suggestion that LECs would somehow be unable to accomplish with new technology what cable operators have already accomplished with older technology is nonsense.

It is important to realize that by definition, our proposed community-specific approach imposes PEG obligations on the OVS operator that are no greater or less than those imposed on the cable operators against whom they will compete. It thus encourages parity and fair competition. Moreover, any OVS operator that finds the "match or negotiate" formula unattractive always has another option: it can obtain a cable franchise and become a cable operator instead (or, for that matter, pursue other options available under the Act, such as wireless transmission). Thus, comparable PEG obligations help to ensure that both OVS and cable subscribers in the same area will be equally well served, while imposing no disadvantage on either competitor.

5. PEG channels should be provided to all subscribers.

The principal purpose of PEG channels is to provide access to electronic media for individual citizens and groups that traditionally have had no means of contributing to television programming. Such access fosters a wide diversity of information sources for the public, including important but not commercially lucrative programming; the "electronic soapbox"; participation by diverse members of the public, including minorities; and community dialogue over important issues and

events.[50] This diversity is a fundamental goal of the First Amendment of the United States Constitution.[51] This goal would be thwarted if PEG channels were not made available to all OVS subscribers.[52]

The provision of OVS PEG channels to all subscribers would be consistent with the Act's requirement that OVS operators' PEG obligations be no less than the PEG obligations of cable operators. In this respect, the OVS PEG channels (along with must-carry channels) could be part of a "basic package" similar to the basic tier on a cable system.[53]

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[50] For example, the City of St. Louis produces and cablecasts four to six town hall meetings per year, so that citizens who cannot attend the meetings can still know what was discussed. Locally produced election night coverage can make immediate information available when commercial broadcast outlets do not wish to interrupt their standard evening lineups, giving viewers additional options. Similarly, educational channels can provide important distance learning opportunities during the day and broader community education programs by night. See also attached Comments at 32-33 and Appendix A thereto.

[51] See, e.g., H.R. Rep. No. 934, 98th Cong., 2d Sess. at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4667.

[52] "There simply is no point in requiring diverse information sources and services if a large segment of the population . . . can be denied access to that information . . .". See id. at 36, 4673.

[53] See 47 U.S.C. § 522(3). This scenario is consistent with the Commission's notion that the PEG channels do not count against the maximum one-third of capacity for which the OVS operator may select programming when carriage demand exceeds the capacity. See NPRM ¶ 19, ¶ 57 n.74. It should be noted, however, that in this case the OVS operator's programming allotment should not be one-third of the entire channel capacity: it should be one-third of the non-PEG channel capacity, since the PEG (or must-carry) capacity is an obligation of the entire system in the public interest and should not be attributed solely to the independent programmers.

6. The Commission must ensure that any equipment necessary to deliver PEG programming to local communities is made available.

In the event that special equipment is necessary for local communities to have their PEG programming distributed over the OVS, the Commission must promulgate rules that ensure that the OVS operator will provide that equipment. The failure of the Commission to require the provision of such equipment could make the availability of PEG channel capacity meaningless and preclude actual participation by most PEG producers. For example, to the extent that available system capacity may be primarily or wholly digital or compressed, it will be necessary for the OVS operator to handle conversion from the more common analog format that is more accessible (and affordable) to PEG programmers. Otherwise, the expense of conversion facilities could form as prohibitive a barrier to PEG programmers as a discriminatory denial of capacity.

Similarly, where an OVS is not capable of carrying live broadcasts, the Commission should ensure that program sources of whatever type (typically videotape) will be transposed by the OVS operator into a format that is compatible with the OVS, whether digital or analog, multicast or on-demand, tape or hard disk. Thus, PEG programming should be made available as soon as the necessary conversions can be made, as will presumably occur with any other live programming. Commission regulations must ensure that PEG programs are treated equally with other programs in scheduling such conversion.

In the short term, this means that all OVS PEG channels should be carried on analog channels, unless the franchising authority agrees to an alternative arrangement.

D. Other Title VI Provisions Must Reflect the Purposes of the OVS Provision.

In addition to the express provision for PEG access, new Section 653(c)(1)(A) provides that OVS operators will be subject to certain other Title VI provisions.

