

**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 Markets	)	
	)	
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 Communications	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making 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	)	

**JOINT REPLY COMMENTS OF  
THE UNITED TELECOM COUNCIL  
AND  
EDISON ELECTRIC INSTITUTE**

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## SUMMARY

Albeit well intentioned, the current *NPRM* by the Federal Communications Commission (“Commission”) that proposes to force utilities to provide access to rooftops and riser conduit that they own or control within buildings is fundamentally flawed, because it violates principles of both separation of power and federalism. The building access rules encroach on the authority of Congress and state legislatures to enact laws that affect the rights of property owners. In doing so, it intrudes on the authority of the states to determine the extent of those property rights. Therefore, leaving aside the merits of imposing mandatory building access, the Commission may not proceed as a constitutional matter.

This is so because Congress has not expressly or implicitly authorized the Commission to require utilities to provide building access. Such a requirement would be a taking because it would effect a permanent physical occupation of utility and third party property. When Congress or a legislature enacts laws that effect such a taking, in order not to violate the Fifth Amendment to the United States Constitution the law must provide just compensation for the value of the property taken. Moreover, absent an express or implied delegation from Congress or a state legislature, an agency may not similarly promulgate regulations that effect such a taking, even if the regulation provides just compensation.

Neither the Communications Act of 1934 nor the Telecommunications Act of 1996 expressly or implicitly authorizes the Commission to require utilities to provide building access under Section 224. Congress explicitly limited Section 224 to require access to

poles, ducts, conduit and rights-of-way that are used for wire communications. By virtue of the principle of *expressio unius est exclusio alterius*, access to building rooftops and riser conduit is beyond the scope of Section 224. Nor may the Commission rely on implied sources of authority, if any exist, because building access is not such an imperative policy that it would defeat the grant of authority itself if building access was not implied.

Imposing mandatory building access is fundamentally different from other regulations that the Commission has promulgated based on implied jurisdiction alone. Unlike the Commission's jurisdiction over cable television, affirmed by the Supreme Court in 1968, mandatory building access is not directly implicated under the Act as "interstate communications by wire or radio." Moreover, the Commission's anti-competitive restrictions placed on cable television were limited in scope, unlike the unbridled and intricate building access obligations the Commission would impose under Section 224. Most importantly, the regulation of cable television did not implicate the Fifth Amendment prescriptions against takings, but the proposed rules on building access would.

Given the extraordinary nature of this proposed expansion of the Commission's jurisdiction and the burdens that it would create, imposing mandatory building access simply cannot be justified based on implied authority alone. Moreover, it is not clear that building access is such a widespread and critical problem that it requires the Commission to intervene in this manner. Nor is it clear that imposing building access will accomplish anything more than increase the profit margins of telecommunications companies, particularly fixed wireless carriers. Given these uncertainties, the Commission should defer to Congress and the states on this issue. To do otherwise would be lawmaking in the guise of regulation and would oust state authority over property rights.

Even if the Commission has the authority to create a class of Fifth Amendment takings, it must establish a process to ensure that just compensation is given for the value of the taking. No such process is contemplated by the *NPRM*.

In any event, the Commission should not proceed without first addressing pending petitions for reconsideration that question whether Section 224 requires utilities to provide access for wireless attachments. That issue is also pending before the U.S. Court of Appeals for the Eleventh Circuit, and it would be premature to require utilities to provide rooftop access for antennas without determining whether utilities are obliged to provide access for wireless attachments in general.

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**JOINT REPLY COMMENTS OF  
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Pursuant to Section 1.415 of the Federal Communications Commission (“FCC”) Rules, The United Telecom Council (“UTC”) and Edison Electric Institute (“EEI”) hereby submit their joint reply comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.<sup>1</sup> UTC and EEI oppose the proposals to obligate utilities

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<sup>1</sup> *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 64 Fed. Reg. 41887 (Jul. 7, 1999)(hereinafter “NPRM”).*

to provide non-discriminatory access to telecommunications rights-of-way running over, between and through buildings. Nothing in the comments submitted in this proceeding alters UTC's and EEI's conclusion that mandatory building access is beyond the scope of Section 224, because it would enlarge the meaning of pole attachments beyond the intent of Congress and would preempt state jurisdiction to determine property rights. Moreover, the Fifth Amendment takings implications created by such a requirement precludes the Commission from expanding its jurisdiction to this extent. Finally, it is premature and procedurally improper for the Commission to address building access before the Eleventh Circuit has ruled on the validity of wireless attachments under Section 224 and before the Commission itself has taken final action on pending petitions for reconsideration which address related issues.

## **I. Introduction**

UTC (formerly known as the Utilities Telecommunications Council) is the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller rural electric cooperatives and water districts which serve only a few thousand customers each.

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. EEI's U.S. members serve 99 percent of all customers served by the shareholder segment of the U.S. industry. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

Many of the electric, gas and water utility members of UTC and EEI, some of whom also provide commercial telecommunication service, are required to provide non-discriminatory access to poles, conduit and rights-of-way at rates, terms and conditions that are just and reasonable, in accordance with Section 224 of the Communications Act of 1934, as amended. The proposal to require non-discriminatory access to building rooftops and riser conduit would expand the pole attachment rules beyond the Commission's jurisdiction, would force utilities to become accomplices to trespass by competitive telecommunications providers, and would counterproductively drive up the cost of rooftop access or discourage building owners from negotiating for access altogether. Therefore, UTC and EEI continue to oppose the building access proposal for the reasons stated in its comments and in the following reply comments.

