

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

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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

**REPLY COMMENTS OF
ADELPHIA COMMUNICATIONS CORP.,
PENNSYLVANIA CABLE TV ASSOCIATION
AND SUBURBAN CABLE TV COMPANY INC.**

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TABLE OF CONTENTS

SUMMARY	i
I. The Commission's Pro-Competitive Policies Are Well Served By Mandatory Right of Access Statutes	2
II. Preemption of Right of Access Statutes Would Harm Competition	5
III. The Commission Should Not Presume That State Right Of Access Laws Do Not Allow Cable Operators To Retain Ownership Of Their Facilities.	9
CONCLUSION	15

SUMMARY

Adelphia Communications Corp., Pennsylvania Cable TV Association and Suburban Cable TV Company Inc., support the Commission's decision in its Report and Order against preemption of mandatory access laws. The Commission's stated goal of promoting subscriber choice in the multiple dwelling unit ("MDU") video services market depends upon competition among multichannel video programming distributors ("MVPD"). Mandatory access statutes open up MDUs to two-wire competition by ensuring cable operators an opportunity to compete for subscribers in buildings already serviced by non-franchised MVPDs. Mandatory access statutes were in fact designed to be pro-competitive. Numerous state courts have recognized the benefits of these laws. Rather than prevent non-franchised MVPDs from competing against cable operators in MDUs, access laws merely equalize the positions of competing providers. Perhaps more importantly, access laws prevent landlords from closing off their buildings to cable operators in favor of cutting lucrative deals with unfranchised MVPDs.

Without mandatory access statutes, the growth of two-wire competition would be severely debilitated. These laws are substantially responsible for the increased competition between MVPDs in states which have enacted them. The fact that certain of these statutes are specific to cable operators reflects the fact that cable operators are subject to a regulatory scheme unlike that faced by other MVPDs. This scheme requires cable operators to fulfill significant public service obligations. Thus, by establishing cable-specific mandatory access laws, state legislatures have expressed a preference for having at least one competitor in each MDU act in the public interest, and providing tenants with an absolute right to receive the public service benefits available only from franchised cable operators.

Finally, in order for the Commission's anti-preemption policy to be fulfilled, it must eliminate the presumption that mandatory access statutes are ineffective unless the highest court in the state rules that a cable operator may maintain its wiring in MDUs against the wishes of landlords. This presumption eviscerates the intent of state legislatures which enacted these laws and renders the Commission's decision against preemption meaningless. In the case of Pennsylvania, that state's statute expressly requires cable operators to retain ownership of facilities used in a MDU and that any disputes be resolved through negotiation and arbitration. Thus, by requiring the Pennsylvania Supreme Court to rule on this statute in order for it to be effective, the Commission has effected a *de facto* preemption. The Commission must act to resolve this unintended result and fulfill its pro-competitive goals.

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Adelphia Communications Corp. ("Adelphia"), Pennsylvania Cable TV Association ("PCTA") and Suburban Cable TV Company Inc. ("Suburban"), by its attorneys, hereby submit the following reply comments in response to issues raised by commentators to the

Commission's Report and Order and Second Further Notice of Proposed Rulemaking ("Report and Order") in the above captioned proceeding.¹

In the Report and Order, the Commission decided not to preempt state mandatory access laws.² These statutes protect consumers and competition in the video services market by providing residents of multiple dwelling unit ("MDU") buildings with a right to obtain video programming service from any multichannel video programming distributor ("MVPD") covered by such access statutes, even in the face of private agreements whereby MDU owners have attempted to restrict such competitive choice by MDU residents. Adelphia, PCTA and Suburban support the Commission in its decision against preemption of mandatory access laws and urge the Commission to continue to reject the same tired arguments of commentators seeking to inhibit competition through preemption or modification of these statutes.³

I. The Commission's Pro-Competitive Policies Are Well Served By Mandatory Right of Access Statutes

On numerous occasions, the Commission has clearly enunciated its goal of "foster[ing] the ability of subscribers who live in MDUs to choose among competing service providers."⁴

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

²Id. at ¶ 2(f).

³Comments of the Community Associations Institute at 6-7; Comments of Media Access Project and Consumer Federation of America at 8; Comments of Independent Cable & Telecommunications Association at 11.

