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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

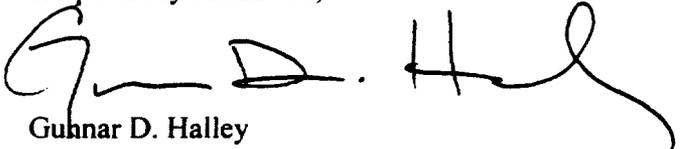
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a memorandum from Professor Viet D. Dinh, on behalf of the Smart Buildings Policy Project, to the Federal Communications Commission that concerns the constitutional and jurisdictional issues raised in the above-referenced proceedings.

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 Buildings Policy Project's written ex parte presentation.

Respectfully submitted,



Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

- | | | |
|-----------------------------|------------------------|------------------------------|
| cc: Chairman Kennard | Commissioner Ness | Commissioner Furchtgott-Roth |
| Commissioner Powell | Commissioner Tristani | Kathryn Brown |
| Clint Odom | Mark Schneider | Helgi Walker |
| Peter Tenhula | Adam Krinsky | Thomas Sugrue (WTB) |
| Christopher Wright (OGC) | Joel Kaufman (OGC) | David Horowitz (OGC) |
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Admitted in District of Columbia only

John Laughlin Carter
Admitted in Virginia only

MEMORANDUM

TO: The Federal Communications Commission

FROM: Viet D. Dinh

DATE: September 5, 2000

SUBJECT: Commission Authority to Promulgate the Rule in Docket No. 99-217

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In its Notice of Proposed Rulemaking in Docket No. 99-217 (“NPRM”), the Commission considered “actions to help ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments.” NPRM ¶ 1. The Commission was motivated by the congressionally prescribed goal of “opening all telecommunications markets to competition” and by the finding that “competition will eventually eliminate the incumbent LECs’ [local exchange carriers’] control of bottleneck local facilities.” *Id.* ¶ 2. Specifically, the Commission noted that “only facilities-based competitors can break down the incumbent LECs’ bottleneck control over local networks,” *id.* ¶ 4, but recognized that its regulatory efforts “have thus far had little practical impact in terms of providing most customers with choices of service providers or reducing the incumbent LECs’ market power.” *Id.* ¶ 13. Accordingly, the Commission sought comment on “whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions.” *Id.* ¶ 53.

Three Commissioners wrote separately. Each lauded the Commission’s initiative and agreed with its purpose. Commissioner Ness, for instance, supported the Commission’s action because it reflected “the pro-competitive spirit imbued in the Telecommunications Act of 1996.” Commissioner Furchtgott-Roth noted that the decision “has a number of laudable aspects,” and Commissioner Powell “wholehearted support[ed] taking all appropriate steps to promote local competition.” Nevertheless, all three quite properly raised questions about the agency’s authority to promulgate the nondiscriminatory access rule in light of Judge Sentelle’s opinion for the D.C. Circuit in *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

This memorandum addresses those questions. I conclude that Commission has statutory authority to promulgate the nondiscriminatory access requirement and that the policy of constitutional avoidance suggested by *Bell Atlantic* does not apply because there is no significant constitutional doubt to the Commission’s proposal.

The Commission has several separate bases of express, primary, and ancillary authority upon which to rely--in the alternative, in combination, or in the aggregate--to promote nondiscriminatory access. First, the Commission has express and specific authority to achieve nondiscriminatory access through the use of ducts, conduits, and rights-of-way that are owned or controlled by a local exchange carrier or other utility, 47 U.S.C. § 224(f)(1). Second, the Commission has authority under 47 U.S.C. § 205(a) to prohibit telecommunications carriers from participating in discriminatory access arrangements, which constitute an unjust and unreasonable practice under 47 U.S.C. § 201(b). The Commission would have authority under 47 U.S.C. sec 411(a) to join all persons, like building owners, who are "interested in or affected by" the prohibition in a subsequent enforcement proceeding and to exercise the same jurisdiction over such interested parties as it has over carriers. See *Ambassador, Inc. v. United States*, 325 U.S. 317, 323-26 (1945). Third, The Commission has authority under 47 U.S.C. § 152(a) to regulate access to ducts, conduits and other property as "facilities incidental to" the transmission of wire and radio communication. The exercise of the Commission's jurisdiction under section 152(a) and its rulemaking authority under 47 U.S.C. §§ 154(i), 201(b), 303(r) would be reasonably ancillary to the effective performance of its responsibilities under the Act--specifically to enforce the provisions that proscribe discrimination and promote local competition, see, e.g., 47 U.S.C. §§ 202, 224, 251, 257.

