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October 16, 1996

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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Mr. Rick C. Chessen, Attorney
Federal Communications Commission
Cable Services Bureau Policy
& Rules Division
2033 M Street, NW, Suite 399
Washington, DC 20554

95-184

Dear Rick:

Pursuant to your request, enclosed are (1) citations to all of the cable mandatory access statutes of which we are aware; and (2) portions of two briefs which set forth cases challenging such statutes (which are close to exhaustive we believe). In addition, the Ohio Supreme Court construed the definitional language of a state utility eminent domain statute to include franchised cable operators. Cablevision of the Midwest, Inc. v. Gross, 639 N.E. 2d 1154 (Ohio 1994). The case did not involve constitutional challenges post-inclusion based on private use or other issues.

Let me know if we can assist you further with any of these matters.

Sincerely,

Deborah

Deborah C. Costlow

DCC:bgb

Enclosure

Connecticut (Conn. Gen. Stat. § 16-333a (1975)); Delaware, (Del. Ann. Tit. 26, § 613 (1989)) (only if utility easements also exist); Florida (Fla. Stat. Ann. § 1232 (West 1982)) (still on the books with respect to condominium properties, although identical statute applicable in rental context found unconstitutional); Illinois (65 ILCS 5/11-42-11.1 (1993); Kansas (Kan. Stat. Ann. § 58-2553(b) (1982)); Maine (Me. Rev. Stat. Ann. tit. 14, § 710-B (1987)); Massachusetts (Mass. Gen. L. Ch. 166A §22 (1995)); Minnesota (Minn. Stat. Ann. § 238.23 (West 1982)); Nevada (Nev. Rev. Stat. Ann. § 742 (Michie 1987)); New Jersey (N.J. Rev. Stat. § 48.5A-49 (1982)); New York (New York Exec. Law, § 39-19-10 (1986)); Pennsylvania (68 Pa. Cons. Stat. Ann. §§250.501-B et seq. (1993)); Rhode Island (R.I. Gen. Laws §39-19-10 (1993)); West Virginia (W.Va. Code §5-18A-3 et seq. (1995); Wisconsin (Wis. Stat. §66.805 (1994)); and District of Columbia (D.C. Code Ann. § 43-1844.1 (1981)).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
(Philadelphia)

ACS ENTERPRISES, INC., a Pennsylvania corporation, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 93-CV-2076
COMCAST CABLEVISION OF PHILADELPHIA, L.P., COMCAST CORP.,	)	
Defendants.	)	

FILED JUL - 2 1993

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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DATED: July 1, 1993

In contrast, Congress chose not to impose similar regulation on other multichannel video programming distributors such as SMATV and MMDS operators like ACS because of Congress' determination that such distributors must keep rates low, service standards high, and programming diverse due to the extreme competitive pressure brought to bear by the market power of the incumbent cable franchisee. Thus, Comcast's attempt to cast the service offered by franchised cable operators as being imbued with the public interest is hardly convincing given Congress' and the FCC's exactly opposite determination.

D. The Private Use Question Has Only Been Decided In The Lansing Case

The case law in other states has hardly settled the question of whether a public use and necessity exists for a condemnation under circumstances where multichannel video services are already being provided to tenants by an alternative provider. Pltfs' Prel. Inj. Br. at 35-38. Indeed, the only case to have squarely addressed this issue is City of Lansing v. Edward Rose Realty, Inc., 481 N.W.2d 795 (Mich. App. 1992), appeal pending, Nos. 93256, 93257 (oral argument heard March 3, 1993). The Lansing case is fully discussed in Pltfs' Prel. Inj. Br. at 36-38.

Comcast ignores the Lansing case, however, and relies on six other cases, none of which dealt with the private use issue under circumstances where video services were already provided, and

four of which did not deal with the private use issue at all.[30] For the most part, Comcast resorts to stating the broad conclusion of law that each of these decisions allegedly held that a public purpose is served by a taking of private property for the provision of the franchisee's cable services and then string-citing these cases in support. Yet an examination of these cases disproves Comcast's assertions that any of them have resolved the private use question. To take each in turn:

(1) AMSAT Cable Ltd. v. Cablevision Systems, No. B-89-534 (TFGD) (D. Conn., slip op. September 23, 1992), appeal pending: This case was cited but not discussed by Comcast. Comcast Br. at 38. The case involved a SMATV operator's challenge to the Connecticut mandatory access statute based on an alleged violation

