FCC RULES

Table of Contents

APPENDICES

COLE, RAYWID & BRAVERMAN, L.L.P.
A PRACTICAL GUIDE TO
CABLE INSIDE WIRING UNDER THE FCC RULES

I. Introduction

A. History of Cable Inside Wiring Regulation

Until 1992, cable home wiring had been left entirely to private contracts and state property law.[1] In 1992, Congress sought to address a limited problem concerning cable home wiring that existed in a few "overbuild" markets. Specifically, Congress had heard reports that some cable operators were making it difficult for customers to switch to a competing cable system by removing wiring inside the home upon termination of service. In Section 624(i) of the 1992 Cable Act, Congress directed the Federal Communications Commission ("FCC") to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." Congress also specified that the FCC was not to regulate cable wiring within MDUs.

Initially, in its first (1993) rulemaking, the FCC abided by the limitations in its enabling legislation and adopted rules which practically governed only the transfer of wiring inside single family homes upon termination of service. Later, however, the FCC grew impatient with the tenacity with which franchised cable systems retained market share. The FCC began a series of proceedings seeking to erode that market share as rapidly as possible. Its October 1997 inside wiring rules adopt a new, federal regime governing competition within MDUs, designed to grant more power to MDU owners and to private cable competitors. The FCC's rules became effective on March 13, 1998. An appeal is pending in the U.S. Court of Appeals for the Eighth Circuit (St. Louis), and although reconsideration petitions and further rules are pending before the FCC, the rules are effective now and will immediately affect strategies in MDUs.

B. A Changed MDU Marketplace

[1] The FCC had previously adopted different rules concerning telephone inside wiring.

From the perspective of franchised cable television operators, "private cable" operators have enjoyed a number of advantages in the MDU market. Private cable operators pay no franchise fees; they need not carry or financially support public, educational, or governmental access channels; they need not carry local broadcast stations; they are immune from local and federal rate regulation; they may package equipment, basic, and premium services in response to MDU dwellers' viewing habits, rather than following the detailed packaging, buy-through, and equipment unbundling rules applied to franchised cable operators. In short, they have grown to be a formidable competitor to cable.

From the FCC's perspective, however, they have not grown swiftly enough. The FCC reports an estimated 28 million MDU units in the country, representing approximately one-fourth of the country's population.[2] The new rules are widely perceived as a regulatory thumb on the scale to enhance private cable opportunities to displace franchised cable in these units, whether or not the market would otherwise select them as the superior provider. One should expect that MDU owners will move aggressively to exploit the new rules. MDU owners' trade associations have already promoted this as an opportunity for MDU owners to profit. (See "Wired for Profit," by The Building Owners & Manager's Association on the Internet, www.boma.org).

The new rules govern in two distinct areas. First, they govern rules of play in MDU contexts, setting forth one scheme for "building-by-building" contests and another if a building owner permits "unit-by-unit" competition, where residents may choose between competing MVPDs. Second, the new rules amend the 1993 rules for single family homes (and for the small amount of wiring within the individual dwelling units of MDUs.) Attached as Appendices C - G to this Guide are separate flowcharts outlining each set of procedures applicable under the FCC's cable inside wiring rules.

The FCC's cable inside wiring rules do not expressly govern "telephone wires." The rules for embedded telephone premises wiring on MDUs are complex, and beyond the scope of this

[2] These estimates are from the FCC's January 1998 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming; Fourth Annual Report*, as supplied to the FCC by SMATV representatives.

Practical Guide. For new installations, however, the MDU owner has the right to require that all of the telephone wire within any one building (and possibly on the entirety of a multi-building property) be treated as unregulated "premises wire." This means, essentially, that the entity that installed the wires may not interfere with the property owner, individual customers, or competitors in their use of these wires under almost any circumstances.

Few cable operators would want their intra-MDU cable plant to be subject to such a regime. In these circumstances, therefore, cable operators that provide MDUs with a service package that includes voice telephony typically choose to transmit the intra-MDU telephony signals on separate telephone wire, even if they are technically capable of sending telephony over their coaxial cable plant, in order to avoid even the argument that the telephone premises wire rules might apply to the coaxial cable plant. As a result, as of today it makes sense to distinguish between the application of the cable inside wiring rules, discussed here, and the telephone premises wiring rules that govern pure telephony plant. A cable operator contemplating using the same physical intra-MDU facilities to carry both voice and video in a particular case should carefully evaluate the impact of *both* sets of rules on their operations.

This *Practical Guide* is designed to help operators understand the cable inside wiring rules (reprinted at Attachment A) and arrive at a plan of action. Appendix B provides a checklist of issues and forms that each operator should consider in formulating its response to the new rules.

II. Fundamental Definitions and Concepts.

Understanding the FCC's rules governing cable inside wiring requires familiarity with some basic definitions that trigger different rights and obligations. The key terms and concepts are:

A. "MVPD." An MVPD, "multichannel video programming distributor," is any cable, SMATV, MMDS, DBS, or other service that "makes available for purchase, by subscribers or customers, multiple channels of video programming."

B. "Cable home wiring" or "home wiring." The FCC uses these terms interchangeably to define the wiring located on the customer's side of the demarcation point, both inside a single family home and inside apartments and other residential units in MDUs. Cable home wiring includes passive splitters, on the customer's side of the demarcation point, but not any active electronics.

C. "Demarcation point." The primary definition of "demarcation point" is the point at or near 12 inches outside of where the cable enters a subscriber's dwelling unit. While this definition was not changed by the FCC's October 1997 rules, the new rules created an exception for wiring that is "physically inaccessible," *i.e.*, embedded in brick, metal conduit, or cinder block with limited or non-existent access openings. Wiring located inside standard drywall is not "physically inaccessible" under the FCC's definition. In the case of physically inaccessible wiring, the substitute demarcation point is the closest practicable point to the actual demarcation point that does not require access to an individual subscriber's dwelling unit.

D. "Home run wiring." The FCC adopted industry trade usage in describing wiring within a typical MDU. "Home run wiring" is the wiring devoted to an individual subscriber. For example, where the termination box is located in the basement of an MDU, the home run wiring is a dedicated wire extending from the basement lockbox to the "demarcation point" where the wire enters the individual resident's dwelling unit. Where common wiring is used in risers going to each floor, the home run wiring would extend from the lockbox located on each floor (for example, in a closet) to the "demarcation point" where the wire enters the individual resident's dwelling unit. "Home run wiring" does not include common riser cables. Home run wiring also does not include amplifiers or other active devices if, as is usual, equivalent replacements can easily be reattached. "Home run wiring" does include passive devices, including splitters and other items that are a "physically integral part" of the home wiring. In reading the rules and this guide, it is critical to keep in mind the distinction between "home run wiring," which is wiring within the common areas of MDUs, and "cable home wiring" within a single family home or an apartment within the MDU.

E. "MDU owner." The FCC uses the term "MDU owner" to refer to "the entity that owns or controls the common areas of a multiple dwelling unit building." It encompasses not only owners, but management of any type, such as condominium association governing boards.

F. "Competitive" and "non-competitive MDUs." The rules for disposition are different depending on whether the MDU owner appoints a single, exclusive MVPD service, or allows more than one MVPD to compete for individual customers. The FCC refers to the procedures in non-competitive MDUs as "building-by-building disposition" of wiring. In competitive MDUs, the FCC refers to "unit-by-unit disposition" of wiring. The FCC has established separate rules for competitive and non-competitive MDUs for home wiring and for home run wiring.

III. Home Run Wiring Rules

The greatest market changes the FCC made through its October 1997 rules is the regulation of home run wiring located in the common areas of MDUs, *i.e.*, outside of the resident's dwelling.

A. Do the Home Run Wiring Rules Apply?

The home run wiring rules apply to all MVPDs that own their inside wiring. The rules apply only where an MVPD owns the wiring and no longer has an enforceable right to remain on the premises. As we shall see, the rules take for granted that a building owner may exclude an MVPD, yet the FCC rules apply even in states with right of access laws. The operation of these principles is discussed in this section.

1. Application to all MVPDs

The home run wiring rules apply to all MVPDs that own their inside wiring, including franchised cable, private cable (or SMATVs), and wireless providers. The FCC's rules do not apply to MDU owners that happen to own the home run wiring, unless the MDU owner is also an MVPD.

2. Contractual Provisions Remain In Effect

Contrary to the implicit belief of some MDU owners, the FCC's rules do not displace existing contracts that govern MDU service in any way. The rules do not permit the MDU owner to terminate the contract in the middle of its term. Every contract that is currently valid under state law remains valid after the effective date of the FCC's October 1997 rules (although, as detailed below, the Commission may eventually act to permit widespread renegotiation of such contracts.)

Similarly, the FCC's rules do not override any existing contractual provisions governing ownership of the wiring and the disposition of the wiring upon termination of the contract. A contract to serve an MDU might specify, for example, that the owner may terminate the contract at any time so long as it makes a defined early termination payment to the operator and pays a specified price for the wiring. The rules apply only at the end of a contract term to specify how the home run wiring is disposed in the event the contract is silent.

3. Incumbent Owns the Home Run Wiring

The FCC's rules governing the disposition of home run wiring in an MDU do not apply unless the incumbent owns the home run wiring. Thus, in many situations an MDU owner and competing providers will take the position that the MDU owner, and not the incumbent, owns all of the inside wiring (home run and home wiring). If the incumbent does not own this wiring, the incumbent does not have the right to remove the wiring or sell the wiring itself. To rebut this argument, an incumbent will want to review its evidence of legal or equitable ownership.

Obviously, the best proof of ownership is a legal document. However, not every MDU cable installation and service understanding has been properly memorialized or recorded in a contract. With the combination of system swaps and clustering among cable operators, and the trading of residential MDUs among developers and investors, cable operators often inherit poorly documented ownership in complexes managed by landlords with no recollection of the terms of the original arrangement. When contract terms for real estate are not recorded or are not clear, the law of "fixtures" comes into play.

Property that is permanently attached to real estate and intended to be permanent can become a "fixture" owned by the MDU owner. But when plant is installed in property in order to deliver a service, fixture law often dictates that the wiring is a "trade fixture" owned by the cable operator. In some states, in the absence of facts or circumstances to the contrary, the law assumes that any fixture placed for the purpose of conducting a business remains the property of the business that installed it, and may be removed even without an express agreement. Other states have adopted tests to determine whether personal property becomes part of the property. is subject to removal. Still other states have codified this law in a statute, as in Pennsylvania, where the law provides that the cable operator retains ownership of all wiring and equipment installed at an MDU.

Applying the general trade fixture standard to cable home run wiring in an MDU may prove the incumbent cable operator's ownership of wiring in the absence of an agreement. Typically, the wiring can be removed, is not adaptable to the use or purpose of the MDU under customary property law, and the incumbent usually did not intend to make the home run systems permanent accessions to the MDUs. Under this principle, the wiring remains a trade fixture owned by the incumbent provider, and efforts by MDU owners or new providers to take it over could constitute conversion.

4. Highest State Court Ruling Upholding Mandatory Access Statute

The FCC adopted a presumption that its home run wiring rules apply, even in states with mandatory access statutes, unless the highest court in the state has found that, under the state's mandatory access statute, "the incumbent always has an enforceable right to maintain its home run wiring on the premises." We are unaware of any such broad ruling at this time. Indeed, courts are usually bound by canons or jurisprudence and constitutional limits to decide a live dispute and must refrain from such broad policy pronouncements. In any state with such a ruling, the burden would shift to the new provider to obtain a judicial determination that the operator has no right to maintain its wire on the premises.

A list of states with some form of mandatory access statute is included as Attachment G.

B. If the Rules Apply, What Next?

If the home run wiring rules apply, then under the FCC's October 1997 rules, an intricate matrix of rules govern the disposition of this wiring when the MDU either terminates the incumbent provider or opens the MDU to competition. These procedures are described below and depicted on flowcharts in Attachments C - F. While the procedures differ for competitive and non-competitive MDUs, in reality, the rules do not provide any incentive to MDU owners to open their MDUs to competition. In fact, the new rules still permit MDU owners to receive payments in exchange for exclusive contracts, making MDU owners more likely to auction exclusive access by a single provider than to open their MDUs to multiple providers.

If the FCC's home run wiring rules apply, and the MDU owner seeks to terminate the incumbent operator, the issue becomes whether the incumbent cable service provider has an enforceable right to remain on the MDU premises.

