

BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Telecommunications Services)
 Inside Wiring)
)
 Customer Premises Equipment)
)
)
 In the Matter of)
)
 Implementation of the Cable)
 Television Consumer Protection)
 and Competition Act of 1992)
)
 Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

OPPOSITION TO PETITIONS FOR RECONSIDERATION

TIME WARNER CABLE

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January 15, 1998

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SUMMARY

Time Warner Cable respectfully submits this opposition to certain petitions for reconsideration filed in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding. Time Warner responds to these petitioners as follows:

First, claims that state right of access statutes stifle competition, are unfairly discriminatory, and create an inconsistent national regulatory scheme, and therefore should be preempted, are flawed and misleading. State access to premises laws are pro-competitive, are not unfairly discriminatory, and serve important public policy goals which mandate that the Commission alter the effect of such statutes.

Second, proposals that the Commission eliminate an incumbent MVPD's right to elect to remove its wiring upon a notice of termination from an MDU owner, thereby only allowing an incumbent MVPD to elect to either abandon or sell its property to the MDU owner, would render the new procedures constitutionally infirm because in every single application they would constitute an unconstitutional taking of property without just compensation. Thus, in order that it not adopt rules or procedures that violate the Takings Clause, the Commission must not take any action which would prevent or restrict an incumbent's ability to remove its home run wiring.

Finally, there is no compelling reason for the Commission to shorten any of the timeframes or deadlines under the new procedures. The timeframes provided for under the new rules are already tight, and further shortening them unacceptably threatens an incumbent provider's valid legal rights, especially in light of the 45 day deadline under the new rules for an incumbent provider to obtain a court order in order to protect its property rights.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

Time Warner Cable (“Time Warner”), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby opposes proposals put forth in certain Petitions for Reconsideration of the Commission’s Report and Order and Second Further Notice of Proposed Rulemaking (hereinafter the “Order”) in the above captioned proceeding.¹ In the Order, the Commission adopted new inside wiring procedural rules concerning the disposition of “home run” wiring inside multiple dwelling unit buildings (“MDUs”) extending from the lockbox or multitap to the point of demarcation for each individual unit. Time Warner, as noted in its own Petition for Reconsideration, believes the Commission must revisit important portions of the new rules and

¹Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. October 17, 1997).

procedures.² However, as described below, proposals put forth in certain other Petitions for Reconsideration would be ill-advised and would only serve to hamper the Commission's efforts in this proceeding to bring the benefits of increased video service competition and choice to MDU residents.

I. The Commission Should Not Interfere With or Preempt State Access To Premises Laws

The Wireless Cable Association and the Consumer Electronics Manufacturers Association argue that despite the Commission's well proclaimed intention not to alter any legal rights incumbent MVPDs may have under state law, it should nonetheless preempt state mandatory right of access statutes.³ These petitioners claim that these statutes stifle competition, are unfairly discriminatory, and create an inconsistent national regulatory scheme. As demonstrated below, these petitioners' analysis is flawed and misleading. State access to premises laws are pro-competitive, are not unfairly discriminatory, and serve important public policy goals which have been conveniently omitted from the petitioners' analysis.

The most important function of mandatory access laws is to protect MDU residents from arbitrary landlords who deny their tenants the opportunity to subscribe to franchised cable television service. In the absence of mandatory access statutes, non-franchised MVPDs often enter into long-term exclusive contracts with MDU owners based solely upon such factors as the amount of money the MVPD is willing to pay the property owner, rather than the service provider's technical proficiency, program diversity, innovativeness, service quality,

²See Time Warner Petition for Reconsideration, filed December 15, 1997.

³Petition of Wireless Cable Association at 12-14, Petition of Consumer Electronics and Manufacturers Association at 2-4.

service price or other factors that are of primary concern to the tenants. Thus, the ultimate impact of such right of access laws is to enhance MDU resident choice and to promote competition.⁴

Accordingly, any proposal for doing away with state access to premises statutes would not enhance the welfare of MDU residents. Along these lines, the Media Access Project and Consumer Federation's Petition for Reconsideration could not be more on point that promotion of MDU residents' right to choose among multiple, competing video service providers must be the Commission's ultimate focus in this proceeding.⁵ Unfortunately, the discussion in this proceeding has too often focused on increasing MDU owners' power to make the video service choices for their residents. As has been extensively documented in this proceeding, such a result ultimately harms MDU residents. The Commission should now redirect the focus back to diminishing landlords' power to act primarily in their own economic interest, further empowering MDU residents to make their own video service decisions. Time Warner has suggested numerous ways in which the Commission can either empower MDU residents, or at

