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Richard D. Harmon

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# ARTICLES

## CO-USE OF COMPATIBLE PRIVATE EASEMENTS BY CABLE TELEVISION FRANCHISEES UNDER THE 1984 CABLE ACT: FEDERAL REFINEMENT OF AN ESTABLISHED RIGHT

BY RICHARD D. HARMON

It is undeniable that cable television has become increasingly important to contemporary society. As cablecasters have refined and expanded their service, viewer demand has grown steadily over the years, and is now at an all-time high.<sup>1</sup>

Much of cable television's progress can be attributed to passage of the Cable Communications Policy Act of 1984. The Act had a number of goals, including the following:

- [E]stablish franchise procedures and standards which encourage the growth and development of cable systems. . . .<sup>2</sup>
- [A]ssure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.<sup>3</sup>
- [P]romote competition in cable communications. . . .<sup>4</sup>

The Legislative History of the 1984 Cable Act also reveals that Congress' purpose was, in part, to foster "the First

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©1992 by Richard D. Harmon. Mr. Harmon is a member of the California Bar, and is in private practice in San Francisco, emphasizing communications law.

1. The Cable TV Financial Data Book (June, 1991) (A Paul Kagan Publication).

2. 47 U.S.C. § 521(2) (1984).

3. 47 U.S.C. § 521(4) (1984).

4. 47 U.S.C. § 521(6) (1984).

Amendment's goal of a robust marketplace of ideas — an environment of 'many tongues speaking many voices'.<sup>5</sup>

Before the Cable Act became law, a number of obstacles had retarded cable television's growth and development. One such obstacle involved private landowners, especially real estate developers and landlords.<sup>6</sup> By the 1980s, many developers were attempting to physically exclude franchised cable television disseminators from their developments so that the resulting captive audience could be served, on an exclusive basis, by the developer or someone with whom the developer had contracted. These exclusionary practices represented a serious problem, since it is estimated that half of all new residential construction in the United States is now in the form of planned or multiple-dwelling unit (MDU) type developments.<sup>7</sup>

By 1984, some state decisions had applied standard principles of easement law to largely solve the problems created by attempts to exclude franchised cable television firms from residential developments. These state easement cases hold that, if a landowner has granted an easement across private property which is compatible with the uses to which cable television would put the easement, the easement holder can subsequently apportion the easement and allow cable television to co-use the easement, without landowner consent.<sup>8</sup> In California, such easement cases were first discussed and applied in *Salvaty v. Falcon Cable Television*.<sup>9</sup>

The *Salvaty* case involved a private telephone easement. Pursuant to a request from a franchised cable television firm, the telephone company—as it is required to do under California law<sup>10</sup> — had apportioned its easement so that the cable television firm could co-use the easement. Mr. Salvaty, the owner of the land over which the private easement ran, objected and filed suit against the utility and the cable firm. Mr. Salvaty claimed that the cable firm was required to obtain his consent

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5. 5 U.S. Code Cong. & Admin. News, at 4656 (1984).

6. In the interest of brevity, the term "developer" shall sometimes be used to refer to developers, landlords, and others who control access to residential developments and multiple-dwelling unit facilities, especially during the construction phase.

7. *E.g.*, Report, Community Association Institute (June 26, 1987). In such developments, the developer often maintains a measure of control over access for a substantial period of time.

8. *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 803-05 (1985).

9. 165 Cal. App. 3d 798 (1985), Cal. Sup. Ct. rev. denied, May 15, 1985.

10. Cal. Public Utilities Code § 767.5 (1980).

before it could co-use the subject easement. The trial court sustained a demurrer, and the California Court of Appeal affirmed, holding that, once the easement arose, a compatible user could make co-use of the easement without the consent of the landowner.<sup>11</sup> With the following words, the *Salvaty* court also rejected a claim that co-use of a compatible, private easement by the cable television firm constituted a taking under *Loretto v. Teleprompter Manhattan CATV Corp.*:<sup>12</sup>

Unlike the case at bench, there was no easement of any kind involved in *Loretto*. Here, we have an easement and the cable equipment was within the scope of that easement.<sup>13</sup>

By adopting Section 621(a)(2) of the 1984 Cable Act,<sup>14</sup> Congress acknowledged, among other things, that franchised cable television firms have a right to co-use any compatible easement on private property.<sup>15</sup> Congress went one step further than *Salvaty*, and also

11. 165 Cal. App. 3d at 804-05.

12. 458 U.S. 419 (1982).

13. 165 Cal. App. 3d at 805.

14. In pertinent part, Section 621(a)(2), which is codified at § 541(a)(2) of Title 47 of the United States Code, reads as follows:

(a)(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses.

