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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 27, 1999

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: Reply Comments in the matters of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, 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 Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217 and the Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, the Community Associations Institute, the National Association of Housing Cooperatives, and the Cooperative Housing Coalition hereby file an original and six copies of their Reply Comments. Copies of the Reply Comments have been submitted to International Transcription Services.

CAI, NAHC, and CHC appreciate the opportunity to submit their Reply Comments to the Commission in this proceeding.

Sincerely,

Lara E. Howley

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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE, THE NATIONAL ASSOCIATION OF HOUSING COOPERATIVES, AND THE COOPERATIVE HOUSING COALITION

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SUMMARY

CAI, NAHC, and CHC support the development of a competitive telecommunications marketplace. With the growth of this marketplace, incumbent and alternative telecommunications providers will compete to offer community association residents advanced, affordable, and flexible services. Community association boards of directors are actively participating in the growth of this marketplace, attempting to find the best options for themselves and their fellow residents. Community associations look forward to the continued expansion of this marketplace.

Unfortunately, many of the proposals contained in the FCC's *Notice of Proposed Rulemaking* in this proceeding would not encourage the growth of competition in this dynamic marketplace. Many alternative telecommunications providers are supporting the concept of forced entry into community associations, arguing that these initiatives would solve a multitude of perceived problems with the marketplace and increase competition. But these proposals would in fact have the opposite effect; they would inhibit the expansion of this rapidly growing marketplace. Since these proposals are based on erroneous assumptions regarding perceived, but actually nonexistent, impediments to the marketplace, forced entry proposals would have the opposite effect than suggested by forced entry proponents.

There are many constitutional and statutory impediments to forced entry initiatives. Forced entry proposals, by their very nature, require unwanted intrusions into community associations. They permit telecommunications providers to occupy community

association property, regardless of the desires of the association. Such a physical occupation of property is exactly the same as that deemed a taking in Loretto v. Manhattan Teleprompter.

In order to create a permissible taking, compensation must be provided. However, in order to provide compensation to community associations, the FCC must have the express authority to mandate compensation. But no statute grants the FCC the authority to provide for compensation to community associations. Since the FCC does not have express authority (and that authority cannot be implied), the FCC cannot mandate takings of community association property. Therefore, the FCC lacks the authority to promulgate forced entry regulations.

The FCC also does not possess the authority to extend the Over-the-Air Reception Devices (OTARD) Rule to cover additional types of antennas. In including Section 207 in the Telecommunications Act of 1996, Congress intended that the only association restrictions to be preempted were those on video antennas. The FCC cannot extend that authority to include the ability to preempt association restrictions on wireless data transmission and reception antennas.

CAI, NAHC, and CHC applaud the growth of the telecommunications marketplace. However, that marketplace will grow best with minimal government intervention. Therefore, the FCC should refrain from taking steps, such as promulgating forced entry regulations, which would unnecessary regulate this marketplace while simultaneously

depriving community associations of their property rights, eviscerating associations' democratic decision-making processes, and destroying the value of common and individually owned property in the association. Forced entry proposals are unconstitutional, unauthorized, and irresponsible public policy.

Before the
Federal Communications Commission
Washington, DC 20554

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REPLY COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE, THE NATIONAL ASSOCIATION OF HOUSING COOPERATIVES, AND THE COOPERATIVE HOUSING COALITION

Pursuant to the 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, 1999, the Community Associations Institute (CAI),[1] the National Association of Housing Cooperatives (NAHC),[2] and the Cooperative Housing Coalition[3] hereby file their Reply Comments. CAI, NAHC, and CHC support the growth of a competitive telecommunications marketplace, since this marketplace offers community associations and their residents attractive, advanced, high quality communications services. However, the proposals advocated by many of the providers in this proceeding will only hinder the expansion of competition in the local telecommunications marketplace. Under the guise of promoting "nondiscriminatory access," telecommunications providers are actually seeking to force entry onto property owned by

[1] Founded in 1973, the Community Associations Institute (CAI) is the national voice for 42 million people who live in more than 205,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence though a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 58 local Chapters and 26 state Legislative Action Committees.

