SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, DC 20005

EX PARTE OR LATE FILED

April 30, 1997

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Federal Communications Commission
Office of Secretary

EX PARTE
William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: Telecommunications Services Inside Wiring; CS Docket No. 95-184, Cable Home Wiring, MM Docket No. 92-260

Tuesday, Kathy Rehmer, Director Regulatory Planning, SBC Communications, Inc., Lea Jones, Regulatory Director, Pacific Telesis Shared Services, Kevin Carbone, Director, Strategic Markets, Pacific Bell Video Services, and Sarah Thomas, Senior Counsel, Pacific Telesis Legal Group discussed over the telephone, and I discussed in person, the issues summarized in the attachments with Suzanne Toller, Legal Advisor to Commissioner Chong, and Marsha MacBride, Legal Advisor to Commissioner Quello. We are submitting two copies of this notice in accordance with Section 1.206(a)(1) of the Commission's rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions.

Sincerely yours,

Gina Harrison
Director
Pacific Telesis Group
(A Subsidiary of SBC Communications, Inc.)

cc: M. MacBride
S. Toller

Attachments

No. of Copies rec'd 0+1
List A B C D E

April 30, 1997

EX PARTE
William F. Caton
Acting Secretary
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Sincerely yours,

Gina Harrison

cc: M. MacBride
S.Toller

Attachments

Cable Inside Wire Docket
CC Docket No. 95-184

SBC/Pacific Telesis Main Points:

Cable Inside Wire demarcation point (demarc) for multiple dwelling units (MDUs) needs to be changed to the point where the common feeder wire meets the line dedicated to the unit.

A. Commission has authority to change the demarc.:
   1) 47 U.S.C. Section 543 (a)(2) - Preference for Competition
   2) 47 U.S.C. Section 548 - Development of Competition and Diversity in Video Programming Distribution
   3) Section 207 of the 1996 Telecommunications Act. Proper implementation of over-the-air reception device rules requires that the demarc be changed.

Perpetual exclusive contracts should not be permitted. Limited-time exclusive contracts should only be permitted for newly wired buildings.

A. Only permitted for new installations where a video provider has newly installed at least 75% of the inside wiring in an MDU.
B. Exclusive contracts should be limited to not more than 7 years. This provides an opportunity for the provider to recover the costs of a new system.
   1) The 7 year period would be from the point in time that the new wiring is installed.
      Example:
      If wiring put in December, 1995, the exclusive contract could remain in place until December, 2002.

The changing of demarcation and limiting the use of exclusive contracts are inextricably tied together.

A decision should be issued soon. Parties should not be permitted to delay a decision in this proceeding.

It is not a taking of real property owners' property to allow alternative video providers access to cable already installed in the premises.

Temporary access necessary to make the connection is not a taking under Loretto, which prohibited only permanent physical occupations.

More recent takings decision regarding temporary takings -- First English Evangelical Church -- is distinguishable because to be actionable a temporary taking must deny a property owner all use of the property.

Warranty of habitability analogy.

Loretto did not rule out regulations which require landlords to provide amenities to their tenants -- e.g., utility connections, mailboxes.

Loretto: "[O]ur holding today in no way alters the analysis governing the state's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the link in the common area of a building."

Inclusion of utility connections and mailboxes indicates regulations of non-safety-related areas are permitted.

FCC v. Florida Power: "Statutes regulating economic relations of landlords and tenants are not per se takings".

Connolly: "Contracts, however express, cannot fetter the constitutional authority of congress . . . . parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Building owners have an obligation to facilitate tenants' access to video competitors.

Second Restatement of Property gives tenants the right to make changes in physical condition of leased property reasonably necessary for tenant to use property in a manner that is reasonable under the circumstances.

It is not a taking of real property owners' property to allow alternative video providers access to cable already installed in the premises (cont'd).

First Amendment

A decision impairing tenants' ability to receive the programming of their choice will directly impact the First Amendment rights of viewers to have access to a multiplicity of sources of news and other information.

Turner Broadcasting: "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."

Red Lion Broadcasting: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."

It is not an actionable taking of cable companies' property to give property owners the right to purchase inside wire.

Telephony inside wire precedent: "The Fifth Amendment permits a taking of property so long as the person from whom the property is taken receives 'just compensation' and so long as the taking is for a 'valid public use.'"