**II. The Commission cannot mandate access to rooftops or riser conduit.**

**A. Neither rooftops nor riser conduit is a “right-of-way,” particularly as used in the Telecommunications Act of 1996.**

The building access proposal starts from the flawed premise that the right to place antennas on a building rooftop is a form of an easement, which the *NPRM* equates with rights-of-way. Furthermore, the Commission tentatively concludes that Section 224 requires access to any rights-of-way over rooftops or through riser conduit, regardless of whether the rights-of-way were publicly or privately granted.<sup>2</sup>

In its joint comments, UTC and EEI disputed the Commission's tentative conclusions, both as to the nature of utility access to building rooftops and to riser conduit within buildings. To paraphrase the joint comments, utility access to building rooftops and

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<sup>2</sup> *NPRM*, at ¶41.

risers are generally obtained under *license*, and are therefore not properly subject to access as a “right-of-way” under Section 224.<sup>3</sup> Moreover, in the exceptional cases in which rooftops and risers are accessed pursuant to rights-of-way and private easements, State law strictly controls the ability of utilities to apportion or convey any right of control or access obtained thereunder.<sup>4</sup>

These clarifications in the joint comments by UTC and EEI are echoed in other comments submitted in this proceeding. BOMA asserts that “there are no ‘rights-of-way’ inside buildings. Building access rights take the form of leases, licenses and easements.”<sup>5</sup> The City and County of San Francisco concurs that “[p]roperty rights are a matter of and are defined by state law. Generally, the term ‘rights-of-way’ has not been applied to building premises. And contrary to the Commission’s assertion, rather than the equivalent of an easement, the privilege of passing over another’s land is a *type* of easement . . . [which] is determined by the original grant, in the same manner as contracts in general, or by the nature of the enjoyment by which it was acquired.”<sup>6</sup>

Nor may the Commission disregard the judicially recognized distinction between public and privately granted utility rights-of-way. As BellSouth notes, both Congress and

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<sup>3</sup> Joint Comments of UTC and EEI at 8.

<sup>4</sup> Joint Comments of UTC and EEI at 5 (adding that rights-of-way are not to be confused with private easements that are controlled by individual agreements which are interpreted according to State law).

<sup>5</sup> Comments of the Building Owners and Managers Association, International (“BOMA”) at 49 (noting *inter alia* that extending “conduit” within Section 224 to include riser conduit would conflict with the Commission’s earlier interpretation that limited conduit to “underground reinforced passages”).

<sup>6</sup> Comments of the City and County of San Francisco at 12 (citations omitted).

the courts have accentuated the distinction between utility rights-of-way and private easements in the Communications Act, preventing cable operators from construing the term “easements” in Section 621(a)(2) to permit them to piggyback on utility lines, “exterior or interior to building structures.”<sup>7</sup>

Proponents of building access such as Teligent are forced to concede that “[s]ome courts have defined [right-of-way] as an easement while others describe a right-of-way as a license or contractual agreement.”<sup>8</sup> AT&T implicitly concedes as much by urging the Commission to require utilities to negotiate modifications to their rights-of-way

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<sup>7</sup> Comments of BellSouth Corporation at 11, *citing Access-to-Premises Litigation Under Federal, State and Local Law*, PLI Cable Television Law 1995 (Jan. 15, 1995) 1111, 1114; *See also*, Comments of Florida Power & Light at 10-11 n. 18. *Citing Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4<sup>th</sup> Cir. 1993) (“dedicated easement” means dedicated to the public); *UACC-Midwest, Inc. v. Occidental Development, Ltd.*, 1991 U.S. Dist. Lexis 4163 (W.D. Mich. 1991) (no indication that Congress intended to grant a right of access over property simply because of existence of utility transmission lines; no access to interior in that no easements exist as to the building’s interior); *Cable Investments, Inc. v. Woolley* 867 F.2d 151 (3d Cir. 1989) (no access to multi-unit dwelling); *Cable Associates, Inc. v. The Town & Country Management Corporation*, 709 F.Supp. 582 (E.D. Pa. 1989) (no access into building through private telephone company easement); *Century Southwest Cable Television, Inc. v. CIIF Associates*, 33 F.3d 1068 (9<sup>th</sup> Cir. 1994) (leaving issue undecided as there was no evidence of easements inside building); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11<sup>th</sup> Cir.), *cert. denied*, 506 U.S. 862 (1992) (no access to interior of multi-unit apartment building). *Accord Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499 at ¶ 1179 (1996), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997), *aff’d in part and vacated in part sub nom., AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (“*Local Competition Order*”)(declining cable operator contentions that utility easements are accessible pursuant to Section 621(a)(2), adding that “[w]e cannot structure general access requirements where the resolution of conflicting claims as to a utility’s control or ownership depends upon variables [i.e. building owner property rights] that cannot now be ascertained.”)

<sup>8</sup> Comments of Teligent, Inc. at 27 (hastily and abruptly concluding, “Regardless of the particulars, rights-of-way encompass a broad spectrum of property interests and the

agreements with building owners so as to enable the utilities to comply with their Section 224 access obligations.<sup>9</sup> If utility rights-of-way were not controlled by individual agreements that could potentially restrict or prohibit third party access, AT&T would not have raised the issue.

