

Several wireless cable operators took advantage of that exception, securing overbuild cable television franchises for areas overlapping their protected service areas. Generally, these operators relied primarily on wireless transmissions to deliver service to consumers, but wired small areas where restrictions on the installation of antennas, line-of-sight limitations or other factors dictated the use of coaxial cable technology. The result has been improved competition, for the overbuild exception provided wireless cable operators an avenue for providing service to subscribers that otherwise could only be served by the local wired cable system.

With Section 11(a) of the 1992 Cable Act, Congress sought to codify at Section 613(a) of the Communications Act the Commission's ban on cable/MDS cross-interests. That Section provides that no cable operator may hold an MDS license with a protected service area overlapping its cable service area. Yet, in what appears to have been an inadvertent oversight, Congress did not specifically incorporate the overbuild exception. Moreover, in implementing Section 11(a), the Commission found that the overbuild exception "appears to conflict with the statutory cable/MMDs [sic] cross-ownership ban," and amended Section 21.912 to eliminate the overbuild exception.²⁵

While the Commission grandfathered cable/wireless cable cross-interests existing prior to adoption of the 1992 Cable Act, the inability of new wireless cable operators to enjoy an overbuild exception has worked against the public interest. Ironically, the cross-

²⁵*Implementation of Sections 11 and 13 of the Cable Television Consumer Protection And Competition Act of 1992: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd 6828, 6843 (1993).

interest ban has backfired. Rather than protecting the spectrum from anti-competitive abuse, it has prevented wireless cable operators from making limited use of coaxial cable where necessary to provide a competitive service. Therefore, the Commission should report on this problem to Congress and recommend that Section 613(a)(2) of the Communications Act be amended to incorporate an overbuild exception.

2. Congress Should Bar All Efforts By Cable Operators To Subvert The Leasing Of ITFS Excess Capacity By Wireless Cable Operators.

A second problem with Section 613(a)(2) is that it fails to codify the Commission's specific mandate that wired cable operators not interfere with efforts by wireless cable operators to lease excess MDS and ITFS capacity in their markets. Indeed, despite the fact that Section 74.931(h) of the Commission's Rules bars a cable operator from leasing excess capacity on an ITFS station within twenty miles of its franchise area, this has become a significant problem in a few markets.

As the Commission is well aware, a wireless cable operator must have access to most of the thirteen MDS and twenty part-time ITFS channels in order to successfully compete in the marketplace.²⁶ Throughout the late 1980's and early 1990's, one of WCAI's primary regulatory objectives was to secure rules barring any cable operator from

²⁶*Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971, 972 (1990) ("A fundamental and critical element in the viability of any multiple channel subscription television service is the need to maximize the number of channels offered to subscribers by the system.").

securing MDS licenses or entering into agreements with MDS and ITFS licensees that foreclosed competition from wireless cable.²⁷ During that period, WCAI presented the Commission with reams of evidence that cable operators across the country were warehousing spectrum in order to preclude the introduction of competitive services. WCAI's efforts bore fruit when, in General Docket No. 90-54, the Commission adopted Sections 21.912(b) and 74.931(h) -- the cable/wireless cross-interest rules.²⁸ Those rules not only bar wired cable ownership of MDS facilities, they bar leasing of MDS and ITFS facilities in close proximity to the franchise area as well.

Congress should not only fully codify those rules, it should expand them to prevent all anti-competitive interference by a wired cable operator with the MDS and ITFS leasing arrangement. The problem is that certain wired cable operators have attempted to circumvent Section 74.931(h). Under Section 74.931(h) of the Rules, no ITFS licensee may "lease transmission time or capacity to any cable television company either directly or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company, if the ITFS main transmitting station is within 20 miles of the cable television company's franchise area . . ."

²⁷See, e.g. Comments of Wireless Cable Ass'n, Gen. Docket No. 90-54, at 104-109 (filed May 7, 1990).

²⁸See *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6416-17 (1990), *on recon.* 6 FCC Rcd 6764, 6773-74 (1991).

