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MEMORANDUM

TO: Federal Communications Commission

FROM: Laurence H. Tribe

DATE: August 8, 2000

RE: Takings Issues Raised by NPRM in FCC No. 99-141

Introduction and Summary

In its Notice of Proposed Rulemaking in No. 99-141, the Commission sought comment on a number of rules to grant competitive telecommunications service providers (TSPs) access to rights of way, buildings, rooftops, and other facilities in office buildings, apartment houses, and other multiple dwelling units. The NPRM was accompanied by separate statements by Commissioners Ness and Powell and a dissenting statement by Commissioner Furchtgott-Roth. All three Commissioners raised serious questions regarding the impact of the NPRM on the rights of property owners under the Takings Clause of the Fifth Amendment.

Commissioner Ness, for example, warned that, "[w]hile well intended, the concept would impose a new regulation on building owners – a class of persons not otherwise regulated by the Commission. . . . [W]here constitutional rights are at stake, judicial precedent informs us that the courts do not favor the imposition of obligations by a federal administrative agency which relies on ancillary jurisdiction."

Commissioner Powell expressed "grave concerns" about the takings issue. He cautioned that, "under judicial precedent, this agency should not move toward rules that would effectuate a per se taking without specific authority to do so." "In the context, a likely taking under the Fifth Amendment, this is not an area where we should be pushing the envelope of our 'ancillary' statutory authority . . . ."

Commissioner Furchtgott-Roth dissented in part from the NPRM in No. 99-141, stating that he was "deeply troubled" by the proposals to require building owners to grant access to competing telecommunications providers. "[T]his Commission must be vigilant [against] overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority – regardless of whether such regulation constitutes commendable

public policy. I fear that today's proposal, if ultimately adopted by the Commission, may stray outside this agency's jurisdictional boundaries."

The concerns voiced by Commissioners Ness, Powell, and Furchtgott-Roth are well-founded. The core principle established by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and recognized by the Commission in the OTARD Second Report and Order, is that a government agency may not force property owners to grant uncompensated public access, even over a small portion of their property and even if there is a compelling public purpose, such as promoting telecommunications competition. Such forced physical access represents a per se taking under the Fifth Amendment.

Proponents of forced access have suggested several ways around the *Loretto* principle. In my view, none of these avenues is available.

First, it has been suggested that, under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987), there would be no taking at all so long as the Commission had a "rational nexus" for the forced access it seeks to impose. But *Nollan* is an irrelevant distraction and cannot be used to defend the proposals in the NPRM. In *Nollan*, the property owners had no right to the building permit they sought from the state, and hence the state was allowed to impose a condition on that permit so long as there was a rational nexus between the state's legitimate purpose and the condition it sought to impose. Here, by contrast, property owners do not need licenses from the FCC in order to rent their property for commercial and residential purposes. Their property rights are a matter of state law, not FCC-granted permits. *Nollan* therefore offers no support to the proposals before the Commission.

Second, it has been suggested that the proposals can be defended as nondiscriminatory access rules. However, the holder of a right to exclude is by definition entitled to exercise it selectively. Thus, courts have repeatedly rejected attempts to allow "nondiscriminatory access rules" to swallow up the right to decide whom to let in and whom to exclude. For example, in *Loretto* the Supreme Court opined that "[t]he right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." 458 U.S. at 439 n.17. Similarly, in *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999), the court of appeals held that a statute nominally phrased as a nondiscriminatory access rule was in fact a per se taking. Hence, even an access rule that applied only prospectively would work a taking. Moreover, at the time when incumbent LECs were granted access to building facilities, most LECs were monopoly providers, often holding exclusive local franchises and operating according to actual or threatened exercises of eminent domain authority. Existing carriers were not voluntarily invited guests. In fact, using forced access as a lever to open a building owner's property to all telecommunications carriers would compound the Fifth Amendment violation, not ameliorate it.

