Access to Premises and Easements: Can the Cable Operator Come In

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Access to Premises and Easements: Can the Cable Operator Come In?

by

PHILIP KANTOR*

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Introduction

For over twenty years, cable operators have attempted to place their cables on, over, and under as much of this country as they could in order to be able to serve as many television watchers as possible. The question as to whether the cable operator could place its cables over private property and within utility easements has been placed before both state and federal courts on many occasions. The answer to this question often depended on what theory and upon which state's law the cable operator attempted to base its request.

Over ten years ago, with the enactment of the Cable Communications Policy Act of 1984, Congress attempted to provide franchised cable operators with a federal right of access to easements. Whether cable operators have been more successful under common law, state property theories, or under the Cable Act is debatable. More importantly, it is questionable whether the Cable Act has actually provided cable operators with any additional rights that they did not have prior to the passage of the Act. Additionally, it appears that there is even some question as to how to properly interpret the access provision of the Cable Act.

The Cable Act was enacted in 1984 in order to update the law to keep pace with the advances of cable communications technology. Prior to the passage of the Cable Act, no uniform regulatory scheme was in place to properly regulate the cable television industry and to ensure its growth and development to best serve the viewing public. The final form of the Cable Act was the result of negotiations and compromises between representatives of those who would regulate the cable industry (the franchising authorities) and those who would be regulated (the cable operators). The result of such intense negotiations was detailed legislation that attempted to cover many significant


2. As early as 1970, the FCC recognized that "actions have been taken in the cable field without any overall plan as to the Federal-local relationship." Notice of Proposed Rule Making in Docket 18892, 22 F.C.C.2d 50 (1970). The FCC later stated that "[c]able television is an emerging technology that promises a communications revolution. Inevitably, our regulatory pattern must evolve as cable evolves—and no one can say what the precise dimensions will be." Cable Television Report and Order, 36 F.C.C.2d 143, 210 (1972).
aspects of the cable industry, ranging from franchising to renewal to
equal employment practices to subscribers' privacy.\(^3\)

As part of its continuing rulemaking under the Cable Television
Consumer Protection and Competition Act of 1992,\(^4\) and with the
enactment of the Telecommunications Act of 1996,\(^5\) the Federal
Communications Commission has sought comments on the status of
the law for cable operators seeking access to private property.\(^6\) The
FCC is reviewing the status of cable operators' access in conjunction
with its rulemaking on inside wiring. The FCC stated that:

Parity of access rights to private property may be a necessary
predicate for any attempt to achieve parity in the rules governing
cable and telephone network inside wiring, because without access
to the premises, the inside wiring rules and proposals discussed in
this NPRM will not even be implicated. An inequality in access can
unfairly benefit one provider over another.\(^7\)

I

Apportionment of Easements

Since before the passage of the Cable Act, in order to try to gain
access to potential subscribers cable operators have utilized easements
by claiming that the easement is "apportionable," meaning that it is
compatible for cable use and that use will not place an additional
burden on the servient estate. For instance, in Clark v. El Paso
Cablevision, Inc.,\(^8\) several homeowners appealed an order temporarily
enjoining them from interfering with a cable operator's use of a utility
pole and easement for the overhanging of its wires, including the right
of ingress and egress located at the rear of their property. The
franchise granted to the cable operator contained a provision
providing the grantee the authority to contract with any public utility

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3. The Cable Act "is a long and complicated statute," containing 28 different sections,
covering virtually every aspect of cable regulation. Michael I. Meyerson, The Cable
543, 545 (1985). "The key to understanding it is to recognize that it is above all else, a compromise."
Id. (emphasis added).
(1994))[hereinafter 1992 Cable Act].
7. Id. at 2774, ¶ 61. "NPRM" is an acronym for "Notice of Proposed Rule-Making."
company lawfully having poles in the streets, alleys, or public grounds of the city and to use such poles for its cables and necessary equipment. Under the terms of the franchise, El Paso Electric Company granted to Cablevision the right to attach its cables and equipment to the utility company's poles. Cablevision placed coaxial cable on the power company's pole located on the private homeowners' property. Thereafter, the homeowners demanded that Cablevision remove the cable. The trial court entered a temporary injunction restraining the homeowners from interfering with Cablevision's use of the utility pole. The Court of Civil Appeals of Texas held that the city "[a]cting for the public . . . allowed the Plaintiff [Cablevision] the use of the easement. Plaintiff's right to the use of the easement comes from the dedication, and its rights to use the poles comes from the Electric Company."