WCAI has been advised that cable systems owned by at least three of the largest multiple system operators ("MSOs") in the nation recently have offered ITFS licensees operating in their franchise areas substantial payments in exchange for express or tacit agreements that the licensees will refrain from leasing excess ITFS capacity to wireless cable operators.²⁹ These operators apparently believe that they can circumvent Section 74.931(h) (and perhaps even 21.912(b), which contains similar language) by couching their arrangements as promises by ITFS licensees to refrain from leasing excess capacity, rather than as agreements for the right to use excess ITFS capacity. In other words, these cable MSOs appear to believe that unless an agreement with an ITFS licensee provides them with the right to transmit programming, it is not barred by Section 74.931(h).

WCAI disagrees. Sections 21.912(b) and 74.931(h) were adopted by the FCC for one purpose and one purpose only -- to preserve scarce spectrum that a wireless cable operator requires in order to successfully compete against franchised cable.³⁰ They were

²⁹In the case that has resulted in the most publicity, Comcast Corporation ("Comcast") has offered a substantial payment to the Sarasota, FL Board of Education (the "Sarasota Board"), provided that the Sarasota Board agree not to lease excess capacity on its unbuilt ITFS station to a wireless cable system operator. See Haugsted, "Wireless Cos: School Shuts Us Out of the Market", *Multichannel News*, at 12 (Feb. 15, 1993). Comcast's offer is a transparent ploy to preclude the imminent introduction of competition to its Sarasota coaxial cable operation. Despite holding numerous franchises around the country, on information and belief Comcast has never before offered to assist in the funding of an ITFS facility. Moreover, Comcast's offer was not unilateral. Rather, it came in response to a request for proposals issued by the Sarasota Board after a prospective wireless cable operator made an offer to lease excess capacity on the Sarasota Board's facility.

³⁰See, e.g. *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private*
(continued...)

designed to assure that the franchised cable operator not frustrate the competitive viability of wireless cable by precluding access to the very spectrum the wireless operator needs to succeed. As the Commission explained:

We decided that ensuring the opportunity for competition by wireless cable operations to cable television companies outweighed the benefits of enhancing cable television company operations. We adopted those rules to prohibit, directly or indirectly, ownership interests in, control of, or leasing of MDS, MMDS, or ITFS capacity by cable television companies . . .³¹

Clearly, the conduct targeted by these rules was not the use by cable of MDS or ITFS spectrum. Rather, it was cable's ability to preclude use by wireless cable operators through acquisition of "ownership interests in, control of, or leases of" scarce spectrum. As the Commission stated when it initially proposed a cable/wireless cross-interest prohibition, the evil is that cable use of spectrum is "subject to warehousing, intentional or not, and underutilization, intentional or not, both of which have the deleterious effect of restricting competition in the delivery of video programming to homes."³²

³⁰(...continued)

Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 FCC Rcd 6410, 6416-17 (1990), *on recon.* 6 FCC Rcd 6764, 6773-74 (1991).

³¹*Id.*, 6 FCC Rcd at 6775 (emphasis added)(footnotes omitted).

³²*Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971, 975 (1990).

WCAI urges the Commission to report to Congress on these developments and to request that Congress expressly bar cable operators from entering into any agreement, express or tacit, that has the purpose or effect of preventing channel capacity from being leased to a wireless cable operator.

E. Congress Or The Commission Should Ban Cable Operators From Seeking Or Securing Deed Covenants and Other Restrictions On The Installation Of Antennas.

In many areas of the country, particularly those that are experiencing rapid population growth and related new residential real estate development, cable operators have begun to pre-wiring residential units for cable service at no charge to the developer in exchange for deed covenants and other restrictions forever barring the homeowner from installing rooftop antennas. Congress or the Commission should ban this transparent anti-competitive practice. Whatever merit there may be for a developer to independently attempt to impose antenna restrictions (and WCAI believes that efforts to enforce such restrictions through the judiciary raise significant First Amendment issues), it is unconscionable for a cable operator to seek and secure restrictions that effectively preclude residents from securing access to wireless cable or DBS services.