Cable companies will receive compensation.

If the cable companies abandon their wiring in place after being given a reasonable period of time to remove it, no takings issues arise.

We propose cable companies be given 14 days from the date they receive notice of an alternative video provider's desire to serve a building to remove wiring. Failure to do so constitutes conclusive evidence of abandonment.

Once wiring is abandoned, cable companies may not seek compensation.

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If cable companies receive compensation, or they abandon wiring in place, there is no actionable taking of the cable companies' property.

We propose compensation for wiring/materials and labor. However, there should be no compensation for lost future profits from customers lost to competition.

This is a competitive issue, not an issue of "damages" for which the cable company is entitled to compensation.

A lost future income stream is also speculative.

Compensation is net of accumulated amortization, expensing, depreciation or other cost recovery.

Consistent with telephone inside wire: "We are requiring the telephone companies to abandon any claim of ownership in wiring that has been expensed or fully amortized."

Gina Harrison
Director
Federal Regulatory Relations

1275 Pennsylvania Avenue N.W. Suite 400
Washington, D.C. 20004
202 393-8403

AML
LLJ

PACIFIC TELESIS
Group-Washington

October 16, 1996

EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: Cable Inside Wire, CS Docket No. 95-184; Over-the-Air Reception Devices, CS Docket No. 96-83

We are submitting copies of an analysis of "takings" and jurisdictional issues relevant to the above-cited dockets, in accordance with Section 1.206(a)(1) of the Commission's rules. We will be filing another letter, in response to specific questions from the staff, shortly.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions.

Sincerely,

cc: Rick C. Chessen
Jackie Chorney
John E. Logan
JoAnn Lucanik
Larry Walke

PACIFIC TELESIS.
Group-Washington

October 16, 1996

JoAnn Lucanik
Chief, Policy and Rules Division
Cable Services Bureau
2033 M Street, N.W., Room 406
Mail Stop 1200
Washington, D.C. 20554

Re: *Telecommunications Services Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, *Restrictions on Over-The-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83

Dear Ms. Lucanik:

We write to address the potential takings and jurisdictional issues raised by the pending cable inside wire docket, Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996) ("NPRM"). We remind you that Pacific Telesis advocates movement of the current cable inside wire demarcation point – which is often located inaccessibly inside a wall – to a point which is more readily accessible. We also support giving multiple dwelling unit ("MDU") owners the right to own their cable inside wire prior to termination of service, and giving MDU residents and tenants "control" over their inside wire so they can choose their video provider.

We do not believe that giving alternative video providers access to MDU owners' property in order to connect new video service "takes" the property of the MDU owner, nor do we believe that changing the ownership arrangement of cable inside wire effects an uncompensated taking of the cable incumbent's property. Moreover, we believe the 1996 Telecommunications Act and the 1992 Cable Act, which both advocate increased competition in video markets, give the Commission ample authority to order the changes we propose.

It Is Not A Taking Of Real Property Owners' Property To Allow Alternative Video Providers Access To Cable Already Installed On The Premises

Allowing alternative video providers access to private property for the limited purpose of installing feeder wiring in a building and connecting the video service of individual customers is not a taking of private property.

First, any access alternative video providers need for their personnel to install new feeder wire and establish connections to existing wiring for individual customers will be temporary only. – i.e., the time it takes to enter the premises and connect the service. The Court in Loretto did not prohibit temporary physical "occupations," only permanent ones. The Court distinguished situations in which the occupation was only temporary (and in which no taking was found) – e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979) and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). The Court's more recent decision in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) that "temporary" takings are compensable is distinguishable, because such takings must "deny a property owner all use of the property" in order to be actionable. Thus the temporary occupation effected by having installers on the premises is not actionable.

Second, to the extent allowing access to MDU owners' property facilitates a tenant or other non-owning resident's access to video competitors, the building owners may have some common law obligation to allow this access for the benefit of their tenants. Such a right would be akin to the implied warranty of habitability that accompanies any tenancy. There is support for affording tenants such rights in the Second Restatement of Property, which gives a tenant the right to "make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances."

