

of any other cable company to provide cable service in the County without a franchise and requested a clarification concerning what non-franchised cable companies could do in the County.

At or around that time, Chesapeake Ranch Club had established its own entity, Chesapeake Shores Cablevision, Inc., in order to facilitate the installation of a cable system within the confines of the Estates. Chesapeake Shores Cablevision, Inc. entered into a partnership with a cable company known as Laxton CATV, Inc. for purposes of installing and operating a cable system in the Estates. In 1985, work was begun by these entities for the laying of cable lines in the Estates under roads owned by the Chesapeake Ranch Club.

In a Memorandum dated July 30, 1985, County Attorney Allen S. Handen advised the County Commissioners that in his opinion the County had no authority to franchise a cable company in the Estates because there were no "public rights of way"<sup>4</sup> in the development. He further opined that the Chesapeake Ranch Club would need a franchise to operate a cable company and that the Chesapeake Ranch Club could not grant to itself a franchise for that purpose.

Although aware of the opinion of the County Attorney, Chesapeake Shores Cablevision and Laxton CATV continued to install cable wiring within the confines of the Estates. Not surprisingly, litigation ensued. On or about December 11, 1985, the County Commissioners brought suit in the Circuit Court for Calvert County seeking to enjoin such installation. *County Commissioners of Calvert County v. Chesapeake Shores Cablevision, Inc.* (No. 85-654). On February 6, 1986, Laxton CATV and Chesapeake Shores Cablevision filed a civil action in this Court naming as defendants both Rite Cable and the County Commissioners, seeking declaratory relief and damages for interference with free speech, violations of the antitrust laws and tortious interference with contractual rela-

4. Mr. Handen was of the view that the state's enabling statute, Md. Ann. Code art. 25, § 3C, which permits the County to franchise cable systems that utilize "any public right-of-way,"

tions. *Laxton CATV, Inc. v. Rite Cable Co. of Maryland, Inc.* (D.Md. S-86-433).

On April 23, 1987, Laxton CATV and Chesapeake Shores Cablevision entered into a Consent Agreement with the County Commissioners in the state court action. Rite Cable was not a party to this Agreement. Under the terms of this document which was filed as a pleading in the state case but not in the federal case, the County Commissioners agreed not to interfere with the installation of a cable system within the confines of the Estates. However, the County Commissioners retained the right to enforce county regulations relating to the granting of a cable franchise except for the collection of a franchise fee. The Consent Agreement further provided that "any franchisee selected by Chesapeake Ranch Club, Inc. to install a SMATV [Satellite Master Antenna Television] or cable television system within the Ranch Club will be deemed to have been granted a franchise by both the county and the Ranch Club to the extent that either has that authority . . ." (Emphasis added). The parties expressly recognized that the initial selection by Chesapeake Ranch Club of defendant North Star as its cable franchise would not require further approval by the County. Laxton CATV and Chesapeake Shores Cablevision agreed to dismiss, with prejudice, their action pending in this Court.

Pursuant to the Consent Agreement, the Property Owners Association entered into a Franchise Agreement with North Star-Maryland on June 29, 1988. The Property Owners Association granted to North-Star Maryland "the exclusive rights and privileges to enter upon the [Estates] and to install, construct, operate . . . a cable television system or SMATV system." (Emphasis added). Based on this document, defendants assert that only North Star-Maryland has the right to provide cable service to residents of the Estates.

Meanwhile, plaintiff continued to install cable within other portions of Calvert

did not encompass a cable operator's use of public utility easements. The County Attorney made no reference in that opinion to applicable provisions of § 621(a)(2) of the Cable Act.

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County pursuant to the franchise it had received from the County Commissioners. Jones Intercable has since laid approximately 400 miles of cable in the County, and it presently serves about 6000 subscribers. In December of 1988, Jones Intercable contacted the Property Owners Association seeking access to the Estates for the purpose of laying cable wire. However, the Property Owners Association indicated that it would deny Jones Intercable such access. Similarly, the Water Company informed Perry Communications, Inc., the contractor which plaintiff had hired to install the necessary cable wiring, that it would not assist in locating water lines in the development.

Electric and telephone service to residents of the Estates is provided by Southern Maryland Electric Cooperative, Inc. and C & P Telephone Company, Inc. These public utilities have easements through and along the roads and byways of the Estates permitting them to provide such service. In 1984, Rite Cable, plaintiff's predecessor, had entered into agreements with these public utilities permitting it to make use of these easements for construction of a cable television system in various parts of Calvert County.

Relying on the agreements which had been reached with these public utilities, plaintiff in December, 1988 directed its contractor to proceed with the necessary work at the Estates. On January 3, 1989, employees of Perry Communications commenced work on premises of the Estates and began laying cable wiring. Since the Water Company had refused to tell plaintiff's contractor where its water lines in the development were, a line was nicked during the day. Plaintiff then ordered its contractor to stop work and filed this civil action. With its complaint, plaintiff filed a motion for a temporary restraining order which would permit plaintiff to proceed with the laying of cable wiring on premises of the Estate.

The temporary restraining order entered by Senior Judge Maletz on January 4, 1989 enjoined the Property Owners Association from denying plaintiff access to the Es-

tates in order to install cable television service, and required the Water Company to assist plaintiff in locating the water lines in the Estates. Plaintiff's contractor resumed work at the Estates the next day.

At the conference held before the undersigned judge on January 12, 1989, defendants contended that North Star-Maryland had an exclusive cable television franchise within the Estates and that plaintiff had no right to enter the premises. Defendants indicated that they intended to move to dismiss the complaint. In view of the conflicting positions of the parties, the Court, after hearing argument of counsel, entered an Order permitting North Star and North Star-Maryland to intervene as defendants, dissolving the temporary restraining order and setting a hearing on plaintiff's motion for a preliminary injunction and defendants' motions to dismiss for January 31, 1989. The Court ruled that the *status quo* should be maintained until a decision could be rendered on plaintiff's motion for a preliminary injunction. Both plaintiff and defendants were directed not to undertake work for the purpose of constructing a cable system at the Estates until further Order of Court. Jones Intercable had laid approximately five miles of wiring within the Estates prior to the dissolution of the temporary restraining order. At the present time, Jones Intercable is providing cable service to five residents of the Estates and claims to have over 135 orders for installation of cable service. Defendant North Star-Maryland asserts that it has laid some five miles of cable in the development and is now serving some 150 residents.

## II

### *Defendants' Motion to Dismiss—Standing*

[1] Defendants have filed a motion to dismiss the complaint on the ground that plaintiff lacks standing to pursue this action. Specifically, defendants assert that § 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), upon which plaintiff relies for

its claim,<sup>5</sup> does not create a private cause of action in the federal courts. Defendants submit that the Cable Act instead relies upon local franchising authorities such as Calvert County for the enforcement of a cable franchise's rights of access to public utility easements. Plaintiff vigorously disagrees, contending that the weight of authority holds that § 621(a)(2) of the Cable Act does indeed create a federal right in favor of a cable company which has been franchised to provide cable service to a local community.

Section 621(a)(2) provides in pertinent part as follows:

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

The only Circuit Court opinion which to date has addressed the precise question presently before the Court is *Centel Cable Television Co. v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir.1988). In a well-reasoned opinion authored by Circuit Judge Fay, the Court held that a cable television company had an implied right of action under § 621(a)(2) to enforce a claimed right to provide cable television service to a residential community.

Following its review of the various other authorities cited by the parties, this Court concludes that the *Centel* opinion correctly states the law to be applied in this case. The facts of *Centel* are remarkably similar to those present here. The cable television company there had moved for a preliminary injunction which would permit it to provide cable television to a residential community. There, as here, plaintiff alleged that it had been granted a franchise to provide cable services, that defendant was the owner of a private residential community within the franchise area, that easements for telephone and electric utilities

5. In its complaint, plaintiff alleges both federal question and diversity jurisdiction. Although the parties dispute the existence of diversity jurisdiction, the question has not been adequate-

ly briefed for the Court to decide the issue. Moreover, the issue need not be reached since the Court has concluded that federal question jurisdiction exists in this case.

existed in the community and that plaintiff had been prohibited by the community from placing its cables in and along these same easements. In *Centel*, it appeared that the owner of the development had been preventing plaintiff from having access to the easements so that such owner might negotiate an exclusive deal with a competing company to provide cable to the residents. Plaintiff there sought a preliminary injunction which would allow it to place its cables in the easements. The district court dismissed the complaint, finding that § 621(a)(2) did not provide plaintiff with a cause of action. On appeal, the Eleventh Circuit reversed, concluding that the statute in question indicated a congressional desire to provide such a cause of action.

In determining whether there is an implied cause of action under a federal statute when there is no express provision in the statute authorizing the private suit, "[t]he central inquiry remains whether Congress intended to create, . . . by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); see also *Cannon v. University of Chicago*, 441 U.S. 677, 688, 99 S.Ct. 1946, 1958, 60 L.Ed.2d 560 (1979). The Supreme Court in the landmark case of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), identified four relevant factors which may be indicative of such intent. These factors require this Court to analyze (1) whether the statute was enacted for the benefit of a special class of which plaintiff is a member; (2) whether there is any indication of legislative intent to create or deny a private remedy; (3) whether implication of such a remedy is consistent with the underlying purposes of the general legislative scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. *Id.* at 78, 95 S.Ct. at 2088 (citations omitted).

ly briefed for the Court to decide the issue. Moreover, the issue need not be reached since the Court has concluded that federal question jurisdiction exists in this case.

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Analyzing § 621(a)(2) under the four factors of *Cort v. Ash*, this Court finds and concludes that Congress indeed intended to provide a private right of action to a cable television company like the plaintiff in this case. This Court would agree completely with the *Centel* analysis in which Circuit Judge Fay carefully reviewed the statutory history of the Cable Act and concluded that consideration of each of the four *Cort* factors indicated a congressional desire to provide a cause of action for a cable television company. This Court will adopt for the purposes of this case the reasoning of the Eleventh Circuit in *Centel*.