⁴Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket 95-184 at ¶ 25 (rel. Aug. 28, 1997) ("Further Notice of Proposed Rulemaking") (continued...)

An obvious, but crucial, element in fostering competition and subscriber choice is the ability of MDU residents to have choices among competing MVPDs comparable to the degree of choice available to residents of single family homes.

The ability of cable operators to access private property, such as MDUs, has historically been limited since, unlike telephone companies, they are not common carriers and cannot typically claim the right of eminent domain.⁵ Thus, in states with no right of access statutes, MDU residents rarely can choose among competing MVPDs offering service simultaneously in their buildings. Rather, by entering into an agreement with the landlord, a single MVPD can effectively lock up the entire MDU and hold its residents captive by cutting off competitors before they can even enter the building.

However, the Commission has noted successful two-wire competition in states where mandatory access statutes permit cable operators to compete in MDUs already serviced by non-franchised MVPDs.⁶ In expressing a preference for this type of two-wire competition, the Commission has concluded that "affording consumers a choice . . . is better than the current situation, in which MDU residents often have no choice at all."⁷ Since mandatory access laws are "substantially" responsible for the existence of two-wire competition today,⁸ they remain the

⁴(...continued)
NPRM").

⁵*Id.* at ¶ 59.

⁶See Further NPRM at ¶ 30.

⁷*Id.* at ¶ 46.

⁸*Id.* at ¶ 30.

best, most efficient means of achieving the Commission's stated goal of MVPD competition in MDUs.

The clear goal of mandatory access statutes was to create a competitive, pro-consumer environment in the MDU video services market. For example, the New York General Assembly, in enacting NY Public Service Law § 228, stated that:

It is in the public interest to afford apartment residents and other tenants of leased residential dwellings the opportunity to obtain cable television service of their choice and to prevent landlords from treating such residents and tenants as a captive market for the sale of television reception services selected or provided by the landlord.⁹

Today, at least thirteen states have mandatory access laws.¹⁰ In reviewing various challenges to these statutes, courts have uniformly recognized their competitive benefits. The United States District Court in Massachusetts found that state's mandatory access provision, General Laws Ch. 166A, § 22, to not inhibit non-franchised MVPDs from competing against cable operators in MDUs:

The right of alternative television services to compete for subscribers and seek access to apartment buildings is not affected by the requirement that [the landlord] permit access to a licensed cable operator who seeks to install cable facilities.¹¹

⁹1990, Dec. 20, P.L. 1465, No. 221, § 3. See generally, NY CLS Pub Ser Art. 11. See also, NY CLS Pub Ser § 228.

¹⁰Connecticut, Delaware, Florida, Illinois, Kansas, Maine, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island and Wisconsin all have enacted some form of mandatory access statute.

¹¹Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 Fed. Supp. 1244, 1257 (D.Mass 1985).

Similarly, the New Jersey Supreme Court found that right of access laws:

result[] in no more than equalizing the competitive position of cable to SMATV, as the latter by its nature already has access to any customer who desires it since SMATV is itself set up in the complex or development where the customer lives.¹²

Another New Jersey court highlighted a key competitive advantage by noting that these statutes prevent landlords from "controlling access [to subscribers by] improperly exacting tribute."¹³

Together, these competitive benefits illustrate the crucial problem stifling video service competition in MDUs, namely, landlords who attempt to prevent their residents from receiving service from the franchised cable operator should they so choose, forcing such residents to obtain service from the unregulated MVPD selected by the landlord. Mandatory access laws unclog that bottleneck and ensure that franchised cable operators, who have assumed a vast array of public service obligations not applicable to other MVPDs, have the opportunity to offer MDU residents a choice in video services. These statutes do not prevent other, non-franchised operators from gaining access to MDUs. They only make sure that cable operators have the same right of access, thereby fostering a more competitive MDU market.

II. Preemption of Right of Access Statutes Would Harm Competition

Without mandatory access statutes, MDU residents would be at a distinct competitive disadvantage. Several commentators, including the Community Associations Institute, Media Access Project and Consumer Federation of America, argue in favor of preempting these laws

¹²NYT Cable TV v. Homestead At Mansfield, Inc., 543 A.2d 10, 15 (N.J. 1988).

