

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

In the Matter of)
)
Promotion of Competitive Networks)
In Local Telecommunications Markets)
)
Wireless Communications Association)
Petition for Rulemaking to Amend)
Section 1.4000 of the Commission's Rules)
)
Cellular Telecommunications Industry)
Association Petition for Rulemaking)
and Amendment of the Commission's)
Rules to Preempt State and Local)
Imposition of Discriminatory or Excessive)
Taxes and Assessments)
)
Implementation of the Local Competition)
Provisions in the Telecommunications)
Act of 1996)

WT Docket No. 99-217

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-98

REPLY COMMENTS
OF ARDEN REALTY, INC.

Arden Realty, Inc. ("ARI") submits these comments in response to the comments of others in the captioned Notice of Proposed Rulemaking ("Notice"), FCC 99-141, released July 7, 1999. ARI's opening comments were confined to the constitutional implications of mandated

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nondiscriminatory access to multiple-tenant premises (“MTPs”), and this reply is similarly focused.

The newly-mandatory §224(f) operates
to effect a taking of property.

In its comments of August 27, 1999, at pages 5-6 and 8-10, ARI argued that (1) any significant diminution of the property owner’s “right to exclude” could effect a taking even if there were no additional physical occupancy involved; and (2) new subsection (f) required a *Loretto* –style *per se* takings analysis rather than a *Penn Central*-style regulatory takings approach. A decision earlier this month from a federal appeals court supports both points.

In *Gulf Power Company, Alabama, et al. v. U.S.*, No. 98-2403, the U.S. Court of Appeals for the Eleventh Circuit, responding to a constitutional challenge of Section 224(f) of the Communications Act brought by seven electric utilities, found that the new subsection “effects a taking of a utility’s property.” 1999 U.S. App. LEXIS 21574 at *11. Specifically, the Court found that a utility’s – and, by extension, an owner’s – “power to exclude” survives any single consent to occupancy and may be applied anew to each physical invasion:

The Supreme Court has expressly recognized that the fact property was taken for a public use to begin with does not mean that it can be taken again for another public use without the payment of just compensation to its owner . . .

[W]e conclude that the fact that a utility gained its property knowing it would be subject to extensive regulation for the public use does not mean its property may be taken for a public purpose without payment of just compensation, however laudable that public purpose might be. (*15)

Put another way, said the Court:

[T]he bundle of rights that a utility has in its property includes the right to permit its use for wire communications, and exercise of that right may not be conditioned on being forced to submit to a permanent physical occupation of its property without payment of just compensation. (*20)

In the Notice, the Commission asked “would constitutional problems be mitigated if a requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property?” The Court’s opinion answers for both utilities and other owners.

As to utilities:

Nothing in *Duquesne* [citation omitted] suggests a utility’s property is less subject to protection against permanent physical occupation than anyone else’s property. (*18)

Speaking for the generality of owners, citing *Loretto*, the opinion continues:

The protection against a permanent physical occupation of one's property does not hinge on the choice of use of that property. (*20)

The Court then concludes as to the takings issue:

[T]he mandatory access provision [§224(f)] effects a per se taking of property under the Fifth Amendment, which leads us to the issue of whether the Act provides an adequate process for obtaining just compensation for the taking. *Id.*

Gulf Power does not resolve the issue of just compensation under §224(f).

Having found that Section 224(f) works a taking, the 11th Circuit Court deferred ruling on the constitutionality of its application:

[T]he Act is not facially unconstitutional under the Fifth Amendment because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation. (*45)

Because the electric power utility complainants had made their challenge to Section 224(f) a facial one, the Court refused to decide what would happen if the maximum statutory rate permitted under Section 224's rate provisions were less than "just compensation." Similarly, it demurred on the proposition that forcible or mandatory occupancy of property would be due more compensation than voluntary entry.