The Commission's nondiscriminatory access requirement does not trigger the canon of constitutional avoidance and the "strict test of statutory authority" of *Bell Atlantic*. Such a requirement does not "raise the sort of 'grave and doubtful constitutional questions,' that would lead [a court] to assume Congress did not intend to authorize their issuance." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). First, there is no doubt under the Just Compensation Clause of the Fifth Amendment. Unlike the physical collocation orders in *Bell Atlantic*, the Commission's proposed nondiscriminatory access rule does not create an identifiable class of cases in which its application "will necessarily constitute a taking." Regulatory conditions of the type contemplated by the Commission are not a per se taking under *Loretto* but rather constitute permissible regulation on the use of property. See, e.g., *Yee v. Escondido*, 503 U.S. 519 (1992); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In any event, 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). The Commission's proposal contemplates that telecommunications carriers pay adequate compensation for their access and thus erases any constitutional doubt under the Just Compensation Clause. Second, there is little danger that the Commission is encroaching on Congress' authority under the Appropriations Clause. Responsibility for paying compensation for access rests with telecommunications carriers, and not the government. Only in hypothetical or, at most, highly speculative circumstances would there be any potential imposition on the public fisc--a possibility so remote that it does not raise constitutional doubts worthy of avoidance.

The analysis is illustrated by the recent decision in *Transmission Access Policy Study Group v. FERC*, - F.3d -, 2000 WL 762706 (D.C. Cir. June 30, 2000) (per curiam). Writing for the court, Judge

Sentelle validated the FERC's authority to require that electric utilities provide mandatory open access to their transmission lines on the same terms and conditions as their own use of the lines, even though the agency did not have express statutory authority to do so. The court accorded *Chevron* deference to the agency's interpretation of its authority, and specifically rejected arguments that the open access requirement worked an unconstitutional taking and that the canon of avoidance counseled application of *Bell Atlantic*'s "strict test of statutory authority." If anything, the rule of *Bell Atlantic* applies with more vigor to the FERC's open access orders than to the Commission's proposed nondiscriminatory access requirement.

The FERC's open-access orders forced utilities to open up their transmission lines to outsiders, even if they had previously used the lines exclusively for transmission of their own electricity. The Commission, instead, contemplates only a nondiscrimination condition upon the owners' decision to provide access to outsiders. The FERC's orders, unlike the Commission's proposed rule, would thus more likely create "an identifiable class of cases in which application of a statute will necessarily constitute a taking." *Bell Atlantic*, 24 F.3d at 1445 (internal quotations and citations omitted). Even so, the matter warranted little more from the court than a casual dismissal: "We need not decide whether this case falls within that category, however, because even if it did, any takings problem created by [the FERC's order] does not raise such significant constitutional doubt as to require us to construe the FPA to prohibit FERC from ordering open access." *Transmission Access* at *13.

I will discuss these points more fully below.

I. Statutory Authority

There is little question that, shorn of the Fifth Amendment implications to the Notice of Proposed Rulemaking, a court would defer to the Commission's determination that it has statutory authority to require nondiscriminatory access to multi-tenant environments for the provision of telecommunications services. The Commission's interpretations of its authority under the Communications Act of 1934, as amended, ("the Act") are accorded the traditional deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), even though the Commission is interpreting the reach of its own jurisdiction. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1300 (2000); *Bell Atlantic*, 24 F.3d at 1445. The Commission has authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Act. 47 U.S.C. § 201(b). As the Supreme Court recently explained, because the relevant provisions of the Telecommunications Act of 1996 ("1996 Act") were inserted into the Act, the Commission's authority under § 201(b) extends to provisions of the 1996 Act. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-79 (1999). In *Iowa Utilities*, the Court also noted that while "'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) *could* exist even where the Act does not 'apply.'" *Id.* at 380 (emphasis in original). The Commission has jurisdiction, both primary and ancillary, to regulate access to multi-tenant environments through its rulemaking powers under 47 U.S.C. § 201(b) and other provisions of the Act, *see, e.g., id.* §§ 154(i), 303(r).

First, Congress explicitly authorized the Commission to require a utility to provide "any

telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224(f)(1); *see also id.* § 224(a)(1) (defining “utility” to include any “local exchange carrier” that “owns or controls poles, ducts, conduits, or right-of-way used, in whole or in part, for any wire communications”). Accordingly, the Act grants express and specific authority to the Commission to promulgate rules seeking to achieve nondiscriminatory access through the use of ducts, conduits, and rights-of-way that are owned or controlled by a local exchange carrier.