1. Program access.

The role of the program access rules (requirements of 47 U.S.C. §§ 536 and 548) in OVS is the same as with cable systems: to ensure that potential competitors can obtain the programming necessary, on the prices, terms, and conditions that are necessary, so that they can provide true competition. To the extent that the Commission's current rules achieve that end, there seems no reason not to apply them to OVS as well. After all, OVS and cable systems will at best be duopolistic competitors in video distribution. For the same reasons, OVS-originated programming should be equally available to other competing video delivery systems.

2. Negative option billing.

The Commission should be able to apply negative option billing standards (47 U.S.C. § 543(f)) without the complications introduced by the Commission's rate regulation rules in the cable context. Since all OVS services will by definition be new, there

will be no need to allow the various negative option exceptions that the Commission has allowed for the restructuring of pre-existing cable services offerings. In accordance with the purposes of the statute, the Commission's rules should focus on providing clear choices to subscribers, rather than on preserving tier structures or packages designated by operators.

E. The 'Fee In Lieu Of Franchise Fees' Paid By An OVS Operator Must Similarly Be Matched To the Local Cable Operator's Obligations.

The Act authorizes a local franchising authority or other governmental entity to require an OVS operator to pay fees in lieu of cable franchise fees, based on its gross revenues for the provision of cable service.[54] The intent of the statute is to ensure that cable systems and OVS have the same obligations in the franchise fee area as well as in PEG requirements. Thus, the statute provides that the rate at which OVS "in lieu of" fees are paid may not exceed that applied to a cable operator in the same franchise area.[55] For the same reason, as with PEG requirements, an OVS operator should be required to pay at a rate no less than that of a cable operator in the same franchise area.

To ensure that OVS and cable systems are subject to comparable obligations, the principles of 47 U.S.C. § 542 should apply here as well. Thus, for example, an OVS operator's fees should be calculated based on all revenues derived from the

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[54] See NPRM ¶ 6.

[55] 1996 Act, section 302(a) (adding new § 653(c)(2)(B)).

"operation of the [OVS] system to provide cable services." 47 U.S.C. § 542(b). That should include not only recurring subscriber revenues for programming but also, as is the case with cable operators, installation, disconnection, reconnection, change-in-service and equipment fees. It also means that, as is the case with cable operators, non-subscriber revenues related to cable service must be included as well. Examples include late fees and administrative fees; fees, payments, or other consideration that the OVS operator receives from programmers for carriage of programming on the system; advertising revenues; and revenues from home shopping and bank-at-home channels. Any other construction of the "fee in lieu of" provision would result in an unlevel playing field between the OVS operator and the cable operator.

IV. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY.

A. A Cable Operator Cannot Be An OVS Operator.

As the NPRM points out, the statute draws an explicit distinction between LECs and cable operators with respect to OVS.[56] New § 653(a)(1) says: "A local exchange carrier may provide cable service . . . through an open video system that complies with this section." When referring to cable operators, on the other hand, the Act uses distinctly different language: "To the extent permitted by such regulations as the Commission

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[56] NPRM, ¶ 64.

may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section."[57]

If Congress had intended that a cable operator could do what a LEC can do under this section — operate an OVS — Congress would have used the same term ("cable service") rather than a different term ("video programming") to describe the cable operator's permissible role in OVS. Since Congress did not do so, the only logical conclusion is that Congress envisioned that only a LEC is eligible to be an OVS operator. Thus, properly read, the Act mandates that only a LEC may operate an OVS, but a cable operator — like any other "person" — is eligible to be an independent programmer on the system, subject to Commission determination of the public interest.

The reason for this difference is evident in light of the goals of the OVS provisions. The Conference Report makes clear that the reason for OVS is to provide an additional route by which LECs may enter the video market to compete with established cable operators.[58] An incumbent cable operator, however, certainly does not need special encouragement to enter: it is

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[57] 1996 Act, section 302(a) (adding new § 653(a)(1)) (emphasis added).

[58] See Conference Report at 177 ("telephone companies need to be able to choose from among multiple video entry options to encourage entry" [emphasis added]). Cf. NPRM, ¶ 64 (overall goals of the OVS provisions include "enhancing competition and maximizing consumer choice").

already there. No purpose would have been served for Congress to allow cable operators to become OVS operators. Certainly there is no suggestion in the legislative history that OVS was cynically intended to allow a cable operator to abrogate its existing franchise obligations, which would appear to be the result of allowing a cable system to be converted to an OVS.

