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August 23, 1996

VIA HAND DELIVERY

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

Re: Ex Parte in CS Docket No. 95-184 (Inside Wiring)

Dear Mr. Caton:

Attached for inclusion in the above-captioned proceeding are Reply Comments prepared on behalf of Bartholdi Cable Company, Inc. in CS Docket No. 96-133. The attached filing further illustrates how the Commission's existing cable inside wiring rules frustrate competition.

Sincerely,

Jay S. Newman

Attachment

JSN:cas

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

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AUG 19 1996

Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	CS Docket No. 96-133

REPLY COMMENTS OF BARTHOLDI CABLE COMPANY, INC.

Bartholdi Cable Company, Inc. ("Bartholdi")[1/], by its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Inquiry in the above-referenced proceeding. While some commenters -- primarily parties representing (or affiliated with) cable operators -- maintain that the video marketplace is competitive,[2/] Bartholdi disagrees. Meaningful competition does not yet exist and will not develop if competing multichannel video programming distributors ("MVPDs") cannot access subscribers.

To promote competition, the Commission must adopt rules which create a level playing field for both incumbent cable operators and competing MVPDs. If the Commission fails to do so, incumbent cable operators will continue to frustrate competition. A case in point

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[1/] Bartholdi was formerly Liberty Cable Company, Inc. ("Liberty").

[2/] See, e.g., Comments of Time Warner at 3; Comments of NCTA at 5.

is the Commission's existing cable inside wiring rules. To no avail, Liberty spent three years urging the Commission to modify its rules by moving the cable demarcation point to a location which is easily accessible to competing MVPDs. In its numerous filings with the Commission, Liberty argued that, as a practical matter, the existing rules preclude it and other competing MVPDS from accessing subscribers.

The inability of a competing MVPD to access subscribers is evidenced by the attached order by the Supreme Court of New York, Time Warner Cable of New York City v. Board of Managers of the Dorchester Condominium, Index No. 109157, July 16, 1996. In the order, the court issues a preliminary injunction prohibiting the Dorchester, a condominium located in Southern Manhattan, from allowing competing MVPDs to utilize the hallway molding in the building to run their wires to individual subscribers.[3/] As a result, a competing MVPD cannot access potential subscribers in the Dorchester and there is no competition in the video services market for residents of the Dorchester.[4/]

[3/] Ironically, Time Warner and NCTA argued strenuously at the Bureau's January 1995, open meeting on inside wiring that competing MVPDs should not be entitled to use the incumbent cable operator's wires from the junction box (typically in the stairwell) to the customer's apartment because competing MVPDs could install their own parallel wires in the existing hallway molding from the junction box to the customer's apartment.

[4/] The court order refers to the reply affidavit of James Kelly, a foreman for Time Warner, which describes several alternatives under which a competing MVPD allegedly could provide service to the building. (See p. 8 of the order.) Affidavits have been submitted to the court attesting to the fact that the alternatives

(continued...)

What cannot be over emphasized is that decisions like the attached have significant implications for the future of competition in the video services marketplace. The Commission must understand that by failing to address the issue of inside wiring in a timely manner (and, thus, failing to create a competitive environment), the Commission is creating a vacuum which the state courts will fill. And, as evidenced by the attached, those courts have very different priorities than does the United States Congress or the Commission as far as the promotion of competition is concerned.

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[4] (...continued)
are not viable. Even if they are, wiring will be exposed which is aesthetically unacceptable to the building owner. Thus, as a practical matter, a competing MVPD will be unable to provide service to residents of the Dorchester.

Thus, it is imperative that the Commission act soon to create a regulatory environment which allows meaningful competition to develop in the video marketplace. Without such action, the state courts will continue to make communications policy, just as one did by the attached.

Respectfully submitted,

BARTHOLDI CABLE COMPANY, INC.

By: _____

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Its Attorneys

Dated: August 19, 1996

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

1031

----------X

TIME WARNER CABLE OF NEW YORK CITY,

Plaintiff,

-against-

Index No. 109157-96

BOARD OF MANAGERS OF THE DORCHESTER CONDOMINIUM,

Defendant.

----------X

CAROL HUFF, J.:

Plaintiff Time Warner Cable of New York ("TWC") moves for an order granting a preliminary injunction prohibiting defendant Board of Managers of the Dorchester Condominium ("Dorchester") from converting, removing, severing, altering or misappropriating any of plaintiff's cable facilities; from exercising dominion and control over any of TWC's cable facilities; from interfering with TWC's access to its cable and cable facilities; and an order directing defendant to restore the cable and cable facilities to TWC's use and control.