Second, the Commission has authority to prohibit telecommunications carriers from entering into or continuing any access arrangements that effectively exclude other carriers. The Commission may reasonably find that such discriminatory access arrangements constitute an unjust and unreasonable practice under 47 U.S.C. § 201(b). Based on such findings, the Commission has authority under 47 U.S.C. § 205(a) to prescribe regulations remedying violations of the Act. Such regulations may include all the components contemplated in the NPRM—such as the definition of access arrangements that would constitute an unjust or unreasonable practice, guidelines for nondiscriminatory access rates, terms, and conditions that would remedy the practice, and procedures for complaints against noncomplying carriers. Of course, the practical effect of such regulation on the carriers is a restriction on the building owners’ practices. However, “no canon of administrative law requires [a court] to view the regulatory scope of agency action in terms of the practical or even foreseeable effects.” *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (1999) (upholding FCC authority to set rates paid by domestic carriers for foreign connections, even though the agency does not have authority to set connection rates charged by foreign carriers). In any subsequent complaint process, 47 U.S.C. § 411(a) permits the Commission to join all persons “interested in or affected by” the regulation or practice under consideration (such as building owners), and the Commission would have jurisdiction over “such additional parties in the same manner, to the same extent, and subject to the same provision as are or shall be authorized by law with respect to carriers.”¹ *See Ambassador, Inc. v. United States*, 325 U.S. 317, 323-26 (1945); *see also United States v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169, 171 n.2 (1948) (affirming joinder authority of the Interstate Commerce Commission to prescribe stockyard practices); *United States v. City of Jackson, Mississippi*, 318 F.2d 1, 16-17 (same for racial desegregation of bus and rail terminals).

Finally, when the Commission seeks to achieve nondiscriminatory access not through use of ducts, conduits, and rights-of-way owned or controlled by a local exchange carrier, the Commission’s authority rests in its jurisdiction to regulate interstate wire and radio communication. 47 U.S.C. § 152(a) specifies that the Act “applies” (both in statutory language and in the meaning of *Iowa Utilities*, 525 U.S. at 380) “to all interstate and foreign communication by wire or radio ... and to all persons engaged within the United

¹ This limitation dispels any fear that the Commission would become a “national landlord.” Its jurisdiction would be limited to regulation of interstate wire and radio communications, as defined by the Act. *See Ambassador, Inc. v. United States*, 325 U.S. 317, 323-24 (1945) (“The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber’s business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships.”).

States in such communication.” The Act defines radio communication to include “all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.” *Id.* § 153(33). And wire communication is “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.” *Id.* § 153(52). Thus, the Act applies to and the Commission is empowered to regulate access to ducts, conduits and other property “between the points of origin and reception” as “instrumentalities [and] facilities incidental to” the transmission of wire and radio communication.

It is beyond peradventure that 47 U.S.C. § 152(a) is an affirmative grant of authority to the Commission. The Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), after interpreting 47 U.S.C. § 152(a) to grant the Commission “broad authority” to regulate interstate communication by wire and radio, specifically rejected the argument “that § 152(a) does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act’s other provisions may separately be made applicable.” *Id.* at 171-72. Surveying the extant sources of legislative intent, Justice Harlan concluded for the Court: “Nothing in the language of § 152(a), in the surrounding language, or in the Act’s history or purposes limits the Commission’s authority to those activities and forms of communication that are specifically described by the Act’s other provisions.” *Id.* at 172. And the Court specifically rejected the contention that “the Commission’s authority is limited to licensees, carriers and others specifically reached by the Act’s other provisions,” *id.* at 173 n.37. The Commission’s “comprehensive mandate” and its “expansive powers” to regulate “all interstate . . . communication by wire or radio,” therefore, is not limited by the identity or status of the regulated persons or entities. *Id.* at 173 (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)).

The Commission’s authority under section 152(a) is limited “to that reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Act. *Southwestern Cable*, 392 U.S. at 178. In addition the authority under 47 U.S.C. § 201(b) to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act,” 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.” The “public interest” prompting agency action is delineated in the 1996 Act’s primary purpose of enhancing competition in the provision of telecommunications services. Congress sought “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly [sic] private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition” H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 113, *reprinted in* IV 1996 U.S.C.C.A.N. 124. To further this goal, Congress granted the Commission primary authority to take a number of specific steps, which primary authority can be supplemented with the ancillary authority to take other steps that the Commission reasonably deems necessary.

For instance, as explained above, 47 U.S.C. § 224 authorized the Commission to require a utility to provide “any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” The Commission may find that the exercise of this primary authority solely will not adequately promote the public interest in competitive telecommunications services and thus may reasonably conclude that it is necessary, in order to enforce this and other provisions of the Act, to supplement this primary jurisdiction with regulation of other parties or matters within its general authority--such as ducts, conduits and other property in multi-tenant environments and their owners. Similarly, 47 U.S.C. § 251 gives the Commission authority to implement and enforce the duty of telecommunications carriers to interconnect with facilities of other carriers and to ensure portability of telephone numbers and dialing parity between carriers. Finally, 47 U.S.C. § 257 expressly authorizes the Commission to “identify[] and eliminat[e] ... market entry barriers for entrepreneurs and other small businesses” that provide telecommunications services and, in doing so, to promote “vigorous economic competition.” The Commission may find that its primary authority to implement these and other provisions² of the Act will not adequately ensure competitive services for certain markets or for certain consumers, such as tenants of multi-tenant environments. *See, e.g.,* NPRM ¶¶ 4-7, 13, 19-25. Based on such findings, the Commission may reasonably conclude that requiring building owners to allow carriers access to their property on a nondiscriminatory basis is necessary in order to effectuate the full enforcement of the statutory provisions cited above and to achieve Congress’s goal of competitive local telephone markets.