1. Injunction Upon MDU Owner's Notice.

The home run wiring rules are triggered by a notice from the MDU owner that it is either terminating the incumbent's service (the usual case), or that it is opening up the building to an alternative MVPD that intends to use the incumbent's home run wiring. In either case, the rules will require the operator to make elections and take other steps, described below, **unless** the operator obtains a court ruling or an injunction enforcing the incumbent's right to remain in the MDU.

There are several legal bases for seeking an injunction, which are all strengthened by the desirability of maintaining the status quo during a dispute over underlying rights. Included among the legal bases for obtaining a preliminary injunction are: (1) a contractual right, express or implied, to remain on the premises; (2) an easement held by the operator; (3) state access to premises laws, in which a cable operator has an enforceable right of access to MDUs in order to provide cable service; (4) state laws prohibiting MDU owners from receiving compensation for providing a right of access; (5) a license which has become irrevocable through investment and reliance on the license; and (6) general policy arguments.

As of this writing, the timing requirements for an operator to obtain an injunction are the subject of a request for reconsideration pending before the FCC. Until the Commission acts on the petitions, however, it is up to the incumbent to obtain an injunction in litigation **within 45 days** of the MDU owner's notice, or the rules will run their course. The rules continue to apply during the 45-day period until the incumbent obtains a court order.

a. Contracts and Easements.

Obviously, the strongest argument against eviction is a written contract and/or easement giving the incumbent a right of access. Some incumbents have entered into explicit exclusive agreements with developers in order to better assure long term recovery of the costs of serving the development. Such contracts also provide for the specific disposition of inside wiring upon termination of the service agreement. Some contracts include parallel easements, which may continue to provide a right even beyond the sunset of the service agreement or term of exclusivity.

Absent an express contract, an implied contract may exist. An incumbent cable television provider typically has engineered and installed the risers and other inside wiring needed to deliver cable services to each unit. That work makes MDUs marketable. In many cases the incumbent provided low-cost discounted service in the early years with an expectation, often contractually-backed, of making its return in the out years. This is the long-term economic equation that the FCC finally came to understand in cable cost of service rules, and that was impressed upon the cable industry by developers and landlords who sought additional up-front payments. Incumbents can also argue in some states that an irrevocable license to remain on the property has been created by the incumbent's investment.

b. Condemnation of Easements.

Cable operators who are certified as competitive local exchange carriers ("CLECs") typically have a statutory right to condemn easements that are necessary to deliver their services. Some states provide regulatory vehicles for cable operators to condemn easements even for video services.

c. Right of Access Statutes.

Landlords are not disinterested trustees in judging among competitors. They are often more interested in protecting their own revenues than in providing access to the provider whom their residents would choose. They therefore often design the dedications, easements, and restrictive covenants of the development, or delay the turnover of rights of way for public use, in order to maximize their ability to *exclude* franchised cable operators from serving the residents.

Many states have attempted to address this problem head-on by passing laws that give a cable operator an enforceable right of access to MDUs in order to provide cable service to residents who have requested such service. A table listing the current statutes is included as Attachment G. There are two common patterns for state access to premises laws. The first gives a right to the **operator**, requiring the owner of an MDU to allow the cable operator to wire for cable service in the MDU, subject to certain conditions. The second gives a right to the **tenant**, requiring the MDU owner to allow the tenant to obtain cable service.

Under either pattern, the statute generally provides conditions that the operator must fulfill in order to exercise the right of access. Typical conditions are that the operator must bear all costs of the installation, indemnify the owner, and compensate the owner (1) for any damage to property caused by installation, operation or removal of the cable facilities and (2) for any diminution in value of the property caused by the operator's exercise of the right of access. Several states also forbid landlords from accepting any form of payment in exchange for granting access to premises, thereby breaking the economic incentive for landlords to place their own interest above their tenants'. Some states anticipate the delaying games that landlords will play, and provide that a dispute over the amount of compensation shall not delay cable installation at an MDU.

It is often unclear exactly which entities and/or properties are covered by access to premises legislation. In some states, the right of access appears to be limited to the franchised operator. In others, alternative MVPDs may also benefit. In some states, the right of access extends to trailer parks, nursing homes, hospitals, condo associations, etc., as well as to MDUs. In others, the right extends to "residential properties" without further definition. In passing its October 1997 rules, the FCC declined to preempt state access laws, but encouraged states to revisit their statutes and to "establish competitive parity" for MVPDs.

The extensive litigation in this area reflects landlords' efforts to bolster their gatekeeper status, and the willingness of some MVPDs to finance the MDU owners' litigation. Landlords have resorted to every conceivable argument to prevent customers from having a choice of video providers. They have attacked the mandatory access statutes as "takings" of their property; or inconsistent with jury trial requirements; or lacking a "public" purpose under State constitutional limits. Even after the 1984 Cable Act adopted Section 621's access-to-easements clause, MDU owners continued their attempts to repel any rights of access. They argued that Section 621 provided no private cause of action, that there were no easements at all, or that the compatible easements previously granted were not "dedicated." A number of Federal Circuits have narrowly circumscribed the federal right of access in the context of MDUs, leaving operators to the uneven operation of state access-to-premises laws.

d. Policy.

In many access cases, policy considerations play an important role. First, landlords, developers, and controlled homeowners associations act as shadow governments, and should not be permitted to assume the role of unregulated electronic editor. Second, MDU owners that prevent access effectively deprive MDU residents of the competitive options that are available to residents of "horizontal" neighborhoods of detached homes. Third, conversion of cable inside wiring frustrates cable's ability to market competing telecommunications services. It divests cable of the broadband pipe to the home used for high speed internet access, and limits the marketing strategy which has broken telephone monopolies abroad -- that is, to bundle voice, even when it is delivered over twisted pair copper, into a package with video.

2. Procedures Where MDU Access Terminated

While the FCC's 1994 rules anticipated both building-by-building and unit-by-unit competition, in reality, MDU owners have little incentive to open their buildings to multiple providers. So long as MDU owners are permitted to obtain a premium from the highest bidder for the right to provide exclusive service, MDU owners will seek to replace incumbents with new providers willing to pay for the right to serve the whole building on an exclusive basis.

a. Notice, Election, and Implementation of Election.

Where the MDU owner chooses to switch the entire MDU to a different service provider, the owner must give the operator 90 days notice of termination. The rules are silent as to whether the date of notice is measured from the date it is sent (the "mailbox" rule) or received. In any event, after notice is provided, the operator has 30 days in which to elect to: (1) remove the wiring and restore the MDU to its prior condition as required by state law by the end of the original 90 day period; (2) abandon the wiring without disabling it; or (3) sell the common wiring to the MDU owner, or if the owner chooses, to the alternative provider. The incumbent must provide written notice of its election to the MDU owner by the end of the 30 day period. Again, the FCC has not specified whether the date of notice to the MDU owner runs from the date the operator sends it, or the date the MDU owner receives it. Operators should consider using the same method for measuring all notice requirements, whether it is from the date of receipt or from the date it is sent.

b. Price of Home Run Wiring.

The FCC declined to adopt any default price or formula for determining the price of home run wiring, opting instead to allow the parties to attempt a negotiated price. The FCC provided little guidance on how to price inside wiring, noting the possible alternatives urged by commenters, including fair market value, fully loaded replacement cost, and depreciated cost. If, at the end of the initial 30-day window the parties have not agreed to a price, the incumbent must then make a second election to either submit the price to binding arbitration, or to abandon or remove the wiring. In all cases, if the MDU owner declines to purchase the wiring, then the alternative MVPD may purchase the wiring.

c. Binding Arbitration.

If the incumbent provider chooses arbitration, the parties have seven days to select an expert arbitrator. If they fail to agree in seven days, each party then selects one arbitrator, who together select a third. Operators should be prepared to present evidence supporting the desired price in arbitration, perhaps using affidavits of cable consultants or expertise developed in cost-of-service rate regulation. The independent arbitrator chosen must then establish a reasonable price for the home run wiring within the original 90-day notice period. If the incumbent elects arbitration and the MDU owner refuses to participate, the incumbent has no further obligation under the home run wiring rules. If the incumbent fails to comply with any of the arbitration deadlines, it is deemed to have abandoned the wiring at the end of the 90-day notice period.

d. Abandonment or Removal of Wire.

If the parties fail to reach a negotiated price within 30 days from the operator's election and do not submit the price determination to binding arbitration, the incumbent must elect either to abandon or remove the wiring, and notify the MDU owner if and when it intends to terminate service before the end of the original 90 day period. The operator must remove the home run wiring and restore the MDU in accordance with state law, if that is its election, by the end of the 90 day period, or else the wiring is deemed abandoned.

The FCC did not clarify how the parties are to count the 90 day period, but did establish an affirmative obligation under the rules for the parties to cooperate to avoid disruption in service to customers, to the extent possible. The simplest way for a cable operator to meet this obligation may be to notify the MDU owner and alternative provider of a date certain when the service will be turned off. The FCC, however, rejected the requests of some MVPDs and MDU owners to establish a penalty for operators that fail to remove wiring, or to require the incumbent to post a bond.

The MDU owner must decide if it or the new service provider will purchase the home run wiring, and must notify the incumbent of this choice no later than 30 days before the termination of access to the MDU becomes effective.

3. Procedures Where MDU Opened to Competition

Some MDU owners might forego the compensation available through an exclusive service agreement or be forced to comply with an access to premises law, and open the building up to more than one video service provider. In such cases, the Commission has provided separate rules to account for the interaction of the additional affected entity(ies).

a. Notice, Election, and Implementation of Election.

In competitive MDUs, the MDU owner must give the incumbent 60 days notice that it is invoking the FCC's "head-to-head" competition rules for home run wiring. In turn, the incumbent must: (1) obtain within 45 days a court order or injunction affirming that it has an exclusive right to use the home run wiring (*i.e.,* an exclusive right of access to the MDU); or (2) elect within 30 days to remove or abandon the home run wires for subscribers, if and when they choose the competitor's service, or sell each home run wire to the MDU owner, again, as the subscriber switches service providers. At the same time the incumbent makes its election, if the MDU owner intends to allow the alternative provider to purchase home run wiring, the alternative MVPD must elect whether to sell, remove or abandon the home run wiring in the event that a subscriber switches back to the incumbent in the future.

In the implementation phase of the process, each provider must sell, remove, or abandon its *home wiring* for each unit within seven calendar days of the subscriber's oral or written notice of intent to use a different provider, or within seven calendar days of the actual service termination date if the subscriber has requested service termination more than seven calendar days in the future. The incumbent provider must notify the subscriber of the date on which service will be terminated if that date is prior to the expiration of the seven day period. The incumbent operator also must disconnect the wire from its lockbox, and leave it accessible for the new provider within 24 hours of the time it actually terminates service.

The MDU owner or alternative provider may act as the subscriber's agent in providing notice of a subscriber's desire to change services *if* the subscriber consents and *if* permitted by state law. The FCC clarified, however, that it is not creating any new right of MDU owners and MVPDs to act on behalf of subscribers in terminating service, and has been asked for further clarification in petitions for reconsideration.

The incumbent, alternative provider and MDU owner must all cooperate to avoid disruption in service to subscribers to the extent possible. As in the case of exclusive buildings, the best way to cooperate with the alternative provider and the building owner is to set a date and time when the service will be terminated, and give appropriate notice. Remember, in these buildings, there will be natural churn as residents trade one provider for the other, and sometimes back again. The service providers will need to establish a relationship that works for both.

If the subscriber declines to purchase the wire when given the option, the MDU owner may elect to purchase it, or the MDU owner may assign its right of purchase to the new competitor. The MDU owner is required to notify the incumbent provider of its decision one time for the entire MDU. This election will then be implemented each time a subscriber declines to purchase the inside wiring for that unit. If the MDU owner fails to provide the incumbent with such notice, the incumbent will be under no obligation to sell the home wiring to the MDU owner or the alternative provider when an individual subscriber terminates and declines to purchase the wiring.

b. Price Negotiation/Arbitration of Home Run Wiring In Competitive Buildings.

As with MDUs served by one entity, after the MDU owner provides notice to the incumbent cable operator that the status quo is changing, the FCC rules call for a 30 day period in which the parties must negotiate the price for home run wiring. The difference, however, is that the MDU owner may include the alternative provider in the negotiation and/or arbitration for home run wiring that it may eventually own.

