

Based upon its experiences with the Commission's Part 94 licensing process, Liberty has assumed a certain lead and lag time in its contracting. Typically, Liberty attempts to build a sufficient period of time into its contracts in an effort to allow for the necessary application to be processed to a grant prior to the time in which service under the contract is to commence. In situations where contract requirements conflict with prevailing application processing times, Liberty has traditionally sought special temporary authority from the Commission to operate pending final action on the application. Exhibit 2, Affidavit of Behrooz Nourain, Director of Engineering. It has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational. Exhibit 2.

Application processing for each of the above-referenced sites has exceeded the norm due to the frequency coordinator's use of incorrect emission designators. Exhibit 2. Mr. Nourain, perhaps inadvisably, assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing, and thus rendered the paths operational. Exhibit 2. To compound the situation, the administration department failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions. Exhibits 1 & 2. Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995. Exhibit 2. Thus, without knowledge that his actions were in violation of the Commission's rules, and without intent to violate those rules, Mr. Nourain commenced operation prior to grant.

Liberty has requested special temporary authority to operate each of the paths petitioned by Time Warner to allow it to operate while it opposes what it believes are

baseless allegations concerning its qualifications to hold 18 GHz authorizations for the delivery of video entertainment material to customers. This inadvertent violation compounds the need for a grant of those requests pending action on the Time Warner petitions. No viable alternative other than grant of special temporary authority as Liberty has requested better serves the public interest.

While termination of service over the microwave paths is an alternative, that alternative is not in the public interest. First, any termination would force Liberty to abruptly cut off service to existing subscribers. Even if Time Warner were to expeditiously jump into the breach -- as it no doubt would like to do -- these subscribers would be deprived of service for an indeterminate period of time.

Equally as important is the fact that the forced termination of Liberty service would irreparably harm Liberty's reputation with its subscribers and cripple Liberty's efforts to provide viable competition to Time Warner in the New York metropolitan area. With the elimination of Liberty as a distributor of multichannel video programming in New York City, subscribers would be forced back into the arms of Time Warner, the grasp of which they sought to escape. Exhibit 3, Letter from Daniel F. Tritter to Ed Olsen, Time Warner Accounts Manager - Condominiums and Co-ops, dated May 15, 1995; Exhibit 4, letter from Linda DiGiovanni, Board Secretary, Park Hudson, to Bertina Ceccarelli, dated May 17, 1995; Exhibit 5, letter from Bob Steinberg, Board President, Briar Oaks, to Bertina Ceccarelli, dated May 17, 1995; and Exhibit 6, Dear Normandy shareholder letter. The state of competition in the New York metropolitan area multi-channel video delivery market would revert to the state of monopoly that existed before

Liberty began to offer its alternative programming services. Again, such a state of affairs is not in the public interest.

When the 18 GHz Order granted private cable operators access to the 18 GHz band, the Commission voiced its conviction that the public interest was well served by allowing competition in the video services marketplace through wireless cable operators.

The Commission said:

After carefully reviewing the record, we conclude that adoption of this proposal, ..., will promote the public interest by encouraging competition in the video distribution marketplace. The need for such action is well documented. This Commission recently conducted a review of marketplace developments in the video distribution industry in which we concluded that cable systems possess a disproportionate share of market power and, therefore, are capable of engaging in anti-competitive conduct. In these circumstances, competition provides the most effective safeguard against the specter of market power abuse. As competition from alternative multichannel providers such as second competitive cable operators, wireless cable multi-point distribution services, SMATV systems, and direct broadcast satellite ("DBS") emerges, we find that it would serve the public interest to enhance their competitive potential.

Operational Fixed Microwave Service (Video Distribution System), 6 FCC Rcd. at 1271.

The Commission also said:

In conclusion, cable systems increasingly dominate the multichannel video delivery services, resulting in criticism of the industry and complaints of anti-competitive conduct. Although rival multichannel providers are emerging in the marketplace, we recognize the need for action designed to encourage these operators to enter the market and to increase their market viability. To improve the competitive potential of alternative multichannel providers eligible to hold licenses in the Operation-Fixed Microwave Service, we take action in this proceeding permitting the use of the 6 MHz wide, point-to-point channels in the 18 GHz band for the distribution of video entertainment material. We also amend our rules to eliminate the restriction on the number of channels that may be assigned for this purpose. This action serves the public interest by encouraging the growth of competitive alternatives to cable systems and by providing consumers with a diverse range of video distribution service. In addition, the action taken

herein furthers the best interests of the public by promoting spectrum efficiency and increasing the flexibility of licenses.