In sum, depending on the form and reach of the final rule, the Commission may rely on one, a combination, or all of the bases of jurisdiction outlined above in order to support its authority to require nondiscriminatory access to multi-tenant environments. Such reliance would likely be validated by a court according the traditional *Chevron* deference to an agency’s interpretations of its organic statute.

Because the Commission’s proposed nondiscriminatory access rule arguably implicates the Takings Clause of the Fifth Amendment, the analysis is more involved, but a judicial affirmation of agency authority is just as likely. In a nutshell, the complication arises from the notion that the command that courts interpret statutes to avoid “serious constitutional problems,” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted), also requires a “strict test of statutory authority” for agency action under certain circumstances. *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994). The short answer to this complication is that neither the canon of constitutional avoidance nor the rule of *Bell Atlantic* applies because the proposed nondiscriminatory access requirement does not pose a “serious constitutional problem” or “raise the sort of ‘grave and doubtful constitutional questions,’ that would lead [a court] to assume Congress did not intend to authorize [its] issuance.” *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

A recent D.C. Circuit decision, on all fours with the instant matter, illustrates. In *Transmission Access Policy Study Group v. FERC*, – F.3d –, 2000 WL 762706 (D.C. Cir. June 30, 2000) (per curiam), the court reviewed two orders of the Federal Energy Regulatory Commission (“FERC”), under

² *See, e.g.,* 47 U.S.C. § 332(c)(7); 1996 Act, §§ 207, 706.

which “utilities must now provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines.” *Id.* at *3. On the question of agency authority, the court recognized that the Federal Power Act (“FPA”) does not expressly authorize the FERC to adopt the open access rule. The agency ordered general open access because only such an industry-wide requirement would “remedy the fundamentally anti-competitive structure of the industry,” *id.* at *6; section 211 of the FPA, however, granted the FERC authority to order open access only on a case-by-case basis. Nonetheless, the court upheld the FERC’s authority to promulgate the generic orders because the agency reasonably interpreted its power under sections 205 and 206 of the FPA to remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates, *id.* at *5, and thus is entitled to deference under *Chevron*. *See id.* at *8-*11.

Importantly, in the portion of the opinion written by Judge Sentelle, *id.* at *1 n.1, the court specifically rejected the argument that the FERC’s open access requirement implicated the Takings Clause and refused to construe the agency’s statutory authority narrowly in order to avoid the constitutional questions. Because when the government takes property “there is no inherent constitutional defect, provided just compensation is available,” the petitioners’ claims “turn not on whether open access effects a taking, but whether FERC’s cost-based transmission pricing policies in the end provide just compensation.” *Id.* at *13. The court then explained:

We recognize that our jurisdiction to review an agency’s construction of a statute necessarily involves an exercise of the policy of avoiding constitutional issues where possible, even though the issues may concern arguable takings amenable to Tucker Act remedy, “when ‘there is an identifiable class of cases in which application of a statute will necessarily constitute a taking.’” *Bell Atlantic* 24 F.3d at 1445 (D.C. Cir. 1994) (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). We need not decide whether this case falls within that category, however, because even if it did, any takings problem created by [the FERC’s order] does not raise such significant constitutional doubt as to require us to construe the FPA to prohibit FERC from ordering open access. If there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us.

Id. at *13.

Just so here. Like the FERC’s open-access orders, the Commission’s proposed rule is designed to give consumers—here, residents of multi-tenant environments—the benefit of a competitive market, a goal specified by Congress. The FERC’s generic access orders are predicated on a finding that enforcing open access on a case-by-case basis under section 211 of the FPA is inadequate because of the natural propensity of incumbent utilities to use their position to exclude competitors from the market, *id.* at *6; likewise, the Commission has found that existing regulatory efforts are inadequate to ensure effectuation of the 1996 Act, NPRM ¶ 13, and to prevent practices that hamper the ability of market entrants to compete against incumbent providers. NPRM ¶ 31. With respect to compensation, the FERC required utilities to provide competitors access “on the same terms and conditions as they use their own lines,” *id.* at *3, just as the Commission proposes to require the building owners who provide access to any telecommunications providers to “make comparable access available to all such providers under

nondiscriminatory rates, terms, and conditions.” NPRM, ¶ 53.

