

ordinarily not remove the wiring after termination of service because it costs more to remove than it is worth. Nevertheless, the franchised operator will invariably claim that it owns the separate wiring on the property and threaten to sue the property owner and the competitor for conversion and tortious interference with prospective economic advantage if the property owner allows the competitor to use the separate wiring. Often the issue of who owns the wiring is unclear, and therefore the property owner, faced with the prospect of becoming embroiled in a large and highly expensive and visible law suit, backs down and allows the franchised operator to retain exclusive access to the property. The 12 inch rule encourages this result by preventing property owners from acquiring the wiring back to the point where it is dedicated to individual units so that the property owner can add providers or change providers without facing the Hobson's choice of defending a lawsuit or incurring the cost, impairment, risk, disruption and inconvenience associated with adding another set of wires throughout the building.

3. **ICTA Strongly Believes That Moving The Cable Demarcation Point For MDUs Back To Where The Wire Is Dedicated To An Individual Unit, And Permitting The Property Owner To Purchase The Wiring Upon Termination, Promotes Competition And Is Consistent With Congress's Expressed Intent**

a. ICTA's Recommendation Will Promote Competition

The cable demarcation point for MDUs should be at the point where the wire is dedicated to an individual unit. That is, all separate wiring should be considered "cable home wiring" that may be purchased upon termination of the cable service. As previously explained in sections I.A.1.a. and b above, ICTA respectfully submits that this wire can only be purchased by the property owners.

Allowing the property owners to purchase such wiring would greatly foster competition in the MDU market, both where the property owner wants multiple cable providers on its property and

where it wants a single provider. With this modification to the cable home wiring rules, property owners who wanted more than one provider at their properties could then do so without having their buildings subjected to a whole new set of separate wiring. Both providers would install their own common wiring and the providers would share the existing separate wiring. Given that the separate wiring is dedicated to individual units, and each tenant would only subscribe to one company's cable service, such a sharing arrangement would work as the separate wire would simply be moved from one provider's junction box to another. Such a result is eminently preferable to one where even though a property owner wants two providers on its property, it refuses to allow a second provider because it comes at the cost, impairment, risk, disruption and inconvenience associated with having a whole new set of separate wiring installed on the property.^{12/}

Allowing the property owners to purchase all of the separate wiring after termination will also promote competition in the industry where the property owner wants only one cable provider to service its property. Franchised cable operators are currently entrenched in most MDUs in the country. Property owners will only be released from the franchised operators' stranglehold if the property owners are permitted to terminate the operators' service and use the separate wiring without fear of being hauled into court. This fear can only be eliminated if the property owners are given the right to purchase all of the separate wiring upon termination. Eliminating this concern will allow property owners seriously to consider the attributes of both the franchised cable operator and its competitors before deciding which will service its property. This will greatly benefit the tenants of the property, because the property owner's decision of which provider to select will then be based

^{12/} A property owner could purchase the separate wiring from the first provider when adding a second provider by simply terminating the first provider's service momentarily (so that it can purchase the wiring) and then permitting both providers to provide service at the property.

upon factors that are important to tenants such as price, quality of service, and channel selection, instead of factors that are unimportant to the tenants, such as the property owner's desire to avoid a lawsuit.

Property owners' primary concern is to have high occupancy rates and therefore, left to their own devices, they will choose the cable provider(s) that they believe will best serve their tenants' needs, after a consideration of all relevant criteria. As the Third Circuit in Woolley, 867 F.2d at 157, correctly found: it may be assumed that the property owner's selection of the cable provider "will be based on the realities of the marketplace and that the wishes of the tenants will not go unheeded since cable television may be one of the services that prospective tenants consider in their selection of a building."

In sum, ICTA believes that the Commission should ensure that its regulations permit the property owners to base their decision on the relevant criteria and not on the fear of being sued. The Commission can accomplish this objective by allowing the owners of MDUs to purchase all of the separate wiring upon termination of the cable service.

b. ICTA's Recommendation Is Consistent With Congress's Expressed Intent

As previously indicated, Section 16(d) was enacted so that when a cable provider's service is terminated, property owners could avoid incurring damage to their property by the cable operator's removal of the wiring, and avoid incurring the cost and inconvenience of having new wiring installed. Legis. Hist. at 1156. ICTA's recommendation is consistent with both of these objectives. By allowing the property owners to purchase all of the separate wiring upon termination, the first objective is met because the provider would then be able to remove only the common wiring (should the provider choose not to lease it to an alternative provider, see Section I.A.4. directly below). Similarly,

Congress's second objective would be met under ICTA's recommendation since only the common wiring would need to be installed (again assuming no lease of the same), which installation can be complicated and expensive, and therefore would not result in any significant cost or inconvenience to the property owner.^{13/}

c. ICTA's Recommendation Is Sound Policy

Because rental apartment tenants have only temporary interests in the building in which they live, ownership or control over cable inside wiring is simply inconsistent with the nature of such tenancy. Ordinarily, tenants vacate their unit within a very short time following the expiration of the lease. At that point, the tenant clearly has no interest in acquiring the cable inside wiring. The tenant will not be remaining at the unit to use the wire in connection with the services of another video programming distributor and, presumably, there is no advantage to removing the wiring for use at the tenant's next residence. Thus, the tenant in this context almost certainly will not exercise any right to purchase the cable inside wiring conferred by the Commission's rules. Similarly, if a tenant terminates service without leaving the building, the tenant still has no financial stake in the long term service options available at the building sufficient to motivate the tenant to purchase the cable inside wiring.

