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WILLKIE FARR & GALLAGHER

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Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

June 8, 2000

202 328 8000
Fax: 202 887 8979

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

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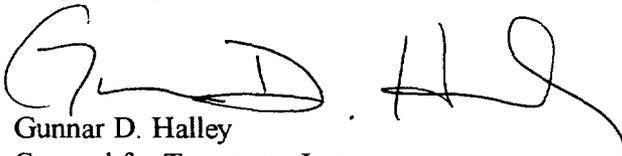
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Submitted on behalf of Teligent, Inc., please find attached a copy of the Smart Buildings Policy Project's April 28, 2000 written *ex parte* presentation to Lauren Van Wazer of the Wireless Telecommunications Bureau and a description of a May 16, 2000 *ex parte* communication by the Smart Buildings Policy Project, as well as copies of the written testimony delivered during the course of a hearing by Professor Viet Dinh, Dr. John Hayes, and Timothy Graham before the House Constitution Subcommittee on March 21, 2000. Copies of these items were delivered today on behalf of Teligent, Inc. to Commissioner Furchtgott-Roth and his legal advisor Bryan Tramont.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of Teligent, Inc.'s written ex parte presentation.

Respectfully submitted,


Gunnar D. Halley
Counsel for TELIGENT, INC.

cc: Commissioner Furchtgott-Roth
Bryan Tramont

Enclosures

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VIA HAND DELIVERY

April 28, 2000

EX PARTE

Ms. Lauren Maxim Van Wazer
Senior Attorney, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 4-A223
445 12th Street, S.W.
Washington, D.C. 20554

Re: Promotion of Competitive Networks in Local Telecommunications Markets, WT
Docket No. 99-217, CC Docket No. 96-98

Dear Ms. Van Wazer:

During the course of an April 11th *ex parte* meeting between members of the Smart Buildings Policy Project and you and several other members of the Commission staff working on the *Competitive Networks* item, you inquired about the Commission's exercise of authority pursuant to Section 4(i) of the Communications Act. Specifically, you explained that you were aware that the regulation of cable television operators found its origin in Section 4(i) in conjunction with the Commission's Title III authority. You asked whether I was aware of additional examples of the Commission regulating pursuant to its authority under Section 4(i). Please find below a written response to that inquiry.

The Commission may act consistent with its authority despite the absence of a specific statutory directive. As I am certain you are aware, Section 4(i) does not provide the Commission with an independent basis of authority but, rather, operates as a "necessary and proper" clause enabling the

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 2290
WL 89-2762
Fax: 202 887 89

Ms. Lauren Van Wazer
April 28, 2000
Page 2

Commission to give effect to its responsibilities under the goals of the Communications Act.¹ Some of these responsibilities are delineated specifically, such as the provisions promoting telecommunications competition in the Telecommunications Act of 1996. However, the specific directives are not the sole spheres in which the Commission is authorized to take action to promote telecommunications competition or, indeed, the other broad goals of the Communications Act. That is, where the Commission has jurisdiction, it does not need affirmative and specific statutory support for implementing rules such as the requirement of nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The proper inquiry, therefore, is not whether the Communications Act expressly authorizes Commission action, but whether the Communications Act expressly prohibits Commission action. Barring express prohibition, the Commission determines whether its action is necessary to accomplish its statutory obligations, including, but not limited to, making available, "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"²

For example, the D.C. Circuit has relied upon "the cases which have recognized implied agency authority to deal with aligned activities which may effect the regulatory system entrusted to the agency. 'Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.' It would 'frustrate the purposes for which . . . [the Communications Act] was brought into being [if Congress had attempted] an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.'"³

Similarly, in *FTC Communications v. FCC*, the relevant section of the Communications Act contained no provision granting the Commission the authority to set interim rates, and the appellants argued that no such authority could be implied. The Second Circuit rejected this argument, finding

¹ 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.")

² 47 U.S.C. § 151.

³ Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220, 225 (D.C. Cir. 1967)(citations omitted).

Ms. Lauren Van Wazer
April 28, 2000
Page 3

that the Commission's actions were authorized by § 4(i)'s general grant of authority to issue necessary orders.⁴ Separately, in the context of license payments, Mtel argued that the lack of affirmative statutory support for requiring a pioneer's preference payment proved that the imposition of such a requirement was not "necessary in the execution of [the Commission's] functions" under the Act, as required by § 4(i). The Court of Appeals for the D.C. Circuit rejected this proposition. It noted that the FCC had the Section 309 duty to determine whether the public interest, convenience, and necessity would be served by the granting of a license application. The Commission determined that the payment was necessary to ensure the achievement of its statutory responsibility, and its judgment was accorded substantial deference by the D.C. Circuit, which upheld the FCC's rule.⁵

Other examples abound. In *Media Access Project v. FCC*, the D.C. Circuit explained that "even if the Reform Act had never been enacted, the Commission, in order to respond properly to requests under FOIA, could have adopted the same or similar regulations to govern the charges to be made for responding to FOIA requests. Such regulations would not be inconsistent with the purposes and goals of the Communications Act because they would lead to more efficient processing of FOIA requests."⁶

⁴ FTC Communications, Inc. v. F.C.C., 750 F.2d 226, 231-32 (2d Cir. 1984).

⁵ Mobile Communications Corp. of America v. F.C.C., 77 F.3d 1399, 1406 (D.C. Cir. 1996). Mtel also argued that because the statute provided two bases upon which the FCC can require payment for radio licenses, the use of a third mechanism was inconsistent with the Communications Act and not within the FCC's power under § 4(i). Again, the D.C. Circuit disagreed. It concluded that "Mtel's reliance on the *expressio unis maxim* -- that the expression of one is the exclusion of others -- is misplaced. The maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.' *Expressio unis* 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.'" Id. at 1404-1405 (citations omitted). Indeed, a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger." Texas Rural Legal Aid, Inc. v. Legal Serv. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991).

⁶ Media Access Project v. F.C.C., 883 F.2d 1063, 1066 (D.C. Cir. 1989).

Ms. Lauren Van Wazer
April 28, 2000
Page 4

Similarly, the Second Circuit noted that "although the Act makes no mention of Community Antenna Television (CATV), the broad power of the Commission to regulate communications was found to encompass the regulation of this technological development. Our own court has upheld the authority of the Commission to regulate prime time access in television communication despite the absence of any explicit authority in the Act."⁷ It went on to explain that an activity's substantial effect on the efficiency of offering communications or the price at which such communications is offered is sufficient to confer FCC jurisdiction. "[E]ven absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, *where such activities may substantially affect the efficient provision of reasonably priced communications service.*"⁸

Consequently, it is important to bear in mind that express mention neither of access to tenants in multi-tenant environments nor of the behavior of building owners in the Communications Act does not leave the Commission without authority. The context of the entirety of the Communications Act and the goals contained therein appropriately serve as a basis for the notion that the Commission possesses authority to require nondiscriminatory telecommunications carrier access to multi-tenant environments.⁹ More specifically, though, the effect that unreasonable or discriminatory restrictions on access impose on interstate communication subjects building owners' behavior to the jurisdiction of the Commission.