Indeed, if anything, the case for judicial validation of agency authority is stronger for the Commission’s proposed nondiscriminatory access rule than for the orders at issue in *Transmission Access*. First, the FERC did not rely on any express statutory authorization to mandate open access but rather on an interpretation of its authority under the general anti-discrimination provisions of the FPA, which interpretation was accorded *Chevron* deference. The Commission, by contrast, has express statutory authority under section 224 to mandate nondiscriminatory access as to part of the scope of its proposal and may reasonably interpret that provision to expand such authority to other parts. In addition, as outlined above, there are several other bases of agency authority deriving from a number of provisions of the Act that the Commission may reasonably rely upon in the alternative or in the aggregate. Second, the FERC’s open-access orders forced utilities to open up their transmission lines to outsiders, even if (as was generally the case) they had previously used the lines exclusively for transmission of their own electricity. The Commission, instead, asks “whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions,” NPRM ¶ 53, and thus contemplates imposing a nondiscrimination condition upon the owners’ provision of access to outsiders. As explained below, this distinction makes the constitutional issues raised by the Commission’s condition upon access proposal even less weighty than those the D.C. Circuit readily dismissed with respect to the FERC’s mandatory access order.

Although the constitutional issues implicated by the Commission’s proposal warranted no more than a casual dismissal in *Transmission Access* as not raising “such significant constitutional doubt” so as to trigger the canon of constitutional avoidance or the rule of *Bell Atlantic*, for the sake of completeness the remainder of this analysis will explore the full reasoning that would lead to the court’s conclusion.

II. Constitutional Avoidance.

Although its roots trace to the beginning of the republic,³ the canon of constitutional avoidance gained general acceptance with Justice Brandeis’ famous concurring opinion in *Ashwander v. Tennessee Valley Auth.*,⁴ which compiled and explained the various strands of the doctrine. In its classical formulation, the canon prescribed that “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court’s] plain duty is to adopt that which will save the Act.” *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Despite significant criticism,⁵ the canon has been relaxed from one avoiding unconstitutional interpretations of a

³ See *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

⁴ 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

⁵ See, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 97; Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1177-80 (1992); *United States v. Marshall*, 908 F.2d 1312, 1335-36 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (advocating saving constructions only when “there is not merely a question about, but a constitutional barrier to, the statute when interpreted literally”), *aff’d sub nom. Chapman*

statute to one avoiding interpretations that would raise grave and significant constitutional doubts. In its modern conception, the canon counsels that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted).

Bell Atlantic involved the Commission’s physical co-location orders, which required incumbent carriers to set aside a portion of their central offices for use by their competitors. Judge Sentelle, writing for the court, noted that the Commission’s orders implicated the Just Compensation Clause of the Fifth Amendment because they work a “permanent physical occupation” that constitutes a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). See *Bell Atlantic*, 24 F.3d at 1445. The policy of avoidance takes effect “when ‘there is an identifiable class of cases in which application of a statute will necessarily constitute a taking,’” *id.* at 1445 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)), in order to forestall the possibility of “executive encroachment on Congress’s exclusive powers to raise revenue and to appropriate funds.” *Id.* at 1445 (citations omitted). Following that policy of avoidance, the court reasoned that the Commission’s authority to order co-location must either come from express statutory language or be a necessary implication thereof. *Id.* at 1446. The court held that this “strict test of statutory authority” was not satisfied and concluded that the Commission lacked authority to issue the physical co-location orders. *Id.* at 1447.

The canon of constitutional avoidance and its application in *Bell Atlantic* does not justify a conclusion that the Commission lacks statutory authority to require nondiscriminatory access to multi-tenant environments. Such a requirement does not “raise the sort of ‘grave and doubtful constitutional questions,’ that would lead [a court] to assume Congress did not intend to authorize their issuance.” *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). First, unlike the physical co-location orders in *Bell Atlantic*, the Commission’s proposed nondiscriminatory access rule does not create an identifiable class of cases in which its application “will necessarily constitute a taking.” The Supreme Court has not characterized regulatory conditions of the type contemplated by the Commission as a per se taking under *Loretto* but rather has validated them as a permissible regulation of the underlying activity. See, e.g., *Yee v. Escondido*, 503 U.S. 519 (1992); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In any event, the Commission’s proposal contemplates that competitive carriers pay adequate compensation for their access so as to erase any constitutional doubt under the Just Compensation Clause. Second, because such a compensation mechanism exists, there is little danger that the Commission is encroaching on Congress’ authority to raise revenue and appropriate funds.

A. Just Compensation Clause

The Supreme Court’s cases under the Just Compensation Clause fall into two classes. A permanent physical occupation of private property is a taking per se, see, e.g., *Loretto v. Teleprompter*

v. United States, 500 U.S. 453 (1991). See generally Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

Manhattan CATV Corp., 458 U.S. 419, 426 (1982); the only question is whether there would be adequate compensation. By contrast, other government regulations, 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 Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978). Should the Commission require, as it did in the physical co-location orders in *Bell Atlantic*, that building owners must open up their property for telecommunications companies to install equipment, such a requirement would constitute a permanent physical occupation that is a per se taking. That much is evident from *Loretto* itself.