ARI is not comfortable, and the FCC should not be, with the prospect of case-by-case litigation of “fair market value” versus “fully allocated cost” and which standard should apply under Section 224. Far preferable would be an acknowledgment that, because subsection (f) clearly effects a taking, leading to a strong possibility that just compensation must be marketplace compensation, federal regulation is not required. Instead, the FCC should maintain the status quo with respect to MTP access and let the parties negotiate freely. They are likely to be better judges of fair market value than the agency.

This conclusion comes with greater force given the sketchy record on how to apply any cost or compensation standard to “rights-of-way.” There is precedent on the fully-allocated cost standard for cable TV attachments to utility poles, as such. There is a rulemaking order on how to apply Section 224 to ducts.¹ But there is little if any administrative or judicial guidance on applying the statute to rights-of-way. 13 FCC Rcd at ¶¶117-121. Access to MTPs does not involve poles. It is unclear whether the relatively untried duct/conduit formula will work well for cable risers. And the guidance on internal rights-of-way is virtually zero. Under these circumstances, the FCC

¹ Report and Order (CS Docket 97-151), 13 FCC Rcd 6777 at ¶¶103-116. The terms “duct” and “conduit” appear to be used interchangeably.

would be well advised to permit case-by-case private negotiation rather than mandating case-by-case administrative adjudication. 13 FCC Rcd at ¶121.

Gulf Power seriously erodes arguments that expansion of §224 to MTPs would not effect takings.

Teligent (Comments, 53-60) and other competitive carriers² contend at length that Section 224 cannot effect a taking if the utility or property owner effectively consents to some initial occupancy. The 11th Circuit since has ruled that new subsection (f) of the statute is a mandatory access provision whose application necessarily leads to a *per se* taking. Responding in *Gulf Power* to the government's attempted defense that a utility or other owner retains the volition to deny all occupancy – an argument Teligent (58-66) and other commenters recycle – the Court's previously-quoted declaration bears reiteration here:

[T]he bundle of rights that a utility has in its property includes the right to permit its use for wire communications, and exercise of that right may not be conditioned on being forced to submit to a permanent physical occupation of its property without payment of just compensation. (*20)

² Competition Policy Institute, 11-15; WinStar, 38-44; Sprint, 17-20.

The unqualified holding of the *Gulf Power* court – that Section 224’s application constitutes a taking all the time, not just some of the time -- bars the end-run around *Bell Atlantic*³ attempted by Teligent (Comments, 66-67) and other commenters.⁴ Similarly, the attempt to distinguish *Bell Atlantic*’s doctrine of avoidance, on the basis that to apply the doctrine would be plainly contrary to the intent of Congress (Teligent Comments, 68), must fail on jurisdictional grounds. As Apex, BOMA, GTE and other commenters have demonstrated, the extension of Section 224 beyond outdoor poles and underground ducts, to encompass rooftops and intra-building cable risers, was not the plain intent of Congress at all. From its inception in 1978, the statute has been fashioned and construed narrowly.

CONCLUSION

For the reasons set forth above, the FCC should heed the *Gulf Power* court’s conclusion that application of Section 224(f) would effect a taking of property requiring just compensation under the Fifth Amendment. The agency also should consider carefully the Court’s description of the complexity which case-by-case adjudication of just compensation is likely to

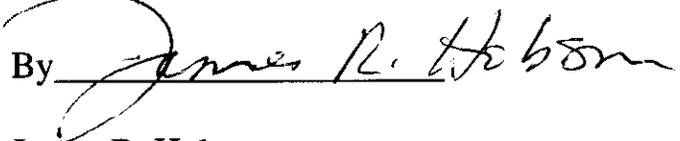
³ *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).

⁴ Competition Policy Institute, 13-15; WinStar, 43-44.

entail. The FCC should then apply its own policy of avoidance by retaining the federal *status quo* allowing parties to negotiate freely the terms of access to MTP communications sites.

Respectfully submitted,

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