Similarly, in Salvaty v. Falcon Cable Television, the issue was whether a telephone company and a cable operator had to secure a private property owner's consent before cable equipment was installed on a telephone pole situated on the telephone company's easement on the property. In 1926, the property owner conveyed an easement "over, across and upon the rear five (5) feet of the premises" for the construction of a pole for telephone, light and power lines. In 1979, Pacific Telephone and Telegraph Company entered into a license agreement to permit Falcon to place its equipment "in or on Pacific's conduit system and telephone poles." In 1980, the City of Alhambra awarded a franchise to Falcon to provide cable service within the city's limits. The city also adopted an ordinance making it unlawful for any private property owner to interfere with a cable operator's access to private property.

The court found that section 767.5 of the California Public Utilities Code shows a "strong public policy in favor of encouraging the type of cable attachments involved in this case." Additionally, upon a legal analysis of the type of easement granted, the court held

9. Id.
12. Id. at 32.
13. Id. at 33.
14. Id. at 34. See also Witteman v. Jack Barry Cable TV, 228 Cal. Rptr. 584 (Cal. Ct. App. 1986).
that the installation of Falcon’s equipment was proper. Similarly, the court in Cousins v. Alabama Power Co., noted that “[t]he question of apportionment of easements by utility companies has been raised most recently around the country in cases involving cable television. Many courts have found that utility companies are authorized to share or apportion their easement rights with a third party, without obtaining the permission of, or compensating the owner of, the servient estate.”

Recently, the Fourth Circuit Court of Appeals was asked to review an action brought by a cable operator seeking access to the premises of a planned unit development. The cable operator sought access under the federal Cable Act, a West Virginia statute, and a claim of apportionment of easements. The trial court had rejected all three claims by the operator. Under the apportionment claim, the appellate court held that the operator could utilize the easement previously granted to the electric company some 35 years earlier in order to string wire. The court stated that “[t]he fact that an additional wire would be introduced to the many others on the poles does not impose any meaningful increase of burden on Shannondale’s [the property owner’s] interest in the underlying property.” Moreover, the court noted that the landowner’s president had conceded before the trial court that the additional wire of the cable operator “is not a concern.”

The cable operator must look to its state’s common law to ensure that apportionment exists there. Then, it must analyze the plats and surveys of the property it seeks to lay its cables over to ensure that a utility exists. Finally, the operator should check with the utility that was granted the easement to ensure that it does not object to the addition of the cable or fiber optic that it desires to install. Thus,

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15. Salvaty, 212 Cal Rptr. at 35. See also Hoffman v. Capitol Cablevision Sys., Inc., 383 N.Y.S.2d 674 (N.Y. Sup. Ct. 1976)(finding easements held by utility company were exclusive easements in gross which were properly apportioned to cable operator without compensation); Henley v. Continental Cablevision of St. Louis County, 692 S.W.2d 825 (Mo. Ct. App. 1985); Joliff v. Hardin Cable Television Co., 269 N.E.2d 588 (Ohio 1971).
17. Id. at 687 (footnote omitted).
19. Id. at 109.
20. Id. The court noted that “[h]aving reached this conclusion under the [apportion of] easement [claim], we need not reach the question of whether the Cable Communications Policy Act or the West Virginia Television Cable Systems Act authorize the use of Shannondale’s utility easements over Shannondale’s objection.” Id. at 110.
apportionment of easements under state common law appears to be a viable avenue for a cable operator to gain access to television viewers.

II

Section 621(a)(2) of the Cable Act

Unfortunately, the answer to whether the cable operator can come in and serve particular customers through particular easements may have been made more difficult with the enactment and subsequent interpretation of section 621(a)(2) of the Cable Act.\textsuperscript{21} Congress, acting for the public, authorized cable operators to use compatible easements, including, but not limited to, utility easements. Section 621(a)(2) declares:

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 . . . \textsuperscript{22}

The above cited and discussed apportionment of easement cases\textsuperscript{23} stand for the proposition that once an easement is voluntarily granted to one entity, another entity that desires to make a like use, which will not unduly burden the easement or interfere with either the underlying property owner's use of his land or the easement holder's use of the easement, may use that easement without effecting a taking of the property. Thus, the authorization found in section 621(a)(2) should be viewed as Congress' attempt to relieve cable operators of the delays and enormous expense inherent in having to litigate every time it seeks to obtain access to easements and premises. It appears Congress merely desired to federalize the state common law of apportionment of easements in enacting section 621(a)(2).

Federal courts, however, are split over the interpretation of this section of the Cable Act. Most significantly, the courts are split over how to interpret one particular word within the statute: dedicated. This split has caused one chief judge of a federal appellate court to comment: "[W]e now have two rules of law in this circuit concerning the proper construction of section 621(a)(2). To potential litigants


\textsuperscript{22} Id.