However, a nondiscrimination condition upon access, as proposed by the Commission, is substantively different from a mandatory access requirement. Instead of mandating that a building owner open his property to outsiders, a nondiscrimination condition simply requires that, should the owner open his property to an 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). *Loretto* in no way upset this holding. Instead, the Court cited *Heart of Atlanta* with approval, see *Loretto*, 458 U.S. at 440, and emphasized that its holding was “very narrow” and did not question the government’s “broad power to impose appropriate restrictions upon an owner’s use of his property.” *Id.* at 441.

Such appropriate restrictions include, like Title VII, regulation of the property owner’s decision whom to let in and whom to exclude from his property. See *Heart of Atlanta*, 379 U.S. at 259 “[A]ppellant has no ‘right’ to select its guests as it sees fit, free from governmental regulation.”). Thus, in *Yee v. Escondido*, 503 U.S. 519 (1992), the Court addressed a challenge to a local rent control ordinance that, coupled with a state statute, deprived mobile home park owners the ability “to set rents or decide who their tenants will be.” *Id.* at 526. The property owners there, like the opponents of the Commission’s proposed nondiscriminatory access condition in the instant matter, seized on the restriction on the right to exclude and attempted to recharacterize the regulation as a permanent physical occupation—an attempt the Court unanimously rebuffed.⁶

First, the Court rejected an incantation to the right to exclude under *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). “Put bluntly, no government has required any physical invasion of petitioners’ property. Petitioners’ tenants were invited by petitioners, not forced upon them by the government.” *Yee*, 503 U.S. at 528. Second, the Court rejected the argument that “the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants,” *id.* at 530-31. While such an effect may be relevant to a regulatory takings balancing, “it does not convert regulation into the unwanted physical occupation of land.” *Id.* at 531. Finally, the Court rejected an argument based on the oft-touted footnote in *Loretto*, which stated that “a landlord’s ability to rent the building may not be conditioned on his forfeiting the right to compensation for a physical occupation,” *Loretto*, 458 U.S. at 439 n.17. Reliance on this footnote to argue that a condition upon use

⁶ Two Justices concurred in the judgment but agreed with the relevant portions of the Court’s opinion. See *Yee*, 503 U.S. at 539 (Blackmun, J., concurring in the judgment); *id.* (Souter, J., concurring in the judgment).

(or access) is a per se taking under *Loretto*, of course, works a perfect tautology. It assumes that there is a physical occupation, and the Court rejected this circular reasoning: “This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited.” *Yee*, 503 U.S. at 532.

It is of little moment that the building owners’ decision to provide access to a telecommunications carrier (upon which the Commission seeks to attach a nondiscrimination condition) is not “voluntary” in the sense that it is impossible, as a practical matter, to have a multi-tenant environment without any telecommunications services. Any such compulsion to provide access results from conditions of the market, not actions of the Commission. “This element of required acquiescence is at the heart of the concept of occupation.” *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987); see also *Yee*, 503 U.S. at 527 (“The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.”) (emphasis in original).

The practical necessity of telecommunications services in multi-tenant environments belies any suggestion that the initial provision of access was motivated by the some threat of eminent domain by local authorities (even opponents of access do not suggest that any such powers were actually exercised). In any event, to the extent that the initial provision of access is influenced by or results from local regulations under the states’ police power, that fact actually would weaken the argument that the Commission’s proposal would work a per se taking under *Loretto*. Such traditional local regulation diminishes the building owners’ property rights under state law, which opponents of nondiscriminatory access have repeatedly emphasized. And it undermines the building owners’ claims of investment-backed expectations and interests in property necessary for the provision of telecommunications services.

The canon of avoidance and the “strict statutory authority test” of *Bell Atlantic*, therefore, do not apply to the Commission’s authority to promulgate a nondiscriminatory access rule because there is not “an identifiable class of cases in which application of [the rule] will necessarily constitute a taking,” 24 F.3d at 1445 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). Thus, in *Riverside Bayview*, the Supreme Court unanimously declined to invoke the avoidance canon because “fears that application of the Corps’ permit program might result in a taking did not justify the [adoption of] a more limited view of the Corps’ authority than the terms of the relevant regulation might otherwise support.” *Id.* at 128-29. Likewise, in *National Mining Ass’n v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999), the court explained that the possibility that executive action could expose the government to liability for an unlawful taking was insufficient to warrant a narrowing construction because “the avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations.” *Id.* at 917. And the court in *Railway Labor Executives’ Ass’n v. United States*, 987 F.2d 806 (D.C. Cir. 1993), did not apply the avoidance canon when the petitioner claimed only that the agency’s specific application of a statute results in a taking, not that there was an identifiable class of cases in which the statute necessarily resulted in a taking. *See id.* at 816.

