

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 17 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Telecommunications Services -)
Inside Wiring)
)
Customer Premises Equipment)
)
In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992:)
)
Cable Home Wiring)

CS Docket No. 95-184

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MM Docket No. 92-260

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In its initial comments, NCTA urged the Commission not to thwart the development of facilities-based competition by altering its cable home wiring rules based on artificial and premature assumptions about convergence in the telecommunications industry. We demonstrated that the Commission's proposal to move the cable demarcation point in multiple dwelling units ("MDUs") is well outside the bounds of the 1992 Cable Act and the Telecommunications Act of 1996. And, as a policy matter, this proposal would impede rather than promote

competition by creating a world in which all broadband services are delivered by a *single* provider -- a far cry from the multi-wire, competitive model envisioned by the Commission and codified by Congress in the new Act. An MDU customer would have no choice but to take his or her services from one company, rather than having the flexibility to mix and match services from among alternative providers in the building. Only building owners stand to benefit from this scenario. The Commission's ill-considered rush to "convergence" would simply empower landlords to choose which provider will serve the building's residents.

As we demonstrate below, the record in this proceeding does not support the Commission's theory that the evolving and converging telecommunications industry calls for the harmonization of the wiring rules. Given the uncertainty surrounding convergence, there is no consensus among the commenters on whether a common cable/telephony demarcation point is warranted now or in the near future. With no need for uniform rules, cable's competitors focus instead on urging the Commission to extend the cable demarcation point in order to piggyback onto cable's massive capital investment.

Moreover, taking cable's wire from the point of installation amounts to an unconstitutional taking. Just compensation for the forced transfer of an operator's facilities is not merely for the replacement cost of the wiring but the fair market value of the asset confiscated. Thus, any compensation scheme should take into account the lost opportunity to compete.

In addition, proposals to preempt state access-to-premises laws should be denied. While there may be legitimate access concerns, preemption of such laws will not address the landlord bottleneck to competition. Rather, it will heighten opportunities to exclude providers.

Lastly, the commenters favoring uniform regulation of cable and telephone customer premises equipment have put forth no sound reasons for the Commission to ignore the critical functional, technical and architectural differences in this equipment.

DISCUSSION

I. MOVING THE CABLE DEMARCATION POINT BEYOND THE 12-INCH POINT WILL PRECLUDE FACILITIES-BASED COMPETITION IN MDUs

A. Demarcation Point

Although the Commission posits a growing need for parity and uniformity in the regulation of cable and telephony inside wiring, there is no groundswell of support for adopting an over-arching regulatory scheme for both industries.

Indeed, cable's competitors hold widely disparate views on the significance of convergence, on whether and where to set a common demarcation point, and the extent to which the separate identities of cable and telephony should be retained.

While Ameritech and GTE support a common demarcation point for cable and telephony at the "minimum point of entry", NYNEX finds that the telecommunications industry is "still evolving so the exact location of the

demarcation point can not be determined at this time.”¹ US West believes that “flexibility” is required in multiple dwelling units (MDUs) because “a common demarcation point may not be technically feasible depending upon individual wiring configurations.”² Pacific Bell and Pacific Telesis advocate a change in the cable/broadband demarcation point, but “do not support a common demarcation point at this time, because both broadband and telephony technology is in such a state of flux that it is too soon to know what the optimal point might be.”³

BellSouth Corporation finds that:

For the foreseeable future telephone and video programming delivery services will continue to be delivered to subscribers over separate copper and coaxial intra-building facilities, notwithstanding any increased integration of network trunk facilities. With no corresponding “integration” of intra-building telephone and cable plant, there is no technical reason for mandating a common demarcation point for these services.⁴

The Wireless Cable Association (“WCA”) urges the Commission to “depart from the telephone inside wiring rules where necessary to accommodate the practical differences between the wiring topologies employed in MDUs by telephone and cable systems . . .”⁵ WCA proposes a rule that would seize cable operators’

¹ Comments of NYNEX.

² Comments of U S West.

³ Comments of Pacific Bell and Pacific Telesis at 2.

⁴ Comments of BellSouth at 2-3. See also Comments of NCTA, Cox Communications, Continental Cablevision and Cablevision Systems, and Adelphia.