Most of the district court opinions which have been cited by the parties support this Court's conclusion that the plaintiff has standing to bring this action under § 621(a)(2) of the Cable Act. See *Cable Associates, Inc. v. The Town & Country Management Corp.*, 709 F.Supp. 582 (E.D. Pa. 1988); *Centel Cable Television Co. v. Burg & Divosta Corp.*, Case No. 88-8378-Civ-Ryskamp, slip op. at 5-6 (S.D.Fla. Sept. 30, 1988). See also *Rollins Cablevue, Inc. v. Saienni Enterprises*, 638 F.Supp. 1315 (D.Del.1986) ("*Rollins I*"); *Rollins Cablevue, Inc. v. Saienni Enterprises*, 115 F.R.D. 484 (D.Del.1986) ("*Rollins II*"); and *Rollins Cablevue, Inc. v. Saienni Enterprises*, Civ. No. 86-139-JRR (D.Del. Apr. 28, 1987) ("*Rollins III*"). Although the Court in "*Rollins I*" concluded that the Cable Act did not create a private right of action which would permit a cable company to enjoin construction by an unfranchised rival cable system, the Court permitted the plaintiff to proceed under the Act against the owner of an apartment complex and subsequently entered a preliminary injunction granting the cable company access to the private property. *Rollins II* and *Rollins III* thus support the Court's conclusion in this case.

In their memoranda submitted in support of their motions to dismiss, defendants place heavy reliance on *Cable Investments, Inc. v. Woolley*, 680 F.Supp. 174 (M.D.Pa. 1987). On the same day that argument on pending motions was heard in this Court, the Third Circuit Court of Appeals filed an

opinion affirming the District Court's dismissal of the complaint in that case but for reasons different from those stated by District Judge Kosik. *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989).

In its very recent *Woolley* decision, the Third Circuit expressly intimated no opinion concerning the Eleventh Circuit's ruling in *Centel*. 867 F.2d at 154. *Woolley* involved the asserted right of a cable company to compel access to and including the interior of a multi-unit dwelling for the purpose of offering cable television service to tenants of that apartment building. Concluding that the cable company's complaint based on the Cable Act did not state a cause of action, Circuit Judge Sloviter found that it was not necessary to reach the issue whether a private right of action can be implied under the Cable Act to enforce the right asserted.

Accordingly, the *Woolley* opinion is of little assistance to defendants in this particular case. The Third Circuit in *Woolley* held only that the Cable Act provides no substantive right whereby a cable company would be entitled to run cable wires along utility easements within the interior of a multi-unit dwelling in order to provide cable service to the tenants therein. From its review of the legislative history of the Cable Act, the Court concluded 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. 867 F.2d at 156.

No multi-unit apartment building is involved here. Rather, the Estates is a large residential community with telephone and electric utility easements existing in and over its roads and byways. Indeed, Circuit Judge Sloviter specifically observed that "the substantive right sought to be enforced in *Centel* is more limited than that sought here, where [plaintiff] seeks access to tenants inside buildings owned by [defendants]." 867 F.2d at 154. As discussed more fully hereinafter, this Court has concluded that the Cable Act does indeed give a franchised cable company a substantive

right of access to property through easements which are within the area to be served and which have been dedicated for compatible uses. As *Centel* and the other cases cited hereinabove have held, a private right of action does exist under the Cable Act permitting plaintiff to seek to enforce such a statutory right.

For these reasons, this Court concludes that under § 621(a)(2) of the Cable Act, plaintiff has standing to assert a cause of action against defendants in this case. Accordingly, defendants' motion to dismiss for lack of standing will be denied.

### III

#### *Motion to Dismiss—Indispensable Party*

[2] Defendants have filed a second motion to dismiss pursuant to Rules 12(b)(7) and 19(a), F.R.Civ.P., asking this Court to dismiss plaintiff's complaint for failure to join Calvert County as a party in this litigation. Defendants assert that defendant North Star-Maryland and plaintiff both claim to have been granted a cable franchise from Calvert County to operate a cable television system within the Estates. Because the Court must necessarily define the extent of Calvert County's authority with respect to the granting of a cable franchise in a private development, defendants argue that the County is an "indispensable party" to this litigation.

Rule 19(a) governs the "Joinder of Persons Needed for Just Adjudication," and provides, in pertinent part, as follows:

(a) 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, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obli-

gations by reason of the claimed interest. If the person has not been so joined, the court shall order that person be made a party.

The purpose of Rule 19 is to provide for the full and complete adjudication of a dispute with a minimum of litigation effort, so that the interests of the plaintiff, the defendants, and the public will best be served. *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir.1970). The Fourth Circuit Court of Appeals has held that "[t]he inquiry contemplated by Rule 19 is a practical one. It is addressed to the sound discretion of the trial court." *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir.1980).

Applying these principles to the facts of this case, this Court does not conclude that this civil action must now be dismissed pursuant to Rule 19 because Calvert County has not been joined as a party. Although Calvert County is not an indispensable party, the Court believes that it would be desirable to require joinder of the County under Rule 21. There is no need to join the County for the entry of the preliminary injunction sought by the plaintiff. However, the presence of the County as a party here and a determination of the County's position concerning the dispute between these competing cable companies may permit the Court to frame a more effective final judgment or decree granting final relief to the prevailing party. Accordingly, defendants' motion to dismiss pursuant to Rule 19 will be denied, but an appropriate Order will be entered under Rule 21.

On the record here, this Court does not find that in the absence of Calvert County, complete relief cannot be accorded among those who are already parties. The preliminary relief ordered by the Court herein does not alter any action previously taken by the County nor does it require any action by the County. The Consent Agreement previously signed by the County merely stated that to the extent that it had such authority, the County would permit defendants to have their own cable television system in the Estates. Similarly, the

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non-exclusive franchise awarded to plaintiff's predecessor permits plaintiff also to operate a cable system on property of the Estates.

Moreover, this Court's ruling on the motion for a preliminary injunction should not as a practical matter impair the County's ability to protect its interests relating to the subject of this action. The Court can determine preliminarily whether plaintiff has an immediate right to lay cable wiring along utility easements within the Estates pursuant to federal law without impairing any interest of the County. The case thus does not raise the prospect of the entry by the Court of a decree voiding any governmental order. Indeed, the County has in the past demonstrated an unwillingness to proceed with litigation seeking to resolve the respective rights of these parties, and more recently has indicated that it does not intend to participate voluntarily in this action.<sup>6</sup>

Finally, a decision by the Court in this case should not leave those presently parties to this suit subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. Defendants argue that a decision favorable to plaintiff would necessarily require a finding that Calvert County is empowered to grant a franchise in a private community. As a result, defendants argue, Calvert County might impose on North Star-Maryland a franchise fee in contravention of the Consent Agreement. The record to date does not support this contention. The County has been made aware of this litigation and presumably would have sought to intervene if it believed that the suit's outcome would entitle it to a franchise fee. Defendants' argument relies on many assumptions which are unwarranted on this record at this preliminary stage of the proceedings.<sup>7</sup> See *Coastal Modular Corp.*, 635 F.2d at 1108.

6. The Court has been advised that counsel have contacted officials of Calvert County, and that these officials have declined to participate in this litigation.

Nevertheless, it is apparent to the Court that Calvert County, as the local entity responsible for franchising these cable companies, does indeed have an interest in the subject matter of this dispute. In passing the Cable Act, it was the intent of Congress that local governments should continue to have substantial control over cable services in their own communities. See H.R.Rep. No. 934, 98th Cong., 2d Sess. 19-20, reprinted in 1984 U.S.Code Cong. & Admin.News 4655, 4656-57. The circumstances of this case lead the Court to the view that joinder of Calvert County in this case would be desirable, although not indispensable, in order that all parties with an interest in this dispute may be heard on the merits and in order that a final and more complete resolution of the issues raised herein may result.

Rule 21, F.R.Civ.P., provides in relevant part: "Parties may be dropped or added by Order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." See *Saul Stone & Co. v. Browning*, 615 F.Supp. 20, 22 (N.D.Ill.1985). The Rule grants the trial judge broad discretion to join additional parties as plaintiffs or defendants in order to issue an effective decree, prevent multiplicity of suits, or to grant complete relief. See *A.S. Abell Co. v. Chell*, 412 F.2d 712, 717 (4th Cir.1969); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 688, 691-92 (4th Cir.1978).

For the reasons stated, defendants' motion to dismiss for failure to join an indispensable party will be denied. However, the Court will enter an Order directing plaintiff to file an amended complaint naming as defendants not only the present parties but also the Board of Commissioners of Calvert County. Plaintiff, *inter alia*, should seek declaratory relief against the County Commissioners, including a request that the Court adjudicate plaintiff's right to provide cable television service to residents

7. Defendants' reliance on *Chesapeake Bay Village, Inc. v. Costle*, 502 F.Supp. 213 (D.Md.1980) and *Spirit v. Teachers Insurance and Annuity Association*, 416 F.Supp. 1019 (S.D.N.Y.1976) is misplaced. The facts of those cases are markedly different from the ones present here.

of the Estates. While this question and other issues are being litigated, the preliminary injunction being entered herein will remain in full force and effect.