Indeed, analogous to the context of nondiscriminatory telecommunications carrier access to intra-building and rooftop facilities is the *Lincoln* court's explanation that "facilities or services that

⁷ GTE Service Corp. v. F.C.C., 474 F.2d 724, 731 (2d Cir. 1973)(citations omitted).

⁸ Id. (emphasis added).

⁹ See, e.g., Mobile Communications Corp., 77 F.3d at 1406 ("Contrary to Mtel's contention, our decision in *Railway Labor Executives' Ass'n v. National Mediation Bd.* did not enshrine *expressio unius* as a maxim of universal and conclusive application. The conclusion in *RLEA* that the agency lacked authority for its action followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history. In the very different context of the case before us, we see no conflict between the language and structure of the Communications Act and the imposition of a payment requirement on Mtel.").

substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state. The interconnections provided to MCI do substantially affect provision of interstate communication, that of Execunet, and are thus subject to the jurisdiction of the FCC."¹⁰ Similarly, the D.C. Circuit found that a company was engaged in interstate communication sufficient to warrant FCC jurisdiction because "its facilities are a link in the interstate transportation of television signals" as are the facilities of a multi-tenant building owner.¹¹

Cogently stated, "Section 4(i) empowers the Commission to deal with the unforeseen -- even if [] that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries. . . . The power asserted here is less far-reaching than the power the Commission has been allowed to exercise under its implied 'ancillary jurisdiction' to regulate services such as cable television that impinge on the services over which it has explicit statutory jurisdiction."¹²

As applied to the issues contemplated in the *Competitive Networks* rulemaking, unreasonable restrictions on telecommunications carrier access to consumers in multi-tenant environments will frustrate the exercise of the Commission's jurisdiction in promoting interstate telecommunications competition. Such concerns are what led the Court of Appeals for the Fourth Circuit to conclude that "[i]f, as North Carolina is formally proposing and the Attorney General of Nebraska has held to be permissible, state jurisdiction over intrastate communication facilities is exercised in a way that, in practical effect, either prohibits customer-supplied attachments authorized by tariff F.C.C. No. 263 or restricts their use contrary to the provisions of that or any other interstate tariff, the Commission will be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it. The Commission must remain free to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done."¹³

¹⁰ Lincoln Tel. & Tel. Co. v. F.C.C., 659 F.2d 1092, 1109 (D.C. Cir. 1981)(citations omitted).

¹¹ Buckeye Cablevision, 387 F.2d at 225.

¹² North American Telecommunications Ass'n v. F.C.C., 772 F.2d 1282, 1292-93 (7th Cir. 1985)(citations omitted).

¹³ North Carolina Utilities Comm'n v. F.C.C., 537 F.2d 787, 793 (4th Cir. 1976).

Finally, it is worth noting that although actual restraint of competitive development is demonstrated in the record of the *Competitive Networks* rulemaking, even the *potential* for restraint is sufficient to justify Commission action.¹⁴ If the Commission perceives the potential for unreasonable behavior affecting interstate communications and the need for intervention to prevent such behavior, Section 4(i) grants it the authority to take action.¹⁵

Given the context in which Section 4(i) may be used, it is not surprising it has been used so frequently and successfully by the Commission in order to accomplish its statutorily derived responsibilities. Additional examples of the FCC using Section 4(i) as the primary basis for its authority, albeit in conjunction with another statutory provision, include the following:

- Pursuant to Section 4(i), the FCC amended its pioneer's preference rules to condition granted PCS licenses on the payment of an appropriate charge. It engaged in an extensive analysis of the cases interpreting the FCC's 4(i) authority, and concluded that "[t]he rule that emerges from the cases described above is that Section 4(i), although 'not infinitely elastic,' is a 'wide ranging source of authority.' 'Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries.' 'If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions."¹⁶

¹⁴ "It is irrelevant that the rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted." GTE Service Corp., 474 F.2d at 731 (citing Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir. 1971)).

¹⁵ For example, the *Lincoln* court noted that "[t]he instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection." Lincoln Tel. & Tel. Co., 659 F.2d at 1109.

¹⁶ Review of the Pioneer's Preference Rules; Amendment of the Commission's Rules to Establish New Personal Communications Services, ET Docket No. 93-266, GEN Docket No. 90-314, PP-6, PP-52, and PP-58, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055 at

- The Commission explained the breadth of its authority under Section 4(i) in adopting certain access charge rules. "Moreover, the existing access compensation arrangements produce results that conflict with Congressional goals other than the elimination of discrimination or preferences that are discussed in Subpart II.D, *infra*. Congress has conferred broad powers upon this Commission in Section 4(i) of the Act, 47 U.S.C. S 154(i), to adopt orders and regulations to achieve those goals. Those powers would be sufficient to enable us to adopt the access charge rules we are adopting in this Report and Order apart from the powers conferred by Sections 201(a) and 205."¹⁷
- In enacting an aggressive and far-reaching program for providing people with disabilities more access to telecommunications, the Commission recently concluded that it possessed authority to implement Section 255 of the Act pursuant to Section 4(i), 201(b), and 303(r). It took note of the Supreme Court's holding "that [section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.' In other words, an individual provision of the Communications Act need not contain an express grant of rulemaking authority in order to empower the Commission to adopt implementing regulations."¹⁸
- In the *Computer II* proceeding, the Commission concluded that enhanced services were not common carrier offerings subject to Title II. This conclusion, though, did not mean the Commission lacked authority. "This does not mean however that we are void of jurisdiction over enhanced services." The Commission noted the sources of its jurisdiction in Title I and explained

¶ 33 (1994)(citations omitted); see also Application of Nationwide Wireless Network Corp. for a Nationwide Authorization in the Narrowband Personal Communications Service, File No. 22888-CD-P/L-94, *Memorandum Opinion and Order*, 9 FCC Rcd 3635 at ¶¶ 25-35 (1994)(explaining that 309(j) was not the only source of the Commission's authority to assess charges for a license and explaining that such authority is found in Section 4(i) in conjunction with other provisions of the Communications Act).

¹⁷ MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 FCC 2d 241 at ¶ 52 (1983)(citations omitted).