Thus, the statutory reference to cable operators indicates that a cable operator, like any other person, may be a programmer on an OVS, but not an OVS operator. It seems clear that Congress inserted this reference to clarify the ongoing dispute over whether a cable operator could be a programmer on a video dialtone system under the Commission's former rules. There is no need to suppose that Congress intended, absurdly, to apply entry incentives to cable operators that are already in the video market.

B. Even If the Commission Were To Conclude That A Cable Operator May Be An OVS Operator, Separate Local Community Consent Would Still Be Required.

Even if the Commission were to conclude (incorrectly) that cable operators may become OVS operators, any such FCC approval would be subject to the public interest, convenience, and necessity.[59] The Commission would certainly need to consider as part of the public interest any effect the cable operator's transition to OVS might have on the benefits the cable operator had previously agreed to provide to the community through its

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[59] See 1996 Act, section 302(a) (adding new § 653(a)(1)); NPRM, ¶ 65.

cable franchise, including franchise fees, PEG channels, facilities, and services, and the like.[60] The Commission would also have to face the issue of whether converting a cable system to an OVS would remove it from the scope of the buyout restriction in new section 652 and thus tend to reduce competition by allowing consolidation of cable and LEC systems.

One key element the Commission cannot ignore, however, is whether the affected local franchising authority has consented to a cable operator's conversion to OVS. A cable system cannot become an OVS without prior local community approval, for at least two reasons. First, unlike a LEC, a cable operator's only right to be in the public rights-of-way comes from its cable franchise. Thus, if the cable operator were to try to abandon its cable franchise to become an OVS operator, the operator would thereby forfeit its right to be in the local public rights-of-way at all, and would be subject to immediate eviction for abrogating its franchise agreement with the local community.

Second, a cable franchise is a contract between the cable operator and the local government, under which the community allows the operator to use the public rights-of-way in return for certain conditions and benefits. If the Commission were to make

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[60] See section V.B.3 infra regarding the infrastructure benefits of PEG requirements in cable franchises. Similarly, cable franchises generally require service to be extended to all parts of the community to the extent commercially feasible, and thus promote the universal service goals of the Act. The Commission could hardly condone the conversion of such a cable system to an OVS bound by no universal service requirements, which could be allowed to abandon less lucrative neighborhoods, schools, and business districts.

rules that allowed a cable operator unilaterally to abandon the local government's contractual rights under that franchise agreement, that would be a taking of the local government's property rights under contract.[61] As such, it would be vulnerable under all of the Fifth Amendment arguments set forth in section V below.

As also noted below, the short review period for OVS certification approval means that a prospective OVS operator must be required to make all the necessary showings at the time of application. Thus, any OVS certification the Commission may allow a cable operator to present must include an express agreement by each affected local franchising authority assenting to the conversion. For the reasons discussed below, it must also include an agreement between the operator and the local government authorizing use of the public rights-of-way for OVS purposes. An OVS certification without the necessary local government agreements should be considered facially incomplete and rejected.

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[61] It must be kept in mind that the conditions of franchise agreements are voluntarily agreed to by cable operators, as are the conditions of any contract negotiated for mutual benefit by two businesses. The Cable Act ensures that no cable operator can be compelled to undertake commercially impracticable obligations. See, e.g., 47 U.S.C. § 545.

C. A Cable Operator May Provide Programming Through An OVS, But Only If Consistent With Its Cable Franchise and the Public Interest.

The Act seems clearly to contemplate that a cable operator may be eligible to be among the independent, unaffiliated video programmers on an OVS, at least in some instances — but only to the extent the Commission deems such carriage "consistent with the public interest, convenience, and necessity."[62] The NPRM, however, disturbingly suggests that it should be left to the "discretion" of the OVS operator to decide whether a cable operator may become a programmer on the OVS system.[63]

While such discretion might certainly be convenient to the OVS operator, there is no reason to think it would be so to the public. To the contrary, allowing the incumbent cable operator and the OVS operator to engage in such arrangements — perhaps trading carrier and programmer relationships in different geographic areas — raises the troubling possibility of effectively allowing LECs and cable operators to end-run the Act's prohibitions on mergers between cable operators and LECs in the same area. Conversely, in some cases, allowing cable operators to consume capacity on an OVS might be construed as anticompetitive foreclosure of capacity otherwise available to its competitors.