[2] The National Association of Housing Cooperatives (NAHC), organized in 1950, is a non-profit, national federation of organizations and individuals whose goal is to promote the interests of cooperative housing communities. NAHC members include housing cooperatives, regional associations of housing cooperatives, professionals, non-profit groups, government agencies, and interested individuals. Policy is determined by an elected Board of Directors representing all types of members throughout the United States.

[3] The Cooperative Housing Coalition is an association formed by the National Association of Housing Cooperatives (NAHC), the National Cooperative Bank (NCB), the NCB Development Corporation (NCBDC), the Council of New York Cooperatives & Condominiums (CNYC), the Federation of New York Housing Cooperatives (FNYC), and other cooperative member organizations to positively impact public policy through interaction with Congress and government agencies for the purpose of maintaining and enhancing the environment for existing and new housing cooperatives. Organization Members of the Coalition represent over 1.1 million families who own and democratically control the cooperative communities in which they live.

community associations and their residents. Forced entry would take community association property, which the FCC cannot mandate absent express congressional authority, which the FCC does not have. Rather than consider unneeded and inappropriate forced entry regulations, the FCC should permit the telecommunications marketplace to expand unhindered by government regulation. By refraining from regulatory intervention, the FCC would actually be creating incentives for all parties, including incumbent providers, alternative providers, and community associations, to develop creative solutions that ensure that community association residents' dual desires of receiving advanced telecommunications services and protecting their investments in their homes are achieved.

I. COMMUNITY ASSOCIATIONS ARE PROMOTING THE GROWTH OF THE TELECOMMUNICATIONS MARKETPLACE

Many of the telecommunications providers in this proceeding have argued that building owners and managers are impeding the growth of local competition by refusing to permit providers to have access to multitenant environment (MTE) property,[4] by charging exorbitant access fees,[5] or by delaying negotiations.[6] They assert that MTE owners and managers do not recognize the value of advanced telecommunications services to their property and residents,[7] prohibiting residents from obtaining the services of their choice.[8]

[4] See, for example, Comments of the Association for Local Telecommunications Services (ALTS), 2; Comments of the Personal Communications Industry Association (PCIA), 15; Comments of Teligent, Inc. (Teligent), 9; Comments of WinStar Communications Inc. (WinStar), 14-18.
[5] Comments of Metromedia Fiber Network Services, Inc. (MFNS), 5, Comments of Teligent, 9; Comments of WinStar, 15; Comments of Wireless Communications Association International (WCA) 25.
[6] Comments of MFNS, 6; Comments of Teligent, 9, Comments of WinStar 14.
[7] Comments of WinStar, 15.
[8] Comments of ALTS, 5; Comments of Teligent, 9; Comments of WinStar, 16.

These assertions do not reflect the current reality of the telecommunications marketplace in community associations.

Community associations, like other MTE owners, support the growth of the competitive telecommunications marketplace.[9] While commercial and residential rental MTEs have a strong incentive to provide innovative services to satisfy tenant demand,[10] the incentive for community association boards to ensure that advanced telecommunications services are offered in their associations is even stronger. This is because community associations are governed by their residents. If residents want advanced telecommunications services, they will demand that the members of the association board of directors – their fellow owners – find providers to meet their needs. Community associations and their residents have convergent interests in obtaining the most advanced, cost effective, and flexible telecommunications service possible; they are not and should not be treated as obstructions to the competitive marketplace.[11]

In many regions, competitive telecommunications providers – especially those most actively advocating forced entry in this proceeding - have not offered to serve community associations.[12] Therefore, it is misleading and inaccurate for these providers to assert that