15. Cable television franchise rights usually arise pursuant to municipal ordinance. Regardless of their source, franchises are contractual in nature, and thus give rise to all property rights associated with contracts as well as with ordinance entitlement. See, e.g., *City of Lafayette v. American Television Communication Corp.*, 98 Cal. App. 3d 27, 31 (1979). Section 621(a)(2) provides that a cable television firm is entitled — as part of its franchise-based property rights — to co-use not only the public rights of way, but also all compatible, private easements, as needed to provide service. In the few cases where cable television's co-use of compatible easements has been judicially resisted, the court erroneously focused on the property rights of the land owner, without appreciating the cable firm's equal right to co-use compatible easements. This erroneous focus has caused a few courts to describe easement co-use with loaded phrases such as "forced access," "mandatory access," "compelled access" and "piggy-backing." E.g., *Media General Cable v. Sequoyah Condominium Council of Co-Owners*, 737 F. Supp. 903, 908 (E.D. Va. 1990) ("compelled access"). Such loaded phrases are inaccurate. When a cable television firm invokes § 621 (a)(2), it is exercising a franchise-based property right and is not impairing the legitimate rights of any other party. Mischaracterization and erroneous analysis can be avoided if the neutral phrase "co-use of compatible easements" is adopted by courts confronting these issues. In this way, the property rights of cable television franchisees will receive the same level of protection as the property rights of landowners.

made it illegal for holders of compatible, private easements to refuse to apportion.<sup>16</sup> The 1984 Cable Act, in other words, made it unlawful for developers to arrange exclusive easements regarding cable television service facilities. Since residential developments normally contain a number of easements which are compatible with cable television uses — especially if another cable television service provider has been allowed access to the development — Section 621(a)(2) went far toward remedying the problem of developers' exclusionary practices.

The legislative proposal which became the 1984 Cable Act originally had another provision — § 633 — which was not an easement co-use provision.<sup>17</sup> Section 633 was a tenants' rights clause. It provided that, where there was *no* easement of any kind, tenants in apartment buildings could still demand cable television service. Under § 633, if tenants made such a demand,

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16. The Legislative History to § 621(a)(2) states, *inter alia*, that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights of way which have been granted to other utilities are in violation of this Section and not enforceable." House Report at 59, *reprinted at* 5 U.S. Code Cong. & Admin. News, at 4696 (1984). Elsewhere in the Legislative History, Congress made it clear that utility easements were only an example of the types of easements which would be compatible with cable television uses. *Id.*

17. The unenacted § 633 was a consumer-oriented proposal, and read as follows:

**CONSUMER ACCESS TO CABLE SERVICE**

- (a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a *lessee* or *owner* (including a person who owns shares which entitle such person to occupy a unit in a cooperative project) of a unit in such building or park.
- (b) (1) A State or franchising authority may, and the Commission shall, prescribe regulations which provide —
- (A) that the safety, functioning, and appearance of the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
- (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both;
- (C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator; and
- (D) methods for determining just compensation under this section.
- (2) A State or franchising authority may make the regulations prescribed by the Commission applicable within such entity's jurisdiction.

landlords had to honor the tenants' request.<sup>18</sup> The trigger mechanism for the tenants'-rights provision was a demand for a franchisee's cable television service *by a tenant*.<sup>19</sup> This type of trigger is the exact opposite of the easement co-use provision now contained in § 621(a)(2), which is triggered by a *cable firm's* decision to exercise its property right to co-use a compatible easement. Since entry by a cable firm in the

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(c) Any owner of such a multiple-unit building or park may not demand or accept payment from any cable operator in exchange for permitting construction with or installation of facilities necessary for a cable system on or within the premises in excess of any amount which constitutes just compensation.

(d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to —

(1) the extent to which the cable system facilities occupy the premises;

(2) the actual long-term damage which the cable system facilities may cause to the premises;

(3) the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and

(4) the enhancement in value of the premises resulting from the availability of services provided over the cable system.

(e) (1) During the period for which regulations by a State or franchising authority are not otherwise in effect under subsection (b), regulations of the Commission shall apply with respect to the cable system involved.

(2) Regulations under subsection (b) shall be prescribed not later than 180 days after the effective date of this title.

(f) This section shall take effect on the 180th day after the effective date of this title.

(g) The preceding provisions of this section shall not apply to units which are customarily leased to a person of less than 30 days and to units in a hospital.

(h) (1) This section shall not apply to any owner of a multiple unit residential or commercial building or manufactured home park who makes available to residents a diversity of information sources and services equivalent to those offered by the cable system authorized to provide cable service in the area in which such building or park is located, as determined under rules prescribed by the Commission.

(2) The Commission shall prescribe rules to carry out the provisions of paragraph (1) not later than 180 days after the effective date of this title. (emphasis added).

18. An exception existed where the landlord provided "equivalent" cable service to that offered by the franchised cable company. However, since § 633 was not enacted, it is apparent that Congress rejected the single-supplier scenarios embodied in the unenacted § 633.

19. See former § 633(a), *supra*, note 17.

absence of easements (or some easement-like arrangement) would not normally involve a compatible use or the exercise of a cable firm's existing franchise-based property rights, § 633 had no relation to § 621(a)(2).

Section 633 was ultimately rejected by Congress. However, the elimination of the tenants'-rights provision from the final version of the Act had no impact on the scope and reach of the unrelated easement co-use provision in § 621(a)(2), or on the goals and purposes of the Cable Act itself. Section 621(a)(2) provides that franchised cable television companies, as a part of their franchise property rights, are authorized to construct their cable systems not only "over public rights-of-way," but also "through easements . . . dedicated for compatible uses." The Act makes no distinction between easements in the interiors of buildings and easements outside buildings — it provides that franchised cable television disseminators can obtain access to *all* easements dedicated for compatible uses.