Third, it has been suggested that the takings problem could be avoided if the access requirement were phrased as a condition on carriers rather than on property owners. Thus, it has been suggested that the Commission could prohibit all TSPs from serving a particular building

unless the building owner had granted open and nondiscriminatory access. But this proposal does not alter the fact that the rule would work a taking. The proposal would have precisely the same practical effect on property owners as would a direct mandate of open access. If the government may not order a dinner party host to open his private party to the entire neighborhood, neither may the government forbid guests from attending unless the host grants "open access."

Fourth, it has been suggested that, even if the Commission's access rules would work a taking, the FCC can devise a system of fees on entering TSPs to ensure that property owners receive just compensation for the invasion of their property rights. As a constitutional matter, however, the Commission is forbidden from establishing a system that works a taking – even if compensation is paid by a third party – unless the scheme has been clearly authorized by Congress. For example, in *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1444 (D.C. Cir. 1994), the D.C. Circuit invalidated a physical collocation requirement even though the Commission had allowed for tariffs permitting LECs to recover the reasonable costs from new entrants of providing space and equipment to co-locators.

The access proposals would therefore trigger concerns under the separation of powers as well as the Takings Clause. Moreover, the proposal's feasibility is highly doubtful. It is impossible to set a single, nationally uniform "access fee." Given the wide variations in technology and building architecture, disputes regarding appropriate compensation would have to be handled on a case-by-case basis, and the FCC would be transformed into a national landlord. This proposal is a prescription for an administrative nightmare.

Discussion

1. Per Se Takings Under *Loretto*

In the NPRM in No. 99-141, the Commission requested comments on the question "whether there would be any constitutional impediment to [its] adoption and enforcement of a nondiscrimination requirement." NPRM, ¶ 58. The Commission noted that, "[u]nder the Fifth Amendment to the United States Constitution, government may not effect a taking of private property without just compensation." *Id.*

The Commission observed that, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Supreme Court "held that because the installation of [cable television] facilities constituted a permanent physical occupation of the landlord's property, it amounted to a per se taking for which just compensation is constitutionally required, regardless of the minimal extent of the occupation or the importance of the public interest served." NPRM, ¶ 58. The Commission also acknowledged that, in *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit struck down an FCC requirement that LECs offer physical collocation to competing telecommunications carriers. "The Court held that because the Commission's order created an identifiable class of cases in which application of the regulation would necessarily constitute a taking, it could not be sustained in the absence of express statutory authority." NPRM, ¶ 58.

Several of the proposals in the NPRM would require building owners to acquiesce in the physical presence of uninvited telecommunications providers on their property. Yet a regulation requiring a building owner who makes her property available to a single telecommunications provider to grant similar access to any and all such providers would effect a "permanent physical occupation" of the property under *Loretto*. As the Commission's statements in the NPRM suggest, the power to exclude others is a traditional property right, and prohibiting property owners from exercising this power therefore raises serious Fifth Amendment questions. Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435. In *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), for example, the Supreme Court held that the Army Corps of Engineers effected a taking by opening up a private marina to members of the general public and therefore depriving the property owners of the right to exclude.[1]

Similarly, in *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987), the Supreme Court upheld the pole attachments provision of the Communications Act, 47 U.S.C. § 224 — which authorized the FCC to regulate the terms of contracts between utility companies and cable operators for the attachment of cable to utility poles — solely on the ground that "nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators," even if the utility companies had already granted telephone carriers or other persons access to the poles. 480 U.S. at 251. The Court in *Florida Power* expressly stated, however, that it did "not decide . . . what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* at 251 n.6.

The Eleventh Circuit recently had the opportunity to apply *Loretto* in the circumstance left open in *Florida Power*. In *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the court of appeals held that the mandatory access provision of 47 U.S.C. § 224 is a per se taking, although the court was able to find that Congress had provided for just compensation. No such provision for just compensation exists in the proceeding at bar, nor is there any clear congressional authorization for the taking.

The scale and practical significance of the property invasion are not determinative. *Loretto*, for example, involved the occupation of a mere 1½ cubic feet on an apartment building's roof. The Supreme Court held that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." 458 U.S. at 438 n.16.

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[1] In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), four Justices recognized that a common carriage obligation for "some" of a cable system's channels would raise Takings Clause questions because it would strip the cable operator of the power to exclude other programmers. *Id.* at 684 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part).

