

The *OTARD Second Order* relies primarily on the authority of *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), but that reliance is misplaced. *Florida Power* is nothing but a rent control case: once a property owner acquiesces in the presence of a tenant, the government may have authority to regulate the rates charged by the property owner. But the power to regulate rents does not give the government the power to require the property owner to lease additional space to a tenant or a third party without violating the takings clause. Nor does *Florida Power* say that a property owner can be required to lease space to any company that requests access to the premises.²¹

Even if the logic of *Florida Power* and the *OTARD Second Order* applied to this case, there is a crucial distinction. Those decisions distinguish *Loretto* on the ground that the New York cable statute did not give Mrs. Loretto a choice: she was required to acquiesce to the presence of the physical intrusion. Building owners, however, never had a practical choice about whether to allow the ILECs onto their properties. Their buildings would have been unmarketable if they had not allowed the incumbent monopoly providers onto the premises. Furthermore, as discussed in the Real Property Study, at this juncture building owners typically still have little choice in the matter. If an ILEC has a license coupled with an interest, the owner cannot freely remove the ILEC from the premises nor change the terms of the ILEC's access rights. The fundamental fact remains that most building owners have been and continue to be required to acquiesce to the presence of the ILEC.

owner, and the general right of navigation corresponds to the nondiscriminatory access requirement proposed by the NPRM.

²¹ *Yee v. Escondido*, 503 U.S. 519 (1992), is inapposite for the same reason: that case regulated the relationship between mobile home park owners and their existing tenants, but it does not stand for the proposition that a mobile home park owner can be required to rent additional land to mobile home owners, merely because it has chosen to rent one mobile home pad to one person.

2. A Nondiscriminatory Access Rule Would Constitute a Regulatory Taking.

The nondiscriminatory access proposal is ultimately an attempt to force building owners to bear the cost of the expansion of facilities-based competition. As the Cooper, Carvin Analysis describes at pp. 30-34, such a rule violates the principles underpinning the Fifth Amendment not only as a *per se* physical taking, but as a regulatory taking as well. Nondiscriminatory access would effectively make it impossible for building owners to recover investments they have made in telecommunications infrastructure and would destroy the existing market for rooftop antenna sites and building access rights. While still small in comparison to rental revenues, these markets are well-established and building owners now have a reasonable investment-backed expectation of revenue from those sources. Those revenues vary from building to building, but they can be substantial.²² Consequently, under the factors identified in *Connolly v. Pension Benefit Guar.*, 475 U.S. 211, 224 (1986), any forced access proposal will effect a taking.

For a full exposition of the Fifth Amendment issues raised by the NPRM, we urge the Commission to review the Cooper, Carvin Analysis.

D. Congress Has Not Expressly Authorized the FCC To Take Property for this Purpose.

Even if the Commission had jurisdiction over building owners, and even if the Commission could require nondiscriminatory access without violating the Fifth Amendment, the Commission does not have the express authority required by *Bell Atlantic*. The D.C. Circuit made clear in *Bell Atlantic* that Congress has not conferred the power of eminent domain on either the Commission or entities under its jurisdiction. Without such an express statutory authorization, the Commission cannot effect a taking. *See*, Cooper, Carvin Analysis at 37-40.

²² *See* RTE Group, Real Estate FAQ's, <http://www.rtegroup.com/real/faq/html>.

E. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims.

The Commission's lack of explicit statutory authority to take private property cannot be rectified by a 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. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts require a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money. This includes an award of just compensation in the instance of a taking of private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in *Bell Atlantic, supra*, 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 defeat such constitutional claims wherever possible. *See Cooper, Carvin Analysis* at 39-40. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in *Chevron v. N.R.D.C.*, 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

In fact, the legislative history of Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use -- upon payment of defined compensation -- compatible utility easements across private property, shows that Congress did not intend to give the Commission power to mandate access to multi-unit buildings generally. In 1984 the House

deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.

In a series of cases the courts have held that Section 621(a)(2) must be read narrowly to avoid a taking. *See, e.g., Media General Cable of Fairfax v. Sequoyah Condominium*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings v Georgia v. McNeil Real Estate Fund*, 953 F.2d 600 (11th Cir. 1992), *reh' r' g en banc denied*, 988 F.2d 1071 (11th Cir. 1993), *cert. denied*, 506 U.S. 862 (1992); *Cable Investments v. Woolley*, 867 F.2d 151 (3rd Cir. 1989).

