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December 5, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Ex Parte Notice -- MM Docket 92-260 and RM-8380

Dear Mr. Caton:

In accordance with Section 1.1200 et seq. of the Commission's Rules, Time Warner Entertainment Company, L.P. ("Time Warner") hereby submits these comments regarding cable home wiring issues raised by Liberty Cable Company, Inc. ("Liberty") in its Response to Ex Parte Letters in MM Docket 92-260, filed with the Commission on November 14, 1994.

I. Liberty's Position In The Home Wiring Proceedings Is Arbitrary And Subjective, And Is Inconsistent With Congress' Intent Regarding The Cable Home Wiring Rules.

Liberty's relentless pursuit of an amendment to the cable home wiring rules that would move the point of demarcation for multiple dwelling units ("MDUs") to some point outside the dwelling unit where the existing wiring coming from a subscriber's dwelling unit is first "readily accessible,"[1] is entirely arbitrary and subjective, and inconsistent with

[1] See Liberty Petition for Reconsideration in MM Docket 92-260, at 1, 4-5; Liberty Ex Parte Notices in MM Docket 92-260, dated July 28, 1993 and September 24, 1993. See also, Liberty Ex Parte Notice, dated November 14, 1994, at 2 & n.2.

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Congress' intent. As Time Warner has asserted repeatedly, a point of demarcation that varies from building to building, depending on how the building is wired, would create a situation in which there is no means to definitively measure the exact point of demarcation.[2] Such an arbitrary and impractical point of demarcation will most likely spark numerous disputes over where the point of demarcation actually lies in a particular situation, rather than "moot disputes" over whether portions of the wiring located outside of individual dwelling units belongs "to the franchised cable operator or the building owner,"[3] as Liberty suggests.

Liberty's latest proposal suggests that the point of demarcation be moved far outside the subscriber's dwelling unit to the point where the "Individual Line" connects with the "Common Line." However, Liberty has manufactured these terms out of whole cloth; they have no established meaning in the industry, and Liberty has offered no concrete definitions. More importantly, Liberty has not suggested a precise methodology to ascertain the location of its mythical demarcation point. Thus, Liberty's proposal would only lead to countless unresolvable disputes. The Commission should retain its current point of demarcation, which is capable of precise location.

Furthermore, any proposal that seeks to set the point of demarcation for eventual subscriber control outside the subscriber's dwelling unit is contrary to Congress' intent in enacting the home wiring provision of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[4] The home wiring provision specifically states that the home wiring rules are to apply to "cable installed by the cable operator <u>within</u> the premises of [the] subscriber."[5] Moreover, Congress has elaborated that the home wiring provision "limits the right to acquire home wiring to the cable installed <u>within the interior premises of a subscriber's dwelling unit</u>,"[6] and that

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[2]<u>See</u>, <u>e.g.</u>, Time Warner Response to Petitions for Reconsideration in MM Docket 92-260, at 3.

[3]Liberty <u>Ex</u> <u>Parte</u> Notice, dated November 14, 1994, at 2.

[4]Pub. L. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. §§ 151 <u>et</u> <u>seq</u>.

[5]47 U.S.C. § 544(i) (emphasis added).

[6]H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") (emphasis added).

it does not apply to "any wiring, equipment or property located outside of the home or dwelling unit."[7] Any attempt to expand the home wiring rules to cover wiring that is outside the subscriber's individual dwelling unit exceeds the scope of authority given to the Commission by Congress in the 1992 Cable Act.

Finally, Liberty's proposal that the Commission should classify passive equipment as cable home wiring is clearly contrary to Congress' intent.[8] Liberty is now attempting to push its outrageous position even further, in an effort to gain control over locked junction boxes that have been installed by Time Warner. Congress explicitly stated that the home wiring provision "does not apply to any of the cable operator's other property located inside the home (e.g., converter boxes, remote control units, etc.) or any wiring, equipment or property located outside of the home or dwelling unit."[9] The Commission simply cannot amend its definition of home wiring to include any equipment other than wiring located within a subscriber's premises. Liberty's suggestion that the home wiring rules be contorted so as to give it access to a cable operator's lockboxes, located well outside individual dwelling units, would sanction Liberty's typical modus operandi, which is to illegally and forcibly break into Time Warner's lockboxes, tortiously convert Time Warner's equipment, recklessly cut off service to customers who continue to desire to receive service from Time Warner, engage in shoddy engineering practices which lead to dangerous signal leakage, and leave the broken lockbox unsecured and thus exposed to theft of cable service.