TWC holds a cable television franchise from the City of New York, covering Southern Manhattan. The Dorchester, located at 155 West 68th Street, is within TWC's franchise area. TWC and its predecessors have provided cable service to residents of the building since 1969, and currently have 520 subscribers in the building. In 1994, pursuant to a contract, TWC rewired the cable facilities in the building and replaced TWC's existing molding with smaller custom colored flat-hinged molding specified by Dorchester.

Paragraph 1 of the contract authorizes TWC to install, maintain, remove, replace and/or relocate wirest, conduits, cables, amplifiers and similar devices.

Paragraph 5 states:

"Neither the owner nor the Agent...shall tamper, interconnect or interfere with, make any alterations to, or remove, or knowingly permit anyone not authorized by TWCNYC to tamper, interconnect or interfere with, make any alteration to, or remove any Equipment and/or converters except with the prior written consent of TWCNYC."

Paragraph 8 provides that the title to all installations shall remain with TWC. Moreover, paragraph 6 of the Custom Colored Molding Rider to the contract provides that title to all equipment, including the custom colored molding, shall remain with TWC.

After executing the contract, TWC retained a contractor, Rae Mar, to rewire the building. TWC paid the entire $59,000 cost of the work. The system, which was completed less than two years ago, includes vertical riser cables extending through the building's stairwells and laundry rooms, passing into and through distribution boxes located on each floor. From those junction boxes, "home run" cables run through plastic custom colored flat-hinged molding installed by TWC near the ceiling line in each floor's hallway. These moldings form an enclosed conduit structure to house the cables installed by TWC in order to reduce the risk of accidental or deliberate damage and to deter theft of service. When a tenant of the building requests cable service, TWC installs converters and

wiring in the individual apartment, and connects the apartment wiring to the "home run" cable that passes by the tenant's apartment unit in TWC's hallway molding.

The instant dispute arose when Dorchester permitted Liberty Cable ("Liberty"), a competitor of TWC, to wire the building for its own cable service. Liberty is a "video programming distributor" which is not currently required to obtain a cable franchise. TWC contends that Dorchester has violated its contract with TWC, and is tampering with or converting portions of TWC's cable facilities by permitting Liberty to provide its service at the building using TWC's cable facilities, including the TWC molding. According to TWC, Liberty is unlawfully running its own cables through TWC's molding. TWC maintains that the molding is too small to accomodate both TWC's existing "home run" cables and the new cables Liberty plans to install, without jeopardizing the integrity of TWC's system and service. As a result of the crowding of cables in the molding, TWC claims, TWC would lose a significant amount of business and have operational problems, including degradation of service and increased maintenance problems, unless the court issues an injunction. For example, TWC states, an overloaded molding may become detatched or cracked, expose cables, or cause damage to cable facilities in the molding, requiring TWC to make frequent maintenance and repair visits to the building to correct the problem. In addition, TWC contends that Liberty's use of TWC's cable facilities would deprive TWC of the chance to provide upgraded service in the future, e.g., telephone or Internet access.

TWC further states that Liberty would have an unfair competitive advantage if it were permitted to use TWC's cable facilities; this would permit Liberty to underprice TWC's service. Moreover, unless the injunction is issued, TWC says, cable companies such as TWC would lose their incentive to improve facilities. TWC asserts that the injunction would not prevent competition, in that Dorchester could intall at its own expense, or require its own cable designee, such as Liberty, to install, separate facilities of its own in order to offer another video service.

In order to be entitled to a preliminary injunction, the moving party must demonstrate a probability of success, danger of irreparable injury in the absence of an injunction and a balancing of the equities in its favor (Albini v. Solork Associates, 37 A.D.2d 835). The first question, then, is whether TWC has shown a probability of success.

Dorchester denies that Liberty's installation will interfere with TWC's ability to deliver cable service to Dorchester residents. Liberty began the installation of it system in late April, 1996. According to Dorchester, that installation is now complete with the exception of adding the microwave reception antenna needed to deliver Liberty's signal to the Dorchester and hooking up individual subscribers: According to Dorchester, the preliminary injunction sought by TWC would prevent Liberty from hooking up new subscribers. Liberty installed a separate vertical riser cable system which distributes Liberty's signal vertically throughout the stairwells of the building. Liberty has also placed

a single cable inside the plastic molding installed in Dorchester hallways (i.e., TWC's molding) to obtain access to each potential subscriber. None of the cables installed by Liberty in the hallway molding is actually affixed to anything. In other words, according to Dorchester, the Liberty cable occupies empty space and does not displace TWC cables in the hallway molding, and the hallway molding is large enough to hold the cables of both TWC and Liberty. Dorchester contends that the only feasible way for any cable company to enter most of the units in the Dorchester is through a hole over the doorway. That space, about three inches between the top of the door jam and the ceiling, is completely covered by the hallway molding. In other words, in Dorechester's view, there is no way that Liberty can obtain access to these units without going through an area already covered by the hallway molding. Thus, Dorchester claims, the preliminary injunction sought by TWC would prevent Liberty or any other competitor of TWC from providing cable service at the building.