¹⁸ Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, FCC 99-181 at ¶ 13 (rel. Sept. 29, 1999)(citations omitted).

that Section 2 "confers on this agency broad subject matter jurisdiction." It concluded that "Title II and Title III provide the principal regulatory forms of the Communications Act, but the Commission also has regulatory powers independent of Title II and Title III." The Commission then concluded that enhanced services fell within its subject matter jurisdiction under Title I.¹⁹

- In reviewing whether to deregulate LEC billing and collection services, the Commission concluded that such services were not common carrier communication services for purposes of Title II regulation. However, the Commission went on to explain that it nevertheless "could invoke our ancillary jurisdiction under Title I of the Communications Act for that purpose." It went on to explain that the combination of Section 4(i) and Section 2(a) (with the accompanying relevant definitions in Section 3) provided the Commission with "powers [that] would be sufficient to enable [the FCC] to regulate exchange carrier provision of billing and collection service to interexchange carriers" ²⁰
- The Common Carrier Bureau rejected a Maryland PSC assertion that the FCC lacked jurisdiction over billing and collection services. It stated that "billing and collection service is incidental to the transmission of wire communications, as defined in section 3(a) of the Act, and is subject to the Commission's ancillary jurisdiction under Sections 2(a) and 4(i) of the Act." The Common Carrier Bureau went on to affirm the FCC's authority to preempt state regulation of billing and collection services.²¹ The full Commission affirmed the Bureau's decision and reasoning. It reiterated that the Supreme Court had "clearly established that Section 2(a) is a substantive grant of jurisdiction and not merely a description of the forms of communication to which the Act's other provisions governing common carriers (Title II of the Act) and broadcasters (Title II of the Act) apply. Thus, it is well settled that this Commission may assert Title I jurisdiction over activities that are not within the reach of Title II, but that are within the scope of our broad authority granted in Section

¹⁹ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384 at ¶ 124-125 (1980).

²⁰ Detariffing of Billing and Collection Services, CC Docket No. 85-88, *Report and Order*, FCC 86-31, 59 Rad. Reg. 2d 1007 at ¶¶ 35-36 (rel. Jan. 29, 1986).

²¹ Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services, DA 87-361, *Memorandum Opinion and Order*, 2 FCC Rcd 1998 at ¶ 34 (1987).

2(a) over 'interstate communication,' provided that our exercise of jurisdiction is 'necessary to ensure the achievement of [our] . . . statutory responsibilities.'"²²

- The Commission reiterated that although billing and collection services were not common carrier services, they sufficiently affected the conditions under which interstate carriers offer transmission services as to give the FCC jurisdiction over billing and collection through its Title I authority.²³ The Commission also explained that "[b]esides 'affecting' interstate communications, the billing and collection service that C&P provides for AT&T are also 'closely related to the provision of [such] services,' since billing and collection must occur accurately and efficiently for an interstate carrier to offer its services on an economically sound basis."²⁴
- The Commission relied upon its 4(i) authority to permit non-LECs and out-of-region LECs to become open video system operators. "In any event, the Commission also could exercise its authority under Section 4(i) of the Communications Act to permit non-LECs to become open video system operators even assuming arguendo that it was clear and unambiguous that the second sentence of Section 653(a)(1) addressed only the issue of whether cable operators and others could provide programming on a LEC's open video system and did not address the issue of whether non-LECs could also become open video system operators." The Commission explained that "Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority. In these cases, the courts found that the Commission's regulations were not inconsistent with the Act because they did not contravene an express prohibition or requirement of the Act, and were reasonably "necessary and proper" for the execution of the agency's enumerated powers."²⁵

²² Public Service Commission of Maryland and Maryland People's Counsel Applications for Review of a Memorandum Opinion and Order By the Chief, Common Carrier Bureau Denying The Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services; The Public Utilities Commission of new Hampshire Petition for Rule Making Regarding Billing and Collection Services, Memorandum Opinion and Order, 4 FCC Rcd 4000 at ¶ 38 (1989).

²³ Id. at ¶ 40.

²⁴ Id. at ¶ 42.

²⁵ Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, CS Docket No. 96-46, *Second Report and Order*, 11 FCC Rcd 18223 at ¶ 20-21 (1996).

- Radio broadcasters complained that in adopting rules governing the conduct of radio operators, the FCC lacked authority to prohibit conduct that was not already expressly prohibited in the Communications Act. The FCC rejected this position noting its broad authority pursuant to the "necessary and proper" provisions of the Act, including Section 4(i).²⁶
- The Commission adopted rules governing the disposition of cable home run wiring pursuant to its authority under Section 4(i). "We conclude that the Commission has authority under Sections 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly Section 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. Section 4(i) permits the Commission to 'perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.' *The Commission may properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.* We invoke Section 4(i) here because, contrary to the arguments posed by some commenters, the Communications Act does not prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace." The Commission noted that "[c]ourts have upheld various Commission regulations that were not within explicit grants of authority under the 'wide-ranging source of authority' of Section 4(i). In these cases, the courts found that the Commission's regulations were not inconsistent with the Communications Act because they did not contravene any provision of the Act and were 'appropriate and reasonable' exercises of authority."²⁷ The Commission also "conclude[d] that Section 4(i) also invests the Commission with authority to expand our rules in this manner with regard to MVPDs *that are neither radio licensees nor common carriers.* Again, we conclude that the same competitive concerns are present regardless

²⁶ Ronald W. Didriksen, Docket Nos. 11317, 11318, 11319, *Memorandum Opinion and Order*, 22 FCC 1151 at ¶ 6 (1957).

²⁷ Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring. CS Docket No. 95-185; MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 3659 at ¶ 83-84 (1997)(citations omitted)(emphasis added).

of the type of service provider that initially installs the broadband inside wiring. In addition, we conclude that such an extension of our rules is necessary in the execution of our functions and is not inconsistent with the Communications Act, as described above."²⁸

- The FCC concluded that Sections 4(i) and 4(j) provided it with the authority to require a dial-a-porn provider to submit certain information, tape recordings, and transcripts of messages to the Commission.²⁹
- As noted earlier, the Court of Appeals for the Second Circuit concluded that the FCC possesses authority under sections 1 and 4(i) of the Communications Act to regulate data processing activities of common carriers, which pose a "threat to efficient public communications services at reasonable prices."³⁰
- The establishment of the high cost fund to support universal service objectives was accomplished pursuant to the Commission's authority in Sections 1 and 4(i) of the Act. The D.C. Circuit explained that since "the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority."³¹
- The FCC's chain broadcasting rules were upheld as proper pursuant to 4(i) and the "necessary and proper" counterpart in Title III. The court explained that "[w]e think it clear from *National Broadcasting Co. v. United States* that § 4(i) and subsections f, g, and i of § 303 of the Communications Act provide statutory authority for the instant regulation."³² The court went on to explain that "it is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the 'public interest, convenience, and

²⁸ Id. at ¶ 101 (citation omitted).

²⁹ Intercambio, Inc., File No. ENF 88-03, *Memorandum Opinion and Order*, 4 FCC Rcd 6860 at ¶ 6 (1989).

³⁰ GTE Service Corp. v. FCC, 474 F.2d at 730-31.

³¹ Rural Telephone Coalition v. F.C.C., 838 F.2d 1307, 1315 (D.C. Cir. 1988).