II. Liberty's Proposed Changes To The Home Wiring Rules Do Not Create A Level Competitive Playing Field.

One of the goals of the 1992 Cable Act is to promote competition in the video distribution industry.[10] While Time Warner and Liberty agree on this basic objective of the 1992 Cable Act, they do not see eye to eye on the means of achieving that goal. Time Warner has repeatedly proposed a means of creating a level competitive playing field -- that of pursuing a policy whereby cable and its competitors are incurring similar

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[7] Id. at 118, 119 (emphasis added).

[8] See Liberty Ex Parte Notice, dated November 14, 1994, at 2.

[9] House Report at 118 (emphasis added).

[10] 1992 Cable Act at § 2(b) (Statement of Policy).

costs to install internal wiring in MDU buildings, rather than forcing cable operators to shoulder the entire capital cost associated with installation of such wiring, while their competitors simply gain access to that wiring without incurring any installation costs whatsoever.[11] Time Warner believes this is still the best means by which to promote competition because all competitors will incur essentially the same costs in offering their services to consumers, rather than giving competitors a free ride over the proprietary facilities installed by cable operators.

Liberty, on the other hand, believes that alternate providers should be able to have unfettered access to a cable operator's wiring, even before a cable subscriber has terminated its cable service over that wiring,[12] without incurring any costs associated with using that wiring.[13] Liberty's latest attempt to push its proposal is couched in slightly different terms, stating that such proposal "contemplates that inside wiring will only include those wires which connect a subscriber to the cable operator's [wiring outside the MDU unit] (and can be easily detached from [such cable]) without destroying any part of the MDU and interfering with the cable operator's provision of service to its subscribers in the MDU."[14] Even phrased in this manner, Liberty's proposal is a thin veil for its desire to have access to thousands of feet of cable wiring in MDU buildings (but outside individual dwelling units) without incurring any costs of installing such wiring itself. The Commission should not enact home wiring provisions that enable such free riders to benefit from the enormous investment that the cable television industry has made singlehandedly in "wiring the nation" for cable service.[15]

Time Warner submits that the Commission's goal should be to foster competition, not to provide unfair advantages to particular competitors. Without question, Liberty's proposal would aid competitors such as Liberty because it would allow them to serve MDU buildings without incurring anywhere near the same

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[11] E.g., Time Warner Comments in RM-8380, at 15.

[12] See Liberty Comments in RM-8380, at 2-4.

[13] See Liberty Ex Parte Notice, dated November 14, 1994, at 3.

[14] Id. (emphasis in original).

[15] See Time Warner Reply Comments in RM-8380, at 10.

costs borne by Time Warner in wiring such buildings. Liberty's proposal, however, would not aid competition; it would merely allow Liberty to displace Time Warner as the multichannel video programming provider in certain MDU buildings. Competition would be thwarted because the cable operator's ability to serve various MDUs will be severed if it is forced to cede ownership over portions of its distribution plant to competitors such as Liberty. The Commission's current home wiring rules, on the other hand, foster competition and consumer choice, because each multichannel video programming distributor ("MVPD") is encouraged to construct its own end-to-end distribution system capable of seamless interconnection to the home wiring located within the MDU unit. Thus, consumers can make instantaneous transitions from one provider to the other, or even elect to receive selected services from different providers simultaneously.

III. The Commission's Current Home Wiring Rules Are Objective And Far More Practical Than Any Of Liberty's Proposals.

Liberty continues to argue that, in MDUs in New York City where Time Warner and Liberty compete for subscribers, home wiring is inaccessible twelve inches outside the subscriber's dwelling unit, or can only be accessed by causing "substantial damage to the building and the subscriber's apartment."[16] As Time Warner has demonstrated previously, this simply is not true.[17] The Commission's existing point of demarcation -- at or about twelve inches outside the point where the wiring enters the subscriber's dwelling unit -- is easily accessible by alternate service providers in most MDU situations in New York City. Most MDUs in New York City employ a "homerun" configuration, and the wiring in such buildings typically is readily accessible in public areas such as hallways. Often, the wiring is enclosed in removable wiremold which allows convenient splicing by alternate service providers.[18]

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[16]Liberty Ex Parte Notice, dated November 14, 1994, at 4.