The MDU owner, by contrast, has a long term interest in the building and the services available to it. MDU owners must compete for tenants in the fiercely competitive residential real estate market. The quality of the cable and telecommunications services available on the property is one factor on

^{13/} ICTA's comments regarding the cable demarcation point only relate to wiring that is installed by the cable operator or its predecessors. Property owners often install their own wiring and ICTA strongly recommends that they should continue to be permitted to do so. ICTA respectfully submits that tenants cannot install wiring in the common areas (without property owner permission) for the reasons discussed in Section I.A.1.

which they compete. For this reason, where MDU owners do not already own the cable inside wiring, either due to private agreement with the service provider or by virtue of state law, they should be afforded the option to acquire cable inside wiring in the buildings when either they or a tenant terminates service. MDU owner control over cable inside wiring in rental apartment buildings also will help to mitigate safety concerns since the property owner remains responsible for maintenance of the common areas and for building security.

With respect to condominium properties, condominium owners are responsible for, and have property rights in, the common areas of their buildings. Through their by-laws, the condominium association as representative of the overall resident-owners typically has management control over such common areas and selects the cable and telecommunications service provider(s) via majority vote. It is reasonable to assume that the appropriate owner-management association will deal responsibly with issues regarding cable inside wiring and thus reasonable to allow the option to purchase to vest with such association.

In short, the Commission should vest any and all inside wiring disposition rights on those with the greatest interests in the property -- property owners and associations. This would bring the Commission's rules into harmony with most state fixtures laws and maximize resident welfare.

4. ICTA Does Not Believe That The Concerns Raised By Certain Parties About Moving The Cable Demarcation Point, Which Were Alluded To By The Commission, Are Well-Founded

In the Notice, the Commission referred to concerns raised by other parties about extending the cable demarcation point. ICTA strongly maintains that these concerns are not well-founded. First, the question was raised as to whether the Commission has the statutory authority to extend the demarcation point. For the reasons set forth in section I.A.1.a. above, while ICTA agrees that

the Commission does not have the statutory authority to extend the cable demarcation point if it gives the tenant the option to purchase the cable home wiring (i.e., deems the tenant the subscriber under Section 16(d)), ICTA strongly believes that the Commission has the statutory authority if it gives the option to purchase to the property owners.

Second, ICTA believes that moving the demarcation point will not unfairly restrict the ability of franchised operators to compete to provide telephony and advanced telecommunications services, as the Notice indicates others have claimed. ICTA believes that those operators will not have to rewire in the future to provide such services if the demarcation point is moved. It does not appear that each video service provider will need its own separate wiring at MDUs for the transfer of voice, video and data. Thus, it may not be necessary for each provider to have its own wire, as a tenant may be able to obtain video, voice and data from three different providers using the same separate wire.

The premise underlying the argument, i.e., that only the franchised cable operators will be capable of providing telephony and advanced telecommunications services in competition with local exchange carriers, is not true. Those ICTA members supplying service to over 80% of the private cable subscriber base all provide or offer broadband service to MDUs and have been doing so for years. Thus, tenants will not be left bereft of a competitive alternative for telephone and, e.g., the “Internet”.

Moreover, under ICTA's recommendation, franchised cable operators will not be unfairly treated. In fact, they will be paid for the value of the wiring regardless of whether they even owned it. Moreover, given that franchised operators at MDUs ordinarily recoup the costs of any wiring that they purchased fairly quickly, most operators will have more than fully recouped their investment.

In addition, the Commission should be wary of parties resisting a move of the cable demarcation point who try to muddle the distinction between the capability to provide a service and the right to provide it. One obviously can have the former without the latter. That is, if applicable law or the property owner gives a provider the right to provide video or data at the property, that provider will have that right regardless of whether their separate wiring was purchased by the property owner. If neither applicable law nor the property owner gives them that right, then they will not have that right regardless of whether all of the separate wiring can be purchased by the property owner.

Third, the Notice indicates that some have argued that the demarcation point cannot be extended much beyond 12 inches because their common wiring may be invaded. This argument has no relevance to ICTA's proposal, which contemplates that only the separate wiring can be purchased. Fourth, the Commission has indicated that parties may contend that moving the demarcation point may lead to the point being difficult to ascertain. With ICTA's recommendation that is not a concern. The point would always be where the common wires interconnect with the separate wires, so that only the separate wires could be purchased.