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[30] Comcast dismisses the import of the Lansing case in a paragraph by claiming (1) that a tenant request did not trigger access but instead the cable franchisee determined the multiunit buildings to be accessed and (2) that a heightened scrutiny test is somehow unique to Michigan law such that this Court need not give the same close scrutiny here and impliedly that a lesser scrutiny in Michigan would have led to a different result. First, the Michigan Court of Appeals directly focused on whether a tenant could force the cable franchisee to service the property or whether the ultimate decision was left with the cable franchisee. Thus, there is absolutely no difference in the working of the Lansing ordinance and the Act at issue here. In both instances, while a tenant can request service from the cable franchisee, the cable franchisee can refuse to provide it. 481 N.W.2d at 798 ("...Ordinance 753 does not confer upon tenants the right to access franchise cable service; it confers upon the cable franchisee the ability to provide access.") Second, this Court must also apply close scrutiny when it is evident that a taking involves private uses and benefits in order to determine whether those private uses and benefits so predominate over any public uses that the statute is rendered unconstitutional. United States v. Certain Parcels of Land in Philadelphia, 215 F.2d 140, 148 (3d Cir. 1954). Third, the Michigan Court of Appeals specifically held that "[u]nder any standard of review, the primary purpose of a taking must be public." 481 N.W.2d at 798.

of the SMATV operator's First Amendment rights, allegations that federal law preempted passage of a state mandatory access law, and allegations that the just compensation provisions were defective by not authorizing compensation to be paid for the taking of the SMATV operator's property. None of these claims are at issue in this case. None of the claims at issue in this case were at issue in the AMSAT case. The court had no occasion to examine at all, much less decide, whether the taking authorized by the Connecticut statute, either on its face or as applied, was a taking for a private use in violation of the constitutional rights of the property owners.

(2) Times Mirror Cable Tel. of Springfield, Inc. v. First Nat'l Bank of Springfield, 221 Ill. App. 3d 340, 582 N.E.2d 216 (1991): This case was string-cited twice but not discussed. Comcast Br. at 38, 40. As set forth in Pltfs' Prel. Inj. Br. at 36-37, n. 28, the Times Mirror Court apparently ruled, contrary to all jurisprudence of which plaintiffs are aware, that it is irrelevant for constitutional purposes under Illinois law whether a public or private use is served by a taking. Id., e.g., 582 N.E.2d at 220 ("Like eminent domain, the issue presented by the cable statute is not whether the landowner objects to the taking; his preferences and opinions are irrelevant. Instead, the issue is compensation."); at 224 ("The cable statute precludes property owners from interfering with cable installation when it has been requested by tenants. Only compensation is the issue; the statute does not require proof of public use or purpose."). Even Comcast

concedes that both federal and Pennsylvania law forbid a taking for a private use and that should the takings in the instant case be proven to be for a private use, such takings would be invalid as abriding the constitutional rights of the property owners. The Times Mirror case cannot be properly cited for deciding that a taking of private property for the provision of video services serves a valid public purpose when the court decried all responsibility under the Illinois statute to even examine the private use issue. Moreover, there is no indication in the decision that residents of the mobile home park already had access to video services by an alternative provider.

(3) NYT Cable TV v. Homestead at Mansfield, Inc., 11 N.J. 21, 543 A.2d 10 (1988): This case was cited twice but not discussed. Comcast Br. at 38, 39. This decision is an affirmance by an equally divided supreme court and has no value as precedent. In any event, the question at issue was whether the court should affirm "judicial surgery" performed by a lower court by grafting a just compensation provision onto the New Jersey mandatory access statute so as to preserve its constitutionality in light of the Loretto decision. Neither the intermediate court nor the justices voting to affirm discussed any issues relating to the public necessity of forcing access to properties already served by an alternative video services provider. In fact, the only discussion is found in the opinion to reverse. 543 A.2d at 17. Justice Stein's analysis recognized that the necessity to condemn property to provide franchised cable services is wholly dependent upon the

context, i.e., the "different regulatory, competitive and technological conditions", id. at 28. Where multichannel video programming services were being provided, the "access rights of franchised cable companies" were merely the "nominal focus"; "the heart of the controversy" was the private interests of cable companies and their competitors. Id. at 22. Thus, the question was not the same as that considered by the New Jersey legislature, i.e., whether it was a public purpose to provide some form of cable at all. Id. at 27.

