

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of )  
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Implementation of Local )  
Competition Provisions in )  
the Telecommunication Act )  
of 1996 )  
)  
\_\_\_\_\_)

MM Docket No. 96-98

**JOINT REPLY COMMENTS OF  
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL  
NATIONAL REALTY COMMITTEE  
NATIONAL MULTI HOUSING COUNCIL  
NATIONAL APARTMENT ASSOCIATION  
INTERNATIONAL COUNCIL OF SHOPPING CENTERS  
AND INSTITUTE OF REAL ESTATE MANAGEMENT**

Introduction

The joint commenters, representing the owners and managers of multi-unit properties,<sup>1</sup> urge the Commission to confine any rules adopted in this proceeding to the scope of Section 251(d)(4) and to avoid defining access to rights-of-way in such a manner as to infringe on the property rights of owners of multi-unit properties as has been suggested by AT&T and MFS Communications, among others. Any definition of rights-of-way that would permit mandatory access to multi-unit buildings by telecommunications providers would lead to a taking of private property under the Fifth Amendment and would plainly exceed the Commission's statutory authority. Section 251 and Section 224 provide the Commission with jurisdiction solely over LECs and utilities, not building owners.

<sup>1</sup> The commenters are more particularly identified in footnote 1 of their comments filed on March 18, 1996 in Docket No 95-184.

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**I. ANY ATTEMPT BY THE COMMISSION TO DEFINE RIGHTS-OF-WAY TO INCLUDE PROPERTY OWNED BY ANY PERSON OTHER THAN A LEC OR UTILITY WOULD INFRINGE ON THE OWNER'S RIGHTS AND WOULD RAISE SERIOUS FIFTH AMENDMENT TAKINGS ISSUES.**

AT&T, MFS Communications, and NextLink Communications (sometimes collectively referred to herein as "AT&T et al ") have taken advantage of the NPRM herein, based on competitive access obligations of LECs, to request that the Commission interpret the term "rights-of-way" in a very broad manner, so as to infringe on or even completely disregard the rights of non-LEC, private property owners who have granted limited access to particular LECs for purposes of providing telephone services. Specifically, AT&T has requested that the Commission define rights-of-way to include "not only easements across land, but also entrance facilities, telephone closets or equipment rooms (*e.g. within commercial buildings or multi-unit dwellings*); cable vaults, controlled environment vaults, manholes, or any other remote terminal ... and any other pathway (or appurtenance thereto) owned or controlled by a LEC." (AT&T Comments, at 15 [emphasis supplied]) MFS Communications similarly would have the Commission define "rights-of-way" to include "cable entrance ways into buildings, telephone equipment rooms and wiring closets, and LEC-controlled risers, conduits, and lateral ducts *within the common areas of multi-tenant buildings* and within LEC premises." (MFS Communications Comments, at 9 [emphasis supplied]) Finally, NextLink Communications suggests that the term "rights-of-way" covers ". . . a variety of public and private properties. . ." and that the ". . . Commission's rules, therefore also should be explicit in defining a right of access to a broad range of properties." (NextLink Comments at 5)

A. Mere Occupancy by a LEC does not Equate to Control by a LEC.

AT&T et al. fail to make the distinction in their proposed definition between mere occupancy of, and legal control of, a right-of-way in a multi-unit building. State law will determine ownership and control of property.<sup>2</sup> However, state law typically distinguishes between ownership and mere occupancy of a right-of-way (e.g., a telephone closet). The right to occupy property, by itself, does not provide the LEC with either legal ownership or the right to control the right-of-way.<sup>3</sup> Such rights reside with the owner of the building unless specifically surrendered to the LEC via a lease agreement or some other form of contract. Mere occupancy does not imply either ownership or legal control. Instances in which a building owner actually cedes control to a LEC are rare at best, and, in any event, are subject to state property laws. Thus, any attempt to adopt a definition of rights-of-way that includes areas in buildings, that, while merely occupied by LECs, are owned by building owners, would effect a taking of the building owner's property rights under the Fifth Amendment. Even a definition that is confined to those rare instances in which actual control has been ceded may effect a taking of property rights protected under the Fifth Amendment.

