Executive Committee

Media Works
Bryan Rader

Castle Cable
Anne Walker

Blonder Tongue
Bob Pallé

US On-Line
Rob Solomon

Directors

Advanced Telemedia
Trey Gaskins
AMLI Residential Services
Greg O'Berry
Archstone Communities
Scott Templeton
AvalonBay Communities
Lyn Lansdale
BroadbandNOW, Inc.
Robert Champagne
Camden Property Trust
Laurie Baker
Consolidated Smart Systems
Dan Terheggen
EPT Management Co.
Steve Beltran
Equity Residential Prop.
James Sweeney
Forest City Residential
Lori Reeves
Gables Residential Trust
Sue Ansel
MST
Frank Matarazzo
Muller Communications
Rich Muller
OnePath Networks
David Stehlin
OnePoint Communications
Laurel Dent
ParaComm
Don Johnson
ReFlex Communications
Mark Petersen
StarCom
Christopher Day
StellarVision
Henry Beaumont
Town & Country Trust
Drew Pierson
United Dominion Realty
Scott Wiggins
WSNet
Cary Ferchill

RECEIVED
DEC 14 2000
FCC MAIL ROOM

ORIGINAL

December 13, 2000

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, DC 20554

EX PARTE OR LATE FILED

RE: Ex Parte Communication in CS Docket No. 95-184

Dear Secretary Salas:

At a meeting I had with Mr. John Norton, Mrs. Eloise Gore and Ms. Cheryl Kornegay on December 6, 2000, we discussed amending the definition of "physically inaccessible" contained in the FCC Inside Wiring Rules. The specific proposal is attached for reference. I was asked to consult with the MDU/REIT members of ICTA to be certain that they support such a proposal. I have done so. All companies that are members of ICTA do support the proposed redefinition. Those companies include the following:

- AMLI Residential Properties
- Archstone Communities
- AvalonBay Communities
- Bozzuto & Associates
- Camden Property Trust
- EPT Management Company
- Equity Residential Properties Trust
- Gables Residential Trust
- Town & Country Trust
- United Dominion Realty Trust

Representatives of these companies have also discussed this matter with the Real Access Alliance and understand that previous statements to the FCC by that group regarding demarcation point were in the context of the Wireless Bureau rulemaking on competitive networks. That is, the statements were in the context of telephony in office/commercial buildings, and not related to video in the residential buildings.

If further information is required I will be pleased to provide it.

Sincerely,

William J. Burhop
Executive Director

No. of Copies rec'd 0
List ABCDE

Independent Cable & Telecommunications Association
3004 Oregon Knolls Drive, NW
Washington, DC 20015
E-Mail: icta@icta-online.org Web Site: www.icta-online.org
PH: 202.364.0882 FX: 202.364.8309

RECEIVED

DEC 14 2000

FCC MAIL ROOM

To: FCC Cable Services Bureau

From: ICTA

Date: 12/05/00

Re: CS Docket No. 95-184/Inside Wiring

The Independent Cable & Telecommunications Association believes that the following items should be incorporated into the pending rule on inside wiring:

1. **Demarcation Point.** The phrase "physically inaccessible," which is incorporated into the definition of "demarcation point" in the current rule,[1] should be modified to make it clear that wiring is physically inaccessible when it is concealed behind plaster, wallboard, sheet rock or molding. Under the current rule, a location is considered to be "physically inaccessible" when accessing the wiring at that point "would require significant modification of, or significant damage to, pre-existing structural elements, and would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring."[2] The rule provides several examples of "physically inaccessible" wiring, such as where the wiring is "embedded in brick, metal conduit or cinder block with limited or without access openings."[3]

   In most modern MDU buildings, cable wiring is in fact located behind sheet rock, plaster, wallboard or molding. Property owners typically object to competitive providers removing sections of walls and/or molding in order to access wiring at the demarcation point as currently defined, because of the disruption and possible damage to walls or molding. The result is that competition is suppressed in the MDU environment, in direct contradiction with the goals of the Commission's rules governing the disposition of cable inside wiring. The Commission should add to its list of examples of "physically inaccessible" wiring the following language: " ... or concealed behind sheet rock, wallboard, plaster or molding."

2. **Fresh Look Window.** The proposed time period within which property owners could invoke their right to a "fresh look" at perpetual contracts should be a minimum of two years. This is especially important for smaller, less sophisticated property owners who must be educated as to what a "perpetual contract" is, whether they are bound by such a contract and how to invoke their

---

[1] 47 CFR § 76.5 (mm) defines "demarcation point" as "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual's dwelling unit."

[2] Id.

[3] 47 CFR § 76.5 (mm) (4).

right to a "fresh look." Even more importantly, a property owner is unlikely to invoke his or her "fresh look" right to revoke a perpetual contract unless a new contract can be negotiated within the "fresh look" period. Obviously, negotiation of an MVPD contract, whether with the incumbent operator or with a competing provider, can take months to consummate and is subject to delays of various kinds, including deliberate stalling on the part of incumbent providers wishing to defeat the property owner's fresh look rights.