The Commission has employed a similar legal analysis in identifying takings issues in analogous circumstances. In the Local Competition First Report and Order, for example, the Commission held that the pole attachment statute, 47 U.S.C. § 224, does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower.[2] The Commission observed that an overly broad interpretation of Section 224 could impact the owners and managers of small buildings, as well as incumbent LECs, by requiring additional resources to administer rights-of-way located on their properties. In the NPRM in FCC No. 99-141, the Commission added that a broad view of Section 224 would raise "practical and constitutional concerns." ¶ 39. The Commission asked for comments on "whether any interpretation of utility ownership or control might result in the taking of a building owner's property without just compensation within the meaning of the Fifth Amendment to the United States Constitution, and whether any construction should therefore be avoided." ¶ 47.

In the OTARD Second Report and Order, the Commission declined to impose an affirmative obligation on building owners to allow tenant access to place antennas in building common and rooftop areas. 13 FCC Rcd at 23897. With respect to those areas, the Commission expressed concern that a rule prohibiting landlords from excluding antennas would constitute a per se taking because it would authorize a permanent physical occupation of the landlord's property. *Id.* at 23894-96. The Commission found that the relevant statute did not expressly authorize such a taking: "because there is a strong argument that modifying our Section 207 rules to cover common and prohibited access property would create an identifiable class of per se takings, and there is no compensation mechanism authorized by the statute, we conclude that Section 207 does not authorize us to make such a modification." *Id.* at 23897.[3]

In her separate statement in the NPRM in No. 99-141, Commissioner Ness opined, "I have difficulty distinguishing that precedent [the OTARD proceeding] from the instant case." Commissioner Powell found the takings issue even more difficult in this case than in OTARD: "here, we lack a provision analogous to Section 207, but nevertheless contemplate requiring 'nondiscriminatory access' to privately owned rooftops and other areas – a seemingly greater intrusion into the rights of property owners than we could stomach in the OTARD proceeding."

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[2] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16084-85 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[3] The Commission also held that the Fifth Amendment did not prevent the FCC from requiring a building owner to allow a tenant to place an antenna on property that the tenant controls. OTARD Second Report and Order, 13 FCC Rcd at 23882-85.

2. The Irrelevance of *Nollan*

It has been suggested that, under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987), there would be no taking at all so long as the Commission had a "rational nexus" for the forced access it seeks to impose. That is incorrect. On the contrary, *Nollan* strongly supports the rights of property owners. In *Nollan*, the Supreme Court invalidated an attempt by the state to condition issuance of a permit to build an ocean-front residence on the property owners' willingness to grant the public a permanent easement across their beach. The Court deemed it "obvious" that a direct state appropriation of such an easement would constitute a taking of a classic property interest – the right to exclude others – rather than a mere restriction on its use. *Id.* at 831. Notably, *Nollan* held that the Takings Clause applies even to "conditional" takings, where the government imposes a permit requirement prospectively, with none of the forced access and retroactivity difficulties presented by the instant proceeding.

In *Nollan*, the property owners had no right to the building permit they sought from the state, and hence the state was allowed to impose a condition on that permit so long as there was a rational nexus between the state's legitimate purpose and the condition it sought to impose. Here, by contrast, property owners do not need licenses from the FCC in order to rent their property for commercial and residential purposes. Their property rights are a matter of state law, not FCC-granted permits. *See, e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (noting that it is *state* law rather than *federal* law that is the primary source of property rights); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (same).

Hence, the Commission's access proposals cannot be defended as conditions on a license or property right it has granted. Rather, in this case principles of federalism further undermine the validity of the contemplated invasion of traditional state property rights.

3. The Takings Clause Cannot Be Avoided By Framing the Rules As a Regulation of Carriers.

It has been suggested that the takings problem could be avoided if the access requirement were phrased as a condition on carriers rather than on property owners. Thus, it has been proposed that the Commission could prohibit all TSPs from serving a particular building unless the building owner had granted open and nondiscriminatory access.