[9] See, Comments of CAI, NAHC, and CHC (CAI) 8; Comments of the Independent Cable & Telecommunications Association (ICTA), 6; Comments of the National Association of Counties et al. (Counties), 3; Comments of Optel, Inc., 2, Comments of the Real Access Alliance (RAA), 5-14.
[10] Comments of Allied Riser Communications Corporation, (Allied), 3; Comments of Apex Site Management (Apex), 4-6; Cornerstone Properties et al. (Cornerstone), 2, 4-5; Real Access Alliance, 5-14.
[11] In fact, none of the anecdotes presented by various providers as examples of "intransigent" MTE owners and managers involve community associations.
[12] Comments of CAI, 9. MTE owners have also noted that the demand for alternative telecommunications services in commercial and residential rental properties far exceeds the providers' ability to offer these services. Comments of Apex, 5; Comments of the RAA, 24.

community associations are barring access to association property when providers have not even offered to serve them. The FCC should not be misled by such mischaracterizations of community association participation in the telecommunications marketplace, for in regions in which competition exists, community associations are actively seeking providers that will offer them alternative services.

Competition in the telecommunications marketplace is growing rapidly for certain, usually commercial and highly urbanized market areas. Even the telecommunications providers most strongly advocating forced entry privileges have announced with great fanfare the expansion of their businesses.[13] It is illogical and inconsistent to trumpet the success of a business plan to investors and then, alternatively, complain to the FCC that that business plan is not effectively working. The FCC should recognize that by asking the FCC to support forced entry proposals, telecommunications providers are effectively requesting community associations and their residents to subsidize the growth of their businesses.[14] These for-profit businesses are requesting the FCC to protect them from the fluctuations of the marketplace and insulate them from competition. In a forced entry environment, homeowners would ultimately bear the burden of repair costs and security breaches on community association property, as well as increased liability and litigation costs; nonprofit community associations and their homeowners cannot afford to subsidize these for-profit entities. In promulgating forced entry regulations, the FCC would be burdening community associations, which have not caused any perceived difficulties in

[13] See, Comments of the RAA, 11.
[14] See, Comments of the RAA, 24.

the marketplace, to assist telecommunications providers in evading competition and maximizing their profit margins. This is fundamentally unfair. The FCC should not promote such irresponsible public policy.

Even several of the alternative telecommunications providers and their associations oppose forced entry.[15] They recognize the anti-competitive effects of these proposals, particularly for the newest and as-yet uncreated providers that would not be able to participate in the race for space that forced entry regulations would create. The FCC should not adopt public policy that would undermine the creation and growth of additional alternative telecommunications competitors.

II. THE FCC CANNOT PROMULGATE FORCED ENTRY REGULATONS

In this proceeding, several (but not all) telecommunications providers have voiced their support for forced entry policies, which would require community associations to permit these providers to have access to association property for the installation of telecommunications equipment, regardless of the associations' lack of consent to the installation. The providers argue that forced entry can be accomplished through one of several methods: through using utility easements or rights of way on community association property, through using incumbent local exchange (ILEC) provider networks on community association property, and through gaining entry rights to association property. The FCC should not adopt any of these proposals, since they would necessarily implicate the constitutional takings issue and exceed the FCC's authority.

[15] For example, Allied, ICTA and Optel.

As a preliminary matter, it is untrue that all participants in this proceeding have at some time agreed to support forced entry legislation or regulations.[16] CAI, NAHC, and CHC have never supported any type of forced entry proposal. It is CAI's, NAHC's, and CHC's unequivocal position that forced entry proposals are anti-competitive and distort the telecommunications marketplace, violate the takings clause of the United States Constitution, and eviscerate community associations' democratic decision-making authority and property rights.

A. The Forced Entry Proposals Supported By Telecommunications Providers Would Create Unconstitutional Takings

The telecommunications providers promoting forced entry have asserted that the occupation of community association property required for the installation of telecommunications equipment would not be a taking of community association property. They argue that there would be no compelled physical occupation of property, since one provider already occupies the property.[17] They equate forced entry with the mere regulation of occupancy by a third party already permitted on the premises.[18] These arguments are illogical and without basis in law or reality.

[16] See, Comments of Teligent, 21.
[17] Comments of the Competitive Policy Institute (CPI), 10; Comments of Teligent 54.