[17]See Time Warner Ex Parte Notice, dated September 29, 1994, at 8.

[18]See Time Warner Ex Parte Notices, dated September 29, 1994, at 8 and December 16, 1993, at 2-3 (explanation of different types of video distribution architecture employed in MDUs and accessibility of wiring in various types of installations, with emphasis on accessibility of wiring in the majority of MDUs in New York City).

Liberty's entire proposal is a straw man which is premised on its erroneous assertion that a cable operator's feeder cables located outside the MDU units "are typically not accessible 12 inches outside the subscriber's premises since they are (i) concealed in inaccessible pipe conduits or molding; or (ii) buried in concrete hallway floors."[19] Without submission of any supporting data, Liberty baldly claims that "Time Warner is patently wrong when it states in its ex parte letters that in the overwhelming majority of MDU buildings in New York City, the cable which is twelve inches outside a subscriber's unit, is located in readily accessible public areas which allows for convenient splices."[20] True to form, Liberty's statements are made with reckless disregard of the facts. In lower Manhattan, only 368 MDU buildings out of 20,867 served by Time Warner Cable of New York City (about 1.8%) employ a conduit architecture where cables are inaccessibly buried in floors or walls. In upper Manhattan, only 214 of the 14,525 MDU buildings served by Paragon (about 1.5%) employ such conduit architecture. Thus, as Time Warner has repeatedly advised the Commission, in the vast majority of MDU buildings in New York City, a competing MVPD can easily access the internal wiring located inside the unit through a simple splice at the point in the public hallway where the cable enters the individual unit, or within the unit itself at the wallplate or other point where the wiring actually enters the unit.

Liberty's claim that a twelve-inch point of demarcation is practically meaningless is disingenuous, and should not be given credence. MDUs where the wiring is inaccessible without causing significant physical damage to the building are the exception rather than the norm in New York City. Thus, Liberty's proposal that the demarcation point be extended beyond twelve inches outside the point where the wiring enters the subscriber's dwelling unit is both unnecessary in most MDUs that Liberty serves or desires to serve, and exceeds the Commission's authority and Congress' intent with regard to the home wiring rules.

IV. A Wallplate Demarcation Point Is The Most Practicable Demarcation Point in MDUs With Internal Conduit Systems.

If the Commission is going to clarify the MDU demarcation point in those cases where the existing home wiring is connected to the cable operator's system through a wallplate in the

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[19]Liberty Ex Parte Notice, dated November 14, 1994, at 4.

[20]Id.

dwelling unit, the only alternative that is both practicable and consistent with Congress' intent is to set the demarcation point explicitly at the wallplate inside the individual dwelling unit, or at such other point where the wiring actually enters the interior of the dwelling unit.[21] Indeed, such a construction would not even require an amendment to the current home wiring rules, since the wallplate, or point where the wiring actually enters the unit, is obviously "at (or about) twelve inches" from where the wire enters the subscriber's dwelling unit.[22] A wallplate demarcation point also would not exceed the scope of the home wiring provision by covering common wiring within the MDU, but outside the subscriber's dwelling unit,[23] and it would be readily accessible by any alternate providers that desire to use the internal wiring within an individual dwelling unit. Moreover, a wallplate demarcation point alleviates the risk of conversion and unfair competition that would exist if the demarcation point were to be set at a point that could be hundreds of feet outside the subscriber's dwelling unit.

Liberty's claim that a wallplate demarcation point would allow alternate providers only two real options for obtaining access to subscribers in MDUs is meritless.[24] First, Liberty would not "have to compel Time Warner to remove its [distribution cables] from internal pipe conduits so that Liberty's [cable] could be placed in the conduit."[25] As noted above, Time Warner's experience demonstrates that over 98% of the MDU buildings in New

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[21]See, e.g., Time Warner Ex Parte Notices, dated December 16, 1993, at 2 and September 29, 1994, at 9.