³² Metropolitan Television Co. v. F.C.C., 289 F.2d 874, 876 (D.C. Cir. 1961)(citations omitted).

necessity.' And elimination of this danger is consistent with the Commission's duty under the Act to 'encourage the larger and more effective use of the radio in the public interest.'"³³

- Finally, the operation of Title I authority served as the basis of FCC authority to regulate and deregulate CPE. "As it had with enhanced services, the Commission found that CPE is within the scope of sections 152 and 153 of the Act, which gives the Commission jurisdiction over 'all instrumentalities, facilities, apparatus, and services ... incidental to' 'interstate and foreign communication by wire or radio.' The exertion of jurisdiction over CPE pursuant to these sections was justified, the Commission found, because including CPE charges in tariffs has a direct effect upon interstate transmission rates. The Commission therefore ordered, first, that all CPE be unbundled from transmission services; that is, no carrier can offer CPE as part of a transmission offering. Second, the Commission ordered that AT&T can offer CPE only through a separate subsidiary. These requirements were designed to ensure fair competition in the CPE market and to prevent AT&T from cross-subsidizing its competitive services through its monopoly services."³⁴

One of the FCC's obligations under the Act is to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate radio and wire] communication service, shall be just and reasonable." 47 U.S.C. § 201(b).³⁵ The record in the FCC's *Competitive Networks* rulemaking demonstrates that unreasonable restrictions on telecommunications carrier access to tenants in multi-tenant environments either prohibits altogether the practice of providing interstate radio and wire communication or imposes such onerous costs necessitating an unreasonable increase in the charges therefor in conflict with the goals of the Act. In order to maintain just and reasonable rates for interstate communication by wire and radio, the FCC possesses the authority to ensure that the component inputs of such communication -- inputs such as the rates for and requirements by which carriers obtain access to consumers in multi-tenant environments -- remain reasonable. In this manner, Section 4(i) authorizes the FCC's exercise of jurisdiction to accomplish the goals of the Act (and, specifically, those outlined in the *Competitive Networks* rulemaking).

³³ Id. (citations omitted).

³⁴ Computer and Communications Industry Ass'n v. F.C.C., 693 F.2d 198, 208 (D.C. Cir. 1982)(citations omitted).

³⁵ The Act goes on to explain that "[c]harges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b) (emphasis added).

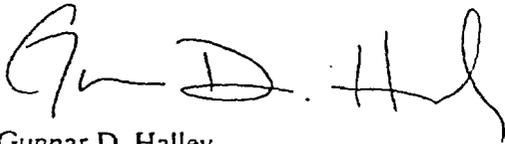
Ms. Lauren Van Wazer
April 28, 2000
Page 13

Similarly, the record in *Competitive Networks* demonstrates that other goals of the Communications Act -- including the ability of consumers to choose among competing facilities-based providers of telecommunications services -- are threatened by the discriminatory and unreasonable restrictions that are being imposed on telecommunications carriers by many multi-tenant building owners.

Finally, those who control multi-tenant environments may be engaged in telecommunications and thus subject to the direct jurisdiction if they own or control intra-building wiring and related apparatus. Even where they do not, the FCC has undoubted jurisdiction over carriers serving multi-tenant environments and may impose suitable obligations upon them that have the effect of influencing multi-tenant environment owner behavior.³⁶

I believe this analysis, and the examples provided above, demonstrate sufficiently that Section 4(i) allows the Commission to take the action necessary to ensure that the goals of the Communications Act -- such as those outlined in the *Competitive Networks Notice of Proposed Rulemaking* -- can be achieved.

Very truly yours,



Gunnar D. Halley

cc: Jeffrey Steinberg
Joel Taubenblatt
Leon Jackler
Eloise Gore

³⁶ See Ambassador, Inc. v. United States, 325 U.S. 317 (1945) ("We do not think it is necessary in determining the application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission"); see also Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 480-81 (2d Cir. 1971) ("The fact that the statute contains no explicit authority to regulate the activity of networks is not conclusive. . . The syndication and financial interest rules, though direct regulations of networks, as well as the prime time access rule, are within the Commission's statutory power")(citations omitted).

WILLKIE FARR & GALLAGHER

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Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036-3384

VIA HAND DELIVERY

EX PARTE

202 328 8000
Fax: 202 887 8979

May 16, 2000

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MAY 16 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

On behalf of the Smart Building Policy Project,¹ Professor Viet Dinh of Georgetown University Law Center, David Turetsky of Teligent, Inc., Jonathan Askin of the Association for Local Telecommunications Services, Philip Verveer of this firm and myself met this morning with Wilbert Nixon, Leon Jackler, Lauren Van Wazer, Jeffrey Steinberg, Joel Taubenblatt, and Paul Noone of the Wireless Telecommunications Bureau, Commercial Wireless Division, and Cheryl King and Eloise Gore of the Cable Services Bureau, to discuss issues concerning the provision of nondiscriminatory telecommunications carrier access to multi-tenant buildings.

We explained that the issue of constitutional takings does not operate as a bar to the Commission's actions and, indeed, the actions contemplated in the *Competitive Networks* rulemaking may not even constitute a taking of private property. We also explained why the limits of the D.C. Circuit's *Bell Atlantic v. FCC*² decision do not apply to the actions considered

¹ The Smart Building Policy Project is a growing coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Commercial Internet Exchange, Digital Microwave Corporation, Harris Corporation, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Siemens, Telecommunications Industry Association, Teligent, Inc., Time Warner Telecom, Winstar Communications, Inc., and the Wireless Communications Association.

² Bell Atlantic Telephone Cos. v. F.C.C., 24 F.3d-1441 (D.C. Cir. 1994).

Washington, DC
New York
Paris
London

in the above-referenced dockets, particularly in light of the subsequent decision by the D.C. Circuit in *Nat'l Mining Ass'n v. Babbitt* which limited the application of the *Bell Atlantic* avoidance canon analysis.³ I attach hereto a copy of the written testimony provided by Professor Dinh to the House Subcommittee on the Constitution as a summary of the substantive takings and related *Bell Atlantic* issues discussed during the course of our meeting.

We also explained the FCC's authority and its interest in permitting the widespread development of facilities-based telecommunications competition were roughly proportional to a rule requiring that multi-tenant building owners permit nondiscriminatory telecommunications carrier access under a *Nollan* analysis.⁴ We noted that the Commission has been given jurisdiction over all persons engaged in interstate wire or radio communication in the United States.⁵ To the extent that building owners exert control over access to and/or charge for telecommunications carrier access to the intra-building communications network, they become persons engaged in interstate wire communication (as that term is literally defined in the Act),⁶ and bring themselves within the jurisdiction of the FCC.

Moreover, because multi-tenant building owners' restrictions on telecommunications carrier access affect the rates and terms for interstate services offered to consumers by communications common carriers, the FCC retains authority to regulate those actions. One of the FCC's obligations under the Act is to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate radio and wire] communication service, shall be just and reasonable."⁷ The record in the FCC's *Competitive Networks* rulemaking demonstrates

³ 172 F.3d 906, 917 (D.C. Cir. 1999).

⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); see also *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁵ 47 U.S.C. § 152(a).

