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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring	MM Docket No. 92-260

To the Commission:

REPLY COMMENTS
OF THE
AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF
OPEN ACCESS TO CABLE HOME WIRING

The American Public Power Association's main interest in this proceeding is to secure open and unfettered access to cable home wiring for its members. APPA has recommended that the Commission adopt rules for cable home wiring similar to those in effect for inside telephone wiring, which prevent telephone companies from using claims of ownership to restrict the customer's control over the removal, replacement, rearrangement or maintenance of the wiring. The Commission could thereby achieve Congress's central purpose of stimulating competition in the cable field while avoiding the complexities to which a loss-of-ownership rule might lead.

The comments of most of the other interested parties directly or indirectly underscore the soundness of APPA's

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recommendation. Many commenters have made the same suggestion as APPA -- most notably the telephone companies, which have found the Commission's rules applicable to inside telephone wiring to be reasonable and workable. At the same time, the number and complexity of the arguments offered for and against ownership rules confirm that any such rules would raise many difficult issues that would distract all concerned from Congress's fundamental objective of promoting competition.

I. THE COMMISSION SHOULD ADOPT A TELEPHONE-WIRING APPROACH TO CABLE HOME WIRING

A. The Purported Distinctions Between Cable And Telephone Home Wiring Are Not Valid

One commenter suggests that the cable and telephone fields differ fundamentally because cable operators would lose their whole business to a competitor if subscribers were to acquire control over cable home wiring, whereas telephone companies were able to continue to provide telephone service to their consumers after the Commission's telephone wiring rules went into effect. Comments of Times Mirror Cable Television at 6-7. This supposed distinction is irrelevant here.

First, it is not the subscriber's acquisition of control over home wiring, but the subscriber's termination of service, that would cause a cable operator to lose business. Such a termination would presumably occur only if the operator failed to offer competitive services -- which would be within the operator's own control. The operator would also be perfectly

free to seek to recover any lost business, and leaving the wiring in place would enhance its ability to do so. Indeed, as the courts have frequently found, the prospect of resumed service is one of the main reasons why operators typically do not remove home wiring after termination of service. See, e.g., TeleScripps Cable Co. v. Electric Plant Board of the City of Glasgow, CA No. 89-CI-269, (Kentucky Barren Circuit Court, 43rd Judicial Circuit, 1989), Opinion and Order Granting Temporary Restraining Order, Exhibit B to APPA's Opening Comments, at 6; TV Transmission v. County Board of Equalization, 338 N.W. 2d 752, 753 (Neb. 1983); Continental Cablevision of Michigan, Inc. v. City of Roseville, 425 N.W. 2d 53, 55 n.7, 56 (Mich. 1988).

Furthermore, the Commission's purpose in adopting its telephone wiring rules had nothing to do with telephone service; those rules were expressly intended to open up competition for the installation and maintenance of inside wiring. The Commission was seeking to diminish the telephone companies' control of that business, and it viewed homeowner control of inside telephone wiring as essential to doing so. Here, Congress has mandated that the Commission open up competition for cable service. It is perfectly logical and appropriate for the Commission to view subscriber control of cable home wiring as essential to achieving that objective.

B. The Commission's Telephone Wiring Approach Would Not Result In Unconstitutional Takings

Another commenter suggests that "the uncompensated permanent use of [cable home] wiring, would, of course, be an unconstitutional taking." Comments of Allen's TV Cable, et. al, at 6. While not directed specifically to the Commission's telephone wiring approach, the comment suggests that even rules that deal only with subscriber use of wiring, rather than with ownership, would be constitutionally infirm. APPA disagrees.

In Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) -- one of the two cases upon which the commenter relies, without giving specific page cites -- the Supreme Court has recently held that a law prohibiting "all economically beneficial use of land" resulted in an unconstitutional taking. Id. at 2899. In its opinion, the Court made two points of particular significance here: (1) as to real property, an unconstitutional taking requiring compensation occurs only if the owner had no reason to expect that his property might be "restricted, from time to time, by various measures enacted by the State in legitimate exercise of its police powers . . ..;" and (2) "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale) . . .." Id. at 2899-900 (citations omitted).

Here, cable operators could at most claim that cable home wiring is their personal property, rather than the real property (through the law of "fixtures") or personal property of homeowners. 1/ Accordingly, the operators would have to satisfy the Supreme Court's more exacting test for unconstitutional takings. It is virtually inconceivable that they could meet that standard, for at least the following reasons.