[22]47 C.F.R. § 76.5(mm).

[23]See House Report at 118.

[24]See Liberty Ex Parte Notice, dated November 14, 1994, at 5.

[25]Id. Indeed, this preposterous suggestion by Liberty is perhaps most telling of its true motives. Liberty seeks to require Time Warner to remove its distribution facilities from MDU buildings in the event Liberty is unable to convert such facilities to its own use. In this way, Liberty could assure protection from competition from Time Warner because Liberty would have successfully blocked Time Warner's ability to again gain access to that subscriber. Even in situations where Time Warner loses a particular MDU resident, Time Warner needs to maintain its facilities leading to that unit so that it can compete to get that subscriber back or offer alternative services.

York City are not wired with internal conduit architecture. Moreover, even in the few internal conduit buildings which do exist, in many instances, there is room to fish a second wire through the conduit so that both the cable operator's wire and an alternative provider's wire could remain in place.

In situations where there is not room for two wires in the pipe conduit, alternate providers have numerous options for installation of their wire, such as external, hallway, or common closet installations. Because landlords typically receive handsome compensation from unfranchised MVPDs based on a percentage of their revenues from the building, most landlords have a strong incentive to allow Liberty or another MVPD to install cable in hallway moldings, or on the outside of the building. Installation of a second wire in common areas of the building is a one-time disturbance to owners of MDUs, rather than something that must be done numerous times. Furthermore, home wiring would not have to be removed and replaced each time a subscriber changes video service providers, as Liberty contends,[26] because each MVPD would have its own wiring in place, and would be ready to be hooked up to a subscriber's dwelling unit upon request for that service.[27] To the contrary, it is Liberty's approach that would require unnecessary disturbance to residents and MDU buildings, as well as interference with the quality and integrity of the franchised cable operator's service to non-switching residents, every time a resident chooses to switch service providers. The current home wiring rules, by encouraging each provider to install its own independent facilities, allow such service changes without disruption to

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[26]Liberty Ex Parte Notice, dated November 14, 1994, at 5.

[27]Congress stated that, by giving subscribers who terminated cable service the right to acquire the wiring in their dwelling unit, consumers would be able "to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause." House Report at 118. Thus, the disruption to subscribers that the home wiring provision sought to avoid was that of having cable operators remove their own wiring upon subscriber termination of service, not that of allowing competing MVPDs to install some of their own wiring for the provision of service which the subscriber has requested. In most cases, the alternative MVPD will be able to incorporate all or some of the existing home wiring, but the home wiring rules provide no guarantee that the alternative MVPD will not have to supplement the existing home wiring on some occasions.

Liberty further contends that the wallplate demarcation point is "sensible only in the very limited case where the conduit leading to the wallplate is large enough to accommodate two sets of cable and [the cables are connected] inside a 'gem' box covered by the wallplate."[28] Contrary to Liberty's belief, there are substantially more than "a handful" of MDUs in New York City that have such a configuration. In fact, it is Time Warner's experience that in every MDU that has internal conduit, there will be a "gem" box where the conduit terminates in each unit, and the internal wiring will be readily accessible at the wallplate. Thus, Liberty's plea for a demarcation point far beyond the subscriber's dwelling unit is entirely unnecessary.

V. Liberty's Proposed Amendment To The Home Wiring Rules Is Statutorily Unauthorized And Violates The Constitution And State Laws.

Contrary to Liberty's casuistry at page 7 of its November 14 ex parte notice, the home wiring rules, and particularly Liberty's proposed amendment of them to apply to extensive cable facilities well beyond tenants' apartments, does not merely place constraints on the use of cable installed by the cable operator, but forces the cable operator to relinquish ownership and control of it to another person without just compensation. It is important to note that cable installed by a cable operator under state access laws such as New York Executive Law Section 828 remain the property of the cable operator upon and at all times after installation.[29] In holding that Section 828 effects a "taking" for which just compensation must be paid to the landlord, the Supreme Court distinguished statutes that require landlords to install mail boxes, smoke detectors, fire extinguishers, etc. in common areas of their buildings, without any requirement of compensation. The Court found the fact of ownership by the cable operator to be a critical point of distinction between Section 828 and such other laws.[30]

The cable operator does not cease to own its facilities in common areas of the building simply because someone in the building is not currently receiving the cable operator's service

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[28] Id.