(and to me) this circuit's interpretation of section 621(a)(2) is confused." 24

The Ninth Circuit Court of Appeals in Century Southwest Cable Television, Inc. v. CIIF Associates, 25 recently addressed this section of the Cable Act. While the court found that it "need not decide this disputed question of the meaning of 'dedicated' [because] Century has offered no evidence of easements within the 12 buildings of the Apartments which would come under the statute," 26 it simply set forth the dispute in one sentence: "Does the term mean merely 'put aside for the use' of some body, such as an utility, or does it mean a grant and a gift of an interest in land for public use?" 27

A. The Use of Black's Law Dictionary

The court in Century further noted that "[s]everal . . . circuits have held that Congress chose to use 'dedicated' as the term is used in real property law, so that there must be a grant for public use for an easement to be 'dedicated.'" 28 One of those circuit courts was the Eleventh Circuit in Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd. 29 In that case, the cable operator sought access to the residents of McNeil's apartment buildings. 30 Although several theories were asserted, the court discussed section 621(a)(2). 31 The cable operator claimed that the apartment building owner had privately granted exterior and interior easements, which were compatible for cable television usage, to ODC (a rival cable operator), Georgia Power (the electric company), and Southern Bell (the telephone company). 32 Additionally, the cable operator alleged that it could directly trace, or "piggyback," any of the other cables or wires already present on the property. 33 Therefore, the cable operator argued that it had a right of access under section 621(a)(2) to the

24. Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 988 F.2d 1071, 1082 (11th Cir. 1993)(Tjoflat, C.J. dissenting to court's decision to deny petition for rehearing en banc)[hereinafter Cable Holdings III].
25. 33 F.3d 1068 (9th Cir. 1994).
26. Id. at 1071.
27. Id. at 1070.
28. Id. (citations omitted).
29. 953 F.2d 600 (11th Cir. 1992)[hereinafter Cable Holdings II].
30. Id. at 601.
31. Id. at 600.
32. Id. at 603. This was the only theory remaining on appeal.
33. Id.
residents of the apartment buildings. In a series of orders, the district court ruled in favor of the cable operator. The building and landowner appealed the decisions granting the cable operator access to the residents to the Eleventh Circuit Court of Appeals.

The appellate court held that on its face, § 621(a)(2) does not provide the right of access sought by Smyrna Cable. The provision does provide a right to access 'easements . . . which have been dedicated for compatible uses,' 47 U.S.C. § 541(a)(2) (1988), but it does not explicitly include wholly private easements in the class of easements accessible by franchised cable companies.

To support this conclusion, the court looked to the sixth edition of Black's Law Dictionary. Without reference to any legislative history or to any general statutory construction principles, the court stated that "Congress's use of the word 'dedicated' at least suggests a reference to the legal meaning of 'dedication.'" The court then cited Black's for the definition of when an easement is legally "dedicated." Consequently, the court held that, "although not dispositive, the 'dedication' language of section 621(a)(2) seems to contradict Smyrna Cable's alleged right to access the private, non-dedicated easements which may exist on McNeil's property."

The Cable Holdings court then turned to the legislative history of the statute and found that Congress had drafted, but then rejected, a section of the Cable Act that would have expressly granted the cable operator the right of access to apartment building tenants sought in the action. The court noted that the proposed section 633 would have granted the cable operator the right to provide service to tenants within an apartment building even over the objection of the owner of the building. Moreover, the court held that section 633 contained a

34. See, e.g., Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 874 (N.D. Ga. 1986) [hereinafter Cable Holdings I] (holding on cross motions for summary judgment that cable operator has a right of access but only to the extent that its system properly exercised the right).

35. Cable Holdings II, 953 F.2d at 603.

36. Id. at 606.

37. Id. (citing Black's Law Dictionary 412 (6th ed. 1990)).

38. Cable Holdings II, 953 F.2d. at 606 (emphasis added).

39. Id. (footnote and citations omitted).

40. Id.

41. Id.
just compensation provision in recognition of the Supreme Court’s
*Loretto v. Teleprompter Manhattan CATV Corp.* decision.\(^{42}\)

In conclusion, the Eleventh Circuit in *Cable Holdings* held that
“Section 621 (a)(2) provides a franchised cable company with the right
to access only those easements which have been dedicated for general
utility use, whether by plat recordation for a residential subdivision or
otherwise.”\(^{43}\) Because the easements found on the McNeil property
“were privately granted by McNeil in order to allow limited rights of
access to particular entities . . . Smyrna Cable has no right to forcibly
access and occupy these easements.”\(^{44}\)

