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

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In the Matter of)

Telecommunications Services)
Inside Wiring)

Customer Premises Equipment)

CS Docket No. 95-184

In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)

MM Docket No. 92-260

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

The National Cable Television Association (“NCTA”), by its attorneys and pursuant to the Commission’s December 23, 1997, Public Notice Report No. 2245, opposes the petitions for reconsideration of Ameritech New Media (“Ameritech”), the Consumer Electronics Manufacturers Association (“CEMA”), DirecTV, and Wireless Cable Association International (“WCA”).

I. THE COMMISSION SHOULD GRANT NCTA’S PETITION FOR RECONSIDERATION

The *Order* provides for a stay of the presumption and transfer of ownership procedures if a state court, within 45 days of the landlord’s notice to transfer ownership, issues an injunction pending a final judicial ruling. We repeat our view that this artificial deadline makes no sense, and none of the other petitions filed suggest otherwise. If a state court issues a stay on day 46 or indeed at any time prior to the ruling on the merits, the stay should be given full force and effect. The Commission should not interfere with the state judicial process by interposing its transfer procedure where a state court has found a stay of proceedings is warranted. The Commission

should recognize the validity of a state court stay if it is issued at any time prior to the transfer of ownership.

The *Order* found that new procedures would apply to the disposition of home run wiring where the MDU owner chooses a new service provider unless the incumbent could demonstrate the state's highest court had held valid an access to premises statute that established the cable operator's right to remain on the premises against the will of the property owner. In its Petition for Reconsideration, NCTA also called for a modification whereby it is presumed that the new home run wiring procedures will not apply in states that have adopted access to premises statutes. Most if not all of these statutes, we explained, confer upon an incumbent operator an enforceable right to remain on the premises. It is arbitrary and wasteful of resources for the Commission to presume, subject only to rebuttal by a state's highest court, that the opposite is true.

Finally, where ownership is to be transferred from the incumbent to the MDU or an alternative service provider, actual ownership should not transfer prior to the actual payment of compensation by the MDU owner or alternative service provider, as we indicated in our Petition. Requiring payment prior to or at the time of actual transfer will ensure that the parties obtain the benefit of their negotiated bargain.

**II. IF THE MDU OWNER SELECTS A NEW MVPD, THE INCUMBENT MUST
RETAIN THE OPTION TO REMOVE ITS HOME RUN WIRING FROM THE
PREMISES**

In the *Order*, the Commission adopted its proposal to require the incumbent provider to select among three options where the MDU owner has decided that a new MVPD will serve the building, and the incumbent has no legal right to remain on the MDU premises against the will of the property owner. The Commission determined that in these circumstances the incumbent must elect, within 30 days, whether to sell the wiring to the MDU owner or alternative service

provider, to abandon the wiring or to remove it. The *Order* provides time deadlines for accomplishing the subsequent steps associated with each of these options.

DirecTV and WCA advocate the elimination of the option to remove the wiring. DirecTV complains that cable home run wiring may be embedded in the structure of an MDU, and its removal may "... entail substantial demolition and reconstruction of the interior spaces of an MDU, creating significant disruption to the homes and lives of MDU residents."¹ It argues that the incumbent should be allowed to remove its wiring only if it has first offered to sell it and the MDU owner has refused to buy. WCA argues if the incumbent is allowed to remove home run wiring the MDU owner will be discouraged from switching providers. It argues that the incumbent should not be permitted to remove the wiring in any circumstances, but that if the incumbent offers to sell at a price that the Commission has established as reasonable, the MDU owner should be compelled to buy it.²

Eliminating the incumbent's right to remove the wiring before offering to sell or abandon it to the MDU owner raises a serious constitutional issue. As the Commission has itself determined, it would constitute a "taking" under the Fifth Amendment. Thus the Commission concluded that the procedural requirements that it adopted in this proceeding would *not*

¹ Petition for Reconsideration of DirecTV, Inc., CS Docket No. 95-184, Dec. 15, 1997, at 3.

² Petition for Reconsideration of Wireless Cable Association International, CS Docket No. 95-184, Dec. 15, 1997, at 10.

constitute a “forced taking of the incumbent’s physical property” precisely because “the incumbent has a reasonable opportunity to *remove, abandon, or sell the wiring.*”³

It is the option to remove that is the critical leg, in a Constitutional sense, of this three-legged stool. So long as the incumbent has the option to remove its wiring where it no longer has an enforceable right to remain on the premises, and so long as the rules provide a reasonable time period for exercising that option, the incumbent’s property rights are at least arguably protected.⁴ But if this option were removed, the incumbent would be forced to transfer ownership of its property against its will -- and this, as the *Order* correctly concluded, would be a taking.