¹³Princeton Cablevision, Inc. v. Union Valley Corp., 478 A.2d 1234, 1239 (N.J. Super. ch. 1983).

since they "favor the incumbent provider and are inherently unfair to community association residents and all alternative MVPDs."¹⁴ This assumes that the incumbent provider is always a franchised cable operator and mistakenly suggests that non-franchised MVPDs are at some sort of disadvantage in obtaining access to MDUs. On the contrary, non-franchised MVPDs are often the entrenched incumbent in MDUs, excluding cable operators through private agreements with landlords and developers.¹⁵

The Commission noted in its Report and Order the steadily growing number of MDU buildings in Manhattan which allow two-wire competition, a fact demonstrating the success of non-franchised MVPD providers who are able to compete, and flourish, in states with mandatory cable access statutes.¹⁶ Indeed, the Commission has recognized that the presence of such competition "is substantially due to the existence of state mandatory access statutes."¹⁷ The claims of commentators that access laws must be preempted in order to allow non-franchised MVPD providers to compete freely with cable operators are therefore disingenuous at best. Rather than promoting competition, the preemption of mandatory access statutes would impede the development of two-wire competition which has flourished in those progressive, pro-consumer states which have enacted these laws. The Commission has clearly expressed its

¹⁴Comments of the Community Associations Institute at 6. See also Comments of Media Access Project and Consumer Federation of America at 8.

¹⁵See Christopher Palmeri, "My partner, your landlord," Forbes, May 20, 1996, at 104.

¹⁶Report and Order at ¶ 37.

¹⁷Id.

preference for two-wire competition over single operator service in MDUs.¹⁸ Mandatory access laws are a proven, effective means of encouraging video service competition in MDUs.

The fact that certain of these statutes are specific to franchised cable operators reflects the cable industry's special regulatory status. Non-franchised MVPDs are not subject to most of the public interest requirements imposed on franchised cable operators. For example, cable television franchises typically mandate universal service throughout the franchise territory, whereas unfranchised MVPDs are free to "cream-skim" by serving only upscale MDU buildings. Similarly, the anti-redlining restrictions in the Cable Act protect consumers against invidious economic discrimination in service, a common practice among SMATV and wireless cable operators.¹⁹ As to programming itself, cable operators must provide leased access for commercial use, as well as reserve channels for public, educational and governmental access programming.²⁰ Cable operators are also subject to mandatory carriage obligations relating to local commercial and non-commercial televisions stations.²¹ With respect to technical standards, the FCC's rules establish minimum guidelines for operation and signal quality.²²

¹⁸Further NPRM at ¶ 62 ("subscriber choice would be enhanced by the use of multiple wires"); Report and Order at ¶ 35 (public interest would be served by fostering "the ability of subscribers who live in MDUs to choose among competing video service providers.")

¹⁹47 U.S.C. §541(a)(3).

²⁰47 U.S.C. § 532, 531.

²¹47 U.S.C. §§ 534, 535.

²²47 U.S.C. § 544(e); 47 C.F.R. §§ 76.601-76.617.

Additional obligations include various customer service requirements,²³ compliance with FCC Equal Employment Opportunity requirements,²⁴ and the requirement to pay franchise fees to local governmental authorities.²⁵

These regulatory mandates together ensure that franchised cable operators act in the public interest, and no other category of MVPDs are subject to public service obligations even remotely equivalent in number or scope to those imposed on franchised cable operators. Thus, by enacting mandatory right of access statutes, state legislatures have guaranteed that MDU residents will have the option of receiving the various public interest benefits available only from franchised cable operators. Preemption of these statutes would only serve to freeze out cable operators from offering their services in MDUs and guarantee non-franchised MVPDs a captive audience. Moreover, the Communications Act expressly provides that cable franchises must be nonexclusive and that franchising authorities may not unreasonably refuse to award additional competitive franchises.²⁶ Thus, to the extent certain right of access statutes apply only to franchised cable operators, the benefits of such statutes are equally available to any MVPD willing to assume the public interest responsibilities of a franchised cable operator.

²³See, e.g., 47 U.S.C. § 552.

²⁴47 U.S.C. § 554(a)

²⁵47 U.S.C. § 542.

²⁶47 U.S.C. § 541(a)(1).