Proponents of building access acknowledge the limitations of Section 224 by urging the Commission to adopt an expansive meaning of the ownership or control of utility rights-of-way. They argue that utilities provide access to any facilities they use or have the right to use, regardless of whether they actually own or control them. Thus, rooftops which utilities do not control as licensees would be subject to Section 224, merely because they have the right to use them. Likewise, they argue that property owned by a utility but used in the manner of a right-of-way would be subject to Section 224, even though as a legal matter, it is not a “right-of-way” at all.<sup>10</sup>

The extent of utility ownership or control should not be manipulated to obliterate the meaning of the term “right-of-way.” A mere license to use a rooftop does not allow a utility to convey rights to third parties to place an antenna on it. Nor would a private easement to use building risers necessarily allow a use that is either inconsistent or which exceeds the scope of the original grant.<sup>11</sup>

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Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.”) *Id.* at 27-28.

<sup>9</sup> Comments of AT&T at 30-36.

<sup>10</sup> Comments of WinStar Communications, Inc. at 55-56. (enabling carriers to demand access to utility rooftops, apart from those owned by third-parties that they only have a license to use.)

<sup>11</sup> Comments of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Southern Company (“AEPSC *et al.*”) at 16

Similarly, though a right-of-way may be owned in fee, one can never have a right-of-way over one's own property. Where the sole purpose of the fee-owned property is not for use as right-of-way, but where the owner has on the fee-owned property, lines or walks or drives in order to access a particular building on his or her own property for his or her own use, such use, even in the broadest sense and common usage is not a use of way over another's property."<sup>12</sup>

Thus, the extent of ownership or control of utility "rights-of-way" may only be determined according to the unique limits in each case according to state law.

**B. Congress did not preempt existing state law governing the interpretation of licenses, private easements and rights-of-way.**

In the *NPRM*, the Commission invited comment on the extent to which it should defer entirely to state law in determining rights-of-way that would be subject to mandatory building access.<sup>13</sup> In the joint comments, UTC and EEI noted that anything less than complete deference would preempt state jurisdiction without adequate authority or justification.<sup>14</sup> Imposing mandatory building access under Section 224 would preempt state jurisdiction over property rights by dictating to the states the extent of third party

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("Since an electric utility's right of access is limited to the delivery of electric service, the electric utility does not have the power to convey a right of access to the pathways it occupies for some other purpose to a third party, such as the delivery of telecommunications services.")

<sup>12</sup> Comments of Florida Power & Light Company at 20. *See also* Comments of AEPSC *et al.* at 24 ("An owner of land in fee simple cannot have an easement in his own land, such as a right-of-way, because all possible uses of an easement are contained in his general right of ownership. You can have one or the other, a right-of-way or a fee simple. You can't have both"); Comments of Cinergy at 10 ("Thus, where the Commission asserts that the term 'right-of-way' is synonymous with an easement, it implicitly excludes from the definition of "rights-of-way" land that is owned in fee simple absolute, in that the presumed 'right-of-way' would merge . . . and would be extinguished.")

<sup>13</sup> *NPRM* at ¶ 47.

<sup>14</sup> Joint Comments of UTC and EEI at 6-9.

access to utility rights-of-way. Congress neither expressly nor implicitly authorized the Commission to oust state jurisdiction of rights-of-way.

The City and County of San Francisco concurs with the preemption analysis in the joint comments by UTC and EEI. Preemption of state jurisdiction, especially state and local police powers, would require an “unmistakably clear” statement by Congress. Nowhere in sections, 4(i), 201(b) and 303(r) does Congress specifically authorize the Commission to preempt state property laws, any more so than local zoning restrictions. Instead, as both the comments by San Francisco and UTC and EEI note, Congress manifested the opposite intent in Section 332(c)(7)(a), when it preserved state jurisdiction over state and local police powers such as zoning.<sup>15</sup> Moreover, Section 224(c) allows the states to preempt federal regulation of pole attachments, further undermining the claim that federal jurisdiction implicitly displaces that of the states.<sup>16</sup>

State jurisdiction over rights-of-way does not stand as an obstacle to building access. Proponents of building access argue that a national uniform policy is necessary to force states that have not already imposed such an obligation to do so. PCIA asserts without elaboration that “compliance with varied access requirements across different states could impede the effectiveness of competition.”<sup>17</sup> MCI Worldcom and others would

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<sup>15</sup> Comments of City and County of San Francisco, at 17, *citing* 47 U.S.C. § 332(c)(7)(a). *See also* 47 U.S.C. § 253(c) (preserving State and local authority to manage the public rights-of-way or “to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way . . .”).

<sup>16</sup> 47 U.S.C. § 224(c).

<sup>17</sup> Comments of The Personal Communications Industry Association (“PCIA”) at 9; *See also* Comments of The Association for Local Telecommunications Services (“ALTS”) at 18-19(claiming that the process of winning building access legislation on a state-by-state

go one step further by requiring states that regulate pole attachments in accordance with Section 224(c) to certify that they adopt “access rules that go at least as far as the Commission’s rules in promoting competitive access to poles and conduits.”<sup>18</sup> None of the proponents adequately explains why such commandeering of regulation of property rights is necessary, much less constitutional.<sup>19</sup>

Contrary to proponents’ unsupported opinions, the Commission can accomplish its policy objectives without creating or exacerbating conflicts with state law regarding use of utility easements and rights-of-way. Alternative technologies and free market solutions have not been investigated.<sup>20</sup> Moreover, imposing non-discriminatory prices for building access may have the perverse effect of artificially maintaining costs above market levels.<sup>21</sup> For example, a building owner may not be able to attract a low-cost CLEC to serve his tenants if the building owner cannot offer the CLEC access to the building at rates below those he has previously negotiated with others. The Commission needs to consider all the

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basis is “not only slow and extremely expensive, but also thus far largely unsuccessful.”); *and see* Comments of WinStar Communications, Inc. at 20-22 (claiming that a “national, federal solution to the building access problem is essential [because] [i]t would be very difficult and time-consuming for competitors to rely upon intervention from all 50 States.”).