If, after the 30 day negotiation period ends, the parties have not agreed on a price, the incumbent must choose to remove or abandon the home run wiring, or to submit the price to arbitration. As in exclusive buildings, if the parties fail to agree in seven days on an expert for arbitration, they have seven more days to each designate one expert, who in turn together select a third. The arbitration panel has only 14 days after selection to establish a reasonable price, so the operator should be prepared to introduce evidence, such as affidavits, supporting the reasonableness of its desired price. Once a per unit price is established, either through negotiation or arbitration, it applies to all of the units at the time they switch providers. If the incumbent provider misses any of the deadlines for arbitration, it is presumed to have abandoned its wiring. If the MDU owner refuses to participate in arbitration, the incumbent has no further obligations under the home run wiring procedures.

Clearly, the procedure in competitive MDUs is complicated by the participation of the alternative MVPD(s). In recognition of the cumbersome process, and the prohibitive transaction and record keeping costs, the FCC has acknowledged that the parties may negotiate and/or advocate in arbitration up-front lump sum payments in lieu of unit-by-unit payment for home run wiring. A lump-sum payment from the new service provider to the incumbent allows the parties to do away with these transaction costs, and focus on providing competitive service.

c. Molding.

The new rules allow competitors to install a second set of wires in existing molding or conduit occupied or owned by the incumbent, so long as the MDU owner agrees that there is adequate space for the added wire and permits the installation, and provided that the incumbent does not have a contractual right to occupy the molding exclusively. The rules do not provide for any compensation to be paid to the incumbent for this use.

Incumbents that have a contractual right to occupy the molding exclusively or without interference from the MDU owner need not permit an alternative provider to share the molding free of charge. Absent such a contractual right, the FCC claims that the incumbent has no property interest in the vacant space inside the molding.

In all cases where a new alternative provider uses existing molding, that provider must pay any installation costs, including the costs of restoring the property to its prior condition and the costs of any damage to the incumbent's wiring or other property.

4. Loop Through Wiring Is Now Subject to FCC Rules.

The initial rules of 1993 did not apply to MDU wiring constructed in a continuous loop ("loop-through wiring"). Because the new rules effectively promote landlord control of the entire MDU's service, the FCC has made the rules applicable even to loop-through wiring. As with non-loop wiring, however, the rules differentiate between that part of the wire inside the dwelling and that part in common areas. Disposition of the portion of wire within the dwelling unit will be governed by the rules for home wiring; the rest of the loop will be governed by the procedures for home *run* wiring.

In MDUs that have no coop, condominium, or other similar organization of divided ownership interests, the individual owners will have the right to purchase the portion of wire from the demarcation point into the apartment. In MDUs that are all rental units, the owner of the MDU will have the right to elect to switch service providers and the right to purchase the loop-through wiring. As with other MDUs, and as detailed in the discussion of cable home wiring below, if the resident declines to purchase the wiring inside the unit, the MDU owner may purchase it. If both the resident and the MDU owner decline to purchase the wiring, then the alternative provider may purchase it. Given that the loop cannot be severed, the practical effect of the rule is likely to be simply different pricing rules for that part of the loop outside the dwellings.

IV. Cable Home Wiring Rules.

The FCC's cable home wiring rules apply upon voluntary subscriber termination in single family homes and individual MDU residential units. Slightly different rules, explained below, apply to home wiring located inside the MDU residential unit when the MDU owner allows a second provider to compete in the building, and when the MDU owner terminates service for the entire MDU. As of this writing, the cable home wiring rules only apply to cable operators. However, as part of its *Second Further NPRM*, the FCC will consider whether to extend this requirement to all MVPDs.

A. Outside Plant Unaffected.

In both single family homes and MDUs, the only wiring that is subject to the FCC's home wiring rules is wiring that was installed by a cable operator or its contractor ***within*** the premises of the subscriber. Wiring is within the premises under the rules if it is on the customer side of the demarcation point. The rules exclude from coverage all "active" elements such as amplifiers, converter or decoder boxes, or remote control units. These may be removed by an operator at any time after termination of service and need not be offered for purchase by terminating subscribers under the rules.

B. Voluntary Termination Triggers Disposition.

The home wiring rules as applied to single family homes and individual MDU residential units come into play only after a subscriber voluntarily terminates cable service.[3] The subscriber has no right to acquire home wiring prior to termination of service and, similarly, if there is an "involuntary" termination (such as for non-payment or theft), the subscriber has no right to acquire the home wiring.[4]

C. What to Do When a Subscriber Calls to Terminate

The FCC's rules governing cable home wiring require that every operator be prepared to respond to customer termination calls immediately. When a customer calls, presumably every operator's CSRs are prepared to engage in some customer-retention dialogue with hopes of retaining that customer. When those efforts fail, however, the FCC has a strict set of guidelines that CSRs must follow, with implications for the operational and technical staff that must service the customer. To meet these obligations, CSRs must be trained to look for particular information in termination calls, and be prepared to provide specific cost information during the same calls. And there are different twists for termination calls from single family home customers and those in MDUs. The details are outlined in the flowchart attached in Appendix G.

---

[3] The disposition of home wiring inside MDUs when the MDU owner changes the status quo for the entire building is discussed below.

[4] Unless the subscriber already owns the home wiring, an operator is permitted to remove it when terminating service for non-payment or theft. Late payments or billing disputes are not to be considered "theft" under the rules.

1. Information During the Call

In the case of both single family homes and MDU residential units, a cable operator that owns and intends to remove home wiring upon termination of service must inform a subscriber of four things "during the initial contact"[5] in which the subscriber requests termination:

- That the operator owns the home wiring;
- That the operator intends to remove the home wiring upon termination of service;
- That the subscriber may purchase the home wiring; and
- The per-foot cost and total cost of the home wiring (see following section on compensation).

In order to provide this information, CSRs must have the data and know the Company's position ahead of time. Likewise, they must be provided with some estimate of the per-foot cost **and** total cost of the home wiring.

If the subscriber agrees to purchase the wiring, ownership transfers immediately, so that the subscriber may permit a competing service to use the wiring. If the right to purchase the wiring is declined, the procedures differ slightly for single family homes and MDU residential units.

In the case of both single family homes and MDU residential units, if the operator fails to provide the specified information, or otherwise fails to follow the required procedures, the operator is deemed to have relinquished its ownership interests in the home wiring immediately, and is not entitled to compensation for the home wiring, nor permitted to make any subsequent attempt to remove it or restrict its use. This strict rule makes it important in theory for each operator or system to assess whether it owns home wiring in single family homes and/or MDUs, to work up estimates of the per-foot and total length of plant (perhaps based on the size of the home, which some

[5] If the subscriber terminates services in writing, it is the cable operator's responsibility to contact the subscriber and inform the subscriber of this information.

customers will know), and the price. The replacement cost, however, may in many cases be nominal (*see* Section IV.F, Compensation, below), so that the cost of obtaining and maintaining this data, training CSRs to use it properly, and incorporating necessary procedures in operations, may in some cases outweigh the benefits of obtaining payment.

2. Removal of Home Wiring In Single Family Home

In the case of a single family home where the customer declines to purchase home wiring after receiving the necessary price information, the operator has seven *calendar* days from the date the customer gives its notice of termination in which to remove the wiring.[6] If the operator is not planning to remove the wiring, it will have already foregone any future claim of ownership for the home wiring. The operator should, of course, take any necessary steps to insure the integrity of its system upon termination of service to the customer.

3. Transfer of Home Wiring In MDU Residential Unit

For the most part, the rules for single family homes apply equally when a resident of an MDU calls to terminate service. The cable operator's CSR must inform the MDU resident that he or she may purchase the home wiring at replacement cost, and may not remove the home wiring until the subscriber declines to purchase it. However, if the subscriber declines to purchase the home wiring, the cable operator must then offer the home wiring to the MDU owner or alternative provider (if one exists). If every eligible entity declines to purchase the home wiring, the operator has seven *calendar* days from the date of termination in which to remove that wiring. This rule does not affect home run wiring in any way.

a. Treatment of Cable Home Wiring Inside MDU Residences Upon Termination of Service to Entire MDU Building

Apart from the typical scenario where an individual MDU resident terminates service, the

[6] Seven calendar days is the time limit under the October 1997 rules; the former rule allowed seven business days for removal.

FCC concluded that, if the MDU owner "has the legal right" by law or contract to terminate the service of individual residents, then the MDU owner is deemed to be the "subscriber," and is allowed to terminate service for all of the residents in the MDU. It is unclear the extent to which cable operators may police MDU owners' representations of agency. Presumably, however, where there is some doubt as to the MDU owner's agency, the MVPD may require proof from the MDU owner that it has the right to terminate service on behalf of its subscribers. The FCC declined to adopt procedures to guard against unauthorized changes in service, *i.e.*, slamming, but pledged to revisit the issue if necessary.

Where the MDU owner terminates service for all subscribers, the home run wiring rules, discussed in Section III are triggered, and would require notice from the MDU owner, followed by the operator's election to sell, remove or abandon the wire. The difference is that the operator is required to provide the MDU owner with a per-foot replacement cost for the entire MDU (not separate units), and would have 30 days (as opposed to seven under the rules for individual subscribers) to remove the wire if the owner declines to purchase the wiring.

b. Special Treatment of Home Wiring for Competitive MDUs Where Customer Terminates But Operator Has Reasonable Expectation of Service to Next Resident

During calls from customers that live in buildings where the MDU owner has authorized multiple video providers, CSRs have the added task of asking whether the resident is moving out or, if staying, switching to an alternative provider. If an individual MDU subscriber in a competitive building terminates service without indicating that it intends to switch to a new service provider, the home run wiring procedures do not apply. Where a tenant moves, and the incumbent "might have every reasonable expectation that the next tenant will request its service," the incumbent need not give up its wiring, which may be used to serve the new tenant. If the subscriber will remain in the dwelling, it appears that the operator must still meet the requirements of the home wiring rules, *i.e*, informational requirements and subsequent abandonment, sale or removal.

D. Home Wiring Rules Only Govern Wiring Owned by the Operator.

Where the home wiring is deemed to already belong to the subscriber, the cable operator may not demand compensation for the home wiring or remove the home wiring. Therefore, the FCC rules do not apply where:

- The operator has already transferred ownership to the subscriber by specific agreement. Such agreements may exist in MDUs or developments where the operator sold wiring to the builder or developer, for installation by the builder. Installation fees or portions of a subscriber's monthly bills paid to the operator, however, are not deemed payment for the subscriber's acquisition of the wiring.

- The operator historically treated the home wiring as belonging to the subscriber for tax purposes. The FCC offers an example of not paying personal property tax on the wiring in states where such taxes are applicable. However, the FCC does not profess to be an expert in the tax treatment of cable property and its conclusion should not be considered dispositive under state law.

- Where state law considers the wiring to be a fixture within that subscriber's jurisdiction (see discussion in Section III.A.3. above).

- Where the subscriber has installed the home wiring itself (see below).

These exceptions presumably reflect the FCC's assumptions about, and intention not to interfere with, the operation of state property and tax law. The range of fact scenarios, however, and variations in state laws, mean that there is often no black and white test for ownership apart from clear documentation.

E. Subscriber Installation of Home Wiring.

The FCC concluded in its October 1997 rules that cable subscribers, like telephone customers, have a right to install their own home wiring and to connect additional home wiring within their premises to the wiring installed and owned by the operator. However, subscribers may not cut, improperly terminate, substantially alter or otherwise destroy cable operator-owned wiring. As long as no electronic harm or interference is caused to the system, customers may connect any splitters, wiring, or other equipment to the home wiring. Cable operators may require that any home wiring installed by a subscriber meet reasonable technical specifications so as to protect the cable operators' systems from signal leakage, for which the cable operator remains ultimately responsible. Under the FCC's Cumulative Leakage Index Rules, a customer must be disconnected if leakage from home wiring violates the FCC's leakage standards.

F. Compensation for Home Wiring: Replacement Cost.

Underlying the Commission's rules for disposition of cable home wiring is a pricing limitation that, in many cases, limits the amount the operator may charge for wiring to less than the incremental cost of collecting the charge. Although the specific price the subscriber must pay to purchase home wiring is not set forth in any rule, the most that an operator may charge is the "replacement" cost of the wiring. The FCC rules state that replacement cost is to be based on the cost per foot of coaxial cable multiplied by the length in feet of the wiring. In rules adopted in 1993, the FCC explained that it expects operators to use a reasonable approximation of the length of the wire. It also expects that the charge will be based on costs of coaxial cable "in the community" and noted that in 1992, in Washington, D.C., this cost was $.06 per foot.