There is no justification for the providers' argument that forced entry initiatives do not implicate the takings issue. The placement of telecommunications equipment on community association property without the association's consent is a compelled physical occupation of that property. The proposals presented in this proceeding are exactly the same as those codified in the New York statute in Loretto v. Manhattan Teleprompter.[19] There is no way telecommunications providers can credibly assert otherwise.

The telecommunications providers' reliance on Yee v. City of Escondido[20] and Heart of Atlanta Motel v. U.S.[21] is inapposite. Forced entry initiatives do not merely regulate previously permitted occupations of property. Unlike the apartment owners in Yee or the hotel owners in Heart of Atlanta Motel, community associations are not in the business of leasing their property to telecommunications providers or anyone else.[22] Furthermore, the telecommunications providers seeking these privileges are not currently on the property, so there would be no regulation of a current, previously permitted occupation, unlike the situations in Yee and Heart of Atlanta Hotel. Forced entry regulations would create an intrusion of a provider with which the association had no prior relationship onto association property.

[18] Comments of ALTS, 21; Comments of CPI, 13; Comments of PCIA, 20; Comments of Teligent, 54; Comments of WinStar, 40.
[19] 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).
[20] 503 U.S. 519 (1992).
[21] 379 U.S. 241 (1964).
[22] In certain circumstances, community associations may lease portions of their property to various contractors (even telecommunications providers in recent situations). However, community associations are not in the business of leasing all of their property (whether common property or units); they are formed to preserve and maintain the common property of the association for the benefit of association residents and

Just because there is already one provider on association property does not mean that others can enter the property without obtaining the association's consent. The entry of the second provider without the association's permission would still be an invasion of association property. The situation proposed by the telecommunications providers is the same as a rule requiring associations that permitted one chain store to operate on association property to permit any other chain store to operate on association property. Such a proposal would be considered illogical, invasive, and infeasible; any forced entry regulations must be considered in the same light. [23] They would create intrusions onto community association property that would be a compelled physical occupation and therefore a taking.

Some providers have argued that FCC v. Florida Power Corp.[24] applies in this situation, removing forced entry regulations from the Loretto analysis.[25] However, these telecommunications providers fail to make the correct analogy. Florida Power states: "[i]t is the invitation, not the rent, that makes the difference. The line that separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license."[26] Under a forced entry regulation, telecommunications providers would not be entering association property pursuant to any invitation, but against the association's wishes. This intrusion cannot be considered an

their individual properties in the association. Any leasing conducted by community associations is purely incidental to their main functions.

[23] Comments of Optel, 18.

[24] 480 U.S 245, 107 S. Ct. 1107, 94 L. Ed. 2d 282.

[25] Comments of WinStar, 40.

[26] Florida Power, 480 U.S. 252-253.

invitation. The telecommunications provider would be an interloper with the government license that Florida Power indicated was covered by the Loretto decision. It is irrelevant that other providers may already be on the property whether by invitation or not;[27] the new telecommunications provider would still be an interloper without an invitation. The new provider's intrusion onto community association property would be a physical occupation of property without the association's consent, depriving the association of the ability to control the use of association property; it would therefore be a taking.

Many providers also assert that the FCC's *Second Report and Order* in the Over-the-Air Reception Devices (OTARD) proceeding sets a precedent for the taking of community association property for the installation of telecommunications equipment.[28] However, nothing in the *Second Report and Order* supports these assertions. The *Second Report and Order* refers to FCC regulation of a voluntary physical occupation of MTE property by a tenant already permitted on the property.[29] Under forced entry regulations, it would not be the resident seeking to install telecommunications equipment in the association, but a telecommunications provider that has not been previously permitted on the property. Telecommunications providers cannot equate themselves with residents in community associations; they are in entirely different positions vis-à-vis the association because association residents, unlike telecommunications providers, are subject to certain

[27] Many ILECs were not originally invited onto MTE property by property owners. See, Comments of the RAA, 39.
[28] Comments of Teligent, 54; Comments of WinStar, 43.
[29] In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations: IB Docket No. 95-59; In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket No. 96-83 *(OTARD Second Report and Order)*, paragraphs 21, 22, 27.

obligations to the associations and its residents. Therefore, the *Second Report and Order* cannot be a precedent for telecommunications providers to use in asserting that they have the right to intrude onto community association property.