In any event, 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). As long as “the government has provided an adequate process for obtaining

compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.” *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1018 n.21 (1984)). The Fifth Amendment does not require that compensation precede the taking, *Ruckelshaus*, 467 U.S. at 1016; all that is required “is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.” *Williamson County*, 473 U.S. at 194 (internal quotations omitted). The Commission’s proposed regulation satisfies this standard, as it contemplates that carriers would compensate building owners at nondiscriminatory rates for access to ducts, conduits and other property. *See* NPRM ¶ 60. Although the Commission is currently seeking comments on how such rates should be determined, it has proposed that owners be permitted “to obtain from a new entrant the same compensation it has voluntarily agreed to accept from an incumbent LEC.” *Id.* Such reliance on the arms-length bargain struck with incumbent carriers seems a reasonable approximation of the fair market value of access and thus would provide just compensation for any taking of property. And 47 U.S.C. § 224(e)(1) provides that charges must be “just” and “reasonable,” a standard that comports with the Fifth Amendment’s requirement of just compensation. *See FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

Where such a compensation scheme is in place, the real question is not one of agency authority but whether future application of the rule would result in constitutionally adequate compensation. *See Transmission Access Policy Study Group v. FERC*, – F.3d –, 2000 WL 762706, *13 (D.C. Cir. June 30, 2000) (per curiam) (“At bottom, both of the petitioners’ Fifth Amendment claims turn not on whether open access effects a taking, but whether FERC’s cost-based transmission pricing policies in the end provide just compensation.”). And because remedies under the Tucker Act, 28 U.S.C. § 1491, is available as a procedure to attain adequate compensation for federal takings, *see Ruckelshaus*, 467 U.S. at 1016, claims for unconstitutional takings are not ripe in a facial petition to set aside agency action. *Id.* at 1019. Thus, the “argument that specific congressional authorization is required for those conversions that might result in takings is a thinly veiled attempt to circumvent the established method for determining whether Tucker Act relief is available for claims arising out of a takings pursuant to a federal statute.” *Presault v. ICC*, 494 U.S. 1, 13 (1990).

A building owner wishing to challenge a future Commission order setting access charges as constitutionally inadequate can bring such a challenge in a petition for review of agency action as being “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B). If the reviewing court grants the petition, the agency on remand can revise its order to the constitutionally adequate level. The building owner would thus receive full compensation from the telecommunications carrier. In the highly unlikely event that the carrier (for reasons of insolvency or bankruptcy) is unable to pay the revised access charges, the building owner might have a just compensation claim⁷ under the Tucker Act—a claim that is neither ripe nor jurisdictionally proper before a court reviewing the Commission’s authority to promulgate the nondiscriminatory access rule. *See Transmission Access*, at *13 (“The remedy of just compensation is not within our jurisdiction but that of the United States Court of Federal Claims, under the Tucker Act,

⁷ The existence of any such claim assumes that a defaulting carrier would still have a right of access despite nonpayment or that the owners would have a temporary takings claim for any unpaid access.

28 U.S.C. § 1491.”) (citing *Bell Atlantic*, 24 F.3d at 1444 n.1; *Railway Labor*, 987 F.2d at 815-16). Alternatively, the building owner may elect to file a Tucker Act claim instead of challenging the agency action. See *Great Falls Mfg. Co. v. United States*, 112 U.S. 645, 656 (1884). Because the filing of that claim concedes the lawfulness of the agency action under applicable regulations, statutes, or constitutional provisions (other than the Fifth Amendment Just Compensation Clause), see *Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1364-65 (Fed. Cir. 1998); *Tabb Lakes, Ltd. v. United States*, 10 F. 3d 796, 802 (Fed. Cir. 1993), such election would be unlikely.⁸ Under either scenario, however, there is no constitutional doubt that the building owner would suffer an uncompensated taking, let alone a “grave,” “serious,” or “significant” one that would trigger the canon of avoidance.

B. Appropriations Clause.

There is no significant constitutional doubt that the Commission, by promulgating a nondiscriminatory access requirement, may be encroaching on Congress’ power to appropriate funds. First, “the Tucker Act is an ‘implied’ promise to pay just compensation which individual laws need no reiterate.” *Presault v. ICC*, 494 U.S. 1, 13 (1990). It thus constitutes a continuing congressional appropriation of funds to compensate for authorized takings. That is why the Supreme Court has consistently found that “a Tucker Act remedy exists unless there are unambiguous indications to the contrary.” *Id.*; see also *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1017-19 (1984).

Second, in any event, the possibility of any government liability for the Commission’s proposed nondiscriminatory access regime is so slight that it renders insignificant any constitutional doubt. A common feature of any charge or rate regulation that responsibility for payment rests with the private parties who purchase the regulated service or product—in this case, telecommunications carriers seeking access. As explained above, even if a charge or rate is deemed to provide constitutionally inadequate compensation, responsibility for paying the revised, constitutionally mandated charge or rate still rests with the private parties and does not shift to the federal government. Only in hypothetical or, at most, highly speculative circumstances would there be any potential imposition on the public fisc—a possibility so remote that it does not raise constitutional doubts worthy of avoidance. As Judge Sentelle explained in *Transmission Access*, “We need not decide whether this case falls with that category [of cases in which application of a statute will necessarily constitute a taking], however, because even if it did, any takings problem created by [the FERC’s order] does not raise such significant constitutional doubt as to require us to construe the FPA to prohibit the FERC from ordering open access. If there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us.” *Transmission Access* at *13.