[29] See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), on remand, 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983).

[30] Id. at 441 n.19; see also id. at 439 ("Of course, Teleprompter, not appellants' tenants, actually owns the installation.").

The cable operator does not cease to own its facilities in common areas of the building simply because someone in the building is not currently receiving the cable operator's service through some portion of them.[31] It is incorrect for Liberty to suggest that there is any point in time, while the cable operator has a franchise for the area and a right to provide service in the building, that the cable operator "has no need for" the cable it has installed.[32] The cable facilities need to be available to the cable operator promptly upon receipt of a request for service so that the cable operator can comply with franchise and statutory obligations in a timely fashion. Pending such a request, the cable facilities must be maintained and kept secure by the cable operator, who remains responsible for insuring that there is no signal leakage or degradation in service to current subscribers.

If the cable operator's cable has been taken over by a direct broadcast satellite ("DBS") company in order to provide satellite service to tenants, and some tenants later request basic cable service from their cable operator (because DBS companies do not provide local broadcast stations), the cable operator would, under Liberty's proposed amendment to the rules, have to install substantial new cable facilities in the building in order to meet its statutory and franchise service obligations to such tenants. Similarly, if an unfranchised company like Liberty has taken over Time Warner's cables to serve a tenant and the tenant later wants a new interactive or other service (cable or telephone) offered by Time Warner, while still receiving certain services from Liberty, it would become Time Warner's burden under Liberty's proposed rule amendment to construct substantial new cable plant, because Liberty would have previously taken over use of Time Warner's original cable plant.

Moreover, the rule that Liberty wants the Commission to amend in a manner so clearly beyond the Commission's jurisdiction[33] is not reciprocal or evenhanded. It applies only

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[31]See Loretto, 458 U.S. at 439 ("So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.").

[32]See Liberty Ex Parte Notice, dated November 14, 1994, at 7.

[33]The legislative history of the 1992 Cable Act makes clear that the scope of the home wiring provision is limited to "the cable installed within the interior premises of a subscriber's dwelling unit," and that it "does not apply to any wiring,

(continued...)

against and to the detriment of cable operators; cable operators can never use the rule to take over facilities installed by a SMATV operator, MMDS, DBS, or Video Dialtone provider who has wired buildings. Of course, such a rule amendment will provide a great inducement to such companies to allow the franchised cable operator to wire new buildings at its own expense (which it may need to do to comply with franchise and state law obligations to provide service on request), and thereafter use them without any meaningful contribution to the installation cost. The so-called "dedicated" cables that Liberty refers to in its November 14 ex parte notice represent the preponderance of the cable plant (and the cost of cable construction) within apartment buildings (in contrast to the risers serving multiple floors, which are relatively inexpensive to install). Moreover, unlike single family home installations where the cable operator at least has the opportunity to recover its labor costs through an installation charge, applying the home wiring compensation formula to MDU distribution wiring would be grossly unjust because it is designed to cover only the costs of the cable, not the extensive labor costs involved in wiring MDUs, and such labor costs can never be recovered in installation fees chargeable to customers.

In sum, the amendment of the home wiring rule proposed by Liberty does not merely regulate the terms and conditions of a "relationship that had been previously and voluntarily entered into between the relevant parties,"[34] but would deprive the cable operator of vested property rights that it acquired either by mandatory access laws (in the many states and municipalities where they exist) or by contracts which were entered into long before the proposed rule amendment. Since the proposed rule amendment provides no proper mechanism for the award of just

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[33](...continued)
extensive cable located outside customers' apartment units or homes can be taken from the cable operator merely because it is a "dedicated" line. The cables located outside subscribers' apartments are not installed at the time a customer requests service and pays an installation charge; such "outside" wiring is installed, at the time the building is first wired for cable, throughout the building (in hallways, conduits, or on the exterior of the building), so that it is available to be connected to wiring that is installed in the interior premises of an apartment unit at the time a tenant requests service.