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<sup>2</sup> Historically, the term "control," as used in Section 224, has commonly been applied to agreements between pole-owning utilities whereby a telephone company obtains control over the "communications space" on electric utility-owned poles, defined in accordance with applicable safety codes. The term "control," in the context of Section 224, has never been applied to a premises within a building owned by a third party but occupied by a utility or a telephone company under lease or other agreement with the owner.

<sup>3</sup> Thus, NextLink Communications' assertion that LEC- controlled facilities should "guarantee[s] access, for instance, where a utility or incumbent carrier has a right of entry agreement, an easement or a governmental franchise" (NextLink Communications Comments, at 5 fn. 3) can be true only in instances where the terms of such entry agreement, easement or franchise specifically authorize it to afford access to other telecommunications providers, (i.e. give it the right to "control" versus the right to "occupy" such facilities).

## B. The Commission has No Jurisdiction Over Building Owners.

The Commission has no jurisdiction over building owners either under Section 251, as added by the 1996 Act, or under Section 224, as amended by the 1996 Act. In these sections, Congress uses the term "rights-of-way" in the context of ownership of LECs or control by utilities, respectively. Building owners are neither LECs nor are they included in the definition of "utility" contained in Section 224.<sup>4</sup> Section 251 only authorizes the Commission to exercise jurisdiction over LECs<sup>5</sup> and Section 224 only authorizes the Commission to exercise jurisdiction over utilities -- and then only in the event that the state has chosen not to regulate such utilities. Neither term embraces private property owners.

AT&T et al.'s attempt to expand the reach of Section 224 contradicts Congressional intent to narrow the reach of the term "utility" in the 1996 Act. AT&T et al. fails to recognize that the 104th Congress, in making pole attachments mandatory,<sup>6</sup> narrowed the definition of subject utilities from that in the 1978 Act which had broadly defined utility as "any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls pole, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication."<sup>7</sup> Further, since Section 224

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<sup>4</sup> "The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S. C. § 224(a)(1).

<sup>5</sup> 1996 Act, §251(d).

<sup>6</sup> Cf. FCC v. Florida Power Corp., 480 U.S. 245 (1987), where the U.S. Supreme Court held that previously Section 224 regulated only utilities that had themselves already decided to allow pole attachments and that "nothing in the Pole Attachments Act [Section 224] 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." Id. at 241.

<sup>7</sup> P.L. 95-234 (1978), as amended P.L. 98-549 (1984).

reaches only utilities whose poles and rights-of-way are used "in whole or in part, for ... wire communications," it is clear that Congress intended the requirements of Section 224 to apply only to wire communications service providers. Clearly, building owners, as such, are not wire communications service providers. Furthermore, given Section 251's incorporation under Part II "Development of Competitive Markets" it is likely that Congress in 1996 fashioned the Section 224 amendments in reliance on the well-established antitrust doctrine that requires owners of "essential facilities" to provide access to such facilities to their "competitors." Cf. United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).

MCI's comment that building owners must treat all would-be telecommunications providers in a nondiscriminatory fashion seems to suggest that the Commission should regulate building owners. Once again, the statute contains no authority for the Commission to exercise jurisdiction over building owners. Therefore, the Commission has no authority to act on this suggestion. Nor need the Commission attempt to supplant the marketplace, since unlike the local telecommunications market which has been perceived by Congress to require legislative mandates regarding competition in Title I of the 1996 Act, the real estate market has been and continues to be highly competitive for the reasons set forth in the comments and reply comments of BOMA, et al, in Docket No. 95-184, copies of which are attached hereto.

Finally, separate and apart from the Commission's clear lack of jurisdiction over building owners under Section 251 and Section 224 cited above, the Commission lacks jurisdiction over building owners qua building owners in any context. See Comments of BOMA, et al, in Docket 95-184 at 4.

C. Any Commission Interpretation of the term "Rights-of-Way" to Permit Mandatory Access Violates the Owner's Property Rights.