⁴Remarkably, while proclaiming to be the advocates of competition and consumers' best interests, these petitioners simultaneously ask the Commission to destroy legal mechanisms which guarantee that MDU residents have access to multiple providers, the very result that is most consistent with competition and consumers' best interests. These arguments are not surprising given these same petitioners' repeated attempts in this proceeding to skew the new procedures in their favor, to the competitive disadvantage of franchised cable operators and against the best interests of MDU residents.

⁵Petition of Media Access Project and Consumer Federation at 9-12.

the very least take steps to do away with the overwhelming incentives of landlords to act against the best interests of their residents.⁶

It is undeniable that MDU residents benefit when they can choose among multichannel video service providers. The Commission itself has declared that the goals of Section 624(i), and therefore this proceeding, would be best served by fostering "the ability of subscribers who live in MDUs to choose among competing video service providers."⁷ The record in this proceeding demonstrates that the real impediment to such competition and choice is not right of access statutes, but landlords acting as bottlenecks and eliminating choice in their buildings by restricting MVPD access to their buildings. Indeed, the evidence conclusively shows that MDU owners have a powerful temptation to foreclose competition and choice by allowing access to their building only to the MVPD offering the greatest compensation. Elimination of right of access statutes, laws which guarantee consumer access notwithstanding the actions of MDU owners, would only further enhance MDU owners' incentives and ability to allow exclusive MVPDs access to their buildings, and would do absolutely nothing to actually benefit MDU residents who would increasingly be held captive to the self-serving video service decisions of their landlords.

⁶Time Warner believes that in order to fully protect the best interests of MDU residents, the Commission's new procedures should only apply where an MDU owner allows multiple providers into its building in order to compete on a unit-by-unit basis, and where the MDU owner does not receive an inappropriate "kickback" from a video service provider in exchange for exclusive access to its building. These changes would mitigate against the strong incentive of MDU owners to act against the best interests of their residents. Petition of Time Warner at 9-15.

⁷Order at ¶ 35.

That the new rules already increase landlord power to the detriment of MDU residents was eloquently addressed by the Media Access Project and the Consumer Federation:

By placing control over a viewer's choice of MVPDs in the hands of MDU owners, the Commission R&O arbitrarily fails to consider that in this proceeding, as in any exercise of Commission authority relating to mass media, it must place the needs and interests of viewers before the interests claimed by MDU owners and assorted industry competitors. This ordering of the Commission's priorities has been fixed as a matter of well-established constitutional law. Moreover, the primacy of rights of viewers is intrinsic to, and inseparable from, the Commission's statutory mandate to serve the public interest.

* * * * *

The Commission's R&O, however, erroneously places citizens' First Amendment rights last, leaving MDU residents with virtually no ability to choose between MVPDs. Instead, it confers exclusive power to choose among MVPDs upon landlords and condominium associations. MDU dwellers will be deprived of their rights simply because they cannot afford, or choose not to own, their own houses. They may be forced to buy the incumbent MVPD's service or the owner's choice of alternative services, even though it may offer less diversity and or fail to meet their needs for specific, niche programming readily available from other competing MVPDs.⁸

As further noted by the Media Access Project and the Consumer Federation, the concern over choice is made ever the more important because many MDU residents are already some of the least empowered and disadvantaged members of our society, and their right to make their own viewing decisions should be a primary Commission concern in this proceeding.⁹ If anything, the Commission should now take steps to reduce MDU owners' power in this regard. This problem would only be exacerbated by doing away with state right of access statutes, thereby eliminating many MDU residents' ability to choose between franchised cable service and a competing provider offering service head-to-head in the same building.

⁸Petition of Media Access Project and Consumer Federation of America at 9-12

⁹Id.

Claims that such statutes are anti-competitive are dead wrong. Contrary to the self-serving arguments of the Wireless Cable Association,¹⁰ state cable mandatory access laws never restrict the ability of non-franchised MVPDs to either access MDUs or to negotiate with property owners, and the claim that cable mandatory access laws somehow act as barriers to entry is completely undercut by the fact that non-franchised MVPDs have been, and continue to be, very successful in securing access to MDUs in states where cable mandatory access laws exist. Indeed, in right of access states, non-franchised MVPDs readily obtain access agreements by offering substantial revenue sharing arrangements with property owners, bulk rate discounts or other inducements which the franchised cable operator may not be permitted to offer.