Some landowner interests have resisted § 621(a)(2), even though it reflects well-established easement law. Their most common litigation arguments are as follows:

1. There is no private right of action to enforce § 621(a)(2).
2. That — since state easement law allegedly does not allow co-use of compatible easements on private property — § 621(a)(2) only applies to classic, publicly dedicated easements.
3. The non-enactment of § 633 of the Act means that § 621(a)(2) cannot apply to the interiors of MDU structures, such as apartment buildings or condominium facilities.
4. That, in any event, a cable franchisee's co-use on a compatible easement or private property constitutes a "taking" for which just compensation is due.

Some of the landowners' arguments intertwine. For example, it has been argued that, since the unenacted § 633 was purportedly the only section which contained a just compensation provision, the deletion of § 633 reveals a "legislative intent" to not allow co-use of private easements. As

explained below, the arguments of landowner interests have each been rejected by the majority of courts confronting these issues under § 621(a)(2). Although § 621(a)(2) issues are now being actively litigated in district courts in the Ninth Circuit,<sup>20</sup> the Ninth Circuit itself has not had occasion to interpret or apply § 621(a)(2) as of this writing.

#### A. COURTS HAVE HELD THAT A PRIVATE RIGHT OF ACTION DOES EXIST

In *Centel Cable Television Co. of Florida v. Admiral's Cove Assoc., Ltd.*,<sup>21</sup> the Eleventh Circuit held that a private right of action exists to enforce § 621(a)(2), and several district courts have agreed.<sup>22</sup> The private-right-of-action issue thus appears to be resolved, and those opposed to vigorous enforcement of § 621(a)(2) are no longer actively pursuing the point in contemporary easement co-use litigation.

#### B. STATE EASEMENT LAW ALLOWS CO-USE OF COMPATIBLE PRIVATE EASEMENTS

In discussing the easement co-use provision of § 621(a)(2), it is appropriate to begin with the law of easements. An easement is not a document; it is a right — an irrevocable, incorporeal right to engage in some activity on the land of another.<sup>23</sup> Such a right arises if a landowner allows certain activities on the land at issue.<sup>24</sup> No special form of words is required to create an irrevocable right of use (*i.e.*, an easement).<sup>25</sup>

20. *E.g.*, *Heritage Cablevision of California, Inc. v. J.F. Shea Co., et al.*, No. C-90-20073(WAI) (N.D. Cal., filed Feb. 8, 1990) (LEXIS, 18811); *United Artists Cable Television of Santa Cruz, Inc. v. Blue Pacific Mobile Home Park, et al.*, No. C-91-20451 JW (N.D. Cal., filed July 31, 1991); *Booth American Co. v. Total TV of Victorville*, No. CV-91-2286-RSWL (C.D. Cal. 1991) (partial summary judgment ruling in favor of franchised cable television firm's co-use of compatible private easements announced on January 13, 1992).

21. 835 F.2d 1359 (11th Cir. 1988); Accord, *Centel Cable Television Co. of Florida v. Thos. J. White Development Corp.*, 902 F.2d 905 (11th Cir. 1990).

22. *E.g.*, *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F.Supp. 422, 429 (D. Md. 1989).

23. 28 Cal. Jur. 3d, *Easements & Licenses*, § 1 (1986).

24. *Id.*, at 80. (The right of use is "created by grant or agreement, express or implied, which confers a right on its owner to some . . . use . . . over the estate of another.")

25. *Scanlan v. Hopkins*, 128 Vt. 626, 629, 270 A.2d 352, 355 (1970). Some landowners have recently attempted to evade § 621(a)(2) by manipulating service agreements with competitors of cable franchisees, sometimes even to the extent of including words to the effect that the agreement "is not an easement." However, nomenclature is not controlling, and substance will prevail over form. If any service provider is permitted to provide cable television-type service, an easement arises. Congress has forbidden private arrangements to exclude franchised cable firms. Attempts to



Easements can greatly benefit the landowners' property.<sup>26</sup> Easements also convey to the easement holder an interest in real property.<sup>27</sup> The land over which the easement runs is traditionally referred to as the "servient estate" or "servient tenement."<sup>28</sup> If another parcel of land is benefitted by the easement, it is referred to as the "dominant" estate or tenement, and the easement is considered to be "appurtenant."<sup>29</sup> If an easement benefits another person or entity, rather than a dominant estate, it is a "personal interest in the land of another," and is referred to as an "easement in gross."<sup>30</sup>

It is common for private easements in gross to exist on private property.<sup>31</sup> While utility companies often hold private easements in gross, the utilities are not the only holders of such easements.<sup>32</sup> In the context of cable television, the only relevant easements will ordinarily be easements in gross, although § 621(a)(2) is not restricted solely to easements in gross. For example, easements appurtenant may be involved.

It is well-established under state easement law that franchised cable television disseminators can co-use private, compatible easements in gross if they impose no greater burden on the easements; an absence of additional burden is presumed when easements are "exclusive."<sup>33</sup> In this context, "exclusive" means that the landowner granting the easement has not reserved a right to also use the easement for the same type of activity in which the easement holder intends to engage.<sup>34</sup> In

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characterize access arrangements in a way which will "thwart the intent of the Cable Act" are not tolerated. *Centel Cable Television Co. v. Thos. J. White Devel. Corp.*, 902 F.2d 905, 909 (11th Cir. 1990).

26. For example, allowing for a competing, franchised cable television service would add an amenity to an apartment complex, expand viewer choice and enhance marketability.

27. 28 Cal. Jur.3d, *supra*, § 1 at 79, n.2, citing *Darr v. Lone Star Industries, Inc.*, 94 Cal. App. 3d 895, 157 Cal. Rptr. 90 (3rd Dist., 1979).