[34]Liberty Ex Parte Notice, dated November 14, 1994, at 7.

compensation, the proposed rule amendment is fatally deficient constitutionally, as well as statutorily unauthorized.

VI. Liberty's Illegal And Tortious Conduct At New York City MDUs Controlled By Liberty Has Precipitated Various Legal Actions Involving Liberty And Time Warner.

The lawsuits referred to in Section VI of Liberty's November 14 ex parte notice were occasioned by Liberty's illegal and tortious conduct at apartment buildings controlled by Liberty. Liberty's descriptions of the facts and circumstances of each of the cases cited by it are replete with misleading statements, omissions of critical facts, distortions and outright falsehoods. The true facts demonstrate that Liberty does not believe in honest competition, but is prepared to employ any means to prevent tenants of buildings under contract to Liberty from receiving franchised cable television service.

It is important for the Commission to understand why Time Warner must, from time to time, bring suits against landlords to protect its ability to provide state-of-the-art cable service. In each of the cases cited by Liberty, Liberty entered into one of its typical exclusive contracts with a building owner. Those contracts give Liberty -- not the building owner and not the building's tenants -- effective control of the decision (and of any litigation ensuing therefrom) of whether, and on what terms and conditions, tenants may be allowed to subscribe to franchised cable television service. Liberty's exclusive contracts are long-term, often 10 years. Liberty's first move in taking over a building is to take control of Time Warner's cable television facilities there. In such cases Liberty is indifferent to whether this has the effect of cutting off service to tenants who still want to receive Time Warner's service (as is their right under New York law). When the tenant or Time Warner invokes its legal right to receive or provide franchised cable service, Liberty opposes on the ground that the law is inapplicable, or the law has not been properly implemented, or some other pretext calculated to frustrate tenants' rights and the rights of Time Warner.

Furthermore, when Time Warner attempts to rewire or upgrade its facilities in accordance with its obligations under its franchise and New York law, so that Time Warner can have its own system providing state-of-the-art service, Liberty exercises its contractual control over the building to resist, delay, and ultimately defeat the installation of such facilities. In these disputes, whether they result in litigation or not, Liberty designates and pays for the lawyer who ostensibly represents the building owner (but who is actually acting on behalf of Liberty),

to ensure that Liberty does not have to face effective competition in the buildings it serves.

Liberty is well able to finance these dilatory tactics, including litigation, because it is controlled by one of New York's largest and wealthiest real estate companies. Liberty, for example, not only defends litigation initiated by Time Warner or Paragon against buildings under Liberty's contractual control, but frequently commences, in its own name or in the name of building owners, cases and proceedings intended to prevent Time Warner from providing service in accordance with its statutory rights.[35]

Liberty procures its exclusive long-term contracts by agreeing to pay landlords substantial sums and/or by undercutting Time Warner's rates in the case of owner-occupied apartment buildings, which Liberty is able to do principally because it steals Time Warner's facilities instead of installing its own equipment. (Liberty has never, in its entire corporate existence, offered to pay Time Warner or Paragon for any of their cable facilities that it unlawfully converts to its own use.) While Time Warner seeks to protect its ownership and control of the cable facilities it installs in buildings at great expense (in order to ensure the integrity and quality of its service, prevent theft of service, and control signal leakage), Time Warner has not for many years entered into any exclusive contracts with building owners in New York City, and has never taken the position that any New York City building owner could not offer, through Liberty or another company, a competing service to tenants.

The true facts of the six cases cited in Section VI of Liberty's November 14 ex parte notice are set forth below:

- Paragon Cable Manhattan v. 180 Tenants Corporation and Douglas-Elliman, Gibbons & Ives, Inc. In this apartment building (180 East End Avenue) Paragon provided service through a loop-through cable system which Paragon's corporate predecessor purchased from

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[35]See, e.g., Matter of 86th Street Tenants Corp. v. New York State Commission on Cable Television, Index No. 105358/93 (Sup. Ct. N.Y. Co. Dec. 23, 1993) (Liberty, through its surrogates, unsuccessfully challenged, inter alia, (a) the power of the NYSCCT to issue Orders of Entry permitting Time Warner or Paragon to upgrade its cable facilities, and (b) the applicability of Section 828 of the New York Executive Law to cooperative apartment buildings).