This fact is evidenced most notably by the heavy penetration of non-franchised MVPDs in hundreds of MDUs in right of access states such as New York, New Jersey, and Massachusetts. Indeed, as the Commission itself recognized in the Order, the very existence of two-wire competition in New York City is due in large part to the very existence of the right of access statute: "[T]he presence of multiple wires in MDUs is substantially due to the existence of state mandatory access statutes (such as New York's) and not to a desire for multi-wire competition on the part of property owners."¹¹ If the Commission now does away with state right of access statutes, two wire video competition in states such as New York will also be eliminated. As the Commission has recognized, "affording consumers a choice among

¹⁰Petition of Wireless Cable Association at 11-12.

¹¹Order at ¶ 37 (citing statistics regarding continued steady growth of two-wire competition in MDUs in New York City).

various packages offered by multiple service providers is better than the current situation, in which MDU residents often have no choice at all."¹² It naturally follows that the Commission should be doing everything it can to promote, not destroy, multiple wire competition in MDUs, and certainly should not interfere with the very right of access statutes which are most likely to result in such competition.¹³

To the extent that state right of access statutes in any manner favor certain MVPDs, it is hardly the case that the law is unfair or without a valid public policy rationale. Indeed, the petitioners' argument for preemption of mandatory access statutes in the interest of "competitive parity" ignores the fact, for example, that there are important differences between franchised and non-franchised MVPDs, differences which underpin the need for the continued existence of these statutes. Not surprisingly, petitioners fail to discuss these substantial differences and why or why not they warrant different treatment under existing law. Indeed, in making such arguments, non-franchised video providers seek "selective-only parity," *i.e.*, identical treatment for access but not for other service provision requirements, obligations or regulations to which a franchised operator, for example, is subject.

To elaborate, the vastly different regulatory frameworks within which franchised and non-franchised video services providers operate are sufficiently different to justify different treatment under state mandatory access laws in those cases where that is an issue. Non-franchised video service providers typically are not subject to the stringent public interest

¹²Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. August 28, 1997) at ¶ 46.

¹³Order at ¶ 35.

requirements and obligations which go hand-in-hand with franchising requirements in certain mandatory access states. It is these requirements and obligations which unequivocally distinguish franchised cable operators from non-franchised MVPDs and fully rebut any argument that these statutes are unfairly discriminatory. Most importantly, franchised cable operators are subject to exacting service obligations and related requirements as a result of Title VI of the Communications Act, the rules of the FCC and their local franchise agreements, including:

- Universal service and anti-redlining restrictions^{14/}
- Franchise fees based on gross annual revenues^{15/}
- Customer service requirements¹⁶
- Retransmission consent^{17/}
- Cable technical standards^{18/}
- Leased access and public, educational, and government programming requirements¹⁹

^{14/}47 U.S.C. § 541(a)(3).

^{15/}47 U.S.C. § 542. These franchise fees are typically as much as 5% of the cable operator's annual gross revenues.

^{16/}47 U.S.C. §552.

^{17/}47 U.S.C. § 325(b)(1).

^{18/}47 U.S.C. § 544(e); 47 C.F.R. §§ 76.601-76.617.

^{19/}47 U.S.C. §§ 531-532.

- Construction and maintenance of institutional networks^{20/}
- Equal Employment Opportunity^{21/}

What is most compelling about these obligations is that many serve the very important public interest concerns raised by the Media Access Project and the Consumer Federation in its petition by ensuring that all residents, including MDU dwellers, have access to these benefits.

II. An Incumbent's Right to Remove Its Home Run Wiring Must Be Preserved

DirectTV and the Wireless Cable Association argue that an incumbent MVPD's right to elect to remove its wiring upon a notice of termination from an MDU owner should be eliminated. Instead, they argue that the new procedures should only allow an incumbent MVPD to elect either to abandon or sell its home-run wiring to the MDU owner at predetermined price that presumptively reflects just compensation, but that the incumbent should never be allowed to retain ownership of its property by removal from the MDU.²² Such a proposal is unconscionable. Stripping the new procedures of the removal option automatically renders them constitutionally infirm because they would constitute an unconstitutional taking of property without just compensation.