Fifth, while not addressed in the Notice, the Commission has informed ICTA members that certain parties will claim that Section 652(d)(2) of the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act of 1996") precludes moving the cable demarcation point to the point where the wire is dedicated to an individual dwelling unit because that would conflict with a cable operator's Congressionally-granted ability to lease that "wire." ICTA firmly believes that this argument misconstrues the facilities available for lease under Section 652(d)(2). That section does not cover inside wiring at all, but rather addresses the exterior cable drop running from the curb up to the single family home or MDU building. ICTA strongly believes that to hold

otherwise would create a total conflict with the purposes behind Section 16(d) as set forth exhaustively above. Under standard rules of statutory construction, separate provisions are to be construed where possible so as to create harmony, not conflict. See, e.g., U.S. v. Stauffer Chemical Co., 684 F.2d 1174 (6th Cir. 1982) (and cases cited therein), aff'd, 464 U.S. 165 (1984). ICTA respectfully contends that its construction preserves the logic and harmony of both sections while the contrary construction would serve to eviscerate Section 16(d).

Finally, the Commission has raised the issue of whether extending the demarcation point would create difficult compensation issues, such as how the operator would be compensated for the additional wire. ICTA believes that the operator should be compensated under the same formula currently used pursuant to 47 C.F.R. §76.802 whereby the provider is compensated based upon the replacement cost of the wiring. There is no reason to alter this formula just because the length of the wire purchased will be greater than before.

In light of the foregoing, ICTA respectfully requests that the Commission move the cable demarcation point for MDUs to the point where the wire is solely dedicated to an individual rental unit, and upon termination of the service give the property owner the option to purchase that wire.

B. If The Commission Concludes That It Does Not Have The Power To Adopt ICTA's Recommendation, ICTA Strongly Urges The Commission To Require That Cable Operators Elect Within Seven Business Days After Notice Of Termination Whether To Remove The Portion Of The Separate Wiring That May Be Removed

If the Commission decides to keep the 12 inch rule (and allow the property owner to purchase the wiring if the tenant refuses), ICTA urges the Commission to include an additional provision so that it can achieve in most cases Congress's objectives under Section 16(d). As previously explained, when the property owner cannot obtain ownership of the separate wiring upon termination

of the provider, it often will stay with the provider against its own wishes (and the interests of the tenants) to avoid the Hobson's choice of defending a lawsuit or having a second set of separate wires installed on its property. It is ICTA's strong view that the best way to remedy this problem, as explained above, is to permit the property owner to purchase the separate wiring upon termination of the provider's service. If the Commission believes it does not have the power to reach that result, ICTA respectfully recommends that the Commission add a regulation providing as follows:

- (i) within seven business days after the cable provider receives written notice from the property owner that service will be terminated as of a date certain, each provider must provide written notice to the property owner as to whether the provider will remove all of the provider's wiring that can be removed (i.e. the separate wiring that is more than 12 inches from a rental unit and any separate wiring in or within 12 inches of the rental unit that both the tenant and property owner may decline to purchase), restoring the property to its prior condition;^{14/}
- (ii) if the cable provider declines to remove the wiring or does not make an election to remove within seven business days after notice of termination, the property owner may consider the separate wiring abandoned, and may use that wiring in any manner it sees fit immediately upon the effective date certain of the termination of the provider;^{15/}
- (iii) if the cable provider elects to remove the separate wiring that it may remove, it must remove that wiring within ten business days after the effective date certain of the termination (and cannot just disable the wiring and cannot just

^{14/} This termination notice must also include a statement as to whether the property owner will purchase the wiring in or within 12 inches of the rental unit if the tenants do not. If, and only if, the property owner refuses to purchase such wiring, this notice should include a statement as to which tenants will purchase the separate wiring in or within 12 inches of their rental unit. Tenants should be given seven business days to make that decision, and therefore, if the property owner elects not to purchase the wiring, it should not send out the notice to the provider until it gives tenants seven business days to decide whether they will purchase the separate wiring in or within 12 inches of their rental unit.

^{15/} The property owners' rights would only be subject to any ownership interest a tenant may have in the wiring in or within 12 inches of its rental unit if the tenant elected to purchase that wiring.

retaliate by ceasing to provide signal in advance of the effective date certain);
and

- (iv) if the cable provider fails to remove the wiring within ten business days after the effective date certain of the termination after electing to do so, it will be deemed to have abandoned the wire and will be liable to the property owner or the new provider for the cost of installing the new separate wiring and the cost of removing the old separate wiring if such wiring is removed (in the alternative, the property owner or new provider can recover as liquidated damages \$20,000 or the revenues earned by the cable provider at the property during its last three months of service, whichever is greater).