## IV

*Plaintiff's Motion for  
Preliminary Injunction*

The principles to be applied by this Court in determining whether a preliminary injunction should issue are well established. The standard for granting interlocutory injunctive relief in this Circuit is the "balance-of-hardship" test first outlined in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 196 (4th Cir. 1977). This test depends on a "flexible interplay" among four factors to be considered: (1) the likelihood of irreparable harm to plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to defendants if the requested relief is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981); *Maryland Undercoating Co. v. Payne*, 608 F.2d 477, 481 (4th Cir. 1979). A preliminary injunction is an extraordinary remedy, and the plaintiff in a particular case has the burden of showing an entitlement to this form of injunctive relief. *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 (4th Cir. 1980). The final decision whether to grant or deny a motion for preliminary injunction is one committed to the sound discretion of the trial judge. *First Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481, 488 (4th Cir. 1970).

While a trial court should properly consider all four factors outlined in *Blackwelder*, the Fourth Circuit has emphasized that [T]he two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. *Blackwelder, supra*, 550 F.2d at 196; see also *Federal Leasing, supra*, 650 F.2d at

499. Thus, the likelihood of irreparable injury and the probability of success on the merits must be considered in relation to each other.

[3] Findings of fact and conclusions of law as required by Rule 52(a), F.R.Civ.P., are contained in this Memorandum and Order. In view of the short period between the filing of the complaint in this case and the hearing on plaintiff's motion for a preliminary injunction, there has been little time for the parties to engage in discovery. Accordingly, the motion was heard and considered on the voluminous record furnished to the Court by way of affidavits, exhibits and memoranda. It is well established that a court may make findings of disputed facts on a record such as this one for the purpose of ruling on a motion for a preliminary injunction. *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 487 F.Supp. 1248, 1258 (D.Md.1980), *aff'd*, 650 F.2d 495 (4th Cir. 1981).

[4] After carefully reviewing the record here and after hearing oral argument, this Court finds and concludes that the balance of hardship at this stage of the case weighs decidedly in favor of plaintiff. Upon consideration of all of the *Blackwelder* factors, this Court is satisfied that a preliminary injunction should issue and should remain in effect during the pendency of this case.

Considering first the factor of irreparable harm, the Court finds it likely that plaintiff will suffer irreparable harm if the preliminary injunction is not issued. Were plaintiff denied the right to construct and operate a cable television system within the Estates during the pendency of this case, North Star-Maryland would enjoy a judicially sanctioned monopoly during the time required to bring this case to trial. Were plaintiff to then ultimately prevail on the merits, it would be difficult, if not impossible, to determine how many subscribers plaintiff could have obtained if it had been allowed to compete within the Estates. Immeasurable harm to plaintiff's reputation and good will would result if it became known to the residents that plaintiff was

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not being permitted to provide cable service to the Estates at the present time.

It is of considerable significance in this case that plaintiff does not seek to exclude defendant North Star-Maryland from constructing and operating its own cable system within the Estates. Plaintiff seeks merely to compete with North Star-Maryland in soliciting and providing cable television services to the residents of the Estates.

In contrast to the potential injury faced by plaintiff if the motion is denied, the only threatened harm to defendants if the preliminary injunction were granted is the prospect of competition for cable service within the Estates. With the entry of a preliminary injunction, defendant North Star-Maryland will lose the monopoly it claims was created by what it characterizes as "an exclusive" franchise agreement. However, such claimed monopoly is contrary to both federal and County law. Section 601(6) of the Cable Act, 47 U.S.C. § 521(6), specifically provides that one of the primary purposes of the federal legislation was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue burden on cable systems." The legislative history of the Cable Act further indicates that "[a]ny private arrangements which seek to restrict a cable system's use of such easements and rights-of-way which have been granted to other utilities are in violation of this section and are not enforceable." H.R.Rep. No. 934, 98th Cong., 2d Sess. 59, reprinted in 1984 U.S.Code Cong. & Admin.News 4655, 4696. Moreover, County law itself prohibits the granting by the County of an exclusive franchise to a cable company providing cable television services. See County Ordinance of July 24, 1984.

Were defendants to ultimately prevail in this case on the merits, North Star-Maryland would presumably take over Jones Intercable's subscribers. Any property damage caused by construction operations of Jones Intercable would be adequately covered by the bond which plaintiff has posted with this Court, with the utility com-

panies, and with Calvert County pursuant to the cable franchise agreement.

In support of the conclusion reached herein, this Court would rely on the sound reasoning of Judge Ryskamp in *Centel Cable Television Co. v. Burg & DiVosta Corp.* (Case No. 88-8378-CIV-RYSKAMP) (S.D.Fla.1988). That case involved factual circumstances remarkably similar to those present here. Centel Cable, plaintiff in that case, had a non-exclusive cable franchise for an entire municipality, including a private residential development owned by defendant Burg & Divosta Corporation. The Court there entered a preliminary injunction enjoining defendant from preventing Centel Cable from laying cable wire along utility easements within the development. In language equally applicable to this case, Judge Ryskamp stated:

If preliminary relief is not granted, Centel will incur indeterminable additional costs, will lose indeterminable customers, revenues and profits, and will suffer irreparable damage to its reputation and good will.

The record indicates that no substantial harm will be caused to Burg & DiVosta if preliminary injunctive relief is granted. Centel is insured, has posted a performance bond with the town of Jupiter and has been in the cable business for a number of years. Further, Section 621(a)(2)(A)-(C) of the Cable Act (47 U.S.C.A. § 541(a)(2)(A)-(C)) provides Burg & Divosta with statutory protection as to the manner of Centel's access to and work in [the development]. Section 621(a)(2)(c), as well as the common law, permits Burg & DiVosta to seek compensation for any harm caused by Centel. 47 U.S.C. § 541(a)(2)(c).

*Id.*, slip op. at 6-7.

This Court having resolved the balance of hardships in favor of plaintiff, it is enough for the entry of a preliminary injunction that serious or grave questions have been presented. *Blackwelder, supra*, 550 F.2d at 196. However, much more has been shown by plaintiff here. The record in this case indicates that plaintiff very likely will prevail on the merits of this case.

Plaintiff has a non-exclusive franchise which extends to all unincorporated areas of the County. Pursuant to § 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), plaintiff has a right to gain access to the Estates along easements therein which are "dedicated for compatible uses." See also *Centel, supra*, 835 F.2d at 1362; *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F.Supp. 871, 874 (N.D.Ga.1986). By "compatible" easements, Congress meant those easements "dedicated for electric, gas, or other utility transmission." *Centel, supra*, 835 F.2d at 1362 n. 5 (citing H.R.Rep. No. 984, 98th Cong., 2d Sess. 59, reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4696). Plaintiff's predecessor in interest, Rite Cable, negotiated license agreements with the electric and telephone companies to make use of their easements. Therefore, Jones Intercable would appear to have an enforceable statutory right to lay cable wires within the Estates along those utility easements.

Defendants raise various arguments contesting plaintiff's case on the merits. First, defendants argue that plaintiff does not have a valid franchise to operate a cable television system within the Estates. Defendants rely on the Memorandum of the County Attorney dated July 30, 1985 indicating his opinion that Calvert County had no authority to franchise a cable company in the Estates because there were no "public rights of way" in the development.

The conclusions reached by the County Attorney are erroneous as a matter of law. The County Attorney did not even mention § 621(a)(2) of the Cable Act, which is clearly applicable here. Under that statute, a franchisee may construct a cable system through easements which are within the area to be served and which have been dedicated for compatible uses. Just such easements exist in the Estates. In concluding that neither the County nor a developer had the authority to award a cable franchise within the Estates, the County Attorney in essence was of the opinion that no cable service could be provided to the Estates by any one. Such a result is hardly in accord with federal or local law.

Defendants also argue that plaintiff is presently estopped from claiming a right to provide cable service within the confines of the Estates. Defendants contend that the respective rights of the parties to operate cable television systems in the Estates was addressed in earlier litigation between the parties which culminated in a Consent Agreement and that such Agreement bars plaintiff from suing here. There is no support in the record here for this contention. The Consent Agreement on which defendants rely cannot bind plaintiff or its predecessor, Rite Cable, because neither entity was a party to that agreement. Rite Cable did no more than permit the dismissal with prejudice of an action brought against it in federal district court by entities which are not parties to this suit. There is no indication that the cable franchise held by Rite Cable, and now by plaintiff, was modified in any manner. Indeed, Paragraph 6 of the Consent Agreement states: "The parties hereto stipulate and agree that this Agreement shall bind *only* the Defendants, Laxton CATV, Inc. and Chesapeake Shores Cable Vision and Plaintiffs, Board of County Commissioners and Calvert County." (Emphasis added). The Consent Agreement hardly precludes litigation by plaintiff of its right under the Cable Act to lay cable wiring along compatible utility easements located within the Estates.

Relying on doctrines of waiver and estoppel, defendants further point to letters written in 1985 by two of Rite Cable's employees, Jeff Miller and George Sevast. According to defendants, these letters demonstrate that Rite Cable recognized that it had no legal right to enter the Estates. The letters in question hardly bar or estop plaintiff from seeking to enforce in this action rights conferred upon it by the Cable Act. The employees in question were neither attorneys nor executive officers of plaintiff's predecessor. To avoid a confrontation in 1985 with the owners of the Estates, these representatives of Rite Cable agreed to respect the owner's right to deny them access to the property at that time. Such was hardly a binding and conclusive agreement by Rite Cable that it (or its

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successors) had no legal right to provide cable services to residents of the Estates at any time in the future. Indeed, these individuals specifically questioned the right of any other cable company to provide services to the property and requested a clarification from the County Commissioners concerning what a non-franchised cable company could do in the County.<sup>8</sup>

Defendants also argue that plaintiff cannot prove that the utility easements it seeks to use are "compatible" with cable construction. Defendants assert that most of the utility easements granted by the Chesapeake Ranch Club and the Property Owner's Association are aerial easements while the cable wiring being installed by Jones Intercable is underground. Defendants further contend that those underground easements which were granted to the electric company generally cannot permit, for safety reasons, any other use. These arguments are unavailing.