<sup>18</sup> Comments of MCI Worldcom, Inc. at 18, 20.

<sup>19</sup> *See Printz v. U.S.*, 521 U.S. 898 (1997).

<sup>20</sup> Joint Comments of UTC and EEI at 8.

<sup>21</sup> *Compare Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342 (1914) (in which the Interstate Commerce Commission’s policy requiring non-discriminatory railroad rates ultimately raised rates nationwide and effectively ousted state jurisdiction to the point that states insisted that the FCC be denied similar jurisdiction over intrastate communications in the Communications Act of 1934 (i.e. Section 2(b)).

ramifications before it ousts state jurisdiction in the name of non-discriminatory building access.

Some states already have required building access.<sup>22</sup> While it may be difficult for CLECs to convince states that non-discriminatory building access is necessary or even wise, that is not an adequate justification for usurping their authority.<sup>23</sup> Section 253 only allows the Commission to preempt state laws or regulations, “that prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service.”<sup>24</sup> Inaction does not trigger Commission authority under Section 253.

**III. The Commission may not impose non-discriminatory building access because it would necessarily create an identifiable class of applications that would constitute a *per se* taking under the Fifth Amendment.**

In the *NPRM*, the Commission invited comment on the takings implications in requiring building access.<sup>25</sup> UTC and EEI advised that such a requirement would constitute a taking that the Commission was not authorized by Congress to impose.<sup>26</sup> Since then, the Eleventh Circuit Court of Appeals has confirmed that the mandatory access requirement in Section 224 is a *per se* taking, because it effects a permanent

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<sup>22</sup> Connecticut, Texas, Ohio, Nebraska and California. *See Notice* at ¶54 n. 129; and *see* Comments of WinStar Communications, Inc. at 19.

<sup>23</sup> *Supra* n. 14.

<sup>24</sup> 47 U.S.C. § 253(a). Nor should it be implied that Section 253(c) only preserves state and local authority over “public rights-of-way.” Section 253(c) refers to rights-of-way that the state would be entitled to “manage” or for which they could “require fair compensation.” Congress did not mention “private rights-of-way” in Section 253(c), because states do not manage them nor are they entitled to receive compensation for them. *But see* Comments of WinStar Communications, Inc. at 55.

<sup>25</sup> *NPRM* at ¶¶ 58-60.

<sup>26</sup> Joint Comments of UTC and EEI at 14-16.

physical occupation of property that utilities are required to provide under Section 224(f).<sup>27</sup> Therefore, the Commission may not impose building access under Section 224 because Congress has not authorized it to create such an identifiable class of applications that would necessarily constitute a taking.

Building access is neither expressly authorized within the Act, nor could it be implicated “as a matter of necessity, where ‘the grant [of authority] itself would be defeated unless [takings] power were implied.’”<sup>28</sup> As the joint comments illustrated, Congress intended to limit the scope of Section 224 explicitly to “poles, ducts, conduit and other rights-of-way.”<sup>29</sup> The conclusion that Congress did not expressly authorize the Commission to extend Section 224 to include conduit or rights-of-way necessary for building access is apparent from the legislative history of the 1978 Pole Attachment Act which was left unaltered by the Telecommunications Act of 1996.<sup>30</sup> Nor may the Commission rely on implied sources of authority elsewhere within the Communications

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<sup>27</sup> *Gulf Power v. U.S.*, No. 98-2403, slip op. at 5-6 (11<sup>th</sup> Cir. Sept. 9, 1999), *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>28</sup> *Bell Atlantic v. FCC*, 24 F.3d at 1446, quoting *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F.362, 373 (C.C.W.D. Pa), *aff’d*, 123 F.3d (3d Cir. 1903), *aff’d*, 195 U.S. 540 (1904).

<sup>29</sup> Joint Comments of UTC and EEI at 12-13, *citing* 47 U.S.C. § 224(a)(1).

<sup>30</sup> *See* S. REP. NO. 95-580 at 16 (clarifying that the Pole Attachment Act would not require the Commission “to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire or even access and rents for antenna sites,” adding 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.”).

Act to provide ancillary jurisdiction to require building access, because such access has not been shown to be necessary, either as a practical or policy matter.