Whether such a taking would be constitutionally permissible would depend, first, on whether the required compensation by the MDU owner -- an arbitrated price under DirecTV’s proposal, or a Commission-mandated price under WCA’s proposal -- would be deemed just compensation in all cases. But that is a moot question because, wholly apart from whether the takings proposed by DirecTV and WCA would be accompanied by just compensation in all cases, the Commission has no statutory authority to impose such a taking. As the United States Court of Appeals for the District of Columbia Circuit has made clear, the Commission may not impose a taking unless it is express authorized by Congress to do so or unless some other explicit

³ *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, FCC 97-376, at 51-52 (“*Order*”) (citations omitted) (emphasis added).

⁴ *See Texaco, Inc. v. Short*, 454 U.S. 781 (1982).

grant of authority would “as a matter of necessity . . . ‘be defeated unless [takings] power were implied.’”⁵

Nothing in the Communications Act of 1934, as amended, expressly directs or authorizes the Commission to effectuate a taking of home run wiring. Indeed, the Commission’s authority to regulate wiring at all under Section 624(i) is expressly *limited* to wiring “within the premises” of subscribers.⁶ Furthermore, the legislative history specifically states that, with respect to MDU wiring, Section 624(i) was intended to apply only to wiring “within the individual dwelling unit of individual subscribers.”⁷

The Commission nevertheless found authority to regulate MDU home run wiring in Section 623(b) of the Act, which gives the Commission certain regulatory responsibilities with respect to subscriber rates.⁸ This jurisdictional stretch is itself dubious (as NCTA argued in its previous comments), and it is the subject of a pending petition for review in the United States Court of Appeals for the Eighth Circuit.⁹ But even the Commission has not argued -- and could not reasonably argue -- that Section 623 *expressly* authorizes regulations that effectuate a taking of MDU home run wiring. Nor could the Commission seriously maintain that its rate regulation

⁵ *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994), *quoting Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373 (C.C.W.D. Pa), *aff’d*, 123 F 33 (3d Cir. 1903), *aff’d*, 195 U.S. 540 (1904),

⁶ 47 U.S.C. §544(i).

⁷ H.R. Rep. No. 102-268, 102d Cong., 2d Sess. 119 (1992).

⁸ *Supra* n.3, at 45-46.

⁹ *Charter Communications, Inc. v. FCC*, No. 97-4120 (8th Cir. filed Nov. 24, 1997).

authority Under Section 623 would necessarily be defeated unless such takings power were implied.

These, presumably, are among the reasons why the Commission adopted rules that did not purport to disturb existing property rights with respect to MDU home run wiring.¹⁰ And they are reasons why the Commission should not -- and may not -- remove the option of an incumbent operator to remove its own home run wiring from an MDU's premises.

III. STATE MANDATORY ACCESS TO PREMISES STATUTES SHOULD NOT BE PREEMPTED.

The Commission's new procedural rules for the disposition of home run wiring apply only where the incumbent cable operator has no legally enforceable right to remain on the premises after termination of its service agreement. Thus, to the extent that a state mandatory access law gives incumbent cable operators such a right, such operators will not be required to notify MDU owners whether they intend to remove, sell or abandon their wire after termination. In right-of-access states, incumbents generally are not required by law to dispose of their wiring after termination. Therefore, there is no reason to require them to give advance notice of how they intend to dispose of their wiring.

Several commenting parties had asked the Commission to *preempt* state mandatory access laws, so that incumbents in such states would no longer have a right to remain on the premises -- but the Commission refused to do so. As discussed in the previous section, the Commission has no express statutory authority to interfere with existing property rights

¹⁰ *Supra* n.3, at 22.

regarding wiring outside individual residential units. And the Commission concluded that it should not disturb or preempt state law determinations as to the property rights of incumbents and MDU owners.

The Commission did, however, establish a rebuttable presumption that incumbent operators do *not* have a legally enforceable right to remain on the premises of an MDU after termination by the MDU owner. And this presumption applies even in right-of-access states, unless the highest court of the state has ruled that the mandatory access law establishes such a legally enforceable right. NCTA and others have asked the Commission to reconsider and reverse this presumption in right-of-access states, since mandatory access laws generally do confer a right to remain on the premises.