A similar stance was taken by the Fourth Circuit Court of
Appeals in *Media General Cable of Fairfax, Inc. v. Sequoyah
Condominium Council of Co-Owners.*\(^{45}\) In that case, the cable
operator sought access to residents within the condominium complex,
which was comprised of more than 1,000 individual townhouses and
other residential units.\(^{46}\) Sequoyah had granted specific easements in
favor of the electric and telephone companies and a rival provider of
multi-channel programming services.\(^{47}\) Media General intended to
utilize these and other easements under the Cable Act in order to
install lines to provide cable service to residents of the complex. When
Sequoyah denied its request, Media General sought injunctive relief.
The district court denied relief, holding that the right of access is
limited to easements which have been dedicated for public use and
none of the easements sought to be used by Media General had been
so dedicated.\(^{48}\)

On appeal, the Fourth Circuit also followed the *Black’s Law
Dictionary* definition, stating: “the word ‘dedicated’ has a more
restricted and legally significant definition in the property-law context
than in the layman’s vocabulary. It is generally accepted that where
Congress uses technical words, or terms of art, those words are to be
construed by reference to the art or science involved.”\(^{49}\)

\(^{42}\) *Id.*; see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

\(^{43}\) *Cable Holdings II*, 953 F.2d at 610.

\(^{44}\) *Id.*

\(^{45}\) 991 F.2d 1169 (4th Cir. 1993).

\(^{46}\) *Id.* at 1170-71.

\(^{47}\) *Id.* The rival company provided similar services to those that a franchised cable
company provides to its customers; however, it was not a franchised cable operator under the
definition found in the Cable Act, 47 U.S.C. § 521(f). *Id.* at 1170.

\(^{48}\) *Id.* at 1171.

\(^{49}\) *Id.* at 1173 (citations omitted).
Additionally, the Fourth Circuit, like the Eleventh in *Cable Holdings*, found the Cable Act's legislative history persuasive, especially the failure to enact section 633. The court stated that "[c]areful study of the House Bill as originally proposed and an understanding of the innerworkings of the statute make it clear that Congress was trying to achieve two different things in the two different sections." In brief, the court found that "[t]he focus in § 633 was on the rights of individuals in single residential units . . . [while § 621] appears to give franchise holders the ability to make use of public rights of way and easements which are being used by similar utilities such as telephone companies and power companies."

Consequently, four appellate courts have found that section 621(a)(2) does not provide the cable operator with the right to come in unless the easement has been dedicated to the public and is being used by a similar utility. According to these appellate courts, the easement, in order to be used by a franchised cable operator, must be found on a subdivision plat. An easement that has been granted to a telephone or electric company, but not dedicated to the public in general or to general utility use, is a private easement, even if it has been recorded and is found in the public records. According to this interpretation, it is not the type of easement that can be utilized by a franchised cable operator over the objection of a private land owner under section 621(a)(2).

B. The Ordinary Meaning of Dedicated

Franchised cable companies have argued that utilizing the technical or *Black's Law Dictionary* meaning of dedicated contravenes the "fundamental canon of statutory construction . . . that unless otherwise defined, words will be interpreted as taking their ordinary contemporaneous common meaning." Section 621(a)(2) does not state that the compatible use easement must be set aside for "public use," nor that a "private" easement may not be accessed. Rather, the easement must merely be set aside for utility or similar use.

Thus, under the common definition of the verb "dedicate," which is used in the past tense by Congress in section 621(a)(2), the word

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50. *Id.* at 1174. See also *Cable Invs., Inc. v. Woolley*, 867 F.2d 151, 156 (3d Cir. 1989); TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 815 (8th Cir. 1993).

means to "set apart for a definite use." Thus, under the common meaning of the verb "dedicate," an "easement dedicated for compatible uses" includes any easement which has been set aside, established, or set apart for utility use.

Such common usage is consistent with the Eleventh Circuit's opinion in its first review of section 621(a)(2). In *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, Judge Fay used the word "dedication" interchangeably with the words "grant," "established," and "obtained," all signifying a nonlegal meaning. The Court held that: "[h]owever obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user." Judge Fay also stated: "Admiral's Cove argue[s] that Congress only authorized cable franchises to place their cables in publicly owned easements rather than utility easements. . . . We disagree with this line of reasoning." Additionally, Judge Fay found that "the determination by Admiral's Cove that Congress authorized Centel's use of public easements but not easements dedicated for use by utilities to be contrary to the legislative history of the Cable Act."

In *Centel Cable Television Co. of Florida v. Thos. J. White Development Corp.*, Chief Judge Roettger specifically held that "[t]he legislature did not place any special significance on the meaning of the

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54. *Admiral's Cove*, 835 F.2d at 1363 n.7.

