

be relaxed for small systems back in 1976 remain valid, and perhaps even more relevant today given the ever increasing number of alternate MVPDs that may be operating in a given community.

IV. Shared Use Of Home Run Wiring Is Not Feasible And Would Constitute An Illegal Taking Of Private Property.

In its Further Notice, the Commission requests comment on DirecTV's proposal that the Commission adopt a "virtual" point of demarcation which it claims would permit multiple video service providers to share a single broadband home run wire. Such simultaneous use of wiring has already been recognized in this proceeding to be technically, practically and economically infeasible.⁵⁴ Indeed, the technical limitations of most cable systems make shared use impossible. In order for coaxial wiring to carry multiple services without signal leakage or interference, sufficient bandwidth is needed so that each provider can occupy a distinct frequency block. The vast majority of installed MDU wiring carries bandwidth sufficient for only one MVPD's channel line-up, making it impossible for two or more providers to share such wiring.

Even if the necessary bandwidth were available, cable operators require additional room to ensure their ability to expand and offer future services. The forced sharing of a single broadband wire would, as a practical matter, cripple cable operators by stifling the very growth they need to effectively compete with alternative services like DirecTV. Furthermore, once one service provider begins to share bandwidth, there would be no end to competing requests by other providers attempting to stake their claim to some remaining portion. This carving up of frequencies would eliminate altogether any possibility of cable

⁵⁴See First Order on Reconsideration, MM Docket No. 92-260, 11 FCC Rcd 4561, ¶ 10 (1996).

operators expanding their service, thereby effectively precluding cable operators from providing Internet service through cable modems or carriage of digital television. In order to provide such services, operators require additional bandwidth. Without the ability to connect customers to the Internet, incumbent providers will lose a major growth sector for the future and consumers will face fewer choices when choosing an Internet service provider. Finally, expensive and as yet unrealized technologies would be needed to convert, filter and amplify a second signal, thereby compounding the economic hardship upon cable operators.

Even if sharing were technically possible, rather than promoting competition among MVPDs, proposed sharing of MDU wiring would simply provide alternative services with an unfair competitive economic advantage over incumbent providers. This competitive advantage would derive from the direct and substantial investment of incumbent operators in infrastructure and only serve as a disincentive against future investment. Incumbents will not want to spend money installing upgraded bandwidth capacity if they know that new services will free ride on their investment. MVPD providers like DirecTV are themselves both practically and economically capable of installing infrastructure for their own use. Their clear preference is to instead receive a FCC-mandated ride on the coat tails of the cable industry through the shared use of wiring. The Commission should not allow new services to enjoy the fruits of incumbents' labor.

Furthermore, the Commission lacks the legal authority to impose shared use upon incumbent providers. The FCC's successful competitive initiative in telecommunications resale was premised upon the ability of the Commission to regulate that industry as a

common carrier.⁵⁵ Cable has never been regulated as such. To the contrary, Congress has demanded that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."⁵⁶ The Commission cannot simply graft its common carrier policies onto the cable industry. Common carriers, such as the incumbent local exchange carriers, have always been aware that their facilities are part of the "public switched network" and that any investments made in infrastructure are to serve the Commission's goal of universal service. Cable operators, on the contrary, have always operated under the expectation that they were part of the private sector and exempt from common carrier obligations. The FCC's common carrier regulatory scheme extends to only those entities which voluntarily hold themselves out as common carriers, which clearly does not include cable television.⁵⁷ Any attempt by the FCC to modify its regulation of the cable industry in this way would directly contravene both the will of Congress and the Commission's statutory authority.

Finally, shared use constitutes an impermissible taking of private property under the Fifth Amendment. Courts have previously held that the denial of an owner's access to its property through government regulation is a *per se* taking.⁵⁸ Shared use would also deprive

⁵⁵See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, American Telephone and Telegraph Company Co. v. FCC, 572 F.2d 12 (2d Cir. 1978).

⁵⁶47 U.S.C. § 541(c).

⁵⁷National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between [public and private] carriers").

⁵⁸Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992).

incumbent operators from enjoying the fundamental right of being able to exclude others from their property.⁵⁹ Without the ability to exclude competitors from occupying a portion of their bandwidth, incumbent operators would be subject to a permanent physical occupation of their property. The Supreme Court has held such an occupation, when authorized by the government, to be a taking "without regard to the public interests that it may serve."⁶⁰ A permanent physical invasion by a stranger constitutes a special, more severe injury since the incumbent "may have no control over the timing, extent or nature of the invasion."⁶¹ Case law further requires that the FCC have express statutory authority in order to affect a taking of personal property, a mandate clearly lacking in this matter.⁶² DirecTV's proposed flat-rate compensation scheme cannot cure this defect since *per se* compensation formulas are constitutionally insufficient.⁶³ The offering of just compensation in this matter would necessarily subject each individual taking to an adjudicatory determination, a constitutional defect that DirecTV's proposal fails to address.

⁵⁹Id.

⁶⁰Loretto v. Teleprompter Manhattan Cable TV Corp., 458 U.S. 419, 426 (1982).

⁶¹Id. at 436.

⁶²Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

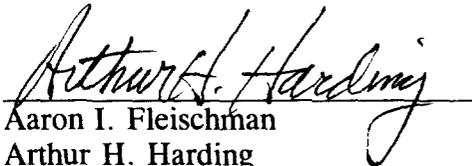
⁶³Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985).

V. Conclusion.

For all of the reasons set forth above, and for all of the reasons set forth in Time Warner's prior Comments and Reply Comments filed in this proceeding, the Commission should not create rules that interfere with existing contracts; create disparity among various MVPDs with regard to the ability to enter into future exclusive contracts; exempt small MVPDs from signal leakage reporting requirements; or permit the shared use of home run wiring. However, the Commission's single family home wiring rules should apply to all MVPDs.

Respectfully submitted,

TIME WARNER CABLE

By: 
Aaron I. Fleischman
Arthur H. Harding
Jill Kleppe McClelland
Susan A. Mort

FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 939-7900

Its Attorneys

Dated: December 23, 1997