CEMA and WCA argue, however, that the Commission's presumption does not go far enough. They argue, again, that state mandatory access to premises laws should simply be preempted. Thus, CEMA objects that "... the *only* thing an incumbent operator must do [in right of access states] in order to nullify the Commission's cable inside wiring rules is to obtain a preliminary injunction from a state court within 45 days of the initial notice."¹¹ CEMA goes on to conclude that "[b]ased on the language of these statutes, state courts may well determine that incumbent operators *do* have a legally enforceable right to stay on the premises."¹² In these circumstances, CEMA is asking the Commission to override the lawful policy judgments of state

¹¹ Petition for Reconsideration of the Consumer Electronics Manufacturers Association, CS Docket No. 95-184, Dec. 15, 1997, at 3 ("CEMA") (emphasis in original).

¹² *Id.* (emphasis in original).

legislatures with respect to whether cable operators and other MVPDs are entitled to continue to serve MDUs against the will of the property owner.

WCA argues that preemption of state mandatory access statutes is needed because these statutes “effectively preclude the possibility of competitive entry.”¹³ WCA contends that a second entrant will be thwarted in mandatory access states because the MDU owner is obliged to permit access by the cable operator and a second entrant would be viewed by the MDU owner as unduly disruptive. WCA argues that preemption is justified as a means of furthering the agency’s pro-competitive policies. This argument is advanced despite the record evidence by Cablevision and Time Warner of the substantial presence of two providers in MDUs located in right of access states.

The Commission’s determination that there should be no preemption of state mandatory access to premises laws was right. These laws confer state property rights based on the states’ balancing, on the one hand, of MDU owners’ asserted interests in aesthetics, space limitations and the potential for property damage, and, on the other hand, the interests of MDU residents in having the opportunity to choose to subscribe to the cable service of any franchised cable operator. The balancing of these considerations is properly within the province of state legislatures, and the Commission should not preempt such state determinations. Moreover, the notion that right-of-access laws generally impede competition and that the preemption of such laws would necessarily promote competition is wrong. Preemption of access laws can *reduce*

¹³ Petition for Reconsideration of the Wireless Cable Association International, CS Docket No. 95-184, Dec. 15, 1997, at 12.

competition by denying multiple entrants the right to enter and compete for subscribers within a building.

In any event, the Commission lacks the necessary authority to preempt state access to premises laws. Where, as here, preemption would effectively constitute a taking or property under the Fifth Amendment, the Commission would, for the reasons described in the previous section, require *express* statutory authority to preempt. The Communications Act contains no such grant of authority. The Commission could not preempt state access to premises laws even if it wished to do so.

IV. THE COMMISSION SHOULD REJECT AMERITECH'S PROPOSAL TO REDUCE THE ELECTION PERIOD FOR UNIT-BY-UNIT DISPOSITIONS

Ameritech argues that the unit-by-unit procedure for the notification to the incumbent of the MDU's intent to terminate service, the subsequent election by the incumbent of the sale, abandonment and removal options, and the resulting implementation process, will take too long. It contends that the time frames provided for in the *Order* are "... entirely too generous and will discourage vigorous unit-by-unit competition."¹⁴

Ameritech further posits exceptional possibilities and asks for general case rules to respond to these possibilities. The company argues that an MDU may include as few as two units, even though it may include several hundred, and maintains that there is no reason for different procedures for MDUs and single family residences. It claims also without submitting

¹⁴ Petition of Ameritech for Partial Reconsideration, CS Docket No. 95-184, Dec. 15, 1997, at 4.

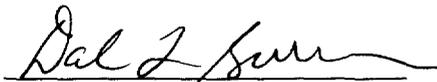
any supporting evidence that the incumbent will use the time period “to develop its competitive counterattack” and will engage in “...plotting how to win back the customers.”¹⁵

It is ironic that the same company that has been found wanting in timely meeting the basic tenets of local telephone competition¹⁶ is urging entirely too abrupt action with respect to the unit-by-unit transfer of home run wiring. MDUs may include dozens or individual units, and more particularly those which are likely to be the objects of competitive MPVD bidding, and thus implicated in these rules. The process of notification, election and implementation may be complex and may require the reasonable time which the Commission has provided. The Commission should reject Ameritech’s proposal.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions for Reconsideration of DirecTV, WCA, Ameritech and CEMA.

Respectfully submitted,



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¹⁵ *Id.* at 4-5.

¹⁶ *See Memorandum Opinion and Order*, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, FCC 97-298, rel. Aug. 19, 1997.

CERTIFICATE OF SERVICE

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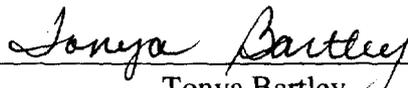
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