⁶ The definition of "wire communication" includes "all instrumentalities, facilities, apparatus, and services . . . incidental to [the] transmission [of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection...]" 47 U.S.C. § 153(51). The telephone unit as well as the local loop have both been deemed an instrumentality or facility of wire communication. One can reasonably infer, then, that the portions of the network between CPE (the telephone itself) and local loops also constitute an instrumentality of wire communication. The FCC unquestionably has subject matter jurisdiction over the use of such in-building facilities for the provision of interstate wire and radio communications.

⁷ 47 U.S.C. § 201(b). The Act goes on to explain that "[c]harges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in

that unreasonable restrictions on telecommunications carrier access to tenants in multi-tenant environments either prohibits altogether the practice of providing interstate radio and wire communication or imposes onerous costs necessitating an unreasonable increase in the charges therefor in conflict with the goals of the Act. In order to maintain just and reasonable rates for interstate communication by wire and radio, the FCC possesses the authority to ensure that the component inputs of such communication -- inputs such as the rates for and requirements by which carriers obtain access to consumers in multi-tenant environments -- remain reasonable. In this manner, Section 4(i)⁸ authorizes the FCC's exercise of jurisdiction over the practices of multi-tenant building owners that affect the provision of interstate wire and radio communication to accomplish the goals of the Act (and, specifically, those outlined in the *Competitive Networks* rulemaking).

During the course of this morning's meeting, we also discussed the effect of the recent Eleventh Circuit *Gulf Power II* decision on the Commission's authority to take action pursuant to Section 224 of the Communications Act. In the *Competitive Networks* Notice of Proposed Rulemaking, the Commission tentatively concluded that the nondiscriminatory access afforded by Section 224 of the Communications Act extends to the covered facilities owned or controlled by utilities within multi-tenant environments ("MTEs").⁹ A cursory reading of the recent *Gulf Power II* decision of the Eleventh Circuit may have cast some doubt upon the Commission's continued authority to use Section 224 to provide nondiscriminatory access to MTEs for fixed wireless carriers. A careful reading of this decision, though, illustrates that the Commission retains the jurisdiction conferred by Section 224 to accomplish nondiscriminatory access to MTEs for fixed wireless carriers.

chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b) (emphasis added).

⁸ 47 U.S.C. § 154(i).

⁹ Promotion of Competitive Networks 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 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; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *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*, FCC 99-141 at ¶ 41 (rel. July 7, 1999).

Section 224(f)(1) provides that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."¹⁰ The Communications Act defines "telecommunications carrier" as "any provider of telecommunications services"¹¹ which is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*."¹² The Commission has confirmed that wireless carriers provide telecommunications services¹³ and, therefore, qualify as telecommunications carriers.

Notwithstanding the clear language of Section 224(f)(1) to include any telecommunications carrier (a term that includes wireless carriers and is defined expressly without regard to facilities used), the Eleventh Circuit's recent *Gulf Power II* decision concludes that the Commission lacks authority over attachments to utility poles for wireless communications.¹⁴ Specifically, the decision finds that Section 224 gives "the FCC authority to regulate attachment to poles used, at least in part, for wire communications, and by negative implication does not give the FCC authority over attachments to poles for wireless communications."¹⁵ This appears to be a mistaken textual analysis. The court ignores the clear definition of "telecommunications carrier" in the statute. Moreover, it considers the use of the term "wire communication" that is contained in the definition of "utility" -- the entity that must *provide* nondiscriminatory access -- to give meaning to the definition of "telecommunications carrier" -- the entity that *receives* nondiscriminatory access.

Nevertheless, barring reversal on appeal, the force of the decision remains. However, it is not fatal to a Commission attempt to act pursuant to Section 224 as a way to ensure nondiscriminatory telecommunications carrier access to the ducts, conduits, and rights-of-way of utilities that exist on and within MTEs. First, the decision appears to contemplate a mobile wireless technology rather than a fixed wireless technology. In explaining the differences between wireline and wireless systems, the court explains that "wireless networks transmit through a series

¹⁰ 47 U.S.C. § 224(f)(1).

¹¹ 47 U.S.C. § 153(44).

¹² 47 U.S.C. § 153(46)(emphasis added).

¹³ See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 at ¶ 780 (1997).

¹⁴ Gulf Power Co. v. F.C.C., Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486, 2000 WL 367727 (11th Cir. 2000).

¹⁵ Id. at *8.

of concentric circle emissions that allow the network to continue working if one antenna malfunctions."¹⁶ Technologically, this explanation is inaccurate for fixed wireless systems whose networks rely on the operation of customer-specific building antennas to transmit signals. Hence, it appears that the court uses the term "wireless" to refer implicitly to "mobile wireless" rather than to "fixed wireless."

In addition, the decision states that "it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems. Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers."¹⁷ It has been established on the record in the *Competitive Networks* rulemaking that the utility ducts, conduits, and rights-of-way within MTEs clearly represent a bottleneck for fixed wireless carriers. The *Gulf Power II* court contemplated Section 224's operation as a means by which the Commission could eliminate bottleneck control that inhibits the provision of telecommunications service via competitive networks. Therefore, the presence of this multi-tenant building bottleneck gives the Commission jurisdiction to eliminate that bottleneck control for fixed wireless carrier access pursuant to Section 224 in a manner consistent with the rationale of the *Gulf Power II* decision. Hence, the decision should not be viewed as detrimental to the proposals set forth in the *Competitive Networks* Notice of Proposed Rulemaking.

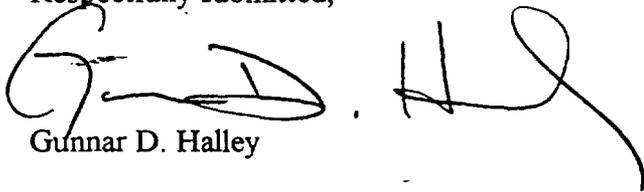
¹⁶ Id. at *9.

¹⁷ Id.

Ms. Magalie Roman Salas
May 16, 2000
Page 6

Because these topics concern a pending rulemaking at the Commission, in accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's ex parte presentation as well as two copies of Professor Dinh's earlier-referenced written testimony. I also enclose two copies of the written testimony of Timothy Graham of Winstar Communications, Inc. and of John Hayes of Charles River Associates that were submitted contemporaneously with Professor Dinh's testimony to the House Subcommittee on the Constitution as part of the March 21, 2000 hearing. The testimony of Mr. Graham and Dr. Hayes address issues raised in the above-referenced proceedings.

Respectfully submitted,



Gunnar D. Halley

Enclosures

cc: Wilbert Nixon (WTB)	Leon Jackler (WTB)
Lauren Van Wazer (WTB)	Jeffrey Steinberg (WTB)
Joel Taubenblatt (WTB)	Paul Noone (WTB)
Cheryl King (CSB)	Eloise Gore (CSB)
Christopher Wright (OGC)	David Horowitz (OGC)
Joel Kaufman (OGC)	Jonathan Nuechterlein (OGC)

SUMMARY OF WRITTEN TESTIMONY OF
VIET DINH
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER
BEFORE THE HOUSE SUBCOMMITTEE ON
THE CONSTITUTION
MARCH 21, 2000

The nondiscriminatory access proposals in the FCC's *Competitive Networks* rulemaking are constitutionally sound and the FCC possesses the statutory authority to promulgate them.