These are not matters that should be left to the "discretion" of either the OVS operator or the cable operator.

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[62] 1996 Act, section 302 (adding new § 653(a)(1)).

[63] NPRM ¶ 15.

Instead, the Commission should review and apply the requisite public-interest analysis on a case-by-case basis.

V. THE OVS CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY.

Any OVS rules adopted by the Commission must acknowledge local governments' rights — specifically, their property interests in the public rights-of-way within their jurisdictions that OVS systems will use. Thus, an OVS certification must show that the prospective OVS operator has obtained all necessary local consents to use of the rights-of-way for OVS, and any approval of an OVS certification by the Commission should be expressly conditioned on the applicant's having and maintaining those consents.

A. An OVS Remains Subject To the Right of Local Communities To Manage Their Public Rights-of-Way and To Receive Fair Compensation For Their Use.

While the 1996 Act makes the Commission responsible for approving a LEC's certification of compliance with Commission rules, the FCC, as a federal agency, lacks the power to grant an OVS operator permission to use local public rights-of-way that do not belong to the federal government. Any suggestion in the OVS rules that the Commission's approval makes separate approval by local rights-of-way owners unnecessary would violate the Takings Clause of the Fifth Amendment.

1. Local governments have an inherent right to manage and receive compensation for their rights of way.

Local governments are landlords responsible for managing the use and occupation of the public rights-of-way. It is the responsibility of local governments (or in some cases state governments, as noted below), to schedule common trenching and street cuts for the most efficient use of local rights-of-way; to repair and resurface streets damaged by such construction; to ensure public safety in the use of the rights-of-way by gas, telephone, electric, cable, and similar companies; to keep track of the various systems using the rights-of-way so that one system operator does not interfere with another's facilities; and, not least, to obtain fair compensation for the public from the private, profit-making use of this valuable public property.[64]

Neither the Commission nor the federal government can grant a right to use public rights-of-way that do not belong to the federal government. Over a century ago, the Supreme Court recognized the limits on federal authority to infringe on the rights of local governments to control their property, including local rights-of-way.

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[64] In the vast majority of states, the right to manage and receive compensation for the public rights-of-way belongs to the local government within whose jurisdiction the rights-of-way exist. Thus, these comments speak generally in terms of local government authority. In some states, however, that right is in part reserved by the state government, and that authority over the rights-of-way is exercised at the state level. But in no case may the federal government dispose of that right at will (except, of course, with respect to property owned by the federal government). The Commission must therefore ensure in its rules that right-of-way issues are left to be addressed according to the way each state has chosen to allocate this responsibility.

> It is a misconception . . . to suppose that the franchise or privilege granted by the act of 1866 [the federal post roads act] carries with it the unrestricted right to appropriate the public property of a state. . . . No one would suppose that a franchise from the federal government . . . would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . . . And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state.[65]

In the 1996 Act, Congress explicitly recognized local governments' right to manage and receive compensation for use of local rights-of-way by telecommunications service providers and OVS providers. In discussing the OVS provisions of the Act, for instance, the Conference Report states that "The conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner."[66] Similarly, new § 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis . . .[67]

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[65] City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 95, 13 S.Ct.485, 488 (1893). See also Western Union v. Penn. R.R., 195 U.S. 540, 557 (1904)(citing St. Louis v. Western Union) (franchise privilege could only be exercised subordinate to public rights and only upon payment of just compensation).

[66] Conference Report at 178.

[67] 1996 Act, section 101(a) (adding new § 253(c)). New § 653(c)(2)(B) provides that an OVS provider "may" be charged a fee "in lieu of" a cable franchise fee. As noted in section

2. The right to control local rights-of-way is a property right like that of any private property owner, which is protected under the Fifth Amendment.

As the St. Louis and Western Union cases make clear, local governments' interests in their rights-of-way are property rights.[68] Like the property rights of individuals and private corporations, those of local governments are protected by the Fifth Amendment of the Constitution.

The Supreme Court has ruled that the takings clause of Fifth Amendment encompasses the property of state and local governments, and the same principles of just compensation apply to local government property interests as to the property interests of private persons.[69] Thus, a local government has the same rights against federal appropriation of its property as did Bell Atlantic against required physical collocation of a competitor's wires in its central offices.[70] And just as an

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V.B.3, however, this provision, without more, does not satisfy the just compensation requirement of the Fifth Amendment.

