

task of remedying section 22's constitutional shortcomings.

Therefore, the defendants' motion to dismiss must be allowed and the complaint ordered dismissed.

SO ORDERED.



UNITED STATES of America, Plaintiff,

v.

CHARLES GEORGE TRUCKING CO.,  
INC., Charles George, Sr., Dorothy  
George, James George, Charles George,  
Jr., Dorothy Lacerte, Trustee, and Ernest  
Dixon, Jr., Trustee, Defendants.

COMMONWEALTH OF  
MASSACHUSETTS,  
Plaintiff,

v.

CHARLES GEORGE TRUCKING CO.,  
INC., Charles George Land Reclamation  
Trust, Charles George Sr., Dorothy  
G. George, James George, Charles  
George, Jr., Dorothy G. Lacerte, Trustee,  
and Ernest G. Dixon, Jr., Trustee,  
Defendants.

Civ. A. Nos. 85-2463-WD, 85-2714-WD.

United States District Court,  
D. Massachusetts.

March 31, 1988.

The United States sought order in aid of immediate access to hazardous waste site and adjacent land for purposes of cleanup. The District Court, Woodlock, J., held that: (1) district court had jurisdiction, and (2) Government's entry did not constitute a taking.

Motion for immediate order in aid of access allowed.

**1. Health and Environment** ⇐25.5(10),  
25.15(2)

Where owners of hazardous waste site or adjacent land do not consent to Government's entry to clean up site, Government has option of either obtaining administrative order of entry and then proceeding to federal district court in enforcement proceeding to obtain compliance with order or proceeding directly to federal district court to obtain original court order enjoining interference with authorized request for entry. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(e)(3, 5), as amended, 42 U.S.C.A. § 9604(e)(3, 5).

**2. Health and Environment** ⇐25.15(2)

District court had jurisdiction to issue order to prohibit interference with Government's entry onto hazardous waste site and adjacent land for purposes of cleaning up site, even though there was no administrative order to that effect; prior administrative order would not have provided owners with anything more than district court already possessed and would have been a useless formality. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(e)(3, 5), as amended, 42 U.S.C.A. § 9604(e)(3, 5).

**3. Eminent Domain** ⇐2(5)

Government's entry upon hazardous waste site and adjacent land to clean up site did not constitute a "taking" for which owners had to be compensated under Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(e, j), as amended, 42 U.S.C.A. § 9604(e, j).

**4. Administrative Law and Procedure**  
⇐704

**Health and Environment** ⇐25.15(3.2)

Statute providing that federal courts may review challenges to remedial action in action to recover response costs or damages or for contribution barred district court from reviewing Environmental Protection Agency's remedial action prior to enforcement. Comprehensive Environmental Response, Compensation, and Liability

nary injunction, absent an abuse of its discretion. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 2176, 90 L.Ed.2d 779 (1986); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir.1979). Such deference is inappropriate where, as here, the proceedings in the district court did not include an evidentiary hearing, and the district court failed to set forth those portions of the record that it thought obviated the necessity of such a hearing. See *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir.1987). In the order appealed from there is no mention of irreparable harm, nor is there a finding or explanation of how and why it would occur absent an injunction.

[2] Because a finding of irreparable harm is an absolute prerequisite to the issuance of an injunction, we vacate the district court's order and remand the case to it for an evidentiary hearing and appropriate findings.

Reversed, injunction vacated, and remanded.



**CABLE INVESTMENTS,  
INC., Appellant,**

v.

**Mark WOOLLEY; Waterford Associates, a Pennsylvania limited partnership; Cold Springs Apartment Associates, a Pennsylvania limited partnership; First Investors General, Inc.; and MGM Enterprises, Inc.**

No. 88-5413.

United States Court of Appeals,  
Third Circuit.

Argued Oct. 18, 1988.

Decided Jan. 31, 1989.

Cable television company brought action against landlord that refused to permit

company to provide cable service to apartment buildings. Landlord filed motion in limine seeking dismissal. The United States District Court for the Middle District of Pennsylvania, 680 F.Supp. 174, Edwin M. Kosik, J., dismissed the suit, and cable company appealed. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) Cable Communications Policy Act does not give cable system operators right of access to multiunit dwellings for purpose of providing services to tenants; (2) Pennsylvania tenant rights statute, which prohibits landlord from restricting tenant's right to purchase goods and services from any source, did not permit tenant to insist that landlord allow cable company to install equipment and provide service, so as to give cable company rights to access to interior of multiunit dwellings; and (3) private landlord's refusal to grant cable company access did not violate federal or state free speech protections.

Affirmed.

**1. Telecommunications ⇐449.5(1)**

Cable Communications Policy Act does not give cable television operators right of access to multiunit dwellings for purpose of providing services to tenants. Communications Act of 1934, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

**2. Telecommunications ⇐449(2)**

Pennsylvania tenant rights statute, which prohibits landlord from restricting tenant's right to purchase goods and services from any source, did not permit tenant to insist that landlord allow cable television company to install equipment and provide service, so as to give cable company rights to access to interior of multiunit dwellings. 68 P.S. § 250.554.

**3. Landlord and Tenant ⇐124(1)**

Pennsylvania common law did not permit tenant to insist that landlord allow cable television company to install equipment and provide service and give cable company

rights of access to interior of multiunit dwellings.

**4. Constitutional Law** ¶90.1(9)

Private landlord's refusal to grant cable television company access to multiunit dwellings did not involve state action for purposes of federal free speech protection. U.S.C.A. Const.Amend. 1.

**5. Constitutional Law** ¶90.1(9)

**Telecommunications** ¶449(2)

Private landlord's refusal to permit cable television company access to multiunit dwellings did not violate Pennsylvania free speech protection. Pa.Const. Art. 1, § 7.

Harvey Freedenberg (argued), Alan R. Boynton, Jr., McNees, Wallace & Nurick, Harrisburg, Pa., for appellant.

Deborah C. Costlow (argued), Gretchen L. Lowe, Piper & Marbury, Washington, D.C., for appellees.

Before SLOVITER and HUTCHINSON, Circuit Judges, and DEBEVOISE, District Judge.\*

**OPINION OF THE COURT**

SLOVITER, Circuit Judge.

At issue in this case is the right of plaintiff-appellant Cable Investments, Inc., a provider of cable television service, to require the owners of two apartment complexes to give it access to the premises so that it can provide its cable services to the tenants. The district court dismissed Cable Investments' suit, *Cable Investments, Inc. v. Woolley*, 680 F.Supp. 174 (M.D.Pa.1987), and for the reasons that appear below, we will affirm.

I.

*Background*

A.

Defendant Mark Woolley is a general partner in defendant Waterford Associates

and defendant Cold Springs Apartment Associates, both Pennsylvania limited partnerships, and is a major stockholder in defendant MGM Enterprises, Inc. (MGM) and defendant First Investors General, Inc., both Pennsylvania corporations (collectively referred to for convenience as "Waterford Associates"). Waterford Associates owns two apartment complexes, Coventry at Waterford and King's Arms at Waterford (collectively "Waterford"), both located in York Township, York County, Pennsylvania.

Cable Investments offers cable television service to subscribers in York Township pursuant to a nonexclusive franchise granted it by the township. It provided cable television service to Coventry at Waterford beginning in 1979, and prior thereto through its predecessor, Keystone Communicable, Inc. As of August 1, 1985, Cable Investments served 189 subscribers out of the 288 units in Coventry at Waterford. Cable Investments began providing cable television service to King's Arms at Waterford after it had prewired the units during their construction, beginning in October 1984. As of August 1, 1985, Cable Investments provided service to 16 of the 60 units in the complex. There is no written agreement between Cable Investments and Waterford Associates for the provision of cable television at Waterford, and Cable Investments does not claim that it has any right based on contract.

In July 1985, Waterford Associates notified Cable Investments that as of August 1, 1985, it would no longer be permitted to provide cable television service to Waterford, and notified the Waterford tenants that Cable Investments would no longer provide such service. Although Waterford Associates requested Cable Investments to remove its equipment (primarily amplifiers placed along the cables on Waterford property), Cable Investments refused to do so. On approximately August 1 Waterford Associates disconnected Cable Investments'

by designation.

\* Hon. Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting

system. Thereafter, MGM began offering cable service to Waterford tenants through a satellite dish erected on the Waterford premises.

On September 10, 1985, Cable Investments initiated this suit in federal court based on a variety of federal and state claims and sought damages and injunctive relief to require Waterford Associates to permit Cable Investments to continue to offer its cable television service to Waterford Associates' tenants. On December 29, 1987, the district court granted Waterford Associates' motion to dismiss the claims alleging violation of Cable Investments' rights under the First Amendment, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Supp. IV 1986), the free speech clause of the Pennsylvania Constitution, and Pennsylvania's Landlord and Tenant Act, 68 Pa.Stat. Ann. § 250.554 (Purdon Supp.1988). Cable Investments subsequently voluntarily dismissed the remainder of its claims, thereby rendering the district court's order dismissing the four claims a final order from which Cable Investments appeals.