First, as APPA and many other commenters have shown in their opening comments, cable operators typically do not remove cable wiring after termination of service, in large part because the cable has very limited value to the cable operator after a subscriber decides to terminate service. 2/ Thus, the main cause of any loss of value to the operator would not be the Commission's rules authorizing the subscriber's use of the wiring after termination of service, but the subscriber's own decision to terminate.

Second, even after termination, cable home wiring would not become "economically worthless" to the operator. Cable

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1/ For this reason alone, the second case upon which the commenter relies, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is inapplicable here. Comments of Allen's TV Cable, et. al, at 6 n.3. As the Supreme Court noted in Lucas, 112 S.C. at 2893, Loretto involved the "discrete" rule of takings jurisprudence applicable to permanent "physical invasions" of real property.

2/ That used cable can hardly have much value is underscored by the facts that Tele-Communications, Inc. has expressed willingness to absorb embedded cable wiring costs and that District Cablevision in Washington, D.C. is currently selling new coaxial cable to its subscribers at 6 cents a foot.

operators know this perfectly well. Indeed, as discussed above, one of the main reasons that cable operators typically leave wiring in place after termination is that they believe doing so will help them win back the subscriber's account.

Third, even if the result of applying the Commission's telephone wiring rules to cable would be to render the cable operators' entire investment in home wiring worthless, such a result would clearly have been foreseeable, and hence, would not be the product of an unconstitutional taking. After all, the Commission's telephone wiring rules have been in effect for six years. With the prospect of the Commission's adopting similar rules for cable ever present, any reasonably prudent operator would have considered recovering its costs of home wiring in installation or service fees. If they chose not to do so, that is not the fault of the Commission or of affected subscribers.

II. DEFINITION OF CABLE HOME WIRING

The first-round commenters have suggested a broad range of definitions of "cable home wiring," reflecting the many different ways in which cable is wired. This issue becomes especially complicated in the context of multi-dwelling units. For example, in some multi-dwelling buildings, wiring runs from individual apartments to a common point in a utility room, basement, roof or exterior wall; in other buildings, wiring extends from individual apartments to common wiring beneath hallways or in risers on each floor; in still other buildings

with "loop-through" wiring, the wiring connects individual apartments in series.

APPA urges the Commission to define "home wiring" in a flexible way that places the demarcation point where it will have the most impact on encouraging competition. Specifically, APPA urges the Commission to focus its definition on the point, which may differ from setting to setting, at which the subscriber's wiring can most feasibly be switched from one cable operator's system to another's without disruption to the subscriber. 3/

III. RETROACTIVITY

As indicated in APPA's opening comments and above, the Commission can avoid a host of complex issues by putting "ownership" issues aside and simply adopting its telephone wiring approach here. One such issue would be whether to give retroactive effect to new rules giving subscribers title, upon termination of service, to cable home wiring installed by cable operators before the effective date of the Act. That issue received much attention in the opening round of comments,

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3/ The Commission should also make clear that any new definitions it adopts would "grandfather" the rights that have already been determined on a case-by-case basis in litigation between cable operators and competitors. For example, after extensive jury trial, the City of Glasgow, Kentucky, won a judgment that home wiring and underground "house drops" were fixtures and, hence, real property that belonged to the homeowners rather than the cable operator. TeleScripps Cable Co. v. Electric Plant Board of the City of Glasgow, CA No. 89-CI-269, (Kentucky Barren Circuit Court, 43rd Judicial Circuit), Judgment dated August 28, 1991, enclosed as Exhibit B to APPA's opening comments.

particularly in the context of multi-user accounts governed by arm's length contracts between cable operators and major commercial entities.

APPA recommends that whatever rules the Commission decides to promulgate be made expressly applicable to existing cable home wiring, at least for residential subscribers, who, as Congress recognized in the legislative history of the Act, have had little bargaining power over cable operators. Any adverse impact upon cable operators -- which is likely to be negligible -- would be far outweighed by the benefits of increased competition that would result from applying the new ownership rules to existing wiring. Indeed, given the large number of homes already wired and the longevity of cable home wiring, purely prospective rules could well gut the home wiring provisions of the Act.

Respectfully submitted,

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