28. 28 Cal. Jur. 3d, *supra*, § 7.

29. *Id.*, at 90.

30. *Id.*, at 90-91.

31. See, e.g., *Salvaty, supra*, 165 Cal. App 3d at 803-05; *Witteman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584 (1986), *cert. denied*, 484 U.S. 1043 (1987). *Witteman* is still useful for scholarly purposes, although, due to a unique procedural history, the opinion is technically depublished at this time.

32. See, e.g., *Witteman, supra*, 228 Cal. Rptr. at 586 (In addition to the telephone utility, which had a private easement in gross, the city also had a cable-access easement); *Heritage Cablevision of California, Inc. v. J.F. Shea Co., Inc., et al.*, No. C-90-20073 WAI (N.D. Cal., June 4, 1990) (Lexis, 18811) (Preliminary Injunction Order discussing easements in gross held by a second franchised cable television firm).

33. See, e.g., *Salvaty, supra*, 165 Cal. App 3d at 803-05.

34. *Witteman v. Jack Barry Cable TV, supra*, 228 Cal. Rptr. at 588; *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825, 828 (Mo. App. 1985).

cable television cases, it is rare to have an easement in gross which is not exclusive in this sense. This fact is not surprising. Few landowners desire to compete in such easements with utility companies or other, similar easement holders. In *Witteman*, for example, the landowner "had no intention to provide utility services" in the utility easements at issue, and thus the easements in *Witteman* were exclusive for purposes of apportionment.<sup>35</sup>

If a franchisee imposes no additional burden on an easement, then, under the theory of apportionment, it can co-use the easement.<sup>36</sup> The landowner's consent is not needed for such compatible co-use to occur.<sup>37</sup> Moreover, utility companies in some states cannot refuse to apportion their private easements to cable television franchisees.<sup>38</sup> The California Legislature, for instance, has enacted Section 767.5 of the Public Utilities Code, which regulates commercial conduct in a way which prohibits utility companies and landowners from entering into exclusive contracts designed to keep cablecasters from co-using compatible easements.<sup>39</sup>

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35. *Witteman, supra*, 228 Cal. Rptr. at 588.

36. *Salvaty, supra*, 165 Cal. App. 3d at 803-04; *Witteman supra*, 228 Cal. Rptr. at 587-88.

37. *Salvaty, supra*, 165 Cal. App. 3d at 804-05.

38. See, e.g., Cal. Public Utilities Code § 767.5 (1980); see also *Witteman, supra*, 228 Cal. Rptr. at 589. Section 621(a)(2) federalizes this rule. See note 16 *supra*. The rule against refusals to apportion does not involve a taking. For example, the landowner and the easement holder can be analogized to a landlord and tenant. The rule prohibiting refusals to apportion is merely a regulation of the economic relations of a landlord and tenant. Government, of course, has "broad power to regulate . . . the landlord tenant relationship . . . without paying compensation. . . ." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). Accordingly, once a developer creates an easement, it can no longer assert that co-use of compatible easements is not allowed: a compatible use has been authorized by the landlord, and both the landlord and tenant thus become subject to economic regulation. *Salvaty, supra*, 165 Cal.App.3d at 805. Section 621(a)(2) is a classic example of such regulation. Section 621(a)(2) has established a statutory scheme whereby the grant of an easement which would be compatible with cable television is deemed—at the time of the grant—to also be a grant to local franchisees, by operation of law. For this reason, such easements are, in essence, pre-apportioned, multi-compatible-user easements. Franchisees thus need not approach the easement-holder for apportionment; apportionment already exists. Accordingly, § 621(a)(2) takes nothing from holders of compatible easements, nor from landowners, who voluntarily allowed the use at issue. *Salvaty*.

39. In pertinent part, § 767.5 of the Utilities Code reads as follows:

Authority To Regulate Public Utility Pole  
Attachments For Cable Television

(a) As used in this section:

- (1) "Public Utility" includes any person, firm, or corporation, except a publicly owned public utility, which owns controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communication.

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(2) "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhole.

(3) "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility.

(4) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the commission, to allow its use by a cable television corporation for a pole attachment.

(5) "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment.

(6) "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.

(7) "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the commission.

(8) "Rearrangements" means work performed, at the request of a cable television corporation, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of the cable television corporation, of the support structure in order to provide adequate surplus space or excess capacity.

(9) "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual costs shall be historical capital cost less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this paragraph, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

(b) The Legislature finds and declares that public utilities have a dedicated portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations. The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

To a degree, California's legislative policy reflects a determination that the public interest is served by "the expansion of cable services."<sup>40</sup> Congress has embraced the same policy.<sup>41</sup> Several courts have also recognized that allowing co-use of compatible, private easements is appropriate as part of "the natural evolution of communications technology" uses which have already been allowed in various easements by landowners.<sup>42</sup>

C. SECTION 621(a)(2) DOES NOT PROVIDE FOR LESS CO-USE OF PRIVATE EASEMENTS THAN STANDARD PRINCIPLES OF STATE EASEMENT LAW

The enactment of the 1984 Cable Act must be viewed with the above-described principles of conventional easement law in mind. With regard to easement co-use, § 621(a)(2) provides as follows:

Any franchise shall be construed to authorize the construction of a cable system . . . through easements . . . which have been dedicated for compatible uses. . . .