The rule also requires a cable operator to sell the customer any passive splitters located on the customer's side of the demarcation point. The price cable operators may charge for these splitters is limited to the replacement cost of the actual number of passive splitters, or a reasonable approximation of the actual number of splitters. The estimated cost for passive splitters must be provided to customers along with, or as part of, the cost of the home wiring supplied in the initial contact (*i.e.*, the operator may state a single price).

The rules do not prohibit, and would seem to encourage, a cable operator's sale to the customer of passive equipment and hardware (other than splitters) located on the customer's side of the demarcation point. Indeed, the Commission requires the operator to sell splitters because they "are a physically integral part of the home wiring," and are necessary to avoid disruption to service.

Connectors, barrels, wall plates and other passive equipment may also be included in the sale under this rationale, although the FCC recognized that "it would be too burdensome to require cable operators to be prepared to quote the replacement cost" during the initial call. With careful review of available data, however, operators may be able to calculate the replacement cost of such equipment based on reasonable approximations of the number and type of items located in the customer's unit. The replacement cost of a barrel and two connectors could add $1.50 or more to the price the customer pays for the wiring, depending on costs to the operator in the area. Depending on state and local law, cable operators may need to collect sales tax on the price of the home wiring (the FCC's rules are silent on this).

V. Putting It All Together: Hypothetical Situations

A. Hypothetical 1: MDU Terminates Service For Entire MDU; No Written Proof of Ownership or Written Service Agreement

Assume that you are the franchised operator serving an MDU built seven years ago. There is no contract with the building, and no written record of ownership of the wiring, but the MDU builder called you when the building was going up, and you installed all of the wiring at your own cost and have maintained it since installation. The MDU owner sends written notice that it intends to terminate service within 90 days and that it believes that it owns all of the wiring in the MDU.

Under the rules, the incumbent has at least 30 days in which to elect whether to remove, abandon or sell **home run wiring** that it owns. The operator should immediately respond to the MDU owner to assert that it owns the home run wiring, and will be proceeding under the FCC's rules, which allow 30 days for the operator to elect whether to sell, remove or abandon the wiring.

Due to the lack of a written contract, the operator must rely on state law to prove ownership of the wiring. Such state laws may take into consideration who maintained and paid taxes on the wiring. The operator should determine whether it is in a state that recognizes the trade fixture rule, which presumes that the wiring remains the property of the business entity that installed it.

The operator should also determine if the building is in a state with a statute that provides access to MDUs for video providers (chart, Appendix H). Even if the operator fails to establish its ownership of the home run wiring, if it has a right to serve the building independent of the wiring, the MDU owner will have greatly diminished incentives to fight for the wire. Other sources of a right to remain, such as the existence of easements, the power of condemnation, or the creation of an irrevocable license, should also be reviewed. If the operator believes it has an enforceable right to remain, as soon as possible, the operator will want to pursue an injunction in court enforcing its ownership of the wiring and it's right to remain on the premises.

If the operator proves that it owns the wiring and has not obtained an injunction by the thirtieth day, it must offer to sell to the MDU owner any **home wiring** (i.e., wiring inside each residential unit) and must provide the MDU owner with the total per foot replacement cost for such wiring . The MDU owner then has 30 days to inform operator whether it will purchase the home wiring. If it does, the transfer of ownership becomes effective on the ninetieth day or the date that service is terminated, whichever is earlier. If the MDU owner declines to purchase the home wiring, it may permit the alternative provider to purchase it. If neither the MDU owner or the alternative provider purchase the wiring, the incumbent must remove the home wiring by the ninetieth day.

Even if ownership of the wiring is established, the operator may conclude that it has no enforceable right to remain on the premises. In that case, it should direct its efforts at negotiating a fair price for the **home run wiring**. The rules allow the operator a second chance to elect to remove or abandon the home run wiring if no agreement on price is negotiated, so there is no real incentive to forego the negotiation. If, after 30 days of negotiation, the parties cannot agree on a price, the operator must either submit the price to binding arbitration, or elect to remove or abandon the wiring. At this point, the operator should be prepared with evidence to submit to arbitration, because the short time frame after the negotiation period allows at most two weeks to select arbitrators, who must set the price within another two weeks. The arbitrator must assess a reasonable price for the wiring by the end of the 90-day period. Or, if the operator elected to remove or abandon the wiring, either expressly or by default, it must do so by the end of the 90-day period.

B. Hypothetical 2: MDU Terminates Service For Entire MDU; Written Service Agreement and MDU Owner Concedes Cable Operator Owns Wiring

Let us make the same assumptions as in Hypothetical 1, except that in this example there is an exclusive service agreement with the MDU for 15 years that is silent as to the ownership of the wiring installed by the operator. The contract gives the operator a strong position in claiming an enforceable right to remain on the premises and the operator should seek an injunction as quickly as possible.

Even after the operator has asked for an injunction, however, it is obligated to continue following the FCC's process until an injunction is issued. Thus, if the court fails to issue an order before the 30th day after Notice of Termination, the FCC's rules require the operator to offer to sell the **home wiring** to the MDU owner. Until an injunction is obtained, the FCC's rules also require the operator to proceed with negotiation concerning the **home run wiring** (if that was elected) until the 60th day, and then to arbitration, removal, or abandonment.

If the MDU owner declines to purchase the wiring, it may permit the alternative provider to purchase both the home run and home wiring. If this happens, the cable operator must negotiate with the alternative provider for the sale price of such wiring as though it were the MDU owner.

C. Hypothetical 3: MDU Terminates Service for Whole Building Upon Expiration of Service Agreement; Operator Opts to Abandon Wiring

In this case, the operator and its predecessors have served the MDU with the same wiring for 30 years. The service agreement has expired and the MDU owner does not dispute that the cable operator owns the wiring. The cable operator decides that it does not have a strong argument supporting a right to remain, and the number of subscribers is not worth fighting over. The operator decides to abandon the wiring, including the passive splitters, but to remove the amplifiers and other active devices. The cable operator must notify the MDU owner within 60 days of notice of termination that it intends to abandon the wiring and passive elements but remove the amplifiers and other active devices. The operator must also notify the MDU owner if it intends to terminate service before the expiration of the 90 day period.

D. Hypothetical 4: MDU Opened to Competition; Non-Exclusive Agreement Specifying Cable Operator Owns Wiring

The Operator has been serving the MDU pursuant to a non-exclusive agreement for 5 years. The MDU Owner notifies the incumbent that it intends to open the MDU to competition in sixty days. The operator does not have a basis to seek an injunction to block competition. Given that the operator owns the wiring, the FCC's rules apply. The MDU owner has notified the operator that it wants to purchase the home run wiring if and when a subscriber switches to an alternative provider. It would also like to purchase the *home* wiring if and when a subscriber terminates service and does not elect itself to purchase the wiring.

With respect to the **home run wiring**, the operator has thirty days to notify the MDU owner in writing whether it will remove, sell or abandon the home run wiring whenever a subscriber switches to the competing provider. The election does not apply if the subscriber terminates service but does not switch to a competing provider. If the operator elects to remove or abandon the home run wiring, it must do so on the seventh calendar day after the subscriber terminates service. If it intends to terminate service prior to that date, it must so notify the subscriber or its agent. If the operator elects to sell the wiring, the operator and MDU owner have 30 days to negotiate a price. If price negotiations fail, the parties may submit the price to binding arbitration. If the MDU owner refuses to participate in binding arbitration, the operator's obligations under the FCC's rules cease and the operator may argue that no one else may use its wiring. If the operator misses any deadlines, it is deemed to have abandoned its wiring. Once a price is established for the wiring, the transfer of ownership becomes effective seven days after the date the subscriber notifies the operator that it intends to switch to a competing provider or on the actual date of service termination.

With respect to **home wiring**, the MDU owner must notify the operator whether the MDU owner or the alternative provider will purchase the home wiring in the event that the subscriber declines to purchase it upon termination of service. If the subscriber elects to purchase, then the FCC's home wiring rules apply. If the subscriber declines to purchase, the operator must sell the home wiring to the MDU owner or alternative provider, depending on the MDU owner's initial election, within 7 days of the subscriber's termination.

If the MDU owner seeks to terminate service on behalf of an individual subscriber, the operator should verify that it has the authority to act on behalf of the subscriber.

The MDU owner may elect instead to permit the alternative provider to install its own wires in the building, either in the molding occupied by the incumbent operator or in expanded molding. At this point, the operator will want to check whether its agreement states that it has an exclusive right to occupy the molding. If the operator does have an exclusive right, it should seek to exclude the alternative provider from using that molding, including through judicial process, if necessary.

E. Hypothetical 5: MDU Opened To Competition; Owner Declines To Purchase Home Run Wiring

Assuming the same fact pattern as in Hypothetical 4, instead of electing to purchase the home run wiring, the MDU owner notifies the incumbent that the alternative provider has permission to purchase the home run wiring. The alternative provider then must join with the incumbent in making an initial election as to the disposition of the home run wiring. If the incumbent elects to sell, the incumbent must negotiate with the alternative provider in advance as to the price of the home run wiring. Similarly, if the alternative provider elects to sell, it must negotiate up-front as to the price of the home run wiring. The initial price is then binding on all transfers, so that if a subscriber switches back and forth between providers, the price is already established. The providers may also negotiate an up-front lump sum payment in lieu of a unit by unit payment.

F. Hypothetical 6: MDU Resident Terminates Service

In this case, the operator has been providing service pursuant to an access agreement with the MDU owner which agreement has not yet expired. The MDU owner has not sought to terminate service or to open the building to competition. A subscriber calls and wishes to terminate service. The operator's CSR must inform the terminating subscriber that the cable operator owns the wiring and intends to remove it unless the subscriber wishes to purchase the wiring for a cost specified by the CSR (per-foot and total). If the subscriber opts to purchase the wiring, constructive ownership of the home wiring transfers to the subscriber immediately. If the subscriber declines to purchase, the operator is required to remove or abandon the wiring within 7 days of the subscriber's notice unless the MDU owner has provided reasonable advance notice that it intends to purchase home wiring where the subscriber declines. If the MDU owner has so notified the operator, the operator must offer to sell the home wiring to the MDU owner at the per foot replacement cost and constructive transfer of ownership becomes effective in seven calendar days. The cost of the home wiring is the replacement cost per foot multiplied by the number of feet on the subscriber's side of the demarcation point plus the cost of any passive splitters on the subscriber's side of the demarcation point.

G. Hypothetical 7: Single Family Home Resident Terminates Service

A subscriber calls and wishes to terminate service. The operator's CSR must inform the terminating subscriber that the cable operator owns the wiring and intends to remove it unless the subscriber wishes to purchase the wiring for a cost specified by the CSR (per-foot and total). If the subscriber declines to purchase, the operator is required to remove or abandon the wiring within 7 days of the subscriber's notice.

VI. Legality of the New Rules

There are very serious questions about the FCC's authority to adopt these rules. First, the FCC has no explicit statutory authority for regulating wiring in MDUs. Instead, it relied upon an extraordinarily expansive view of its authority to promote competition in ways that override the specific limitations Congress provided in Section 624 for the disposition of home wiring upon termination of service. Section 624 expressly applies only on termination — not before — and applies only "within the premises of such subscriber." The legislative history specified that the provision does not apply to the common area wiring outside the dwelling itself. Nor is the FCC's exercise of authority consistent with a provision of the 1996 Act that forbids LECS from using cable drops and MDU wiring without the concurrence of the cable operator, and even then only on a temporary, limited basis. Finally, the FCC's general authority under Title I does not provide sufficient authority, and has been found in the past not to authorize the FCC to preempt contract and property rights under State law. A notice was filed appealing these rules to the Eighth Circuit

Court of Appeals, but that proceeding will not be litigated until the Commission resolves the pending requests for reconsideration.

VII. Issues On Further Review

A. Continuation of Inside Wire Rule Making

Apart from the pending reconsideration requests, the FCC has issued a *Second Further Notice of Proposed Rulemaking*, asking for further comment on four issues.

1. Exclusive Service Contracts.

Perhaps most significantly, the FCC's *Second Further Notice of Proposed Rulemaking* proposed to cap the length of exclusive contracts for all MVPDs at a term that would allow the MVPD to recover its initial capital costs for serving that MDU. The FCC suggested a maximum term of seven years, unless the MVPD could demonstrate that it has not had a reasonable opportunity to recover its specific investment costs. The FCC put forth for comment whether it should cap not only future agreements, but existing agreements as well. It is also considering whether to allow MDU owners to terminate existing contracts with cable operators, perhaps upon some payment to the incumbent that would compensate for unrecovered investment. The FCC has also asked whether it should limit exclusive contracts only where the MVPD possesses market power, which many believe is just a code word for cable operators, and asked for comment on how to define market power for this purpose.