**A. Mandating nondiscriminatory access to building rooftops and riser conduit would effect a *per se* taking under the Fifth Amendment to the Constitution.**

In their comments, proponents of building access primarily argue that building access would not be a *per se* taking, but would instead be a regulatory taking, if a taking at all.<sup>31</sup> The decision in *Gulf Power* has foreclosed that argument.<sup>32</sup> Proponents alternatively argue that, even if building access would be considered a taking, it would not be unconstitutional so long as just compensation was provided for the value of the taking.<sup>33</sup> While it is true that a taking is legal when Congress “has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation,”<sup>34</sup> the same cannot be said when an agency’s interpretation of its authority

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<sup>31</sup> See e.g. Comments of Teligent at 53-65 (distinguishing the mandatory collocation rules in *Bell Atlantic* for the proposition that building access would not constitute a taking, because landlords would have the option to escape the requirement and restrict all telecommunications providers or to submit to the requirement and accept all on a non-discriminatory basis); accord Comments of Competition Policy Institute at 10-13; Comments of PCIA at 20; Comments of WinStar Communications, Inc. at 41, 45-50 (all citing *Yee v. City of Escondido*, 503 U.S. 519 (1992) for the proposition that building access is not a *per se* taking, because it is avoidable.)

<sup>32</sup> *Gulf Power*, No. 98-2403, slip op. at 6-7 citing *Loretto*, 458 U.S. at 426, and quoting *Western Union Telegraph Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 573 (1904)(rejecting both the argument that Section 224 is optional and that utility property committed to public use loses its Fifth Amendment protection from uncompensated takings).

<sup>33</sup> Comments of Teligent at 64.

<sup>34</sup> *Gulf Power*, No. 98-2403, slip op. at 13, quoting *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

creates “an identifiable class of cases in which application of a statute will necessarily constitute a taking.”<sup>35</sup>

The taking of private property by agency action represents “executive encroachment on Congress’s exclusive powers to raise revenue, and to appropriate funds.”<sup>36</sup> Courts must narrowly construe statutes, “within the bounds of fair interpretation . . . to defeat administrative orders that raise [such] substantial constitutional questions.”<sup>37</sup> Therefore, in order to prevent the encroachment upon the legislative authority of Congress, courts would be obligated to prevent the Commission from imposing building access, which Congress did not authorize and which would necessarily create a class of applications that would constitute a taking.

Proponents of building access are misguided when they assert that the takings implications on the Commission’s authority are mitigated “by the ability of parties to seek judicial relief under the Tucker Act.”<sup>38</sup> Even though “the Tucker Act remedy [was] presumed available” in *Bell Atlantic*, the D.C. Circuit was compelled to vacate the

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<sup>35</sup> *Bell Atlantic*, 24 F.3d at 1445. “Of course the Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for redress, generally no constitutional question arises and the judicial policy of avoiding such questions may not be applied. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28. But precedent instructs that the policy of avoidance should nonetheless take effect when ‘there is an identifiable class of cases in which application of the statute will necessarily constitute a taking.’”

<sup>36</sup> *Id.* (citations omitted).

<sup>37</sup> *Id.* citing *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988).

<sup>38</sup> Comments of Teligent at 64; *and* Comments of WinStar Communications, Inc. at 48.

collocation rules.<sup>39</sup> The court explained that it could not accord *Chevron*<sup>40</sup> deference to the Commission’s collocation rules because to do otherwise “would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen,” *through Tucker Act claims*.<sup>41</sup> Therefore, the availability of Tucker Act relief would not stop a court from vacating an agency order that effected a *per se* taking, such as building access, without authorization from Congress.

Nor can proponents of building access effectively distinguish the facts at issue in *Bell Atlantic*. First, *Gulf Power* undermines their claim that building access, unlike collocation, could be construed as a voluntary option.<sup>42</sup> Second, like physical collocation, building access would *necessarily* constitute an unauthorized taking that a court would invalidate because it would open the flood-gates to lawsuits from every landlord rendered helpless against the onslaught of carriers invading his or her property at supposedly cost-based rates.<sup>43</sup>

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<sup>39</sup> *Bell Atlantic*, 24 F.3d at 1445.

<sup>40</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>41</sup> *Bell Atlantic*, 24 F.3d at 1445.

<sup>42</sup> Comments of Teligent at 66. *Compare Gulf Power*, No. 98-2403, slip op. at 6 (holding that Section 224(f) requires a utility to acquiesce to a permanent, physical occupation of its property and effects a *per se* taking of a utility’s property under the Fifth Amendment.) *cf. FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (holding that there was no taking under *Loretto* in the pre-1996 version of the Pole Attachment Act because it did not contain the necessary “element of required acquiescence”).

<sup>43</sup> *See* Comments of BellSouth Corporation at 16-17 (claiming that “[t]he question that continues to bother building owners . . . provoked into panic by ‘mandatory access’ proposals in this and certain legislative proceedings . . . is, *how many carriers must I plan for.*”); *But see* Comments of Teligent at 67 (claiming that building access would either “*not . . . necessarily constitute a taking . . . or would effect a taking, if at all, only in*

Nor are landlords the only class of takings litigants. Carriers with existing agreements to serve multiple tenant environments (“MTEs”) would represent another class created by non-discriminatory building access. As ICTA emphasizes in its comments, “the expansion of access rights in the *NPRM* would, perversely, have significant anti-competitive consequences in the local [multichannel video programming distribution] markets,” by interfering with the ability of new entrants to recover and attract investment through exclusive agreements to serve MTEs.<sup>44</sup> Abrogating such exclusive agreements would constitute a compensable regulatory taking, not *necessarily* in every case, but certainly in most.<sup>45</sup>

**B. Congress has not authorized the Commission to impose building access.**

In the final analysis, the Commission may not impose building access because this proposal is lawmaking rather than a reasonable interpretation of its existing authority, either express or implied. The Commission is asserting jurisdiction over persons that are not engaged in communications by wire or radio,<sup>46</sup> and it is forcing utilities to become

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certain situations”) *citing U.S. v. Riverside Bayview Homes*, 474 U.S. at 127-28 and *Nat’l Mining Ass’n v. Babbitt*, No 98-5320, 1999 WL 241776 (D.C. Cir. 1999).