#### B.

While a detailed understanding of the technicalities of the provision of cable television service is not essential to the disposition of the issues before us, a brief description will be useful. A cable television company receives television signals via, *inter alia*, a satellite link and/or an antenna tower at its receiving stations, called cable headends, processes the signals in form for conversion into television programming, and distributes the signals to the communities it serves through coaxial cables along trunk lines, which may be strung along telephone poles or placed underground following public rights of way. From the trunk lines, distribution (or feeder) lines run onto the property of subscribers. Distribution lines can also be aerial or underground. It is obviously desirable for the cable company to place its distribution lines in trenches dug by the telephone or utility companies during the construction of houses or apartments, thereby avoiding the ad-

ditional expense of opening and closing the trenches or installing and maintaining an aerial system. Both trunk lines and distribution lines periodically have amplifiers to boost the signals, because signal power gradually diminishes as distance is traversed.

The distribution lines are connected to tap units, or distribution boxes, affixed, in this case, to the outside of the apartment buildings. From these tap units, drop lines extend to individual apartments. If the drop lines are installed during the construction of a multi-dwelling unit, the wiring can be placed inside the walls of the building and provide access to an individual apartment through an outlet similar to an electrical outlet. Such prewiring is a cheaper, more aesthetically pleasing, and more convenient alternative to postwiring after construction is complete and the residents have moved into the apartments. Postwiring requires that wires be strung either on the outside of buildings or on the inside along halls or through completed walls and ceilings/floors. In addition, because the wires ultimately must run into individual units, postwiring requires coordination with the residents of the building. *See generally* United States Dep't of Commerce, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, app. B at 3-6 (National Telecommunications and Information Administration Report No. 88-233, 1988) (hereinafter Department of Commerce Report).

#### II.

##### *The Cable Communications Policy Act of 1984*

#### A.

[1] Cable Investments argues first that its right of access to and including the interior of a multi-unit dwelling for the purpose of offering cable television service can be derived from the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Supp. IV 1986) (the Cable Act).

In support of its motion to dismiss, Waterford Associates argued, and the district

court agreed, that no private right of action by a franchisee can be implied under the Cable Act. Instead, the district court held, enforcement should be left to the franchising authority. 680 F.Supp. at 179. The district court's opinion was issued shortly before the decision of the Eleventh Circuit holding that section 621(a)(2) does create a cause of action in favor of a cable company. See *Centel Cable Television Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359 (11th Cir.1988) (holding Congress provided a right of action to a cable company seeking to place its cable in open trenches through easements listed on recorded plats provided by a residential developer for electric and telephone utilities). While we intimate no opinion on a private right of action under the *Centel* facts, we note that the substantive right sought to be enforced in *Centel* is more limited than that sought here, where Cable Investments seeks access to tenants inside buildings owned by Waterford Associates.

Generally, in cases considering whether a private right of action can be implied, the substantive right at issue has been established or assumed, and the only issue is whether it can be enforced and by whom. That is not the case with the right of a cable television company to provide service and utilize facilities within a private apartment complex. Because it appears more orderly to decide first whether the statute gives a substantive right of access to multi-unit dwellings before reaching the issue of who can enforce any such right,<sup>1</sup> we asked the parties to brief the substantive issue, which had been raised but not decided in the district court. It is an issue of law, which the parties agree it is appropriate for us to decide.

#### B.

The Cable Act created a new framework for the regulation of the rapidly developing cable television industry. The overall purpose of the Act is to "(1) establish a national policy concerning cable communications;

1. There is no question that Cable Investments has suffered the "injury in fact" that satisfies the Article III standing requirement. See *Associa-*

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems; (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public; (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521.

As the Supreme Court noted recently, the Cable Act left franchising to state or local authorities. See *City of New York v. FCC*, — U.S. —, 108 S.Ct. 1637, 1641, 100 L.Ed.2d 48 (1988). The same section of the Cable Act, section 621(a), that provides for the award of franchises, see 47 U.S.C. § 541(a)(1), also authorizes the franchisee to construct its system over public rights-of-way and easements dedicated for compatible uses, see 47 U.S.C. § 541(a)(2). It is the latter provision on which Cable Investments relies for its claim of a statutory right to offer cable television service to Waterford's tenants. The relevant language provides:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses. . . .

47 U.S.C. § 541(a)(2).

Cable Investments recognizes that its attempt to compel access to the Waterford tenants cannot be grounded on its statu-

*tion of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970).

tory right to construct its cable system "over public right-of-way." It has not suggested that there is any *public* right-of-way through which it can place the final cable connections needed to hook up its service to multi-unit dwellings. Instead it argues that the statutory right to construct its system "through easements" gives it access over any easements which have been set aside for uses compatible with cable television, including those under private arrangement with the owner.

Under its argument, if property owners grant easements to utilities through which cable companies could install their wiring, then the cable companies can compel the owners of a multi-unit dwelling, such as Waterford, to give them access to the private property and inside the apartment buildings themselves. Specifically, it argues that "Section 621(a)(2) [47 U.S.C. § 541(a)(2)] allows cable operators such as Cable Investments to use *any* easements which have been dedicated to a use compatible with the provision of cable television, not just those which are on the exterior of buildings. To the extent that the easements continue into buildings, Section 621(a)(2) requires access." Supplemental Brief of Appellant at 3 (emphasis in original).

We find no support in the express language of the statute for Cable Investments' position that Congress authorized franchised cable companies to force their way onto private property, over the protests of the property owner, in order to offer cable television service to the tenants of the property owner. The statute does not define the term "easements" or "dedicated for compatible uses." In light of this ambiguity, we turn for guidance to the legislative history.

### C.

The Report from the House Committee on Energy and Commerce, the principal

2. The FCC has not taken any position on this issue. Its general position that property owners cannot deny cable access "over public rights-of-way and through easements designated for compatible uses," *see* Implementation of the Provi-

source of legislative history on the Cable Act, states that,

Subsection 621(a)(2) [codified at 47 U.S.C. § 541(a)(2)] specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. Such use is subject to the standards set forth in section 633(b)(1)(A), (B) and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.

H.R.Rep. No. 934, 98th Cong., 2d Sess. 59, reprinted in 1984 U.S.Code Cong. & Admin.News 4655, 4696.

As is evident, this excerpt provides only limited guidance on the question before us. Although it clarifies that a cable television franchisee may use easements dedicated for electric, gas or other utilities, it does not illumine the critical issue, whether those easements are considered to run up to as well as into an apartment building for purposes of mandatory access. The final sentence of the excerpt, as Cable Investments emphasizes, provides that private attempts to restrict access are null, but inasmuch as the sentence is explicitly limited to "such" easements as are covered by the section, this obviously begs the question.<sup>2</sup>

We find more guidance in the legislative history of section 633, referred to in the foregoing excerpt of the Report. Section 633, which was originally included in the bill as it was reported out of the House Committee on Energy and Commerce, did expressly provide for mandatory access to

sions of the Cable Communications Policy Act of 1984, 50 Fed.Reg. 18,637, 18,647 (1985), merely duplicates in substance the statutory language. *Id.*

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tenants within a multi-unit dwelling. The relevant language was:

Sec. 633.(a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner . . . of a unit in such a building or park.

H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984); reprinted in H.R.Rep. No. 934, 98th Cong., 2d Sess. 13.

What is significant for our purposes is that section 633 was dropped from the bill that was passed by Congress. The fact that section 633 was not part of the Act as it ultimately emerged from Congress is a strong indication that Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable service to apartment dwellers. See *Russello v. United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 300-01, 78 L.Ed.2d 17 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Thompson v. Kennickell*, 797 F.2d 1015, 1024-25 (D.C. Cir.1986) (finding deletion of provision to contribute to evidence of congressional intent).

The absence of a mandatory access provision in the bill as finally enacted was specifically remarked upon by Congressman Wirth, the chairman of the Subcommittee on Telecommunications of the House Energy and Commerce Committee from which the bill emanated. Representative Wirth was one of the original sponsors of the bill and had been in favor of the multi-unit dwelling provision. After its deletion, he stated:

3. We note in passing that even those members of Congress who supported the draft of section 633 which would have provided mandatory access were motivated by a concern that tenants of multi-unit dwellings might not have access to

The purpose of [section 633] was to ensure that all consumers including those who reside in apartments and mobile home parks, had the opportunity to receive cable service. . . . The provision prohibited landlords from interfering with a consumer's ability to receive cable service—an increasing [sic] troublesome problem whereby landlords become the ultimate electronic editors, deciding to what sources of electronic information, if any, a consumer shall have access.

