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access providers ("CAPs") to the central offices of local exchange companies ("LECs"). *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

In *Bell Atlantic*, while the Commission concededly did have statutory authority to order "physical connections," this authority could be satisfied by a form of collocation known as "virtual" collocation, where the CAP simply strings its own cable to a point of interconnection near to the LEC central office, and did not necessarily require physical collocation. As a result, the court ruled that the Commission did not have authority to order physical collocation, since this form of collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." *Id.* at 1445 (citing *Loretto*). Indeed, the court stated that it would uphold the Commission's authority only if "any fair reading of the statute would discern the requisite authority," or if the Commission's authority would "as a matter of necessity" be defeated absent such authority. *Id.* at 1445-46 (emphasis added).

In addition to *Bell Atlantic*, a number of other cases, discussed or referenced above, have narrowly construed the Cable Act in order to avoid possible Takings Clause problems. Indeed, these cases primarily involved the question as to the scope of forced access requirements, and whether they could be read to extend to rights of way that had previously been granted to specific carriers, or applied only to clearly dedicated "easements." Courts have construed the statutes narrowly so as to avoid the question whether the broader

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construction urged by the plaintiffs would constitute a taking. *See, e.g. Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (rejecting the plaintiffs broad interpretation of “dedicated” easement as raising “serious questions” under the Takings clause); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (adopting result of *Cable Holdings*); *Cable Investment Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (construing section 621(a)(2) narrowly to avoid constitutional concerns about a potential taking without just compensation).

Because the Telecommunications Act, which was enacted two years after the D.C. Circuit’s decision in *Bell Atlantic*, in no way speaks to the question of how to exercise the power of eminent domain or of how to compensate building owners, it is clear that the Commission lacks statutory authority to issue these regulations.

**(C) Because It Violates Appropriations Law, An Unauthorized Taking Is Especially Problematic, And Courts Therefore Require A Higher Standard To Be Satisfied In Determining Whether Authority Exists**

The Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, provides: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” The Supreme Court has relied on this clause in ruling that no funds shall be transferred from the Treasury other than in accordance with the

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letter of the difficult judgments made by Congress. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990). Thus, the Court has held that plaintiffs will established legal remedies against the Government nevertheless cannot recover monetary damages, absent a clear congressional appropriation. *Id.* at 425 (holding that equitable doctrine of estoppel could not grant respondent a remedy that Congress has not expressly authorized); *Knote v. United States*, 95 U.S. 149, 154 (1877) (the pardon power of the President, however large, “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress); cf. *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80 (1992) (reasoning that funds held in the Treasury during the course of an ongoing *in rem* forfeiture proceeding cannot properly be considered public funds).

For an agency to order the taking of private property, it necessarily must have authority from Congress to spend the public funds needed to pay just compensation to the owners of that private property. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (reasoning that the necessary result of Fifth Amendment and the constitutional separation of powers is that Congress is the only branch of government able to raise revenue and is therefore the only branch able to authorize a seizure of property under the Takings Clause). Moreover, this basic constitutional principle was recognized by the D.C. Circuit in *Bell Atlantic* in 1994, as evidenced in its explanation of why the

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deference to administrative action articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), do not apply where the action will effect a taking:

*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.

*Bell Atlantic*, 24 F.3d at 1445; *see also GTE Northwest v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (ruling that “the power of eminent domain may be exercised by an agency only if the agency has express statutory authority.”).

Thus, because Congress is the only branch of government constitutionally entitled to raise and spend revenue, the Executive’s power to create financial liabilities for the government requires an express statutory authorization. There is no provision in the Telecommunications Act that can plausibly be read to provide the Commission with this authority. Indeed, in light of the enormous financial liabilities that would be triggered by the regulations proposed in the NPRM, *see* Section II(C) above, it is inconceivable that Congress would have authorized this expenditure, let alone have done so implicitly and without any debate in the legislative history of the Telecommunications Act. *See* S. Conf. Rept. 104-230.

For the Commission to exercise the power of eminent domain contained in the NPRM would therefore constitute an unauthorized encroachment on

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Congress' exclusive power under the Appropriations Clause, and, in addition, may well cause a violation of the Anti-deficiency Act. This statute prohibits agency's from spending or obligating funds in excess of their annual appropriation, and the Supreme Court has recently indicated that if an agency were to expose itself to massive financial liability through lawsuits, it would then be in jeopardy of violating this statute. *See Hercules v. United States*, 516 U.S. 417 (1996).

For the foregoing reasons, it is clear that the Telecommunications Act did not provide the Commission to promulgate those regulations proposed in the NPRM that would constitute a taking of the private property of building owners.