The kind of forced building access contemplated here would largely replicate the provisions for forced building access in S. 1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

F. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act.

Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

(A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to “any officer or employee of the United States Government,” it applies to all branches of the federal government, legislative and judicial, as well as executive. *See* 27 Op. Att’y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term “obligations” broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also “other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds.” 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which “result in Governmental liability under clear line of judicial precedent, such as through claims proceedings.” *Id.*

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official’s wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency’s control in creating obligations which exceed its appropriations level is considered by the Comptroller General in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. The Supreme Court has held that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In *Hercules v. U.S.*, 516 U.S. 417 (1996), the Court rejected a government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act.

G. Imposing a Nondiscrimination Requirement on Building Owners in the Name of Extending Service to Tenants Would Be Inequitable, Because CLECs Are Free to Discriminate Against Tenants.

Given the power of the arguments against imposing a nondiscriminatory access obligation, we are confident that the Commission will not adopt such a proposal. Nevertheless, there is an inherent inequity in the proposal that we wish to highlight. The CLECs argue, in essence, that they should be permitted to impose an obligation on building owners without assuming any reciprocal obligation of their own. According to the CLECs it is acceptable for them to discriminate -- they can decide not to serve a person even if a potential subscriber requests service, and they can choose not to install their facilities in a building, even if the owner

invites them to come in -- but it is not acceptable for building owners to deny access to providers. This is illogical and inequitable.

In fact, property owners understand why CLECs wish to be able to choose their customers. In many cases it may not be economical for them to extend their facilities to an adjacent building. The size and design, the likely needs of prospective subscribers in the building, the presence of multiple competitors in the building, and other factors may indicate that the provider will not recover the cost of extending service within a reasonable time. The same may even be true of a potential customer in a building that is already being served. The Alliance understands this type of economic constraint because similar issues arise when considering how many providers an owner should allow into a building, and what costs the presence of each provider is likely to impose on the owner. *See Yovanov Decl.* at ¶¶ 7-11. We object, however, to the prospect of being held to a different standard. We agree that CLECs should be free to exercise their business judgment because the market will punish bad decisions -- we ask only for the same freedom for building owners.

We also note that allowing CLECs to discriminate may mean that many smaller and less attractive buildings will never get competitive service, simply because their revenue potential will not be great enough to induce investment. Imposing a nondiscrimination obligation on building owners alone would therefore be an arbitrary decision: it would benefit CLECs at the expense of building owners, but would not accomplish the ostensible policy goals of the proposal.

H. Imposing a Nondiscrimination Requirement in the Name of Fairness to CLECs Would Be Unreasonable Because Building Owners Should Not Be Punished for the Terms of Agreements Entered into in a Monopoly Environment.

As competitive service providers have entered the market, the real estate industry has dealt with them just as it has every other person seeking access to the environments created and maintained by individual property owners. The real estate industry has dealt with the CLECs in the same way that it deals with ILECs in those cases in which it is not hamstrung by past agreements. Indeed, the same basic principles apply to every lease transaction, including negotiations with cellular telephone and PCS operators. *See* Stern Declaration at ¶ 6-11. As with any other market transaction, the terms and conditions of CLEC entry have been based on finding a balance between the needs of both parties.

The consequence of the rise of competition in the telecommunications markets is that building owners are faced with two types of providers and two types of access regime. The traditional ILEC access rights were suited to the past monopoly telecommunications market, but are unsuitable to the new competitive market, where there are risks and liabilities to be allocated among different providers.

Rather than recognize this, the NPRM wrongly sees the property owner as responsible for the contrasting situations of the ILEC and the CLEC, and accuses property owners of unreasonable discrimination. Property owners do not discriminate against CLECs: they treat them just as they do all other people who seek access to their buildings, and with whom they are in a position to negotiate. The perception of discrimination arises because in many cases the owner is hamstrung by the existing rights of the ILEC. If those rights could be readily altered, owners would be able to deal with ILECs on a level playing field, just as they do now with CLECs and all other people seeking access to their properties.

The solution is not to require property owners to grant access to all telecommunications providers on the same terms. Because of the historical position of the ILECs, this would mean that building owners would lose all control over their properties. They would be completely exposed to all kinds of injury and liability with little or no opportunity to protect themselves, except for costly after-the-fact litigation. Congress itself was unwilling to do this with respect to rights-of-way franchise fees in Section 253(c) (“unreasonably discriminate”); *TCG v. Dearborn*, 16 F. Supp. 2d 785, 792 (E.D. Mich. 1998). Nor is the solution some sort of cookie-cutter agreement mandated through negotiation -- not all service providers are the same. They may offer different types of service, use different technologies, and occupy different amounts and areas of a property. Furthermore, they will have different reputations based on their past performance, and therefore pose different risks. Only the market can properly deal with all these different issues.