Bell Atlantic is not to the contrary. The court noted in passing that the property owners “would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level

⁸ In certain cases, where an agency action determines the scope of a party’s property rights, the agency action can only be reviewed under the Administrative Procedure Act and is not subject to collateral attack in a Tucker Act complaint before the Court of Federal Claims. See *Del-Rio*, 146 F.3d at 1366; *Aulston v. United States*, 823 F.2d 510, 513-14 (Fed. Cir. 1987).

of compensation mandated by the Fifth Amendment.” 24 F.3d at 1445 n.3. However, its holding rests on the conclusions that the Commission’s action would “necessarily constitute a taking” and “expose the Treasury to liability both massive and unforeseen.” *Id.* at 1445. By contrast, the existence of a constitutionally adequate compensation scheme, as in *Transmission Access* and as contemplated by the Commission, would render any residual risk to the public fisc highly speculative. Lacking any reason to suppose the Commission would not set constitutionally acceptable rates, a court would “frustrate permissible applications of a statute or regulation” were it to invoke the canon of avoidance and require explicit congressional authorization. *Riverside Bayview*, 474 U.S. at 128.

Resort to Justice Douglas’ concurrence in *The Steel Seizure Case* is equally unavailing. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (Douglas, J., concurring) (1952) (arguing that the “branch of government that has power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected”). In that case, Congress had expressly declined to confer on the President the authority to resolve labor disputes by seizing industrial facilities. See *Youngstown Sheet*, 343 U.S. at 586. By contrast, the Court held in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that the President had authority to suspend claims against Iran that were pending in U.S. courts even without explicit congressional authorization. See *id.* at 675-88. Congressional action there did not “constitute specific authorization,” but it did “indicate congressional acceptance of a broad scope for executive action.” 453 U.S. at 676-77. Likewise, in the instant matter, the Court has interpreted the Act to grant the Commission “broad authority” to regulate interstate wire and radio communication, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), and to give the Commission “a comprehensive mandate,” with “not niggardly but expansive powers.” *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)

Nor can constitutional doubt be created by recharacterizing the Commission’s regulation of access charges as a tax on carriers and a payment to building owners. Access charges are neither a tax nor an appropriation; rather, they are payments between two private parties for an underlying service or product—in this case, access. Ratemaking is simply regulation of that economic transaction.⁹ That is why courts regularly accord traditional *Chevron* deference to agency interpretations of ratemaking authority. See *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1232 (1999); see also *Transmission Access* at *9, *28-29; *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1003 (1987). I suppose, hypothetically, that an agency could set a rate so low or so high that it bears little or no relation to the cost of the underlying service or product. The remedy for such confiscatory rates lies in an as-applied challenge to agency action under 5 U.S.C. § 706(2)(A) as arbitrary, capricious and contrary to law or under 5 U.S.C. § 706(2)(B)

⁹ The distinction between general taxes and “fees,” which is a levy for specific “value to the recipient” of a government service, made in *National Cable Television Ass’n v. United States*, 415 U.S. 336, 341 (1974) is irrelevant. Regulation of access charges is not an imposition of a levy on either carriers or building owners, but simply regulation of the transaction between the two. In any event, the Supreme Court has unanimously rejected any suggestion of congressional exclusivity or nondelegability of the power to tax. See *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (“We discern nothing in this placement of the Taxing Clause that would distinguish Congress’ power to tax from its other enumerated powers—such as its commerce powers, its power to ‘raise and support Armies,’ its power to borrow money, or its power to ‘make Rules for the Government’—in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive”); see also *id.* at 223-24 (distinguishing *National Cable*).

as being violative the parties' Fifth Amendment rights or in excess of constitutionally delegable powers. In any event, the possibility of such agency overreach is so small and remote that it does not raise any constitutional doubt warranting avoidance.

* * *

In sum, the Commission has statutory authority to promulgate the nondiscriminatory access requirement contemplated in Notice of Proposed Rulemaking in Docket No. 99-217 under a number of provisions of the Communications Act of 1934, as amended. In addition the Act's express grant of such authority in 47 U.S. § 224 for a portion of the proposed rule, the Commission may reasonably interpret that and other provisions to grant both primary and ancillary jurisdiction to promulgate the proposed rule—which interpretation would be accorded traditional *Chevron* deference. There is no warrant to invoke the policy of constitutional avoidance suggested by the *Bell Atlantic* decision because there is no significant constitutional doubt to the Commission's proposal, for the reasons fully explicated above and illustrated by the D.C. Circuit's decision in *Transmission Access*.