By adopting such a regulation ("ICTA's alternative recommendation"), the Commission will achieve in most cases Congress's objectives under Section 16(d) to have property owners, upon termination of service, avoid incurring damage to their property by the cable operator's removal of the wiring, and avoid incurring the cost and inconvenience of having new wiring installed. Legis. Hist. at 1156. As previously indicated, used cable wiring has such limited value that it costs more to remove the wiring than it is worth. Therefore, in most instances under ICTA's alternative recommendation, the cable operator will decline to remove the wiring and the property owner will be able to avoid the damage to its property from the removal of the separate wiring and the cost and inconvenience of having new separate wiring installed.

ICTA's alternative recommendation would also greatly benefit tenants and property owners because the property owner will know in advance of the effective date certain of the termination whether the separate wiring will be removed. Therefore, if the wiring is to be removed, the property owner can insist that the new provider's wiring be installed by the time of termination so that there will be no void in the tenants' service. Under ICTA's alternative recommendation, the property owner will not face the dilemma of either (i) having to have a second set of separate wires installed before

it even knows whether the first set will be abandoned; or (ii) failing to provide the tenants with cable service during the period where the former provider is deciding whether to remove the wiring.

The damage provisions under ICTA's alternative recommendation exist to ensure that the regulation is complied with, and to allow property owners or alternative providers who are damaged by a cable provider's failure to comply with the regulation to recover their damages. The liquidated damage provision permits entities to enforce this regulation without incurring significant legal fees litigating over the reasonable and or actual costs of installing new wiring and removing the old wiring.^{16/}

Finally, the Commission unquestionably has the authority to adopt ICTA's alternative recommendation since such recommendation will enable Congress' objectives under Section 16(d) to be met in most cases. In addition, under ICTA's alternative recommendation, there is no taking of the cable provider's property outside of the 12 inch rule so this recommendation does not raise any issues concerning whether the taking is unconstitutional.

C. ICTA Believes That If The Commission Moves The Cable Demarcation Point, The Current Rules For Compensation Of Broadband Cable Should Not Change

Pursuant to 47 C.F.R. §76.802, upon termination the cable provider is compensated for the cable home wiring based upon the replacement cost of the cable. ICTA submits that there is no reason why this compensation scheme should change if the Commission moves the demarcation point to where the wire is dedicated to an individual residential unit.

^{16/} There are numerous ways in which the Commission could logistically prescribe ICTA's alternative recommendation. For example, the Commission could keep the 12 inch rule and simply add the provision set forth in ICTA's alternative recommendation. Alternatively, the Commission could add the provision set forth in ICTA's alternative recommendation, move the cable demarcation point for MDUs to where the separate wiring begins, and clarify that a tenant can only purchase the wiring up to 12 inches outside of its rental unit.

D. ICTA Does Not Believe That The Commission Has The Authority Or Power To Require Cable Providers To Sell Their Inside Wiring Prior To Termination Of Their Service

Under Section 16(d), Congress required the Commission to “prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.” 47 U.S.C. §544 (i) (emphasis added). Given that Congress explicitly addressed this issue, and decided that the Commission should only prescribe rules concerning the disposition of cable after the cable system service is terminated, ICTA respectfully submits that the Commission does not have the statutory authority to prescribe rules concerning the disposition of cable prior to the termination of service.

ICTA believes that the Commission also cannot force cable operators to sell their wires because such a requirement would constitute a taking under the Fifth Amendment. The Commission does not have the power to exact a taking under the Fifth Amendment unless Congress has given it that power. See Section II.A.2. herein. In light of Section 16(d), it is ICTA's view that while Congress gave the Commission that power with respect to the distribution of operator-installed cable after termination of service, Congress has not given the Commission that power of eminent domain with respect to the forced sale of inside wiring prior to the termination of service.

ICTA further believes that for the reasons set forth in Section I.A.1.b. herein, if the Commission moved the demarcation point to where the wire is dedicated to an individual rental unit, and yet sought to require cable operators to sell to tenants the inside wiring prior to termination of service, such a requirement would result in an impermissible taking of the property owners' property.

In light of the foregoing, ICTA urges the Commission to forego from requiring cable operators to sell their inside wiring prior to termination of service because ICTA believes that the Commission

lacks the statutory authority to do so and does not have the eminent domain power to exact such a taking.^{17/}

E. ICTA Believes That The Commission Should Not Deregulate Cable Inside Wiring Rates, And If It Does So, It Should Only Deregulate Rates For The Period Prior To The Cable Operator Receiving Notice Of Termination Of Its Service

The ICTA strongly urges the Commission to refrain from deregulating cable inside wiring rates. If the Commission decided to deregulate such rates, cable operators could continue to engage in anticompetitive conduct by simply refusing to sell the wiring except at outrageous prices. The property owner would then be faced with the dilemma of having to pay a king's ransom for the wiring, having a second set of separate wires installed, or staying with a cable provider that the property owner does not believe is the best choice for its MDUs. Such deregulation would only spur additional litigation because some property owners would refuse to pay the outrageous price or install a second set of wires, and therefore would face a conversion/tortious interference lawsuit from the cable operator. Permitting the cable operator to receive replacement cost for the wiring is eminently fair given that the wiring is worth less than it costs to remove it, and the cable operator has ordinarily more than fully recouped its investment by the time it is terminated.