A number of States have enacted laws to provide for *citizen access* so that consumers would not be denied access to the increasing wealth of programming and services available over cable television. I applaud these efforts and, of course, the fact that a similar provision is no longer part of [the bill] in no way affects the applicability of those State laws. I hope my colleagues will join with me in the future to see to it that a similar Federal provision is enacted.

16 Cong.Rec. H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (emphasis added).<sup>3</sup>

In addition, Representative Fields, also a member of the House Energy and Commerce Committee, who had opposed the mandatory access provision, commented as follows on the final version:

I am particularly pleased with the version of the legislation before us today which differs slightly from the bill reported from the Commerce Committee in June. The bill before us today *does not contain* a provision I had particular concern about in committee, *the so-called consumer access to cable*.

Under that provision, if one tenant in an apartment building requested cable, a *property owner would have been forced to wire the entire building*. Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better,

cable in the absence of such a provision. See note 7 *infra*. In this case, however, there is no basis for any such concern because Waterford's tenants do have access to cable television, albeit service provided by a different system.

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more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.

Fortunately, since the time of the committee markup and [sic] following the most recent series of negotiations between representatives from the cities and the cable industry, *this objectionable section was deleted* from this legislation, thus clearing the way for what I hope will be early enactment of H.R. 4103. Cong.Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields) (emphasis added). The statements by congressmen on both sides of the issue are particularly strong evidence that the Cable Act contains no provision mandating access to private apartments.

Further evidence that Congress acted deliberately in eliminating the cable companies' mandatory access to multi-unit dwellings that would have been granted by the original bill is the fact that the Cable Act as ultimately passed encompasses some of the protections for property owners that the deleted section 633 provided, but not those requiring just compensation for takings. As drafted, section 633(b)(1)(A), (B) and (C), set out in the margin,<sup>4</sup> required

4. Subsection (b) of section 633 provided in part as follows:

(b)(1) A State or franchising authority may, and the [Federal Communications] Commission shall, prescribe regulations which provide—

(A) that the safety, functioning, and appearance of the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both;

(C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator....

H.R. No. 4103, 98th Cong., 2d Sess. § 633(b) (1984); reprinted in H.R.Rep. No. 934, 94th Cong., 2d Sess. 13.

5. Section 621(a)(2) provides that:

(2) Any franchise shall be construed to authorize the construction of a cable system over

that regulations be promulgated to safeguard the safety, functioning and appearance of property affected by the installation of cable facilities, to place the cost of installation, construction, operation or removal of cable facilities on the cable operator and/or subscriber, and to provide just compensation by the cable operator for any damages caused thereby. These sections were moved verbatim into section 621 of the Act, 47 U.S.C. § 541, when section 633 was deleted from the bill and now appear in 47 U.S.C. § 541(a)(2)(A)-(C), the only difference being that in lieu of requiring regulations by the FCC or the franchising authority, the statute as enacted requires that these matters be ensured by the cable operator.<sup>5</sup>

On the other hand, the subsections of section 633 that were not carried over into section 621 of the Cable Act would have required the prescribing of regulations to provide "methods for determining just compensation" under this section, section 633(b)(1)(D), and would have required that such regulations consider the extent of physical occupation, the long-term damage, and the extent of interference with normal use and enjoyment of the property caused by the cable system.<sup>6</sup>

public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

47 U.S.C. § 541(a)(2)(A)-(C).

6. These provisions of section 633 were:

(d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to—

(1) the extent to which the cable system facilities physically occupy the premises;

The House Committee Report explains that this subsection of section 633 was a conscious attempt to create a mechanism for providing just compensation to property owners. See House Report No. 934 at 80-81; 1984 U.S.Code Cong. & Admin.News at 4717-18. The Report states that Congress included the compensation mechanism "[i]n order to comply with the constitutional requirements" of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (holding that New York law granting cable television companies right to place wires across private property worked a taking of private property). House Report No. 934 at 81; 1984 U.S.Code Cong. & Admin.News at 4718. Congress' failure to transfer to section 621 the subsections requiring regulations that guaranteed just compensation for takings and enumerating the factors to consider in calculating just compensation suggests that Congress recognized that once it deleted the provision for mandatory access to multiple unit dwellings, it need no longer be concerned with the "taking" issue.

Just compensation for the value of the property taken is to be distinguished from just compensation for damages, which was the subject of a separate provision in section 633 and which was transferred to section 621. See 47 U.S.C. § 541(a)(2)(C). Although two district courts have suggested that section 621(a)(2)(C) does incorporate section 633's provisions for just compensation for the taking of the owner's property that mandatory access entails, *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F.Supp. 1244, 1259 (D.Mass.1985); *Cable Holdings, Inc. v. McNeil Real Estate Fund IV, Ltd.*, 678 F.Supp. 871, 873-74 (N.D.Ga.1986), we find them unpersuasive in light of the legislative history. Section 633 as drafted con-

(2) the actual long-term damage which the cable system facilities may cause to the premises;

(3) the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and

(4) the enhancement in value of the premises resulting from the availability of services provided over the cable system.

tained both subsection (b)(1)(C), requiring regulations providing for just compensation for damages, and subsection (b)(1)(D), requiring regulation of methods for determining just compensation. It is unlikely that they were intended to cover the same thing, particularly since subsection (d), which listed the factors to be considered in prescribing methods of just compensation for a taking, cross-referenced subsection (b)(1)(D) but not (b)(1)(C). Congress recognized the distinction between the damages for which the cable company must compensate under subsection 621(a)(2)(C) and long-term damages which are to be considered in determining just compensation for a taking, which were the subject of the deleted subsection 633(d)(2).

In light of Congress' deletion of the provisions that insured payment for the value of property taken pursuant to the mandatory access provision, we read the requirement in section 621(a)(2)(C) that owners be "justly compensated" by the cable operator for any damages to be unrelated to any takings issue. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 107 S.Ct. 1207, 1219, 94 L.Ed.2d 434 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93, 100 S.Ct. 1723, 1741-42, 64 L.Ed.2d 354 (1980) (Stewart, J., dissenting)).

Finally, were there any lingering doubt from the legislative history that the version of the Cable Act ultimately enacted does not contemplate mandating installation and operation of cable facilities in a multi-unit dwelling over the objection of the owner, they should be laid to rest by the deletion

(e)(1) During any period for which regulations by a State or franchising authority are not otherwise in effect under subsection (b), regulations of the Commission shall apply with respect to the cable system involved. H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), reprinted in H.R.Rep. No. 934, 98th Cong., 2d Sess. 13.

in the Cable Act of the subsection of section 633 that prohibited owners of multi-unit dwellings from demanding more than just compensation. Section 633(c) would have provided: "Any owner of such a multiple-unit building or park may not demand or accept payment from any cable operator in exchange for permitting construction or installation of facilities necessary for a cable system on or within the premises in excess of any amount which constitutes just compensation." H.R. No. 4103, 98th Cong., 2d Sess. § 633(c) (1984), reprinted in H.R.Rep. No. 934, 98th Cong., 2d Sess. 13. Its deletion is explicable only if Congress recognized that the bill as enacted did not provide for mandatory installation of cable facilities in such multi-unit buildings.

The deletion of section 633 in the final version of the Cable Act, the transfer of some of its provisions to section 541 but not those provisions detailing the factors to be considered in arriving at just compensation for a taking, the deletion of any reference to multi-unit buildings, and the statements of the congressmen approving and decrying the deletion of section 633 lead ineluctably to the conclusion that Congress made a considered decision that the Cable Act should not give cable operators the right to impose their service on owners of multi-unit dwellings who choose not to use them.<sup>7</sup>

#### D.

Our holding that the Cable Act does not mandate access by cable companies to multi-unit dwellings avoids the necessity of resolving the parties' dispute over whether access by more than one cable system is technologically feasible. Waterford Associates contends that simultaneous dual use of the same cable wiring is impossible. Cable Investments does not contradict that but contends that it is possible for a cable company and a satellite system to serve the

7. Even if Congress had included section 633 in the final version of the bill, Cable Investments still might not gain access to Waterford. Section 633(h)(1) provided that "[t]his section shall not apply to any owner of a multiple unit residential or commercial building or manufac-

ture apartment complex. Waterford Associates responds that if parallel systems were installed there would be too many wires too close together at the point of initial distribution, which could cause interference and resulting diminution of the quality of reception. In light of our construction of the statute, we need not remand for a factual determination on this issue.