In other words, the solution to the CLECs’ complaint is not to continue the historical distortion of the market caused by the ILECs’ monopoly power, but to restore the free market by removing the ability of the ILECs to dictate terms to owners. It may be that regulatory action is needed to do that -- but we believe that the record shows that the situation will correct itself, as new building are constructed, old ones renovated or replaced, and as the CLEC industry grows and matures. As CLECs gain market share and access to buildings -- as they demonstrably are -- ILECs will be forced to abandon past practices. Furthermore, over time, as they recover their investment in existing plant, it may become easier for building owners to negotiate new agreements.

We appreciate the desire of the new entrants into the marketplace to eliminate every obstacle in their paths, but – to coin a phrase – Rome wasn’t built in a day. In enacting the 1996

Act, Congress did not consider mere inconvenience or expense an “obstacle” to competition. *AT&T v. Iowa Util. Bd.*, 119 S.Ct. 721, 735 (1999) (§ 251[d][2][B]). Rather than attempt to regulate property owners, the Commission should either let the market work or, if it must do something, consider what the Commission can and should do regarding existing relationships between ILECs and property owners.

IV. SECTION 224 DOES NOT AUTHORIZE THE FCC TO EXPAND THE SCOPE OF EXISTING EASEMENTS OR OTHER ARRANGEMENTS BETWEEN PROPERTY OWNERS AND SERVICE PROVIDERS.

The NPRM proposes to require all utilities governed by Section 224 to make conduits and rights-of-way inside buildings available to competing telecommunications providers, as a means of allowing such providers to extend their facilities to subscriber premises located inside buildings. Adopting this proposal would violate the intent of Congress in enacting and amending Section 224, as well as the Fifth Amendment prohibition on takings.

A. Section 224 Does Not Apply to Ducts, Conduits, or Rights-of-Way Located Inside Buildings.

Section 224 was first enacted in 1978, and most recently amended in 1996. In all that time, it has never been held to apply to facilities located within buildings and the Commission cannot change that interpretation now. There are several reasons for this.

First, the express language of Section 224 prevents it from being applied to facilities inside buildings. By its terms, Section 224 applies only to poles, ducts, conduits and rights-of-way owned or controlled by utilities. The first thing to notice here is that the statute only imposes obligations on “utilities.” Building owners are patently not utilities, so Section 224 cannot apply to facilities owned by them. The second point to notice is that the right of access applies only to “poles,” “ducts,” “conduits,” and “rights-of-way.” There are, of course, no poles

inside buildings. Further, the ducts and conduits located inside buildings are most commonly part of the fabric of the building and are neither owned nor controlled by the utilities that have the right to occupy them -- they are owned and controlled by the property owner.²³ Even if they were installed after initial construction at the expense of a utility, ducts and conduits are most likely to be fixtures and therefore the property of the building owner.²⁴ Finally, there are no “rights-of-way” inside buildings. Building access rights take the form of leases, licenses, and easements. Leases and licenses are not rights-of-way and, although an easement can be a right-of-way for real property purposes, the two terms are not synonymous.²⁵ In fact, the very use of

²³ Under the doctrine of accession, items that are incorporated into the construction of improvements on real estate become part of the real estate. *See* Property Law Study at p. 25.

²⁴ A “fixture” is an item of personal property that has become part of real property either through attachment to or use in association with the real estate. “Trade fixtures” are items that are annexed to the real property, are used in the owner’s trade or business, and may be removed without injury to real property; trade fixtures remain the property of the person installing them. *See* Property Law Study at pp. 26-27. Whether an item is a fixture depends on the facts and circumstances of an individual case, and typically depends on whether (i) it has been annexed to the real property; (ii) it is adapted to the purpose of the real estate; and (iii) the party attaching the property to the real estate intended to make it a permanent part of the real estate. *See* Property Law Study at p. 26. The importance of the intent factor make it difficult to generalize about this issue, but it seems fair to say that when utilities install ducts and conduit in buildings they have no expectation that they will ever remove the item from the property. Indeed, ducts and conduit are not likely to be trade fixtures for that very reason. In many cases, removing ducts or conduit would cause permanent injury to the property. In short, utilities generally do not own ducts or conduit in buildings. Furthermore, building owners generally reserve the right to control access to all facilities and spaces inside their buildings - since the building owner has ultimate control over who gets in and where, utilities cannot be said to control any facilities inside a building.