AT&T et al.'s broad definition of "rights-of-way" fails to explicitly recognize or accommodate the property rights of building owners. A LEC's access to private property, including the occupation of a telephone closet or other facility on such property, is typically an easement implied solely by virtue of the building owner's consent to the LEC's use of such space. Where there is a written agreement between the telephone company and the property owner, it typically does not contain a right to sublease. Landlords do not generally allow providers unknown to them and unapproved by them to do work on their premises. In any case, the telephone company generally has no power to sublease or to control the leasing of the space it occupies in multi-subscriber buildings. As discussed in Section I.A. supra, mere occupancy of space pursuant to a lease does not constitute control of the occupied space. No other entity may occupy such an easement unless the building owner specifically permits the other entity to occupy the space as well.

Thus, any attempt by the Commission to define "rights-of-way" by regulation in a manner that would effect mandatory access to a multi-unit building without the building owner's consent raises serious takings issues. Moreover, the statutory language does not authorize the Commission to effect a taking of private property either explicitly or implicitly. Such Fifth Amendment issues are similar to the ones raised by those commenters in Docket 95-184 who desired mandatory access to multi-unit buildings for inside wiring purposes. See Comments and Reply Comments of BOMA, et al. in Docket 95-184, attached hereto.

## II. THE COMMISSION NEED NOT ADOPT A UNIFORM RULE PREEMPTING STATE PROPERTY LAW DEFINITIONS OF RIGHTS-OF-WAY

Nothing in the Communications Act, as amended, requires the Procrustean one-size-fits-all approach to access, overriding legal rights defined by state law.

### A. Section 224 Does Not Embrace Federal Universality.

Section 224(c)(1) of the Act endorses diversity by providing provides that "[n]othing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State."

Congress has recognized the states' authority to regulate pole attachments and has specifically excluded Commission regulation in instances where states have chosen to regulate such attachments. Thus, contrary to AT&T's suggestion of a Commission definition of rights-of-way, the language of Section 224 -- to the extent it is referenced in Section 251(b)(4) -- effectively precludes the Commission from promulgating a uniform rule that would preempt state property law definition of rights-of-way.

Given Congressional recognition of state regulation, it is plain that Congress intended to allow state property laws to continue to govern ownership and control of rights-of-way. Section 224 contains no express language to suggest that Congress intended to preempt state property laws, and neither is there any implied preemption of such laws.<sup>8</sup> Thus, the Commission cannot give credence

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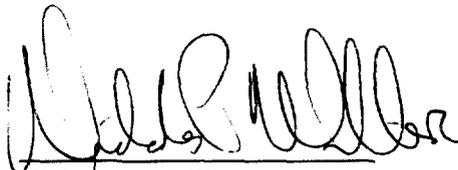
<sup>8</sup> Implied preemption could occur in only two ways: either by actual conflict between federal and state or local law, (see Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); or by an expression of congressional intent to preempt an entire field of regulation. See Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947). Neither is applicable here.

actually owned by a LEC. This is so particularly in light of the fact that unqualified "ownership" is typically more clear-cut and subject to fewer variations under state law than is "control".

### CONCLUSION

The Commission should take official notice of the comments and reply comments of BOMA, et al., filed in Docket No. 95-184, on March 18, 1996 and April 17, 1996 respectively, and should not implement rules under this NPRM that violate building owners' property rights.

Respectfully submitted,



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June 3, 1996

Attachments:

Comments of BOMA, et al. on Docket 95-184,  
dated March 18, 1996

Reply Comments of BOMA, et al. on Docket 95-184,  
dated April 17, 1996.

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**ATTACHMENT 1**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Telecommunications Services  
Inside Wiring

Customer Premises Equipment

CS Docket No. 95-184

JOINT COMMENTS OF  
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL  
NATIONAL REALTY COMMITTEE  
NATIONAL MULTI HOUSING COUNCIL  
NATIONAL APARTMENT ASSOCIATION  
INSTITUTE OF REAL ESTATE MANAGEMENT  
NATIONAL ASSOCIATION OF HOME BUILDERS

Summary

The commenters welcome the prospect of a rationally de-regulated market place for telecommunications services. Our customers -- our tenants and prospective tenants -- are demanding and enjoying this kind of deregulated market for many services, including of course, telecommunications services. Just as the telecommunications industry will be revolutionized, and ultimately improved, by competitive opportunities, our industry recognizes opportunities in increased customer sophistication and demands for new telecommunications services. Indeed, these demands will be (and already are) providing opportunities for our businesses to compete, one against the other, for market share. Our members aggressively market the characteristics of their properties, including telecommunications services. These

comments include a detailed discussion of the manner in which the real estate markets have responded and are responding to the proliferation of new telecommunications providers and the market forces that define this response (Point IV[A]).