It appears that cable television can now be provided not only through wired systems such as those operated by cable companies like Cable Investments and private systems using a satellite master antenna like MGM but also by wireless cable systems using different technologies. The Department of Commerce predicts that additional systems are likely to appear in the future. See Department of Commerce Report, app. B at 8-12. In light of the proliferation of systems and the possibility of interference, a legislature enacting a mandatory access provision would have to consider whether to regulate also how selection should be made from among competing systems. Our holding that the statute does not mandate giving the cable company access to the building leaves that selection to the owner of the property. We may assume that selection will be based on the realities of the marketplace and that the wishes of the tenants will not go unheeded since cable television may be one of the services that prospective tenants consider in their selection of a building.

Finally, we are guided in no small part by the requirement to interpret a statute when possible to avoid raising constitutional questions. See *United States v. Grace*, 461 U.S. 171, 175-76, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983); *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). Our statutory construction of the Cable Act avoids the constitutional issue that would be created were access

tured home park who makes available to residents a diversity of information sources and services equivalent to those offered by the cable system [seeking access]." *Id.* at § 633(h)(1). MGM's cable television service may be equivalent to that offered by Cable Investments.

mandated without providing for just compensation to be made to the owner.

In *Loretto*, the Supreme Court held that a statute that mandates installation of cable television facilities on private premises constitutes a taking of the property. The Court reaffirmed "the traditional rule that a permanent physical occupation of property is a taking," *Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179, and noted that the installation of cable television involved attachment of plates, boxes, wires, bolts and screws to the building. *Id.* at 438, 102 S.Ct. at 3177; see also *Kaiser Aetna v. United States*, 444 U.S. 164, 180, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979) (factor in finding taking was "actual physical invasion of the privately owned [property]").

Cable Investments relies on two district court cases as rejecting a challenge based on *Loretto* to the construction of section 621(a)(2) of the Cable Act as a mandatory access provision. See *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F.Supp. 1244, 1258-59 (D.Mass.1985); *Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F.Supp. 871, 874 (N.D.Ga.1986). However, both cases construe the Cable Act as providing for just compensation for the taking that would be effected if the Cable Act mandated access to the interior of private buildings. We have already explained why we disagree with those district courts' statutory interpretation, since Congress deleted the provisions designed to comply with *Loretto*. Moreover, in *Greater Worcester* the court held unconstitutional the Massachusetts statute which did mandate access because it failed to provide for just compensation for landlords for the installation of cable on their property. See 682 F.Supp. at 1252.

Cable Investments also suggests that since the wires are already in place, no taking occurs. It concedes, however, that only one signal at a time can go through those lines. Transcript of Oral Argument at 28. A requirement that Waterford Associates must permit Cable Investments to

8. Cable Investments concedes that Waterford Associates owns the wiring currently on the

use those lines could be viewed to effect a permanent occupation of Waterford Associates' property<sup>8</sup> which would constitute a taking. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 1112, 94 L.Ed.2d 282 (1987) (a critical factor in *Loretto* was that the statute "specifically required landlords to permit permanent occupation of their property by cable companies"). However, in light of our holding that Congress did not provide for mandatory access to multi-unit dwellings, there was no necessity for Congress to provide for just compensation for the value of the property taken, and hence the absence of any such provision does not raise any constitutional question.

### III.

#### *The Pennsylvania Landlord and Tenant Act*

[2] The alternate statutory basis on which Cable Investments relies for its claim for access to Waterford is the Pennsylvania Landlord and Tenant Act. Cable Investments argues that under Pennsylvania law it can follow the utilities' easements to the exterior of the building and that thereafter its access to the interior of each tenant's apartment is mandated under section 250.554 of the Pennsylvania Landlord and Tenant Act or common law.

It is true, as noted by Representative Wirth, that a number of states have passed statutes mandating access to multi-unit dwellings. For example, the Massachusetts statute considered in *Greater Worcester Cablevision* provided that a landlord must permit a cable operator to install its cable television equipment on its property if a tenant has asked for cable service. See 682 F.Supp. at 1247. Indeed, that is precisely why the court held the statute unconstitutional. See *id.* at 1248-52.

The Pennsylvania Landlord and Tenant Act is not analogous. Section 250.554 provides, in pertinent part, that,

Waterford property, even though Cable Investments installed at least some of it.

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Cite as 867 F.2d 151 (3rd Cir. 1989)

The tenant shall have a right to invite to his apartment or dwelling unit such employees, business visitors, tradesmen, deliverymen, suppliers of goods and services, and the like as he wishes so long as his obligations as a tenant under this article are observed.... These rights may not be waived by any provisions of a written rental agreement and the landlord and/or owner may not charge any fee, service charge or additional rent to the tenant for exercising his rights under this act.

It is the intent of this article to insure that the landlord may in no way restrict the tenant's right to purchase goods, services and the like from a source of the tenant's choosing....

68 Pa.Stat. Ann. § 250.554 (Purdon Supp. 1988).

The Pennsylvania courts have not given this provision the expansive construction Cable Investments desires. In *Wilco Electronic Systems, Inc. v. Davis*, 375 Pa.Super. 109, 543 A.2d 1202 (1988), the only reported appellate decision on this issue, the Superior Court declined to bring cable television within the reach of section 250.554 and noted the difference between allowing a tenant to purchase "goods, services and the like" and allowing a tenant to force a landlord to permit a cable company to provide service to the tenant. Unlike the former, "[t]he very nature of cable television involves tangible equipment which must be permanently installed and may result in substantial damage to property." *Wilco*, 543 A.2d at 1209. At least two Courts of Common Pleas had previously reached the same conclusion. See *T-C Harrisburg Co. v. Sammons Communications*, 107 Dauphin County Rep. 411, 417-18 (1987); *Weaver v. Dallmeyer*, 101 York Legal Record 110 (1987).

The only authority supporting Cable Investments' position, *Stephenson v. Diversified Holdings Corp.*, No. 5144 Equity 1983 (C.P. Berks, Aug. 24, 1983), slip op., *aff'd without op.*, 339 Pa.Super. 626, 488 A.2d 1171 (1984), is of limited value because the issue arose in the context of a preliminary injunction and the court noted that the final

resolution of the parties' rights would await trial. *Stephenson*, slip op., at 3, 6. In any event, the Superior Court's subsequent construction of the statute in *Wilco* would take precedence.

[3] We defer to the *Wilco* court's reasonable construction of section 250.554. Permitting a tenant to insist that a landlord allow a cable company to install equipment and provide service is an intrusion of a qualitatively different nature than the temporary intrusion effected by tradesmen and business visitors. We also reject summarily Cable Investments' argument that the common law gives tenants such rights, an argument that would have been discussed in *Wilco* were it viable.

Because we hold that Pennsylvania law does not give Cable Investments any rights to the interior of Waterford's buildings, we need not decide the extent to which it can piggyback on the private easements of various utilities up to the exterior of the building under either Pennsylvania law or the Cable Act.

#### IV.

##### *The First Amendment of the United States Constitution*

[4] We need spend little time on Cable Investments' argument that Waterford Associates' refusal to grant it access is a violation of the First Amendment of the United States Constitution. Although a municipal ordinance restricting cable franchising raises a cognizable First Amendment claim, see *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95, 106 S.Ct. 2034, 2037-38, 90 L.Ed.2d 480 (1986), in this case Cable Investments complains about Waterford Associates' conduct restricting its access, not the conduct of the state or a municipality. Following an extensive discussion of the applicable precedent, Judge Kosik dismissed this count on the ground that no state action was implicated. 680 F.Supp. at 176-78.

Cable Investments, while admitting that Waterford is not a "company town", nonetheless argues that the apartment complex-

es bear a close enough resemblance to the "company town" in *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), that Waterford Associates' exclusion of Cable Investments should be considered state action. *Marsh* is inapposite. There, a company effectively operated as the municipal government, in that it owned the streets, sidewalks, and business block, paid the sheriff, privately owned and managed the sewage system, and owned the building where the United States post office was located. *Id.* at 502-03, 66 S.Ct. at 276-77. "[T]he owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569, 92 S.Ct. 2219, 2229, 33 L.Ed.2d 131 (1972). *Marsh* has been construed narrowly. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-59, 98 S.Ct. 1729, 1734-35, 56 L.Ed.2d 185 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 513-21, 96 S.Ct. 1029, 1033-37, 47 L.Ed.2d 196 (1976); see also *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 428-31 (3d Cir.1988).

Cable Investments has not alleged, and the record does not suggest, that Waterford Associates has become a substitute for a municipal government in any meaningful way. There is no allegation that the two complexes in this case are anything more than apartment buildings with some associated shopping facilities and office space. We agree with the district court that Cable Investments has failed to allege the requisite state action to support its First Amendment claim.

#### V.

##### *The Free Speech Clause of the Pennsylvania Constitution*

[5] Finally, Cable Investments argues that Waterford Associates' refusal to permit it access to Waterford is a violation of Article I, Section 7, of the Pennsylvania Constitution. That provision declares that, The free communication of thoughts and opinions is one of the invaluable rights of

man, and every citizen may freely speak, write and print on any subject....