55. *Id.* at 1363 (emphasis added). Judge Fay spent a substantial amount of time discussing the enactment and intent of the Cable Act. For instance, he found that "[a]n important objective of the Cable Act was to alleviate the patchwork of federal, state and local laws and regulations that hampered the growth of cable television. . . . Congress intended the Cable Act to provide uniformity." *Id.* at 1363. In discussing "the legal meaning of 'dedication,'" the *Cable Holdings* panel generally notes the manner of legally dedicating an easement. *Cable Holdings* of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 606 (11th Cir. 1992). However, each state's law concerning dedication is different, some being more complex than others. Thus, under the *Cable Holdings* scenario, a cable operator must consult the law of dedication of easements in each particular state and then obtain a legal opinion as to whether a particular developer or owner of land properly dedicated an easement. The result of this inquiry will be different depending on which state that particular cable operator is located. Thus, this analysis is in direct conflict with *Admiral's Cove's* finding that "Congress intended the Cable Act to provide uniformity." *Admiral's Cove*, 835 F.2d at 1363.

56. *Id.*
term ‘dedicated’ over and above its common meaning ‘to set aside.’”\(^{57}\)
That decision was affirmed in its entirety by the Eleventh Circuit,\(^{58}\) which panel expressly held that access extended to use of private non-publicly dedicated roads.\(^{59}\) Consequently, the Admiral’s Cove and Thos. J. White panels used the word “dedicated” in its ordinary, common meaning.

Thus not interpreting “dedicated for compatible uses” to apply to any actual utility easements not only renders Congress’ proscription against private arrangements in section 621(a)(2) a nullity, but also frustrates the very intent of the section. Contrary to the finding of the other circuit courts, a review of the legislative history of section 621(a)(2) provides support for using the common meaning of dedicated.

Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. Such use is subject to the standards set forth in section 633(b)(1)(A), (B), and (C). Consideration should also be given to the terms and conditions under which easements and rights-of-way make use of them. Any 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.\(^{60}\)

There is no mention nor delineation of “publicly dedicated easements,” or “private easements,” nor can one be derived by inference. Thus, Congress’ definition of the word “dedicated” is controlling,\(^{61}\) and must be followed by any court interpreting the statute. The Eleventh Circuit Court of Appeals in Admiral’s Cove noted that “[t]he legislative history informs us that Congress intended to authorize the cable operator to ‘piggyback’ on easements ‘dedicated

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58. See Thos. J. White, 902 F.2d at 911.
59. Id. at 909 (emphasis added).
61. See ANR Pipeline Co. v. Federal Energy Regulatory Comm’n, 894 F.2d 1396, 1399 (D.C. Cir. 1990); Conoco, Inc. v. Federal Energy Regulatory Comm’n, 622 F.2d 796, 798, 800 (5th Cir. 1980)(construing Natural Gas Policy Act’s use of the phrase “committed or dedicated” court and determining Commission must use NGPA definition).
for electric, gas or other utility transmission." The Burg & Divosta court concluded its discussion on this portion of the section 621 legislative history by declaring that "the Cable Act does not permit a developer to grant access to one cable operator and to deny it to another." The decision in Cable TV Fund 14-A, Ltd. v. Property Owners Association Chesapeake Ranch Estates supports this analysis. In that case, the "defendants contended that North Star-Maryland (a cable service provider) had an exclusive cable television franchise within the Estates and that the plaintiff had no right to enter the premises." In granting the cable operator's motion for a preliminary injunction enjoining the defendants from interfering with its installation of a cable system at the Estates, the court found that "the only threatened harm to defendants if the preliminary injunction were granted is the prospect of competition for cable service within the Estates." As support for that conclusion, the court noted that one of the goals of the Cable Act, as section 601(6) of the Cable Act states, was to "promote competition in cable communications." The court then quoted the legislative history forbidding private arrangements. Thus, by granting the injunctive relief requested, the Cable TV Fund 14-A court held unenforceable the exclusive arrangement to provide cable service to the residents of the Estates.

Both of the courts in Cable Holdings and Cable Investors v. Woolley side-stepped this prohibition, stating baldly that this prohibition "begs the question." In Cable Holdings, the court found that the private agreements between the landowner and the utilities and the other cable provider "do not violate the passage of the legislative history . . . even though those agreements may effectively

62. Admiral's Cove, 835 F.2d at 1362 n.5.
65. Id. at 427.
66. The Federal District Court of Maryland also noted that the defendant would lose "what it characterizes as an 'exclusive' franchise agreement. However, such claimed monopoly is contrary to both federal and County law." Id. at 433.
67. Id.
68. Id.
69. Cable Holdings of Ga., Inc. v. McNeal Real Estate Fund VI, Ltd., 953 F.2d 600, 607 (11th Cir. 1992)[hereinafter Cable Holdings II]; Cable Invs., Inc. v. Woolley, 867 F.2d 151, 155 (3d Cir. 1989).
exclude Smyrna Cable (the franchised operator)." However, the result pronounced by the appellate court in *Cable Holdings* cannot stand, since it opens a loophole large enough to devour the entire thrust of the statute. The *Cable Holdings* court essentially informs landowners that to avoid the result intended by Congress, one need simply enter into "private arrangements" with utility companies and non-franchised cable operators, granting them "private easements" which are not placed upon the plat of the subdivision. Such a simple way to avoid effectuating the purpose of any statute should not be sanctioned by any court.