the building owner several years earlier for a price of $16,800, as reflected in a written contract. Paragon learned from certain of its subscribers in the building that Liberty had signed a contract with the building owner and was telling tenants that they would be converted to Liberty's service and that they would not be able to receive Paragon's service any longer. Paragon, based on the foregoing information, sought and obtained a restraining order from the New York Supreme Court preventing Liberty from cutting off Paragon's service to tenants who wished to continue to receive it. Upon issuance of the restraining order, Liberty and the building owner under contract to it did not move to vacate the restraining order or litigate the case but sought mediation from the New York State Commission on Cable Television, to which Paragon readily consented. Because of the timely intervention of the court and the Cable Commission, Liberty dropped its longstanding interference with Paragon's efforts to install an upgraded system in the building, independent of the loop-through system which Liberty wished to take over, and Paragon, at long last, was able to construct its upgraded system. Paragon thereupon surrendered its loop-through system to the building (effectively, to Liberty) without recovery of the $16,800 purchase price or any other compensation whatsoever.

Accordingly, residents of this building are now able to receive Liberty's service or Paragon's service, even though Liberty had intended that tenants be able to receive only Liberty's service. Moreover, the two systems are independent and do not share any cable or cable facilities, so that there is no interference between Liberty and Paragon, as is the case where Liberty attempts to use Paragon's or Time Warner's facilities.

- Manhattan Cable Television, Inc. v. Fifty-First Beekman Corp. Manhattan Cable received reports similar to those that Paragon previously received in connection with the above-cited case, to the effect that Liberty was intending to take over Manhattan Cable's loop-through system at the building (420 East 51st Street). Manhattan Cable attempted, through repeated letters and telephone calls, to obtain confirmation from Liberty and the building owner that Manhattan Cable's system would not be taken over and its subscribers cut off, but that Liberty would install cable of its own, so that tenants could receive service from either company at their election. Because the responses of Liberty and the building owner were deliberately vague and

unclear, and Liberty's announced installation date was imminent, Manhattan Cable sought and obtained a restraining order that prevented Liberty from cutting off service to Manhattan Cable's tenants without their consent. The restraining order did not interfere with Liberty's work at the building, according to the deposition testimony of Liberty's then chief operating officer. During the pendency of the case, Liberty installed its own cable in the conduits used by Manhattan Cable (which Liberty probably would not have done but for the restraining order). Contrary to the assertion at page 8 of Liberty's November 14 ex parte notice, Liberty did not thereafter obtain statements requesting a switch from 100% of the building's residents. To the contrary, some of the tenants continued to request and receive Manhattan Cable's franchised cable television service, notwithstanding the financial disincentive created for them by Liberty's bulk rate contract imposing the costs of Liberty's service upon all residents whether they wanted it or not. Upon the application of Manhattan Cable, the action was dismissed without prejudice as moot, following the completion of Liberty's installation. Consequently, this case is another example of residents of the building being able to obtain service from either Liberty or the franchised cable company, contrary to Liberty's original plans.

- In the Matter of the Application of Manhattan Cable Television, Inc. to Obtain Disclosure of the Board of Managers of the Horizon Condominium and Liberty Cable Company, Inc. to Aid in Bringing an Action Against The Board of Managers of the Horizon Condominium. Contrary to the false description at page 9 of Liberty's November 14 ex parte notice, Time Warner did not sue this condominium, but rather made an application for pre-action disclosure pursuant to Section 3102(c) of the New York Civil Practice Law and Rules to ascertain whether Liberty was about to unlawfully take over its facilities. As a result of this proceeding and the negotiations that followed, no lawsuit was ever commenced, and a settlement agreement was entered into, a copy of which Liberty has attached to its November 14 ex parte notice as Exhibit B in direct violation of paragraph 5 thereof, which states: "The parties shall keep this agreement (and its contents) strictly confidential and may use or disclose it only to the extent necessary to enforce it in a court of law." Liberty casually disregards its contractual obligations

just as it disregards and flouts state access laws and Time Warner's property rights.