Pa. Const. art. I, § 7.

Cable Investments argues that this provision has been interpreted and applied more broadly as to state action than has the First Amendment. For support, Cable Investments cites *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981). Although the Court in *Tate* held that persons distributing political leaflets on the grounds of a private college during a public symposium at which the director of the FBI was speaking were engaging in speech protected under the Pennsylvania Constitution, it did so on the ground that the college had held itself out as a forum open to the public. 495 Pa. at 174-75, 432 A.2d at 1390-91. The *Tate* opinion was clarified in *Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986) (plurality opinion), where the Court held that a shopping mall could exclude all individuals engaged in political solicitation. Although the theories of the justices comprising the majority differed, all but one of the seven justices agreed that because the shopping mall had not invited the public onto its premises for political purposes, Article I, Section 7, was inapplicable.

This case is governed by *Western Pennsylvania Socialist Workers* rather than *Tate*. Waterford Associates has not presented Waterford as a public forum for any purpose for which Cable Investments wishes to speak. More importantly, discrimination on the basis of the political content of the speech, a significant factor in *Tate*, is not present here. Therefore, the district court did not err in dismissing Cable Investments' claim under the Pennsylvania Constitution.

#### VI.

##### *Conclusion*

In summary, we hold that section 621(a)(2) of the Cable Act does not mandate access by cable companies to multi-unit dwellings for the purpose of providing their services to the tenants. Because we hold that the count of Cable Investments'

**ST. CROIX HOTEL v. GOVERNMENT OF VIRGIN ISLANDS 163-169**

Cite as 867 F.2d 169 (3rd Cir. 1989)

complaint based on the Cable Act states no cause of action, we need not reach the issue whether a private right of action to enforce the right asserted by Cable Investments can be implied.

We also hold, in accordance with a similar holding by the Pennsylvania Superior Court, that the Pennsylvania Landlord and Tenant Act cannot be construed to grant cable companies mandatory access to multi-unit dwellings. In addition, we agree with the district court that Cable Investments' claims under the United States Constitution and the Pennsylvania Constitution state no cause of action.

For the foregoing reasons, we will affirm the dismissal of the complaint.



**Editor's Note:** The opinion of the United States Court of Appeals, Third Circuit, in *Jalil v. Avdel Corporation*, published in the advance sheet at this citation, 867 F.2d 163-169, was withdrawn from bound volume because rehearing was granted, judgment vacated and mandate recalled.

**ST. CROIX HOTEL CORPORATION, Appellant,**

v.

**GOVERNMENT OF THE VIRGIN ISLANDS.**

No. 88-3433.

United States Court of Appeals,  
Third Circuit.

Argued Dec. 9, 1988.

Decided Feb. 2, 1989.

Former Chapter 11 debtor filed action for declaratory judgment and slander of title after Department of Finance filed real

estate tax liens. The District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction, David V. O'Brien, Chief Judge, held for Department, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, held that settlement agreement between debtor and Bureau of Internal Revenue, with regard to employment taxes, was not binding upon Department of Finance, which sought to recover property taxes.

Affirmed.

**1. Taxation ¶552½**

Settlement agreement between debtor and Bureau of Internal Revenue, with regard to employment taxes, was not binding upon Department of Finance, which sought to recover property taxes, absent evidence that Assistant Attorney General who signed settlement agreement spoke for any agency of government other than Bureau.

**2. Bankruptcy ¶2124**

District court sitting in Virgin Islands, acting as bankruptcy court after congressional authorization for separate bankruptcy judge lapsed, had authority to confirm bankruptcy court's prior finding that, although debtor had previously been found to have paid all taxes, debtor was required to pay postpetition taxes as administrative expenses upon discovery that postpetition taxes had not in fact been paid.

Joel H. Holt, (argued), Christiansted, St. Croix U.S.A. V.I., for appellant.

Godfrey R. de Castro, Atty. Gen., Rosalie Simmonds Ballentine, Sol. Gen., Joanne E. Bozzuto, (argued), Asst. Atty. Gen., Susan Frederick Rhodes, Asst. Atty. Gen., Dept. of Justice, St. Thomas, U.S.A. V.I., for appellee.

Before GREENBERG, SCIRICA and WEIS, Circuit Judges.

**OPINION OF THE COURT**

WEIS, Circuit Judge.

In this declaratory judgment action, the district court ruled that pre-petition proper-

N.W.2d 890 (1979); M.C.L. § 780.653;  
M.S.A. § 28.1259(3).

183 Mich.App. 597

Gordon MUMAUGH and Marian Mumaugh, husband and wife, Individually and in their capacity as Trustees for John Mumaugh and Vicary Mumaugh; and David Squires, Individually and in his capacity as Trustee of the David E. Squires Irrevocable Living Trust, U/T/A 12-18-81, Plaintiffs-Appellants.

v.

DIAMOND LAKE AREA CABLE TV COMPANY, a limited partnership, Defendant-Appellee.

Docket No. 112860.

Court of Appeals of Michigan.

Submitted Jan. 9, 1990.

Decided May 7, 1990.

Released for Publication June 1, 1990.

Landowners brought action against cable television company, alleging trespass and unjust enrichment or quantum meruit arising out of cable television company's attachment of its wires to poles across public utility's easement on landowners' property. The Cass Circuit Court, Michael E. Dodge, J., entered judgment in favor of cable television company. Landowners appealed. The Court of Appeals, Murphy, P.J., held that: (1) the Cable Communications Policy Act of 1984 grants franchised cable television companies a federal right to use any "easements dedicated to compatible uses," whether public or private; (2) the Cable Communications Policy Act of 1984 granted company the right to access the easement dedicated to a compatible use held by the utility over landowners' land; and (3) interest in land conveyed to company was something more than a mere authority to temporarily use the land, thus the interest was an easement, rather than a license.

Affirmed.

1. Telecommunications ¶449(2)

The Cable Communications Policy Act of 1984 grants franchised cable television companies a federal right to use any "ease-

III

As to the trial judge's request for an advisory opinion, we should decline to render such an opinion. Our docket consists of true cases and controversies and we routinely decline invitations to render advisory opinions on issues unnecessary for the disposition of appeals. See *Rozankovich v. Kalamazoo Spring Corp. (On Rehearing)*, 44 Mich.App. 426, 205 N.W.2d 311 (1973); *Johnson v. Muskegon Heights*, 330 Mich. 631, 48 N.W.2d 194 (1951).

IV

The final issue raised is whether reinstatement and retrial of the charge would violate the defendant's constitutional rights against double jeopardy. I would hold that defendant's constitutional rights would not be violated by reinstatement and retrial.

First, I note that a mid-trial dismissal of the charge on Fourth Amendment grounds was sought and requested by the defendant. Although the basis for the dismissal relied upon by the trial judge was not argued by the defendant, the result was advocated by defense counsel.

Second, the transcript indicates that although defense counsel expressed concern as to double jeopardy, defendant nevertheless consented to the dismissal. Under such circumstances, I find no double jeopardy violation. See *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), and *People v. Dawson*, 431 Mich. 234, 253, 427 N.W.2d 886 (1988).

Accordingly, I respectfully dissent and would reverse and remand for trial.



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ments dedicated to compatible uses," whether public or private. Communications Act of 1934, §§ 601 et seq., 621(a)(2), as amended, 47 U.S.C.A. §§ 521 et seq., 541(a)(2).

## 2. Telecommunications ⇐449(2)

Cable Communications Policy Act of 1984 granted a licensed cable television company the right to access an easement dedicated to a compatible use held by a public utility over landowners' land, even though the landowners objected. Communications Act of 1934, §§ 601 et seq., 621(a)(2), (a)(2)(C), as amended, 47 U.S.C.A. §§ 521 et seq., 541(a)(2), (a)(2)(C).

## 3. Telecommunications ⇐449(2)

Scope of easement granted to public utility company "to erect, maintain and operate in perpetuity a line of poles for the supporting of electric power, telephone wires" and other uses which could "prove practical" could reasonably be construed as a dedication for any use by public utilities, all of which were compatible with cable television service.

## 4. Eminent Domain ⇐2(1.1)

There was no taking of landowners' property by a cable television company's use of easement granted to a public utility, which was compatible with the company's use; landowners failed to show how the company's use of the easement materially increased the burden on their property. U.S.C.A. Const.Amend. 5.

## 5. Licenses ⇐43

A "license" is merely authority or permission to do some act or series of acts upon the licensor's land without having permanent interest therein.

See publication Words and Phrases for other judicial constructions and definitions.

## 6. Assignments ⇐5

A license is not assignable.