⁵ Comments of WCA at 4.

facilities in MDUs at *two* demarcation points, one point that would include all wiring and passive devices serving a subscriber's individual unit and then a second point for the common area wiring at the minimum point of entry "that will be owned and/or controlled exclusively by the property owner."⁶

These comments unmask the frail underpinnings of the Commission's NPRM: that the facilities used to deliver video, telephony and data are becoming so indistinguishable that the rules applied to each industry must be harmonized to promote competition. The dichotomy between cable and telephony wiring regulation is not an impediment to competition, nor a cause for consumer confusion. The need for uniform treatment of all wireline networks is not driving the telephone, wireless and other delivery media's interest in this proceeding. Rather, the only thing that holds most of these comments together is the desire to gain free access to the broadband facilities already installed by cable. Thus, while many commenters caution the Commission about the purely speculative nature of convergence, they are quick to advocate moving the cable demarcation point and

⁶ Comments of WCA at 21. The Independent Cable and Telecommunication Association ("ICTA") takes the far-fetched and legally unsound position that cable operators should be forced to sell their plant to the property owner (instead of the tenant) at the individual "dedicated line". DirecTV and ICTA put forth another extreme proposal: sharing the wire. As the Commission has acknowledged, the shared use of coaxial cable simultaneously by two or more broadband providers is "not technically or economically feasible in the marketplace at the present time." See Cable Home Wiring, MM Docket No. 92-260, First Order on Reconsideration and Further Notice of Rulemaking, rel. January 26, 1996 at ¶10. Assuming that hardware that does not exist today could be produced, sharing the drop facility would result in signal losses and other technical performance problems that would greatly reduce the quality and reliability of service to the customer and violate FCC rules and standards.

have the cable industry subsidize their entry or expansion into the broadband marketplace.⁷

But as we and other parties have shown, proposals to extend the demarcation point beyond its current location in MDUs, e.g. to the “minimum point of entry”, to the “point where the line is dedicated to an individual unit”, or to some ill-defined interconnection point, will not have the pro-competitive effect envisioned by the FCC. They will only stifle competition and diminish consumer choice by undermining existing marketplace incentives that encourage network upgrades and the deployment of competitive end-to-end broadband networks. Instead, proposals to extend the cable demarcation point “would alter cable operators’ investment incentives by substantially heightening the risk that the new facilities being deployed would be surrendered to a competitor, and therefore could not be used by the operator to offer the services that spawned the investment.”⁸ And they would ultimately “reward competitors that have been heretofore unwilling to invest in their own distribution facilities, while harming providers that have deployed broadband facilities -- precisely the opposite result mandated by Congress.”⁹

⁷ Taking over control of cable-installed MDU wiring will provide an enormous competitive advantage to the telephone and wireless industries. For example, as Cablevision pointed out, it is estimated that 70 percent of its potential customers in Boston reside in buildings with 6 or more units, while 85 percent of its potential customers in New York City live in MDUs with 4 or more units. Comments of Continental and Cablevision at 2, note 3.

⁸ Comments of Continental and Cablevision at 3.

⁹ Id. at 10.

As explained by Cox Communications, “the only competition that [these proposals] conceivably would promote would be competition for the right to be the *sole* provider of broadband service in an MDU (or residential unit)” -- a competitive paradigm that will only elevate the interests of the building owner over the interests of the residents and the greater public interest.¹⁰

Moreover, the Commission is not operating in a regulatory vacuum here. As many cable parties pointed out, it plainly lacks the statutory authority to move the demarcation point under the 1992 Cable Act and the 1996 Telecommunications Act. Although Media Access Project and the Consumer Federation of America try to find ambiguity where there is none, Congress made clear that the cable operator’s common area wiring was not to be the subject of Commission regulation -- only the wiring *inside* the subscriber’s premises.¹¹ And this rejection of a government taking of the operator’s facilities was reaffirmed in the buy-out prohibition in the 1992 Act, which provides that the operator’s *concurrence* is needed before any local exchange carrier can access the wiring from the last multi-unit terminal to the end user.¹²

¹⁰ Comments of Cox Communications at 5.

¹¹ Comments of Media Access Project/CFA. Even ICTA admits that Congress only authorized the Commission to prescribe rules concerning the disposition of cable “within the subscriber’s premises.” Thus, it asserts that “wiring placed throughout the common areas is not part of the tenant’s actual premises.” Comments of ICTA at 3.

¹² Telecommunications Act, §652 (d)(2).

