

the subscriber's home. All proposals to apply the telephone inside wiring rules must be rejected as beyond the FCC's authority.

**D. The Commission May Not Divest Cable Operators of Their MDU Wiring Unless Operators Are Compensated Based On the Fair Market Value of Lost Subscribers.**

A number of parties urge the Commission to convey ownership of a cable operator's wiring that is located *outside* of the subscriber's residential units, such as wiring in common areas and risers, and even wiring from the cable distribution plant, to the landlord or, the developer of the building.<sup>55</sup> The Commission's NPRM, of course, recognizes that any such regulations would amount to a taking of the cable operator's property, thus requiring compensation under the Fifth Amendment of the United States Constitution.<sup>56</sup> As in all takings jurisprudence, the constitutional question posed by proposals to divest cable operators of all MDU wiring is: what amount of compensation for the confiscated cable plant is *just*, and therefore required.<sup>57</sup>

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<sup>55</sup> See, e.g., Comments of Multimedia Dev. Corp. at 14, 16; Comments of DIRECTV at 8, 12; Comments of WCA at 15. Because no party suggests that MPVDs be permitted to purchase wiring, the FCC should clarify that MPVDs may not purchase cable inside wiring, as an agent of any "subscriber" or otherwise.

<sup>56</sup> The Commission states that the disposition of wiring required by the rules now in effect "presents no Fifth Amendment difficulties, since the operator will ultimately be compensated for its wiring," and cites *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) as holding that "Fifth Amendment does not prohibit 'takings', only uncompensated ones." *First Order on Reconsideration*, MM Docket No. 92-260, FCC 95-503 (released Jan. 26, 1996) at ¶ 2 & n. 53.

<sup>57</sup> See, e.g., *Olson v. United States*, 292 U.S. 246, 256 (1934); *United States v. 133,445 Rentable Square Feet of Space*, No. 88-1476, 1990 U.S. Dist. LEXIS 7422, at \*6 (D.D.C. June 12, 1990); see generally J. GELIN AND D. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN*, 104-105 (1982) ("GELIN & MILLER"); J. SACKMAN, *NICHOLS' THE LAW OF EMINENT DOMAIN*, 12.02 (1993) ("NICHOLS").

The longstanding measure of compensation for private property taken by the government for public purposes is "fair market value."<sup>58</sup> Recently, the United States Supreme Court explained that the concept of "fair market value" includes all aspects of value that would pertain on an open market for the property. "Fair market value" is:

"such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property.' Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.<sup>59</sup>

The Court has noted that the "compensable value is properly measurable in terms of [the taken property's] economic potential . . ." *United States v. Reynolds*, 397 U.S. 14, 16 (1970)(analyzing compensation due for lakeside property with residential and recreational value). Indeed, the Fifth Amendment requires that the government provide compensation for the *lost economic value* of a business where the property taken is linked to that value:

As Mr. Justice Brandeis observed for the Court in *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396, 'In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property.'<sup>60</sup>

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<sup>58</sup> *United States v. 50 Acres of Land*, 469 U.S. 24, 26 & n. 1 (1984) (citing *United States v. Miller*, 317 U.S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller"))).

<sup>59</sup> *BFP v. Resolution Trust Co.*, 114 S. Ct. 1757, 1761 (1994)(citing *East Bay Municipal Utility District v. Kieffer*, 278 P. 476, 482 (1929), *overruled on other grounds County of San Diego v. Miller*, 532 P.2d 139 (1975) (en banc); *Nevada Nat. Leasing Co. v. Hereford*, 680 P.2d 1077, 1080, (1984) (en banc); *Guardian Loan Co. v. Early*, 392 N.E.2d 1240, 1244, (1979)).

<sup>60</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1949) (Fifth Amendment required compensation for the diminution in the value of trade routes disrupted by temporary government taking of physical plant).

Just as the Supreme Court has required compensation for damage beyond the mere value of tangible property taken in these cases, if the Commission forces cable operators to turn over their wiring in the common areas, risers, and other non-residential areas of MDUs, as part of a redefinition of the "demarcation point" or otherwise, then it must comply with the constitutional mandate by assuring that cable operators are compensated for the total economic damage inflicted by the forced sale of the wiring.<sup>61</sup>

A cable operator that turns its MDU wiring over to a competitor or building owner has lost much more than a few pennies per foot of wire. It has lost its ability to do business with those subscribers. Even in states with mandatory access laws, the operator will be unable to serve those former subscribers at least as long as it takes to rewire the building(s), and in many cases, as long as it takes to litigate with the landlord over the applicability or reach of the statute. In states without access laws, the operator has lost those subscribers forever, barring a falling out between the building management and the alternative service provider that is often in partnership with management. The value of these lost subscribers far exceeds the cost of wire.

If the cable operator were to sell its facilities used to serve the same subscribers on the open market to a willing buyer, the operator would stand to receive either a dollar amount per subscriber (currently valued in deals from approximately \$1,200 to \$1,800), or a multiple of

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<sup>61</sup> See, e.g., *United States v. Hardage*, 58 F.3d 569, 577 (10th Cir. 1995) (remanding *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) (noting in context of temporary regulatory taking, compensation includes injury to the property's potential for producing income"); *Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (fair market includes not only the value of the property itself, but also "an assessment of the property's capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the property."); NICHOLS, *supra* at 12.02. ("the owner is entitled to have consideration given to all of the capabilities of the property, to the business use, if any, to which it has been devoted, and to any and every use to which it may reasonably be adopted.").

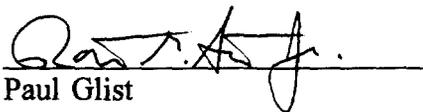
cash flow. The wire is purchased as one of the assets of the system, but its value does not begin to approach the loss inflicted on a cable operator, in terms of fair market value, when it is forced to sell the essential facility used to provide service to a block of subscribers.

Any rule that compels a cable operator to give up wiring essential to serve its subscribers must include a provision that compensates the cable operator for the fair market value of those subscribers. Anything less gives rise to a taking of the cable operator's property without the "just compensation" required by the Fifth Amendment.

## CONCLUSION

For the foregoing reasons, the Joint Commenters ask the Commission: to assure that MDU residents are able to obtain cable service; to reject proposals for preemption of state access statutes; to adopt a national rule governing access to MDUs; to reject proposals that the FCC move the demarcation point for cable inside wiring, or otherwise impose the existing model of telephone wiring regulation on cable operators; and to reject proposals to apply the existing cable inside wiring rules to loop-through plant.

Respectfully Submitted,



Paul Glist

Robert G. Scott, Jr.

T. Scott Thompson

**COLE, RAYWID & BRAVERMAN, L.L.P.**

1919 Pennsylvania Avenue, N.W.

Suite 200

Washington, D.C. 20006

(202) 659-9750

**Attorneys for Marcus Cable Co., American Cable Entertainment, Greater Media, Inc., TCA Cable TV, Inc., Cable Television Association of Maryland, Delaware and the District of Columbia, Cable Television Association of Georgia, Minnesota Cable Communications Association, New Jersey Cable Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Television Association, South Carolina Cable Television Association, Tennessee Cable Television Association, Texas Cable TV Association**

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