III. The Commission Should Not Presume That State Right Of Access Laws Do Not Allow Cable Operators To Retain Ownership Of Their Facilities.

In the Report and Order, the Commission claims that the applicability of state mandatory access laws is unclear, and therefore the new rules will be “presumed” to apply in mandatory access states unless a state’s highest court has found that the incumbent always has an enforceable right to maintain its home run wiring on the premises. In its discussion of the applicability of the new procedures, the Commission discounts the protection these statutes afford cable operators to maintain their wiring in MDUs against the will of MDU owners:

We are unwilling to conclude that state mandatory access statutes always grant incumbents the right to maintain their home run wiring in an MDU over the MDU owner’s objection. Contrary to the arguments of some cable operators, this is not an issue of the right to install wiring. Rather, the issue is whether the incumbent has a legally enforceable right to maintain its home run wiring on the premises over the objection of the MDU owner. Accordingly, our procedures will apply in mandatory access states to the extent state law does not permit the incumbent to maintain its home run wiring (in the case of a building-by-building disposition) or a particular home run wire to a particular subscriber (in the case of a unit-by-unit disposition) against the will of the MDU owner.²⁷

While the Commission acknowledges that state mandatory access statutes grant cable operators the right to initially install wiring, it also asserts that these same statutes somehow do not permit cable operators to maintain their wiring in those same MDUs unless they have entered into a contract with the MDU owner and the contract has not expired.

Such an analysis is contrary to the fundamental purpose of mandatory access statutes. Under a rational reading of any mandatory access statute, the right to install wiring in an MDU

²⁷Report and Order at ¶ 79.

against the wishes of an MDU owner also conveys an undeniable right to maintain that wiring in the building so long as the operator holds its cable franchise. Any contrary analysis, including the Commission's assertion that the right to maintain wiring in a mandatory access state is somehow preconditioned on an underlying contractual relationship between the cable operator and the building owner, emasculates the operation and intent of such laws.

Most mandatory access statutes straight-forwardly state that owners of MDUs shall not interfere with the installation of cable television facilities upon their property, or that residents of MDUs shall not be denied access to any available franchised or licensed cable television service, and thereby allow cable operators to install and maintain broadband facilities in MDU buildings. For example, under Pennsylvania's mandatory access statute, a tenant has the right to request and receive cable service, and a landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring cable service from an operator of the tenant's choice, provided that the operator compensates the landlord in a manner prescribed by the statute.²⁸ The statute also grants to operators whose service has been requested an ongoing right of access to the building "for the purpose of constructing, reconstructing, installing, servicing or repairing CATV system facilities," and goes on to provide that the "operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises."²⁹

²⁸ See 68 P.S. § 250.501-B *et seq.*

²⁹ 68 P.S. § 250.503-B (emphasis added).

A cable operator's dual rights to install and to maintain its facilities under a mandatory access statute can not be separated as the Report and Order seems to suggest. A right to install simply has no meaning, if upon completion of installation, an MDU owner has a contrary right to require that the wiring be immediately removed.³⁰ If a mandatory access statute grants a cable operator the right to install wiring in an MDU without the consent of the MDU owner, that right obviously includes a commensurate right to maintain the installed wiring in the MDU without the consent of the MDU owner in order to provide service to the building's residents on an on-going basis. The clear meaning of such a right is that a cable operator need not enter into any type of contract with, or otherwise obtain permission from, an MDU owner, and any federal requirement to the contrary in effect destroys the very operation of these statutes. Thus, because state mandatory access statutes always allow the incumbent cable operator a right to maintain its facilities in an MDU against the wishes of the MDU owner, the home run wiring disposition rules adopted in the Commission's Report and Order cannot possibly apply to deprive cable operators of the exclusive right to use their home run wiring in such states.

The Commission has stated that "an incumbent's ability to rely upon any rights it may have under state law" shall not be preempted by the home wiring regulations.³¹ Indeed, the Commission specifically stated that new rules

³⁰The Commission's rule raises the illogical threat that immediately after installation, the building owner can claim that the inside wiring is not appropriately on the premises, and thereby force a fire sale of that wiring and/or the MVPD to reinstall another set of home runs.