Operational Fixed Microwave Service (Video Distribution System), 6 FCC Rcd. at 1272.

Furthermore, in its 1994 report to Congress on the status of competition in this marketplace, the Commission makes clear that little has changed in the way of competition; cable is still king. Annual Assessment of the Status of competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442 (1994). In sum, the public interest is well served by the promotion of competition by wireless cable operators in the video services marketplace.

The Commission's action in opening the 18 GHz band to wireless cable operators has achieved its goal in that it has stimulated competition to incumbent cable monopolists. Liberty is competing head-to-head with Time Warner in Manhattan using the 18 GHz band. To compete effectively with Time Warner, Liberty must convert buildings from Time Warner's service to Liberty's service after subscribers in those buildings have elected to switch from Time Warner to Liberty. If Liberty cannot meet its potential and existing customers' demand for its service, those customers will cancel their contracts with Liberty and remain with Time Warner. As Mr. Tritter's letter indicates, subscribers to other services, as well as many non customers who have never subscribed to cable will also be denied a competitive choice.

A series of occurrences where Liberty fails to deliver its service within 30 days and where potential customers cancel their subscriptions to Liberty's service will immeasurably damage Liberty's business and reputation. Of course, it will also greatly damage the Commission's ability to fulfill its goal of bringing competition to the video marketplace, at

least in the short term in Manhattan where Liberty has expended millions of dollars to install its system and repel Time Warner's almost constant assaults.

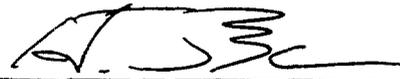
CONCLUSION

Liberty respectfully acknowledges its unauthorized operation. In the future, Liberty will install administrative procedures to ensure that service is not commenced prior to Commission grant of authority to commence service. Liberty reiterates here its request for special temporary authority to operate pending action on the petitions to deny.

Respectfully submitted,

LIBERTY CABLE CO., INC.

By



Howard J. Barr
Its Attorney

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May 17, 1995

DECLARATION OF PETER O. PRICE

I, Peter O. Price, do hereby declare and state under penalty of perjury as follows:

1. I am President of Liberty Cable Co., Inc..

2. I have read the foregoing Surreply. With respect to statements made in the Opposition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, or belief.


Peter O. Price

Date: 5/17/95

DECLARATION OF BEHROOZ NOURAIN

I, Behrooz Nourain, do hereby declare and state under penalty of perjury as follows:

1. I am Director of Engineering of Liberty Cable Co., Inc.
2. I have read the foregoing Surreply. With respect to statements made in the Opposition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, or belief.



Behrooz Nourain

Date: 5/17/95



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Federal Communications Commission

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JUN 09 1995

In Reply Refer To:
95M003

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Re: Liberty Cable Co.

Requests for Special Temporary Authority

File No.	Callsigns
708777	WNTT370
708778	WNTM210
708779	WNTM385
708780	WNTT555
708781	WNTM212
709426	WNTM212
711937	WNTM212
709332	(new)
712203	WNTW782
712218	WNTY584
712219	WNTY605
713295	WNTX889
713296	WNTM210
713297	WNTL397
713300	(new)

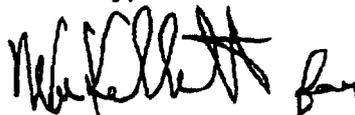
Dear Counsel:

This letter requests additional information regarding allegations of misrepresentations raised by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") in its Response to Surreply filed June 1, 1995. These concerns are relevant

to the requests for special temporary authority ("STA") filed by Liberty Cable Co., Inc. ("Liberty") referenced above. Time Warner has alleged that the affidavit submitted by Behrooz Nourain with Liberty's Surreply contradicts an affidavit submitted by Mr. Nourain in the U.S. District Court for the Southern District of New York dated February 21, 1995. Time Warner also asserts that the affidavit falsely indicates that transmission paths were inadvertently turned on after the filing of STA requests when in fact the paths were placed in operation in April prior to STA requests made on May 4, 1995. Accordingly, Liberty is directed to explain the inconsistencies between the affidavits. Liberty is also directed to provide the date each unauthorized path was placed in operation as well as the number of subscribers currently being served by each new path. Further, Liberty is requested to address the issue of whether there are contractual or other barriers that prevent the subscribers from electing to receive service from Time Warner or any other provider. Liberty's response should be in the form of a further written statement of fact attested to in accordance with 47 C.F.R. § 1.17.