²⁵ The term “right-of-way” is a general one that refers to the right to pass over property over a defined linear route for the purpose of regular passage or transmission, usually over a very long period of time, if not permanently. Although, unlike easements, real property licenses or leases, a right-of-way is not a distinct legal category of use and access rights, the courts have consistently deemed rights-of-way to be either easements or fee interests. In many instances, rights-of-way will be in the form of easements, but it is inappropriate to describe rights-of-way as being “equivalent” to an easement. Nevertheless, to the extent that a right-of-way always takes the form of an easement or a fee interest, a right-of-way at least connotes an interest in real property. *See generally* Property Law Study at pp. 19-20. The term “lease,” on the other hand,

the term “right-of-way” indicates that Congress did not mean to include building access rights, because, as noted earlier, most such rights are actually licenses.²⁶

Second, the purpose of Section 224 was not to allow cable operators to extend their networks anywhere that a utility happened to have facilities or access rights, but to protect cable operators from excessive pole attachment rates. *See Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 302 (D.C. Cir. 1993). The name “Pole Attachment Act” says it all. The reference to ducts and conduits was of course necessary to deal with situations in which utility facilities had been installed underground; that there may also be ducts and conduits inside buildings is irrelevant in this context, for the reasons discussed above.

In addition, the legislative history of the Pole Attachment Act says nothing about creating a right of access to facilities inside buildings. The legislative history never refers to facilities inside buildings, and repeatedly refers to access to poles and rights-of-way in a manner that indicates that it was only concerned with outside facilities. The Pole Attachment Act was adopted because the Commission had concluded that it had no jurisdiction “to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities.” Sen. Rep. 580, 95th Cong., 1st Sess., at p. 14, *citing California Water & Tel. Co. et al.*, 40 R.R.2d 419 (1977). The Senate Report expressly stated that the “expansion of FCC

conveys a very different meaning. A lease grants the right to occupy and possess a defined parcel for a defined period; neither the concept of transmission nor the concept of linearity apply. *See id. at 16-17*. A license is the right to enter onto property for a certain purpose -- but it is not an interest in the underlying property, it does not imply that the property is necessarily being used to support transmission facilities, and there is no connotation of linearity. *See id. at 12-13*.

²⁶There are certainly easements inside buildings - but if Congress had meant to include access rights in general, it either would have added licenses to the list, or used a broader term that includes licenses. But it did not. By using the term “right-of-way” and not including licenses, Congress indicated that it was concerned with transmission facilities outside of buildings. Accordingly, for purposes of Section 224, while the term right-of-way includes easements in general, it does not include easements inside buildings.

regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the provision of utility pole communications space to CATV systems.” *Id.* Finally, the Report stated that “any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction.” *Id.* at 16.

Furthermore, if Section 224 applied to the interior of buildings, the cable mandatory access statutes adopted by many states would not have been necessary.²⁷ Similarly, if Section 224 allowed cable operators to “piggy-back” on the existing rights of utilities to enter buildings, the cable industry would not have sought to apply Section 621(a)(2) of the Act to obtain the same right,²⁸ or at the very least would have pursued similar litigation under Section 224 after the courts rejected those claims.

Nothing in the legislative history of the 1996 Act evinces any intention to alter this understanding of the meaning of Section 224. The addition of subsection (f), creating a right of nondiscriminatory access, adds nothing to the meaning of the phrase “poles, ducts, conduits, and rights-of-way,” and is irrelevant to this analysis.

²⁷ Nor would it have been necessary for Congress to consider a federal mandatory access provision just six years after the Pole Attachment Act became law. The Cable Communications Policy Act of 1984, as it was reported out of the House Committee on Energy and Commerce, expressly provide for mandatory access to tenants within a multi-unit dwelling. The relevant language was: “Sec. 633.(a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system...” H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984); reprinted in H.R.Rep. No. 934, 98th Cong., 2d Sess. 13. However, Section 633 was dropped from the bill as passed by Congress.

²⁸ See, e.g., *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989); *Media General Cable, Inc. v Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), *cert. den.*, 506 U.S. 862 (1992).