The benefits to our customers -- consumers, if you will -- of the new competitive pressures unleashed by the efforts of Congress and the FCC are clear. As an industry, we are, therefore, at a loss to understand how the Federal Communications Commission could rationally interject a static regulatory regime at the intersection between our business and the telecommunications revolution. As set forth in these comments, constitutional and policy considerations weigh heavily against FCC-generated ground rules regarding the terms of telecommunications companies' access to and their highly profitable use of the real estate owned and managed by our respective members.

Any attempt by the Commission to mandate access to multiple-unit buildings by telecommunications providers -- whether under the guise of defining demarcation points or otherwise -- would lead to a taking of private property under the Fifth Amendment and would plainly exceed the Commission's statutory authority.

The U.S. Supreme Court has held in Loretto v. TelePromTer Manhattan, 458 U.S. 420 (1982), that any regulation allowing a telecommunications provider to emplace its cables in, on, or over a private multi-tenant building is a governmental taking. Congress has not given the Commission the power of eminent

domain; Congress has passed no legislation that would allow the Commission to obligate the United States to respond in damages in the Claims Court for such a taking; and any such attempt by the Commission to impose such an unbudgeted fiscal liability on the federal treasury would violate the Anti-Deficiency Act of 1870, now 31 U.S.C. § 1341. A previous Commission attempt to force even carriers subject to the Communications Act to make their central office buildings available to competing carriers has been rebuffed in the courts. See Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994) (central office co-location). The Commission's power over non-carrier buildings is even less than the Commission's power over building in subject carriers' regulated rate bases. Moreover, the Commission would not be prepared to undertake the case-by-case adjudications necessary to fix just compensation for multitudinous takings. (Points II and III)

Aside from the straight-forward Constitutional and jurisdictional impediments to Commission regulation of access to private premises, other considerations suggest the benefit of an unregulated approach. First, the nation's limited but growing experience with unregulated (competitive) access providers makes clear that there is no need for the Commission to intervene on the access issue. Access is adequately regulated by the marketplace, and only the market will be flexible enough to respond to fast-changing consumer needs and technological developments. (Point IV[A]) Second, the Commission could not craft one-size-

fits-all regulations that would be superior to on-the-spot management's responsibility for particularized building safety and code compliance, occupant security. Indeed, effective management of the property, including allocation of limited duct and riser space and prevention of physical interference between competing providers is all demanded by the nature of the real estate business and its responsiveness to tenant concerns. (Point IV[B])

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues, (ii) abandon any attempt to deal with the former, and (iii) adopt rules for the specific demarcation point and other wiring issues raised by the NPRM that reflect the realities of the diverse physical and market characteristics of multiple-unit buildings. (Points I and V)

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## Introduction

The joint commenters, representing the owners and managers of multi-unit properties,<sup>1</sup> urge the Commission not to attempt to adopt rules purporting to confer on telecommunications providers any rights of access to private office buildings, condominiums, coöp buildings, and apartment buildings and complexes. To force the emplacement of telecommunications providers' wires and other

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1/ The joint commenters are the Building Owners and Managers Association International ("BOMA"), the National Realty Committee ("NRC"), the National Multi Housing Council ("NMHC"), the National Apartment Association ("NAA"); the Institute of Real Estate Management ("IREM"), and the National Association of Home Builders ("NAHB"). Founded in 1907, BOMA is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. NRC serves as Real Estate's roundtable in Washington for national policy issues. NRC members are America's leading real estate owners, advisors, builders, investors, lenders, and managers. NMHC represents the interests of more than six hundred of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums. NAA is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. The IREM represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada. NAHB is a trade association representing the nation's housing industry. NAHB's 185,000 member firms are involved in the development and construction of single family housing, the production and management of multi-family housing, and the construction and management of light commercial structures.