Whether a nondiscriminatory access requirement constitutes a per se taking under the Supreme Court's *Loretto* doctrine has not been addressed directly by the Supreme Court or any lower courts. A requirement that a building owner open its property for any and all telecommunications carriers to install equipment would operate as a per se taking under Supreme Court precedent. But this is not what the FCC proposes to do. Rather, the FCC proposes to impose a requirement that building owners treat telecommunications carriers in a nondiscriminatory manner -- providing new entrant access pursuant to rates and conditions similar to those imposed on the incumbent. This requirement is substantively different for purposes of legal analysis. The FCC's proposal is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964 which the Supreme Court held not to constitute a taking of property.

Nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to the property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. The FCC's nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunications carriers and the nondiscrimination is proportional to the impact of the building owners perpetuating local telecommunications monopolies through discriminatory access.

However, it is not necessary to determine whether a nondiscrimination requirement operates as a taking. Regardless of whether the requirements operate as a taking or not, the FCC's proposals are constitutionally sound because the FCC may ensure that a reasonable, certain, and adequate provision for obtaining compensation exists for any taking of the landlord's property. The just compensation requirements of the Fifth Amendment are satisfied.

The FCC possesses the authority to require nondiscriminatory access whether or not such a requirement constitutes a taking, even under the D.C. Circuit's analysis in *Bell Atlantic v. FCC*. The FCC is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. The Commission has the authority to require new entrants into a building to pay just compensation to property owners. A court reviewing the FCC's actions should grant *Chevron* deference to the agency's interpretation of its authority under the statute.

WRITTEN TESTIMONY OF
VIET DINH
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER
BEFORE THE HOUSE SUBCOMMITTEE ON
THE CONSTITUTION

MARCH 21, 2000

Mr. Chairman and Members of the Subcommittee,

Thank you very much for this opportunity to comment on the constitutional issues raised by the pending FCC Notice of Proposed Rulemaking on nondiscriminatory telecommunications access to multi-tenant environments. I note that there are several bills pending in Congress that seek to ensure the same result as the proposals under consideration by the FCC.

I am an Associate Professor of Law at the Georgetown University Law Center where I specialize in constitutional law, among other things. Prior to joining the faculty, I was a law clerk to Justice Sandra Day O'Connor on the U.S. Supreme Court, and to Judge Laurence Silberman on the Court of Appeals for the D. C. Circuit. I am currently writing *JUDICIAL AUTHORITY AND SEPARATION OF POWERS; A REFERENCE GUIDE TO THE U.S. CONSTITUTION*, to be published by Greenwood Press.

Although I appear on behalf of the Smart Building Policy Project,¹ I am here as an analyst and not an advocate. My analysis, therefore, is not necessarily the position of the Project or any of its members; rather, it is simply how I see the constitutional issues in this matter.

The takings issue posed by this hearing's inquiry concerning the FCC's Notice consists of two principal questions: (1) whether a nondiscriminatory access requirement constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment; and (2) even if such a requirement is constitutionally sound, whether the FCC has authority to promulgate the proposed rules. I will address each question in turn. For the

¹ The members of the growing Smart Building Policy Project currently include the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Teligent, Inc., Winstar Communications, Inc., and the Wireless Communications Association.

reasons detailed below, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them.

I. The Constitutionality of a Nondiscriminatory Access Requirement

The Fifth Amendment to the Constitution guarantees that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V. The proper analysis of the proposed FCC action, accordingly, has two component steps: (A) whether a nondiscriminatory access requirement constitutes a taking of private property; and (B) if it is a taking of property, whether the property owners would not receive just compensation. Only if both inquiries yield affirmative answers would there be a violation of the Fifth Amendment.

A. Taking.

The Supreme Court has established two tests to determine whether a government action constitutes a taking. A permanent physical occupation of private property is a taking per se, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); the only question is whether there would be adequate compensation. By contrast, other government regulations not involving a permanent physical occupation, such as conditions on the use of private property, are takings only if they fail the multifactor balancing test applicable to regulatory takings. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

Whether a nondiscriminatory access requirement constitutes a permanent physical occupation that is a per se taking under *Loretto* is a close question, one that the Supreme Court has not directly addressed. Nor has my research revealed any holding or discussion in lower court opinions directly on point.

Unlike the proposed nondiscriminatory access requirement, if the FCC were to require building owners to open up their property for any and all telecommunications companies to install their equipment, such a requirement would constitute a per se taking. That much is evident from the facts of *Loretto* itself, and it matters not that the intrusion is minimal—that the ceded area is no “bigger than a breadbox.” *Loretto*, 458 U.S. at 438 n.16. In that regard, I think the Court of Appeals for the Eleventh Circuit correctly held in *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999), that the mandatory access provision of 47 U.S.C. § 224 is a per se taking. (The court further held that the taking is constitutional because there are adequate procedures for just compensation, a subject to which I return below in Part B.)

A nondiscriminatory access requirement of the type proposed by the FCC, however, is substantively different. Instead of mandating that a property owner open his property to outsiders, a nondiscrimination provision simply requires that, should the owner open his property to any outsider, he must also entertain others. The proposal, therefore, is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964, which the Supreme Court held not to constitute a taking of property in *Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241, 261 (1964). *Heart of Atlanta Motel*, of course, is not directly apposite because Title VII requires general access to places of public accommodation only, and the FCC proposal would provide limited access to property retained for private use. This distinction, however, turns on the public purpose of the government action. With respect to whether the action constitutes a taking, however, it seems to me that the two nondiscriminatory access requirements are quite analogous.

So viewed, nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to his property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Commission conditioned the grant of a building permit upon provision of a permanent easement to provide access to public beaches. The Court held that a permanent access easement is a permanent physical occupation under *Loretto*, *see id.* at 831-32; however, that holding did not end the analysis. The easement requirement constituted a taking only because, as a condition, it did not bear a sufficient nexus to the government's reason for regulating the construction of the residential home. *See id.* at 836-37. The Court later explained that a sufficient nexus exists if there is a "rough proportionality" between the "nature and extent" of the condition and the "impact" of the underlying activity. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Following these guidelines, numerous courts have upheld permanent access easements as reasonable conditions. *See, e.g., Curtis v. Town of South Thomaston*, 708 A.2d 657, 659-60 (Me. 1998) (upholding a fire safety regulation that conditioned approval of a subdivision plan upon the developer building a fire pond and granting the town an easement to maintain and use the pond); *Grogan v. Zoning Board of Town of East Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (upholding zoning board's decision to condition grant of permit to build addition onto house upon owner's granting scenic and conservation easement), *appeal dismissed*, 670 N.E.2d 228 (N.Y. 1996); *Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995) (en banc) (upholding planning commission's decision to condition approval of short plat applications upon dedication of rights of way for road improvement). Just so with the FCC's proposed nondiscriminatory access requirement. Such a nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunication carriers; the nondiscrimination condition is proportional to the impact of the landowners' actions, that is perpetuating local telecom monopolies through discriminatory access.