## 7. Easements ⇐1

An "easement" is an interest in land through which one individual has the right

to use the land of another for a specific purpose.

See publication Words and Phrases for other judicial constructions and definitions.

## 8. Electricity ⇐9(1)

Power line easement granted to public utility was an easement in gross, where it was not appurtenant to any estate in land, but was a personal interest granted to the utility to use landowners' land for the erection and maintenance of a utility pole line.

## 9. Easements ⇐24

Gas ⇐9

Railroads ⇐81

Telecommunications ⇐84

While easements in gross are generally unassignable, easements in gross which are commercial in nature, such as easements for pipelines, telephone and telegraph lines, and railroads, are generally assignable.

## 10. Public Utilities ⇐114

Interest in land conveyed to public utility was something more than a mere authority to temporarily use of the land, thus the interest was an easement, rather than a license, where the conveying instrument granted to the utility the right to erect and maintain a pole line "in perpetuity" and appeared to assume assignability.

## 11. Telecommunications ⇐449(2)

Attachment of company's cable television wires to poles on public utility's easement did not materially increase the burden on the servient estate, and thereby violate the rule that use of an easement is strictly confined to the purposes for which it was intended; the use of the easement was consistent with those uses expressly set forth in the easement itself, and Cable Communications Policy Act of 1984 could be seen as a legislative determination that the use of preexisting utility easements does not materially overburden those easements. Communications Act of 1934, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

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Westrate, Holmstrom & Dobrish by Mark A. Westrate, Dowagiac, for plaintiffs-appellants.

Miller, Canfield, Paddock & Stone by Michael B. Ortega, Kalamazoo, for defendant-appellee.

Before MURPHY, P.J., and HOOD and NEFF, JJ.

MURPHY, Presiding Judge.

Plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(8), failure to state a claim on which relief can be granted. The court ruled that, as a matter of law, 47 U.S.C. § 541(a)(2) gave defendant cable television company a right of access to use easements dedicated to compatible uses. The court further ruled that the easement held by Indiana and Michigan Electric Company (I & M) was dedicated to a use compatible with defendant's use of the easement. The court further found that no genuine issues of fact existed and that defendant was entitled to judgment as a matter of law. MCR 2.116(C)(10). We affirm.

Plaintiffs are the owners of properties situated in Silver Creek Township, Cass County. Plaintiffs held this property subject to a pole-line easement granted to I & M in 1922 by plaintiffs' predecessors in interest. The conveying instrument described I & M's interest as follows:

[T]he right and easement to erect, maintain and operate in perpetuity a line of poles for the supporting of electric power, telephone and telegraph wires, and the transmission thereby of electrical energy, power, light, heat or messages or anything, and for such further or other different uses and purposes or methods and needs as may hereafter prove practical.

In 1986, defendant was awarded a franchise to provide cable television service in Silver Creek Township. Shortly before receiving the franchise, defendant entered into an agreement with I & M for the use of I & M's utility poles. However, the agreement expressly stated that I & M was

not conveying or guaranteeing any easement, right of way, or franchise for the construction and maintenance of defendant's attachments to the I & M utility poles. Defendant agreed to indemnify and defend I & M against claims arising out of defendant's failure to secure the right, license, permit, or easement to construct and maintain its attachments on I & M's poles.

In 1987, defendant attached its cable television wires to the I & M poles across the easement on plaintiffs' property. Plaintiffs demanded that defendant remove the wires. When defendant failed to comply, plaintiffs commenced the present action alleging claims for trespass and unjust enrichment or quantum meruit.

On appeal, plaintiffs contend that the trial court erroneously granted summary disposition in defendant's favor because 47 U.S.C. § 541(a)(2) does not give defendant an absolute right to install its cable television wires across a privately granted easement, regardless of whether the easement was dedicated to a compatible use. We disagree.

Section 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2), provides:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator

for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

[1] Plaintiffs argue that the term "public" as used in the statute modifies both rights of way and easements. Plaintiffs conclude that Congress intended to except a privately granted easement, such as the one at issue in the present case, from the general right of access granted in the statute. Conversely, defendant argues, and the trial court agreed, that the plain language of 47 U.S.C. § 541(a)(2), its legislative history, and judicial interpretation of the statute reveal a clear intent by Congress to grant franchised cable television companies a federal right to use any "easements dedicated to compatible uses," whether public or private. After reviewing the applicable federal case law, we agree with defendant.

The majority of courts that have construed the statute have rejected arguments that 47 U.S.C. § 541(a)(2) grants only a right to construct cable television lines through publicly dedicated easements. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F.Supp. 871, 873 (N.D.Ga.1986); *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F.Supp. 1315 (D.Del.1986). See also *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F.Supp. 422, 434 (D.Md.1989) (cable company had a right to gain access to private residential community along easements therein which were dedicated for compatible uses); *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F.Supp. 1244 (D.Mass.1985) (land owner conceded cable company's right to use whatever easements and public rights of way that were on the property so long as the use was compatible). In reaching this conclusion, the courts have relied on the legislative intent expressed in the language of the cable act itself and on the legislative history of the act.

47 U.S.C. § 521 provides in pertinent part:

The purposes of this subchapter [47 U.S.C. § 521 *et seq.*] are to—

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community.

Additionally, the Report from the House Committee on Energy and Commerce stated:

Subsection 621(a)(2) [codified at 47 U.S.C. § 541(a)(2)] specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. *This would include, for example, an easement or rights-of-way dedicated for electric, gas or other utility transmission.* Such use is subject to the standards set forth in section 633(b)(1)(A), (B) and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. *Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.* [H.R.Rep. No. 934, 98th Cong. (2d Sess.) 59, reprinted in 1984 U.S.Code Cong. & Admin. News 4655, 4696.]

See also *Centel Cable Television of Florida v. Admiral's Cove Associates*, 835 F.2d 1359, 1362, n. 5 (C.A. 11, 1988) ("Congress intended to authorize the cable operator to 'piggyback' on easements 'dedicated for electric, gas, or other utility transmission'"). We believe that the broad scope of the above-expressed congressional intent requires a broad reading of the phrase "dedicated to compatible uses" to include any easements granted to a public utility for a use compatible with cable television.

However, we also note that there are decisions which reach a somewhat different conclusion. In *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (C.A. 3, 1989), the

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United States Court of Appeals for the Third Circuit rejected a cable company's argument that 47 U.S.C. § 541(a)(2) allows cable operators to use *any* easements dedicated to a use compatible with the provision of cable television services. The Court stated that there was no support in the express language of the statute for a finding that "... Congress had authorized franchised cable operators to force their way onto private property, over the protests of the property owner, in order to offer cable television services to the tenants of the property owner." *Id.*, at 155. The Court noted that Congress had ultimately deleted proposed sections of the cable act which granted cable operators mandatory access to multi-unit dwellings, provided for a system of just compensation for such takings and prohibited the property owners of multi-unit dwellings from demanding more than just compensation for such access. Consequently, the Court concluded that the cable operator had no right of access to the interior of a multi-unit apartment dwelling. *Id.*, at 155-159.

However, we believe that *Cable Investments, supra*, is easily distinguished from the present case. Because the deleted proposed § 633 was directly applicable to the very issue presented in *Cable Investments*, the Court logically and properly concluded that Congress, by deleting that section, did not intend to allow cable operators to compel access to multi-unit apartment dwellings. The *Cable Investments* decision was also based, in part, on the fact that proposed § 633 was designed in response to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that case, the United States Supreme Court held that a New York statute which provided that landlords must allow cable television companies to install cable facilities upon their property worked an unconstitutional taking of private property without just compensation. However, *Loretto* did not involve the use of preexisting utility easements, whether private or public.

Somewhat more troubling, however, is the recent decision, *Cable Associates, Inc v. Town & Country Management Corp.*,

709 F.Supp. 582 (E.D.Pa.1989), in which the court focused on the meaning of the term "dedicated" as used in 47 U.S.C. § 541(a)(2). The cable company argued that "dedicated" should be given its ordinary meaning of set aside for a definite purpose. *Id.*, at 584. However, the court concluded that Congress had used "dedicated" as a term of art which must, consequently, be construed in a manner consistent with real property law. In that context, the concept of dedication involves a landowner's appropriation of his property to some public use and an acceptance by or on behalf of the public. Therefore, the court held that, even though the telephone company's easement extended into the individual units in the apartment building, the cable company had no right of access through that easement because it was a merely private right granted to the telephone company. *Id.*, at 584-586. Again, however, we note that this case involved only a cable company's right to access the interior of privately owned apartment buildings.