Moreover, such deregulation probably would not result in subscriber access prior to termination. Property owners who have sought to purchase all of the separate wiring upon termination have often discovered that cable operators would not sell the wiring at any price even though the wiring was of no economic value to them anymore. Such refusal, of course, was designed to force property owners to consider allowing the cable provider back on the property because the other two

^{17/} For the same reasons as set forth in Section I.E. below, ICTA believes that if the Commission does require pretermination acquisition, it should not deregulate the cable inside wiring rates.

alternatives -- litigation or adding a second set of separate wires -- were repugnant to the property owner. Cable operators do not want to lose the leverage that they have by claiming ownership of the separate wiring, and are unlikely to sell it at any price (other than perhaps an outrageous price) if cable inside wiring rates are deregulated.

In the alternative, ICTA recommends that the Commission should not deregulate the rates upon which the inside wiring can be sold for the period after an operator receives a termination notice. Given that the Commission's reason for considering deregulating inside wiring rates is to encourage pretermination access, such purpose will not be promoted at all by deregulating the rates once the operator has received a termination notice.

F. ICTA Does Not Believe That The Commission Should Create A Presumption That The Subscriber Owns The Wiring Once The Cable Operator Has Installed The Wiring

ICTA firmly believes that the Commission should refrain from creating a rebuttable presumption that once the cable wiring is installed by the operator, the subscriber owns that wiring, even assuming that the Commission has the power to create such a presumption, which, in light of Sections I.A.1. and I.D. herein, ICTA respectfully submits the Commission probably does not have (especially if the subscriber is deemed to be the tenant). A rebuttable presumption would have little value given the unclarity of state fixtures law. With a rebuttable presumption, a property owner faced with the threat of a lawsuit from a cable operator who claimed to own the wiring would still face the risk of losing that suit and therefore as discussed in Section I.A.2., back down and allow the franchised operator to retain exclusive access to the property. In addition, cable operators could easily overcome a rebuttable presumption by ensuring that the contract language specified the cable operator's retention of ownership. In short, ICTA believes that a rebuttable presumption is not the solution and

will only lead to further litigation over the applicability of the presumption under a given set of facts, and its effect, if any, in light of state fixture law. ICTA strongly encourages the Commission to establish a bright line test so that there will be no question as to who owns the wiring at each point in time.

ICTA respectfully submits that the Commission could not constitutionally impose an irrebuttable presumption. The only difference between an irrebuttable presumption and a requirement that the cable operator sell the inside wiring prior to termination (which ICTA believes is unconstitutional as discussed in Section I.D.), is that in the former scenario the cable operator could not even receive any compensation for the wiring even though in both instances it loses any ownership rights it has to that wiring.

II. MANDATORY ACCESS

A. ICTA Respectfully Submits That The Commission Has No Constitutional Or Statutory Authority To Mandate Access To Private Property By Service Providers

1. It Is Well-Established That The Forced Installation Of Cable And Telecommunications Facilities On Private Property Is A Taking Which Must Serve A Public Use And For Which Just Compensation Must Be Paid

The forced installation of cable and telecommunications facilities on private property, whether exterior or interior to the building structures, clearly constitutes a *per se* taking due to the permanent physical occupation caused by such installation. Loretto, 459 U.S. at 426. Property owners have a constitutionally-protected right to exclude third parties, including cable and telecommunications providers, from their properties in the absence of a valid taking for a public use and the payment of just compensation. Id.; Cable Holdings of Georgia v. McNeil Real Estate, 953 F. 2d 600, 605 (11th Cir. 1992), cert. denied, 113 S.Ct. 182 (1992).

Thus, courts have struck down state or municipal mandatory access laws that either did not provide for just compensation or were invalid because the taking was for a private use. See, e.g., Storer Cable TV v. Summerwinds Apartments Associates, Ltd., 493 So.2d 417 (Fla. 1986), reh'g denied, 507 So.2d 1176 (mandatory access statute governing access to rental properties was overturned as an unconstitutional taking of private property without just compensation); Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F.Supp. 1244 (mandatory access statute invalidated due to lack of just compensation). To date, only New Jersey courts have chosen to imply a just compensation requirement where none was expressly provided. Princeton Cablevision, Inc. v. Union Valley Corp., 195 N.J. Super. 257, 478 A.2d 1234 (N.J. Ch. 1983); NYT Cable v. Homestead at Mansfield, 518 A.2d 748 (N.J. App. 1986), aff'd by equal division of the Court, 543 A.2d 10 (N.J. 1988) (applying "judicial surgery" to uphold mandatory access statute).