In this case, Liberty once again was threatening to take over Time Warner's facilities. There was no question that Time Warner owned the cable facilities it installed at the Horizon Condominium several years earlier at a cost of tens of thousands of dollars, since this was reflected in a written contract. The settlement agreement was entered into by Time Warner solely because of the uncertainty as to its ability to continue to provide service at the building because of the lack of judicial precedent as to the application of New York Executive Law Section 828 to condominiums. The settlement agreement, therefore, reflects a compromise on the part of Time Warner and Liberty to resolve a dispute in the case of one particular building with exceptional facts; it does not reflect a belief on the part of Time Warner that optimal service can be provided by a sharing of cable between and among more than one cable service provider. The experience of Time Warner in New York City has been that such sharing results in chronic interference, chaos, and poor service.[36]

- Paragon Cable Manhattan v. P & S 95th Street Associates and Milstein Properties Corp. In this building (182 East 95th Street), which is owned by members of the Milstein family who are principal owners of Liberty, Liberty began providing service in the Summer of 1993 using cable facilities installed at the expense of Paragon's predecessor company at the time the building was constructed. Paragon has produced invoices and purchase orders showing that Paragon paid an electrical contractor for the installation of its cable at the building at that time. In addition to Liberty's takeover of Paragon's facilities at the building,

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[36]Liberty refers to a complaint letter it wrote to the New York City Department of Telecommunications and Energy, a copy of which is attached as Exhibit C to its November 14 ex parte notice. We are informed by the official at the New York City Department of Information Technology and Telecommunications (the successor agency to the Department of Telecommunications and Energy) that, although no formal written response has been made to Liberty's complaint, Liberty has been orally advised that the Department finds no basis to take any action regarding Liberty's complaint.

Milstein personnel who have been deposed in this action have acknowledged that they were directed by the Milstein organization and/or Liberty not to permit Paragon personnel to make service calls to new or existing Paragon subscribers at the building unless Liberty was notified and had a chance to send someone over to escort the Paragon technician. As a consequence of this policy, prospective Paragon subscribers were diverted to Liberty's service before they were able to get connected to Paragon's service (since Liberty would instruct the doorman to tell the Paragon service person to come back another day and would then solicit the tenant for Liberty). Because of this tortious conduct, Paragon has great difficulty servicing its customers in this building, and has lost many existing and prospective subscribers there. Liberty's assertion that there was cutting of its cables by Paragon is totally unsubstantiated, and is a recent fabrication to justify Liberty's outrageous interference with Paragon's facilities and customers at the building. Since there is admittedly a common ownership interest between this building and Liberty, Liberty could readily have constructed a parallel system in the building instead of infringing upon Paragon's system, but such a course would require Liberty to invest capital in its business instead of engaging in its traditional parasitism.

- 10 West 66th Street Corporation v. Manhattan Cable Television, Inc. This case was commenced by a landlord under contract to Liberty against Time Warner (Manhattan Cable). The plaintiff's motion for a restraining order was so baseless and frivolous that it was denied outright by the court and, after Time Warner filed its opposition to landlord's motion for preliminary injunction and requested sanctions because of the groundless nature of the motion, the landlord promptly withdrew its motion. Several days later, the landlord dropped its tortious interference claim altogether. At no time did Time Warner interfere with the landlord or Liberty at 10 West 66th Street. Liberty has been providing service there since April 1992. The case remains pending, albeit inactive for over two years, because the landlord, under Liberty's direction, has continued to refuse to permit Time Warner to install an upgraded system in the building so that Time Warner can provide better service to tenants and compete effectively there.

of Entry issued by the New York State Commission on Cable Television on April 2, 1992 to allow Time Warner to upgrade its cable facilities at the building in accordance with New York law. There has never been any interference by Time Warner with Liberty at or in connection with this building. Liberty, however, controls Time Warner's access to the building through its contract and does not wish Time Warner to be able to provide upgraded service there to compete with its own service.

For all the foregoing reasons, and for the reasons set forth in Time Warner's previous submissions to the Commission regarding cable home wiring, the Commission should not amend or interpret its home wiring rules to apply broadly to MDUs, as Liberty proposes.

Sincerely,

Arthur H. Harding

Arthur H. Harding

cc: Julia Buchanan
Jennifer Burton
Richard Chessen
Lynn Crakes
Marian R. Gordon
Meredith Jones
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