## IV. CONCLUSION

As a general matter under local law, building owners are free to restrict access to their property to specific utilities and telecommunications providers, and to negotiate leases with tenants that restrict the tenants' ability to place telecommunications equipment on the building. If the Commission promulgates a rule that prohibits or abrogates these underlying rights of building owners, then it has effected a taking of their property. Under established Supreme Court precedent, this taking is best analyzed as a *per se* taking by virtue of the fact that it causes a permanent physical occupation of the property. In addition, because the prohibitions essentially disable building owners from being able to generate

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any telecommunications-related revenue from their otherwise uniquely valuable telecommunications assets, the prohibitions also amount to a regulatory taking.

Whether viewed as a *Loretto* taking or a regulatory taking, however, the regulations proposed by the Commission in the NPRM would trigger a very large financial liability for the Government to pay just compensation to building owners. This liability was certainly not foreseen or intended by Congress when it passed the Communications Act, nor was there any indication at all in the act that Congress meant for the Commission to have the authority to issue regulations restricting the established rights of real property owners.

For these reasons, the Commission should revise its proposed regulations so as not to impinge on the property rights of building owners.

August 27, 1999

Respectfully submitted,

Steven S. Rosenthal  
Charles J. Cooper  
Hamish P.M. Hume

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

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking	)	
To Amend Section 1.4000 of the	)	
Commission's Rules to Preempt	)	
Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas	)	
Designed to Provide Fixed Wireless	)	
Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rulemaking and	)	
Amendment of the Commission's Rules	)	
To Preempt State and Local Imposition of	)	
Discriminatory and/or Excessive Taxes	)	
And Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications	)	
Act of 1996	)	

**DECLARATION OF GERALD L. HAGOOD IN SUPPORT OF JOINT  
COMMENTS OF BUILDING OWNERS AND MANAGERS ASSOCIATION  
INTERNATIONAL; INSTITUTE OF REAL ESTATE MANAGEMENT;  
INTERNATIONAL COUNCIL OF SHOPPING CENTERS; MANUFACTURED  
HOUSING INSTITUTE; NATIONAL APARTMENT ASSOCIATION;  
NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL  
ASSOCIATION OF OFFICE AND INDUSTRIAL PROPERTIES; NATIONAL  
ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REAL  
ESTATE INVESTMENT TRUSTS; NATIONAL MULTI HOUSING COUNCIL  
AND NATIONAL REALTY COMMITTEE**

I, Gerald L. Hagood declare as follows:

1. I submit this Declaration in support of the Joint Comments of the Building Owners and Managers Association International; Institute of Real Estate Management; International Council of Shopping Centers; Manufactured Housing Institute; National Apartment Association; National Association of Home Builders; National Association of Office and Industrial Properties; National Association of Realtors; National Association of Real Estate Investment Trusts; National Multi Housing Council and National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I have been involved in commercial real estate in Spokane, Washington, for 33 years. I am a CPA and have extensive experience in real estate finance, operations, taxation, and ownership issues.
3. I am currently a managing partner or agent for seven partnerships representing four office buildings and 305 apartment units.
4. As the owner of multi-tenant real estate, I am very conscious of the physical needs required by the telecommunications industry in order to provide service to tenants. Over the past two decades, telecommunications providers have placed greater and greater demands on obtaining access to my buildings.
5. While the local telephone company has a traditional right of way to carry its wires into the buildings and to each of the offices or apartments within the buildings, I have never understood this right of way to have been something that would allow other companies also to have unrestricted access to the wiring inside my property. Indeed, I understood that I was able to offer access to the

inside wiring in my buildings to other telecommunications providers on whatever terms I felt to be fair and appropriate.

6. I have in fact negotiated and entered into a number of different access agreements with telecommunications providers because I believe very strongly that it is in my interest to ensure that tenants are able to use their preferred provider. Nevertheless, these access agreements are entered into individually with each provider, and I would be very surprised to learn that I was not free to turn certain providers away if I felt that it was not beneficial to my buildings and my tenants to have that provider installing his equipment.
7. It has been my experience that, in many instances, the installation of telecommunications equipment does cause a significant disturbance to other tenants in the building, and that the subcontractors of the telecommunications provider are not always considerate of these other tenants. This is one reason why I may sometimes consider refusing access to certain providers.
8. During the course of the past few years, as more and more providers have been given access, I have discovered that my buildings do not have unlimited areas for conduit from the ground floor to the roof. Because of this space constraint, I may at some stage want to refuse access to new providers, or to refuse renewal of access to providers who are not used by any tenants in a building. Obviously, I will make these decisions based very much on existing or future tenant preferences, as it would be foolish of me to deny access to a popular provider. Nevertheless, I certainly expect that I will need to be able to control access in

the future, as more and more providers will compete for the same limited amount of conduit space.