Without the right to remove, an incumbent provider has absolutely no bargaining leverage with the MDU owner in attempting to sell its property, and the two options available - sell or abandon - would conflate to one option as the sell option really becomes no option at all. An MDU owner would always simply refuse to engage in any negotiations for purchase

^{20/}47 U.S.C. §531(b).

^{21/}47 U.S.C. § 554(a).

^{22/}Petition of DirecTV at 2-4; Petition of the Wireless Cable Association at 5-10.

whatsoever, leaving the incumbent with only one real choice, to abandon its wiring altogether. Thus, without the removal option, the new procedures become nothing more than a forced abandonment of incumbent MVPDs' rightfully owned property.

Such a forced abandonment constitutes an unconstitutional taking. The legal standards on this matter could not be more clear, and the Commission has predicated its own analysis that the new procedures do not violate the Takings Clause on the retention of the removal option.²³ Because abandonment would effectively be the only option available, an incumbent would be left with absolutely no relationship whatsoever to its property. A federal regulation which forces a cable operator to turn over its ownership rights to its rightfully owned personal property is a *per se* taking, triggering the just compensation requirement under the Takings Clause of the Fifth Amendment.²⁴ As there would also be no mechanism to adequately value the taken property under well established "just compensation" standards, such a rule would violate the Takings Clause.²⁵

²³Order at ¶ 103 ("[T]here is no forced taking of the incumbent's physical property, since the incumbent has a reasonable opportunity to remove, abandon, or sell the wiring".)

²⁴See, e.g., Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

²⁵Furthermore, the Commission simply does not have the authority to effectuate such a taking. In order to affect such a taking of personal property, the Commission must have express statutory authority from Congress. See Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). No such authority exists in the Communications Act as it relates to broadband home run wiring. The Commission also has an obligation to avoid adopting a regulation that implicates a serious constitutional issue as the DirecTV/Wireless Cable Association rule most certainly would. Id.

This conclusion is not remedied by the Wireless Cable Association's suggestion that the Commission institute some sort of presumptive price mechanism to value an incumbent's "abandoned" wiring.²⁶ To satisfy the just compensation clause, the Commission cannot simply prescribe some manner of "just compensation" for the forced abandonment of the cable operator's internal wiring; rather a property owner is entitled to have compensation determined in an adjudicatory proceeding.²⁷ Under Florida Power, the court held that the legislature could not prescribe a

'binding rule' in regard to the ascertainment of just compensation, [because] Congress has usurped what has long been held an exclusive judicial function. . . . As the Supreme Court held in Monongahela [Navigation Co. v. United States], 148 U.S. 312, 327-28 (1893)], such interference 'with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution.'²⁸

Because the legislative act in question in Florida Power did not allow for an adjudication of what constitutes just compensation, the court deemed it unconstitutional.²⁹ As determination of just compensation is clearly a judicial, and not a legislative question, establishment of a "default" price for the sale of home run wiring, absent the right to a *de novo* adjudication of just compensation, does not satisfy the takings clause:

when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even

²⁶Petition of the Wireless Cable Association at 7-8.

²⁷Florida Power, 772 F.2d at 1546 (determination of just compensation must be determined by adjudication and any rule purporting to set compensation is itself unconstitutional).

²⁸Id. at 1546 (citations omitted).

²⁹Id.

what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.³⁰

Thus, in order to satisfy the Takings Clause, any default price established by the Commission would have to be subject to a *de novo* hearing before the agency or court.

Likewise, the Commission must reject DirecTV's suggestion that the Commission should not provide cable operator's with an opportunity to remove their home run wiring in MDUs because the Commission's rules require cable operators to first offer cable home wiring for sale to the subscriber before removal.³¹ First of all, Sec. 621(i) of the Communications Act specifically directs the Commission to adopt rules regarding the disposition of wiring "within the premises of such subscriber."³² No such statutory authority exists with regard to MDU home run wiring, which by definition is located entirely outside the dwelling units of individual MDU residents. Moreover, as explained above, the establishment of a "presumptive" sale price by the Commission for home wiring, without the opportunity for fair market value to be determined through an adjudication, renders Section 76.802 of the Commission's rules constitutionally invalid. The Commission must not compound this infirmity by promulgating rules which result in an unconstitutional taking of cable operators' home run wiring installed in MDUs.³³

³⁰/Monongahela, 138 U.S. at 327; see also United States v. Sioux Nation of Indians, 448 U.S. 371, 417 (1980); Washington v. United States, 214 F.2d 33, 44 (9th Cir. 1954).