3. **Mandatory Access Laws.** ICTA strongly urges the Commission to preempt state and local mandatory access laws/regulations, which only serve to inhibit competition in the marketplace. This occurs in several ways: First, such laws preclude competitive MVPDs from entering into competitive, short-term exclusive contracts with property owner. That is because mandatory access laws are discriminatory in that they generally provide only franchised cable operators with a legal right to wire an MDU building over the owner's objection. Where that is the case, only franchised cable operators have the ability to negotiate exclusive MDU contracts. Second, even where the incumbent MVPD does not have an exclusive agreement with the property owner, mandatory access laws provide the incumbent with a "legal right to remain" on the premises, thus precluding the owner's right to invoke the Commission's inside wiring rules at all. Third, as the Commission has itself acknowledged, property owners are reluctant to allow the installation of multiple home run wires in common areas (such as hallways) due to space limitations, aesthetics, the possibility of disruption and inconvenience, and the potential for damage to the property.[4] So long as the franchised operator has a legal right to wire an MDU building, property owners object to the installation of a second wire, even when they would prefer service from a competitive provider. As ICTA as well as other parties have documented, there is far less competition in mandatory access jurisdictions than elsewhere.[5] Finally, as property owners and managers have pointed out in this proceeding, competition for tenants in the MDU environment is intense, and the provision of quality video products is a significant factor in the owner's ability to attract tenants. These facts eliminate the need for as well as the purpose of mandatory access laws altogether.

   Should the Commission decide not to preempt state and local mandatory access laws/regulations, ICTA recommends that the Final Report and Order amplify what the FCC has previously expressed. That is, that mandatory access laws/regulations are not, on their face or in practical effect, conducive to MVPD competition. On the contrary, such laws/regulations function to further entrench and enhance the market position of franchised cable operators by deterring entry in the marketplace by alternative MPVDs. It should also be noted that non-

[4] *Report and Order and Second Further Notice of Proposed Rulemaking*, para. 35.
[5] *See*, for example, ICTA Comments at page 50.

franchised alternative providers do not have the benefit of governmental authority to lay cable across public rights-of-way, they do have substantially higher programming and operational costs, and they have fewer potential customers than do franchised operators and therefore less capability to recover their costs of providing service.

The record indicates that competition is strong among MDU owners for residents to produce high occupancy rates. Also, that the provision of quality video products is a significant factor in that competition. These forces reduce or eliminate the need for and purpose of mandatory access laws. The Commission should urge that mandatory access laws/regulations should be adopted *only* if there is a clear and convincing showing that MDU owner competition for residents is not present in the market and *only* if MDU owner provision of non-broadcast video programming for residents is not a competitive force in that market.

4. **"Legally Enforceable Right to Remain."** ICTA has submitted to the Cable Services Bureau letters from at least one large franchised cable operator to various property managers in California in which the incumbent operator asserts that it has a "legally enforceable right to remain" on the premises either because the incumbent has a "prescriptive easement" to maintain cable wiring in the MDU building, and/or intends to utilize the cable for non-video purposes at some undetermined point in the future. These assertions are legally spurious, and obviously designed to intimidate property owners from asserting their rights under the inside wiring rules, thus undermining competition among MVPDs. The Commission should therefore make it clear that: (a) a so-called "prescriptive easement" to maintain cable wiring in an MDU building cannot defeat application of the inside wiring rules unless the incumbent produces a valid court order affirming the existence of such an easement; and (b) the incumbent's vague or specific "intention" to utilize existing cable wiring for non-video purposes in the future does not constitute a "legally enforceable right" to maintain cable wiring in an MDU building, and cannot defeat the owner's right to invoke the rules governing the disposition of cable inside wiring.

5. **"Abandon Without Disabling."** Currently, the rules governing the disposition of cable home run wiring allow an incumbent MVPD whose MDU service has been terminated to "abandon without disabling" the home run wiring. However, the term "disabling" remains vague and ambiguous, thus allowing incumbents various ways of making it difficult or impossible for the alternative provider to use the abandoned wire. Therefore, the Commission should clarify that when home run wiring is "abandoned," it must be as readily usable for the alternative provider as it was for the incumbent before abandonment. In addition, the Commission should create a remedy for the alternative provider and/or the

property owner in cases where the wiring is abandoned but not readily usable. Specifically, the alternative provider and/or the property owner should have the right to compel the terminated incumbent to re-enable the wiring such that is readily usable, and if a court finds that the abandoned wiring is not readily useable, the incumbent should be required to reimburse the alternative provide and/or property owner for the full amount of the latter's legal fees and costs.

6. **Right to Purchase.** Under the current rules governing the disposition of cable home run wiring, an incumbent MVPD whose service has been terminated is given the option of removing, abandoning or selling the home run wire to the property owner or the alternative provider. Because removal of cable inside wiring can be an extremely disruptive process, the current rule allows the incumbent MVPDs to deter property owners from choosing an alternative provider by threatening to remove the inside wiring should the owner invoke the Commission's home run wiring rules. This is contrary to the pro-competitive purpose of the inside wiring rules. Therefore, the Commission should revise the cable home run wiring rules to provide that the property owner or alternative provider has the right to purchase (at depreciated book value) home run wiring of incumbent MVPD whose service to an MDU building has been terminated, *before* the incumbent may remove or abandon that wiring. This revision would remove a significant obstacle to competitive entry by alternative MVPDs as well as make the rules governing the disposition of cable home run wiring consistent with those governing the disposition of cable home wiring.