(4) Cablevision of the Midwest, Inc. v. Gross, 1992 Ohio App. LEXIS 3490 (1992), review pending, 602 N.E.2d 1173 (1992): This case is cited twice but not discussed. Comcast Br. at 39, 40. Therein, plaintiff cable franchisee sought a declaratory ruling that a local ordinance granted it the right to access the interior of multiunit dwellings to provide service to tenants upon the payment of just compensation. The property owners had argued that the ordinance did not authorize the cable franchisee to appropriate any interest in private property, and that such interior installation could proceed only with the property owner's consent. On the plain language of the ordinance, the court found that the city had granted a right of access to the cable franchisee and had conditioned such right upon the payment of just compensation. The property owners did not challenge whether the ordinance, if so construed to allow a taking, was unconstitutional as a taking for a private, rather than a public use. The court simply did not address the private use issue.

(5) Direct Satellite Communications, Inc. V. Bd. of Pub. Utilities, 615 F. Supp. 1558 (D.N.J. 1985): This case was cited once in a string-cite and not discussed. Comcast Br. at 40. This case challenged the New Jersey mandatory access statute solely on the basis of whether its application violated the First Amendment rights of the property owner and SMATV operator. (For First Amendment discussion of this case, see Section VI., infra.) Again, the private use question not being at issue in the case, the court's ruling is purely inapposite.

(6) Lake Louise Improvement Ass'n v. Multi-Media Cablevision of Oak Lawn, Inc., 157 Ill. App. 3d 713, 510 N.E.2d 982 (1987): This case is cited once but not discussed. Comcast Br. at 40. This was an appeal from a lower court ruling on preliminary injunction holding the Illinois mandatory access statute unconstitutional as a taking of property for a private use, as well as for inadequately safeguarding the owner's right to just compensation prior to a taking. As discussed in Pltfs' Prel. Inj. Br. at 36-37, n. 28, the appellate court explicitly stated that it "reverse[d] and remand[ed] without deciding at this time the constitutional issues presented." 510 N.E.2d at 983. The court held that the "prime purpose of a preliminary injunction is to preserve the status quo between the parties" and that the final judgment as to the constitutionality of the statute should properly be left "until the conclusion of the litigation, with the trial court, in the meantime, fashioning a preliminary injunction that would protect the rights of all the parties pending a final

determination of the extremely important modern issues tendered by the case." Id. at 985, 986. Indeed, the court's comments with respect to the need to consider a full evidentiary record with respect to the private use issue is equally applicable to this case and countenances against Comcast's motion to dismiss based on its allegations that the law is "settled" in this area as well as Comcast's attempt to have this Court erroneously view this case as a mere facial challenge in order to defeat discovery and proof as to the predominantly private uses and benefits redounding to Comcast from the takings objected to here: the question "should not be construed constitutionally without a complete inquiry into the substance of the legislation and its ultimate purpose." Id. at 984. In any event, the case did not involve circumstances where multichannel video services were already being supplied by the landlord through an alternative system.

Finally, Comcast relies on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and implies that the United States Supreme Court has validated the "public purpose" which Comcast alleges is served by the Act. Yet even a cursory reading of the case proves that the Supreme Court did not rule on whether the mandated provision of cable services on private property serves a legitimate public use and necessity at all, much less in circumstances where such services are already being provided by the landowner through an alternative multichannel video services operator. The Court only determined that the government-mandated installation of cable lines on private property

constituted a taking necessitating the payment of just compensation. The issue as to whether the state statute served a legitimate public use and necessity was not before the Court and the Court did not render an independent determination of it. The opinion merely states that the Court had no reason to question the state court's determination that the legislative decision fell within the state's police power, id., 458 U.S. at 425. Since Loretto simply did not involve a private use challenge, the ruling cannot be cited to justify the takings here. The Court stressed that its holding "is very narrow" and limited its decision to the facts, id., 458 U.S. at 441.