<sup>44</sup> Comments of Independent Cable and Telecommunications Association (“ICTA”) at 3.

<sup>45</sup> *See Bell Atlantic*, 24 F.3d at 1446 (distinguishing regulatory takings that may avoid a narrowing construction under the avoidance canon from unauthorized *per se* takings that “confer an exclusive right of physical occupation,” that must be vacated under “the doctrine established in *Loretto*.”) *But see* Comments of Teligent at 64, 67 (neglecting to mention the distinction between regulatory and *per se* takings as applied to the avoidance canon).

<sup>46</sup> *See e.g.* Section 201(a). 47 U.S.C. §201(a). *But see* Comments of Sprint Corporation at 16-17 (claiming that a building owner who provides space in an MTE to a carrier is subject to Commission jurisdiction under Section 201(a)).

unwilling accomplices to trespass by drastically enlarging the scope of Section 224,<sup>47</sup> inconsistent with the intent of Congress<sup>48</sup> and the Commission’s own earlier policy statements.<sup>49</sup> At the same time, it would necessarily trample the authority of the states by forcing them to conform their laws and privately negotiated agreements to an arbitrary federal standard of the ownership or control of utility rights-of-way.<sup>50</sup>

1. Congress has not expressly authorized building access.

Nowhere within the Act has Congress expressly authorized such a significant undertaking.<sup>51</sup> Section 224 merely requires that investor-owned utilities (“IOUs”) and ILECs provide cable operators and telecommunications carriers access to “poles, ducts, conduit and rights-of-way” that they use for wire communications.<sup>52</sup> It does not require utilities to provide access for wireless attachments, especially those on building rooftops.<sup>53</sup> Nor does the legislative history support an interpretation that would include building

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<sup>47</sup> 47 U.S.C. § 224. *See also* Comments of Ameritech at 4.

<sup>48</sup> *See* Joint Comments of UTC and EEI at 10-14; *and see* S. REP. NO. 95-580 at 16, *supra* n. 30.

<sup>49</sup> *See Local Competition Order* at ¶ 1185 (clarifying that “an overly broad interpretation of [rights-of-way] could impact the owners and managers of small buildings, as well as small LECs by requiring additional resources to effectively control and monitor such rights-of-way located on their properties.”)

<sup>50</sup> Joint Comments of UTC and EEI at 5-9.

<sup>51</sup> Joint Comments of UTC and EEI at 10-14.

<sup>52</sup> 47 U.S.C. §224.

<sup>53</sup> Joint Comments of UTC and EEI at 11-13. *Accord* Comments of AEPSC *et al.* at 23. But *see* Comments of WinStar Communications, Inc. at 53-54 (asserting vague policy grounds for expanding Section 224 to include wireless attachments, including those on building rooftops.)

access, including riser conduit.<sup>54</sup> Therefore, the Commission may not use Section 224 as the vehicle to allow telecommunications carriers to gain access to buildings.

2. The authority to impose building access may not be implied.

The Commission relies solely on implied sources of authority, but it bears repeating that “such an implication may be made only as a matter of necessity, where ‘the grant [of authority] itself would be defeated unless [takings] power were implied.’”<sup>55</sup> This is not simply a question of whether building access is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”<sup>56</sup> Although the Communications Act gives the Commission, “not niggardly, but expansive powers,”<sup>57</sup> it does not give carte blanche for CLECs to take private property. Building access is not necessary as a practical or policy matter to justify creating such a broad class of takings based on ancillary authority alone.

*a. Building access is unnecessary as a practical matter.*

It is far from clear that building access is such a widespread and serious problem that it threatens to cripple the Commission’s efforts to promote local competition. ICTA

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<sup>54</sup> See S. REP. NO. 95-580 at 16, *supra* n. 30.

<sup>55</sup> *Bell Atlantic*, *supra* n. 28.

<sup>56</sup> *Notice* at ¶ 57 quoting *United States v. Southwestern Cable, Co.*, 392 U.S. 157 (1968). See *Bell Atlantic*, 24 F.3d at 1445 (courts do not accord *Chevron* deference to an agency interpretation of its authority that creates an identifiable class of applications that would necessarily constitute a taking.) *But see* Comments of WinStar Communications, Inc. at 47-48 (citing Section 706 and Section 254 as sources of ancillary authority to effect a taking through mandatory building access.) Note that neither Section 706 nor Section 254 contemplate compensating parties for governmental takings designed to promote advanced telecommunications services or universal service.

<sup>57</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

reports that “in residential markets, MDU owners are not a significant barrier to entry for CLECs. Where CLECs are offering high-quality services at competitive prices, MDU owners are seeking them out to improve the quality of, and raise the value of, the units on the property.”<sup>58</sup> Instead of fighting building owners, one CLEC, OnSite Access, has built its business in commercial markets by winning over landlords.<sup>59</sup>

OnSite’s [business] model is an increasingly familiar one: The building-centric service provider works through building owners or managers securing an agreement to provide service throughout the building. Landlords get a percentage of the billed and collected revenue, and the service provider runs a high-speed connection into the building’s basement and installs access equipment at that point.