For the most part, the cases construing 47 U.S.C. § 541(a)(2) are of little help in the present case because they involve either accessing private multi-unit buildings or easements that were formally dedicated in a plat, rather than an accessing of an existing utility pole line in a privately granted easement. Most factually analogous to the present case is *Centel Cable Television Co. of Florida v. Thomas J. White Development Corp.*, unpublished opinion of the Federal District Court for the Southern District of Florida, decided February 28, 1989 (Docket No. 88-14148-CIV-Roettger). In that case, the developer and owner of a large private residential development sought to exclude a franchise cable company from accessing both easements granted in private arrangements with utility companies and those designated as public utility easements in an effort to reserve for itself the exclusive right to provide cable service to the development's residents. In holding that the cable company had a right to access both the public and the private utility easements, the court noted that easements

need not be "publicly" dedicated in order to be "dedicated" to compatible uses within the meaning of 47 U.S.C. § 541(a)(2). "The legislature did not place any special significance on the meaning of the term 'dedicated' over and above its common meaning 'to set aside.'"

[2,3] It is clear that the majority of courts which have construed the phrase "easements dedicated to compatible uses" have chosen to apply the broad common meaning of the terms used. Therefore, on the basis of our review of the language of 47 U.S.C. § 521 *et seq.*, its legislative history, and the interpretative case law, we conclude that 47 U.S.C. § 541(a)(2) grants cable television companies the right to access the easement dedicated to a compatible use held by I & M over plaintiffs' land. Furthermore, we note that the express language of I & M's easement evidences the grantor's intent to allow use of the easement beyond the I & M electrical wires, all of which are compatible with cable television service. The broad scope of this easement could reasonably be construed as a dedication for any use by public utilities.

[4] We further note that Congress included a provision for just compensation of the property owner for any damages caused by the cable company when installing, constructing, operating, or removing its facilities. 47 U.S.C. § 541(a)(2)(C). We believe that this provision sufficiently addresses the problem of the Fifth Amendment prohibition against the taking of private property without just compensation raised by plaintiffs. Any taking that occurred through defendant's installation, maintenance, and use of cable television wires would seemingly be limited to such damages because defendant is using the preexisting I & M utility pole line over an easement for which, presumably, plaintiffs have been adequately compensated at a prior time. Plaintiffs fail to show how defendant's use of the easement materially increases the burden on their property. Without an additional burden, there has been no taking of plaintiffs' property. See *United Cable Television of Mid-Michigan v. Louis J. Eyde Limited Family Partner-*

*ship*, unpublished opinion of the Federal District Court for Western Michigan, decided November 20, 1989 (Docket No. L89-30103 CA); *Greater Worcester Cablevision*, 682 F.Supp. at 1259.

[5,6] Alternatively, plaintiffs argue that the property interest granted to I & M was only a license rather than an easement. We disagree. A license is merely authority or permission to do some act or series of acts upon the licensor's land without having any permanent interest therein. *McCastle v. Scanlon*, 337 Mich. 122, 133, 59 N.W.2d 114 (1953); *Macke Laundry Service Co. v. Overgaard*, 173 Mich.App. 250, 254, 433 N.W.2d 813 (1988). A license is not assignable because it is based on personal confidence. *Sweeney v. Hillsdale Co. Bd. of Rd. Comm'rs*, 293 Mich. 624, 630, 292 N.W. 506 (1940).

[7-9] By contrast, an easement is an interest in land through which one individual has the right to use the land of another for a specific purpose. *Peaslee v. Saginaw Co. Drain Comm'r*, 365 Mich. 338, 344, 112 N.W.2d 562 (1962); *St. Cecelia Society v. Universal Car & Service Co.*, 213 Mich. 569, 576-577, 182 N.W. 161 (1921). The easement at issue is an easement in gross because it is not appurtenant to any estate in land, but is a personal interest granted to I & M to use plaintiffs' land for the erection and maintenance of a utility pole line. *Smith v. Denedy*, 224 Mich. 378, 380-383, 194 N.W. 998 (1923); *Evans v. Holloway Sand & Gravel, Inc.*, 106 Mich. App. 70, 78, 308 N.W.2d 440 (1981). Easements in gross are generally unassignable. *Stockdale v. Yerden*, 220 Mich. 444, 447-448, 190 N.W. 225 (1922). However, easements in gross which are commercial in nature, such as easements for pipelines, telephone and telegraph lines, and railroads, are generally assignable. *Johnston v. Michigan Consolidated Gas Co.*, 337 Mich. 572, 580-582, 60 N.W.2d 464 (1953).

[10] The interest conveyed to I & M was something more than a mere authority to temporarily use plaintiffs' land. The conveying instrument grants I & M the right to erect and maintain its pole line "in

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perpetuity" and appears to assume assignability. Therefore, we conclude that the interest conveyed to I & M was an easement rather than a license.

[11] We also reject plaintiffs' contention that attachment of defendant's cable television wires to the poles on the I & M easement materially increases the burden on plaintiffs' servient estate and violates the rule that the use of an easement is strictly confined to the purpose for which it was intended. *Delaney v. Pond*, 350 Mich. 685, 687, 86 N.W.2d 816 (1958). Defendant's use of the easement is clearly consistent with those uses expressly set forth in the easement itself. Furthermore, the enactment of 47 U.S.C. § 541(a)(2) may be seen as a legislative determination that the use of preexisting utility easements for

cable television service does not materially overburden these easements.

For the reasons set forth above, we conclude that the trial court correctly concluded that 47 U.S.C. § 541(a)(2) granted defendant a right to access the utility pole line easement across plaintiffs' property and that, therefore, plaintiffs had failed to state a claim on which relief could be granted.

Affirmed.



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The Court concludes that the agreement, intended to circumvent the requirements of Rule 17(a), does not in this case frustrate the policies of the rule. Because to hold otherwise would provide a foreign and unwelcome influence on plaintiff's case, the Court will give effect to the "Loan & Trust Receipt" agreement.

Defendants have moved that INA be joined also by reason of Rule 19(a), Fed.R. Civ.P. Rule 19(a) states, in relevant part,

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties....

The Advisory Committee Notes state that the purpose of this rule is to ensure finality of judgment:

[Rule 19(a)(1)] stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter.

As established above, INA's complete control over the present litigation will preclude it from relitigating any of the issues which will be litigated in this action. Because INA will not be able to raise these issues against defendants in the future, complete relief can be accorded among the parties as presently constituted, and joinder of INA is not necessary.

For the foregoing reasons, the Court will deny the motion of the Bekins defendants to require joinder of Acro's insurer. A separate Order will be entered.

#### ORDER

For the reasons that are given in the Opinion filed herewith, it is ORDERED this 25th day of January, 1989, by the United States District Court for the District of Maryland, that:

1. The motion of Acro Automation Systems, Inc. for partial summary judgment against defendants Bekins Van Lines Co., Bekins Forwarding Company, Inc. (formerly GO-98, Co.) and The Primary Source for Transportation Services, Inc. (formerly Bekins High Technologies International, Inc.) is granted, and these defendants may not rely on claimed limitations of liability;

2. The motion of these defendants to require the joinder of Insurance Company of North America is denied.



CABLE TV FUND 14-A, LTD. d/b/a  
Jones Intercable, Plaintiff,

v.

PROPERTY OWNERS ASSOCIATION  
CHESAPEAKE RANCH ESTATES,  
INC. and Chesapeake Ranch Water  
Company, Defendants,

and

North Star CATV Services, Inc. and  
North Star Cable Television Company  
of Maryland, Inc., Intervening Defen-  
dants.

Civ. No. H-89-17.

United States District Court,  
D. Maryland.

Feb. 14, 1989.

Cable television provider sought preliminary injunction under Cable Communications Policy Act to gain access to private residential community, which was within provider's franchise area, to lay cable along public utility easements. The District Court, Alexander Harvey, II, Chief Judge, held that: (1) cable television provider had implied private right of action under Cable Communications Policy Act, and (2) provider was entitled to preliminary injunction in

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order to enforce its right of access to public utility easements within private residential community.

Motion granted.

### 1. Telecommunications $\Leftarrow$ 449.10(2)

Cable television provider had implied private right of action under Cable Communications Policy Act against owner of private residential community within provider's franchise area to seek enforcement of provider's right of access to public utility easements within community for purposes of laying cable. Communications Act of 1984, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

### 2. Federal Civil Procedure $\Leftarrow$ 219, 258

In suit brought by cable television provider against owner of private residential community, which was within nonexclusive franchise granted by county to provider, and utility for alleged violation of Cable Communications Policy Act based on denial of right of access to public utility easements within residential community, county was not an indispensable party under Rule 19, but would be joined as defendant under Rule 21 to assist district court in making final judgment on matter. Fed.Rules Civ. Proc.Rules 19, 21, 28 U.S.C.A.

### 3. Injunction $\Leftarrow$ 152

District court may make findings of disputed facts on record consisting of affidavits, exhibits and memoranda for purposes of ruling on motion for preliminary injunction.