As a practical matter, there is no reason for the Commission to believe that apartment dwellers have no recourse but to accept one provider or another. While Liberty Cable argues that the cable wiring is inaccessible at the 12-inch demarcation point, Time Warner and others have repeatedly shown in the vast majority of MDUs the demarcation point is readily accessible in the wiremold in the hallways or at the wallplate within the dwelling.¹³ Indeed, other cable competitors only talk about installing a second wire as “redundant” or “inconvenient”, not as a physical impediment. The inaccessibility argument is false and should not provide the factual basis for a one-wire policy.

In sum, the Commission should not preempt long-term facilities-based competition by requiring cable operators to cede control of their pathway into the resident’s unit. As Congress directed, it should allow consumers to own and control the wiring inside their premises and require competing providers to construct and maintain their own broadband infrastructure outside the home.¹⁴ This is the only way to ensure that consumers can choose alternative services simultaneously from a variety of competing service providers.

¹³ See e.g. Comments of Time Warner at 17-21; Guam Cable TV at 4-6.

¹⁴ In single family homes, there is general agreement that a demarcation point at or about 12 inches outside of where the wiring enters the home is acceptable for both broadband and narrowband technology. And there appears to be general consensus that the demarcation rules should be based on the delivery technology (broadband vs. narrowband) rather than on the services provided over the facility (video vs. telephony). Additionally, many commenters supported the application of the signal leakage and signal quality technical standards to all broadband providers.

B. Customer Access to Inside Wiring

As the Commission recognizes, subscriber rights to acquire wiring within the individual premises go into effect only upon termination of cable service under the 1992 Cable Act. The Commission has no statutory authority to force cable operators to cede control of home wiring at the point of installation. Nevertheless, several parties urge the Commission to disregard this statutory mandate and give subscribers pre-termination access to wiring.

As Time Warner notes in its initial comments, the Commission could adopt incentives for cable operators to voluntarily turnover control of home wiring to consumers upon installation.¹⁵ And NCTA noted that some cable operators are educating their subscribers about handling cable wire and authorizing them to rearrange the wiring *inside* their home. But the Commission should not divest cable operators of their ability to recoup their enormous capital investment in MDUs by taking an operator's facilities prior to termination of service. As described below, such action would effectuate an unconstitutional taking in contravention of the express intent of Congress. Thus, proposals to create a presumption that the subscriber owns the inside wiring upon installation should be rejected.

Moreover, Congress was well aware of the practical implications of allowing subscribers to access continuously-activated coaxial wiring: harmful signal leakage. Indeed, it stated that "[n]othing in this [home wiring] section should be

¹⁵ Comments of Time Warner at 29-31.

construed to create any right of a subscriber to inside wiring that would frustrate the cable operator's ability to prevent or protect against signal leakage during the period the cable operator is providing service to such subscriber."¹⁶ Media Access Project and CFA attempt to minimize the signal leakage issue but, as cable parties demonstrated, signal leakage is a serious problem if the wiring is improperly installed and maintained. For this reason alone, cable operators should not lose control of the wiring while cable service is being provided.

II. THE FIFTH AMENDMENT REQUIRES JUST COMPENSATION BASED ON FAIR MARKET VALUE FOR CONFISCATION OF CABLE PLANT IN MDUs

As NCTA argued in its initial comments, proposals to extend the demarcation point in MDUs beyond the subscriber's individual unit -- and thereby force a cable operator to transfer ownership of all or even a portion of its plant in an MDU to the subscriber, the landlord or to a competing service provider -- constitutes a "taking" of property under the Fifth Amendment.¹⁷

The Commission recognizes that a taking would be implicated by its action, but asserts that it does not violate the Fifth Amendment because the cable operator would be compensated for the facilities involved at the per-foot replacement cost of the cable.¹⁸

¹⁶ H.R. Rep. No. 628, 102d Cong., 2d Sess., 119 (1992).

¹⁷ Loretto v. Teleprompter Manhattan CATV Cor., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990).

¹⁸ In paragraph 20 of its *First Order on Reconsideration* in MM Docket No. 92-262, the Commission concludes: "We believe that such a transfer presents no Fifth Amendment

The Commission's analysis ignores a fundamental requirement of the Fifth Amendment: there must be, not simply compensation, but just compensation.¹⁹ The cable operator must be compensated not merely for the replacement cost of the wire but the fair market value for the asset being confiscated.²⁰ Thus, the physical property taken is only incidental to the loss of the cable operator's ongoing business. The physical wire is hardly the whole story.