This suggested circumvention of the *Loretto* principle is unavailing. Rephrasing the access rule as a regulation of TSPs makes only a semantic difference and has the same practical effect on property owners as a direct mandate of access. Under the suggested rule, property owners would have no choice but to grant open access in order to be able to offer their tenants any telecommunications services at all. "[T]he Constitution measures a taking of property not by what [the government] says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

4. The Proposals Cannot Be Defended As Nondiscriminatory Access Rules

The primary constitutional defense of the proposals before the Commission is that they are nondiscriminatory access rules rather than takings. In the NPRM in No. 99-141, the Commission requested comments on whether the constitutional problems might be mitigated if the nondiscrimination requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property, or if it enabled a property owner to obtain from a new entrant the same compensation that it has voluntarily agreed to accept from an incumbent LEC. NPRM, ¶ 60. According to the line of argument suggested by the NPRM, the Commission would be prohibited from requiring a building owner to open its property to any and all telecommunications carriers, but the Commission would (supposedly) be free to require that a building owner provide access to new telecommunications carriers on the same terms and conditions as she offers to incumbents. This purported distinction collapses, for several reasons.

First, the "nondiscriminatory access rule" argument is premised on the fiction that property owners have freely and voluntarily opened their buildings to incumbent telecommunications carriers. In many if not most instances, however, property owners had no real choice. Prior to the 1996 Telecommunications Act, LECs often enjoyed exclusive local franchises, so that a building owner faced with the practical necessity of providing telecommunications services to her tenants had no option but to grant access to the incumbent carrier. In some states building owners operated under the threat, if not the actual exercise, of eminent domain powers by existing telecommunications carriers to obtain access. Hence, it is incorrect to treat existing carriers as invited guests. In fact, using forced access as a lever to open a building owner's property to all telecommunications carriers would compound the Fifth Amendment violation, not ameliorate it.

Second, even if building owners had acted voluntarily in granting access to incumbent LECs in the past, imposing a new "nondiscrimination" rule would change the rules mid-stream and create a serious problem of retroactivity. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The settled investment-backed expectations against which property owners granted access in the past provided that the owners did not thereby engage in a wholesale waiver of their right to exclude. *See also GTE Northwest, Inc. v. Public Utility Commission*, 900 P.2d 495, 504 (1995) (en banc) ("[T]he facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to something less than a taking.").

Third, the holder of a right to exclude is by definition entitled to exercise it selectively. A homeowner who invites her friends to a dinner party does not thereby invite all members of the public into her house. Thus, courts have repeatedly rejected attempts to allow "nondiscriminatory access rules" to swallow up the right to decide whom to let in and whom to exclude. For example, in *Loretto* the Supreme Court explained that "[i]t is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained

by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." 458 U.S. at 439 n.17.

Similarly, the provision at issue in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), could have been described as a "nondiscriminatory access rule." The provision stated that "'a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.'" *Id.* at 1328 (quoting 47 U.S.C. § 224(f)(1)). Nonetheless, the Eleventh Circuit held that the provision effected a taking and that the "nondiscriminatory access rule" argument was "foreclosed by *Loretto*." *Id.* at 1331. "Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* See also *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (narrowly construing section 621(a)(2) of the Communications Act, which grants cable companies access to dedicated easements, in order to avoid constitutional questions), *cert. denied*, 506 U.S. 862 (1992); *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812, 814-15 (8th Cir. 1993) (holding that granting cable companies broad access to utility easements "dedicated" to compatible uses would give rise to "serious questions" under "the Takings Clause of the federal constitution"); *Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1174 (4th Cir. 1993) (similar);*Cable Investments Inc. v. Woolley*, 867 F.2d 151, 159-60 (3d Cir. 1989) (similar).

The proposals in No. 99-141 cannot be defended by invoking *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). *Heart of Atlanta* involved not an access rule but a prohibition on one particularly offensive criterion – race – which places of public accommodation could use in selecting among potential guests. Moreover, under common law background principles, innkeepers have long been required to grant open access to all members of the public and to accommodate all unobjectionable persons for whom they have space. *See* 379 U.S. at 260. These background principles form an important element of a public accommodation's property rights. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (property rights are subject to "restrictions that background principles of the State's law of property and nuisance already place upon land ownership"). Title VII, as upheld in *Heart of Atlanta*, simply codified this narrow and pre-existing regulatory limitation on property rights.