Third, the Commission itself has had ample prior opportunity to consider the meaning of Section 224, and until now has never indicated that it applies to facilities located inside private buildings. For example, as the NPRM notes, the Commission's pole attachment rules define the term "conduit" as "a pipe placed in the ground in which cables and/or wires may be installed." 47 C.F.R. § 1.1402(i). This demonstrates that the Commission has always understood that Section 224 does not extend to facilities located inside buildings.

More recently, the Commission examined the effects of the 1996 amendments to Section 224 and concluded that they did not require utilities to grant access to every piece of real property owned or controlled by them. NPRM at ¶ 37; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (the "*Local Competition Order*") at 16084, ¶ 1185. In the *Local Competition Order*, citing the legislative history of Section 224, the Commission also explicitly rejected attempts to expand the scope of Section 224 to include access to third-party property. *Id.* at ¶ 1179. The Commission properly stated that the scope of authority's ownership or control over a right-of-way is a matter of state law.

In the face of this long-standing interpretation, the Commission cannot readily adopt a new reading of Section 224. The Supreme Court has held that an agency interpretation of a statute that conflicts with an earlier interpretation is "entitled to considerably less deference" than a consistently held interpretation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981). Under this standard, any attempt to alter an interpretation of the statute that has prevailed since Congress first considered the legislation and continued through multiple amendments is unlikely to be upheld by the courts.

The language and meaning of the statute have not changed -- the only new factor is the increased pressure on the Commission to produce facilities-based competition by whatever means necessary. The Commission must acknowledge that the relevant provisions of the law remain unaltered, and that if Congress had intended to establish a forced access obligation it had ample opportunity in 1996.²⁹ Therefore, Section 224 cannot be used to create a right of forced access to buildings.

B. The Scope of Existing Rights Granted by Property Owners to Utilities Is Governed by State Property Law and the Commission Has no Power To Expand that Scope.

The Commission has no power to grant, expand, or determine the scope of property rights. “[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (internal quotation omitted). “[P]roperty rights have traditionally been, and to a large degree are still, defined in substantial part by state law.” *Columbia Gas Transmission Corporation v. An Exclusive Natural Gas Storage Easement In The Clinton Subterranean Geological Formation Beneath A 264.12 Acre Parcel In Plain Township, Wayne County, Ohio*, 962 F.2d 1192, 1198 (6th Cir. 1992) citing 36 C.J.S. Federal Courts § 189(5) (1960) (“As a general rule, legal interests and rights in property are created and determined by state law. . .); see also *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (“Surely it must be conceded as a general proposition that the law of real

²⁹ In fact, Congress had explicitly rejected an attempt to establish a forced access requirement in 1994.

property is, under our Constitution, left to the individual States to develop and administer”) (J. Stewart, concurring). *See also* Property Law Study at pp. 3-4.

Even the Commission has recognized that “[t]he scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law.” *Local Competition Order* at ¶ 1179, citing S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977). In its discussion of Section 224(f)(1), the Commission notes that it “cannot structure general access requirements where the resolution of conflicting claims as to a utility’s control or ownership depends upon variables that cannot now be ascertained. We reiterate that the access obligations of section 224(f) apply when, *as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.*” *Id.* (emphasis added).³⁰

The Commission had it right the first time. It cannot adopt a rule saying that every access right held by a utility to occupy a building owner’s property is automatically extended to allow every CLEC and cable operator to install its facilities as well.³¹ Such a rule would amount to a

³⁰Note also that there is a difference between access rights inside a building and rights-of-way outside. Cramped quarters, limitations on access, and the proximity of other facilities and structures inside a building mean that whatever control a utility may have inside a building is severely restricted by the building owner’s supervening rights.

³¹ Similarly, if the Commission were to adopt a very broad definition of “own and control,” it would place utilities in the untenable position of being required to provide access to real property to which the individual utility did not have the right to grant access. For example, imagine a utility that occupies rooftop space on a building pursuant to a lease, which includes an appurtenant real property license for the utility to use riser space within the building to service its rooftop site. In many such situations, the utility would lack the real property interest necessary to permit any additional user to piggyback on its facility. First of all, the lease would quite likely contain strict limitations on use of the premises, such as a provision restricting the utility to operating its facility for purposes of transmitting and receiving signals within a specified band of the radio spectrum. Such use restrictions would not permit use of the leased space for cable television, wireless telecommunications or fixed wireless telecommunications purposes or for broadcast on other bands of the radio spectrum. Similarly, the licensed rights to access the riser space would be appurtenant to the leasehold interest and thus not be able to be used by anyone but the tenant utility, and then only in direct connection with that utility’s operation of the rooftop space.

declaration by the Commission of the scope of the property rights of the property owner and the utility. The Commission cannot create property rights, nor can it decide what they encompass. Such matters are purely questions of state law.