³¹Further NPRM at ¶ 34. The Commission did not abandon this goal in adopting the final rules. Report and Order at ¶ 69.

would apply only where the incumbent provider no longer has an enforceable right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home runs on the property.³²

But as they now stand, the Commission's rules purport to allow a cable operator in a mandatory access state to maintain its wiring in an MDU only so long as the MDU owner agrees to allow such wiring to remain. As explained above, such a requirement functionally renders such statutes meaningless, and thereby infringes upon the very rights that the Commission claimed to protect.

The Commission has determined that a state mandatory access law should be presumed to not be effective against its new home wiring rules unless the highest court in a state has found that the statute preserves a cable operator's right to maintain facilities on MDU property against the wishes of landlords. This approach is exactly backwards, and stands the notion of a presumption on its head. The general principle is that a law, enacted by a legislature, should be presumed valid and enforceable unless a court has declared otherwise. Even then, a lower court should not be assumed to have the final word on a statute's validity. Thus, the rational way to have a presumption work is that state access laws should remain fully effective and not be "trumped" by the Commission's inside wiring rules.

Moreover, the Commission's presumption is backwards for another obvious reason. The validity of a state access to premises law might never be challenged. For one thing, it is routinely the case that many laws are never subject to judicial review. Such cases are expensive

³²Id.

to bring and face the difficult hurdle that the challenged laws are presumed valid. In this case, it is even less likely that someone would challenge access to premises legislation because the body of law in this area, including clear precedent from the United States Supreme Court, has made clear the parameters for an enforceable statute. For another thing, there is no logical procedural means to obtain the result (a decision from the State's highest court) the Commission seeks. An MVPD is obviously not going to bring a lawsuit to have an access to premises law declared valid. Nor is a building owner likely to appeal a lower state court decision that such a law is valid to the State's highest court. To do so would potentially set aside the Commission's presumption that building owners will own the home runs.

The type of judicial determination contemplated by the Commission is particularly unlikely in Pennsylvania. Pursuant to 68 P.S. § 250.506-B, the Pennsylvania legislature has directed that disputes between landlords and cable operators be resolved through negotiation, and if that fails, through arbitration. While the arbitrator's decision is appealable,³³ the Pennsylvania right of access statute clearly reveals the intent of the legislature to exhaust alternative dispute resolution mechanisms before additional burdens are placed on local courts. Thus, an FCC policy which "presumes" that state mandatory access laws are ineffective unless the highest court in the state has ruled that the statute allows the cable operator to maintain its facilities on the MDU property against the wishes of the landlord would not only contravene the intent of the Pennsylvania legislature to avoid burdening the state's courts with such disputes, it would ignore the plain statutory language requiring cable operators to "retain ownership of all

³³68 P.S. § 250.506-B(b)(4).

wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises.”³⁴

In sum, despite the Commission’s clearly stated policy against preempting state rights, the Commission’s requirement that there be a ruling of legality from the highest state court is tantamount to a full preemption of various state mandatory access statutes. The Commission simply cannot require cable operators to obtain declaratory rulings from the highest state court in each mandatory access state in order for such statutes to fulfill the intent of the legislatures which enacted them. A federal regulatory policy forcing service providers to cede control over wiring that is protected under state law must be reversed. Any regulation that directly conflicts with existing state law in such manner has a preemptive effect, which is contrary to the Commission’s stated intent not to enact any rules that apply when the incumbent provider still has existing legal rights to its cable wiring. Moreover, the Commission’s determination that a valid state law will essentially be presumed invalid absent a ruling from the highest court in the state is in itself arbitrary and capricious.

CONCLUSION

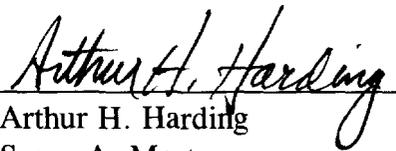
Mandatory right of access statutes are essential to creating a level playing field between MVPD providers in MDU buildings. Rather than promote competition, the preemption of these laws would only stifle the burgeoning video service market in MDUs. The ultimate proof lies in the success non-franchised MVPDs have enjoyed in states where right of access laws

³⁴68 P.S. § 250.503-B.

currently exist, and that two-wire competition is far more prevalent in right of access states than in non-right of access states. The Commission was correct in deciding not to preempt these statutes.

Respectfully submitted,

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