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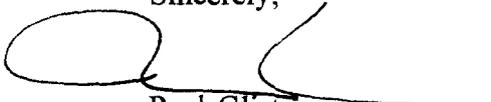
William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: **Cable Home Wiring**
Ex Parte: CS Docket 95-184/MM Docket 92-260

Dear Mr. Caton:

On January 8, 1997, James O'Brien and James Wholey of Jones Communications, Inc. and Paul Glist of Cole, Raywid & Braverman met with Meredith Jones and Rick Chessen of the Cable Services Bureau; Marsha McBride and James Coltharp of Commissioner Quello's Office; Suzanne Toller of Commissioner Chong's Office; and Anita Wallgren of Commissioner Ness' Office to discuss the matters raised in the attached memorandum.

Sincerely,


Paul Glist

Enclosure(s)

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cc: James O'Brien
James Wholey
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Marsha McBride
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Suzanne Toller
Anita Wallgren

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Cable Home Wiring in MDUs

January 8, 1997

Certain RBOCs have been advocating immediate shift of the "demarcation" point in MDUs and similar changes in ownership rights, including a "fresh look" allowing building owners to unilaterally terminate service contracts with cable operators.

Business Concerns with Moving the Demarc Point or Adopting 'Fresh Look'

Effectively Precluding Cable's Use of Home Wiring. Our fundamental concern is that all of these changes are related to efforts by RBOCs to (1) avoid the costs of building video-capable plant (2) frustrate cable's ability to market competing telecommunications services. In Alexandria today, we offer high speed internet access over the broadband pipe, and would be cut off from our customers if Bell Atlantic took that pipe. Our strategy for marketing voice, even when it is delivered over twisted pair copper, is to bundle it into a package with video. This is how we were successful in the UK, and this is what is driving penetration in Alexandria. If cable is limited to selling voice, we do not have an attractive marketing package, and the RBOCs will have succeeded in defeating interconnection through the back door.

Current MDU Contracts Emerged in a Competitive Environment. Inside wire was installed to make buildings marketable. In many cases the operator provided low cost discounted service in the early years with (contractually-backed) expectation of making its return on the out years. These are the same economics which the FCC approved of in the cost of service docket. These contracts were not imposed in a monopoly environment. SMATVs have been competing with us vigorously ever since the deregulation of earth stations in 1979. There is no reason to assume the contrary, and no predicate for a "fresh look."

Cable Home Wiring Should Not be Resolved Piecemeal Unless FCC Limits Abuses by Landlords and Developers.

- Inviting takeover of inside wire does not automatically benefit the consumer. NCTA has submitted record evidence that new providers will try to lock up developments on an exclusive basis and evict the incumbent, even when the new entrant charges more to the end customer. The developer profits through kickbacks. Landlords and property developers have sought relentlessly to treat their residents as captives and to control physical access to their MDUs in order to exact payments from MVPDs. By turning over

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control of home wiring to these unelected shadow governments, without adopting rules for access to premises and non-interference by landlords, the FCC would be reducing customer choice and empowering landlords and property developers to enrich themselves with no benefit to the consumer.

- We are frequently faced with "exclusives," in which the supposed competitor seeks to use our wire to "compete" and then contracts to exclude us from ever serving that unit. Only a minority of States have access to premises laws. Until the FCC adopts pro-competitive access conditions, any change which facilitates takeover of inside wire will aggravate this problem. The FCC cannot take this in pieces, moving the demarc today, handling the other issues later. The various schemes which have been advanced, such as Pac Tel's, contemplate a window in which properties under current contract will be locked up under new exclusives which shut out the current contract party, and then grandfather the "new" exclusive after having destroyed the existing contract. The FCC cannot try to deal with the contractual and property rights piecemeal, especially since it has not really put this out for comment.
- If the Commission were to proceed on this course, at a minimum it would need to condition the exercise of new rights to cable home wiring on landlords' and developers' surrender of the right to exclude. The Commission would also need to adopt strict provisions precluding the landlord or developer from acting as the resident's proxy holder; assuring that the "decisions" of residents are made after full and fair campaigns by providers; and precluding the landlord from tampering with those campaigns, buying or influencing votes, including proxies in leases, or profiteering from the result of the campaign. Otherwise, the Commission will simply have divested incumbent cable operators of their property and turned it over to landlords and developers who will use it for their own enrichment, rather than for providing choices to consumers.

Cable Cannot be Compensated in Today's Competitive Environment by Shifting Costs into a Supposed Rate Base. Those who advocate moving the demarc point now assume that an operator has been able to or will be able to recover his wire investment from other customers. In today's competitive environment, cable operators are unable to pass through even authorized cost recovery without suffering substantial loss of customers to competitors. (The Wall Street Journal reported October 25, 1996, A2, that TCI's recent rate increases to cover increased equipment costs led to a loss of 70,000 customers and a share price drop to a 52 week low.)

Maintaining the Current Rules Enhances Competitive Choice by Encouraging Competitors to Compete, Rather Than to Displace Competition. Record evidence shows that in NY, under the current rules, Liberty has overbuilt the MDUs, giving customers a real choice of providers. This is a far better model which eliminates the opportunity for a developer to sell-out his tenants.

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Legal Authority

The Commission Does Not Have the Legal Authority to Effectively Divest Cable of Common Wiring in MDUs.

- Section 624 applies only "within the premises of such subscriber." Congress specifically provided that "this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit." H. Rep. 102-628 at 118.
- Section 623 is not a basis: it protects the "subscriber" which is defined to exclude building owners and others who redistribute signals. It could not in any event evade the limits set by Congress' express provision on point.
- Section 652(d) of the 1996 Act also addresses the issue, providing that "a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission." Congress has limited any claims by LECs who wish to use cable network wiring from the last multiuser terminal to the end user premises—which includes cable drops and MDU wiring. Section 652(d)(2) forbids such use without the concurrence of the cable operator. Even then the Act permits such use only on a temporary, limited basis. This cannot be read to support the permanent transfer of ownership envisioned in LEC proposals to the FCC.
- Section 1 is insufficient basis for breaking contracts and stripping cable of contractual expectancy.

Just Compensation is Not Provided Unless the Owner is Paid for the Business Value of the Distribution System Which is Taken

- Constitutionally, providing us depreciated book in this environment would not compensate us for the economic value of the distribution system and would not satisfy "just compensation," any more than the price of bricks would compensate for the condemnation of a business. "Compensable value is properly measurable in terms of [the taken property's] economic potential . . ." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). "As Mr. Justice Brandeis observed for the Court in *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396, 'In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property.'" *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11

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(1949) (Fifth Amendment required compensation for the diminution in the value of trade routes disrupted by temporary government taking of physical plant).

- It is illusory to pretend that the compensation opportunity is presented by shifting costs to the ratebase of other customers. In today's competitive environment, cable operators are unable to pass through even authorized cost recovery without suffering substantial loss of customers to competitors.

There is No Basis for Applying the "Fresh Look" Doctrine to Cable MDU Agreements

- The "fresh-look doctrine" has been used as an extreme measure by the Commission only in the context of monopoly common carrier regulation in situations where no competitive alternatives existed at the time the common carrier agreements were signed (which is not the case with cable/MDUs). It may not be applied to cable television under the limits of Section 621(c). In the few instances where the FCC has applied "fresh-look" policy, it relied heavily on its broad Title II powers under Sections 201 and 205 authorizing it to prescribe just and reasonable charges for common carrier offerings.
- In addition, the market for MDU's has been competitive since at least 1979 (see above). There is no reason to presume that each contract reflects monopoly abuse.