In determining fair market value, "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."²¹ Under any reasonable concept of fair market value, it is simply wrong to value a commercial business on the basis that no business is actually being conducted. In other words, where a building containing a business is condemned for eminent domain purposes, compensation for the fair market value is not merely for the bricks in the building, but must reflect the value of the business.

difficulties, since the operator will ultimately be compensated for its wiring....," citing U.S. v. Riverside Bayview Homes ("Fifth Amendment does not prohibit 'takings', only uncompensated ones".)

¹⁹ See generally, Nichols, *The Law of Eminent Domain*, §12.02 (1989).

²⁰ See generally E. McQuillen, *The Law of Municipal Corporations*, §32.92 (1991); *Comments of Time Warner* at 21-22 (paying replacement cost to the operator does not compensate for lost opportunities to compete; the forced sale would seriously undermine the operator's ability to provide new services, including telephony, in the future). See also *Comments of Continental and Cablevision* at 11-12.

²¹ Nichols, *Law of Eminent Domain*, §12.02.

While future profits generally are not included in just compensation, the fair market value may include, 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.”²² For a cable system, the wire installed by the operator could produce future income, including the delivery of new cable services in addition to those currently being offered, and new telecommunications services. Future income could also be derived from a new tenant moving into the apartment unit who desires to receive service from the cable operator.

Furthermore, in determining market value the owner is entitled to have, the property valued at the “highest and best use” i.e., the “highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future...to the full extent that the prospect of demand for such use affects the market value while the property is privately held.”²³

When a cable system is sold, it is often valued on a per subscriber basis. This includes value for existing subscribers, as well as potential subscribers. The purchaser today generally plans not only to maintain existing revenues and subscribers, but to add new subscribers and new services, including additional cable and telecommunications services, such as high speed Internet connections

²² See Yancey v. United States, 915 F.2d 1534, at 1542.

²³ Olson v. United States 292 U.S. 246, 255 54 S.Ct. 704, 708, 78 L. Ed. (1934); United States v. Land, 62.50 Acres, 953 F.2d 886 (5th Cir. 1992).

and telephony. The valuation of the cable system by the purchaser is based on the assumption that the system will continue to have access to subscribers' dwelling units within the service area. Thus, the fair market value of the cable system is substantially reduced if ownership of the cable distribution plant, which enables service to be provided to individual dwelling units in MDUs, is ceded to some other entity. That reduction in the price a purchaser is willing to pay for the cable system is not measured by \$2 or \$3 worth of cable at a replacement value of six cents per foot, but rather according to a per subscriber value of \$1,200-\$2,800.

In sum, the cable industry invested in wiring on the basis of a return premised on the availability of service. Cable operators are service providers -- they are not in the business of installing wiring for their competitors. If the Commission moves the demarcation point, it will take away not only a portion of the value of the cable plant itself, but the value of both the existing and future relationship between the cable operator and the individual subscriber.

III. THE COMMISSION SHOULD NOT PREEMPT STATE ACCESS TO PREMISES LAW

The Wireless Cable Association urges the Commission to "level the playing field" by paradoxically preempting state access to premises laws. As described in our initial comments, the cable industry has a long history of fighting for access to MDU's in the face of resistance from property owners desiring sweetheart deals from the provider. While alternative video providers may face similar obstacles to access, preempting state access statutes is not the solution to the landlord bottleneck to competition. These laws are not discriminatory; and they do not

exclude others from providing service. All that they do is ensure consumer access to multichannel video programming services.

And now that the law prohibits exclusive franchises, alternative providers may avail themselves of access statutes by assuming the range of franchise requirements now borne by cable systems. This would include universal service requirements, public, educational and governmental access channels, franchise fees and other requirements. By virtue of their status as monopoly providers, telephone companies benefit even more from access statutes and easements that are not available to cable and other providers.

The Commission should promote policies that broaden access to private property for all competing providers. Just as cable operators fought long and hard for access to premises statutes, wireless and SMATV providers also may seek access rights locally. But preempting cable access laws will not open up landlord barriers to competition -- it will only exacerbate their exclusionary practices and fuel exclusive deals. And, as we have shown, if the Commission extends the cable demarcation point, it will only enhance the building owners' power at the expense of subscriber choice.