9. In addition to entering into inside wiring access agreements with telecommunications providers, I have also been approached by wireless companies seeking access to my roofs. The same general space constraint applies to wireless providers; however, they require access both to my roofs and to riser space from their antenna on the roofs to the rooms in the buildings. I have entered into a number of agreements with wireless providers, and will likely enter into more in the near future, but I expect that at some stage I will need to monitor the space problem on the roof and possibly charge a higher fee to the provider or agree to access on a more selective basis.
10. The fees I am paid for access to my building, either through the roof or through traditional inside wiring access, may at some point represent a very substantial source of revenue to me, and I would be very surprised to learn that I am required by law to allow all telecommunications providers access to my building without any right to determine the compensation I receive in exchange. There are so many providers in the market right now, even in Spokane, Washington, that such a rule would be impracticable, and would also impose an enormous burden on me as a property owner. More importantly, it has been my clear understanding that I am a property owner who has the right to control who has the right to enter into my property, whether as a traditional tenant or as a telecommunications provider.

11. For the same reason, I believe very strongly that I cannot be forced to allow tenants to affix any form of telecommunications equipment that they wish onto any part of my property. While I want very much to facilitate their ability to receive the service they wish, I may at some point need to restrict their ability to place certain kinds of equipment on the outer part of a building, even if connected to their rented premises. Certain kinds of equipment are aesthetically unpleasant, obtrusive, and even dangerous if hung on certain parts of a building. While I do not currently restrict the ability of tenants to install such equipment, given the space constraints I described above, it is certainly conceivable to me that I will want to do so at some point in the future. Moreover, it would be extremely surprising to me to learn that I did not have the power to do so.
12. I urge you to continue to allow marketplace dynamics to govern access to private property, and all private property owners to exercise their constitutional rights.



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

In the Matter of	)	
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Promotion of Competitive Networks	)	WT Docket No. 99-217
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	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications	)	
Act of 1996	)	
	)	

**DECLARATION OF ALLAN HEAVER IN SUPPORT OF JOINT COMMENTS  
OF BUILDING OWNERS AND MANAGERS ASSOCIATION  
INTERNATIONAL; INSTITUTE OF REAL ESTATE MANAGEMENT;  
INTERNATIONAL COUNCIL OF SHOPPING CENTERS; MANUFACTURED  
HOUSING INSTITUTE; NATIONAL APARTMENT ASSOCIATION;  
NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL  
ASSOCIATION OF OFFICE AND INDUSTRIAL PROPERTIES; NATIONAL  
ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REAL  
ESTATE INVESTMENT TRUSTS; NATIONAL MULTI HOUSING COUNCIL  
AND NATIONAL REALTY COMMITTEE**

I, Allan Heaver declare as follows:

Association of Realtors; National Association of Real Estate Investment Trusts; National Multi Housing Council and National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. Allan B. Heaver - Managing Member of Heaver Properties.

Building Owners and Managers Association (BOMA) International's Committees, i) Chairman - Government Policy Advisory Committee (1999- ), ii) Chairman - Renovation and Retrofit Committee (1993-97), iii) Chairman - Government Affairs Division (1993-95), iv) Member - Energy Committee (1994- ), v) Member - State/Local Affairs & Congressional Network (1988- ).

Building Owners and Managers Association (BOMA) International's Mid-Atlantic Region President (1996-98), Board of Directors (1986 -)

Building Owners and Managers Association (BOMA) Baltimore, President (1988-90), Chair of Legislative Committee (1990-92), Member Legislative Committee (1988 -)

Building Owners and Managers Institute, International, leading provider in the commercial real estate field. Board of Trustees (1990 -).

Rocky Mountain College (Billings, MT), Board of Trustees (1997- ).

McDonogh School, Baltimore, Md and Attended Lehigh University.

Professional Designation RPA-Real Property Administrator.

Author of various articles dealing with property management, real estate, indoor air quality

3. Heaver Properties is a privately owned commercial real estate development firm, which has been involved in the management and development of commercial real estate for over 35 years. Heaver Properties currently owns/manages 15 properties in the Baltimore area comprising under 1,000,000 square feet of commercial space.

4. As the owners of multi-tenant real estate, we are very conscious of the physical needs required by the telecommunications industry in order to provide service to tenants. Over the past two decades, telecommunications providers have placed greater and greater demands on obtaining access to our buildings.