The joint commenters are also filing comments currently in the Commission's cable home wiring rulemaking in Docket No. 92-260 and, in a third filing, are submitting combined comments in this docket and Docket No. 92-260 regarding the regulatory flexibility analyses required by P.L. 96-354, 5 U.S.C. § 601 et seq.

facilities on the private property of others would constitute an unconstitutional taking in violation of the Fifth Amendment.

Moreover, the Commission lacks even colorable statutory authority to regulate the emplacement of wires, etc., in or on private buildings. The Commission's regulatory jurisdiction over demarcation points is limited to the offerings of common carriers under Title II and to the activities of cable operators under Title VI. Building owners are neither common carriers nor cable operators. Accordingly, the Commission should abandon any attempt to deal with access to private property and should reflect in its rules regarding demarcation and related issues the realities of the marketplace.

**I. THE COMMISSION SHOULD DECOUPLE THE ACCESS-TO-PROPERTY ISSUE FROM THE DEMARCATION POINT ISSUES AND DEAL ONLY WITH THE LATTER.**

The notice of proposed rulemaking herein (FCC 95-504) unnecessarily combines the two distinct issues of demarcation points and access to property. The notice has the matter backward to the extent that it assumes that placement of the demarcation point regulates access to private property. In fact, it is property access that may influence where demarcation points should be located for regulatory purposes.

**A. The Commission's Demarcation Powers are Limited to Carriers and Cable Operators.**

The Commission's powers to establish demarcation points for telephone and cable purposes are circumscribed by their respective statutory origins. These two statutory bases give the Commission no jurisdiction over the owners of private buildings:

1. The Commission's power over telephone wiring derives from its historic powers to regulate the offering of, and to prescribe the accounting for, telephone company services under Section 203 and 220 of the Act. The Commission's jurisdiction under Title II extends only to "common carriers exclusively . . . , and not even all of these." See Pennsylvania R.R. v. P.U.C. of Ohio, 298 U.S. 170, 174 (1936). The jurisdictional predicate for Title II jurisdictions is common carriage. Id. at 175. It goes without saying that building owners are not carriers, so the Commission's jurisdiction with respect to them is just that much more remote.

2. The Commission's power over cable wiring derives from its authority to prescribe rules for abandonment of "cable installed by the cable operator within the premises" of a subscriber. See Section 624(i) of the Cable Act, as added by Section 16(d) of the 1992 Act. Building owners and operators, as such, are not cable operators.

**B. The Commission Lacks Authority over Building Owners and Managers Generally.**

The scope of the Commission's jurisdiction is limited by Section 2(a) of the Act, 47 U.S.C. § 152(a), to interstate communication and "to all persons engaged ... in such communication .... [and] to all persons engaged ... in providing [cable] service, and to the facilities of cable operators which relate to such service, as provided in title VI." Accordingly, the Commission's exercise of jurisdiction under Title II with regard to telephone inside wire is limited to the bundling and booking of telephone companies' inside wire. Similarly, the Commission's exercise of jurisdiction with regard to cable wiring is limited to abandonment pursuant to Section 624(i) of the Cable Act, 47 U.S.C. § 544(i).

Building owners are neither carriers nor cable operators. If the Commission lacks jurisdiction over central office buildings on the regulated books of fully subject carriers, see Bell Atlantic v. FCC, supra, then a *fortiori* it lacks jurisdiction over the private property of building owners, who are neither carriers nor cable operators. More generally, the Commission lacks jurisdiction over real property ownership, even when used in a regulated activity. See Regents v. Carroll, 338 U.S. 586 (1950); Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Bell Atlantic, supra.

Neither of the Commission's powers to determine demarcation points -- its power over the booking and unbundling of inside wiring and its power over cable abandonment -- confers on it any power to give private companies any access to the private property of others. Significantly, Section 259 and 271(c), added this year by P.L. 104-104 -- to the extent they do so -- apply only to local exchange carriers. Accordingly, there is no logical basis for the Commission to couple access-to-property issues with demarcation points. The Commission should decouple the access issue from the demarcation-point issues and deal only with the former.