Some developers have argued that § 621(a)(2) should be restricted to situations involving public dedications. There are numerous indications that § 621(a)(2) is not so limited.

First, the plain meaning of the language used by Congress is not restricted to public dedication situations. Section 621(a)(2) refers to easements "dedicated for compatible uses," not "dedicated for public uses." A fundamental principle of statutory interpretation is that the plain meaning of the statute should be applied.<sup>43</sup>

Moreover, if § 621(a)(2) is confined to formal, publicly dedicated easements, then the Section would provide for less easement co-use than standard easement law, and would thus serve no practical purpose. Since congressional action was not needed for cable television to gain access to compatible,

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40. *Witteman, supra*, 228 Cal. Rptr. at 587 ("the *Salvaty* court noted that public policy strongly favored the expansion of cable services to the public. . . .").

41. 47 U.S.C. § 521(2) (1984).

42. *Salvaty, supra*, 165 Cal. App. 3d at 803, citing *Faus v. City of Los Angeles*, 67 Cal.2d 350, 355-58, 62 Cal. Rptr. 193, 431 P.2d 849 (1967); and *Norris v. State of California ex rel. Dept. of Public Works*, 201 Cal. App. 2d 41, 47, 67 Cal. Rptr. 595 (1968).

43. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

*publicly* dedicated easements, the developers' "public dedication" argument would relegate § 621(a)(2) to situations where it is not needed.<sup>44</sup> Courts, of course, are to avoid statutory "interpretations which would produce absurd or nugatory results."<sup>45</sup>

#### D. THERE ARE MANY OTHER INDICATIONS THAT SECTION 621(a)(2) IS NOT RESTRICTED TO PUBLIC DEDICATION SITUATIONS

A public dedication involves a gift of an interest in land, accepted by government.<sup>46</sup> The public gift feature of dedication law also reveals that § 621(a)(2) cannot be confined to public dedication situations. The Legislative History states that, under § 621(a)(2), "private arrangements which seek to restrict a cable system's use of such easements . . . which have been granted to other utilities are in violation of this Section and not enforceable."<sup>47</sup> This language clarifies that the easements

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44. *United Cable Television of Mid-Michigan v. Eyde*, No. 5:89-CV-403 (File No. L-89-30103 CA) [Slip Op. at 5-6] (W.D. Mich. 1989). In relevant part, the *Eyde* court observed as follows:

The defendants argue that a cable franchisee's access to easements under Section 621(a)(2) is limited to publicly dedicated ones. See *Cable Assoc. v. Town & Country Management Corp.*, 709 F. Supp. 582, 584 (E.D. Pa. 1989). Thus, they argue that even if the statute creates a private right of action, United will not succeed on the merits of this case because Consumers' easement is a private one which has not been publicly dedicated under Michigan state law.

However, neither the statute nor the legislative history supports the defendants' position. First, the language of Section 621(a)(2) contains no requirement that the easement be dedicated for public use. Second, the legislative history contains no statements which would support the argument of the defendants on this issue. Actually, the legislative history supports the conclusion that Congress intended private easements to be within the scope of Section 621(a)(2) by stating that "[a]ny private arrangements which seek to restrict a cable system's use of such easements . . . which have been granted to other utilities are in violation of this section and unenforceable." Legislative History at 59, reprinted in 1984 U.S. Code Cong. & Admin. News at 4696. If Congress intended to permit access to only publicly dedicated easements, there would have been no need to include such a statement in the legislative history. Thus, the face of the statute does not create a distinction between public and private easements and the legislative history indicates that this lack of a distinction was intentional. Therefore, the Court rejects the defendants' argument that private easements are outside the scope of Section 621(a)(2) of the Cable Act.

*Id.* (footnote omitted).

45. *Application of the United States*, 563 F.2d 637, 642 (4th Cir. 1977).

46. 6A *Powell on Real Estate* § 926[1] (1992).

47. 5 U.S. Code Cong. & Admin. News, at 4696 (1984).

being referred to in § 621(a)(2) include, for example, those granted to other utilities. An easement granted to a utility is, by definition, not a gift to the public. Where the grantee is a private easement holder, there is no public dedication.

Congress' prohibition of "private arrangements" restricting easement co-use is also telling. It is difficult to imagine a *private* arrangement which could validly restrict a third party's use of compatible, *publicly* dedicated lands. By prohibiting private restrictive arrangements, Congress made it clear that § 621(a)(2) extends to private easements.

There are many other indications that § 621(a)(2) is not limited to instances of public dedication. For example, the FCC, in a Notice announcing proposed rules to implement the Cable Act, clearly stated that § 621(a)(2) "authorizes construction of a cable system over public rights-of-way and through easements *designated* for compatible uses such as those used for utilities."<sup>48</sup> When asked about its use of the word "designated," the FCC rejected restrictive readings of § 621(a)(2), and explained that "[o]ur use of the phrase 'dedicated for compatible uses' in the Notice was not intended to be more or less encompassing than the phrase 'dedicated for compatible uses' used in the Cable Act."<sup>49</sup> This is a clear indication that, as used in § 621(a)(2), the phrase "designated for compatible uses" carried the same meaning as the phrase "dedicated for compatible uses" in the Act.