Instead of setting a precedent for the adoption of forced entry proposals, the *OTARD Second Report and Order* rejects forced entry. In the OTARD proceeding, the FCC ruled that it did not have the authority under Section 207 of the Telecommunications Act of 1996 to permit individual antenna installations on common property absent the property owner's (community association's) consent due to the takings issue.[30] Forced entry regulations would likely take an even greater amount of property than that envisioned by expansion of the OTARD Rule; two FCC Commissioners have already noted in this *Notice of Proposed Rulemaking* that the Commission cannot contradict its OTARD analysis by mandating forced entry.[31]

After claiming that forced entry would not result in per se takings, the telecommunications providers advocating forced entry also argue that forced entry would not be a regulatory taking, claiming that the three parts of the Penn Central

[30] *OTARD Second Report and Order,* paragraphs 39-43.
[31] See, In the Matters of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, 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 Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking (Notice of Proposed Rulemaking),* statements of Commissioner Susan Ness and Commissioner Michael K. Powell.

Transportation Company v. City of New York[32] regulatory takings test are not met. First, they argue that forced entry regulations are in the public interest. Next, they argue that the economic impact on community associations would not be great. Third, they argue that community association residents have no investment-backed expectations to destroy.[33] This is not the case, however. Forced entry regulations would not be in the public interest, since they would be ineffective, would distort the growth of the telecommunications marketplace, and would destroy community associations' rights to control their own property. Forced entry regulations would cause great economic hardship for community associations, as they would be forced to subsidize telecommunications providers' business plans. Notwithstanding telecommunications providers' claims,[34] associations would bear increased costs for repair to damaged property, increased security costs, increased liability coverage, and increased litigation costs due to forced entry regulations,[35] because associations would not have the necessary leverage to negotiate contracts to protect the association and exclude those providers that would not protect association property. Forced entry regulations would also destroy community association homeowners' expectations of a financially viable, structurally sound community. Community association homeowners purchase their homes in associations in part to protect their investments from decreasing property values. With forced entry regulations destroying associations' abilities to manage the association property, property values of individual residences could easily decline. Homeowners, the

[32] 438 U.S 104, 57 L. Ed 2d 631, 98 S. Ct. 2646, *reh denied* (US) 58 L. Ed. 2d 198, 99 S. Ct. 226 (1978).
[33] Comments of Teligent, 59; Comments of WinStar, 41-42.
[34] Comments of PCIA, 11; Comments of WinStar, 27.
[35] Comments of CAI, 20-27. See also, Comments of Cornerstone Properties, 17, 20; Comments of the Counties, 16; Comments of the Education Parties, 7; Comments of the RAA, 61-67.

very people telecommunications providers claim to serve, would be paying more to reduce the business expenses of these providers. They should not be forced to do so.

All of the forced entry proposals outlined in this proceeding would take community association property, regardless of whether access to utility rights of way, ILEC networks, or community association property were mandated. Utility rights of way and ILEC networks cannot be summarily expanded to permit telecommunications providers to install equipment either in those rights of way or networks located on community association property without the association's consent.[36] This intrusion would also result in a per se taking, since providers would be expanding rights of way or using ILEC networks, thereby occupying community association property not subject to the right of way or the network.

Throughout their Comments, even those providers most strongly supporting forced entry regulations have acknowledged that MTE takings arguments are valid.[37] Teligent acknowledges these rights by suggesting that MTE owners cede their Fifth Amendment rights in forbearance of FCC regulation.[38] While Teligent is correct is observing that MTEs have valid takings concerns with forced entry regulations, the rest of Teligent's argument is without merit. As demonstrated in numerous Comments and reiterated below, the FCC does not have any authority over community associations and other MTE

[36] Comments of CAI, 11-12; Comments of the Counties, 13; Comments of the Electric Utility Coalition (Electric), 10.
[37] See Comments of WCA, 28-29.
[38] Comments of Teligent, 60-61.

owners.[39] Therefore, there is no basis for the FCC to require that MTE owners cede their Fifth Amendment rights.