Not surprisingly, Comcast does not focus on the United States Supreme Court decision, but rather on the decision by the New York Court of Appeals which was overturned. While the New York Court of Appeals found that the statute was reasonably related to the public purpose sought to be achieved and was therefore within the police power of the state, the court could not have found that such a public purpose justified a taking, since the court held that the statute did not even authorize a taking of private property in the first instance. Nor did the New York Court of Appeals confront a case where the cable services found to serve a public purpose were already available to the tenants; rather, the tenants would have been left without any access to any video programming services from any provider.

In short, to advocate a dismissal of plaintiffs' claims not on the basis that the Amended Complaint is somehow defective,

but that the law is completely settled on the private use issue is disingenuous. The issue is nearly of first impression in the nation, and clearly is of first impression with respect to the Pennsylvania statute. As discussed above, the single case involving a direct challenge to a cable mandatory access statute which proceeded through a full trial on the issue and a full appeal, i.e., the Lansing case, resulted in a holding that the taking was an unconstitutional taking of private property for a private use where nonfranchised cable service was already available to tenants. See also Pltfs' Prel. Inj. Br. at 36-38. Like the Lansing case, this case should also proceed to an examination of the merits of plaintiffs' private use challenge.

III. THE PROPERTY OWNERS HAVE A CONSTITUTIONAL RIGHT TO CHALLENGE THE PUBLIC VALIDITY, SCOPE, AND NECESSITY OF A PROPOSED TAKING

A. The Legislature May Not Abrogate This Right

In their initial memorandum, plaintiffs demonstrated that the Act violated the federal and state constitutions by prohibiting an owner of property from obtaining a judicial determination of the validity, scope, and necessity of a proposed taking. Pltfs' Prel. Inj. Br. at 8-20. In response, Comcast concedes that the Act prohibits the property owner from challenging the taking on these grounds, since it permits property owners to seek judicial review

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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U.S.C.A. 3rd. CIR.

Case Nos. 94-1623, 94-1671 & 94-1818

ACS ENTERPRISES, Inc., et al.,

Plaintiffs/Appellants,

V.

COMCAST CABLEVISION OF PHILADELPHIA, L.P., et al.,

Defendants/Appellees.

On Appeal From The United States District Court
For The Eastern District of Pennsylvania (Philadelphia)

BRIEF OF APPELLANTS

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18 Ghz or any other of the plethora of suppliers now entering the marketplace to provide cable services. Market entry by alternative multichannel video service providers, such as ACS, surely will be chilled as a result of the Legislature's preferential treatment of those video service providers municipally-franchised. See Price, 221 A.2d at 150 (holding that the public's net gain of 180 parking spaces, when juxtaposed with the significant tax savings, revenue entitlement and nonpublic use granted to a developer in the construction of a parking garage and apartment complex facility, was insufficient to conclude that the public was the "primary and paramount beneficiary" and that the government's involvement on behalf of a private enterprise resulted in such a competitive advantage over other private enterprises not so aided that wholly private investment in similar projects would be "discourag[ed]").

The public use and benefit is fulfilled once tenants have multichannel video services available for subscription if desired. To mandate that such services must be available from a particular source is not only anticompetitive, but also demonstrates that the primary and paramount purpose for the exercise of eminent domain under the Act is to benefit a private enterprise, i.e., those purveyors of video services doing so pursuant to a municipal franchise. Any condemnation must be viewed as primarily benefitting Comcast, not the residents of the subject apartment complexes.

Only one court has ever definitively addressed the question of whether a public use exists for a condemnation under circumstances where multichannel video services are already being provided to tenants by an alternative supplier. City of Lansing v. Edward Rose Realty, 502 N.W.2d 638 (1993). Therein, the Michigan Supreme Court held unconstitutional a city ordinance prohibiting owners of multiunit dwellings from interfering with a tenant's choice to receive cable service from the municipally-franchised cable operator and authorizing eminent domain as the remedy for such interference. Because of the availability of an alternative video

service provider, the court reasoned that such a taking predominantly served the cable franchisee's private interest in expanding its customer base, thereby generating "substantial revenues through subscription payments," and "increas[ing the] market value of its overall system." Id. at 645. The court rejected the city's arguments that certain franchise requirements applicable only to the cable franchisee were sufficient to "support invasion of an owner's private property," i.e., requirements for universal service, franchise fees, emergency override and public, educational and governmental access channels. Id. at 645-646.