The basic principles of statutory construction support the position of the FCC. The general rule is that "when a word which has both a technical and a common and ordinary meaning appears in a statute, the latter meaning will prevail over the former in the absence of any indication that the word was used in its technical sense."<sup>50</sup> Rejection of technical meanings is especially appropriate when "such a technical definition is not supported by the purpose of the statute. . . ."<sup>51</sup> Moreover, since the word "dedicated" was not defined in the definition section of the Cable Act,<sup>52</sup> the ordinary meaning should be applied.<sup>53</sup>

48. 49 Fed. Reg. 48769 (1984) (emphasis added).

49. 50 Fed. Reg. 18647 (1985).

50. *St. Lukes Hosp. Ass'n v. United States*, 212 F.Supp. 387, 391-92 (N.D. Ohio 1962), *rev'd on other grounds*, 333 F.2d 157 (6th Cir. 1964).

51. *In re Garner*, 18 Bkry. Rptr. 369, 371 (S.D. N.Y. 1982).

52. The definitions section is codified at 47 U.S.C. § 522.

53. *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning").

There is a common meaning for the word "dedication" which differs from the formalistic notion of "public dedication" which Congress eschewed. To "dedicate" is to: "Set apart for a special purpose; devote to some work, duty, etc."<sup>54</sup> This more general meaning of the word dedication has been adopted by most courts when interpreting § 621(a)(2). For example, in a recent state court case, *Mumaugh v. Diamond Lake Area Cable TV Co.*,<sup>55</sup> the Michigan Court of Appeals held that cable firms were entitled to co-use compatible easements under § 621(a)(2), whether they are "public" or "private." In the process, the *Mumaugh* court observed:

The majority of courts that have construed the statute have rejected arguments that 47 U.S.C. § 541(a)(2) grants only a right to construct cable television lines through publicly dedicated easements [citing *Cable Holdings of Georgia*, *Rollins Cablevue*, *Cable TV Fund*, and *Greater Worcester Cablevision*]. In reaching this conclusion, the courts have relied on the legislative intent expressed in the language of the Cable Act itself and on the Legislative History of the Act.<sup>56</sup>

This conclusion is consistent with recent cases applying § 621(a)(2). In *Centel Cable Co. v. Thos. White Devel. Corp.*,<sup>57</sup> the Eleventh Circuit held that, under § 621(a)(2), a franchise includes, as a part of the franchise itself, a property right to use compatible easements, even if the easements traverse "private roads" or cross "private property."<sup>58</sup>

In one case, *Cable Associates, Inc. v. Town & Country Management Corporation*,<sup>59</sup> the court concluded that there is a general rule favoring technical meanings over the ordinary definitions of common words.<sup>60</sup> Based on this conclusion, the *Cable Associates* court held that the phrase "dedicated for

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54. Webster's *New World Dictionary*, at 383 (1969).

55. 456 N.W.2d 425, 429-30 (Mich. App. 1990).

56. 456 N.W.2d at 428. *Accord*, *Amsat Cable Limited Partnership III v. Connecticut Superior Ct.*, 1991 W.L. 49850, at 7 (Mar. 25, 1991 Conn. Super.) (Administrative Court held that Cable Act intended the phrase "dedicated for compatible uses" to include both public and private easements); *Booth American*, *supra*, note 20.

57. 902 F.2d 905 (11th Cir. 1990).

58. *Id.* at 909-10.

59. 709 F.Supp. 582 (E.D. Pa. 1989).

60. *Id.* at 584, citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

compatible uses" in § 621(a)(2) should be given a technical, "legal" definition, and interpreted to apply only to dedications for public uses.<sup>61</sup>

The case cited by the *Cable Associates* court as supportive of a general proposition favoring technical definitions is *Corning Glass Works v. Brennan*.<sup>62</sup> However, there is no general rule favoring technical definitions. Indeed, the general rule is the exact opposite. The contrary conclusion of the *Cable Associates* court was based on a misapplication of *Corning*. In *Corning*, the Supreme Court ruled as it did because there was ample legislative history in that unique case showing that certain phrases were chosen by Congress because they had certain well-accepted technical meanings in the industrial relations field, and that Congress wanted such technical meanings to apply.<sup>63</sup> Such circumstances do not exist in connection with § 621(a)(2). Indeed, the legislative history of § 621(a)(2) shows that a technical, legalistic definition of the phrase "dedicated for compatible uses" would be contrary to congressional intent.

Notwithstanding the fact that the scope of § 621(a)(2) embraces private easements, on February 12, 1992 an Eleventh Circuit panel reversed *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*,<sup>64</sup> and held that § 621(a)(2) is restricted to public dedication situations.<sup>65</sup> In *Cable Holdings*, a landlord had given a firm named ODC Communications permission to provide cable service in a private apartment complex, and tried to exclude ODC's competitor, the local franchised cable television firm. Applying § 621(a)(2), the district court rejected these exclusionary practices. Its decision has now been reversed.

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61. Another case agrees with this distinctly minority view. *Media General Cable v. Sequoyah Condominium Council of Co-Owners*, 737 F.Supp. 903, 911 & n.14 (E.D. Va., 1990). The *Cable Associates* court felt bound by the holding in *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 160 (3rd Cir. 1989). However, the *Woolley* holding is irrelevant to § 621(a)(2) issues, since *Woolley* did not involve any easements. *Media General*, *supra*, 721 F.Supp. at 782 ("the *Woolley* plaintiff was seeking access to the insides of buildings and apartments where no easements existed"). Both the *Cable Associates* and *Media General* courts erroneously relied on *Woolley* to resolve § 621(a)(2) issues. The district court decision in *Media General* has been appealed to the Fourth Circuit.