Notwithstanding the telecommunications providers' assertions to the contrary, any forced entry regulation would constitute a per se taking of community association property. Forced entry regulations would require community association to submit to physical occupation of their property by uninvited third parties. This is exactly the situation declared a taking in Loretto.

B. The FCC Lacks the Authority to Promulgate Forced Entry Proposals

Throughout this proceeding, the telecommunications providers contend that the FCC has the authority to promulgate forced entry regulations. But the FCC possesses neither the statutory nor the ancillary authority to do so.

1. The Bell Atlantic Analysis Bars the FCC from Adopting Forced Entry Regulations in this Proceeding.

Bell Atlantic v. FCC[40] has been the subject of a great deal of discussion in this proceeding. The telecommunications providers implicitly acknowledge that if the Bell Atlantic holding applies in this proceeding, then the FCC cannot adopt forced entry regulations. Therefore, they have taken great pains to distinguish the situation in the case from their forced entry proposals. However, Bell Atlantic does apply, and bars the FCC

[39] Comments of CAI, 14-18; Comments of the Counties, 6; Comments of the RAA, 34-36.
[40] 24 F.3d 1441 (D.C. Cir. 1994).

from promulgating forced entry regulations, since the FCC has no express statutory authority to do so.[41]

The telecommunications providers have many arguments against applying Bell Atlantic to forced entry proposals. First, they argue that there is no taking involved.[42] Second, they claim that even if these rules could cause takings, that these takings would not occur in all instances, so Bell Atlantic would not apply.[43] However, because forced entry proposals by their very nature would necessarily create takings of community association property at all times, these arguments fail.

The providers propose that forced entry regulations would not apply to community associations if associations exclude all providers.[44] They also argue that forced entry regulations would escape the takings and Bell Atlantic analyses since the regulations would not be mandatory.[45] These arguments are spurious. Since the vast majority of community associations have already permitted (and in many cases, were compelled to permit) ILECs on their property, they would be required to comply with the forced entry rules. While some providers argue that regulations would not be mandatory since community associations could conceivably exclude all providers from association property, such a suggestion is utterly ridiculous and not a feasible choice since associations and their residents must have telecommunications service. As the "choice"

[41] Bell Atlantic, 24 F.3d, 1447.
[42] Comments of CPI, 14; Comments of PCIA, 21; Comments of Teligent, 65; Comments of WinStar, 44.
[43] Comments of Teligent, 67.
[44] Comments of PCIA, 21; Comments of Teligent, 65; Comments of WinStar, 45.
[45] Comments of PCIA, 21; Comments of Teligent, 65; Comments of WinStar, 45.

is not a viable choice, community associations would be forcibly included in these forced entry regulations; they would not be voluntary.

The providers assert that several sections of the Telecommunications Act provide the authority to take community association property. Neither Section 254 nor Section 706, upon which providers rely, provides for just compensation, which is required in order for a taking to be statutorily authorized.[46] Therefore, the providers cannot rely on these sections to confer upon the FCC authority it does not possess.

Another argument advanced by the telecommunications providers is that Bell Atlantic permits the use of implied authority to justify takings if the implication of authority was necessary, where "the grant [of authority] itself would be defeated unless [takings] power were implied."[47] The providers assert that such a situation is present in this proceeding.[48] There is no justification for this assertion. No one in this proceeding has demonstrated that forced entry regulations are necessary as the only way to promote competition.[49] In fact, there is ample reason to suggest the opposite.[50] Since the unregulated marketplace will provide the incentives to promote the deployment of competitive, advanced telecommunications services, forced entry proposals are not necessary. Therefore, FCC authority to take community association property cannot be implied.

[46] Bell Atlantic v. FCC, 24 F.3d at 1445.
[47] Bell Atlantic v. FCC, 24 F.3d at 1446 (citations omitted).
[48] Comments of Teligent, 63, 68.
[49] There has been no showing that forced entry does promote competition.