In City of Lansing v. Edward Rose Realty, 502 N.W.2d 638, 645 (Mich. 1993), the court invalidated a mandatory access law because the taking was for a private and not a public use. That law sought to force MDU owners to suffer the physical appropriation of their properties by a cable operator despite the fact that comparable multichannel video programming services were already being provided by an alternative supplier. The taking was deemed an unconstitutional taking for a private use, predominantly serving to promote the cable franchisee's private interest in expanding its customer base, thereby generating "substantial revenues through subscription payments" and "increas[ing the] market value of its overall system." Id. In the words of the lower court: "Rather than benefiting the public interest, it appears that the proposed condemnation is an attempt by a private entity to use the city's taking powers to acquire what it could not get through arm's length negotiations

with [the MDU owners].” City of Lansing v. Edward Rose Realty, 481 N.W. 795 (Mich. Ct. App. 1992).^{18/}

2. The Commission Has No Inherent Power Of Eminent Domain And Congress Has Not Authorized Any Taking Of Private Property For The Provision Of Narrowband Or Broadband Services

The power of eminent domain is exclusively reserved to the sovereign. U.S. v. 39.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1985), cert. denied sub. nom., Save the Dunes Council Inc. v. U.S., 476 U.S. 1108 (1986). Neither a private entity nor an agency of the federal government inherently has the power of eminent domain. Thus, the authority of governmental bodies such as the Commission or private telecommunications providers to exercise the power of eminent domain is solely dependent upon an express statutory delegation by Congress when as here agency action would create an “identifiable class of [per se takings] cases expos[ing] the Treasury to liability both massive and unforeseen.” Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

Congress has not delegated eminent domain power to the Commission for the purpose of mandating access to private property for the delivery of any component of broadband services by any narrowband or broadband provider. Nor has Congress delegated eminent domain power directly to narrowband or broadband services providers for such purposes. To the contrary, Congress has repeatedly considered and repeatedly rejected passage of a mandatory access law. Accordingly, ICTA respectfully submits that this Commission has no constitutional or statutory authority to mandate access by service providers.

^{18/} The Michigan Supreme Court rejected arguments that the public interest was served because the cable franchisee paid franchise fees and was subject to universal service requirements. It also held that while the public benefited somewhat from the provision of public, educational and governmental access channels that benefit was not so great as to justify a taking.

a. The Cable Communications Policy Act of 1984

As part of the Cable Communications Policy Act of 1984, Publ. L. No. 98-549, 98 Stat. 2779 (1984) ("1984 Cable Act"), Congress considered enacting section 633, a proposed mandatory access provision. Congress, however, decided against enacting that provision and struck it from the legislation.^{19/} See H.R. Rep. No. 934, 98th Cong. 2d Sess. 79-83 (1984), reprinted in 1984 U.S.C.C.A.N. at 4716-20. In so doing, Congress clearly indicated that private property owners should be able to select the video service provider or providers of their choice and freely negotiate for the provision of video services from those suppliers without governmental interference:

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

Under that provision, if one tenant in an apartment building requested cable, a property owner would have been forced to wire the entire building. Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.

Fortunately, since the time of the committee markup and [sic] following the most recent series of negotiations between representatives from the cities and the cable industry, this objectionable section was deleted from this legislation, thus clearing the way for what I hope will be early enactment of H.R. 4103.

130 Cong. Rec. H10444 (Oct. 1, 1984) (Statement of Rep. Fields) (emphasis added). See also 130 Cong. Rec. H10435 (Oct. 1, 1984) (Statement of Rep. Wirth) ("I would like to inform my colleagues

^{19/} As discussed in more detail in Section II.C.2. herein, the provision that Congress considered would only have mandated access if the tenants did not already have access to services roughly equivalent to that offered by the franchised operator.

that Section 633, . . . was deleted from H.R. 4103 and is not part of the legislation we will consider today").

As numerous courts have correctly found, Congress's ultimate decision to delete section 633 in its entirety shows that Congress recognized that the marketplace would ensure residents of private property developments access to cable from some source; thus, government intervention was unnecessary. See, e.g., Woolley, 867 F. 2d at 155, 156 (finding "no support in the express language of the [1984 Cable Act] for [the] position that Congress authorized franchised cable companies to force their way onto private property, over the protests of the property owner, in order to offer cable television services to the tenant of the property owner"; deletion of section 633 "is a strong indication that Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable services to apartment dwellers"); Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund, 953 F. 2d 600 (11th Cir.), cert denied, 113 S. Ct. 182 (1992); Media General Cable v. Sequoyah, 991 F. 2d 1169 (4th Cir. 1993); TCI of North Dakota, Inc. v. Schriock Holding Company, 11 F.3d 812 (8th Cir. 1993); Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994).^{20/}