Consequently, the Commission cannot grant CLECs the right to use or occupy existing access rights inside buildings. To the extent that an existing grant may be broad enough under state law to allow other entities to use it, the property owner has already transferred that element of its property rights -- but such a right would exist independently of Section 224.

C. Expanding the Scope of an Easement or Other Access Grant Beyond Its Original Terms to Permit the Placement of Additional Physical Facilities Would Constitute a *Per Se* Taking.

Whatever rights a utility may have to occupy third-party property are limited by the terms of the grant, as determined in accordance with state property law. *See* Property Law Study at pp. 3-4. Consequently, even if Section 224 applied to building access rights in whatever form, any attempt to broaden the scope of an existing access right to accommodate an additional user's facilities would violate the Fifth Amendment.³² Indeed, to the extent that the Commission were to rely on Section 224 to alter the property rights of either the utility or the underlying property owner, it would effect a taking.

Understanding the nature of a utility's access right in a given case is critical. If the utility only holds a license, as it typically would, the utility has no real property right: it merely has the right to attach its facilities to the underlying property. Property Law Study at pp. 12-16. The Commission could not somehow expand that right to include other service providers because licenses by their nature cannot be subdivided or apportioned. *Id.* at 16. Therefore, if the

³² As noted above, it would also exceed the Commission's jurisdiction. Sen. Rep. No. 580, 95th Cong., 1st Sess. (1977) at 16.

Commission were to purport to expand the scope of a license, it would be granting an additional right to place physical facilities on the property - the very definition of a *per se* taking.

Even if the utility held an easement or other real property interest rather than a license, there would be a taking in many instances: only if the terms of the access right were broad enough to include additional users either by the express terms of the grant, or as interpreted under state law, would there not be a taking. Either the Commission's action would expand the utility's property right by taking an additional piece of the owner's property, or it would shrink -- and therefore take -- the utility's property interest by giving it a share of it to the provider. Once again, this would be a *per se* taking. *See* Cooper, Carvin Analysis at 26-28.

Unlike licenses, easements are apportionable, at least in some circumstances in some states. Property Law Study at pp. 10-12. Either the instrument creating the easement must permit apportionment, or the easement must be exclusive and the apportionment must not "overburden" the easement. Exclusive easements are generally disfavored by the courts, however. It is impossible to define a general rule that would permit the Commission to essentially mandate apportionment without effecting a taking in a large number of cases.

In most cases, therefore, the NPRM's Section 224 proposal would constitute a taking. In all cases, it would raise complex questions of state law regarding the nature of the access right. These are matters the Commission is neither capable of nor empowered to resolve.³³

Finally, the Commission cannot avoid the Fifth Amendment issue by turning to the compensation mechanism offered by Section 224. In *Gulf Power*, the court ruled that the taking created by Section 224(f)'s nondiscriminatory access requirement was saved by the Commission's authority to set rates. The same logic (however flawed) cannot apply if Section

224 is used to require access to a building, because Section 224 only confers authority to regulate pole attachment rates charged by utilities. The statute does not confer authority to determine the valuation of a new access right carved out by taking the building owner's property.

Consequently, under *Gulf Power*, *Loretto*, and *Kaiser Aetna*, such an interpretation would be unconstitutional. See Cooper, Carvin Analysis at 22-23.

D. Congress Has Not Authorized the Commission To Effect Any Taking.

For all the reasons discussed in point III above, the Commission has no authority to effect a taking. The Commission has no general power of eminent domain, and Section 224 does not constitute an express grant of authority to take the property of building owners. See Cooper, Carvin Analysis at 40.

V. WHATEVER AUTHORITY THE COMMISSION HAS TO DESIGNATE CARRIER-CONTROLLED WIRING INSIDE BUILDINGS AS AN UNBUNDLED NETWORK ELEMENT OR TO MOVE THE DEMARCATION POINT DOES NOT INCLUDE THE AUTHORITY TO GIVE CLECs PHYSICAL ACCESS TO BUILDINGS.

The NPRM raises a number of issues regarding access to unbundled network elements and the location of the demarcation point. The Real Access Alliance does not dispute the Commission's authority to consider whether wiring that is owned by ILECs and located inside buildings should be made available to competitors as an unbundled network element ("UNE") insofar as the UNE is a jurisdictional service as distinguished from a tangible, leased facility. We take no position on the merits of resale of either services or network elements as a means of enhancing competition. Similarly, we do not dispute the Commission's authority to deregulate

³³In addition, for the reasons discussed above at Point III.C, any forced access rule constitutes a regulatory taking. See, Cooper, Carvin Analysis at 30-35.

inside wiring or direct regulated carriers regarding what property they may or may not carry on their books for ratemaking purposes.