‘There is a lot of competition in this market,’ [one investor] says. ‘But it’s a gigantic market there [sic] are over 100,000 high-rise buildings in the U.S. with more than 50,000 square feet of office space and multiple tenants.’

This model is attractive to landlords for multiple reasons [the President and CEO of OnSite] says. First, having a building wired for high-speed service helps landlords attract tenants. ‘We put the infrastructure in at no cost to them,’ he says. Second, in today’s economy, when occupancy rates are generally high because business is booming, ‘we offer a way to increase their revenue,’ he says.<sup>60</sup>

This timely story raises questions whether building access is a real barrier to competition.

Nor is it clear that it is necessary to forcibly open access in order to promote competition. BellSouth suggests that, “[p]roper education and planning will obviate many of the access problems which the NPRM seeks to address. ‘Mandatory access’ laws are

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<sup>58</sup> Comments of ICTA at 4.

<sup>59</sup> Carol Wilson, *Provider Leaps Tall Buildings*, Inter@ctive Week via NewsEdge, Sept. 3, 1999.

<sup>60</sup> *Id.*

not needed because building owners will respond to market forces in the same way that they respond today relative to other aspects of the commercial and residential real estate industry.”<sup>61</sup> Moreover, BOMA denies that building owners are completely responsible for difficulties in negotiating building access.<sup>62</sup>

Proponents of building access only offer anecdotal evidence to suggest that building access is a significant barrier to entry. ALTS cites a litany of examples of landlords either flatly refusing or unreasonably pricing building access.<sup>63</sup> While these one-sided complaints may lend some facial plausibility to claims that a problem exists, no comprehensive (or even partial) market study has been filed that would support such a claim, much less confirm it.

*b. Building access is unnecessary as a policy matter.*

UTC and EEI believe that the views expressed by Chairman Kennard -- forbearing from regulating certain broadband technologies -- apply equally to building access. The Chairman has gone on record opposing cable open access because “we can’t predict where this market is going. ... The competitive fires are burning. ... [A] deregulatory approach ... will let this nascent industry flourish.”<sup>64</sup> In the same way that a “new paradigm-shifting technology” may eliminate the demand for cable open access, the

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<sup>61</sup> Comments of BellSouth at 18.

<sup>62</sup> Comments of BOMA at 27-31.

<sup>63</sup> Comments of ALTS at 6-17.

<sup>64</sup> This Week’s Big Thinker, Excerpts from Speech by William Kennard before the National Cable Television Association on June 15, 1999, <http://www.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/jump/0,6918,2294365,00.html> (visited Aug. 25, 1999).

Commission should not wed itself to building access, given the rapidly evolving development of new delivery technologies.<sup>65</sup>

The competitive success of WinStar Communications belies the need for building access to promote competition. Without Commission intervention, WinStar has negotiated access to 4,200 building rooftops, and its market capitalization has risen over 457 percent in only two years, from approximately \$336.6 million in 1997 to over \$1.5 *billion* at present.<sup>66</sup>

Moreover, building access may actually thwart facilities-based competition in various ways. In the extreme, a landlord or manager may deny access to all carriers in order to avoid regulation. More likely, a non-discriminatory rate requirement will fix the price of access at supra-competitive levels. In one sense, non-discriminatory access discourages arms-length negotiation of building access rates between building owners and incumbent providers, both of whom would have incentives to set rates at levels that would discourage new entrants. Conversely, other building owners that wish to attract new entrants would not be able to offer discounts that would make entry profitable for CLECs. Thus, nondiscriminatory building access is not necessarily wise policy and could not support the implication that Congress authorized it.

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<sup>65</sup> *Id.* See also Joint Comments of UTC and EEI at 16, 18, 20.

<sup>66</sup> 1999 10-K Annual Report of WinStar Communications, Inc. filed with the Securities and Exchange Commission, at 1-3 (Mar. 30, 1999); and 1997 10-K Annual Report, at 1 (Mar. 30, 1997).

**C. To require rates at less than full market value would be an unconstitutional taking of private property by the government.**

Even if authority to impose building access existed, it would still be an unconstitutional taking if it failed to provide just compensation to utilities forced to provide access under Section 224. Utilities have paid fair market value for their rights-of-way and private easements and would be entitled fair market value for them.<sup>67</sup> The *NPRM* does not propose how utilities would be compensated under Section 224 nor does it explain how building access would be enforced or what evidentiary burdens would apply in an enforcement proceeding.<sup>68</sup> UTC and EEI are concerned that the *NPRM* does not provide “an adequate process for obtaining compensation.”<sup>69</sup> The failure to adopt a process that ensures utilities receive full market value for their rights-of-way and private easements would serve as alternative grounds for a reviewing court to strike building access.<sup>70</sup>

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<sup>67</sup> See *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441.

<sup>68</sup> Any building access requirement premised upon Section 224 must account for “vital safety and engineering concerns” that prevent certain communications wires to physically occupy the same pathway as electrical wires. See Comments of AEPSC *et al.* at 12.

<sup>69</sup> *Gulf Power*, No 98-2403, slip op. at 13, quoting *Williamson County*, 473 U.S. at 194-95, *supra* n. 34.