**II. COMMISSION-MANDATED ACCESS TO PRIVATE PROPERTY VIOLATES THE OWNERS' FIFTH AMENDMENT RIGHTS.**

Any attempt by the Commission to compel the owners of multi-unit buildings to allow access to, and occupation of, their buildings by third-party telecommunications providers and their facilities would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of wires would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.<sup>2</sup>

For the Commission to mandate access for telecommunications providers' cables in and on private buildings would be just as

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<sup>2/</sup> As the Court said in Ramirez de Arallano v. Weinberger, 240 U.S. App. D.C. 363, 387 n.95, 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'."

unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompter to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982).

**A. Commission-mandated Wiring of Private Buildings Would be an Impermissible "Permanent Physical Occupation."**

The physical requirement that a landlord permit a third party to occupy space on the landlord's premises and to attach wires to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the "character of the governmental action," the Supreme Court has said, "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." Loretto, supra, at 434-35 (emphasis supplied), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).<sup>3</sup>

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3/ In Penn Central the Supreme Court had observed that there was no "set formula" for determining whether an economic taking had occurred and that the Court must engage in "essentially ad hoc, factual inquiries" looking to factors including the economic impact and the character of the government action. No such detailed inquiry is required where there is a permanent physical occupation. Id. at 426.

**B. Forced Carrier Access Satisfies the Legal Test for an Unconstitutional Taking.**

No *de minimis* test validates physical takings. The size of the affected area is Constitutionally irrelevant. In Loretto, supra, at 436-37, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." Id. at 436-37.

The access contemplated by the Commission notice is legally indistinguishable from the method or use of intrusion in Loretto, where the Court found a "permanent physical occupation" of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings' exterior wall. Id. at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation of telecommunication wires and hardware constitutes a taking, regardless of the asserted public interest, the size of the affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (Loretto) and federal regulation (FCC proposed rulemaking).

**C. "Just Compensation" for the Taking Requires Resort to Market Pricing.**

The takings objection to Commission-mandated access to private property cannot be avoided by requiring the telecommuni-

cations benefitted thereby to make a nominal payment to the owner 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 legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the constitution.

While Loretto does not address the question of whether the invalidity of a taking is avoided by payment from a third party, other courts have held that takings to benefit a private telecommunications provider are subject to heightened scrutiny. See Lansing v. Edward Rose Associates, 442 Mich. 626, 639, 502 N.W. 2d 638, 645 (1993). AMTRAK's condemnation and conveyance of the Boston & Maine's Connecticut River railroad tracks to the Central of Vermont Railroad after payment of compensation was narrowly upheld on the technicality that the condemnation was under the adjudicatory oversight of the Interstate Commerce Commission. Nat'l R.R. Passenger Corp. v. Boston & Maine, 503 U.S. 407, 112 S.Ct. at 1403-04 (1992). That degree of governmental involvement is not contemplated here.

The practical point is this, viz., that the Commission cannot prescribe a nominal amount as compensation for access -- the affected property owner is constitutionally entitled to compensation measured against fair market value. See U.S. v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, supra, at 337 n.3, 24 F.3d at 1445

n.3. Is ascertainment of the disputed market values of differing impingements on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

**III. CONGRESS DID NOT GIVE THE COMMISSION POWER TO COMPENSATE OWNERS FOR TELECOMMUNICATIONS CABLE EMPLACED ON THEIR PROPERTY WITHOUT THEIR CONSENT.**

**A. Congress Did Not Give the Commission the Power of Eminent Domain.**

As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. Indeed, even in the former Post Roads Act,<sup>3</sup> Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 13 S. Ct. at 488-89 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of public rights-of-way did not carry with it the power to take non-federal property without compensation. See Western Un. 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).

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate

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<sup>3/</sup> The Post Roads Act of 1866, R.S. 5263, et seq., as amended, formerly classified to 47 U.S.C. §§ 1 et seq., was repealed by the Act of July 16, 1947, 61 Stat 327.