62. 417 U.S. 188 (1974).

63. *Id.* at 201.

64. 678 F. Supp. 871 (N.D. Ga. 1986).

65. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, \_\_\_, F.2d \_\_\_, No. 91-8032 (11th Cir. 1992). Ironically, a Senior District Judge from the Eastern District of Pennsylvania—which is the birthplace of this erroneous view—sat on the *Cable Holdings* panel by designation.



In the district court, ODC argued that it had no easement-type arrangements, but only a form of license. The trial court rejected this argument. The district court found that ODC's license rights constituted an easement for purposes of § 621(a)(2), and this finding was not disturbed on appeal.<sup>66</sup> Accordingly, the facts of *Cable Holdings* are conceptually identical to *Salvaty*. However, the result in *Cable Holdings* is the opposite of that reached in *Salvaty* and in similar state and federal easement cases. A review of the opinion of the *Cable Holdings* court reveals the source of this discrepancy.

The *Cable Holdings* opinion does not discuss or cite easement co-use or easement-apportionment cases such as *Salvaty*. This failure to consider conventional easement law led the *Cable Holdings* court to make statements about the law of easements which are incorrect. For example, contrary to *Salvaty* and similar cases, the *Cable Holdings* court stated that government cannot authorize co-use of easements “*even when a property owner has privately allowed other occupations which are ‘compatible’* . . . .”<sup>67</sup>

This inaccurate statement of easement law was the well-spring of an analysis which is erroneous because its premise is incorrect. After the *Cable Holdings* court mistakenly stated that co-use of compatible private easements is not allowed, it concluded—contrary to *Salvaty*—that co-use of compatible easements involves a “taking” if the subject easements are private.<sup>68</sup> Accordingly, to avoid this perceived taking problem, the *Cable Holdings* court rendered § 621(a)(2) superfluous by restricting it to public dedication situations.

Due to the incorrect premise underlying the *Cable Holdings* analysis, the court relied heavily on inapposite noneasement cases like *Loretto* and *Cable Investments, Inc. v. Woolley*.<sup>69</sup> The *Cable Holdings* court also discussed the irrelevant

66. *Id.*, Slip Op. at 1052 n.3.

67. *Id.*, Slip Op. at 1046 (emphasis in original). No authority was cited by the *Cable Holdings* court for this and similar incorrect statements.

68. *Id.*, Slip Op. at 1047. Actually, no taking is involved. *Salvaty, supra*, 165 Cal. App. 3d at 805. Even if a taking issue does arise in a given, unique case, § 621(a)(2) is constitutional because § 621(a)(2)(C) authorizes just compensation. See Section G, *infra*. The *Cable Holdings* court reached a contrary conclusion, but its brief discussion of just compensation is based on a misreading of unenacted § 633, and is incorrect. *Eyde, supra* note 44.

69. 867 F.2d 151 (3rd Cir. 1989). The *Cable Holdings* court also discussed various alarms raised by ODC, such as the prospect of a government-sanctioned “invasion” of beach property if the district court was affirmed. However, if a beach is traversed by an easement, *Salvaty* would apply, and would cause no difficulty. ODC's arguments were either straw-men or not related to real-world problems.

provisions of unenacted § 633. These unnecessary excursions into *Loretto*, *Woolley* and § 633 illustrate that misperceptions about substantive easement law can lead to errors in the implementation of § 621(a)(2).

The *Cable Holdings* court tried to harmonize its decision with contrary, earlier Eleventh Circuit decisions, but the flawed premise underlying the *Cable Holdings* analysis prevents such reconciliation. For example, in *Centel Cable Television Co. v. Thos. J. White Devel. Corp.*,<sup>70</sup> the landowner classified certain “rights-of-way as private,” and then argued that congressional authorization for co-use of private easements “is a *per se* violation of the Takings Clause.”<sup>71</sup> The *Thos. J. White* court rejected this argument,<sup>72</sup> as have other courts in the Eleventh Circuit. The *Cable Holdings* decision thus creates an intra-circuit conflict in the Eleventh Circuit, with the *Cable Holdings* position being held by only one court. The issue should therefore be reviewed, in light of *Salvaty* principles, by the Eleventh Circuit *en banc*.<sup>73</sup>

The only reasonable interpretation of § 621(a)(2) is that it provides for co-uses of private, compatible easements by cable franchisees which are at least as broad as the standard principles of easement law.<sup>74</sup> Such an interpretation of § 621(a)(2) would also comport with Congress’ stated goals of encouraging the expansion of cable television, “competition in cable communications” and “the widest possible diversity of information sources and services.”

70. 902 F.2d 905 (11th Cir. 1990).

71. *Id.* at 909.

72. *Id.* at 910-11.

73. In the meantime, *Cable Holdings* should be confined to Georgia. Section 621(a)(2) deals with easements, and adopts a broad view of what constitutes an easement. The FCC has ruled that application of § 621(a)(2) in each state should be guided by “the remedies available” at the “local level,” which would include those provided by state easement law. 50 Fed. Reg. 18674 n.51 (May 2, 1985).