Nevertheless, we are concerned with possible applications of the Commission's authority that might be construed as creating a right of physical access to buildings. For example, if the Commission were to declare inside wiring to be a UNE, we would object if such a ruling — either on its own or in conjunction with Section 224 or some other provision — were held to allow a carrier to install its facilities in a building to reach the Network Interface Device and make cross-connections to wiring that was purchased as a UNE.³⁴ Such a right of access would constitute a physical intrusion and therefore would be a taking for all the reasons described earlier and in the Cooper, Carvin Analysis.³⁵ We also do not believe that the Commission has the underlying authority to permit entry in that fashion, again for the same reasons as discussed earlier. Therefore, any decision to include inside wiring as a UNE must respect the property rights of building owners.

It is also not clear that the ILECs or any other carriers own any wiring currently located inside a building, absent an express written agreement. Although the Commission attempted to avoid taking wiring owned by ILECs when it deregulated inside wiring, the separation of ownership and control effected by deregulation, combined with the passage of time and the effects of state law, may have attenuated the ILECs' property rights in the wiring to the vanishing point. To the extent that an ILEC holds a license coupled with an interest, this

³⁴Such a right to enter a building would fall under the rules discussed above in our analysis of Section 224. In most cases, such rights would be deemed licenses and therefore outside the scope of Section 224. Property Law Study at pp. 33-34.

³⁵In addition, it is conceivable that treating wiring inside buildings as a UNE would meet the conditions for a regulatory taking. If CLECs cease negotiating access agreements because they have obtained access through UNE agreements, the investment-backed expectations of some property owners would probably be harmed.

argument conflicts with our argument above, but we make the point only to emphasize that this is a very murky area of the law. Unless the precise nature and scope of ILEC and utility access rights can be clearly established, it may not be practical to adopt a national policy declaring wiring inside buildings to be a UNE. Certainly in those cases in which a building owner indisputably owns the wiring, declaring wiring to be a UNE would not obligate the building owner to make it available, because building owners are not subject to Section 251 of the Act.

Indeed, some building owners might welcome a decision to declare inside wiring to be a UNE, so long as the owner had the right to negotiate terms of access, because it would minimize the need for installation of additional wiring. Such an approach would be most valuable if the boundary of ILEC control were at the MPOE, since that would minimize the degree of any such intrusions to the maximum degree. The Real Access Alliance, however, takes no position on these issues, because building owners do not have a uniform view on them: there is no way to impose a fixed and rigid model on the myriad of properties in the country.

With respect to the location of the demarcation point, most property owners benefit from the flexibility of the current system, which allows them to move the boundary of ILEC control to a place of their choosing if a carrier does not establish it at the MPOE, and the wiring was installed or substantially altered after August 1990. Consequently, we do not see any need to establish a single boundary point at the MPOE or anywhere else. It would, however, be helpful if the Commission were to extend that flexibility to wiring installed before August 1990. This would allow building owners to adopt uniform policies and clear up uncertainty regarding their

rights. We are certainly opposed to establishing a uniform demarcation point at each tenant's premises, especially if combined with any right of entry up to the demarcation point.³⁶

Both property owners and competitive providers would benefit from the right to obtain information from carriers about the location of the demarcation point in a building, and the carrier's policies regarding the location of the demarcation point. This information is often difficult to ascertain and carriers should have an affirmative obligation to provide such information in writing within a reasonable time after a request.

Finally, we question the authority of the Commission to establish a demarcation point³⁷ at any point beyond the termination of facilities owned by a provider. To the extent that a building owner has installed its own wiring, or acquired wiring from a carrier, that wiring is no longer the property of a regulated entity, and is consequently outside the Commission's jurisdiction.

VI. FORCED PHYSICAL ACCESS, IN WHATEVER FORM, WOULD RAISE MANY PRACTICAL PROBLEMS FOR BUILDING OWNERS.

Not only is Commission regulation unnecessary, since property owners are already generally giving CLEC's access to their buildings, but forced physical access would create great practical problems and impose enormous potential liability on property owners. Building owners and managers have a great many responsibilities that can only be met if they can control access to their properties, including compliance with safety codes; ensuring the security of tenants,

³⁶ An example of the complexity of these issues is the recent decision in *GTE Southwest Inc. v. Public Utility Comm'n of Texas*, Tex. Ct. of Appeals. No. 03-97-00148-CV, Jul. 15, 1999 (striking down Texas PUC's demarcation point order as a taking under *Loretto*).