2. Application of Cable Home Wiring Rules to All MVPDs.

The FCC's *Second Further Notice of Proposed Rulemaking* also proposes an extension of the existing cable home wiring rules to all MVPDs.

3. Sharing of Home Run Wiring.

The FCC's *Second Further Notice of Proposed Rulemaking* also addresses the current technical and economic feasibility of simultaneous sharing of home run wiring, a proposal advocated by DirecTV.

4. Signal Leakage Reporting for Small Providers.

The FCC's *Further Notice* also seeks comment on whether small broadband service providers (all of whom are subject to the leakage rules under the new MDU ruling) should be exempt from filing signal leakage reports.

B. *ECI's* Petition

In a critical proceeding highly relevant to the FCC's efforts to promote the transfer of franchised cable market share to SMATVs, the FCC is considering a request for a declaration that the provision of video service in MDUs connected by leased Ameritech telco lines does **not** establish a "cable system" within the meaning of the Cable Act. At this writing, reports are that the FCC is leaning toward granting the petition. Such a ruling could open the door for SMATV providers to link MDU buildings with fiber lines installed in the public rights of way without subjecting the operator to local franchise obligations, including the 5% franchise fee commonly paid by cable operators.

VIII. Conclusion

The FCC has not been satisfied with its regulation of the disposition of cable inside wiring since Congress first directed the FCC to take up the issue in 1992. It views its efforts to divest cable operators of their broadband wiring inside homes and MDUs as a key element to promoting the success of DBS, SMATV, MMDS and other MVPD competitors, and has no apparent hesitation to empower MDU owners to prevent tenants from receiving franchised service and broadband advanced services. The steps the FCC has taken raise substantial questions as to its legal authority to divest cable operators of their property, to abrogate valuable contract rights, and to enact regulations that contradict clear statutory limits on its authority. The rules have already been appealed to the Eighth Circuit and are sure to lead to increased conflicts in competitive markets over the ownership of wiring and the enforceability of existing agreements. Given the outstanding questions and imminent battles, this practical guide must be viewed as a snapshot that outlines the rules at one point in time. Operators will need to check the accuracy of this information over time to assure that they understand their rights and obligations under the FCC's inside wiring rules. We will, of course, keep our clients informed as the regulatory and legal landscape governing cable wiring changes.

* * * * * * *

Appendix A:

Revised Cable Wiring Rules

APPENDIX A

Revised Cable Wiring Rules

Part 76 of title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.5 is amended by revising paragraph (mm)(2) to read as follows:

Sec. 76.5 Definitions.

* * * * *

(mm) * * *

(2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit.

(3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit.

(4) As used in this subsection, the term "physically inaccessible" describes a location that (i) would require significant modification of, or significant damage to, preexisting structural elements, and (ii) would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

Note to paragraph (mm)(4): For example, wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

3. Section 76.613 is amended by revising the heading and by revising paragraphs (b), (c), and (d) to read as follows:

Sec. 76.613 Interference from a multichannel video programming distributor ("MVPD").

* * * * *

(b) An MVPD that causes harmful interference shall promptly take appropriate measures to eliminate the harmful interference.

(c) If harmful interference to radio communications involving the safety of life and protection of property cannot be promptly eliminated by the application of suitable techniques, operation of the offending MVPD or appropriate elements thereof shall immediately be suspended upon notification by the District Director and/or Resident Agent of the Commission's local field office, and shall not be resumed until the interference has been eliminated to the satisfaction of the District Director and/or Resident Agent. When authorized by the District Director and/or Resident Agent, short test operations may be made during the period of suspended operation to check the efficacy of remedial measures.

(d) The MVPD may be required by the District Director and/or Resident Agent to prepare and submit a report regarding the cause(s) of the interference, corrective measures planned or taken, and the efficacy of the remedial measures.

4. Section 76.620 is added to read as follows:

Sec. 76.620 Non-cable multichannel video programming distributors ("MVPDs").

(a) Sections 76.605(a)(12), 76.610, 76.611, 76.612, 76.614, 76.615(b)(1-6), 76.616, and 76.617 shall apply to all non-cable MVPDs. However, non-cable MVPD systems that are substantially built as of January 1, 1998 shall not be subject to these sections until January 1, 2003. "Substantially built" shall be defined as having 75 percent of the distribution plant completed. As of January 1, 2003, Section 76.615(b)(7) shall apply to all non-cable MVPDs.

(b) To comply with Section 76.615(b)(2), a non-cable MVPD shall submit its Internal Revenue Service's Employer Identification (E.I.) number instead of an FCC identifier.

5. Subpart M is amended by revising the heading to read as follows:

Subpart M -- Cable Inside Wiring

6. Section 76.800 is added to read as follows:

Sec. 76.800 Definitions.

(a) *MDU.* A multiple dwelling unit building (*e.g.*, an apartment building, condominium building or cooperative).

(b) *MDU owner.* The entity that owns or controls the common areas of a multiple dwelling unit building.

(c) *MVPD.* A multichannel video programming distributor, as that term is defined in Section 602(13) of the Communications Act, 47 U.S.C. § 522(13).

(d) *Home run wiring.* The wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop.

7. Section 76.802 is amended by revising paragraphs (a) and (g), and adding paragraph (l) to read as follows:

Sec. 76.802 Disposition of cable home wiring.

(a) (1) Upon voluntary termination of cable service by a subscriber in a single unit installation, a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase the wiring at the replacement cost, and the subscriber declines. If the subscriber declines to purchase the cable home wiring, the cable system operator must then remove the cable home wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(2) Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: (i) it gives the subscriber the opportunity to purchase the wiring at the replacement cost; (ii) the subscriber declines, and (iii) neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines. If the cable system operator is entitled to remove the cable home wiring, it must then remove the wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(3) The cost of the cable home wiring is to be based on the replacement cost per foot of the wiring on the subscriber's side of the demarcation point multiplied by the length in feet of such wiring, and the replacement cost of any passive splitters located on the subscriber's side of the demarcation point.

* * * * *

66649.1

(g) If the cable operator adheres to the procedures described in paragraph (b) of this section, and the subscriber asks for more time to make a decision regarding whether to purchase the home wiring, the seven (7) day period described in paragraph (b) of this section will not begin running until the subscriber declines to purchase the wiring; ***

* * * * *

(l) The provisions of Section 76.802, except for Section 76.802(a)(1), shall apply to all MVPDs in the same manner that they apply to cable operators.

8. Section 76.804 is added to read as follows:

Sec. 76.804 Disposition of home run wiring.

(a) *Building-by-building disposition of home run wiring*: (1) Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days' written notice that its access to the entire building will be terminated to invoke the procedures in this section. The MVPD will then have 30 days to notify the MDU owner in writing of its election for all the home run wiring inside the MDU building: (i) to remove the wiring and restore the MDU building consistent with state law within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, whichever occurs first; (ii) to abandon and not disable the wiring at the end of the 90-day notice period; or (iii) to sell the wiring to the MDU building owner. If the incumbent provider elects to remove or abandon the wiring, and it intends to terminate service before the end of the 90-day notice period, the incumbent provider shall notify the MDU owner at the time of this election of the date on which it intends to terminate service. If the incumbent provider elects to remove its wiring and restore the building consistent with state law, it must do so within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, which ever occurs first. For purposes of abandonment, passive devices, including splitters, shall be considered part of the home run wiring. The incumbent provider that has elected to abandon its home run wiring may remove its amplifliers or other active devices used in the wiring if an equivalent replacement can easily be reattached. In addition, an incumbent provider removing any active elements shall comply with the notice requirements and other rules regarding the removal of home run wiring. If the MDU owner declines to purchase the home run wiring, the MDUowner may permit an alternative provider that has been authorized to provide service to the MDU to negotiate to purchase the wiring.

(2) If the incumbent provider elects to sell the home run wiring under paragraph (a)(1), the incumbent and the MDU owner or alternative provider shall have 30 days from the date of election to negotiate a price. If the parties are unable to agree on a price within that 30-day time period, the incumbent must elect: (i) to abandon without disabling the wiring; (ii) to remove the wiring and restore the MDU consistent with state law; or (iii) to submit the price determination to binding arbitration by an independent expert. If the incumbent provider chooses to abandon or remove its

wiring, it must notify the MDU owner at the time of this election if and when it intends to terminate service before the end of the 90-day notice period. If the incumbent service provider elects to abandon its wiring at this point, the abandonment shall become effective at the end of the 90-day notice period or upon service termination, whichever occurs first. If the incumbent elects at this point to remove its wiring and restore the building consistent with state law, it must do so within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, which ever occurs first.

(3) If the incumbent elects to submit to binding arbitration, the parties shall have seven days to agree on an independent expert or to each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen will be required to assess a reasonable price for the home run wiring by the end of the 90-day notice period. If the incumbent elects to submit the matter to binding arbitration and the MDU owner (or the alternative provider) refuses to participate, the incumbent shall have no further obligations under the Commission's home run wiring disposition procedures. If the incumbent fails to comply with any of the deadlines established herein, it shall be deemed to have elected to abandon its home run wiring at the end of the 90-day notice period.

(4) The MDU owner shall be permitted to exercise the rights of individual subscribers under this subsection for purposes of the disposition of the cable home wiring under Section 76.802. When an MDU owner notifies an incumbent provider under this section that the incumbent provider's access to the entire building will be terminated and that the MDU owner seeks to use the home run wiring for another service, the incumbent provider shall, in accordance with our current home wiring rules: (1) offer to sell to the MDU owner any home wiring within the individual dwelling units that the incumbent provider owns and intends to remove; and (2) provide the MDU owner with the total per-foot replacement cost of such home wiring. This information must be provided to the MDU owner within 30 days of the initial notice that the incumbent's access to the building will be terminated. If the MDU owner declines to purchase the cable home wiring, the MDU owner may allow the alternative provider to purchase the home wiring upon service termination under the terms and conditions of Section 76.802. If the MDU owner or the alternative provider elects to purchase the home wiring under these rules, it must so notify the incumbent MVPD provider not later than 30 days before the incumbent's termination of access to the building will become effective. If the MDU owner and the alternative provider fail to elect to purchase the home wiring, the incumbent provider must then remove the cable home wiring, under normal operating conditions, within 30 days of actual service termination, or make no subsequent attempt to remove it or to restrict its use.

(5) The parties shall cooperate to avoid disruption in service to subscribers to the extent possible.

(b) *Unit-by-unit disposition of home run wiring*: (1) Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to maintain any particular home run wire dedicated to a particular unit on the

66649.1

premises against the MDU owner's wishes, the MDU owner may permit multiple MVPDs to compete for the right to use the individual home run wires dedicated to each unit in the MDU. The MDU owner must provide at least 60 days' written notice to the incumbent MVPD of the MDU owner's intention to invoke this procedure. The incumbent MVPD will then have 30 days to provide a single written election to the MDU owner as to whether, for each and every one of its home run wires dedicated to a subscriber who chooses an alternative provider's service, the incumbent MVPD will: (i) remove the wiring and restore the MDU building consistent with state law; (ii) abandon the wiring without disabling it; or (iii) sell the wiring to the MDU owner. If the MDU owner refuses to purchase the home run wiring, the MDU owner may permit the alternative provider to purchase it. If the alternative provider is permitted to purchase the wiring, it will be required to make a similar election within this 30-day period for each home run wire solely dedicated to a subscriber who switches back from the alternative provider to the incumbent MVPD.

(2) If the incumbent provider elects to sell the home run wiring under paragraph (b)(1), the incumbent and the MDU owner or alternative provider shall have 30 days from the date of election to negotiate a price. During this 30-day negotiation period, the parties may arrange for an up-front lump sum payment in lieu of a unit-by-unit payment. If the parties are unable to agree on a price during this 30-day time period, the incumbent must elect: (i) to abandon without disabling the wiring; (ii) to remove the wiring and restore the MDU consistent with state law; or (iii) to submit the price determination to binding arbitration by an independent expert. If the incumbent elects to submit to binding arbitration, the parties shall have seven days to agree on an independent expert or to each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen will be required to assess a reasonable price for the home run wiring within 14 days. If subscribers wish to switch service providers after the expiration of the 60-day notice period but before the expert issues its price determination, the procedures set forth in paragraph (b)(3) shall be followed, subject to the price established by the arbitrator. If the incumbent elects to submit the matter to binding arbitration and the MDU owner (or the alternative provider) refuses to participate, the incumbent shall have no further obligations under the Commission's home run wiring disposition procedures.