It is well established that in construing provisions of a statute, a court has an obligation to accord great deference to the interpretation adopted by the agency charged with its daily administration. The FCC, has adopted an interpretation of this subsection that is identical to that put forth by the cable operators. The FCC stated:

Section 621 also authorizes construction of a cable system over public rights-of-way and through easements designated for compatible uses such as those used for utilities. Thus, a property owner that has already granted or is obligated to grant an easement for utilities cannot deny cable access . . . .

In response to public commentary concerning the use of the word "designate" by the FCC instead of "dedicated," the FCC stated that:

Our use of the phrase "designated for compatible uses" in the Notice was not intended to be any more or less encompassing than the phrase "dedicated for compatible uses" used in the Cable Act. With respect to the access issue, the House Report states 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." Based on the legislative history and the clear language of the statute, we find that a cable system does have the right to access through an easement as long as the other conditions are met.

Additionally, the Commission noted that "[w]e believe that the language and provisions of these sections of the Cable Act are generally self-explanatory and that they need not be codified by our

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70. *Cable Holdings II*, 953 F.2d at 607.
rules." 75 Again, there is no distinction drawn between "public" versus "private" easements in the FCC's discussion. As further support, soon after the enactment of the Cable Act, the National League of Cities and U.S. Conference of Mayors published A Local Government Guide to the New Law, entitled Cable Franchising and Regulation. In discussing section 621(a)(2) of the Cable Act, the Guide states: "This provision is intended to eliminate the legal problems operators have confronted over access to utility easements (particularly, in some midwestern and western states), by making clear that cable franchises will be deemed to authorize construction of cable facilities in utility easements." 76 Additionally, the Guide, in a footnote to the above cited paragraph, states that "[i]t is significant that this provision indicates a congressional intent to confer authority which may not otherwise exist under state or local law." 77

Thus, all those involved in the enactment of the Cable Act, i.e., Congress in its legislative history, the Federal Communications Commission in its Rules to Implement the Cable Act, and the franchising authorities in their Local Government Guide, unanimously agree that the intent of section 621(a)(2) of the Cable Act was to allow cable operators access to two separate and distinct areas to build their cable systems: (1) public rights-of-way; and (2) easements which have been dedicated to compatible uses, including, for example, an easement set aside for electric, gas or other utility transmission. 78 Conversely, none of those involved ever made mention of restricting cable franchisees to easements "dedicated" to the public and prohibiting cable franchisees from "private" easements.

The statutory construction used by circuit courts that have found section 621(a)(2) to effect a taking of private property is not only improper and incorrect, but effectively negates the purpose and effect of section 621(a)(2). As stated earlier, the final form of the Cable Act was the result of intense negotiations and compromises between representatives of the franchising authorities and the cable operators, the parties most knowledgeable of what is contained in a franchise. 79

75. Id.
77. Id. at III-E-5 n.5 (emphasis added).
79. Section 602(8) defines the term "franchise" as "an initial authorization or renewal thereof . . . issued by a franchising authority." 47 U.S.C. § 522(9)(1994).
These parties and Congress knew that most, if not all, cable television franchises already permit the cable operator to use public rights-of-way and public easements to install its cable system.80 "But this 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 private property necessary to construct a cable system. That power is granted in Section 621(a)(2) of the Act."81

Therefore, interpreting the Cable Act to allow franchised cable operators to use only those easements dedicated to a "public use," and not to "private" easements, effectively negates this provision of the Cable Act because it would then grant franchised operators no more rights than what they already have received pursuant to their franchises. Such an anti-competitive and limiting construction also frustrates the purpose and intent of this provision of the Cable Act.82

A critical conclusion reached by the circuit courts to deny access to cable operators is based upon a reliance on the Supreme Court's holding in Loretto v. Teleprompter Manhattan CATV Corp.83 A review of Loretto, though, is misplaced because Loretto dealt with a state regulation mandating attachment of cable wires to a building without the owner's consent. In essence, the regulation in Loretto required the property owner to create an easement for cable use.84 Section 621(a)(2) of the Cable Act contains no such mandate forcing the creation of an easement. Section 621 clearly deals with easements already in existence, stating that a franchised cable operator's construction of a cable system through [utility] easements "which [are] within the area to be served" can only occur in easements "which have been" set aside or established for compatible uses.85