5. While the local telephone company has a traditional right of way to carry its wires into the building and to each of the units within the building, we have never understood this right of way to have been something that would allow other companies also to have unrestricted access to the wiring inside my buildings. Indeed, we understand that we were able to offer access to the inside wiring in our buildings to other telecommunications providers on whatever terms we deemed appropriate and fair.

6. We have negotiated and entered into a number of different access agreements with telecommunications providers because we believe strongly that it is in our interests to ensure that tenants are able to use their preferred provider. Nevertheless, these access agreements are entered into individually with each provider, and we would be very surprised to learn that we were not free to refuse certain providers if we felt that their tenancy was not beneficial to our buildings.

7. It has been our experience that, in certain instances, the installation of telecommunications equipment does cause a significant disturbance to other tenants in the building, and that the subcontractors of the telecommunications provider are not always very considerate of these other tenants. This is one reason why we may sometimes consider refusing access to certain providers.

8. During the course of the past few years, as more and more providers have been given access, we have discovered that our buildings may not have unlimited areas for conduit from the ground floor to the roof. Because of this space constraint, we may at some stage want or need to refuse access to new providers, or to refuse renewal of access to providers who are not used by any tenants in the building. Obviously, we will make these decisions based very much on existing or future tenant preferences, as it would be foolish to deny access to a popular provider. Nevertheless, we certainly expect that we will need to be able to control access in the future, as more and more providers will compete for the same limited amount of conduit space.

9. In addition to entering into inside wiring access agreements with telecommunications providers, we have also been approached by wireless companies seeking access to our roof areas. The same general space constraint applies to wireless providers, however, since they require access both to the roof and riser space from their antenna to the rooms in the building. We have entered into a number of agreements with wireless providers, and will likely enter into more in the future, however, we expect that at some stage we will need to monitor the space problem on the roof and possibly charge a higher fee to the provider or agree to access on a more selective basis.

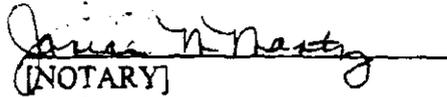
10. The fees which we are paid for access to our buildings, either through the roof or through traditional inside wiring access, may at some point represent a substantial source of revenue to us, and we would be very surprised to learn that we are required by law to allow all telecommunications providers access to our buildings without any right to determine the compensation we would receive in exchange. There are so many providers in the market right now that such a rule would be impracticable, and would also impose an enormous burden on us as a property owner. More importantly, it has been our clear understanding that we are property owners who has the right to control who has the right to enter into our properties, whether as a traditional tenant or as a telecommunications provider.

11. For the same reason, we believe very strongly that we cannot be forced to allow tenants to affix any form of telecommunications equipment that they wish onto any part of their property. While we want very much to facilitate their ability to receive the service they wish, we may at some point need to restrict their ability to place certain kinds of equipment on the outer part of the building, even if connected to their rented premises. Certain kinds of equipment are aesthetically unpleasant, obtrusive, and even dangerous if hung on certain parts of the building. While we do not currently restrict the ability of tenants to install such equipment, given the space constraints we have described above, it is certainly conceivable to us that we may wish to do so at some point in the future. Moreover, it would be surprising to us to learn that we did not have the power to do so.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed August 23, 1999, in Palmdale, Ca.

  
[NAME]

  
[NOTARY]

My commission expires 10/1/01



F

# UTILITY ACCESS AND USE RIGHTS IN THE REAL PROPERTY OF ANOTHER

Charles A. Hansen and Andrew N. Jacobson<sup>1</sup>

## Introduction

This memorandum is filed as a supplement to comments being submitted to the Commission by the Real Access Alliance,<sup>2</sup> in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (released July 7, 1998) (the "NPRM").

This memorandum reviews the basic principals of real property law pertaining to use and access rights to the land of another. The goal of this review is to establish the legal framework necessary to properly address the implications of certain proposals and issues presented in the NPRM, and to offer a consolidated

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<sup>1</sup> Charles A. Hansen is a partner in the law firm of WENDEL, ROSEN, BLACK & DEAN, LLP in Oakland, California, where his practice focuses on real estate, commercial and secured transactions litigation. Mr. Hansen is also a professor at Boalt Hall School of Law, University of California, Berkeley, where he has taught advanced courses in real property law, secured transactions and real estate litigation since 1986. Mr. Hansen has authored a number of books, articles and materials published by the University of California, The California Law Review, the California State Bar, the Rutter Group and the California Continuing Education of the Bar (CEB). Mr. Hansen graduated in 1977 with a J.D. from Boalt Hall School of Law and received his B.A. degree, *summa cum laude*, from U.C.L.A. in 1973.