(3) When an MVPD that is currently providing service to a subscriber is notified either orally or in writing that that subscriber wishes to terminate service and that another service provider intends to use the existing home run wire to provide service to that particular subscriber, a provider that has elected to remove its home run wiring pursuant to paragraph (b)(1) or (b)(2) will have seven days to remove its home run wiring and restore the building consistent with state law. If the subscriber has requested service termination more than seven days in the future, the seven-day removal period shall begin on the date of actual service termination (and, in any event, shall end no later than seven days after the requested date of termination). If the provider has elected to abandon or sell the wiring pursuant to paragraph (b)(1) or (b)(2), the abandonment or sale will become effective upon actual service termination or upon the requested date of termination, whichever occurs first. For purposes of abandonment, passive devices, including splitters, shall be considered part of the home run wiring. The incumbent provider may remove its amplifliers or other active devices used in the wiring if an equivalent replacement can easily be reattached. In addition, an

incumbent provider removing any active elements shall comply with the notice requirements and other rules regarding the removal of home run wiring. If the incumbent provider intends to terminate service prior to the end of the seven-day period, the incumbent shall inform the party requesting service termination, at the time of such request, of the date on which service will be terminated. The incumbent provider shall make the home run wiring accessible to the alternative provider within twenty-four (24) hours of actual service termination.

(4) If the incumbent provider fails to comply with any of the deadlines established herein, the home run wiring shall be considered abandoned, and the incumbent may not prevent the alternative provider from using the home run wiring immediately to provide service. The alternative provider or the MDU owner may act as the subscriber's agent in providing notice of a subscriber's desire to change services, consistent with state law. If a subscriber's service is terminated without notification that another service provider intends to use the existing home run wiring to provide service to that particular subscriber, the incumbent provider will not be required to carry out its election to sell, remove or abandon the home run wiring; the incumbent provider will be required to carry out its election, however, if and when it receives notice that a subscriber wishes to use the home run wiring to receive an alternative service. Section 76.802 of the Commission's rules regarding the disposition of cable home wiring will apply where a subscriber's service is terminated without notifying the incumbent provider that the subscriber wishes to use the home run wiring to receive an alternative service.

(5) The parties shall cooperate to avoid disruption in service to subscribers to the extent possible.

(6) Section 76.802 of the Commission's rules regarding the disposition of cable home wiring will continue to apply to the wiring on the subscriber's side of the cable demarcation point.

(c) The procedures set forth in paragraphs (a) and (b) shall apply unless and until the incumbent provider obtains a court ruling or an injunction within forty-five (45) days following the initial notice enjoining its displacement.

(d) After the effective date of this rule, MVPDs shall include a provision in all service contracts entered into with MDU owners setting forth the disposition of any home run wiring in the MDU upon the termination of the contract.

(e) Incumbents are prohibited from using any ownership interest they may have in property located on or near the home run wiring, such as molding or conduit, to prevent, impede, or in any way interfere with, the ability of an alternative MVPD to use the home run wiring pursuant to this section.

(f) Section 76.804 shall apply to all MVPDs.

9. Section 76.805 is added to read as follows:

Sec. 76.805 Access to molding.

(a) An MVPD shall be permitted to install one or more home run wires within the existing molding of an MDU where the MDU owner finds that there is sufficient space to permit the installation of the additional wiring without interfering with the ability of an existing MVPD to provide service, and gives its affirmative consent to such installation. This paragraph shall not apply where the incumbent provider has an exclusive contractual right to occupy the molding.

(b) If an MDU owner finds that there is insufficient space in existing molding to permit the installation of the new wiring without interfering with the ability of an existing MVPD to provide service, but gives its affirmative consent to the installation of larger molding and additional wiring, the MDU owner (with or without the assistance of the incumbent and/or the alternative provider) shall be permitted to remove the existing molding, return such molding to the incumbent, if appropriate, and install additional wiring and larger molding in order to contain the additional wiring. This paragraph shall not apply where the incumbent provider possesses a contractual right to maintain its molding on the premises without alteration by the MDU owner.

(c) The alternative provider shall be required to pay any and all installation costs associated with the implementation of paragraphs (a) or (b), including the costs of restoring the MDU owner's property to its original condition, and the costs of repairing any damage to the incumbent provider's wiring or other property.

10. Section 76.806 is added to read as follows:

Sec. 76.806 Pre-termination access to cable home wiring.

(a) Prior to termination of service, a customer may: (1) install or provide for the installation of their own cable home wiring; or (2) connect additional home wiring, splitters or other equipment within their premises to the wiring owned by the cable operator, so long as no electronic or physical harm is caused to the cable system and the physical integrity of the cable operator's wiring remains intact.

(b) Cable operators may require that home wiring (including passive splitters, connectors and other equipment used in the installation of home wiring) meets reasonable technical specifications, not to exceed the technical specifications of such equipment installed by the cable operator; provided however, that if electronic or physical harm is caused to the cable system, the cable operator may impose additional technical specifications to eliminate such harm. To the extent a customer's installations or rearrangements of wiring degrade the signal quality of or interfere with other customers' signals, or cause electronic or physical harm to the cable system, the cable operator may discontinue service to that subscriber until the degradation or interference is resolved.

(c) Customers shall not physically cut, substantially alter, improperly terminate or otherwise destroy cable operator-owned home wiring.

Appendix B:

Checklist, Action Items and Forms

FCC INSIDE WIRING RULES
CHECKLIST OF POTENTIAL ISSUES, ACTION ITEMS AND FORMS

This list is provided as a guide to cable operators that are attempting to implement the FCC's cable inside wiring/home run wiring rules. It outlines generally the steps that must be taken before a cable operator can successfully meet its obligation under the new and revised FCC rules. Much of the detail on how to properly understand and accomplish these tasks is contained in the *Practical Guide*, although it is impossible to anticipate ahead of time all of the issues that will arise in implementing the rules.

General

- Identify MSO/regional/system level personnel to understand inside wiring rules and to implement the corporate response.
- Review types of MDU properties served and assess known areas of existing or likely competition.
- Identify relevant access to MDU laws for your markets.
- Audit MDU agreements and easements for "enforceable right" to remain on MDU premises, provisions governing ownership and/or transfer of ownership of wiring. Consider review of state law of fixtures and licenses.
- Work up replacement cost of cable home wiring in single family home and MDU residence, including passive splitters and other passive electronics that are integral to the service on the customer's side of the demarcation point.
- Work up replacement cost of home run wiring, including any passives.
- If arbitration of MDU home run wiring replacement cost is likely (as it is for most operators), identify expert and consider advance drafting of declarations/affidavits that establish reasonableness of replacement cost sought by the operator.
- Identify and decide whether to negotiate sale of riser cables, molding, conduit.

FCC INSIDE WIRING RULES
CHECKLIST OF POTENTIAL ISSUES, ACTION ITEMS AND FORMS

- Outline a plan for responding to calls from MDU owners and tenants seeking to terminate service, *e.g.*, for what types or categories of properties will you be willing to seek injunction enforcing right to remain on the premises; where you are willing to seek an injunction, identify counsel to assist in litigation.

CSR Information

- Develop CSR talking points for calls from both tenants and MDU owners; expect MDU owners to give notice of entire building termination in writing, perhaps by fax. CSR's may transfer MDU owners that call to manager for assistance.

- Create script for CSRs when tenants call to terminate service within their individual dwelling units. Script should include questions to determine whether tenant is switching to an alternative service provider. If tenant is not switching, for example, tenant is moving or no longer wants cable service, the rules governing disposition of the home run wire (i.e., outside the dwelling unit) do not apply. Script should also inform subscriber that cable operator owns the home wiring within the dwelling unit and intends to remove it upon termination of service unless the subscriber wishes to purchase the home wiring. The CSR should then provide the customer with the per foot and total cost of the home wiring.

- Give CSRs replacement cost of wiring; method of determining cost during call by asking questions as to type of dwelling, number of rooms, square footage, or other factors that were used to work up replacement cost estimates.

- CSR must be ready to provide customer with price per foot of wiring (may include passives) and total replacement cost.

Home Run Wiring

- Develop form letters that implement your strategy in responding to different types of notices from MDU owners (a list of potential forms is outlined below).

- If telephony/internet services are provided, make sure that any responses do not adversely affect these ancillary businesses or, where appropriate, include these ancillary services. Also, make sure any revenue sharing arrangements are limited to cable service revenues.

- Revise form contracts with MDU owners to address: disposition of wiring upon termination of contract (contract provisions preempt FCC rules); exclusivity, and what happens if exclusivity is deemed unlawful by FCC or court; and the duration of the agreement, and what happens if FCC limits permissible duration.

Cable Operator Written Responses and Forms for MDU Communications

Once each operator has decided how generally to respond to MDU efforts to replace the operator's service, each operator that has a sizeable MDU customer base will likely want to develop some written form responses to be used in implementing the FCC's rules. Following is a list of the types of correspondence anticipated in the rules.

I. RESPONSES TO MDU NOTICE OF TERMINATION

A. Responses To MDU Owner

1. Immediate Response to MDU Owner

a. Operator asserts right to remain based on contract

b. Operator asserts right to remain based on ruling from highest state court construing access to premises law