³¹/Petition of DirecTV at 3-4.

³²/Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (12992), adopting Section 624(i) of the Communications Act of 1934, 47 USC §544(i).

³³/See Bell Atlantic Telephone Cos. v. FCC, 24 F.2d 1441 (D.C. Cir. 1994).

III. The Timeframes and Deadlines Under the New Procedures Must Not Be Shortened

Ameritech and the Wireless Cable Association suggest that the timeframes and deadlines provided under the new procedures be shortened. Most notably, these petitioners request that the Commission shorten the 30-day deadline for an incumbent MVPD to announce its election regarding the disposition of its home run wiring at such time as it no longer has a legally enforceable right to retain such wiring on the MDU property.³⁴ The Commission must reject these proposals with regard to both the building-by-building and unit-by-unit procedures. The timeframes provided for under the new rules are already tight, and further shortening them unacceptably threatens an incumbent provider's valid legal rights. The petitioners simply offer no compelling rationale why the affected parties should be further rushed into making the important elections affecting their legal rights.³⁵

Preservation of at least a 30 day period for an incumbent to make its initial election is especially important considering the Commission's 45 day deadline for an incumbent MVPD to obtain an injunction in order to protect any valid legal rights it may have. While Time

³⁴Petition of Ameritech at 3-6; Petition of the Wireless Cable Association at 16-18.

³⁵Ironically, both Ameritech and the Wireless Cable Association also urge the Commission take additional steps designed to ensure a smooth transition from one MVPD to the next. However, shorter procedural deadlines would be entirely counterproductive to the goal of promoting seamless transitions. It is unlikely that a mutually acceptable sale or lease price would be negotiated during the initial 30-day period. Given the desirability of negotiated sales as opposed to removals, this 30-day negotiation period should be extended, particularly in any case where the MDU owner and incumbent MVPD agree that such an extension might lead to an agreement with respect to the fair market value of the MDU home run wiring.

Warner believes that this 45 day requirement is unfair and should be dramatically altered,³⁶ if it is maintained, it simply makes no sense for an incumbent to make a hasty and unnecessary initial election if it legitimately has a continuing right to remain and provide service to a building. If anything, the 30 day initial election deadline should be extended by fifteen days to make it consistent with the Commission's 45 day requirement. Then, an initial election and the further procedures triggered by such an election could be coordinated with a legal determination that the incumbent truly does not possess a valid right to remain on the property.

These petitioners' efforts to shorten the procedural timeframes should be exposed for what they are, nothing more than a disingenuous attempt to restrict the ability of incumbent providers to protect their legitimate property rights. Their proposal serves no valid public policy, nor is it respectful of the property rights of incumbent providers that have a legitimate right to retain ownership to their wiring and provide service in a building. In order that fairness and legitimacy in the process be preserved, thirty days to review and weigh its options under the new procedures is the minimum amount of time that an incumbent should be afforded. Petitioners efforts to reduce the timeframe for this initial election, not to mention truncate the other timeframes to their own advantage, is neither fair nor pro-competitive and must be rejected.

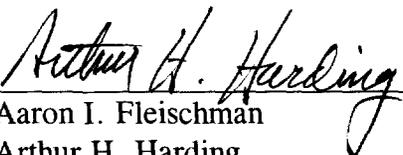
³⁶Because such a requirement effectively destroys any presumption of the validity of an incumbent's legal rights, the 45 day requirement should be abolished. Instead, it should be sufficient for an incumbent provider to seek an injunction or other judicial relief within 30 days of the receipt of a termination notice from an MDU owner, and where an incumbent's rights are disputed, the procedures and deadlines adopted by the Commission must be automatically tolled pending a final resolution of such dispute. Only after such disputes have been resolved with finality under local law (or where the statute of limitations for the enforcement of such a legal right has expired), can the Commission ensure that its new procedural mechanisms "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner."

IV. Conclusion.

WHEREFORE, Time Warner Cable petitions the Commission to reject the proposals discussed above that were put forth in certain Petitions for Reconsideration to its Report and Order and Second Further Notice of Proposed Rulemaking

Respectfully submitted,

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