Andrew N. Jacobson is an attorney with the law firm of MASLON EDELMAN BORMAN & BRAND, LLP in Minneapolis, Minnesota, where his practice focuses on transactional real estate, land use, construction law and telecommunications. Mr. Jacobson has lectured and written several articles and materials on the interface between the real estate and telecommunications industries for the California State Bar, American Bar Association, ABA Probate & Property Journal and the California Continuing Education of the Bar (CEB). Mr. Jacobson received his J.D. in 1991 from Boalt Hall School of Law and graduated with a Bachelor of Architecture degree from California Polytechnic State University at San Luis Obispo in 1984. Mr. Jacobson is a licensed architect and admitted to the California and Minnesota Bars.

<sup>2</sup> The members of the Real Access Alliance are: the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Office and Industrial Properties, the National Association of Real Estate Investment Trusts, the National Association of Realtors, the National Multi Housing Council, and the National Realty Committee. A further description of the members is contained in comments submitted to the Commission by the Real Access Alliance's attorneys -- Miller & Van Eaton, P.L.L.C.

outline and summary of the general legal principles and concepts of real property law applicable to consideration of issues addressed in the NPRM. Because many of the legal principles discussed in this memorandum are rooted in the common law, there exist exceptions to these general principles and, in some instances, courts in various jurisdictions have taken different, sometimes even opposing, positions on the same issue. Similarly, over time, changes have occurred in how certain real property issues are addressed by the courts within a jurisdiction. This is an instance of the dynamic nature of the common law, which frequently evolves in response to changes and advances in society and technology. As a result, many of the cases and secondary sources cited in this memorandum are intended to provide the Commission with representative examples and "majority" rules, rather than invariable holdings.

*Part I* of this memorandum discusses the origins of and basis for use and access rights in real property law. *Part I* also discusses the fact that rules of real property law, including rights of use and access to the land of another, are, with minor exceptions, created by the several states by way of both legislative and decisional processes. In fact, substantive real property law may be the best example of legal matters left to the states and subject to a strong ethic of deference by Congress, the federal courts and federal administrative agencies. *Part II* contains a summary of the relevant general legal characteristics of various types of access and use rights in real property, with a focus on fee interests, leases, easements and real property licenses, which are the most common forms of use and access rights held by utilities. *Part III* examines the nature of utility company access and use rights to real property owned by others and how the form of those rights (i.e., easements, leases or real property licenses) tends to vary depending on such factors as the purpose of the use, location of the use, relationship of the parties, the availability of eminent domain authority and relative cost of the use and access rights.

It is important to note that a number of the terms discussed in this memorandum can have multiple meanings, some of common usage and others of specific legal significance. Even legal terms of art can sometimes have very different characteristics, depending upon the context in which the term is used. A "lease," for example, can pertain to real property or personalty, with one being an estate in real property while the other is merely the right to use personalty for a specified term. Similarly, the legal significance of the term "license" can vary dramatically, depending on the specific factual setting and the type of license which is at issue (e.g., real property *license*, a *license* to practice a profession, a *license* issued by the Commission

to utilize a portion of the radio spectrum, a driver's *license* or the *license* of intellectual property rights). Because many of the questions presented and proposals presented in the NPRM raise significant issues of real property law, it is important that any meaningful analysis of these items be done with legal precision and respect for the underlying body of real property law. It has been observed that "muddiness in legal writings and seeming conflicts in judicial opinions have resulted, in many instances, from the loose use of words."<sup>3</sup>

## **PART I**

### **Rights to Use and Access Real Property Are Issues of State Law**

It is a fundamental principal of real property law in this country that rights in real property arise from and are subject to state and local laws. As enunciated by the United States Supreme Court in *Butner v. United States*, "[p]roperty interests are created and defined by state law."<sup>4</sup> Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* the Supreme Court elaborated further, stating,

"[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."<sup>5</sup>

Real property rights, which are defined in substantial part by applicable state law and principles of real property, are "deeply rooted in state traditions, customs and habits."<sup>6</sup> Historically, the federal courts have shown strong deference to state law standards in the area of real property laws.<sup>7</sup> This federal deference has been consistent, even though the Supreme Court has acknowledged that it can sometimes lead to results varying from state to state.<sup>8</sup>

In past proceedings, the Commission has recognized this important principle of federalism and acknowledged that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter

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<sup>3</sup> Powell on Real Property, Introduction, §5.01

<sup>4</sup> *Butner v. United States*, 440 U.S. 48, 55 (1979).

<sup>5</sup> 449 U.S. 155, 161 (1980) (internal quotation omitted); see also, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) ("Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer" )(J. Stewart, concurring).

<sup>6</sup> *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U.S. 204, 210 (1946).