2. The FCC Lacks Jurisdiction over Community Associations

The telecommunications providers supporting forced entry initiatives assert that the FCC has authority to regulate associations and their property. They claim that this authority is derived from express statutory and ancillary authority. However, the FCC does not have authority over community associations, except where specifically authorized. Therefore, the FCC lacks the authority to promulgate forced entry regulations.

Many telecommunications providers claim that the FCC has the ability to exercise in personam jurisdiction over MTE building owners, including community associations, asserting that community associations sufficiently control the instrumentalities of wire or radio communication to be treated like a telecommunications or cable provider.[51] In particular, they claim that charging for building access renders in personam jurisdiction.[52] However, just because wiring and other equipment are located on community association property does not render a community association a provider of telecommunications services.[53] Community associations seldom own or control telecommunications facilities located on their property. Most merely permit their property to be used for the installation of telecommunications services; ownership or control of the wiring and equipment often remains with the provider. Even if community associations own or control the equipment on community association property, they do not provide the

[50] Even the FCC has noted that the issues addressed in the *Notice of Proposed Rulemaking* are not "principal impediments" to the expansion of the local telecommunications marketplace. *Notice of Proposed Rulemaking*, paragraph 1.
[51] Comments of CPI, 6; Comments of WinStar, 32-33.
[52] Comments of Teligent, 50.

services transmitted by and through this equipment. Therefore, it would be inappropriate to regulate community associations as telecommunications providers, since they do not provide these services. The FCC cannot regulate community associations as telecommunications providers merely because they have some contact with providers offering services.[54]

The telecommunications providers also assert that the FCC has subject matter jurisdiction over community associations since wiring and other equipment is located on community association property.[55] However, just because telecommunications equipment happens to be located on a certain parcel of property does not render that property subject to FCC jurisdiction.[56] Private property is not a telecommunications instrumentality or facility. Therefore, the FCC does not have subject matter jurisdiction over community associations.

Nor can the FCC assert that community associations and other MTEs can be regulated pursuant to ancillary authority. The telecommunications providers supporting forced entry claim that Section 706 of the Telecommunications Act of 1996 permits the FCC to promulgate forced entry regulations, since forced entry would supposedly facilitate deployment of advanced telecommunications services to all Americans through promotion of local competition.[57] They assert that MTEs have prohibited the deployment

[53] Comments of Apex, 10; Comments of the Counties, 6; Comments of ICTA, 10; Comments of the RAA, 34, 36.
[54] Comments of ICTA, 6; Comments of United States Telephone Association (USTA), 6, 16.
[55] Comments of Teligent, 48, Comments of WinStar, 31.
[56] Comments of Counties, 6.
[57] Comments of CPI, 7; Comments of PCIA, 17; Comments of WCA, 27-28; Comments of WinStar, 37.

of advanced telecommunications services and so should be regulated.[58] These arguments fail for several reasons. First, there has been no demonstration that forced entry would promote competition in the local telecommunications marketplace. Therefore, forced entry would not cause the result intended by the telecommunications providers or the FCC. Second, MTE owners, including community associations, are not impeding the deployment of these advanced services. In community associations, it is often the reverse, as providers have not sought to offer service to associations.[59] Additionally, the providers ignore another portion of Section 706, which requires the FCC to refrain from regulation if that forbearance will result in increased deployment of advanced services. Since forced entry regulations would inhibit this deployment, the FCC should follow the mandate of Section 706 and refrain from regulation.

Several telecommunications providers have argued that since the FCC has already asserted jurisdiction over community associations in other proceedings, that it may do so in this proceeding.[60] However, the FCC has asserted authority over community associations only in certain situations, such as Section 207 of the Telecommunications Act. The FCC can only regulate community associations when it has express authority to do so.

Since the FCC has no jurisdiction over community associations that do not operate their own telecommunications system within the association, the FCC cannot assert ancillary

[58] Comments of PCIA, 23-24.
[59] Comments of CAI, 9.
[60] See Comments of CPI, 4; Comments of WinStar, 33.