III. WHILE THE COMMISSION'S IMMEDIATE FOCUS SHOULD BE ON GATHERING INFORMATION ON THE EXTENT WIRED CABLE TELEVISION SYSTEMS ARE SUBJECT TO COMPETITION, IT SHOULD ESTABLISH A REPORTING SYSTEM THAT WILL PERMIT BROADER ANALYSIS.

Because the *NOI* represents the Commission's first attempt to gather information for a report under Section 19(g) of the 1992 Cable Act, the Commission has properly sought comment on whether it should define the relevant market for analysis as each

existing wired cable franchise, or whether it should analyze competition more broadly.³³ Given the monopoly status of most wired cable systems in their franchise areas, the Commission's initial report to Congress will no doubt be most useful if it focuses on the status of competition to wired cable. Yet, in developing a methodology for collection data to be used in subsequent annual reports, the Commission should seek and secure data that will permit a broader analysis in the future.

One of the fundamental problems wireless cable operators have faced in responding to the *NOI* is that the Commission has requested that wireless cable operators provide detailed information regarding their wired cable competitors that is not always readily available. For example, the *NOI* asks each wireless cable operator to advise the Commission on the market share of competing wired cable operators, their penetration rates, their channel capacity and their rates.³⁴ While wireless cable operators generally attempt to be aware of such matters, their information is hardly authoritative. Moreover, wireless cable systems often compete with multiple wired cable systems. For example, Preferred Entertainment, Inc. competes against 100 different wired cable systems from its transmission site atop the Sears Tower in downtown Chicago, IL. Similarly, wireless cable operator ACS Enterprises, Inc. competes against 19 different wired cable systems in the Philadelphia metropolitan area. Obviously, requiring such wireless cable operators

³³See *NOI*, at ¶ 16.

³⁴See *id.*, at ¶¶ 24(c), 24(g), 25.

to collect and report data on a multitude of wired cable systems imposes an unreasonable paperwork burden.

Make no mistake -- WCAI certainly believes that the questions asked in the *NOI* concerning competition in the marketplace are the appropriate ones. However, the Commission can relieve the paperwork burden and secure more authoritative information if it requires each MVPD to submit data only regarding its own operations. Moreover, by requiring the submission by each MVPD of data on service availability, subscriber penetration, rates and other relevant matters on a zip code-by-zip code basis, the Commission can develop a comprehensive, authoritative database that will permit a myriad of competitive analyses. While it would be unduly burdensome to require wireless cable operators and, WCAI presumes, Direct Broadcast Service systems, to maintain records and submit reports based on cable franchise boundaries, it should not be difficult for any MVPD to provide data based on zip codes. WCAI believes that in most cases, cable franchise boundaries are co-terminus with zip code boundaries, so that the Commission can analyze competition within cable franchise areas by requiring cable operators to report on the zip codes they serve.

IV. CONCLUSION.

In short, although there is insufficient data available to draw conclusions with scientific precision, every indication is that wireless cable is emerging as an effective competitive check on the pricing and other practices of the cable monopoly. The pro-competitive provisions of the 1992 Cable Act and the Commission's implementing rules

have met with approval from the financial community, spurring an unprecedented infusion of capital into the wireless cable industry. Chairman Hundt certainly had it right when, in addressing WCAI's annual convention, he remarked that:

We are here to celebrate the acceleration of wireless cable as a viable competitor in the United States and world markets. This is the end of seven lean years and the beginning of seven fat years. I am sure this is a celebration because I've seen people here lending money. In American business, debt financing is the highest form of congratulation.³⁵

With the fine-tuning suggested above, Congress and the Commission can assure that the fat years predicted by the Chairman arrive to the benefits of wireless cable operators and consumers alike.

Respectfully submitted,

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³⁵Hon. Reed E. Hundt, Speech Before The 7th Annual Wireless Cable Convention, Las Vegas, NV, June 22, 1994 (rel. June 29, 1994).

ATTACHMENT A