Certain Federal Communications Commission (FCC) regulations, set forth below are relevant to this dispute. 47 C.F.R. § 76.802, relating to disposition of "home cable wiring," provides that upon voluntary termination of cable service by a subscriber, a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase wiring at the replacement cost, and the subscriber declines. "Cable home wiring" is defined as "the internal wiring contained within the premises of a subscriber which begins at the demarcation point." 47 C.F.R.

§76.5(11). The demarcation point in multiple unit installations is defined as a "point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. § 76.5(mm). Thus, the demarcation point for cable wiring in the Dorchester is the hallway molding and one foot into the hallway.

47 C.F.R. § 76.802(j) provides:

"Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber's side of the demarcation point, such as molding or conduit, to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps to ensure that an alternative service provider has access to the home wiring at the demarcation point."

In 47 U.S.C. § 544(i), Congress directed the FCC 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 each subscriber. The legislative history indicates that the above provision is limited to the "cable installed within the interior premises of a suberiber's dwelling unit," and that it "does not apply to any wiring, equipment or property located outside the home or dwelling unit." H.R. Rep. No. 628, 102nd Cong., 2d Sess, at 118, 119 (1992).

TWC ackowledges that under the above regulations, it is required to permit Liberty some access to conduits from the individual apartments. However, in TWC's view, since the

demarcation point is about 12 inches outside the subscriber's apartment, TWC does not have to cede control of any area beyond that point. Thus, Liberty, or any other alternate service provider can open up the front of TWC's flat hinge moldings in order to sever the home wiring at about 12 inches outside the point that it exits the apartment and to connect such wiring to Liberty's own feeder cable, which can be run above or below TWC's molding.

In Paragon Cable Manhattan v. P & S 95th Street Associates, Index No. 130734-93 (Sup.Ct. New York Co., May 8, 1996, Justice Gammerman), the building owner contended that it was "unworkable" to limit the scope of the FCC's home wiring rule and that use of the cable operator's facilities throughout the common area had to be allowed. The court, however, declined to extend the home wiring rule to any area beyond the demarcation point, holding that the owner had not provided legal authority to support its expanded definition of "cable home wiring."

Section 3.3 of TWC's cable franchise states:

"In the operation of the System, the Company [TWC] shall not interfere in any way with, nor utilize, any master antenna system, satellite master antenna system or any other similar system within the building.

It is true that TWC, under its franchise agreement, must install a cable system of its own rather than use the internal master antenna television (MATV) conduit systems that were built into many apartment buildings at the time of construction. However, this does not mean that TWC must share its own facilities beyond

the demarcation point.

James Kelly, a foreman for TWC, submits a reply affidavit in which he describes several methods by which Liberty could provide service to Dorchester residents without infringing on TWC's cable facilities. For example, Liberty's cables can be installed in the area immediately above TWC's molding and below the ceiling, and drilling a hole in that area into the apartment unit. Since this is above the line of sight of persons passing through the hallway, it would not interfere with the aesthetics of the building. When a tenant chose to switch to Liberty's service, the existing home run cable leading into the apartment could be severed within 12 inches outside the apartment unit, the homerun cable would be pulled back into the apartment and out again through a new hole that can be drilled near the existing one, leading directly to Liberty's cable in the hallway. Liberty's tap for that customer can be placed either in the apartment or in the hallway above the molding. It would also be possible to drill the necessary hole below TWC's molding. If there were an apartment that could not accomodate the drilling of a hole outside TWC's molding, a connection to Liberty's service could be made using the existing hole in the molding; a hole would be drilled in the top or bottom of TWC's molding in an area within 12 inches of the point of entry to the apartment, pulling the existing homerun through such newly drilled hole, and connecting it to Liberty's cable above or below the molding. The Kelly affidavit is credible and provides several alternatives under which Liberty could provide service to the building.