The court also rejected the city's assertion that tenant welfare was the paramount goal of the taking, finding that the city ordinance did not confer upon tenants or even landlords the right to access franchised cable service. Rather it conferred upon the cable franchisee the ability to initiate condemnation in its sole discretion:

> Access to private dwellings pursuant to ordinance 753 is enforceable only by the franchised cable operator. [footnote omitted] Neither [the property owner], the city, nor tenants could initiate condemnation proceedings to ensure competition of cable systems.

Id. at 646-47. In the words of the Michigan Court of Appeals: "Rather than benefiting the public interest, it appears that the proposed condemnation is an attempt by a private entity to use the city's taking powers to acquire what it could not get through arm's length negotiations with [the property owners]." City of Lansing v. Edward Rose Realty , 481 N.W.2d 795 (1992).

Finally, the Michigan Supreme Court found the city's argument that mandatory access would "increase competition" not persuasive.

> While allowing Continental to initiate condemnation proceedings to secure cable access to any dwelling in Lansing, no corollary rights are granted other cable systems. Continental will be guaranteed the ability to compete with private cable systems where it decides to compete, without an equivalent right of competition guaranteed to private systems.

Id. at 646. See also Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 607-608, n. 5 (11th Cir. 1992), cert. denied, 113 S. Ct. 182 (1992) (commenting on anticompetitive, "unequal regime" that would have been created had Congress legislated mandatory access to private property solely for cable franchisees as opposed to all suppliers of multichannel video services).

As in the ordinance in the City of Lansing case, the Act here does not prevent property owners and cable franchisees from entering into exclusive contracts for the provision of multichannel video services, thereby insulating cable franchisees such as Comcast from "competition" and depriving those residents of any opportunity to choose a different cable supplier. The Act does not prevent the landlord from treating tenants as a "captive market"; the Act dictates that the tenants can be held captive only if the reins of captivity are held by the cable franchisee.

This Court has previously noted the "proliferation of systems" capable of delivering multichannel video services apart from the cable franchisee and that Congress left the selection from among competing systems to the owner of the property. Cable Investments, Inc. v. Woolley, 867 F.2d 151, 159 (3d Cir. 1989). Tenant welfare would be served by the landlord, however, because the landlord's "selection will be based on the realities of the marketplace" and because "the wishes of the tenants will not go unheeded since cable television may be one of the services that prospective tenants consider in their selection of a building." Id.

Moreover, this Court concluded that the original impetus for Congress' deliberations over whether to confer eminent domain powers upon cable franchisees stemmed not from a concern that the cable franchisee might be excluded in favor of some alternative supplier, but that tenants might be left without any means of access to multichannel video services from anyone:

> We note in passing that even those members of Congress who supported the draft of Section 633 which would have provided mandatory access were motivated by a concern that tenants of multi-unit dwellings might not have access to cable in the absence of such a provision. . . . In this case, however, there is no basis for any such concern because [the property owner's] tenants do have access to cable television, albeit service provided by a different system.

Id. at 156, n. 3. While Congress ultimately rejected passage of a federal cable mandatory access provision, the fact that Congress would have exempted landlords who entered into other arrangements for the provision of multichannel video services from any condemnation of their property proves Congress' concern was primarily grounded in advancing tenant welfare as opposed to the private welfare of the franchised cable industry. Id. at 159 and n. 7. See H.R. Rep. No. 934, 98th Cong., 2d Sess. 79-83 (1984), reprinted in 1984 U.S.C.C.A.N. at 4716-20 (discussing proposed Section 633 entitled "Consumer Access to Cable Service").

Thus, the Legislature's decision to force the Property Owners to suffer the physical appropriation of their property despite the fact that comparable cable services have already been assured to residents redounds primarily to the private benefit of Comcast, not the tenants. The Act is therefore unconstitutional.

C. The Act Is Unconstitutional Because It Prescribes A Formula For The Calculation Of Just Compensation

The United States and Pennsylvania Constitutions forbid the legislature from authorizing a taking and then prescribing what factors shall be considered in determining the just compensation due the owner; the right to just compensation stems from the Constitution, not the legislature, and thus the determination of just compensation is an exclusively judicial function. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327-28 (1893); Hughes v. Commonwealth Dept. of Transp., 523 A.2d 747, 750 (Pa. 1987). Here the Act's formula