Another analogous line of cases is the rule in antitrust law that a dominant market participant must provide competitors access to essential facilities it owns. *See, e.g., MCI v. AT&T*, 708 F.2d 1081, 1132-34 (7th Cir. 1983). Despite calls from commentators,² my research has uncovered no case holding that such a requirement constitutes a per se taking

² *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1227-40 (1999) (arguing that if a court were to treat Microsoft's operating system software as an essential facility and were to require Microsoft to include Netscape's internet browser in that operating system, the government would have taken Microsoft's property, under the per se rule in *Loretto*, and would be required to pay just compensation).

under *Loretto*. In *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262 (11th Cir. 1990) (per curiam), *vacated as moot*, 499 U.S. 915 (1991), the Eleventh Circuit, sitting en banc, affirmed a district court decision that invoked the essential facilities rationale and ordered the respondent to sell wholesale gas to the petitioner at reasonable prices—over the objections of two dissenting judges that such relief raised Fifth Amendment concerns, *see id.* at 1312-20, and specifically that it would work a per se taking under *Loretto*. *See id.* at 1315 n.52.

In sum, whether a nondiscriminatory access requirement is a per se taking is an open question. Any unqualified answer in the affirmative is in error because it gives conclusive weight to *Loretto* and ignores the competing principles set forth in cases like *Heart of Atlanta Motel* and *Nollan*. I do not venture a conclusion here because the question requires resolving the conflict between two competing lines of cases, both of which are jurisprudentially sensible and legally valid—a task of line drawing that ultimately rests with the Supreme Court. In any event, such a speculation is not necessary to my ultimate conclusion that the FCC proposals are constitutionally sound.

If a nondiscrimination access requirement does not work a per se taking, the proposed FCC action is likely to be upheld as a permissible regulation of the use of private property under the “ad hoc, factual inquiries” into the factors summarized in *Penn Central*: the character of the government action, the economic impact of that action, and its interference, if any, with investment-backed expectations. *See* 438 U.S. at 124. First, the proposed regulations are designed to further the public interest, as defined by Congress, “to foster competition in local telecommunication markets.” Notice of Proposed Rulemaking, ¶ 1 (released July 7, 1999); *see* 47 U.S.C. § 251. The Court “has often upheld substantial regulation of an owners’ use of his own property where deemed necessary to promote the public interest.” *Loretto*, 458 U.S. at 426. Second, the economic impact of the proposed regulations is minimal, at most. Property owners will be directly compensated for the use of property they own and control and indirectly compensated, through rents, for the use of property they own but is controlled by a communications carrier. Third, any expectations backed by the owners’ investments are in the use of their property as real estate. These expectations are minimal, if not nil, with respect to ducts and roof space dedicated to utility equipment. Any fortuitous opportunity they now have to participate in the telecommunications business (either as competitors or as lessors of facilities) results from the deregulatory program that the FCC has pursued following a congressional directive. In any event, any investment-backed expectations the owners may have in telecommunications are limited because the owners are operating in a field (telecommunications and/or transacting with communications carriers) that is heavily regulated by the federal government. Such regulations are constantly in flux, rendering unreasonable any assumption or expectation that a nondiscriminatory access requirement or other regulation on the use of their property would not be imposed in the future.

B. Compensation.

Even if, *arguendo*, the proposed FCC regulations constitute a taking, the analysis does not end. “The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). “If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claims against the government for a taking.” *Id.* at 195. According to the Notice of Proposed Rulemaking, the FCC contemplates two primary avenues for effecting nondiscriminatory access to multi-tenant environments for communications carriers. First, the FCC may require incumbent local exchange carriers to provide competitors with access, at just, reasonable, and nondiscriminatory rates, to the conduits and rights of way that they control (through leaseholds or other access arrangements) in the buildings. *See* Notice of Proposed Rulemaking, ¶¶ 36, 48. Second, the FCC may require building owners to provide competitive local exchange carriers equal access, at nondiscriminatory rates, to their property for the purpose of installing transmission equipment to service tenants. *See id.* ¶ 60. Under either avenue, the FCC may ensure “that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking.” *Williamson County*, 473 U.S. at 194.

First, should the FCC require incumbent carriers to provide access to the conduits and rights of way that they control, 47 U.S.C. § 224(e) permits the carriers to assess charges for such access. The statute sets forth a clear formula for the carrier to recover costs of providing access, through an allocation of the costs of providing both usable and unusable space in the conduits and rights of way. The provision further requires the FCC to promulgate regulations to govern the access charges should “the parties fail to resolve a dispute over such charges.” *Id.* § 224(e)(1). “Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.” *Id.*

This statutory procedure guarantees the incumbent carrier ample opportunities to obtain just compensation for providing access. In the first instance, it may levy compensatory charges according to the prescribed cost allocation formula. Should there be a dispute as to such charges, it may negotiate at arms length with the competitive carrier to set appropriate rates. Finally, should the dispute not be resolved, the FCC, after appropriate complaints and proceedings, may determine rates that are “just, reasonable, and nondiscriminatory” pursuant to duly promulgated regulations. On its face, therefore, the statute satisfies the just compensation requirement of the Fifth Amendment. I suppose that there is a possibility that a particular agency determination of a “just, reasonable, and nondiscriminatory” rate would not provide, in the final analysis, “just compensation” under the Fifth Amendment. Such risk, however, inheres in every governmental action, and the remote possibility does not render the FCC proposal facially unconstitutional. *See Gulf Power*, 187 F.3d at 1337-38. In any event, the FCC’s rate determination, like other agency actions, is subject to judicial review; the incumbent carrier, therefore, is afforded full protection against the risk of such administrative error. *See id.* at 1338.

Second, with respect to access to areas owned and controlled solely by property owners, the FCC proposes that the owners be paid “nondiscriminatory” rates for such access. The Commission is currently seeking comments on how such rates should be determined, so the precise parameters of such compensation are not fixed. I note, however, that the Commission proposes that property owners be permitted “to obtain from a new entrant the same compensation it has voluntarily agreed to accept from an incumbent LEC.” Notice of Proposed Rulemaking, ¶ 60. Such reliance on the arms-length bargain struck with incumbent carriers seems to me a reasonable approximation of the fair market value of access and thus would provide just compensation for any taking of property. To the extent that changed circumstances or different market conditions may render such original compensation an unreliable indicator of fair value, the Commission has also sought comments on how to tailor any nondiscriminatory access requirement to ensure consumer choice “without infringing on the rights of property owners.” *Id.* ¶ 55. Thus, at this point, there is little reason to suspect that the procedures for setting nondiscriminatory access charges would not ensure a fair, certain and adequate process for property owners to obtain just compensation for any taking of their property.