Plaintiff's predecessor, Rite Cable, entered into a license agreement with the Southern Maryland Electric Cooperative permitting it to attach cables, wires and other facilities to the electric company's poles. Rite Cable also entered into a license agreement with the Chesapeake and Potomac Telephone Company which allowed Rite Cable to "place and maintain aerial and underground communications facilities." (Emphasis added). These are clearly "compatible uses" under § 621(a)(2). The legislative history of the Cable Act indicates that Congress intended to authorize the cable operator to "piggyback" on easements dedicated for electric gas or other utility transmissions. *Centel Cable Television Company v. Admiral's Cove Associates, Ltd.*, *supra*, 835 F.2d at 1362 n. 5. In any event, plaintiff has indicated its willingness to utilize aerial easements for its cable wires if ordered to do so by the Court. No such restriction is necessary here.

With respect to the final *Blackwelder* factor, this Court concludes that the grant-

<sup>8</sup> By letter dated June 27, 1985, County Commissioner Gott advised the Rite Cable representative that his company was "free to seek any and

ing of this preliminary injunction will advance the public interest. This is a case in which two competing cable companies are poised to offer cable service to residents of the Estates. With the entry of this preliminary injunction, the residents in question will be able to choose now between the packages being offered by two competing cable companies. Such competition will advance the purposes of the Cable Act by serving the best interests of the consumer. Section 601 of the Cable Act indicates that Congress sought to

(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; [and]....

(4) assure that cable communications *provide and are encouraged to provide the widest possible diversity of information sources and services to the public*....

47 U.S.C. § 521(2), (4) (emphasis added).

Balancing all of the *Blackwelder* factors, this Court concludes that plaintiff is entitled to a preliminary injunction which will enjoin defendants from taking any action to prevent plaintiff from constructing and operating a cable system within the Estates. This injunction will remain in effect during the pendency of this litigation and until the claims and counterclaims are finally determined by the Court.

For the reasons stated, it is this 14th day of February, 1989, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion to dismiss for lack of standing be and the same is hereby denied;

2. That defendants' motion to dismiss for failure to join an indispensable party be and the same is hereby denied;

3. That plaintiff shall file an amended complaint within 15 days adding as a party defendant the Board of County Commissioners of Calvert County;

all remedies available to you for the protection of your franchise territory."

4. That plaintiff's motion for a preliminary injunction be and the same is hereby granted;

5. That defendants Property Owners Association Chesapeake Ranch Estates, Inc. and Chesapeake Ranch Water Company are hereby enjoined until further Order of Court from interfering with the installation by plaintiff of cable television wiring within the Chesapeake Ranch Estates;

6. That said defendants shall until further Order of Court assist plaintiff with the aforesaid installation by informing plaintiff of the locations of all water lines running below ground on the property of Chesapeake Ranch Estates; and

7. That the restrictions imposed on defendants and intervening defendants by Paragraph 2 of the Court's Order of January 13, 1989 be and the same are hereby rescinded.



**THERMAL ENGINEERING CORPORATION** a South Carolina corporation,  
and Willie H. Best, Plaintiffs,

v.

**CLEAN AIR SYSTEMS, INC.**, a North Carolina corporation; Charles P. Campbell and Bobby Correll, Defendants.

No. ST-C-83-304.

United States District Court,  
W.D. North Carolina,  
Statesville Division.

Nov. 6, 1987.

Owner and licensee of patent brought action against alleged infringer seeking injunctive relief, monetary damages and attorney fees. The District Court, Woodrow Wilson Jones, J., held that patent for high

heat transfer oven and process of drying articles was valid.

Patent valid and enforceable.

**1. Patents 6-112.6**

Fact that there was a successful reexamination of the patent even with admitted claims made the challenger's burden of proving invalidity a heavier one. 35 U.S.C. A. § 282.

**2. Patents 6-62(1)**

In order to prove that claims of patent were anticipated, defendants were required to show by clear and convincing evidence that each element of the claims was found in a single prior art reference. 35 U.S.C.A. § 102.

**3. Patents 6-66(1.7)**

Patent covering high heat transfer oven was not invalid for anticipation. 35 U.S.C.A. § 102.

**4. Patents 6-16(1)**

Where party challenges validity of patent as having been obvious to person of ordinary skill at time invention was made, court must make determination of scope and content of prior art, difference between alleged invention and prior art, level of ordinary skill in art, and objective evidence and nonobviousness. 35 U.S.C.A. § 103.

**5. Patents 6-36.1(1)**

Evidence of secondary consideration such as commercial success, long-felt need, replacement of other products in their field, praise by others, and presence of copying by the defendants must be considered, when present, en route to determination of obviousness. 35 U.S.C.A. § 103.

**6. Patents 6-16.20**

Patent covering high heat transfer oven was not invalid for obviousness. 35 U.S.C.A. § 103.

**7. Patents 6-165(3)**

Words used by patentee in patent claims are to be given their ordinary and accustomed meaning unless inventor apparently used them differently, and claims are

For the foregoing reasons, the Court GRANTS the government's petition for enforcement of DCAA's subpoena and ORDERS NNS to produce the withheld documents within ten days of the date of this Order.

The Clerk is DIRECTED to send a copy of this Order to counsel for the plaintiff and defendant.

IT IS SO ORDERED.



**MEDIA GENERAL CABLE OF FAIRFAX, INC., Plaintiff,**

v.

**SEQUOYAH CONDOMINIUM COUNCIL OF CO-OWNERS, Defendant,**

**Amsat Communication, Inc., Intervenor-Defendant.**

Civ. A. No. 89-1077-A.

United States District Court,  
E.D. Virginia,  
Alexandria Division.

May 22, 1990.

Cable television franchisee sought declaration that Cable Communications Policy Act entitled it to install cable wires in compatible easements on condominium common areas. The District Court, Ellis, J., held that: (1) Cable Communications Policy Act did not authorize taking of private property nor did it provide just compensation for such taking; (2) Act permitted access for construction of cable system only through public rights-of-way or easements dedicated to public use; and (3) franchisee was not entitled to install cable wires in compatible easements granted to private parties on common areas of condominium complex.

Ordered accordingly.

**1. Eminent Domain ⇐2(1.1)**

Installing cable wires in compatible easements granted to private parties on common area of condominium complex by cable franchisee would constitute taking for which just compensation would be required. Communications Act of 1934, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

**2. Eminent Domain ⇐10(2)**

Cable Communications Policy Act did not authorize television cable franchisee to take private property in form of placing cables along private easement even if compensation were provided; Act authorized franchisee to use only public lands, namely public rights-of-way and easements which have been dedicated to public use. Communications Act of 1934, § 621(a)(2), as amended, 47 U.S.C.A. § 541(a)(2).

**3. Telecommunications ⇐449(2)**

Owners of private property, including owners of private easements, are not compelled by Cable Communications Policy Act to grant cable television franchisees access to their land or easements. Communications Act of 1934, §§ 621, 621(a)(2)(C), as amended, 47 U.S.C.A. §§ 541, 541(a)(2)(C).

**4. Telecommunications ⇐449(2)**

Cable Communications Policy Act did not entitle cable television franchisee to install cable wires in compatible easements which had been granted to private parties on the common areas of condominium complex, none of which had been dedicated to public. Communications Act of 1934, §§ 621, 621(a)(2), as amended, 47 U.S.C.A. §§ 541, 541(a)(2).

**5. Dedication ⇐1**

Under Virginia law, dedication of property interest occurs only if owner unequivocally offers that interest to public entity for public use and public entity unequivocally accepts it.

**6. Telecommunications ⇐449(2)**

Franchisee seeking to obtain access for cable television wires may still seek access through public rights-of-way such as roadbeds and any easements that have

been dedicated to public use. Communications Act of 1934, §§ 621, 621(a)(2)(C), as amended, 47 U.S.C.A. §§ 541, 541(a)(2)(C).

David C. Kohler and E. Ford Stephens, Christian, Barton, Epps, Brent & Chappell, Richmond, Va., for Media General Cable of Fairfax, Inc.

Stephen R. Pickard, Alexandria, Va., for Sequoyah Condominium Council of Co-Owners.

Robert A. Rowan, Nixon & Vanderhye, Arlington, Va., and W. James MacNaughton, Schenck, Price, Smith & King, Morristown, N.J., for Amsat Communication, Inc., intervenor.

### MEMORANDUM OPINION

ELLIS, District Judge.

#### Introduction

In this declaratory judgment action, Media General Cable of Fairfax, Inc. ("Media General"), a cable television franchisee, seeks a declaration that Section 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2) (the "Act"), entitles it to install its cable wires in compatible easements on the Sequoyah Condominium's ("Sequoyah") common areas. The Sequoyah Condominium Council of Co-Owners ("the Council"), the condominium's governing body, acting pursuant to an ex-

1. See *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 721 F.Supp. 775 (E.D.Va.1989).

2. The seven questions were:

- (1) Identify and describe with particularity each easement Media General contemplates using to provide cable TV service to requesting unit owners in the Sequoyah complex.
- (2) Whether any taking of property would be involved in Media General's provision of service to requesting unit owners and, if so, identify each taking.
- (3) Whether each of the easements Media General contemplates using has been "dedicated for compatible uses."
- (4) Whether Media General's access to any existing dedicated compatible use easements amounts to an additional servitude on the underlying property and, if so, whether it is a taking.
- (5) Whether Media General's access to any existing dedicated compatible use easements

clusivity provision in its agreement with the current television provider, Amsat Communication, Inc. ("Amsat"), has thus far refused Media General permission to install its equipment. In an earlier opinion in this case,<sup>1</sup> the Court permitted Amsat's intervention and ruled that the Act provided Media General with an implied private cause of action to enforce whatever rights it might have under the Act. At the conclusion of the prior opinion, the Court directed the parties to submit materials responsive to seven questions.<sup>2</sup> These questions were designed to elicit responses that would establish a factual record adequate to allow the Court to determine whether the Act confers on Media General any rights to use the specific easements that exist at Sequoyah. The parties' responses produced such a record and also disclose that no material fact is genuinely disputed. The matter is therefore ripe for summary disposition. See Rule 56, Fed.R.Civ.P. The Court must now determine whether the previously found implied private right of action fits the facts of this case.

