

competitive entry into the MDU marketplace.

21. We conclude that cable wiring behind sheet rock is "physically inaccessible" as that term is used in 47 CFR 76.5(mm)(4) of the Commission's rules. As stated, our rule defines "physically inaccessible" as "require[ing] significant modification of, or significant damage to, preexisting structural elements." We believe that the term "structural elements" encompasses sheet rock, otherwise known as wallboard. The "Note" appended to § 76.5(mm)(4), which helps define "inaccessibility," states that "wiring embedded in brick, metal conduit or under cinder blocks with limited or without access openings would likely be physically inaccessible; wiring within hallway molding would not." Sheet rock and other similar materials are not identified specifically. In our view, sheet rock is more like "brick or cinder block," materials also commonly used to form ceilings and hallways, than molding, which is not.

22. The definition of "physically inaccessible" also requires that accessing the wiring at that point would "add significantly to the physical difficulty and/or cost" of connecting. While we acknowledge that cutting a hole through and repairing sheet rock is neither as physically difficult nor as costly as boring through brick, metal or cinder block, we are satisfied that it adds significantly to the physical difficulty and cost of wiring an MDU. For this reason we conclude that wiring that is hidden behind the sheet rock in an MDU wall or ceiling is "physically inaccessible" as the term is used in the Commission's rule. We will amend the "Note" appended to § 76.5(mm)(4) to include sheet rock.

Open Video System Providers

23. In the 1996 Act, Congress recognized the open video system (OVS) as a means by which a local exchange carrier may provide cable service to subscribers within its telephone service area. Although subject to streamlined regulation as compared to their cable counterparts, OVS operators have clearly defined obligations and responsibilities, such as offering up to two-thirds of their channel capacity to unaffiliated programmers on a non-discriminatory basis.

24. A petitioner argues that OVS operators should not be able to avail themselves of the home run wiring rules because OVS operators have no basis to claim a right to use pre-existing MDU home run wiring. The petitioner submits that OVS operators are legally required to construct end-to-end

facilities all the way to end user MDU residents. OVS operators, the petitioner concludes, have an obligation to construct end-to-end facilities to the demarcation point of each subscriber residence and MDU unit within its service area. Yet the statute prohibits an OVS operator provider from consuming all capacity with affiliated programming, and whether the OVS operator acquires existing home run wiring in an MDU or installs the wiring itself is irrelevant to the question of statutory compliance.

25. It is not clear how an OVS operator's obligation to carry affiliated and nonaffiliated programming on a non-discriminatory basis would interfere with the operator's eligibility to avail itself of the home run wiring rules. The petitioner assumes an OVS provider will consume all capacity with affiliated programming, and that, in some way, a requirement that OVS operators must install new home wiring in MDUs will prevent that from happening. Yet the statute prohibits an OVS provider from consuming all capacity with affiliated programming, and whether the OVS operator acquires existing home run wiring in an MDU or installs the wiring itself is irrelevant to the question of statutory compliance.

Synopsis of Second Report and Order *Background*

1. In the *R&O*, the Commission amended its cable television inside wiring rules for the purpose of facilitating competition in video distribution markets. The new rules were intended to foster opportunities for multichannel video programming distributors ("MVPDs") to provide service in multiple dwelling units ("MDU") by establishing procedures regarding how and under what circumstances the existing cable home run wiring would be made available to alternative service providers.

2. In the *2nd R&O*, the Commission declined to restrict exclusive contracts for the provision of video services in multiple dwelling unit buildings ("MDU"). The Commission also declined to ban perpetual contracts for the provision of video services in MDUs or subject such contracts to a fresh look window. The Commission concluded that the cable home wiring and cable home run wiring rules should apply to all multichannel video programming distributors ("MVPDs") in the same manner that they currently apply to cable operators. The Commission adopted a limited exemption for small non-cable MVPDs from its signal leakage reporting requirements but

declined to allow MDU owners to require sharing of incumbent-owned cable wiring.

Exclusive and Perpetual MDU Contracts

3. Exclusive and perpetual contracts between MDU owners and MVPDs grant incumbent MVPDs the legal right to remain on MDU properties and thus limit application of the Commission's inside wiring rules. Exclusive contracts generally refer to those contracts that specify that, for a designated term, only a particular MVPD and no other provider may provide video programming and related services to residents of an MDU. Perpetual contracts generally refer to those contracts that grant the incumbent provider the right to maintain its wiring and provide service to the MDU for indefinite or very long periods of time, or for the duration of the cable franchise term, and any extensions thereof.

4. Commenters noted that most long-term exclusive and perpetual MDU contracts were executed at a time when local competition for the provision of multi-channel video programming was scarce or non-existent. As the Commission has observed, recent advancements in video and communications technology have contributed toward a more dynamic, evolving marketplace with cable and new alternative providers competing for MDU subscribers. It appears that some property owners who might now prefer to choose other providers' services may be bound by exclusive or perpetual contracts.

5. In the *2nd FNPRM*, the Commission recognized that exclusive contracts for video services in MDUs may have competitive consequences. Exclusive contracts could bar alternative MVPDs access to, and thus inhibit competition for MDUs. The Commission also noted arguments that exclusive contracts enable alternative providers to recoup the investment required to enter MDUs and thus to become or remain viable. The Commission asked commenters to address whether it would be appropriate to cap exclusive contracts to open up MDUs to potential competition on a building-wide or unit-to-unit basis, and if so, what would represent a reasonable cap.

6. Commenters identified with real estate interests, private cable operators and some telecommunications entities tend to support exclusive contracts for video programming services as enabling alternative MVPDs to gain a foothold in the MDU market. These commenters generally advocated long-term or no caps on exclusive contracts. Other commenters were critical of exclusive