By contrast, what is at issue in No. 99-141 is private property that (unlike a motel) has never been opened up for general public access. Accordingly, in *Loretto* the Supreme Court explicitly addressed and distinguished *Heart of Atlanta* (and other cases involving fire regulations and rent controls):

> In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. . . . So long as these

> regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

458 U.S. at 440.

5. The Need for Clear Congressional Authorization

It has been suggested that, even if the access proposals would work a taking, the Commission could satisfy the requirements of the Fifth Amendment by devising a scheme for just compensation. But even if it were possible to design a feasible system for compensation (which I doubt), the Communications Act does not contain the requisite clear authority for the Commission to undertake such an effort. There is no provision in the Act expressly arming the Commission with the power of eminent domain over the property of building owners or the power to create a compensation scheme. The Pole Attachment Act, for example, does not grant pole attachment access to all forms of private property but only to "a pole, duct, conduit, or right-of-way *owned or controlled by a utility*." 47 U.S.C. § 224(a)(4) (emphasis added). The existing ducts and rights-of-way in buildings are, by and large, not owned or controlled by public utilities, whose property rights are defined by state law and cannot simply be decreed, *ipse dixit*, by the FCC. In fact, for the FCC to assign these ducts and conduits to utilities would itself constitute a taking. Both the universal access proposal, and the proposal to interpret Section 224 to require utilities to "share" any and all access rights they currently have, represent an attempt to authorize physical occupation of property presently owned by building owners. The Government may not divest a private person of his property "by ipse dixit. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (citing "a law that takes property from A. and gives it to B" as an archetypal taking).

In the NPRM in No. 99-141, the Commission requested comments on the question "whether the imposition of a nondiscrimination requirement on building owners would be within [the FCC's] statutory authority." ¶ 56. The Commission identified its ancillary jurisdiction and other general grants of power as potential sources of authority.

However, these possible bases of Commission power are inadequate. As Commissioner Powell warned in his separate statement, "[w]e have no specific statutory provision that directs, or 'empowers,' us to assert regulatory authority over owners of private property. Instead, this item proposes to rely solely on 'ancillary' jurisdiction. Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf." "[T]his agency should not move toward rules that would effectuate a per se taking without specific authority to do so."

Commissioner Powell was correct. Under the principles of the *Steel Seizure* case, federal

executive or administrative action which effects a taking — and therefore triggers Congress' exclusive powers of lawmaking, raising revenue, and appropriating money from the Treasury, Art. I, § 8, cl. 1; Art. I, § 9, cl. 7 — must be enjoined unless there is clear congressional authorization for the action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *id.* at 631-32 (Douglas, J., concurring). "When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). "Where administrative interpretation of a statute" effects a taking, "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers . . ." *Bell Atlantic*, 24 F.3d at 1445.

The Supreme Court has long held that statutes shall not be read to delegate the congressional power to take property unless they do so "in express terms or by necessary implication." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904); *see also Regional Rail Reorganization Act Cases*, 419 U.S. at 127 n.16. That principle implements the general rule that statutes are to be construed where possible to avoid constitutional questions. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (adopting narrowing construction of statute to avert a takings question). Accordingly, the deference to administrative action ordinarily afforded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable. *See Bell Atlantic*, 24 F.3d at 1445.

This principle applies whether the compensation is to be paid by the government or by a third party. In *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1444 (D.C. Cir. 1994), for example, the D.C. Circuit invalidated a physical collocation requirement even though the Commission had allowed for tariffs permitting LECs to recover from new entrants the reasonable costs of providing space and equipment. The court explained that the plain statement rule still applied:

> Because the Commission allowed LECs to file new tariffs under which they will obtain compensation from the CAPs for the reasonable costs of co-location, it might be thought that there is no threat to the appropriations power at all. But in fact the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment.