Consequently, Loretto does not apply to the situation in which a cable system has been, or seeks to be, constructed and installed by a franchised cable operator within pre-existing utility or other

81. Id. (emphasis added).
82. See American Tobacco Co. v. Patterson, 456 U.S. 63, 70 (1982)("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." The Court found that the reading by EEOC "would make [§703(h)] illegal to adopt, and in practice to apply . . . ."); Mester Mfg. Co. v. INS, 879 F.2d 561, 567 (9th Cir. 1989); Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners, 812 F.2d 1220, 1225 (9th Cir. 1987)("Legislative enactments should never be construed as establishing statutory schemes that are illogical. . . .").
83. 458 U.S. 419 (1982).
84. See id. at 436-38.
compatible use easements which have already been established, voluntarily set aside, or granted by the property owner. Moreover, the Loretto Court expressly limited its holding to the facts in that case by explaining that its decision "is very narrow." 86 Unlike the situation in which a cable operator seeks use of a non-dedicated utility easement, Loretto did not involve use of any pre-existing interior or exterior easements dedicated for use by utilities. Thus, based upon factual differences between these two situations, the fact that Loretto was decided before the enactment of the Cable Act, and that the Loretto Court itself declared its decision was "very narrow," the Loretto decision is clearly inapplicable to section 621(a)(2).

Moreover, the United States Supreme Court, in one of its latest opinions interpreting the Fifth Amendment takings issue, appears to have sanctioned section 621(a)(2)'s apportionment of pre-existing easements to franchised cable operators. In Lucas v. South Carolina Coastal Council, 87 the Court addressed an alleged regulatory deprivation of beachfront property by the enactment of the state's Beachfront Management Act, which barred the owner of property from erecting any permanent habitable structures on his parcel. Lucas filed suit alleging that the Act had deprived him of all "economically viable use" of his property. The Court held that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." 88 Later in his opinion, Justice Scalia spoke of "permanent physical occupations" of land, such as those addressed in Loretto, and noted that the Court has "refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interest' involved . . ." 89 Justice Scalia, however, noted that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation on the landowner's title." 90 Consequently, it follows that the Supreme Court has approved section 621(a)(2)'s apportionment of a pre-existing easement by the government. 91 Thus, section 621(a)(2) does not render a taking of a landowner's property.

86. Loretto, 458 U.S. at 441 (emphasis added).
88. Id. at 1019 (emphasis in original, footnote omitted).
89. Id. at 1028.
90. Id. at 1028-29.
The Eleventh Circuit has faced a cable operator's action for access under section 621(a)(2) three separate times. The first two times, in Admiral's Cove and Thos. J. White, the court found on behalf of the cable operator. However, in the third and most recent case, Cable Holdings, the court found in favor of the landowner. The court attempted to differentiate Cable Holdings from Admiral's Cove and Thos. J. White because the developer privately granted easements to particular entities—Southern Bell, Georgia Power and ODC—and did not dedicate the easements to utility use in general. Therefore, reasoned the panel, these easements were private, and not the type of easements Congress intended to include within section 621.

However, a careful review of the facts of Admiral's Cove and Thos. J. White reveals that the essential nature of the easements at issue in those cases were the same as in Cable Holdings. In each of the cases, easements were granted to a power company, a telephone company, and a private television company or water company. In Admiral's Cove, the developer granted easements and rights-of-way to particular entities which were later recorded on the plat of the Admiral's Cove Development. In Thos. J. White, the developer likewise granted easements to particular entities—Florida Power & Light and Southern Bell, which were on the recorded plat of the development, and to St. Lucie West Utilities, Inc. Other easements granted to the utilities were not platted. In both cases, the easements were all privately negotiated and granted to particular entities. The easements in Admiral's Cove and Thos. J. White were not of the type dedicated "to utility use in general." The decision of the Cable Holdings panel cannot be reconciled with the Eleventh Circuit's prior decisions, and that court should have reheard en banc and vacated the

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92. Centel Cable Television Co. of Fla. v. Admiral's Cove Assocs., Ltd., 835 F.2d 1359 (11th Cir. 1988).
94. Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1990) [hereinafter Cable Holdings II].
95. Id. at 608-09.
96. Id. at 609.
97. Admiral's Cove, 835 F.2d at 1360.
98. Thos. J. White, 902 F.2d at 907.
Cable Holdings decision in order to secure the uniformity of the circuit’s opinions interpreting this portion of the Cable Act.