IV. THE COMMISSION SHOULD REJECT A UNIFORM REGULATORY SCHEME FOR CABLE -RELATED CUSTOMER PREMISES EQUIPMENT AND TELEPHONE CUSTOMER PREMISES EQUIPMENT

In our initial comments, NCTA urged the Commission not to merge cable customer premises equipment under the rubric of Part 68 telephone CPE. The parties that advocate treating cable and telephony equipment the same refuse to

acknowledge the radically different characteristics and functions of each technology and the key differences in network architecture.²⁴ In fact, most of the telephone companies recognize these differences and reject the Part 68 model for cable CPE. And given the evolving nature of cable/telephony convergence, the Commission should retain its separate regulatory schemes for cable-related CPE and telephone CPE.

In an effort to promote their own economic interests, several commenters attempt to severely limit cable's ability to compete in the provision of customer premises equipment. For example, Circuit City Stores, Inc. urges the Commission to prohibit cable operators from integrating security functions with other features in their equipment. As we pointed out in our initial comments, the issue of competitive availability of converter box equipment is being addressed in the ongoing equipment compatibility proceeding, ET Docket No. 93-7, and is also the subject of the upcoming proceeding on navigation devices under section 305 of the new Telecommunications Act.²⁵

Nevertheless, the Commission recently made clear in the equipment compatibility proceeding that it is important that "all parties, including cable

²⁴ See e.g., Comments of Media Access Project/CFA.

²⁵ The comments of Circuit City, the Tandy Corporation, Compaq Corporation and the Consumer Electronic Manufacturers Association ("CEMA") raise a host of issues containing erroneous information that are beyond the scope of the inside wiring proceeding. Many of these issues, such as cable modems, are being addressed by NCTA in the context of the FCC's ongoing equipment compatibility proceeding and the navigation device proceeding.

operators and consumer equipment manufacturers” participate in the market for equipment used to received cable service.²⁶ In discussing the competitive market for new cable ready receivers equipped with the decoder interface standard, the Commission said:

In order to ensure that this market is open to all parties, we conclude that it is necessary to require cable operators to offer component descrambler that perform only signal access control functions. At the same time, we see no need to preclude cable operator from also incorporating signal access control functions in multi-function component devices that connect to the Decoder interface connector.²⁷

Thus, as the Commission further explains:

First, a subscriber could choose to obtain a device that performs special functions from a retail vendor and, with it, use a basic component descrambler provided by the cable operator. Alternatively, the subscriber could obtain a single device from the cable operators that would perform one or more special features and also incorporate the descrambling function.²⁸

There is no support in the new navigation device provision of the Telecommunications Act for Circuit City’s anti-competitive desire to prevent cable operators from providing subscribers with the efficiencies and other economic benefits of bundling features and functions in one device.

²⁶ Compatibility Between Cable Systems and Consumer Electronics Equipment, ET Docket No. 93-7, Memorandum Opinion and Order, rel. April 10, 1996 at para. 38 (emphasis added).

²⁷ Id.(emphasis added).

²⁸ Id. Moreover, some cable subscribers may not want to purchase their set top or set back devices, preferring instead to lease equipment from the cable operator. This is permissibility under the Commission’s equipment compatibility rules and section 305.

Circuit City also states that in a digital environment, it is possible to place all security-related circuitry on a software carrier, such as a card. As discussed in our comments in the equipment compatibility proceeding, this ignores the fragility of digital signal protection. As computer speed and processing increases -- with cable modems containing megabit per second speeds linking multiple processors -- cable pirates will be able to amass the computing power to attack signal security at affordable prices. Indeed, digital security systems have already been broken in Europe.

Those parties who claim that existing cable theft laws, rather than regulation of customer premises equipment, should deal with signal piracy fail to recognize that Congress specifically directed the Commission to ensure that its rules do not jeopardize system security.²⁹ The Commission must take this issue into account in fashioning CPE rules.

²⁹ Telecommunications Act, § 305.

CONCLUSION

For the foregoing reasons, the record in this proceeding does not support the sweeping changes in the cable home wiring rules proposed by the Commission in the NPRM. We urge the Commission, therefore, to reaffirm the demarcation point in its existing cable home wiring rules pursuant to its statutory directive.

Respectfully submitted,



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