<sup>70</sup> *Id.* Even the federal government demands to be paid full market rates for wireless attachments. See, e.g., GSA Bulletin FPMR D-242, 62 Fed.Reg. 32,611 (June 16, 1997) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); GSA Bulletin FPMR D-246, 63 Fed.Reg. 10,631 (Mar. 4, 1998) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); see also, Budget of the United States Government, Fiscal Year 2000, Appendix, page 181, ID. Code 12-9921-4-999 (1999) (proposal for utilities to pay full market value for use of right-of-way on federal land); and see Statement of Mike Dombeck, Chief USDA Forest Service, Before the House Committee on Resources, Forest Health Subcommittee, Forest Service Fiscal Year 2000 Budget (Feb. 23, 1999).

**IV. The FCC must resolve pending petitions for reconsideration and issues on appeal that question the basis for imposing building access rights under Section 224.**

Before opening a new proceeding to address building access, the FCC must first resolve the fundamental question whether wireless attachments are “pole attachments” within the meaning of Section 224 of the Telecommunications Act. This question is currently pending before the Eleventh Circuit Court of Appeals.<sup>71</sup> It is premature for the Commission to mandate access to building rooftops and riser conduit under Section 224 for wireless carriers before the Eleventh Circuit has returned its decision on the Commission’s jurisdiction over wireless attachments. Resolving the issue of wireless attachments is a necessary precondition to expanding that right to include building access. Nor could the FCC simply defy an adverse appellate decision.<sup>72</sup>

It is also procedurally improper for the FCC to adopt a new rulemaking to address building access when petitions for reconsideration addressing it and related issues have been fully briefed and have remained pending for as much as three years.<sup>73</sup> The arbitrary

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<sup>71</sup> *Gulf Power Company v. FCC*, No. 98-6222, (11<sup>th</sup> Cir. )(oral argument set for Nov. 18, 1999).

<sup>72</sup> *See e.g. Iowa Utils. Bd. v. FCC, Writ of Mandamus*, No. 96-3321 (8<sup>th</sup> Cir. Jan. 22, 1998) (ordering the FCC to confine its pricing role under section 271(d)(3)(A) to determining whether applicant Bell Operating Companies (“BOCs”) have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services), *aff’d in part and vacated in part sub nom., AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

<sup>73</sup> WinStar filed its *Petition for Reconsideration* in CC Docket No. 96-98 on September 30, 1996. Comments and reply comments were timely filed by American Electric Power Service Corporation *et al.* (“AEPSC *et. al.*”), Ameritech, Duquesne Light Company (“Duquesne”), Edison Electric Institute and UTC, Sprint Corporation and the United States Telephone Association. Moreover, AEPSC *et al.*, Duquesne and Florida Power &

and capricious manner in which the Commission has ignored the existing record to advance the interests of a single petitioner to the exclusion of others clearly raises the “combination of danger signals that the [FCC] has not really taken a ‘hard look’ at the salient problems and has not genuinely engaged in reasoned decision-making.”<sup>74</sup>

## CONCLUSION

UTC and EEI support the Commission’s efforts to promote competition in telecommunications, but believe that mandatory building access premised on Section 224, runs counter to the “pro-competitive deregulatory national policy framework” that Congress sought to achieve. More specifically, Congress defined the outer limits of the scope of Section 224 when it required utilities to provide access to “poles, ducts, conduit or rights-of-way,” and did not intend to expand that list to include building rooftops or riser conduit. Nor did it even intend to provide for wireless attachments, generally.

Instead, Congress made clear that matters affecting “right-of-way” are to be determined under state law. Nor did it imply that state jurisdiction over property rights should be preempted. To the contrary, by permitting states to preempt federal regulation of pole attachments, Congress evinced the opposite intent.<sup>75</sup> Therefore, imposing mandatory building access through Section 224 would violate fundamental principles of federalism by usurping state jurisdiction over rights in real property.

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Light (“Utility Petitioners”) all filed Petitions for Reconsideration opposing the broader issue of wireless attachments, as a general principle.

<sup>74</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

<sup>75</sup> *See* 47 U.S.C. §224(c).

Nor is building access so imperative that the Commission can rely on implied authority within the Communications Act to impose it. There is a variety of competing telecommunications providers, using a variety of delivery technologies all vying for the lucrative MDU market. Even if they were unable to negotiate access for entry to one building, nothing prevents them from negotiating access to others.

Thus, the Commission lacks the authority to require building access, and courts would be required to vacate it to prevent creating an identifiable class of applications that would necessarily constitute a taking. Moreover, the Commission should not use Section 224 as a backdoor for asserting jurisdiction over building owners. If the Commission determines that building owners are to blame for impeding competition, utilities should not be made scapegoats for their anti-competitive practices. The Commission must find other, preferably legislative, solutions for jurisdiction over building owners.

Alternatively, courts would invalidate any rules that did not provide an adequate process for obtaining just compensation in the form of fair market value of the rights-of-way and private easements taken by building access. The Commission must propose procedures for compensation and enforcement before it adopts any building access rules.

In any event, addressing building access without first resolving the merits of wireless attachments is putting the procedural cart before the horse. The Commission must first render a final decision on petitions for reconsideration opposing wireless attachments that have remained pending for almost three years. Even then, it should await the outcome of the appeal pending at the Eleventh Circuit before proceeding to consider the merits of building access.

**WHEREFORE, THE PREMISES CONSIDERED,** UTC urges the Commission to act in conformity with the views expressed herein, denying the petition of WinStar and refusing to require mandatory access to rooftops and risers, as well as utility poles, ducts, conduits or rights-of-way, for wireless telecommunications providers.

Respectfully submitted,

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