<sup>7</sup> See, e.g., *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991); *Butner v. United States*, 440 U.S. 48, 53 (1979).

<sup>8</sup> *Butner v. United States*, 440 U.S. 48, 53 (1979).

of state law.”<sup>9</sup> In this proceeding, in addition to the policy considerations, jurisdictional issues and constitutional implications of the proposals and questions raised in the NPRM, the issues in the NPRM pertaining to use of and access to privately owned real property must be examined within the legal framework of applicable real property law of the states. While this deference to the states may result in some variation between jurisdictions on certain issues, this freedom of the states to experiment and establish real property laws is a basic characteristic of American federalism.<sup>10</sup>

## **PART II**

### **Survey of Use and Access Rights to Real Property**

#### **A. Types and Categories of Use and Access Rights.**

The NPRM raises a number of issues pertaining to the scope of the duty which a utility (including incumbent local exchange carriers) has to provide nondiscriminatory access to its infrastructure to telecommunications carriers pursuant to Section 224(f)(1). One of the foundational questions in any exploration of this issue is to determine the nature and legal parameters of the use and access rights enjoyed by the utility which is subject to the requirements of Section 224(f)(1). It is axiomatic that a utility can only provide access to real property, to the extent which the utility possesses the necessary use and access rights and has the right and authority to share those rights with others. A utility cannot be required to grant use and access rights to another which it does not itself possess or have the authority to grant.

The discussion below in this *Section II* surveys the spectrum of use and access rights to real property, and the general legal parameters associated with those various categories. The forms of access and use rights which will be most relevant to any discussion of the proposals and questions raised in the NPRM are: fee interests, easements, leases and real property licenses. In addition, *Part II(C)* below addresses the issue of fixtures, which relates to the Commission’s consideration of the meaning of ownership and control of poles, ducts and conduits under Section 224(f)(1).

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<sup>9</sup> Local Competition First Report and Order, 11 FCC Rcd 15499, 16082 ¶ 1179, citing S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977).

<sup>10</sup> See, Gaudio, *American Law of Real Property*, Introduction, §1.01.

When examining the various forms for use and access rights to real property, it is useful to keep in mind the classic law school metaphor of real property ownership resembling a bundle of sticks.<sup>11</sup> In essence, the forms of access and use rights discussed below can represent various points on a spectrum of ownership of real property, running from ownership of the entire bundle (i.e., fee simple absolute) to much less comprehensive personal privileges to merely use certain sticks from that bundle (i.e., real property license). While the actual physical use of real property can appear to the casual observer to be identical under any of the categories on this spectrum, the rights (i.e., sticks of the bundle) held by the user vary dramatically depending on the specific nature of the underlying interest and its attendant rights and obligations.<sup>12</sup>

**1. Fee Interests.** A fee interest in real property is the most comprehensive form of land ownership. In its purest form, the fee simple absolute, fee ownership represents the entire bundle of ownership "sticks," which collectively constitute the ownership rights in real property.<sup>13</sup> While widely varied in content, most jurisdictions have statutory provisions which designate fee simple absolute estates as the preferred or implied form of real property ownership, unless the instrument creating the ownership interest expresses an intent to create a lesser estate in the grantee.<sup>14</sup>

Some fee interests are less than absolute, and these are commonly referred to as defeasible fee estates.<sup>15</sup> The issue of fee estates, absolute and defeasible, is pertinent to the Commission's analysis of the NPRM as it relates to the Commission's inquiries as to the nature of rights of way. American courts have consistently ruled that grants of "rights of way" constitute either easements or fee interests, with the strong judicial preference being towards the creation of an easement.<sup>16</sup> The concept of defeasible estates has sometimes arisen in relation to these rights of way cases, with courts determining that, even where it is clear that a grant of a right of way created a fee interest, the fee interest created was defeasible (e.g., a fee simple

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<sup>11</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

<sup>12</sup> See, Powell on Real Property, Landlord and Tenant Estates, §16.02[4]; Gaudio, *American Law of Real Property*, §5.02[1] (Question of whether particular use and access rights constitute possessory rights (lease) or nonpossessory rights (easement or license) is important to the resolution of a variety of issues).

<sup>13</sup> Gaudio, *American Law of Real Property*, §2.02[2][a].

<sup>14</sup> Powell on Real Property, Estates in Fee Simple, §184.

<sup>15</sup> Gaudio, *American Law of Real Property*, §2.02[3][a]; see also, *Board of County Supervisors of Prince William County, Va., v. United States*, 48 F.3d 520, 526-527 (Fed. Cir. 1995), cert. denied 516 U.S. 812 (1995).