[68] State courts have reached the same conclusion. See, e.g., Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal. 2d 272, 282 P.2d 36, 43 (1955) (franchise fee is "not a tax" but "compensation for the privilege of using the streets and other public property within the territory covered by the franchise"); City of Albuquerque v. New Mexico Public Service Commission, 115 N.M. 521, 854 P.2d 348 (1993); City of Montrose v. Public Utility Commission of Colorado, 629 P.2d 619 (Colo. 1981); Allegheny v. Millvale, Etna and Sharpsburg Street Ry. Co., 159 Pa. 411, 28 A. 202 (1893).

[69] See, e.g., United States v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451 (1984); St. Louis, 148 U.S. at 95.

[70] See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

apartment building owner has the right to grant or deny consent to a telecommunications company that wishes to run cables through or on its building,[71] a local government may grant or deny consent to a telecommunications company that wishes to run cables through rights-of-way belonging to that local government, and any attempt by the federal government to take away that right of consent is subject to the Takings Clause.[72]

3. Any Commission intrusion into local governments' property rights would violate the Fifth Amendment.

a. Commission-mandated access to local rights-of-way would be an impermissible permanent physical occupation.

Any attempt by the FCC in its OVS rules to give OVS providers the right to place OVS systems in local rights-of-way, without regard to local governments' proprietary interests in such rights-of-way, would violate each affected local government's rights under the Fifth Amendment. Any federal grant of authority to build and operate an OVS system on a local governments' rights-of-way would be a "taking" within the meaning

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[71] Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

[72] The property interests protected against federal takings are not confined to fee simple interests. Thus, courts have held that property rights protected by the Fifth Amendment broadly include rights-of-way held either in fee or otherwise for the public trust, including easements and leasehold interests. See, e.g., Donnell v. United States, 834 F. Supp. 19 (D. Me. 1993) (easements are property protected under the Fifth Amendment); National R.R. Passenger Corp. v. Faber Enterprises Inc., 931 F.2d 438 (7th Cir. 1991) (leasehold interests are property interests protected by Fifth Amendment).

of the Fifth Amendment, subject to the constitutional requirement of just compensation.[73]

To require a local government to permit a private party to occupy space and construct an OVS system in its rights-of-way without the local government's consent would be directly analogous to Loretto, where the Court ruled that such a physical intrusion plainly crossed the line between permissible regulation and impermissible taking. Where the "character of the governmental action" is "a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[74]

b. Forced OVS provider access rises to the level of an unconstitutional taking.

An OVS system will inherently make a physical intrusion into the local public rights-of-way. Nor is this a merely minimal intrusion: every new line (or replacement of pre-existing telephone wire with new fiber or video cable) places an increased burden on the rights-of-way in the form of immediate damage from

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[73] Nor would a mere offer or claim of compensation (such as the "fee in lieu of" provisions in new § 653(c)(2)(B)) render such a federal grant constitutional. As the Court said in Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

[74] Loretto, 458 U.S. at 434-35 (emphasis added) (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

new trenching and street cuts, more frequent street resurfacing due to reduced life from cuts, new facilities on crowded poles, and the like. OVS construction also will cause increased traffic congestion, disruption and inconvenience for the local government and the residents it represents. Practically speaking, any invasion of the local public rights-of-way by OVS operators will be far more extensive than the intrusion in Loretto.[75]

In any case, no de minimis test can validate a physical taking. The size of the affected area is constitutionally irrelevant.[76] Any forced access to the local rights-of-way contemplated by an OVS certification would be legally indistinguishable from the intrusion in Loretto, where the Court found a "permanent physical occupation" of the property.

4. Because Congress did not explicitly authorize a taking for OVS, the 1996 Act must be construed so as not to require such a taking.

The authority to take property must be explicitly authorized by Congress.[77] Courts will look to the plain language of the 1996 Act to determine if Congress has explicitly declared its intent to authorize a taking. If such language is ambiguous,

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[75] See, e.g., Mary Anne Ostrom, Residents Say Pac Bell Is Out Of Order, San Jose Mercury, Aug. 14, 1995, at 1A, 8A (impact of Pacific Bell construction in San Jose).