The Eleventh Circuit in both Admiral's Cove and Thos. J. White faced the argument that Congress only authorized the use of public easements rather than utility easements and questioned whether an authorization to use utility easements would be an unconstitutional taking under Loretto. When delineating the parameters of the substantive right of access granted to a franchised cable operator pursuant to section 621(a)(2) of the Cable Act, the Eleventh Circuit rejected the landowners’ arguments and determined that Congress could authorize the use of utility easements. Judge Fay in Admiral’s Cove stated:

Since most developers voluntarily grant easements for use by utilities, however, Congress may force the developer to allow a cable franchise to use the easement without offending the taking clause [sic] of the Constitution. Such “voluntary” action by developers may be an integral part of zoning procedures or the obtaining of necessary permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.100

The court in Thos. J. White reexamined and reaffirmed this precedent, stating “White’s Takings Clause argument must be rejected under Admiral’s Cove.”101 Later, the Eleventh Circuit in Cable Holdings appeared to narrow the holding of both Admiral’s Cove and Thos. J. White by finding that the Cable Act only authorizes use by a cable franchisee to dedicated easements, not “private, non-dedicated easements” granted to a particular utility.102

However, the findings of the Cable Holdings court have been questioned by a district court in California facing the exact same situation,103 and by four Eleventh Circuit Judges, including the chief judge, who voted in favor of rehearing en banc.104 Chief Judge Tjoflat,

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100. Admiral’s Cove, 835 F.2d at 1363 n.7 (citation omitted).
101. Thos. J. White, 902 F.2d at 910.
102. Cable Holdings II, 953 F.2d at 609.
103. Heritage Cablevision of California, Inc. v. J.F. Shea Co., Inc., No. C-90-20073-WAI, 1992 U.S. Dist. LEXIS 8738, at *4 n.1 (N.D. Cal. May 21, 1992)(denial of defendants’ motion for modification and/or clarification)("Cable Holdings is arguable [sic] in direct conflict with two other Eleventh Circuit cases, and failed to cite any other easement co-use case.").
104. Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 988 F.2d 1071, 1071 (11th Cir. 1993)(Tjoflat, C.J., dissenting from denial of rehearing en banc)[hereinafter Cable Holdings III].
in summarizing the reason for his dissent from the decision to deny rehearing *en banc*, stated:

[While the panel reaches its result by distinguishing two Eleventh Circuit decisions, it does so based on an erroneous interpretation of the facts in these cases. On the face of its opinion, therefore, the panel appears fairly to read and distinguish our precedent. Yet, when the panel’s interpretations are laid alongside the facts of *Thos. J. White* and *Admiral’s Cove*, the force of these prior decisions becomes apparent. Correctly represented, our prior cases cannot be distinguished. Moreover, had the panel followed *Thos. J. White* and *Admiral’s Cove*, it would have been compelled to reach a different result. I believe the *en banc* mechanism was designed precisely for these circumstances.]

III

Conclusion

Unfortunately, for an attorney for cable operators seeking counsel as to whether they can have access to certain television watchers through the use of utility easements, the state of the law is different depending on where the operator is doing business. One can be more optimistic in California than in most other locations, based upon cases decided in state and federal courts in California. However, operators in states comprising the federal Third, Fourth, and Eighth Circuit Courts of Appeal have reason to be skeptical of their chances to obtain access rights under section 621(a)(2). Finally, with respect to operators in Florida, Alabama, and Georgia, the states comprising the Eleventh Circuit, practitioners need to know whether the facts are more like *Admiral’s Cove* and *Thos. J. White*, or like *Cable Holdings* before rendering an opinion. However, such a review of the facts of the case and comparing them to the three previously-decided cases of the Eleventh Circuit may not be sufficient. In sum, Chief Judge Tjoflat was certainly correct when he stated that the state of the law concerning access to easements is “confused.”

One possible solution to this confusion that would allow the cable operator in would be to amend section 621(a)(2). The suggested

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105. *Id.* at 1071. This conflict prompted Chief Judge Tjoflat to state: “this circuit’s interpretation of section 621(a)(2) is confused.” *Id.* at 1082.


107. *Cable Holdings III*, 988 F.2d at 1082 (petition for rehearing).
amendment is a simple one word swap. Borrowing from the FCC's Notice of Implementation of the Commission's Rules to Implement Provisions of the Cable Communications Act of 1984, the word "dedicated" is stricken and substituted with the word "designated." As a result, the argument over whether to apply the common, ordinary use or the Black's Law Dictionary definition of a word is obviated. This simple amendment should provide cable operators with greater access to easements, which in turn will provide them with greater access to potential subscribers. Greater access should result in greater competition between franchised cable operators and non-franchised providers of cable service such as SMATV and MMDS operators, which is what the 1992 Cable Act was enacted to accomplish.