#### Facts<sup>3</sup>

Media General holds a nonexclusive cable television franchise in Fairfax County, Virginia, the county within which Sequoyah is located. Sequoyah contains 1018 individual units consisting of three distinct building types: (1) adjoining townhouses, (2) three

can be accomplished consistent with Section 621(a)(2)(A) and (B).

(6) Whether installation of Media General's cables in existing dedicated compatible easements will occasion the need for just compensation pursuant to Section 621(a)(2)(C).

(7) Whether Media General seeks access to existing dedicated compatible use easements even if the facts ultimately show that such easements, by themselves, would not permit Media General to reach the requesting unit owners without crossing over private property controlled by the Council.

*Media General Cable of Fairfax, Inc.*, 721 F.Supp. at 783.

3. The principal factual focus here is on the nature of the easements Media General claims it has rights to use under the Act. Even so, a brief recapitulation of some facts stated in the prior opinion is necessary.

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story garden style units, and (3) five plex units. Individual unit owners own the interiors of each residential unit, but the common areas, *i.e.*, the building exteriors and grounds, are held jointly by all the unit owners as tenants-in-common. The Council, composed collectively of all unit owners, is responsible for administering the complex and supervising its management. Pursuant to this power, the Council entered into an exclusive contract with Amsat's predecessor to provide television service to Sequoyah via a satellite master antenna television system. Amsat is not franchised. Amsat's current contract expires in 1998, but may be subject to renewal by the parties.

Media General claims it was approached by several unit owners about receiving its cable service. Media General then sought the Council's permission to lay its cable across the complex's common areas. The Council denied access, citing an exclusivity clause in the Amsat agreement. Media General now seeks a judicial determination of its right to compel access pursuant to section 621(a)(2) of the Act, which provides in pertinent part:

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). Specifically, Media General asserts that there are four "compatible" easements at Sequoyah through which it has a right under the Act to lay its cable: (1) a Virginia Power easement, (2) a C & P Telephone easement, (3) Amsat's television easement, and (4) a blanket utility easement in Sequoyah's Master Deed.

The Virginia Power easements grant the utility a perpetual right to use rights-of-way across the Sequoyah common areas "to lay, construct, operate and maintain one or more lines of underground conduits and cables as Company may from time to

time deem expedient or advisable ... for the purpose of transmitting and distributing electric power by one or more circuits; and for telephone, television and other communication purposes." There are two types of Virginia Power rights-of-way: (i) designated, *i.e.*, those shown on plats recorded in Fairfax County's land records and (ii) undesignated, *i.e.*, those not shown on recorded plats. The designated rights-of-way are 10 feet wide. Undesignated rights-of-way extend from the designated rights-of-way to the improvements on each lot shown on the plat through an unspecified route discretionarily selected by Virginia Power.

The C & P Telephone easements at Sequoyah, like those of Virginia Power, also permit the installation and maintenance of an underground cable system in designated rights-of-way of various widths (8-15 feet). Notably, these perpetual easements permit C & P to carry "the wires, cables, circuits and appurtenances of any other Company, including all electric wires" within the boundaries of the rights-of-way.

In contrast to the Virginia Power and C & P Telephone easements, the Amsat easement is entirely undesignated. It grants Amsat permission to construct and maintain its system anywhere in the common areas. The corresponding licensing agreement between Sequoyah and Amsat specifies where certain large pieces of equipment are to be located, but neither it nor the easement specifies where the remainder of the system, including the underground cable, is to be placed. Also, unlike the other easements, Amsat's right of access is not perpetual; it is limited to the duration of Amsat's agreement with Sequoyah or any renewal of that agreement. As of now, Amsat's agreement, if not renewed, will expire in 1998.

The final easement Media General claims is "compatible" and usable under the Act is a blanket utility easement. Section XIV(B) of the Sequoyah Master Deed<sup>4</sup> grants:

The record is unclear whether units in the remaining areas at Sequoyah are subject to a similar provision.

<sup>4</sup> The Master Deed submitted to the Court pertains only to phase I of Sequoyah, which by the deed's terms consists of only 220 apartments.

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a blanket easement upon, across, over and under all of the property for ingress, egress, installation, replacing, repairing, and maintaining a master television antenna system and all utilities including, but not limited to, water, sewers, telephones and electricity. By virtue of this easement, it shall be expressly permissible for the providing utility company to erect and maintain the necessary poles and other necessary equipment on said property and to affix and maintain utility wires, circuits and conduits on, above, across and under the roofs and exterior walls of the residences[.][sic] [N]otwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines, or other utilities may be installed or relocated on said property except as . . . approved by the Council. Should any utility furnishing a service covered by the general easement herein provided request a specific easement by separate recordable document, the Declarant or Council shall have the right to grant such easement on said property without conflicting with the terms hereof.

Though not explicit, the last sentence suggests that this easement was granted to utility companies in the abstract so they could provide service to the future Sequoyah unit owners. The only right reserved in the grant is that the Council must approve the location of the utility's system.

#### Analysis

The inquiry appropriately begins with a statement of Media General's position. Simply put, Media General asserts that § 621 of the Act is a valid land use regulation that gives a cable television franchisee a statutory right to lay its cable over or under those areas of a landowner's property that are already the subject of private, "compatible", i.e. similar, use easements. This position is fundamentally flawed; it

5. *Penn Central Transportation Co.*, involved land use constraints on New York's Grand Central Terminal following its designation as a "landmark" under New York City's Landmarks Preservation Law. Although each case considering whether a land use regulation amounts to a taking rests on its own facts, the Supreme Court

rests on alternative assumptions: either, as claimed, that use of any of the easements at Sequoyah would not constitute a taking or the unstated assumption that the Act authorizes takings of private property. Neither of these assumptions is true. Close scrutiny of the Act's terms and its legislative history compels the conclusion that the Act does not authorize the taking of private property; instead it confers on cable television franchisees the far more limited right of access (1) "over public rights-of-way" and (2) through easements "which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2). And, an examination of the easements Media General seeks access to in this case discloses that they are neither "public rights-of-way" nor "dedicated" easements. Elucidation of this conclusion requires consideration of the following series of questions:

(I) Does the placement of Media General's cable in or along private easements involve a taking of private property in the constitutional sense?

(II) Does the Act permit such a taking?

(III) Are the four easements at Sequoyah private easements, public rights-of-way, or dedicated easements?

(IV) Does limiting a cable television franchisee's right of access under the Act to public rights-of-way or dedicated easements render the Act a nullity?

#### I

[1] Prior to 1982, legislation granting access to cable television franchisees was viewed as a land use regulation that might or might not rise to the level of a taking depending on the application of the *ad hoc*, multifactor inquiry described in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).<sup>5</sup> This changed when the Supreme Court handed down *Loretto v.*

noted three factors in the analysis of "particular significance": (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action. 438 U.S. at 124, 98 S.Ct. at 2659.

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*Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). There, on facts analogous to those at bar, the Supreme Court held that permanent physical occupations of land are takings *per se* and that land use regulations resulting in such occupations need not be subjected to the usual *Penn Central* fact intensive inquiry. In *Loretto*, a New York statute prevented a landlord from interfering with the installation of cable television facilities on his property. Loretto, who had purchased an apartment building in Manhattan after cable television wires had been placed on the building's roof, sued the local franchisee claiming, *inter alia*, that cable installation pursuant to the statute constituted a taking without just compensation. The New York Court of Appeals, after conducting the *Penn Central* analysis, ruled that cable placement pursuant to the statute did not constitute a taking.<sup>6</sup> The Supreme Court reversed, holding that the cable on the building was a "permanent physical occupation of land" and hence a taking *per se* not subject to the *Penn Central ad hoc* inquiry. *Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179.

Applied here, *Loretto* teaches that the placement of Media General's cable system in all four easements it seeks to use at Sequoyah would be a taking *per se*. Placement of cable or conduit in or along an

6. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 440 N.Y.S.2d 843, 853-57, 423 N.E.2d 320, 330-34 (1981), *rev'd*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

7. The Virginia Power easement deeds explicitly give the utility a "perpetual" easement over the land. The C & P Telephone and blanket utility easements, with no specific expiration dates or conditions, implicitly give their grantees perpetual easements.

8. In considering the difference between a permanent and a temporary occupation, Justice Marshall, for the *Loretto* majority, discussed several earlier cases. Referring to *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), he noted that no taking occurs where individuals solicit petition signatures on shopping center property in part because such occupation would be "temporary and limited in nature." *Loretto*, 458 U.S. at 434, 102 S.Ct. at 3175. And discussing *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), Justice Marshall noted that an "easement of passage, not being a permanent

easement is plainly a physical occupation of the easement space. And it matters not that the actual area occupied by Media General's cables would be small in comparison with the whole of Sequoyah's common areas; even so, a taking would still occur because "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436-37, 102 S.Ct. at 3176-77. Equally plain is the permanency of this physical occupation. So far as the record discloses, Media General intends to occupy these easements indefinitely into the future, presumably as long as the term of the easement. For three of the four easements, this is forever. The Virginia Power, C & P Telephone, and blanket utility easements grant perpetual rights to use the underlying land.<sup>7</sup> The Amsat easement is limited to the duration of Amsat's agreement with Sequoyah, which, although scheduled to expire in 1998, can be renewed without limitation. Under these circumstances, it is not unreasonable to view Media General's proposed occupation of this easement as potentially permanent.<sup>8</sup> But even if Media General's proposed occupation of the Amsat easement is limited to eight years, the application of the *Penn Central* multifactor analysis points persuasively to the conclu-

occupation of land, was not considered a taking *per se*." 458 U.S. at 433, 102 S.Ct. at 3174. See also *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98, 13 S.Ct. 485, 487, 37 L.Ed. 380 (1893) (placement of telegraph poles along public streets constituted a permanent occupation, but the passage of an ordinary traveller was merely a "temporary, shifting use.") (quoted in *Loretto*, 458 U.S. at 428-29, 102 S.Ct. at 3172). Here, by contrast, Media General's use of the Amsat easement would be a constant physical occupation of land for at least eight years. Such an occupation is different from the temporary occupations cited in *Loretto*; those temporary occupations were fleeting, lasting only moments in the case of easements for passage and hours in the case of the *PruneYard* solicitors. Rather, Media General's constant occupation of easements at Sequoyah would more closely resemble the flooding cases the Supreme Court cited as examples of permanent occupations. See, e.g., *United States v. Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539 (1903).