Pursuant to the authority granted to the Commission by 47 U.S.C. § 308(b), Liberty is directed to respond to these allegations within five days of the date of this letter. Liberty's response should be directed to the Chief of the Wireless Telecommunications Bureau and a copy served on Time Warner. Any answer to Liberty's response shall be submitted no later than five days from receipt of Liberty's response. If you have any questions regarding this matter, please direct your inquiries to the undersigned at (717) 337-1411.

Sincerely,



Michael B. Hayden
Chief, Microwave Branch

cc: Arthur H. Harding, Esq.

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Federal Communications Commission
Office of the Secretary

Phone (908) 634-3700
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April 7, 1992

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FCC MAIL BRANCH

FEDERAL EXPRESS

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20854

Re: Ex Parte Presentation
MM Docket No. 89-15
Definition of a Cable Television System

Dear Mme. Secretary

I am writing on behalf of Liberty Cable Company, Inc. ("Liberty") to urge the Federal Communications Commission (the "Commission") to justify and defend to the Court in Beach Communications, Inc. et al. v. FCC, 1990 U.S.App. LEXIS 3511 (March 6, 1992) ("Beach Communications") the Commission's Report and Order in The Definition of a Cable Television System, 5 FCC Rcd 7638 (1990) (the "Cable Definition Rule"). As discussed in more detail below, the Cable Definition Rule is constitutional under the Equal Protection Clause and the Commission should make that case forcefully to the Court.

Liberty shares the concerns and frustrations expressed by the petitioners in Beach Communications (the "Petitioners") about local regulation of their operations.* Many state and local

* The Petitioners in Beach Communications are owners and operators of satellite master antenna television ("SMATV") systems.

(continued...)

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governments exercise their cable franchise powers to stifle the competition provided by alternative technologies. However, this problem will not be resolved by letting the Court in Beach Communications declare the Cable Definition Rule unconstitutional. Instead, this problem will be exacerbated in the absence of the Cable Definition Rule.

Reducing oppressive local regulation of "external quasi-private SMATV" is best done by local, state and federal legislative action. It cannot be done by the Commission, given the constraints of 47 U.S.C. § 522(6)(B) (the "SMATV Exemption"). Nor can the D.C. Circuit Court resolve this problem in the context of the Beach Communications case. As the Court recognized, the Petitioners' claims of oppressive regulation are not yet ripe for decision.

If the Petitioners truly need judicial relief from oppressive local regulation, they can and should pursue an action under 42 U.S.C. § 1983 in the appropriate federal District Court for violation of their First Amendment rights. That is the appropriate judicial procedure to challenge the barriers to their market entry posed by local regulation. See e.g., Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1552 (N.D.Cal. 1987).

*(...continued)

Each Petitioner seeks to use cable to interconnect its systems at contiguous non-commonly owned multifamily properties. This configuration, defined in Beach Communications as an "external, quasi-private SMATV" system is a "cable system" pursuant to 47 U.S.C. § 522(6) and the Cable Definition Rule and thus subject to local franchise requirements.

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The Commission has done a great deal to protect and promote the development of alternative technologies by preempting local regulation that inhibits market entry. See In re Earth Satellite Commissions, Inc., 95 F.C.C.2d 1223 (1990) ("ESCOM"), aff'd sub. nom. New York State Commission on Cable Television v. F.C.C., 749 F.2d 804 (D.C. Circ. 1984); and In re Orth-O-Vision, 69 F.C.C.2d 657 (1978) ("Orth-O-Vision"), recon. den. 82 F.C.C.2d 178 (1980), review den. sub. nom. New York State Comm'n on Cable Television v. F.C.C., 669 F.2d 58 (2nd Cir. 1982). And it is understandable that the Petitioners want the Commission's preemptive protection to extend to their "quasi-private" systems. But given the constraints of the SMATV Exemption, the Commission simply cannot give that protection, no matter how deserving Petitioners' case might be.