^{20/} These courts also uniformly held that forced access to private utility easements is a taking for which just compensation must be paid and that Congress had not authorized such a taking. Therefore, this Commission clearly has no authority itself to mandate such a taking. Moreover, even with respect to a voluntary apportionment by a utility whose easement grant authorizes same, courts have repeatedly held that such utility easements end at or short of the MDU building wall and do not extend throughout the interior of the MDU. See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1120 (4th Cir. 1995). Thus, access to utility easements is not tantamount to building access. Any authorization for the installation of facilities beyond the precise boundaries of the actual easement grant is a taking of the property owner's property for which just compensation must be paid. See generally, Loretto. Finally, any restriction placed upon a property owner's constitutional right in the future to withhold easements, restrict their apportionability or limit the scope of their use would similarly be a taking for which just
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As emphasized by the Third Circuit, given the "proliferation of systems" capable of delivering multichannel video services, Congress left the selection from among competing systems to the property owner, fully confident that residents' needs would be satisfied because the landlord's "selection will be based on the realities of the marketplace" and because "the wishes of the tenants will not go unheeded since cable television may be one of the services that prospective tenants consider in their selection of a building." Woolley, 867 F.2d at 159.

b. The Consumer Protection and Competition Act of 1992

In its sweeping reform and re-regulation of the franchised cable industry in the Consumer Protection and Competition Act of 1992 ("1992 Act"), Congress did not alter its position on the wisdom of allowing marketplace choice to occur rather than mandate government intervention to tie the property owners' hands. With full knowledge that several circuits had construed the 1984 Act as endorsing the right of property owners and associations to exclude and admit whichever video providers they chose, Congress elected not to alter this outcome or even comment upon it. "Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . ." Lorillard, 434 U.S. 575, 580 (1978) (citation omitted); accord, Merrill Lynch Pierce Fenner & Smith v. Curran, 456 U.S. 353, 381-82 (1982). It is especially appropriate to assume congressional adoption of judicial decisions that are "long-standing and well known . . ." Ankenbrandt v. Richards, 112 S. Ct. 2206, 2213 (1992). Had Congress disagreed with these judicial constructions or had Congress changed its policy conclusions, Congress surely would have corrected

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compensation must be paid given the rationale of these cases.

the situation in the 1992 Act given its substantial revisions to other areas of cable legislation. Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979).

c. The Telecommunications Act of 1996

In a precursor bill to the Telecommunications Act of 1996, i.e., S. 1822, the Senate specifically sought the inclusion of a provision, proposed section 230(j), that would have prohibited property owners and associations from restricting any occupant's ability to receive telecommunications services from a provider of its choice provided that just compensation be made in exchange. S. 1822, 103d Cong., 2d Sess. §230(j) (1994). Once again, however, Congress ultimately rejected mandatory access as a valid means to achieve competition, preferring marketplace controls over regulatory intrusion.

In light of Congress's repeated rejection of a federal mandatory access law, Congress has not granted the Commission the eminent domain power to exact such a taking. Therefore, ICTA respectfully submits that the Commission cannot constitutionally impose mandatory access. Moreover, ICTA believes that such a regulation would also be invalid because Congress's repeated decision to forego mandated access establishes that the Commission does not have the statutory authority to impose it.

B. ICTA Strongly Believes That Even If This Commission Had The Legal Authority To Mandate Access, To Do So Would Not Promote Tenant Welfare Or Increase Competition

Whether supplying service to single family homes or multifamily dwellings, all providers obtain the permission of the private property owner to install their facilities and deliver their services in the absence of mandatory access laws. Thus, each provider competes "at the property line" for the right to serve, e.g., the residents of rental multiunit dwellings, condominiums, planned unit

communities, and individual single family homes. Property owners and associations^{21/} routinely exercise their constitutional right to select the providers of various amenities, including cable and telecommunications, and seek to use the leverage that they have from representing a large customer base to ensure competitive rates and quality service. The owner or association ordinarily selects one provider of such services and negotiates for the benefit of the entire pool of residents competitive rates, responsive customer service standards and programming content tailored to the demographics of the building. It stands to reason that a property owner or association, who assumed all the risk of investment in the property and who continues to be responsible for the maintenance of that investment, should be the one entity entitled to protect and recoup that investment through determining the use to which the property will be put as well as the particular users of it.