c. Operator asserts right to remain based on state law

d. Operator concedes no right to remain; elects disposition of wiring

2. Letter to MDU Owner: Going to Court

3. 30 Day Response To MDU Owner Electing To Remove, Abandon or Sell Wiring

B. Notice to Competing Provider

1. If Competing Provider asserts rights based on MDU owner assignment of owner's rights, Operator demands proof

2. Operator asserts right and intent to remain based on state law without ruling from highest state court

3. Operator asserts right and intent to remain with ruling from highest state court

II. RESPONSES TO NOTICE OF HEAD TO HEAD COMPETITION

A. Responses to MDU Owner

1. Immediate response asserting right to be exclusive provider

2. Immediate response to MDU Owner where no exclusive right that it intends to proceed under FCC's rules

3. 30 day response to MDU Owner electing disposition of wiring

4. Letter to MDU Owner - going to court

B. Notice to Competing MVPD

1. Asserting exclusive right to serve property

2. No exclusive right: asserting ownership of wiring

3. Taking competing MVPD to court

C. Response to Subscriber Termination Notice

D. Response to "Agent" Termination of Subscriber

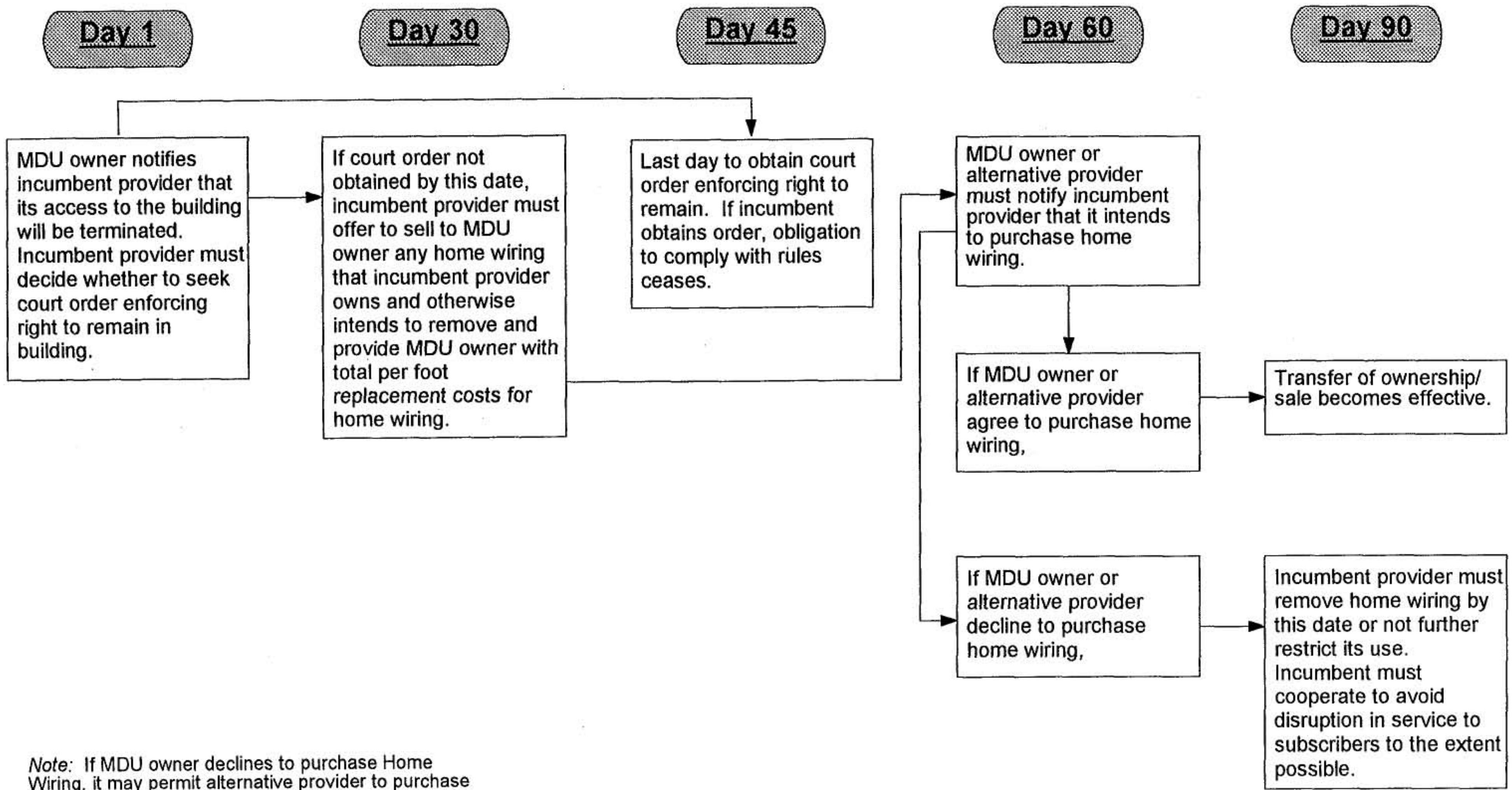
1. Requesting proof of agency

2. Acknowledging proof of agency and expressing intent to comply

Appendix C:

MDU Access Terminated:
Disposition of Home Wiring in Common Areas

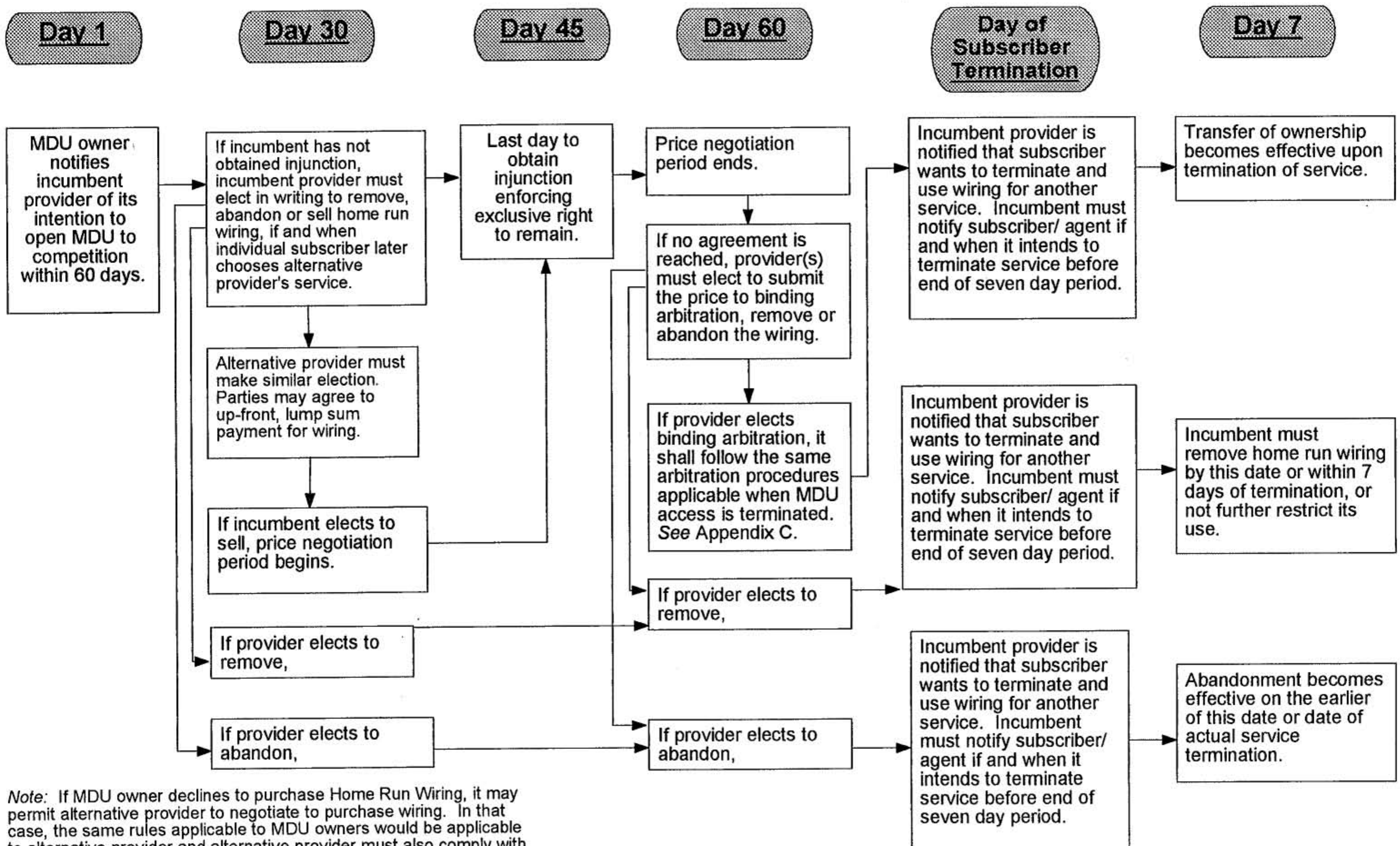
MDU Access Terminated: Disposition of Home Wiring in Individual Dwelling Units



Note: If MDU owner declines to purchase Home Wiring, it may permit alternative provider to purchase it. In that case, the same *rules* applicable to MDU owner would be applicable to alternative provider.

I:\DATA\USER\NRICE\PDQFILES\HOMEWRNG

MDU Opened to Competition: Disposition of Home Run Wiring in Common Areas



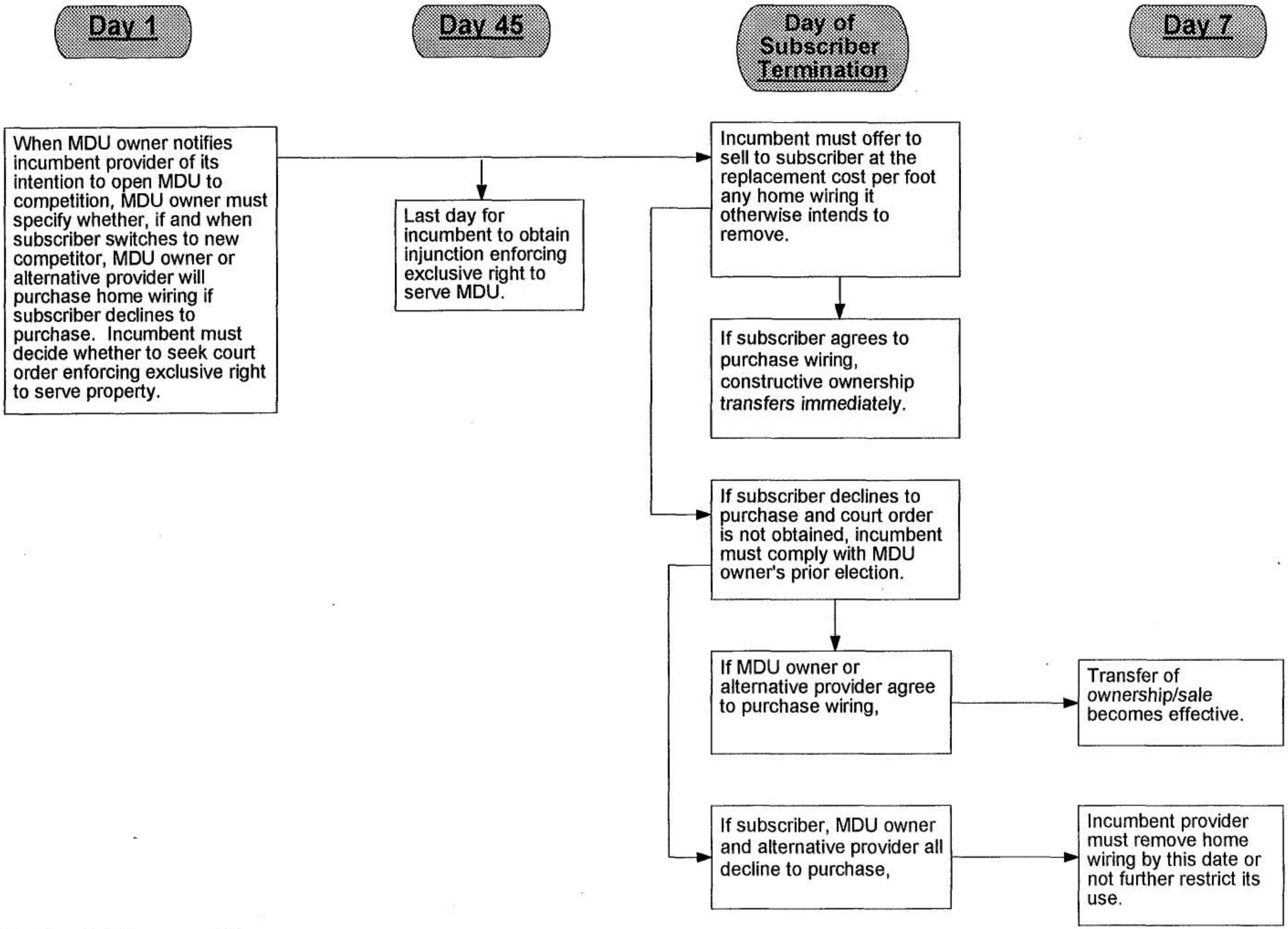
Note: If MDU owner declines to purchase Home Run Wiring, it may permit alternative provider to negotiate to purchase wiring. In that case, the same rules applicable to MDU owners would be applicable to alternative provider and alternative provider must also comply with disposition procedures applicable to MVPDs.

C:\PDQ16\WORK\HOMERUN.PDQ

Appendix F:

MDU Opened to Competition: Disposition of Home Wiring in Individual Dwelling Units

MDU Opened to Competition: Disposition of Home Wiring in Individual Dwelling Units