By the same token, the Commission cannot now abandon the preemptive protection it has previously extended to traditional SMATV systems including those interconnected by wireless technologies. Instead, the Commission should protect the gains it has already achieved by defending the Cable Definition Rule in Beach Communications. The elimination of the Cable Definition Rule by the Court could open the door for local regulation of alternative technologies in a manner destructive to companies such as Liberty which interconnect their SMATV systems by 18 ghz microwave. In addition, Liberty respectfully requests the

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Commission to join Liberty and the Petitioners in asking Congress to rewrite the SMATV Exemption to include Petitioners' "quasi-private systems."

A. Liberty Will Be Hurt If The Cable
Definition Rule Is Declared
Unconstitutional

Liberty began operations in the New York metropolitan area in 1987 as a traditional SMATV operator installing and operating satellite dish antennas at multifamily properties under common control or ownership.* In 1990, the Commission proposed allowing SMATV operators to interconnect their systems using 18 ghz microwave signals. See Notice of Proposed Rulemaking, In Re Amendment of Part 94 of the Commissions Rules to Permit Private Video Distribution Systems of Video Entertainment Access to 18 GHz Band, PR Docket No. 90-5, Adopted January 11, 1990, Released January 23, 1990 (the "Notice"). Liberty filed comments with the Commission to support the use of 18 ghz to interconnect its systems and pointed out that such interconnection could arguably make its entire operation a "cable system."

The Commission addressed this concern when it adopted the Cable Definition Rule by providing that SMATV systems serving non-

* Some of these systems are within a single building and thus, in the terminology of Beach Communications, "internal" systems. Some systems serve multiple buildings under common control or ownership and are thus "wholly private" systems.

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commonly owned multifamily properties are not "cable systems" when interconnected by wireless technologies such as microwave. See Cable Definition Rule at ¶ 6-11. Shortly after the adoption of the Cable Definition Rule, the Commission authorized the use of 18 ghz to interconnect SMATV systems. See Report and Order, In Re Amendment of Part 94 of the Commissions Rules to Permit Private Video Distribution Systems of Video Entertainment Access to 18 GHz Band, FR Docket No. 90-5, Adopted February 13, 1991. These two decisions established the legal framework which encouraged SMATV operators to expand and interconnect their operations using 18 ghz microwave.

In 1991, Liberty began interconnecting SMATV systems at many non-commonly owned multifamily properties using 18 ghz equipment. Indeed, this configuration has become the very essence and heart of Liberty's business with a significant investment of time, energy and money. To date, Liberty has received eight (8) 18 ghz licenses and is preparing applications for many more. Liberty made its commitment to 18 ghz in reliance on the Cable Definition Rule that Liberty's 18 ghz operation is not a "cable system."

But now the Cable Definition Rule may be vacated in its entirety if the Commission does not justify it under the "rational-basis" test. In Beach Communications, the Court said:

At this point, it appears that the distinction in the Cable Act between external, quasi-private SMATV and the exempted facilities may

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violate the minimal equal-protection test. As noted below, we will direct the FCC to consider whether some "rational basis" justifies the distinction. If the FCC is unable to provide a "rational basis," then we will decide without more that the Cable Definition Rule violates the equal protection component of the Fifth Amendment. However, if the FCC does furnish a "rational basis," and we conclude the Cable Definition Rule satisfies the minimal test, we will need to consider whether a heightened scrutiny equal protection challenge is ripe.

Id. at p. 15.

If the Commission does not justify the distinction between Petitioners' "quasi-private" SMATV systems and exempted systems, then the Court will declare the entire Cable Definition Rule unconstitutional. In that event, the proper interpretation of the SMATV Exemption becomes very unclear. Liberty is concerned that this uncertainty could inhibit the development of 18 ghz and adversely affect its business. Accordingly, Liberty urges the Commission to defend the Cable Definition Rule to the Court in Beach Communications.

B. There Are Valid Reasons To Support
The Distinctions In The Cable
Definition Rule

Judge Mikva, in his concurring opinion in Beach Communications, set forth several cogent reasons why the Cable Definition Rule meets the "rational basis" standard under the Equal

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Protection Clause. Liberty's experience has been consistent with all of Judge Mikva's observations.