### 4. Telecommunications $\Leftarrow$ 449.10(2)

Cable television provider was entitled to preliminary injunction preventing owner of private residential community, water company and competing cable television provider from taking any action to prevent provider from constructing and operating cable system within private residential community, notwithstanding competitor's contention that it had been granted exclusive franchise to provide service within private residential community; cable television provider would suffer irreparable harm if injunction were not granted by permitting

competitor to operate monopoly during time required to bring case to trial, monopoly claimed by competitor was contrary to both federal and county law, provider had been granted nonexclusive franchise by county which included private residential community, and under Cable Communications Policy Act provider had right to gain access to community along easements within area and which had been dedicated for compatible uses. Communications Act of 1984, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

Brent N. Rushforth, and Dow, Lohnes & Albertson, Washington, D.C., and Michael A. Pace, Dow, Lohnes & Albertson, Annapolis, Md., for plaintiff.

William D. Coston, Mark J. Palchick, and Bishop, Cook, Purcell & Reynolds, Washington, D.C., and John C. Prouty, Huntington, Md., for defendants and intervening defendants.

## MEMORANDUM AND ORDER

ALEXANDER HARVEY, II, Chief Judge.

The essential dispute in this civil action is between two competing cable television companies which seek to provide cable service to residents of a development in Calvert County, Maryland. Plaintiff Cable TV Fund 14-A, Ltd. (hereinafter "Cable TV Fund") has filed a complaint seeking declaratory and injunctive relief pursuant to § 621(a)(2) of the Cable Communications Policy Act of 1984 (hereinafter "the Cable Act"), 47 U.S.C. § 541(a)(2) (Supp. III 1985). Plaintiff is here asking this Court to grant relief which would permit plaintiff to construct and operate a cable television service within the residential community known as the Chesapeake Ranch Estates.

Plaintiff Cable TV Fund is a Colorado limited partnership with its principal place of business in Denver, Colorado. It provides cable television service to consumers in the State of Maryland and in Calvert County as Jones Intercable, Inc. (hereinafter "Jones Intercable"). Jones Intercable, which is the general partner of Cable

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TV Fund, is a diversified telecommunications company that has its headquarters and its principal place of business in Denver, Colorado.

Two parties are named as defendants in the complaint. Defendant Property Owners Association Chesapeake Ranch Estates, Inc. (hereinafter "the Property Owners Association") is a Maryland corporation with its principal place of business in Calvert County. The Property Owners Association is the developer of the Chesapeake Ranch Estates (hereinafter "the Estates"), a private residential community of approximately 900 homes in the southern part of Calvert County. The Property Owners Association owns all the common areas, including all roads and byways, within the Estates. Defendant Chesapeake Water Company (hereinafter "the Water Company") is a corporation organized under the laws of Maryland with its principal place of business in Calvert County. The Water Company's major business is the operation of the water system within the Estates.

Two additional parties have been permitted to intervene.<sup>1</sup> Defendants North Star CATV Services, Inc. (hereinafter "North Star") and North Star Cable Television Company of Maryland, Inc. (hereinafter "North Star-Maryland") are both Tennessee corporations qualified to do business within the State of Maryland. North Star-Maryland is owned by the controlling stockholder of North Star and was organized specifically to build, own and operate cable television systems in Maryland.

On January 4, 1989, plaintiff filed its complaint in this Court together with a motion for a temporary restraining order. By that motion, plaintiff sought to enjoin the Property Owners Association and the Water Company from taking any action to prevent Jones Intercable from gaining access to the Estates for the purposes of constructing, marketing and operating a cable television system therein. Plaintiff is

1. On January 13, 1989, this Court entered an Order granting the motion of North Star CATV Services, Inc. and North Star Cable Television Company of Maryland, Inc. to intervene as parties defendant.

not in this suit asking that it have the exclusive right to provide cable service to residents of the Estates. Rather, it is asking merely that it be permitted to compete with North Star-Maryland within the development.

A brief hearing was held on January 4, 1989 before Senior Judge Herbert N. Maletz who granted plaintiff's motion for a temporary restraining order and required plaintiff to file a bond of \$10,000. Pursuant to Rule 65(c), F.R.Civ.P., the temporary restraining order entered by Judge Maletz was to expire ten days later on January 14, 1989.

The case was then assigned to the undersigned judge who held a status conference on January 12, 1989. After hearing from counsel, the Court granted the motion of defendant Property Owners Association to dissolve the temporary restraining order which had previously been entered in the case. In order that the *status quo* might be maintained until the Court had ruled on plaintiff's motion for a preliminary injunction, the dissolution of the temporary restraining order was subject to the proviso that defendants and intervenors would not perform any work for the purpose of constructing a cable system in the Estates until further Order of Court. A briefing schedule was established and a hearing date set in connection with plaintiff's request for a preliminary injunction.

Pursuant to the schedule set by the court on January 12, 1989, plaintiff filed a motion for a preliminary injunction.<sup>2</sup> Plaintiff also filed a motion for leave to file a motion for summary judgment, a motion for shortening of filing times, and a proposed motion for summary judgment. Defendants in turn filed a motion to dismiss for lack of standing and a motion to dismiss for failure to join an indispensable party. The Court granted plaintiff's motion for leave to file a motion for summary judgment but

2. Plaintiff had also filed, pursuant to Rule 65(a)(2), F.R.Civ.P., a motion for consolidation of the trial on the merits with the hearing on plaintiff's application for a preliminary injunction. The Court has denied this motion.

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denied plaintiff's motion for the shortening of time for defendants to respond to that motion. The Court reserved ruling on the motion for summary judgment until full briefing had been completed. Presently before the Court for decision are defendants' motions to dismiss and plaintiff's motion for a preliminary injunction.

Extensive memoranda as well as accompanying exhibits and affidavits in support of and in opposition to the pending motions have been submitted by the parties. A hearing has been held in open Court on January 31, 1989. For the reasons to be stated herein, defendants' motions to dismiss will be denied, and plaintiff's motion for a preliminary injunction will be granted.

## I

*Factual Background*

This case has a long and complex history which spans almost five years. Plaintiff obtained whatever rights it now asserts through a predecessor-in-interest. The Board of County Commissioners of Calvert County (hereinafter "the County Commissioners"), is the applicable governing body of the County. Although not a party here, the County Commissioners have been involved in prior litigation with some of the parties to this civil action or their predecessors.

On April 1, 1984, Rite Cable Company of Maryland, Ltd. (hereinafter "Rite Cable") filed an application with the County Commissioners seeking a franchise to construct and operate a cable television system for all unincorporated areas of the County. When Rite Cable submitted its application, one of the maps included as a part of the application contained every street within the Estates development. On July 31, 1984, Rite Cable received a non-exclusive franchise<sup>2</sup> from the County Commissioners to construct and operate a cable system within the unincorporated areas of the County. Rite Cable began construction of a cable system in Calvert County in the fall

of 1984, and cable television service was begun in April of 1985.

In 1987, Rite Cable transferred its entire interest in the cable franchise to Jones Intercable. The County Commissioners approved this transfer on April 14, 1987. Later in 1987, Jones Intercable transferred its interest in the franchise to plaintiff Cable TV Fund, and this transfer was likewise later approved by the County Commissioners. Based on these facts, plaintiff asserts that it now has a non-exclusive franchise to construct and operate a cable system in all unincorporated portions of the County, including the area comprising the Estates.

The Estates is a private residential community of approximately 900 homes in Lusby, Maryland, which is located in the southern part of Calvert County. The Estates was developed by Chesapeake Ranch Club, Inc. (hereinafter "Chesapeake Ranch Club"), the predecessor in interest of defendant Property Owners Association. The Estates consists of approximately 7000 lots, only some of which are presently occupied by private residences. All common areas, including roads and byways, continue to be owned, managed and controlled by defendant Property Owners Association.

In the fall of 1984, Rite Cable commenced negotiations with the Chesapeake Ranch Club in an effort to secure the developer's assistance in laying cable wire in and providing service to the development. These negotiations were not successful. Rite Cable was informed in June of 1985 that the Chesapeake Ranch Club would not permit it to enter the Estates to offer cable service and that the Chesapeake Ranch Club intended to build and operate its own cable system. In a letter dated June 11, 1985 addressed to a County Commissioner, a representative of Rite Cable noted that the Chesapeake Ranch Club would not permit Rite Cable to enter its property and stated that Rite Cable respected the owner's right to deny access to the property. However, Rite Cable questioned the right

3. An Ordinance of Calvert County specifically prohibits the granting by the County of an exclusive franchise to provide cable television ser-

vice. See Ordinance to Establish a Cable Television Franchise, Section 4.00, effective July 24, 1984.