<sup>16</sup> Bruce and Ely, *Law of Easements and Licenses*, § 1.06[1].

determinable or a fee simple subject to a condition subsequent) and would revert to the grantor in the event the specified use for the right of way was terminated in the future.<sup>17</sup>

**2. Easements.** While variously defined, an easement fundamentally consists of the nonpossessory right of one party to use and/or prevent certain uses of the real property of another.<sup>18</sup> The impact that this physical use (e.g., construction and operation of a railroad line) or restriction on use (e.g., prohibition on the landowner constructing improvements on the surface over an underground pipeline) places on the land on which the easement is located is commonly referred to as the "burden." An easement constitutes an interest in real property, not a mere contract right, but is distinct from the fee interest in the land on which the easement is located.<sup>19</sup> An easement is not an "estate" in land, as an estate would include a possessory right. Rather, an easement is an "interest" in the land, in the nature of an incorporeal right -- i.e., the right to an intangible. One cannot simultaneously possess both the fee and an easement interest in the same parcel of real property.<sup>20</sup> Where such interests are simultaneously held, the easement will be said to have "merged" into the fee interest.<sup>21</sup>

Easements are typically created by an express grant, by implication or prescription (each of which presupposes a grant has occurred), reservation, necessity or pre-existing use.<sup>22</sup> Easements are subject to the formalities of the Statute of Frauds and typically cannot be created by parole (i.e., verbal agreement).<sup>23</sup> Some courts have made exceptions to this general "no parole" rule, creating "easements by estoppel," based on the

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<sup>17</sup> See, e.g. *Concord & Bay Point Land Co. v. City of Concord*, 229 Cal. App.3d 209, 296 (Ca. 1991); and *Patricca v. Zoning Bd. of Adjustment of City of Pittsburgh*, 527 Pa. 267, 276 (Pa. 1991); see, generally, Powell on Real Property, Estates in Fee Simple, §§ 188 (fee simple determinable) and 189 (fee simple subject to a condition subsequent).

<sup>18</sup> Bruce and Ely, Law of Easements and Licenses, §1.01; 25 Am.Jur.2d, Easements and Licenses, §§ 1 and 2; *Long Beach Unified School District v. Godwin Living Trust*, 32 F.3d 1364, 1368 (9<sup>th</sup> Cir., 1994).

<sup>19</sup> 25 Am.Jur.2d, Easements and Licenses, §2.

<sup>20</sup> *Board of County Supervisors of Prince William County, Va., v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995), cert. denied 516 U.S. 812 (1995); *Hidaglo County Water Control & Improvement Dist. v. Hippchen*, 233 F.2d 712, 714 (5<sup>th</sup> Cir. 1956).

<sup>21</sup> Bruce and Ely, Law of Easements and Licenses, §10.09; see, e.g., *Guy v. State*, 438 A.2d 1250, 1252-1253 (Del. 1979); *Heritage Communities of NC, Inc. v. Powers, Inc.*, 272 S.E.2d 399, 400-401 (N.C. 1980).

<sup>22</sup> 25 Am.Jur.2d, Easements and Licenses, §§ 3 and 16.

<sup>23</sup> See, *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 107 (4<sup>th</sup> Cir. 1994).

legal theory of detrimental reliance.<sup>24</sup> Only the owner of the real property to be burdened has the power to create an easement, and it is fundamental that an easement may not create a right that the grantor does not possess.<sup>25</sup> As a result, a party holding less than a fee interest in a parcel of land may only create an easement within the terms of its use and access rights.<sup>26</sup>

**a. Easements "Appurtenant" and "In Gross."** Traditionally, easements were deemed to benefit a specific parcel of land (i.e., be "appurtenant" to).<sup>27</sup> The benefits and burdens of an appurtenant easement are said to "run with the land" of both the benefitted land (the "dominant estate") and the land on which the easement is located (the "servient estate"). When the interest "runs," both the benefit to the easement holder and burden to the owner of the land on which the easement is located pass on to subsequent owners of these properties.<sup>28</sup>

Over time, certain types of easements developed which did not benefit a specific parcel of land and instead benefitted a specific individual or an entity. Such easements have come to be known as easements "in gross." Easements in gross are now recognized by the courts as distinct from appurtenant easements.<sup>29</sup> Where an easement in gross is for the benefit of a business or entity, rather than for an individual, that easement is commonly referred to as "commercial."<sup>30</sup> Utility easements used in connection with the construction and maintenance of a utility's distribution infrastructures (e.g., power lines, telephone cables, sewer pipes) are generally deemed to constitute commercial easements in gross.<sup>31</sup>

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<sup>24</sup> See, *Exxon Corp. v. Schutzmaier*, 537 S.W.2d 282, 286-287 (Tex. 1976); *Lake Meredith Development Co. v. City of Fritch*, 564 S.W.2d 427, 430 (Tex. 1978); *Cleek v. Povia*, 515 So.2d 1246, 1248 (Ala. 1987).