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sion that such use would be a taking. While the economic impact of Media General's access and its interference with distinct investment-backed expectations at Sequoyah would likely be small, the character of this physical invasion weighs the balance decidedly in favor of a taking. Government directed physical occupation for eight years deprives a property owner of the use of his land for a significant period of time. When coupled with the possibilities of renewal periods, this occupation rapidly approaches permanency. In sum, if the four easements in issue are private property, Media General's occupation of any of them requires just compensation.

Attempting to avoid this conclusion, Media General urges that authorization of access via voluntarily granted utility easements distinguishes the Act from *Loretto*. Access in *Loretto* was not via easements, but as the result of a state administrative proceeding that did not consider or award just compensation. This distinction does not rescue Media General's position from the effect of *Loretto*. In granting an easement, whether to a utility or not, the grantor gives the grantee, and no others, specific rights to use the underlying property. The Act, if it authorizes access via utility easements, essentially condemns space within these easements for use by the franchisee. This is an additional use of the easement not contemplated by the grantor or the grantee. *Loretto* teaches that such compelled access, if for a permanent physical occupation, is a taking *per se*.

Moreover, Media General has no valid support for its position; its reliance on *Centel Cable TV Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359 (11th Cir.1988) is misplaced. In *Admiral's Cove Associates*, the panel, in dicta, noted that since most developers voluntarily grant easements to

9. For a direct application of this principle from *Admiral's Cove Associates* see *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI*, No. 1:85-CV-3712-RCF (N.D.Ga. Sept. 28, 1989). *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F.Supp. 422 (D.Md.1989), also appears to decide that use of a utility easement does not constitute a taking. There, the district court granted a preliminary injunction to permit a franchised

utilities, Congress could authorize cable franchisees to use these easements without creating a taking. In support, the panel cited the post-*Loretto* decision in *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). 835 F.2d at 1363 n. 7.<sup>9</sup> But *Florida Power*, read closely, does not support this conclusion. There, the Supreme Court held that regulation of the rates utilities charge cable television companies to place their cables on the utilities' poles<sup>10</sup> did not amount to a taking. The Supreme Court noted the clear distinction between the facts before it and *Loretto*. In *Loretto*, the government mandated that the property owner permit the cable television franchisee to place its wires on the owner's property. In contrast, the utilities in *Florida Power* had voluntarily leased space on their poles to the cable companies. Thus, in *Florida Power*, a landlord-tenant relationship already existed. And, as the Supreme Court held, "statutes regulating the economic relations of landlords and tenants are not *per se* takings," but statutes mandating the physical occupation of an owner's property by "an interloper with a government license" are. *Florida Power Corp.*, 107 S.Ct. at 1112. Correctly understood, then, *Florida Power* stands for the limited proposition that, where a property owner voluntarily permits a cable franchisee on its property, Congress may regulate the rates the owner charges the franchisee. This limited proposition has no application to the facts at bar, which involve a taking not a voluntary landlord-tenant relationship. Notably, the Supreme Court in *Florida Power*, citing *Loretto*, explicitly reserved decision on the Pole Attachments Act's constitutionality in the event that act is subsequently applied to compel utilities to permit

cable company to install its cables in a subdivision using compatible utility easements. The court noted that the property owners association owned all the common areas, including the roads and byways, *id.* at 424, but the opinion is unclear whether or not the easements at issue had been dedicated to the public.

10. This regulation by the F.C.C. is authorized by the Pole Attachments Act, 47 U.S.C. § 224(b)(1).

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franchisees access to utility poles and private easements. See *Florida Power Corp.*, 107 S.Ct. at 1112 n. 6. Distilled to its essence, Media General's position is that if a landowner encumbers his property by permitting any other party, not just a utility, to use it in a manner compatible with construction of a cable franchisee's system, the Act authorizes access by cable franchisees. After *Loretto*, such degradation of private property rights, including private easements, is impermissible. Accordingly, to the extent the easements at Sequoyah are private property, Media General's construction of its system through those easements pursuant to the Act would constitute a taking for which just compensation would be required.

II

[2] If the placement of Media General's cables along a private easement would constitute a taking, the question then presented is whether the Act authorizes such a taking. It does not. More specifically, the Act's legislative history demonstrates that (1) Congress did not intend the Act to authorize a taking; (2) the Act does not provide just compensation for a taking; and (3) Congress intended § 621 to do no more than authorize a franchisee to use public lands, namely public rights-of-way and

easements that have been dedicated to public use.

Legislative history reflects that Congress, reviewing an early draft of the Act, expressly considered mandating access by authorizing a taking in circumstances identical to those at bar. As originally drafted, § 633 would have required mandatory access for a cable franchisee to serve, among others, "the owner of a unit within a condominium apartment building or other residential complex," despite the opposition of the owner of the surrounding common areas.<sup>11</sup> See H.R.Rep. No. 934, 98th Cong., 2d Sess. 80 (1984), reprinted in U.S.Code Cong. & Admin.News 4655, 4717 (1984). Specifically to address *Loretto*, and thereby ensure the mandatory access provision's constitutionality, Congress included two additional provisions in § 633 directly addressing just compensation for the taking. See H.R.Rep. No. 934 at 80-81, 1984 U.S. Code Cong. & Admin.News at 4717-18. Section 633(b)(1)(D) required that state franchising authorities or the FCC regulate just compensation determinations, and § 633(d) set forth factors to be considered in determining this just compensation, including: (1) the extent of physical occupation, (2) the long-term damage, (3) extent of interference with normal use and enjoyment of the property, and (4) the enhancement of the property's value from the

11. That version of § 633 provided, in pertinent part:

- (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 building or park.
- (b)(1) A State or franchising authority may, and the 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; and

(D) methods for determining just compensation under this section.

\* \* \* \* \*

(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;
- (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.

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

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availability of cable. See H.R. 4103, 98th Cong., 2d Sess. § 633 (1984), reprinted in H.R.Rep. No. 934, 98th Cong., 2d Sess. 13 (1984). As initially drafted, therefore, the Act not only unambiguously required that a franchisee be given access, but also explicitly provided just compensation for the concomitant taking. Ultimately, however, Congress rejected this mandatory access provision and deleted § 633 from the Act. Several provisions were transferred to the present § 621(a)(2),<sup>12</sup> but the key just compensation provisions, § 633(b)(1)(D) and § 633(d), were excised. The meaning of this deletion is unmistakable; just as Congress had carefully included these provisions to make clear, in light of *Loretto*, that the Act authorized a constitutional taking, so, too, must the deliberate deletion of the provisions mean that the Act, as enacted, no longer authorizes a taking. For without the § 633 just compensation provisions, the Act lacks any means to provide property owners just compensation for a taking.

The only enacted provision that could possibly suffice in this regard is § 621(a)(2)(C). It states:

[I]n using such easements the cable operator shall ensure

(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)(C). Arguably, this language might be broad enough to include just compensation for a taking of private property. But again, the Act's legislative history refutes this argument. In the original version of the Act, § 621(a)(2)(C) coexisted, as § 633(b)(1)(C), in the original draft with the just compensation provisions, § 633(b)(1)(D) and § 633(d).<sup>13</sup> Their subsequent excision demonstrates that

12. In the earlier draft, § 621(a)(2) incorporated its present subsections (A), (B), and (C) by reference to § 633, where they were set out in full as subsections (b)(1)(A), (B), and (C). When § 633 was deleted, these subsections were transferred to § 621. Compare H.R. 4103 § 621(a)(2) and

§ 621(a)(2)(C) does not cover takings, but is limited to compensation for any property damage that may occur as a result of placing cables in eligible easements. Had Congress intended the current § 621(a)(2)(C) to provide just compensation for a taking, it would doubtless have left the excised § 633 takings provisions in place, as they governed the actual calculation of just compensation. Given Congress's concern with *Loretto*, § 621(a)(2)(C)'s retention without additional provisions detailing the determination of just compensation is persuasive, if not conclusive, evidence that § 621(a)(2)(C) concerns only property damage, not the taking of private property.

The conclusion that the Act neither authorizes a taking nor provides just compensation is further confirmed by the juxtaposition in the earlier draft of the present § 621 and the § 633 mandatory access provision. Simply put, this juxtaposition reflects that, as originally drafted, both § 621 and § 633 stood alone and provided two distinct rights of access: § 621 authorized access over public lands; § 633 authorized mandatory access to multi-unit buildings over public or private property. In this earlier version, § 633 did not reference § 621 at all. A franchisee's mandatory access right under § 633 was not constrained to similar-type utility easements, as it was under § 621. And because § 633 provided for a taking, access could have been had through private or public property by any means that ensured "the safety, functioning, and appearance of the premises." H.R. 4103 at § 633(b)(1)(A) reprinted in H.R.Rep. No. 934 at 13. By contrast, a franchisee's § 621 right of access was much narrower. It was not mandatory, but rather depended on, and was limited to, "public rights-of-way" or "easements ... which have been dedicated for compatible uses." Significantly, however, § 621 did not authorize a taking of private property, for while it incorporated subsections

§§ 633(b)(1)(A), (B), and (C), reprinted in H.R. Rep. No. 934 at 6, 13 (earlier version) with 47 U.S.C. §§ 541(a)(2)(A), (B), and (C) (enacted version).