Public Service Law § 228 states that no landlord shall interfere with the installation of cable television facilities upon the premises, except that the landlord may require, inter alia, that the installation of cable facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants, and that the cable company or the tenant (or a combination of them) bear the cost of the installation, operation or removal of such facilities. Dorchester claims that under the above provision, TWC was already obligated to put in the custom colored molding in the hallway, so that the TWC-Dorchester contract lacks consideration. In response, TWC points out that it performed a rewiring and replacement of molding with smaller custom colored molding at Dorchester's request, in connection with a remodeling of the building. Since TWC had installed an upgraded cable system three years before, and there is no claim that the pre-existing system was inadequate, there was no legal requirement that the new custom colored moldings be put in. TWC in fact provided consideration for the agreement; it spent $59,000 on the work. Dorchester further contends that the agreement is void because it is perpetual in nature. TWC says that the agreement is not perptetual because it ends upon the termination of TWC's franchise. In response, Liberty contends that TWC has a virtual guarantee that its franchise will be renewed in perpetuity (47 U.S.C. § 546).

Dorchester cites an Ohio case in which a cable contract was voided

for being perpetual in nature. There are, however, cases in which a contract having no definite date for termination can nevertheless be valid. For example, in Ketcham v. Hall Syndicate, 37 Misc.2d 691, aff'd 19 A.D.2d 611 (1st Dept.), an agreement for the syndication of a cartoon provided that it would be automatically renewed from year to year unless plaintiff's share from the syndication did not equal certain stipulated weekly payments, in which event either party had the right to terminate it. The court ruled that the automatic renewal provision did not make the contract of indefinite duration. While there was no specific date of termination, there was a specific provision for termination upon the happening of the event that certain minimum payments were not made. New York, unlike Ohio, has a mandatory access law for franchised cable television companies (Public Service Law § 228). This statute means that so long as TWC holds a franchise for the area of Manhattan that includes the Dorchester, TWC has the right to serve tenants requesting its franchised cable television service and has the right to maintain its facilities at the building free of interference. In the absence of an express term fixing the duration of a contract, New York courts can inquire into the intent of the parties and supply the missing term if a duration can be fairly and reasonable fixed by the surrounding circumstances (Haines v. City of New York, 41 N.Y.2d 769). Since a cable company cannot operate any cable system without a franchise from the applicable municipality confirmed by the state Public Service Commission (Public Service Law § 212(1), (2), 219 and 221), the

Dorchester-TWC agreement can reasonably be read to contain an implied term that it would terminate upon the termination of the franchise. The contract remains in force unless and until the appropriate governmental agency terminates the TWC franchise.

In support of its claim that TWC is improperly interfering with television service to the building, Dorchester cites Public Service Law § 228(3), which provides that no cable company may enter into an agreement with the owners, lessees or persons controlling or managing buildings served by a cable company to do any act which would have the direct or indirect act of interfering with the existing rights of any tenants of such building to use the master or individual antenna equipment (MATV). This section, however, does not apply, for several reasons. First, neither TWC nor Liberty is an MATV service. Second, the building has an MATV system and TWC is neither using it nor preventing anyone else from using it.

TWC has established a probability of success. Where there is a continuing trespass to or conversion of facilities, an injunction is a permissible remedy (New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 691) (court enjoined municipality from attaching its street lights to poles owned by the telephone company and ordered the removal of lighting fixtures).

Unless Dorchester, or its licensee, Liberty, is prevented from running its system through TWC's cable facilities, TWC runs the risk of service or maintenance disruptions. This potentially would result in lost business, the amount of which cannot readily

be calculated by TWC. There is a danger of irreparable injury in the absence of an injunction. Moreover, so long as TWC permits Liberty to run the necessary lines from subscribers' apartments through the molding within the demarcation area (within 12 inches of the respective apartments), the balancing of the equities favors TWC's right to be free from trespass or interference with respect to the balance of its system (i.e. outside the demarcation area). With respect to the TWC system outside the demarcation area, TWC is entitled to an injunction prohibiting Dorchester from placing further cable equipment within TWC's molding area, and directing Dorchester to remove previously placed cable from the affected area.

Accordingly, the motion is granted to the extent that Dorchester, and its designees, are prohibited from using TWC's cable facilities except those within the above mentioned demarcation area, and is directed to restore remove any cables or other equipment heretofore installed within TWC's facilities outside the demarcation area.

Finally, the Court, sua sponte, directs that plaintiff join Liberty Cable as a party defendant. (CPLR 1001, 1003; New York State Inspection v. State, 106 Misc.2d 654, 658).

Settle order providing for an undertaking.

Dated:

JUL 16 1990

CAROL E. HUFI