II. The Commission’s Authority to Promulgate the Proposed Rules

The nondiscriminatory access proposals by the FCC also raise certain separation of powers considerations concerning the Commission’s authority to promulgate the proposed regulations. For reasons outlined below, I conclude that the Commission would likely be found to have such authority.

As an initial matter, there is little question that, shorn of the Fifth Amendment implications of the proposed requirements, the Commission has authority to regulate access to multi-tenant environments for the provision of telecommunications services. With respect to facilities controlled by incumbent carriers, 47 U.S.C. § 224 explicitly authorizes the Commission to require that a utility provide access to any “duct, conduit, or right-of-way owned or controlled by it,” *id.* § 224(f)(1), and the statute defines utility to include communications carriers. *See id.* § 224(a)(1). With respect to property owned and controlled by the building owners, 47 U.S.C. §§ 151, 152 grant the Commission authority to regulate the transmission of interstate wire or radio communication. The definition of wire communication includes “all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission” and thus contemplates property used for the purpose of providing interstate communication services. *Id.* § 153(52). And 47 U.S.C. §§ 151, 152 further grant the Commission authority to regulate persons engaged in interstate wire communication, as that term is defined above. Building owners, accordingly, are persons engaged in interstate wire communication by virtue of their control or denial of access to the facilities incidental to the transmission of such communication. Finally, the Commission has authority under 47 U.S.C. § 154(i) to “make such rules and regulations, . . . not inconsistent with this chapter, as may be necessary in the execution of its functions” and under 47 U.S.C. § 303(r) to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.” Although the authority under the provisions is frequently termed “ancillary jurisdiction” in the telecommunications

parlance, it is more aptly analogized to a general necessary and proper authority to effectuate the purposes and provisions of the statute. See PETER HUBER, ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.3.1, at 221 (2d ed. 1999).

The analysis into agency authority, however, is further complicated by the presence of Fifth Amendment considerations as outlined above. In *Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit reviewed orders of the Commission that required carriers to set aside a portion of their central offices for use by their competitors—known as the physical co-location orders. The petitioners challenged the Commission's authority to promulgate the regulations. The court recognized that it would normally defer to the Commission's statutory interpretation under the principles announced in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), but held that it would not do so in this case because the Commission's interpretation raised substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds. See *Bell Atlantic*, 24 F.3d at 1445. Specifically, the court found that the FCC's orders amounted to a forced access requirement, and thus in all cases "will necessarily constitute a taking" under *Loretto*. See *id.* at 1445-46 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). To avoid this perceived constitutional difficulty, the court held that the Commission's authority to order physical co-location must either be found in express statutory language or must be a necessary implication from that language, such that "the grant [of authority] itself would be defeated unless [takings] power were implied." *Id.* at 1446 (quoting *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373 (C.C.W.D.Pa. 1903), *aff'd*, 195 U.S. 540 (1904)) (alterations in original). Finding this "strict test of statutory authority made necessary by the constitutional implications of the Commission's action" not satisfied, the court held that the Commission lacked authority to issue the physical co-location orders. *Id.* at 1447.

Upon closer analysis, however, the holding of *Bell Atlantic* does not apply to the nondiscriminatory access requirements proposed by the FCC. First, the regulation of areas controlled by a communications carrier follow from the express authorization to order a physical taking found in 47 U.S.C. § 224. As to that portion of the proposed rule, therefore, the "strict test" of *Bell Atlantic* is satisfied.³ Second, the requirement of nondiscriminatory access to areas owned and controlled by landlords, unlike the forced access orders at issue in *Bell Atlantic*, will not "necessarily constitute a taking." As I concluded above, whether the requirement will be judged under the *Loretto* standard or the competing standards applied in *Heart of Atlanta Motel* or *Nollan* is a close question. In *Loretto* the Court rejected the suggestion that the installation of cable equipment was not a per se taking because the property owner retained the right to cease renting his property to tenants and thereby to avoid the requirement. It explained that "a landlord's ability to rent his property may not be

³ Because 47 U.S.C. § 224(f)(1) requires a carrier to provide access to ducts and conduits "owned or controlled" by it, Congress clearly contemplated that the FCC would regulate property that is merely controlled by a carrier and therefore owned by a third party. Thus, even if the proposed regulations based upon § 224 necessarily effect a taking without just compensation to property owners in every case, Congress in § 224 has expressly granted the FCC the power to effect such takings and has concomitantly authorized the expenditures needed to satisfy those owners' claims for just compensation.

conditioned on his forfeiting the right to compensation for a physical occupation.” *Loretto*, 458 U.S. at 439 n.17. However, the Commission is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. And the Commission has authority to require new entrants into a building to pay just compensation to property owners under 47 U.S.C. §§ 154(i), 303(r), as such regulations are “reasonably ancillary to the effective performance of the Commission’s various responsibilities,” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In particular, the statute requires the Commission to foster competition in local telecommunications markets. On *Bell Atlantic’s* reasoning, therefore, a reviewing court should grant *Chevron* deference to the Commission’s interpretation of its authority under the statute.

As Professors Baumol and Merrill explained in assessing whether provisions of the Telecommunications Act of 1996 effect an unconstitutional taking: “[A]s long as the Act includes mechanisms which can provide just compensation for any taking claims found to have merit, these claims, too, should provide no basis to halt the implementation of the Act in the manner deemed most appropriate by regulators to achieve its purpose.” William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1056 (1997).

* * *

In the final analysis, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them. Thank you.

VIET D. DINH

600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9324

dinhv@law.georgetown.edu

3308 Upland Terrace, N.W.
Washington, D.C. 20015
(202) 244-5851

EDUCATION

HARVARD LAW SCHOOL Cambridge, MA
J.D. *magna cum laude*. Class Marshal. *BlueBook* Editor, Harvard Law Review. Oralist, Ames Moot Court Competition Semifinals. John M. Olin Research Fellow in Law and Economics. Arnold & Porter Scholarship.

HARVARD COLLEGE Cambridge, MA
A.B. *magna cum laude*, in Government and Economics. John Harvard Scholarship. Harvard College Scholarship.

EXPERIENCE

GEORGETOWN UNIVERSITY LAW CENTER Washington, D.C.
Associate Professor of Law; Deputy Director, Asian Law and Policy Studies Program.
Specialties: Constitutional Law, International Law and Development, Corporations.

UNITED STATES SENATE Washington, D.C.
Special Counsel for the Impeachment Trial of the President - HON. PETE V. DOMENICI.
Associate Special Counsel - SPECIAL COMMITTEE TO INVESTIGATE WHITWATER DEVELOPMENT CORPORATION AND RELATED MATTERS; COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS.

UNITED STATES SUPREME COURT Washington, D.C.
Law Clerk - HON. SANDRA DAY O'CONNOR.

UNITED STATES COURT OF APPEALS, D.C. CIRCUIT Washington, D.C.
Law Clerk - HON. LAURENCE H. SILBERMAN.

ACTIVITIES

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PUBLICATIONS

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