[76] In Loretto, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." 458 U.S. at 436-37.

[77] See Hooe v. United States, 218 U.S. 322, 31 S. Ct. 85 (1910).

courts will look to the legislative history.[78] And courts will not construe any law to be a taking if it can be construed to avoid such a result.[79]

The OVS provisions of the 1996 Act language contain no language authorizing the FCC to appropriate local governments' property rights. Nor does the legislative history reveal any intent by Congress to effect a taking of local government property.[80]

Under such circumstances, the OVS provisions of the 1996 Act must be construed to avoid sanctioning a taking of local public property interests. In the analogous context of construing Section 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), which allows cable operators to use compatible public utility easements under certain circumstances, courts have consistently construed the provision to avoid a takings problem. Thus, in Media General Cable, the Fourth Circuit refused to extend 47 U.S.C. § 541(a)(2) to cover the installation of cable wires in compatible private easements in common areas of a condominium. Joining the Eleventh Circuit's view earlier in Cable Holdings, the court reasoned that any other construction of the statute would render

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[78] See Cable Holdings of Georgia vs. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), reh'g en banc denied, 988 F.2d 1071, cert. denied, 506 U.S. 862.

[79] See Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (4th Cir. 1993).

[80] By contrast, Congress made specific provision when it intended to dedicate federal property — which Congress could rightfully control — for the use of new telecommunications services. See 1996 Act, section 704(c).

Section 541(a)(2) indistinguishable from the New York statute held unconstitutional in Loretto.[81] The Fourth Circuit recognized that it had a general duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction."[82]

Given the lack of any clear intent in the 1996 Act to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has consistently been sensitive to such issues, courts are unlikely to be willing to construe the OVS provisions of the Act to grant the FCC authority to promulgate any rules that would effect a taking of local public property. Any contrary construction, of course, would subject the federal government to liability for just compensation.

B. Congress Did Not Give the Commission Power to Take the Property Interests of Local Governments for OVS.

1. The Commission has no power of eminent domain.

As the D.C. Circuit made clear in the Bell Atlantic case, Congress did not confer the power of eminent domain on either the

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[81] Media General, 991 F.2d at 1175.

[82] Id. at 1174-75. Accord, Bell Atlantic, 24 F.3d at 1447; Cable Investments v. Woolley, 867 F.2d 151 (3d Cir. 1989) (Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking); Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994) (no evidence of an express dedication); TCI of North Dakota, v. Shriock Holding Co., 11 F.3d 812 (8th Cir. 1993) (same).

Commission or the communications companies it regulates.[83] Only Congress, not the Commission, has the power of eminent domain, and such power must be exercised pursuant to specific legislation.[84] Unless Congress specifically delegates that power, no administrative agency may exercise it.[85] A delegation of the right of eminent domain must be in express terms or by necessary implication.[86]

The OVS provisions of the 1996 Act, however, make no such delegation by express terms. Moreover, since the Commission certainly could promulgate OVS rules without infringing on the property interests of local governments (simply by requiring OVS operators to obtain any required local consents), the 1996 Act does not create any such right by necessary implication. The Commission therefore has no authority to appropriate local rights-of-way by eminent domain.

Moreover, even if the 1996 Act were implausibly viewed as conferring on OVS providers some right to use local public rights-of-way that belong neither to the federal government nor those providers (and it cannot), it would not follow that those providers could use the rights-of-way free of charge. In City of St. Louis v. Western Union Telegraph Company, the Court made it

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[83] Bell Atlantic, 24 F.3d at 1445.

[84] Carmack v. United States, 135 F.2d 196 (8th Cir. 1943).

[85] Eden Memorial Park Ass'n v. Superior Court in and for Los Angeles County, 11 Cal. Rptr 189, 189 Cal. App. 2d 421 (Cal. App. 1961).

[86] Hooe, 31 S. Ct. at 85, 88.

perfectly clear that even if Congress authorized carriers to use local public rights-of-way, such authorization did not carry with it the power to take non-federal property without compensation.[87]

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in U.S. district court under 28 U.S.C. § 1358. Nothing in the 1996 Act authorizes the Commission to deviate from this prescribed procedure.