Id. at 1445 n.3.[4] The residual risk to the public fisc therefore demanded clear congressional

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[4] The D.C. Circuit's recent decision in *National Mining Association v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999), is by no means at odds with *Bell Atlantic*'s use of the doctrine of constitutional doubt. In *National Mining*, the court addressed an allegation that certain regulations requiring mines to compensate landowners for subsistence damage might cause a

authorization for the Commission's action. Moreover, because the eminent domain power has traditionally been seen as legislative in nature, administrative action which effects an unauthorized taking usurps Congress' lawmaking powers, as well as its power of appropriation. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). And any suggestion that the constitutional situation is altered if the taking is financed by levies on selected parties rather than by taxes on the general public both flies in the face of *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 243-45 (1984) (same standards apply in both situations), and overlooks the fact that the taxing power is no less legislative in character when levied on the few than when levied on the many. *See, e.g., NCTA v. FCC*, 415 U.S. 336, 342-43 (1974) (invalidating FCC fee schedule and narrowly construing congressional statute so that Commission's authority was limited to collecting "fees" on CATVs and other broadcasters, and did not include levying "taxes" on those few entities).

The importance of a plain statement from Congress is heightened by the dialogue between the Commission and Congress on takings issues in recent years. When the Supreme Court held that the Pole Attachment Act did not mandate access, *see FCC v. Florida Power Corp*, Congress responded by authorizing takings (in the form of mandatory access to utility poles) with a clear statement. 47 U.S.C. § 224(f)(1). When the D.C. Circuit held that the FCC lacked authority to mandate physical collocation, *see Bell Atlantic Tel. Cos. v. FCC*, Congress responded with 47 U.S.C. § 251(c)(6). Hence, Congress understands the need for a plain statement authorizing an administrative taking, and its silence with respect to real estate access speaks volumes.

Parenthetically, it should be noted that the Fifth Circuit Universal Service decision does not lend any support to the FCC on the clear statement issue. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999), *cert. granted*, No. 99-1244. The Fifth Circuit did not pass on the clarity with which FCC authority to take or to tax must be established by Congress. Rather, the Fifth Circuit addressed the wholly separate issue of whether the E-rate represented an impermissible agency usurpation of non-delegable congressional taxing authority. The court of appeals responded that even that issue had not been properly presented but that, if it had been, the court would have ruled that the E-rate was not vulnerable to the "non-delegable tax" attack because it was not even a "tax," but a "fee," for purposes of Art. I, § 8, cl. 1.

Aside from the constitutional issue, there would be enormous practical problems in establishing an FCC just compensation scheme. It is impossible to set a single, nationally uniform "access fee." Given the wide variations in technology and in building architecture, disputes regarding appropriate compensation would have to be handled on a case-by-case basis – which would create nothing short of an administrative nightmare. There is no reason to believe that

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taking by abrogating previously negotiated contractual waivers by the landowners. Because this allegation rested on a highly speculative and hypothetical application of the *regulatory takings doctrine*, and because there was no evidence that the regulation would constitute a taking in any identifiable set of cases, the court easily distinguished *Bell Atlantic* and held that the "rather implausible" specter of possible takings would not trigger the avoidance canon.

existing rents (if any) paid to property owners by incumbent LECs under conditions of forced access come anywhere close to the "just compensation" (i.e., *current* fair market value) that would be required under the Fifth Amendment. In many instances, incumbent carriers do not pay rents to property owners; indeed, many owners are simply unaware of the legal status of the wires and conduit running into their building. In any event, access agreements entered in prior years under different market conditions are not permissible proxies for just compensation today. To be adequate, compensation must represent "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943).

In short, either the FCC would be transformed into a national landlord – swamped by innumerable building-by-building disputes – or the Commission would be forced to shift this huge administrative burden onto the shoulders of state and local regulators. These regulators, already struggling with local interconnection agreements, will be unpleasantly surprised to discover that they have involuntarily inherited a mammoth new regulatory task. Twenty-five states have themselves rejected open access proposals as impractical and unwise. Overriding the states' decision with a new federal mandate is a further affront to federalism.

For all these reasons, the nondiscriminatory access requirement proposed in No. 99-141 would constitute a per se taking beyond the Commission's authority to impose.