Judge Mikva stated that the distinctions in the Cable Definition Rule are "a reasonable way to promote the development of non-physical video delivery systems." Beach Communications, Id. at p. 20. Liberty currently operates several "non-physical video delivery systems" at a number of locations throughout the New York metropolitan area. Those systems consist of either satellite or microwave receiving equipment installed at various "commonly owned" multifamily properties. Liberty frequently has the opportunity to use its existing antenna reception site to serve contiguous multifamily properties which are under different ownership. The contiguous multifamily property could be wired directly from the established reception site without crossing public rights-of-way.

As a practical matter, Liberty has two choices for providing service to the contiguous property in this circumstance. The first option is to deliver service to the residents in the contiguous property using "a non-physical video delivery system", i.e. install new microwave reception equipment at the contiguous property and transmit signal to the property from an established remote transmission site (the "Microwave Option"). Or Liberty could string cable from the property it already serves to the contiguous property (the "Cable Option").

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If cost of the equipment were the only consideration, then Liberty would chose the Cable Option. However, under the Cable Definition Rule, the exercise of the Cable Option also means subjecting the two properties wired together to local regulation as a "cable system." However, under the Cable Definition Rule, the Microwave Option is the better economic choice because it avoids state and local franchise requirements altogether. Accordingly, Liberty will expand its system to contiguous properties by using "non-physical delivery systems" because of the distinctions in the Cable Definition Rule between "quasi-private" and other exempted facilities. Liberty's experience is that Judge Mikva is correct. The distinctions in the Cable Definition Rule do encourage the use of "non-physical delivery systems."

There is also another factor favoring the Microwave Option—the control exerted by multiple property owners over the Cable Option. When Liberty installs an SMATV system at a multifamily property, it usually asks for the right to serve a contiguous property with cable. That right is frequently withheld and subject to later negotiation when the opportunity to provide service to the adjacent property presents itself. Thus, if Liberty were to exercise the Cable Option, it would in most cases, need the permission of two property owners to install a "quasi-private"

* Under New York law, this regulation does not become particularly onerous until the "cable system" has more than 1,000 subscribers. See Executive Law § 813(2).

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SMATV system. These multiple owners become, in effect, a "quasi-private franchising authority." Liberty does not need the consent of a "quasi-private franchising authority" to exercise the Microwave Option.*

As Judge Mikva noted, one of the express purposes of the federal Cable Act is to "assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). This interest transcends the ownership of the property being occupied to provide video services—be it public air waves, public streets or private property. And, in Liberty's view, it is the interest of the people who comprise the community, not the property, which is paramount.

Federally regulated video distributors, such as SMATV and MMDS, approach the people in the community from the air waves. Locally regulated video distributors, such as traditional cable companies, approach the people in the community from the streets. Subscribers in single family homes, which directly abut on both the air waves and streets, can choose for themselves which service to take.

But in New York City and most major metropolitan areas, almost everyone lives in multifamily housing. And the urban

* Liberty's microwave transmission site is on property owned by a Liberty affiliate and thus no permission to transmit to other sites is needed. Moreover, it has been Liberty's experience that landlord's for microwave transmission site leases have no interest in controlling the location of receive sites.

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resident is typically separated from the public streets or public air waves by private property owned by a third party—be it landlord, co-op or condo board.

In the absence of any government regulation, the third party landlord has absolute control over whose cable goes on the property. Thus, in the absence of government regulation, the landlord—acting alone or as a part of a "quasi-private franchising authority"—has absolute control over whether federal or locally regulated video services reach the residents of the building. To promote the interests of the residents, it is reasonable to subject the landlord's control to some form of government regulation. Loratto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982).

Furthermore, and to avoid confusion, a line needs to be drawn somewhere on the landlords' property to clarify the division between local and federal regulatory authority over the equipment installed on the property. Drawing such a line reasonably promotes "a national policy" on video distributors and allocates responsibility between "Federal, State and local authority." See 47 U.S.C. § 521(1) and (3). For purposes of the Equal Protection Clause, the dividing line need only reasonably promote one or more of the purposes of the federal Cable Act including "the needs and interests of the local community" and assuring "the widest possible diversity of information sources." See 47 U.S.C. § 521(2) and (4).