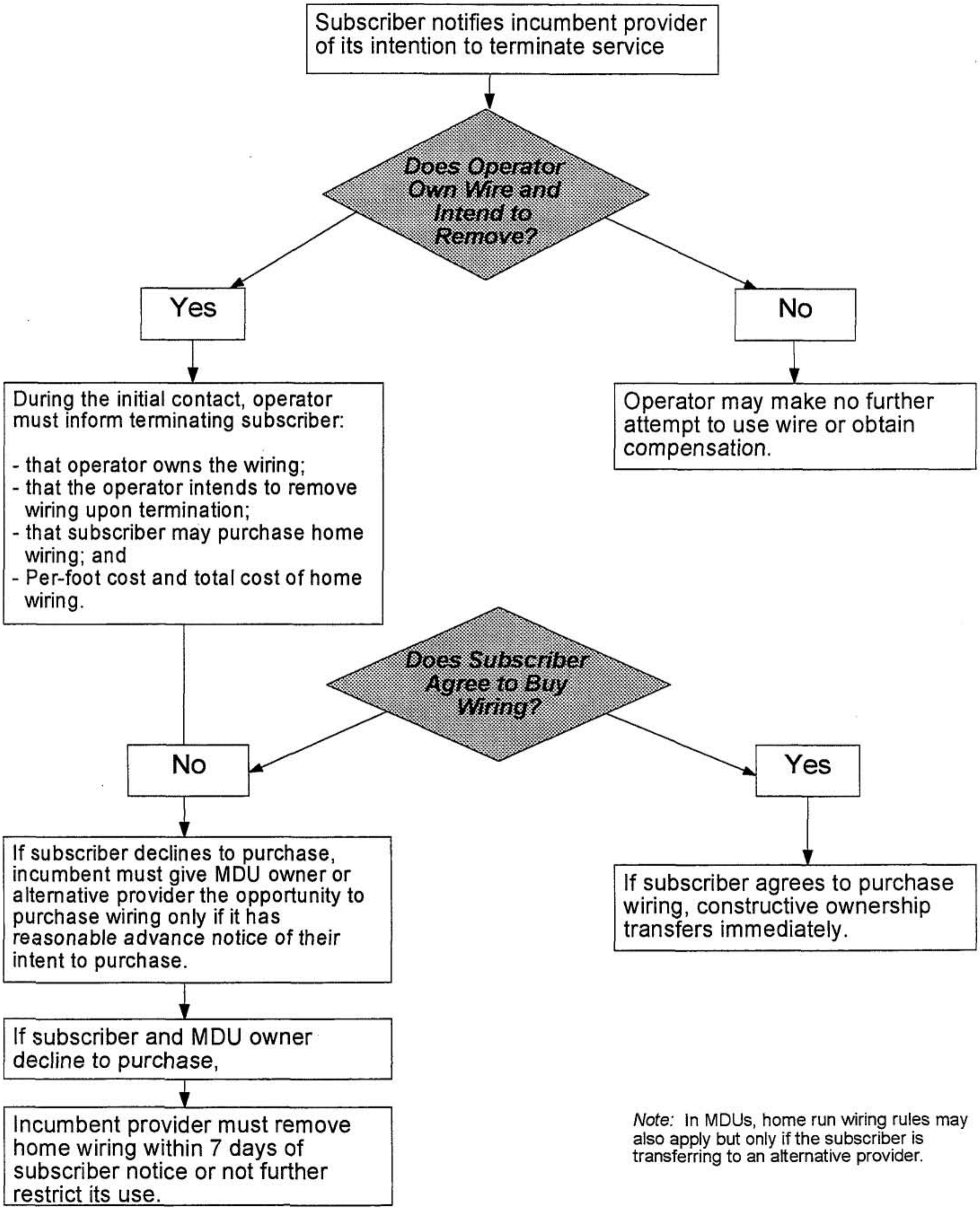


I:\DATA\USER\NRICE\PDQFILES\UNITHMWR.PDQ

Appendix G:

Subscriber Termination: Disposition of Home Wiring in Individual Dwelling Areas

Subscriber Termination: Disposition of Home Wiring in Individual Dwelling Areas



Appendix H:

Table of State Access Laws

SUMMARY OF STATE STATUTES
CONCERNING CABLE TELEVISION ACCESS TO PREMISES

I. STATUTES GRANTING ACCESS TO PREMISES

CONNECTICUT

Right of entry
Conn. Gen. Stat. § 16-333a(b)
MDU owner must permit wiring to provide cable service, provided that: tenant requests it; operator bears entire cost; owner is indemnified; and operator complies with all rules of DPUC pertaining to such wiring.

Conn. Gen. Stat. § 16-333a(f)
Operator can install prior to determination of reasonable compensation.

DELAWARE

Right of Entry
26 Del. C. § 613. Acquisition by Franchisees of Easements
Franchisee has a right to acquire an easement "in or on public lands or waterways" wherever there are facilities of a public utility, provided franchisee's facilities "can be installed in the same manner, above or below ground, as the public utility facilities already on or in the property." Provides for just compensation.

DISTRICT OF COLUMBIA

Right of Entry
D.C. Code §43-1844.1(a)(1). Landlord Tenant Relationship
Landlord may not interfere with installation of cable television facilities, except for requiring that the operator meet safety and other requirements.

ILLINOIS

Right of Entry
65 I.L.C.S. 5/11-42-11.1, Right to Receive Cable Television Service.

In any instance in which a city has granted a franchise to a cable company, no property owner or any other person in control of a residential building within the franchise area shall forbid any occupant from receiving cable service from the franchisee. Tenant must request service. If more than 3 tenants request, operator may install throughout the building. Provisions for just compensation.

765 I.L.C.S. 605/14.3. Granting of easement for laying of cable television cable. Empowers condominium board, at discretion of majority, to grant an easement on condominium property.

55 I.L.C.S. 5/5-1096. Community antenna television systems; interference with and payment for access.

Where county has granted franchise to any community antenna television company within a designated service area, no property owner, condominium association, managing agent, lessee or other person in possession or control of any residential building located within such designated franchise area shall forbid or prevent any occupant, tenant, or lessee from receiving cable television service.

KANSAS

Right of Entry
K.S.A. § 58-2553(a)(5)

Landlord must provide certain services, electrical, plumbing, etc. "The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality."

MAINE

Right of Entry
Maine Rev. Stats., Chapter 710-B. Cable Television Installation
14 M.R.S. § 6041, Installation; consent of building owner required.

Tenant may subscribe to cable service. Operator must have owner's written consent to "affix cable television system facilities to a tenant's dwelling." If agreement cannot be reached over compensation, judicial appeal procedure is available. Appeal procedure does not delay operator's right "to install . . . cable . . . facilities at a tenant's dwelling on the real estate." Operator may not diminish or interfere with tenant's right to use a master or individual antenna system.

MASSACHUSETTS

Right of Entry
Mass. Ann. Laws Ch. 166A. Community Antenna Television Systems.
§ 22. Right to use Individual Antenna; Installation; Consent; Operator's Agreement; Discrimination between Subscribers and Non-Subscribers Prohibited.

Section provides that owner may not prohibit operator from entering buildings to construct, install or service cable facilities if one or more tenants have requested such services. Owner whose property is damaged or diminished in value may obtain compensation pursuant to chapter 79. May not diminish or interfere with tenant's right to use antenna or master antenna.

MINNESOTA

Right of Entry
Minn. Stat. § 238.22 et seq.

Property owner must provide access. Intent is to allow residents freedom to choose among competing cable communications services. Property owner must provide operator access only if the operator "installs equipment with channel capacity sufficient to provide access to other providers of television programming or cable communications services." If another provider uses the operator's facilities, the operator gets reimbursed. Provided operator meets these conditions, right of access can be judicially enforced.

NEVADA

Right of Entry
Nev. Rev. Stat. § 711.255. Service to tenants.

A landlord shall not interfere with the receipt of community antenna television company service or accept payment in exchange for granting access.

NEW JERSEY

Right of Entry
N.J. Stat. § 48:5A-49. Landlords allowing cable television service reception by tenants; prohibition of charges and fees; indemnification of owners by installers; definitions.

Owner must allow tenant to receive cable service. May not demand compensation. May not discriminate in rental charges. May impose reasonable conditions. Operator must indemnify for any damage.

NEW YORK

Right of Entry
NY CLS Exec. § 828

No landlord shall interfere with installation of cable facilities upon his property. No cable television company may enter into any agreement that diminishes or interferes with existing rights of any tenant to use MATV or individual antenna equipment.

NY CLS Pub Ser § 228
No landlord shall interfere with the installation of cable television facilities upon his property or premises. Section contains makeready and repair requirements.

OHIO

Right of Entry
Ohio Rev. Code Ann. § 4931.04 -- Eminent Domain.

Gives power of eminent domain to "telegraph company" to "appropriate . . . land . . . as it deems necessary for the construction and maintenance of its telegraph poles, cables, conduits, piers, abutments, wires and other necessary fixtures, stations, and the right of way in, through, over, across and under such lands and adjacent lands, sufficient to enable it to construct and repair its lines." "Communications business" defined to include a provider of cable television services. *See* Ohio Rev. Code Ann. § 4931.11; *Cablevision of the Midwest, Inc. v. Gross,* 70 Ohio St. 3d 541, 639 N.E.2d 1154 (1994)(cable company is "communications business" within meaning of eminent domain statutes). *See also Metropolitan Cablevision, Inc. v. Cox Cable Cleveland Area,* 604 N.E.2d 765 (Ohio App. 1992)(inside wiring is a fixture).

PENNSYLVANIA
Title 68. Real and Personal Property
Chapter 8. Landlord and Tenant
Article V-B. Tenants' Rights to Cable Television
68 P.S. § 250.501-B *et seq.*

Right of Entry.

§250.503-B: Tenant has right to request and receive service, provided there is an agreement between operator and landlord.

§250.504-B: Cable operator and landlord must negotiate. If they cannot reach an agreement, §250.506-B applies.

§250.506-B. If landlord and operator do not reach agreement, the operator may invoke arbitration, and either party can appeal from the decision of the arbitrator. During pendency of the appeal, the operator has no right of entry.

§250.510-B Services being provided on effective date of the act may not be prohibited so long as tenant continues to request such services.

RHODE ISLAND

Right of Entry
R. I. Gen. Laws § 39-19-10. Installation of cable television in multiple dwelling units.

Tenant may subscribe to cable service. CATV operator's consent is required, if operator agrees to abide by terms of this section. If owner intends to require payment of any sum in excess of a nominal amount, owner may demand, and if agreement is not reached, judicial procedure to determine amount is provided for.

VIRGIN ISLANDS

Right of Entry
30 V.I.C. § 317.

No owner of any dwelling or private housing development or subdivision or his agent shall forbid or prevent any tenant or resident from receiving cable television service.

WISCONSIN

Right of Entry
Wis. Stat. § 66.085. Access to Cable Service.

Owner of an MDU or association or board of directors of a condominium may not prevent a cable operator from providing cable service to a subscriber who is a resident. Before installation, operator must consult with owner to establish points of attachment and methods of wiring.

II. RELATED STATUTES

CALIFORNIA

Cal Gov Code § 66473.3

City or county may by ordinance require subdivision to provide one or more cable television systems an opportunity to construct, install and maintain any equipment necessary to extend cable television service to each residential parcel in the subdivision.

FLORIDA

Right of Entry
Fla. Stat. § 83.66.
Gives right of entry to apartments and landlord-owned MDUs, but has been held unconstitutional.

Fla. Stat. § 177.091(29), Plats Made For Recording.

All platted utility easements shall also be easements for cable television. Allows access to subdivision.

Fla. Stat. § 718.1232. Cable Television Service; Resident's Right to Access Without Extra Charge.

Resident of condo, whether tenant or owner, cannot be denied access to any "available franchised or licensed cable television service."

Provision in landlord tenant code (Fla. Stat. § 83.66) was held unconstitutional.

Fla. Stat. § 704.01(2). Common-law and statutory easements defined and determined.
A statutory way of necessity exists for land or any portion thereof used or desired to be used for a dwelling or dwellings if said land shall be shut off or hemmed in by lands. The owner or tenant of the land-locked land lawfully may use and maintain and easement for franchised cable television service, over, under, through, and upon the lands surrounding the land-locked land using the nearest practical route.

IOWA

Iowa Code § 477.1 provides that "[a]ny person . . . may construct a . . . cable system along the public roads of the state, or across or under the rivers, or over, under, or through any lands belonging to the state or any private individual, and may erect or install necessary fixtures."

MICHIGAN

Case Law
A community antenna television system is a "public utility" within the meaning of the Subdivision Control Act and is therefore entitled to use of an easement which is reserved for public utility access upon a private residential lot. *White v. City of Ann Arbor*, 406 Mich. 554 (1977), *aff'd in part, rev'd in part* 80 Mich. App 346 (1979).

SOUTH CAROLINA

Case law
Residential subdivision developer may not grant exclusive contract to provider of cable television where developer has dedicated streets for maintenance and granted electric and telephone easements. *Timberlake Plantation Co. v. County of Lexington*, 415 SE2d 824 (1992, SC App).

UTAH

Right of Entry
Utah Code Ann. § 54-4-13. Joint use of properties by utilities -- Adjustment of costs -- Cable television easement rights.

Provides for the apportionability of the utility easement for the benefit of cable operators.

VERMONT

30 V.S.A. § 110 provides that "companies, as defined in sections 201 and 501 of this title, which are within the scope of sections 203 and 501 of this title, shall have the same power of condemnation and be subject to the same procedure as hereinafter provided for condemnation by corporations subject to the jurisdiction of the public service board." The procedure involves petitioning to the public service board and explaining why the acquisition is necessary.

VIRGINIA

Va. Code Ann. § 55-248.13:2

Landlord may not accept payment from provider of cable service or SMATV, DBS, STS, or other such service, in exchange for giving tenants access to such service.

WEST VIRGINIA

W. Va. Code § 5-18-12.
Right of access to easements similar to right under federal law.

W. Va. Code § 5-18A-7
A cable operator has a right of access, upon request of tenant or landlord, to conduct a survey or other investigation preparatory to the installation of cable television facilities.

W. Va. Code §5-18A-8
After notice to a landlord and processing by a board of public works, said board shall grant to a petitioning cable operator an order of entry.

COLE, RAYWID & BRAVERMAN, L.L.P.