13. See *supra* note 12.

633(b)(1)(C) does not cover takings, but is limited to compensation for any property damage that may occur as a result of placing cables in eligible easements. Had Congress intended the current § 621(a)(2)(C) to provide just compensation for a taking, it would doubtless have left the excised § 633 takings provisions in place, as they governed the actual calculation of just compensation. Given Congress's concern with *Loretto*, § 621(a)(2)(C)'s retention without additional provisions detailing the determination of just compensation is persuasive, if not conclusive, evidence that § 621(a)(2)(C) concerns only property damage, not the taking of private property.

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633(b)(1)(A), (B), and (C), it did not incorporate § 633(b)(1)(D), the provision for determining just compensation. This failure to incorporate the just compensation calculation provisions, while incorporating other regulatory provisions from the same section in the same draft, is virtually conclusive evidence that Congress never intended § 621 to permit a taking. As § 621 is identical today as it was then, the Court concludes that this provision permits a cable franchisee access only over public lands.<sup>14</sup>

[3] In summary, therefore, this Court agrees with those decisions holding the Act (1) does not provide just compensation for a taking, see *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 160 (3d Cir.1989) (dicta), and (2) does not provide access through private easements, see *Cable Assocs., Inc. v. Town & Country Mgmt. Corp.*, 709 F.Supp. 582, 584-85, 589 (E.D. Pa.1989). By deleting § 633, Congress specifically rejected a mandatory right of access over private property for cable television franchisee's to provide their services. Owners of private property, including owners of private easements, are not compelled by the Act to grant franchisees access to their land or easements. Access pursuant to the Act may be had only through public rights-of-way or easements that have been dedicated to the public use.

The Court is mindful that some courts have reached contrary results. Several have held that § 621 does provide just compensation for a taking. See *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI*, 678 F.Supp. 871 (N.D.Ga. 1986); *Rollins Cablevue, Inc. v. Saienni Enters.*, 633 F.Supp. 1315 (D.Del.1986); *Greater Worcester Cablevision, Inc. v. Carabetta Enters.*, 682 F.Supp. 1244 (D.Mass.1985). The Court finds these cases unpersuasive as they either do not

14. Moreover, the language Congress chose to define the § 621 access right supports this conclusion. Access is limited to "public rights-of-way ... easements ... which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2) (emphasis added). Dedication, as set out more fully in Section III below, is a conveyance by a grantor of certain rights in property to the public. Thus, the very words Congress used limit

address the deletion of the mandatory access provision, § 633, or are silent as to the relationship between the present § 621(a)(2)(C) and the deleted just compensation provisions, § 633(b)(1)(D) and § 633(d). In sum, the current § 621, unlike the deleted § 633, does not authorize a taking of private property. Instead, it mandates franchisee access only to public rights-of-way and dedicated easements. Section 621 only provides compensation to affected property owners for any damages franchisees cause to property through the installation of their cable television systems.

### III

[4] Application of this analysis to the facts at bar compels the conclusion that Media General is not entitled to access to Sequoyah under the Act. This is so because all the easements in issue are conveyances between or among private parties; none has been dedicated to the public; none is a public right-of-way.

[5] The law of dedication is well settled in Virginia. Dedication of a property interest occurs only when the owner unequivocally offers that interest to a public entity for public use and that entity unequivocally accepts it. In the words of the Supreme Court of Virginia,

[At common law] [d]edication is an appropriation of land by its owner for the public use. It may be express or implied. . . . Dedication is not required to be made by a deed or other writing, but may be effectually and validly done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested. It must, however, be manifested by some unequivocal act, and is not effectual and

access under § 621 to public lands. See *Cable Assocs., Inc. v. Town & Country Mgmt. Corp.*, 709 F.Supp. 582, 584-85, 589 (E.D.Pa.1989) ("dedication" is a legal term of art and Congress assumed to understand its meaning when including it in the Act). Media General's right, therefore, to access customers at Sequoyah is limited to public rights-of-way or easements that have been dedicated to the public use.

binding until accepted. When the intention of the owner to make the dedication has been unequivocally manifested, and there has been acceptance by competent authority . . . the dedication is complete.

*Greenco Corp. v. City of Virginia Beach*, 214 Va. 201, 198 S.E.2d 496, 498 (1973) (quoting *Buntin v. Danville*, 93 Va. 200, 24 S.E. 830, 830-31 (1896)). In addition to common law offer and acceptance, dedication may also occur through strict compliance with certain statutes. Cf. Va.Code Ann. § 15.1-478 (Repl.Vol.1989) (example of statutory dedication provision). Either acceptance at common law or strict statutory compliance is necessary because, upon dedication, the government becomes responsible for the property's maintenance and for any tort liability attributable to it. See *Brown v. Tazewell County Water & Sewerage*, 226 Va. 125, 306 S.E.2d 889, 892 (1983); *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474, 220 S.E.2d 247, 250 (1975).

None of the easements in issue has been dedicated to the public. Since no statute addresses the dedication of utility easements,<sup>15</sup> dedication could only have occurred through common law offer and acceptance. But the record is devoid of any language or actions from which an intent either to offer or to accept a dedication could be inferred. The language in the deeds neither explicitly nor implicitly demonstrates an intention to dedicate any of the easements to the public. Moreover, no act of a grantor manifests an intent to dedicate, nor does any act of a cognizant public body establish an acceptance. And nothing on the present record demonstrates that any government entity is responsible for maintaining these easements or would be accountable for any tort liability incurred.

A review of the facts in *Burns v. Board of Supervisors*, 226 Va. 506, 312 S.E.2d 731

15. Neither § 15.1-478 of the Code of Virginia nor § 101-2-6(d)(4) of the Code of the County of Fairfax are apposite to the dedication of utility easements. Both the statute and the ordinance transfer to the County those portions of an approved, recorded subdivision plat set apart for streets, alleys, and easements that create a

(1984) is instructive. There, the Supreme Court of Virginia held that a subdivision's easements for sewer and water lines had been dedicated to the public use. But in contrast to the case at bar, the subdivision's developers in *Burns* had specifically recorded deeds of dedication with the subdivision's plats. These deeds provided, in part, that the developers "hereby dedicate the storm sewer, sanitary sewer and water line easements to the public use." 312 S.E.2d at 733. This offer of dedication was subsequently accepted by the cognizant county officials when they approved the plats before recordation. 312 S.E.2d at 736. No similar language or actions appear in the facts at bar. Accordingly, the Court concludes that none of the four easements in question is dedicated for a public use. Media General, therefore, is not entitled under the Act to use any of these easements to serve potential customers at Sequoyah.

IV

[6] The Court's conclusion that the Act permits a franchisee to obtain access only through public rights-of-way or easements dedicated to the public use does not render the Act a nullity. Franchisees may still seek access through such public rights-of-way as road beds and any easements that have been dedicated. As demonstrated in *Centel Cable Television Co. v. Burg & Divosta Corp.*, 712 F.Supp. 176 (S.D.Fla. 1988), such access is available in certain situations, particularly in developments where individual lots abut a public right-of-way. In *Burg & Divosta*, a developer barred a local franchisee from installing its system during construction of a subdivision, while at the same time permitting a developer-owned cable company to wire the subdivision. The court granted a preliminary injunction to permit the barred franchisee to install its cables along public rights-of-way and easements that had been

public right of passage. Thus, these provisions are limited to "easements of rights-of-way for surface ingress and egress, rather than to easements for subsurface installation and maintenance of public utility facilities." *Burns v. Board of Supervisors*, 226 Va. 506, 312 S.E.2d 731, 736 (1984).

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dedicated to public use in the subdivision's plat. Presumably, once the franchisee's system was installed in the dedicated easements, individual lot owners whose lots bordered on the easements could authorize connections to their property at some future time. *Burg & Divosta* clearly shows that the Act, as interpreted by this Court, is not a nullity.

In conclusion, Media General cannot rely on the Act to compel access to private utility easements in order to reach individual unit owners at Sequoyah.<sup>16</sup> These easements are the private property of the grantors, or their successors, and the grantee utilities. The Act does not authorize a taking of this private property, nor does it provide just compensation for such a taking. Congress has made a deliberate decision not to mandate access in situations like this. Accordingly, Media General may seek access under the Act only via public rights-of-way or through easements that have been dedicated for a public use.

An appropriate Order will enter.



J. DOE, a minor, by his next friend  
and mother, Martha DOE, et  
al., Plaintiffs,

v.

SHENANDOAH COUNTY SCHOOL  
BOARD, et al., Defendants.

Civ. A. No. 90-0128-H.

United States District Court,  
W.D. Virginia,  
Harrisonburg Division.

May 17, 1990.

Mother brought civil rights action under § 1983 for school board's alleged viola-

16. Only the right under the Act to compel access to existing utility easements is in issue here. Not in issue is whether Virginia Power or C & P Telephone, pursuant to the rights granted them

tion of rights under free exercise and establishment clauses. On mother's motion for temporary restraining order, the District Court, Michael, J., held that mother was entitled to temporary restraining order to prevent private sectarian organization from conducting religious classes within a few feet of elementary school in buses closely resembling those used by school itself, and to prevent members of organization from entering school in attempt to recruit students for classes.

Motion granted.

#### 1. Injunction ⇐150

Standard which district court must use in deciding whether to enter temporary restraining order is balance-of-hardships test.