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Both the SMATV Exemption and Cable Definition Rule use a very simple dividing line which promotes and balances the multiple purposes of the Federal Cable Act including local concerns for consumer protection and national concerns for diversity of services. That dividing line is the number of owners (or managers) whose consent is needed for cable installation on multifamily properties. If the consent of more than one multifamily property owner (or manager) is needed to install cable on the property, i.e. a "quasi-private franchising authority", then local community interests are sufficiently implicated, e.g. consumer protection and construction issues, to warrant defining the installation as a "cable system". But if the consent of only one multifamily property owner (or manager) is needed to install cable on the property, then the purpose of "diversity of services" is promoted by subjecting that system to the preemptive protection of federal regulation.

Congress could have said that only the federal government may regulate cable installations on multifamily properties.* Given the current Commission policy on preemption, such an allocation of power would allow SMATV companies to serve entire city blocks

* Indeed, Congress considered then rejected extensive federal regulation of cable installations on multifamily properties. See Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3rd Cir. 1989). Or Congress could have included single family planned unit developments and mobile home parks in the SMATV Exemption. However, that issue is not before the Court in Beach Communications and needs no comment by the Commission.

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without a franchise. But clearly, large numbers of people and property in urban communities would be affected by such systems and legitimate local control over consumer complaints and construction standards would suffer.

The Equal Protection Clause simply does not require that only the federal government can regulate cable installations on multifamily properties. It has long been recognized that local government can regulate the use of private property when that use affects other property or residents in the community.

Nor does the Equal Protection Clause require that only state and local government regulate cable installations on multifamily property. Such an interpretation would severely limit the power of the federal government, acting through the Commission, to promote competition and diversity to traditional cable companies by licensing and protecting alternative technologies.

Stated metaphorically, the Commission has always encouraged "cherry picking" by MDS and SMATV operators to promote competition with cable companies. See Orth-O-Vision and ESCOM. But once the "cherries" start getting plucked in bunches, then the interests of the local regulators and competing cable companies take on greater importance because more people and buildings in the community are affected. It is quite reasonable for Congress and the Commission to tell Petitioners that they must pick the

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"cherries" one at a time." This may be unpalatable to Petitioners but it is not unconstitutional.

Given the recognized intertwining of federal and local concerns in video distributors, Congress can allocate power between the two. The SMATV Exemption and Cable Definition Rule does so in a fair and reasonable manner when the video distribution system is installed on multifamily properties.

Thus, Liberty cannot agree with Petitioners' claim that the interest of the local community in regulating cable television is limited solely to the occupancy of local streets. Such a narrow view would mean that local regulation of cable stops at the curbside—a proposition without support anywhere.

That is not to say that local government can use its control over public streets and private property to frustrate the development of quasi-private SMATV systems. Far from it. In Liberty's view, Petitioners have an absolute First Amendment right to install and operate their quasi-private SMATV systems simply with the permission of affected property owners. Any local regulation which prohibits or substantially interferes with quasi-

* The Commission has never extended its preemptive protection of alternative technologies to include systems installed at multifamily properties under the control or ownership of more than one person. The Commission has always been clear that such systems must comply with local franchise requirements, if any. See In Re Cable Dallas, 93 F.C.C.2d 20 (1983).

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private SMATV operation is unconstitutional and should be challenged in the appropriate proceeding.

But that is another lawsuit for another day. It is not a problem that can be resolved in the Beach Communications case particularly given the lack of specific facts. For example, if Petitioners installed quasi-private SMATV systems in New York, they would not be subject to any significant burdens of state regulation beyond consumer protection and construction matters unless and until they had more than 1,000 subscribers on the system. See Executive Law § 813(2). In some unincorporated areas of the Southwest, "cable franchising" consists of a road crossing permit from the county road commission.

Thus, it would be premature for the Beach Communications Court to engage in a "strict scrutiny" analysis of the Cable Definition Rule as it is unclear what precise burdens a quasi-private SMATV system has to endure in New York or elsewhere.* The resolution to the Petitioners' problem of overregulation lies in a constitutional challenge to the offending local regulation on First

* It is doubtful whether Petitioners even have standing to raise an equal protection claim applying the "strict scrutiny" standard. The gravamen of Petitioners' complaint is that their "quasi-private" SMATV systems are defined as "cable systems" and thus subject to burdensome local franchise requirements. Even if true, the source of Petitioners' injury is the imposition of burdens by local government—not the distinctions drawn in 47 U.S.C. § 522(6)(B). See Direct Satellite Communications, Inc. v. Board of Public Utilities, 615 F.Supp. 1558, 1565 (D.N.J. 1985).