74. The minority of courts holding that § 621(a)(2) is confined to public dedication situations are discussed at footnote 61 above. These courts also based their conclusions on the mistaken belief that easements-in-gross are not apportionable. *See, e.g., Media General Cable v. Sequoyah Condominium Council of Co-Owners*, 737 F. Supp. 903, 908 (E.D. Va. 1990) (citing no authority, the district court stated that: “In granting an easement, whether to a utility or not, the grantor gives the grantee, and no others, specific rights to use the underlying property”); *Cable Associates, supra* note 59, 709 F. Supp. at 586 (citing no authority, and in conflict with the teachings of cases such as *Salvaty*, the district court stated “that just compensation would be required if Congress mandated that a private owner of real property allow access to a franchise [*sic*] cable operator through a strictly private easement”). The recent decision in *Cable Holdings of Georgia* contains the same error. The correct view has been adopted by the majority of courts. *See, e.g., Booth American Co. v. Total TV of Victorville*, No. CV-91-2286-RSWL (C.D. Cal., Jan. 13, 1992) (partial summary judgment allowing co-use of compatible private easements, and rejecting a landowner’s “public dedication” argument).

### E. SECTION 621(a)(2) DOES NOT DIFFERENTIATE BETWEEN INTERIOR AND EXTERIOR EASEMENTS

Section 621(a)(2) does not differentiate between the interiors and the exteriors of buildings. Some developers have attempted to erect such a distinction by adverting to dictum in a case entitled *Cable Investments, Inc. v. Woolley*.<sup>75</sup> However, *Woolley* did not involve any easements or an attempt by a franchised cable firm to co-use a compatible easement.<sup>76</sup> The *Woolley* court's holding is thus not relevant to issues under § 621(a)(2), which relates to situations involving easements and easement-like arrangements.

There is nothing in the law of easements which prevents easements from traveling through buildings. Section 621(a)(2) is addressed to all compatible easements, whether they travel through building interiors or not. As one commentator has noted, the municipal "power to franchise would be meaningless unless the city could assure its franchisees that the [franchise] it grants carries with it the power over the public and [compatible] private property necessary to construct a cable system. That power is granted in § 621(a)(2) of the Act [47 U.S.C. § 541(a)(2)]."<sup>77</sup>

### F. JUST COMPENSATION ISSUES DO NOT ARISE UNDER SECTION 621(a)(2) BECAUSE NO TAKING OCCURS WHEN THE CO-USE AT ISSUE INVOLVES EXISTING, COMPATIBLE EASEMENTS

The few courts that have discussed just compensation in connection with § 621(a)(2) have been forced into the topic by their failure to realize that no "taking" is involved when a compatible co-use is being made of an existing, private easement.<sup>78</sup>

It is thus worth observing that developers' continued reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>79</sup> is misplaced. Besides being an inapposite noneasement case, *Loretto* is inapplicable because its "very narrow"<sup>80</sup> was

75. 867 F.2d 151, 156 (3rd Cir. 1989).

76. "[T]he *Woolley* plaintiff was seeking access . . . where no easement existed." *Media General Cable v. Sequoyah Condominium Council of Co-Owners*, 721 F. Supp. 775, 782 (E.D. Va. 1989).

77. D. Brenner & M. Price, *Cable Television and Other Nonbroadcast Video*, § 3.03, 3-25 (1985) (emphasis added).

78. *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 803-05 (1985).

79. 458 U.S. 419 (1982).

80. *Id.* at 441.

based on "a historically rooted expectation of compensation."<sup>81</sup> At least since the 1984 Cable Act and *Salvaty* (which distinguished *Loretto*), those who would limit § 621(a)(2) have had no expectation of compensation, historically rooted or otherwise.

**G. IN ALL EVENTS, SECTION 621(a)(2) DOES PROVIDE FOR JUST COMPENSATION, SHOULD THE NEED EVER ARISE**

Since co-use of compatible, private easements does not constitute a taking, there is no need to reach issues about whether § 621(a)(2) provides for just compensation. However, should the need ever arise in a given, unique case, it is clear that § 621(a)(2) does authorize and provide for just compensation. A comparison of § 621(a)(2) with former § 633 reveals the source of this authorization.

Former § 633(b)(1)(C) was the provision that *authorized* just compensation.<sup>82</sup> Former Subsection D invited local authorities to devise *methods* for determining the just compensation which Subsection C authorized. Section 621(a)(2) had always cross-referenced Subsection C, and Subsection C was formally transferred to § 621(a)(2) when § 633 was deleted from the Act before its enactment.<sup>83</sup> There can thus be no serious argument that § 621(a)(2) does not authorize just compensation, should such compensation ever be appropriate.

**CONCLUSION**

As has been seen, § 621(a)(2) is an important federal refinement and regulation of cable franchisees' established right to co-use compatible, private easements. Notwithstanding the objections of landowner interests, the federal courts should be liberal in applying § 621(a)(2) so that congressional policies favoring the growth and expansion of the cable television media are fully advanced.

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81. *Id.*

82. *See, e.g.*, § 633(b)(1)(C) [see footnote 17, *supra*]; *Eyde, supra* note 44.

83. Landowner interests have attached significance to the fact that Subsection D was not also transferred. However, the fate of Subsection D is not relevant. Subsection D was never the section authorizing just compensation. Subsection D dealt only with calculation methodologies, and did not need to be transferred to a section dealing with easements, where such methodologies, if they are ever needed, are already well established.