As the Consumer Federation of America recently argued in Comments filed in the Commission's docket examining Restrictions on Over-the-Air Reception Devices,[1] the Court in Loretto did not rule out regulations which require landlords to provide certain amenities to their tenants. The Court observed that "[i]f [the statute at issue] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation." For example, the Court acknowledged that landlords must provide mailboxes, or allow tenants to install them: "[O]ur holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the link in the common area of a building." (Emphasis added.)

Mailboxes are not safety devices, but rather facilitate a tenant's communication with the outside world. Giving a tenant access to alternative video providers serves the same purpose. Thus, a regulation requiring that landlords give alternative providers access in order to accommodate tenants may be just the sort of reasonable

[1] Comments of Consumer Federation of America et al., attached hereto as Exhibit A, at 10-13. See also Comments of the National Association of Broadcasters in the same docket (Exhibit B hereto), at 9-12 (distinguishing the Loretto case).

regulation of the terms of a tenancy that the Court in Loretto declined to foreclose. See also FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987) ("statutes regulating economic relations of landlords and tenants are not per se takings"); Connolly, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of congress. . . . Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

Finally, as the Consumer Federation of America points out in its Over-the-Air Reception Devices comments, a decision impairing tenants' ability to receive the programming of their choice will directly impact the First Amendment rights of views to have access to a multiplicity of sources of news and other information. See Turner Broadcasting System, Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445, 2470 (1994) ("Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 376, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . .") (emphasis added).

It Is Not An Actionable Taking Of Cable Company's Property To Give Property Owners Right To Purchase Inside Cable Wire

In the telephony inside wire docket, the Commission found that because telephone companies were compensated for their wiring, the taking effected by transferring ownership of the wiring to premises owners was not actionable. There, Commission stated that "[t]he Fifth Amendment permits a taking of property so long as the person from whom the property is taken receives 'just compensation' and so long as the taking is for a valid 'public use.'" In the Matter of Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Second Report and Order, 59 RR 2d 1143, paras. 48-50 (1986). Thus, telephone companies were required to abandon any claim of ownership in wiring that "ha[d] been expensed or fully amortized," because such amortization compensated the telephone companies for the cost of the wiring. Id., para. 50.

In like fashion, cable operators should receive "compensation" for the wiring. To the extent the cable companies have already depreciated the wiring or received other cost recovery for it, of course, they should not recover a second time at the time the Commission transfers ownership to end users. See 47 C.F.R. 76.922(g)(6)(i) (providing that cable ratebase may include cost of plant less accumulated depreciation). However, we do believe the compensation formula should include labor costs as well as the value of the physical wiring itself.

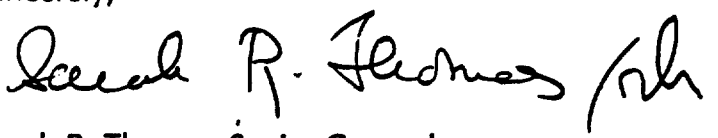
The Commission Has Authority to Order Access to Private Property and Transfer of Cable Wiring Ownership to Premises Owners

As we state above, Congress has explicitly advocated competition in video markets. The Commission derives its authority to take the steps we advocate from these congressional pronouncements. The recent enactment of Section 207 of the 1996 Act, which prohibits actions which impair the right of MMDS and other over-the-air video providers to deliver their signals to end users, may be the most powerful tool the Commission has to effect changes in the treatment of cable inside wiring. As the Commission has recognized in its rulemaking implementing Section 207, that provision clearly applies to antennas designed to receive over-the-air signals. However, every Pacific Telesis MMDS antenna must be accompanied by inside wiring in order for the signal to reach the customer. Without better access to inside wiring, therefore, the promises of Section 207 are empty, because we cannot deliver our signal beyond the antenna without such wiring. Therefore, the Commission should construe Section 207 to give it authority over inside wiring, as well as authority to prohibit actions which impair a provider's right to place antennas.

With regard to both wireline and wireless video, other congressional pronouncements give the Commission authority to change its regulation of cable inside wiring. See, e.g., 47 U.S.C. Section 543(a)(2) (re cable rate regulation, headed "Preference for Competition"); 47 U.S.C. Section 548 ("Development of Competition and Diversity in Video Programming Distribution"). Because the current cable inside wiring rules allow virtually no competition in video markets and freeze out new entrants, new rules are required if Congress' intent to foster competition is to be given effect.

We appreciate your attention to our concerns.

Sincerely,



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