While video services are not “essential services” such as heat and power, property owners and associations are well aware that a substantial number of tenants prefer to have such services available should they choose to subscribe. Thus, in the extremely competitive marketplace for the rental of apartment units, a property owner would be foolish not to ensure that the particular broadband services available were of the highest quality at a competitive price with specific guarantees of customer service. To do otherwise would reduce the level of occupancy in the building as potential tenants would choose to live in other apartment complexes where such quality services at more affordable rates were offered. In short, a property owner's interest is in having the best possible system in order to maximize rental profits through high occupancy rates. As long as such broadband services are offered, however, even if from a single supplier, the tenants' needs are satisfied. ICTA believes that to condemn private

^{21/} Condominium and homeowner associations by their very by-laws are charged with representing the overall residents of the private property in speaking as a single voice.

property solely to force a property owner or association to provide a largely duplicative service does nothing for tenant welfare and is a taking solely to benefit private commercial enterprises. See, e.g., City of Lansing v. Edward Rose Realty, 502 N.W. 2d 638 (Mich. 1993). Mandatory access laws defeat a property owner's or association's ability to protect residents from inferior services delivered at exorbitant rates. If a property owner or association cannot oust a provider from the entirety of the property such that the provider stands to lose a significant volume of customers, there is little, if any, bargaining power to force the provider to offer additional or specialized programming, better its customer service, or lower its rates. An individual tenant does not have the same leverage as the property owner or association as representative for the entire community of subscribers and potential subscribers. Given the drastic variance throughout the country of the demographics of MDU communities, a blanket determination simply cannot be made that multifamily housing residents are better served if access to all narrowband or broadband providers offering service in the geographical area is guaranteed. The decision as to whether single, dual or multiple access will better bring the "information superhighway" to residents should be left to a highly deregulated marketplace.

If the marketplace is permitted to operate free of artificial restraints on contracting power, each narrowband and broadband services provider will be confronted on a regular basis with the possibility that a property owner or association might choose an alternative supplier of similar services, one that can tailor programming and rates to the needs and interests of the tenant community, or that can provide better customer service, for example.^{22/} Without mandatory access, should a particular

^{22/} Benchmark competition provides many of the same benefits that head-to-head competition provides in terms of ensuring quality service at the lowest possible marginal cost. The critical competition occurs at the level of which competitor(s) will obtain access to the MDU property. The mere existence of the alternative provider operating efficiently and at lower cost to the subscriber (continued...)

services provider fail to honor specified contractual obligations and requirements, property owners and associations possess the most effective consumer protection remedy available -- expulsion and exclusion from the building and renegotiation in the marketplace for a substitute provider. Mandatory access laws preclude the exercise of this traditional marketplace remedy.

The fact that in some circumstances a property owner or association may not wish to grant access to more than one provider or that a particular competitor may require exclusivity at a particular MDU should not be viewed as anticompetitive or contrary to tenant welfare. First, exclusivity is often the key to unlocking supracompetitive offerings. Unless an entire customer base can be guaranteed, operators, including private cable operators, cannot economically afford to go beyond "plain vanilla" services or reduce rates. Currently, where sufficient volume can be secured, private cable operators typically price 10-15% below the next highest competitive rate for video programming services at the individual tenant level. With respect to services and in response to MDU demographics, private cable operators often agree to tailor offerings, such as providing a lifeline basic tier, free MATV services, majority ethnic programming and community bulletin boards.

Second, exclusivity is often necessary to attract and justify investment. Given the small subscriber base of any particular multifamily complex as compared with an entire municipality, and the absence of any real economies of scale, most service providers require exclusivity in order to guarantee a return on investment. This is of particular importance for private cable operators who must install a complete stand-alone cable system, including satellite dishes, electronics and descrambling equipment at nearly

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forces all providers' costs to decrease and service to increase.

every private property they serve.^{23/} The presence of an additional provider would simply render it economically infeasible to provide service, *i.e.*, the available subscriber base, now “shared,” is too small to justify the capital investment. Given the fact that those private cable operators serving approximately 80% of the private cable subscriber base have also invested in facilities capable of providing full broadband services to residents, *i.e.*, voice, video, data and security, exclusivity is even more critical in certain settings to achieve a proper return on investment given the typical five to ten year duration of the contractual rights.

By contrast, cable franchisees can serve a new MDU simply by stringing additional cable from the building to the nearest public street for interconnection to its franchise-wide single family headend facility. While a cable franchisee can amortize its installation expenses over its entire franchise area, a private cable operator must amortize its nearly four times higher expenditures only over the single property served in most instances. By allowing exclusive contracts, the competitor can establish a foothold in the market so that the needed return on capital is obtained. These are the very marketplace forces that Congress intended to prevail from the 1984 through the 1996 Acts in the hope of chipping away at the distribution monopoly currently enjoyed by local cable operators. Thus, competition would be diminished by removing the ability of property owners and associations to grant exclusivity.

^{23/} Well over a decade ago, Congress unambiguously and specifically identified and endorsed private cable operators as valid, alternative cable television service providers:

The Committee believes that the SMATV [private cable] industry is a very important component of the communications marketplace, and further believes that such technology has great potential in contributing to the welfare of consumers and competition in the communications marketplace.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 82 (1984) reprinted in 1984 U.S.C.C.A.N. at 4719