2. Congress gave the Commission no implied authority to expose the federal government to fiscal liability.

The Commission's lack of explicit statutory authority to engage in a taking of property cannot be rectified by any reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress.[88] Since the Constitution assigns Congress exclusive control over appropriations,[89] the courts have required a clear expression of intent by Congress to obligate the federal government for claims that require an appropriation of money.

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[87] St. Louis v. Western Union Tel. Co., 148 U.S. at 92. See also Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900)).

[88] See generally Hooe v. U.S., 31 S. Ct. at 87.

[89] See U.S. Const., Art. I, §§ 8 and 9.

In Bell Atlantic, the D.C. Circuit declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to avoid such a taking wherever possible. The court further made clear that this narrow construction of the laws is necessary to prevent encroachment on the exclusive authority of Congress over appropriations.[90]

This means that any FCC rules that would accomplish a taking will not receive the traditional deference accorded to administrative agency interpretations.[91] The reason is that any deference on such a matter would provide the FCC with unbounded power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U.S. Treasury.[92]

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[90] Bell Atlantic, 24 F.3d at 1445.

[91] See Chevron v. NRDC, 467 U.S. 837 (1984).

[92] Even if the 1996 Act could be construed to give the Commission authority to effect a taking in this instance (and it does not), any such taking would be unlawful under the Anti-Deficiency Act, because Congress has not appropriated funds to compensate property owners. See 31 U.S.C. § 1341. The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures — including those caused by executive agencies — within the limits of amounts appropriated by Congress. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a federal government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. See Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9, 116 S. Ct. 981 (1996). The Anti-Deficiency Act prohibits the Commission from interpreting the OVS provisions of the 1996 Act in such a way as to expose the federal government to the inevitable filing of claims by local governments founded on the Fifth Amendment.

3. The "Fee In Lieu Of" provision in Section 653 does not satisfy the requirement of just compensation.

As noted above, any federal statute that is construed to authorize a lawful taking must provide for just compensation in order to be valid.[93] But the FCC cannot avoid the takings objection to any mandated access to the local public rights-of-way its rules might allow by requiring the OVS provider benefitted thereby to make a nominal payment to the local government for access. In Loretto, the New York statute at issue provided for a one-dollar fee payable to the landlord for damage to the property. The Court concluded that the state legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the Fifth Amendment. Thus, neither the Commission nor Congress can prescribe a nominal amount as compensation for right-of-way access. Rather, the affected local government would be constitutionally entitled to compensation measured by fair market value.[94]

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[93] See United States v. 50 Acres of Land, 469 U.S. at 25; Western Union Tel. Co. v. Penn. R.R., 195 U.S. at 557 (no right-of-way can be appropriated without payment of just compensation); United States v. Acquisition, 753 F.Supp. 50 (D. Puerto Rico 1990) (power to extinguish easement rights is subject to compensation requirements); United States v. Carmack, 329 U.S. 230, 241-42, 67 S.Ct. 252, 257 (1946) (federal government can only take state land subject to limits of Fifth Amendment, including payment of just compensation).

[94] See United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, 24 F.3d at 1445 n.3.

It is therefore no answer to the takings problem that the Act provides that any OVS operator "may" be required to pay a fee to the local government in lieu of the cable franchise fee.[95] To the extent that such a fee falls short of what the local government receives from cable operators, it does not represent the fair market value of the local government's property interests.

It is important to note in this regard that a cable franchise may — and typically does — include compensation to the local government above and beyond the cable franchise fee. Such compensation includes payments or in-kind contributions that fund public, educational, and governmental ("PEG") access facilities and (for franchise agreements entered into prior to the 1984 Cable Act) PEG operations.[96] Local governments' compensation from cable operators for use of local rights-of-way also often includes in-kind compensation in the form of dedicated PEG channels and facilities and institutional networks, which are explicitly authorized under 47 U.S.C. §§ 531 and 544.[97] Such facilities and local requirements contribute directly to the development of the nation's information infrastructure, filling

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[95] 1996 Act, section 302(a) (adding new § 653(c)(2)(B)).

[96] See 47 U.S.C. § 542(g)(2)(B)-(C).

[97] The NPRM recognizes that cable operators provide PEG channel capacity, but fails to recognize the substantial cash and in-kind contributions cable operators have agreed to provide pursuant to franchise agreements to support PEG facilities. See NPRM at ¶ 19 n.33. And the NPRM completely overlooks institutional networks that many cable operators must provide under their franchises.