#### 2. Injunction ⇐150

District court may consider four factors in deciding whether to enter temporary restraining order: whether petitioner has demonstrated likelihood of success on merits, whether petitioner will suffer irreparable harm without injunctive relief, whether issuance of injunctive relief would substantially harm defendants, and whether issuance of injunction is in public interest; however, factors of paramount importance which court must balance are those of harm to petitioner and harm to respondent.

#### 3. Injunction ⇐150

There is something of a sliding-scale relationship, in proceeding to obtain temporary restraining order, between harm to plaintiff and necessity of showing likelihood of success on merits; if balance of harm is struck in favor of plaintiff, then it is enough that grave or serious questions are presented, and plaintiff need not show likelihood of success on merits.

#### 4. Civil Rights ⇐268

Violations of First Amendment rights constitute per se irreparable injury, for

in their easements could authorize Media General to construct its system. Nor is the issue of Media General's private rights, if any, under the blanket utility easement before the Court.

NOTICE: RULE 2 OF THE OHIO SUPREME  
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OPINIONS  
IMPOSES RESTRICTIONS AND  
LIMITATIONS ON THE USE OF  
UNPUBLISHED OPINIONS.  
CABLEVISION OF THE MIDWEST, INC.,  
Plaintiff-Appellant,

v.  
Gary GROSS, et al., Defendants-Appellees.  
No. 60703.

Court of Appeals of Ohio, Cuyahoga County.  
July 2, 1992.

Civil Appeal from Court of Common Pleas  
Case No. CP 159,189.

Dale H. Markowitz, Paul J. Dolan, Chardon,  
for plaintiff-appellant.

Rubin Guttman, Cleveland, for defendants-  
appellees.

JOURNAL ENTRY AND OPINION  
JOHN F. CORRIGAN, Judge.

\*1 Plaintiff/appellant, Cablevision of the  
Midwest, Inc., ("Cablevision") appeals from  
the order of the trial court granting summary  
judgment in favor of defendants/appellees,  
Gary and Harley Gross ("Gross"). For the  
reasons set forth below, we reverse and  
remand.

This declaratory action is a dispute between  
the owners of several apartment complexes  
and a licensed cable television franchise,  
concerning the placement of cable television  
facilities in exterior and interior areas of the  
apartments. By order of the trial court and  
stipulation of the parties, this action is for  
declaratory relief only.

At issue is whether under the Cable  
Communications Policy Act of 1984, 47  
U.S.C., Section 542; O.R.C. 4931; and the  
Codified Ordinances of the City of North  
Royalton, Ohio, Cablevision may access  
Gross's private property, including the  
interior of multi-unit dwellings, to supply  
cable television service to Gross's tenants.  
Also at issue are each parties rights, under an

agreement to provide cable television service  
to Gross's tenants, after the cancellation of  
that agreement by Gross in 1988.

On August 15, 1990, Cablevision moved for  
partial summary judgment asking the court  
to declare that under local and state law,  
appellants may provide cable television  
service to residents living in Gross's  
apartment complexes.

On that same date, Gross moved for summary  
judgment asking the court to declare: 1. that  
Plaintiff Cablevision has no right of access to  
private property within its franchise area  
without the consent of the property owner; 2.  
that under the North Royalton Cable  
Ordinance 1981-88, plaintiff Cablevision has  
no right of access to the interior of  
Defendants' multiple dwelling unit buildings  
without Defendants' consent; 3. that under  
the Cable Act Plaintiff Cablevision has no  
right of access to the interior of Defendants,  
multiple dwelling unit buildings; 4. that  
Cablevision has no right to appropriate  
private property for its own use; 5. that by  
virtue of 47 U.S.C. 541(c) and 47 U.S.C. 556(c),  
federal law has pre-empted the Ohio law  
under which Plaintiff Cablevision would be  
regulated as a utility and Cablevision  
therefore cannot be a "communication  
business" as that term is used in Revised Code  
Sec. 4931.11 for the purposes of exercising  
the powers enumerated in Revised Code Sec.  
4931.01 to 4931.23 inclusive; 6. that the  
right to appropriate land under Revised Code  
Sec. 4931.04 does not include the right to  
appropriate any interest in a multiple  
dwelling unit building for the purpose of  
providing cable television service to residents  
therein; 7. that the North Royalton Cable  
Ordinance 1981-88 does not grant Cablevision  
the right to appropriate any interest in  
Defendants, property; 8. that 47 U.S.C. 521  
et seq. does not grant Cablevision the right to  
appropriate any interest in Defendants'  
property; 9. that Defendants, refusal to  
allow Cablevision to enter upon their  
property, install equipment thereon and run  
cables through, in and throughout the walls  
of Defendants' multiple dwelling unit  
buildings, extending into each and every



suite therein is a reasonable exercise of Defendants, property rights and therefore does not constitute an unreasonable interference with the installation of Plaintiff Cablevision's facilities and does not violate any federal, state or local law; \*2 10. that by the terms of the Access Agreement entered into between Defendant and Gross and Plaintiff's predecessor, Matrix Vision of the North Coast, Inc., at the termination of the Agreement, the underground cables and cables within walls at Walnut Hill become the sole and exclusive property of Defendant Gary Gross; 11. that the North Royalton Cable Ordinance 1981-88 only grants Cablevision the right, privilege and franchise to construct operate and maintain a cable television system in the streets of North Royalton for a term of years and does not explicitly or implicitly grant Cablevision the right to take private property;

Responses to each motion were filed in a timely manner.

On September 18, 1990, the trial court issued an order denying Cablevision's motion for partial summary judgment.

On September 21, 1990, the trial court issued an order, devoid of discussion or explanation, granting Gross's motion for summary judgment. This appeal timely follows.

## II.

For its first assignment of error, Cablevision contends that summary judgment was improperly granted for the following reasons:

- A. Chapter 4931 of the Ohio Revised code authorizes Appellant's taking of Appellees' property in order to obtain access to Appellees, tenants requesting cable television service.
- B. The City of North Royalton ordinance authorizes Appellant to enter and occupy Appellees' property to provide cable television service to Appellees' tenants provided Appellee are paid just compensation.

Cablevision's first argument is premised upon R.C. 4931.11 which provides: "Any company organized at any time to transact a telegraph,

telephone or communications business may construct, reconstruct, own, use, lease, operate, maintain, and improve communications systems for the transmission of voices, sounds, writings, signs, signals, pictures, visions, images, or other forms of intelligence, as public utility services, by means of wire, cable, radio, radio relay, or other facilities, methods, or media. Any such company has the power and is subject to the restrictions prescribed in sections 4931.01 to 4931.23, inclusive, of the Revised Code, for telegraph or telephone companies." (Emphasis added.)

Cablevision contends that this statute gives it status as a utility and, therefore, under R.C. 4931.04 it may appropriate private land by eminent domain for the construction of its cable system.

Only two Ohio cases have addressed the issue of confirming "utility" status upon a cable television company. In Warner Cable Communications v. Tax Commissioner (April 26, 1990), Franklin App. No. 89 AP-889, unreported, the Tenth District Court of Appeals found that the cable television company was a "utility" for taxation purposes under R.C. 5739 and 5741. This case governed only the purchase and repair of equipment by the cable television company. However, in Peterson v. First Americable Corp. (January 20, 1989), Trumbull App. No. 4026, unreported, a case quite similar to the one sub judice, the Eleventh District Court of Appeals found that the cable television company was not a "utility" under R.C. 4931.11, and thus did not have the power of eminent domain authorized by R.C. 4931.04.

\*3 The holding in Peterson is buttressed by the Cable Communications Policy Act of 1984, 47 U.S.C. Section 541(c) which mandates that: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." Further, 47 U.S.C. Section 556(c) provides that the Cable Communications Policy Act of 1984 preempts and supersedes inconsistent state and local law.



On the basis of Peterson, 47 U.S.C. Section 541(1), and a plain reading of Chapter 4931 of the Revised Code, we find that Cablevision is not a "utility" or "communication business" within the meaning of R.C. 4931.11, and therefore does not have the power of eminent domain conferred thereby.

Cablevision's second argument is premised upon the Codified Ordinances of the City of North Royalton; Ordinance 1981-88. Cablevision contends that Section 5 of the ordinance imposes a duty upon it as franchisee to provide cable service to every dwelling unit including homes and apartments. Cablevision attempts to fortify this supposed mandate by claiming that Section 14 of the ordinance prohibits landlords from unreasonably interfering with this duty.

Section 5 of the ordinance merely provides that "cable service shall be made available" to every dwelling unit. It does not, as Cablevision contends, mandate that cable television service be installed in every unit.

Section 14 of the ordinance, however, is more compatible with Cablevision's position. This section reads in pertinent part: "No landlord shall unreasonably interfere with the installation of cable television facilities upon his or her property or premises requested by a lawful tenant except that a landlord may require: "(1) That the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants; "(2) That the Grantee or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and "(3) That the Grantee and the Tenant agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities." (Emphasis added.)

The matters of primary concern in this section of the ordinance are that: (1) Service is to be provided upon request by a lawful tenant. (2) The ordinance appears to provide

compensation to the landowner for any damage.

This ordinance appears to authorize the type of operation Cablevision seeks to undertake. However, Section 14 is identical, in all pertinent aspects, to the New York statute examined by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419. In *Loretto*, the New York statute, New York Exec. Law Section 828, provided: "1. No landlord shall "a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require: \*4 "i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants; "ii. that the cable television company of the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and "iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities. "b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or "c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not." *Id.* at 423.

The Supreme Court ruled that the minor but permanent physical occupation of an owner's property, authorized by Section 828, constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments. *Id.* at 426.

Writing for the court, Justice Marshall concluded that "in such a case, the property owner entertains a historically rooted expectation of compensation and the character of the invasion is qualitatively more