³⁷ The Commission's power to prescribe the location of a demarcation point is circumscribed by Section 220 of the Act, 47 U.S.C. § 220. As the Commission has recognized in *Procedures for Implementing the Detariffing of Customer Premises Equipment*, First Report and Order, CC Docket No. 81-893, 95 F.C.C. 2d 1276 (1983), the location of the demarcation point does not reflect title to the wiring but only determines what part of it is on the regulated books of the carrier.

residents and visitors; coordination among tenants and service providers; and managing limited physical space. Needless regulation will not only harm our members' interests but those of tenants, residents, and the public at large.

1. Safety considerations; code compliance.

Building owners are the front line in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For the Commission to limit their control would unfairly increase the industry's exposure to liability and would adversely affect the safety of tenants and more generally the safety of the public.

For example, building and fire codes require that certain elements of a building, including walls, floors, and shafts, provide specified levels of fire resistance based on a variety of factors, including type of construction, occupancy classification, and building height and area. *See* Declaration of Lawrence G. Perry, AIA, attached as Exhibit L. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairways) must meet higher fire resistance standards than other portions of a building. The required level of fire-resistance typically ranges between twenty minutes and four hours, depending on the specific application. These "fire resistance assemblies" must be tested and shown to be capable of resisting the passage of floor and smoke for the specified time.

Over the past ten years, penetrations of fire-resistance assemblies have been a matter of great concern, as such breaches have been shown to be a frequent contributor to the spreading of smoke and fire during incidents. The problem arises because fire-resistance assemblies are routinely penetrated by a wide variety of materials, such as pipes, conduits, cables, wires, and ducts. An entire industry has been built around the wide variety of approaches that must be used

to maintain the required rating at a penetration. It is not a simple issue of just filling up the hole -- the level of fire resistance required, the type of materials of which the assembly is constructed, the specific size and type of material penetrating the assembly, and the size of the space between the penetrating item and the assembly are all factors in determining the appropriate fire-stopping method. Some jurisdictions and standard-setting bodies are also examining whether abandoned or unused cable should be required to be removed, and new cable installed only in metal conduit. The concern is that large amounts of unused cable could contribute to fire hazards. If such codes are adopted, building owners must be able to require providers to comply.

Mandating access to buildings, without adequate supervision and control by a building's owner or manager, would allow people unfamiliar with a building the opportunity to significantly compromise the integrity of fire-resistance-rated assemblies. Telecommunications service personnel are not trained to recognize the importance of such elements in a building's construction, much less to accurately assess the types of assemblies they are penetrating or assuming any responsibility as to code compliance. Thus, while perfectly competent to drill holes and run wire, they would be unable to determine the appropriate hourly rating of a particular wall, floor or shaft, and would not know how to properly fill any resulting holes or recognize those areas that they should not penetrate at all.

In fact, it is unlikely that a person punching holes and pulling cables would even consider patching the holes after they pulled their cables through. Many of these penetrations are made above suspended ceilings or in equipment rooms where there is little or no aesthetic concern.

Maintaining the integrity of fire-resistance-rated assemblies is already a challenge for building managers because of the large number of people and different types of service providers

that may be working a building. Nevertheless, currently a building operator can restrict access to qualified companies and can seek recourse, by withholding payment or denying future access, if the work is not done correctly. If building operators were forced to allow unlimited access to alternative service providers, or were prohibited from restricting such access, the level of building fire safety could be significantly jeopardized. It is essential that building owners and managers be able to continue to ensure in the future that those personnel performing work in a building do so in a manner that does not compromise other essential systems, including fire protection features; this has not been a generic problem in the past, where building owners and managers have retained control. We emphasize that these are not merely theoretical dangers -- we have received reports of actual breaches of firewalls from our members. The only way fire safety can be assured in the future is by allowing building owners and managers to determine who is permitted to perform work on their property.

The same applies to all other codes with which a building owner must comply. *See, e.g.*, Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Allowing an unlimited number of providers unfettered access to buildings increases the severity of the problem by orders of magnitude. Yet the building owner is ultimately responsible for any code violations. Commission regulation in this area could thus have severe unintended consequences for the public safety.