<sup>25</sup> 25 Am.Jur.2d, Easements and Licenses, §14.

<sup>26</sup> *Id.*

<sup>27</sup> 25 Am.Jur2d, Easements and Licenses, § 10; Gaudio, *American Law of Real Property*, § 6.02[6][b].

<sup>28</sup> Bruce and Ely, *Law of Easements and Licenses*, §2.01.

<sup>29</sup> 25 Am.Jur.2d, Easements and Licenses, §11; see, *Bennett v. Commissioner of Food & Agriculture*, 411 Mass. 1, 6 (1991) (old common law rules barring the creation and enforcement of easements in gross have no continuing force).

<sup>30</sup> *Sandy Island Corp. v. Ragsdale*, 143 S.E.2d 803, 807-808 (S.C. 1965); *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646, 648 (Pa. 1938).

<sup>31</sup> See, e.g., *Antonopoulos v. Postal Tel. Cable Co.*, 26 N.Y.S.2d 403 (1941), *affd.* 39 N.E.2d 931 (1942).

b. **Location of the Easement.** The location of an easement may be fixed by agreement between the parties, by use or by acquiescence.<sup>32</sup> Once selected or fixed, the location of an easement generally cannot be changed by either the easement holder or the owner of the servient estate (i.e., the burdened parcel of land), without the other party's consent.<sup>33</sup> This general rule is based on the reasoning that treating the location of an easement as variable would incite litigation, depreciate the value of the burdened real property, and discourage the improvement of the burdened land.<sup>34</sup>

Where the scope of an easement is specific, it decisively establishes the limits of the easement.<sup>35</sup> A "floating easement" (also referred to as a "blanket easement" or "roving easement") is an easement which is not initially limited to any specific area on the burdened real estate.<sup>36</sup> While there are variations based on specific facts and the law of the applicable jurisdiction, the courts generally have taken the practical approach of permitting burdened landowners to designate reasonable locations for floating easements, taking into proper consideration the purpose of the easement.<sup>37</sup> The courts will generally infer an intent by both parties to the easement that the easement be reasonably convenient under the circumstances.<sup>38</sup> Where the burdened landowner fails to designate the location of the easement, the easement owner often will be deemed to have the right to locate the easement, provided that the location is reasonable to the burdened parcel of land.<sup>39</sup> A floating easement generally becomes "fixed" once the usage and location is established.<sup>40</sup> A small minority of courts have taken a much more restrictive approach towards floating easements, holding such easements

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<sup>32</sup> 25 Am.Jur.2d, Easements and Licenses, §77; see also, Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 ALR4th 1053.

<sup>33</sup> 25 Am.Jur.2d, Easements and Licenses, §79; Bruce & Ely, *Law of Easements and Licenses*, §7.05[1]; see generally, Annotation, *Relocation of Easements (Other Than Those Created by Necessity) - Rights as Between Private Parties*, 80 ALR2d 743 (1961).

<sup>34</sup> *Stamatis v. Johnson*, 72 Ariz. 158, 160 (1951).

<sup>35</sup> 25 Am.Jur.Wd, Easements and Licenses, §81.

<sup>36</sup> *City of Los Angeles v. Howard*, 244 Cal. App.2d 538, 541 n.1 (1966); *Missouri Pub. Serv. Co. v. Argenbright*, 457 S.W.2d 777, 780-783 (Mo. 1970) ("blanket easement"); *Salt Lake City v. J.B.&R.E. Walker, Inc.*, 123 Utah, 1, 8 (1953) ("roving easement").

<sup>37</sup> Bruce and Ely, *Law of Easements and Licenses*, §7.02[2][a]; see also, Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 ALR 4<sup>th</sup> 1053, 1062-1064 (1983); *Carroll Electric Coop. Corp. v. Benson*, 312 Ark. 183, 188 (1993).

<sup>38</sup> Bruce and Ely, *Law of Easements and Licenses*, §7.02[2][b].

<sup>39</sup> 25 Am.Jur.2d, Easements and Licenses, §§ 76 and 83.

<sup>40</sup> See, *Beavers v. West Penn Power Co.*, 436 F.2d 869, 874 (3<sup>rd</sup> Cir. 1971) (Where no specific limitation is placed on a utility easement, the boundaries of the easement are determined by the actual location of the utility's wires and cables); see also, *City of Los Angeles v. Howard*, 244 Cal.App.2d 538, 541 n.1 (1966).