> intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative. *Loretto*, 458 U.S. at 426.

Thus, no balancing test is required where a government act authorizes a physical occupation of private property. In reaching this conclusion, the Court emphasized that a physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435. In discussing the long line of authority that supports the view that "physical intrusions" are property restrictions of "an unusually serious character," the Court paid special attention to the importance of protecting a landowner's "right to exclude." *Id.* at 426. In two places in the opinion, the Court reiterated that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," or "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *See Id.* at 433, 435 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The decision therefore leaves no doubt that a property owner is constitutionally entitled to exclude others from his property, no matter what may be the reasons for, or the degree of, the potential invasion.

It is, therefore, well established in constitutional jurisprudence that the expansion of the country's communications infrastructure implicates the Takings Clause. Indeed, it has long been held by the Supreme Court, and followed elsewhere as the law of the land, that any rule requiring a landowner to acquiesce to the presence of a communications carrier on his private property constitutes a taking property under the Fifth Amendment. *See Western Union Telegraph Co. v. Pennsylvania R. R. Co.,* 195 U.S. 540 (1904); *St.*

Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *GTE Northwest v. Public Util. Comm'n,* 900 P.2d 495 (Or. 1995).

Based upon these principles, the Real Access Alliance in their comments on the *Competitive Networks NPRM*, contended that the NPRM's proposed requirement that owners of MTEs provide access to their premises to all communications providers on a nondiscriminatory basis would constitute a *per se* taking of property under *Loretto*.[6] Although the Commission sought to distinguish *Loretto* in the NPRM on the ground that a "nondiscrimination" requirement is somehow different from a "forced access" requirement, the Alliance demonstrated that this understanding of the Takings Clause is unsupportable since, under state property law (which is the baseline for any Takings Clause analysis), building owners are clearly authorized to grant limited rights of use and access to tenants or to communications carriers. Because local property law traditionally allows a property owner to grant access to one party without granting access to *all* similarly situated parties, the Constitution protects the property owner's right to exclude *all* such similarly situated parties. Stated differently, the Fifth Amendment recognizes *as a property right* the right of a property owner to grant permission to use his property only to specific parties, and not to others.

The Commission does not respond directly to these contentions of the Real Access Alliance in the FNPRM. The fact, however, that the Commission has eschewed direct regulation and instead proposes to accomplish the same result through regulation of

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[6] Comments of Real Access Alliance at 37 (filed August 27, 1999).

LECs does strongly suggest a recognition that a regulation which would require property owners to provide nondiscriminatory access to their premises would, at bare minimum, raise substantial takings concerns. Indeed, as part of the *Competitive Networks NPRM*, three Commissioners expressed serious concerns regarding the impact of the proposed regulation on the rights of property owners under the Takings Clause.

Commissioner Ness, for example, warned that, "[w]hile well intended, the concept would impose a new regulation on building owners — a class of persons not otherwise regulated by the Commission. . . . [W]here constitutional rights are at stake, judicial precedent informs us that the courts do not favor the imposition of obligations by a federal administrative agency which relies on ancillary jurisdiction."[7]

Commissioner Powell expressed "grave concerns" about the takings issue. He cautioned that, "under judicial precedent, this agency should not move toward rules that would effectuate a *per se* taking without specific authority to do so." "In the context of a likely taking under the Fifth Amendment, this is not an area where we should be pushing the envelope of our 'ancillary' statutory authority . . . ."[8]

Finally, Commissioner Furchtgott-Roth dissented in part from the NPRM, stating that he was "deeply troubled" by the proposals to require building owners to grant access to competing communications providers. "[T]his Commission must be vigilant [against] overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority — regardless of whether

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[7] Competitive Networks NPRM, separate statement of Susan Ness.

[8] Competitive Networks NPRM, separate statement of Commissioner Michael K. Powell, concurring.

such regulation constitutes commendable public policy. I fear that today's proposal, if ultimately adopted by the Commission, may stray outside this agency's jurisdictional boundaries."[9]

2. The FNPRM suggests that the takings problem that would be presented under *Loretto* by a regulation that requires owners of MTEs to grant access to LECs can be avoided if the access requirement were instead made a condition on the LECs provision of service to the MTE. Specifically, it appears that the Commission is considering prohibiting all LECs from serving an MTE unless the owner has granted open and nondiscriminatory access to any and all competing LECs.

This suggested circumvention of *Loretto* is unavailing. Under the suggested rule, property owners would have no choice but to grant open access in order to be able to offer their tenants any communications services at all. The Takings Clause cannot be so easily manipulated: "[T]he Constitution measures a taking of property not by what [the government] says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

That the FCC cannot effectuate a taking through the circumvention proposed in the FNPRM can be demonstrated through the following illustration. Suppose that the Commission itself wished to acquire rent-free for its permanent use as office space one floor of a newly-constructed commercial building in downtown Washington. However, rather than paying for the space in question, it instead prohibited all the communications providers from providing service to the building until such time as the building's owner

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[9] Competitive Networks NPRM, statement of Commissioner Harold Furchtgott-Roth, concurring in part and dissenting in part.

gave the Commission the office space it was seeking. There can be no doubt that, under this illustration, the FCC has engaged in an uncompensated, *per se* taking of the office space even though the Commission has purported to do no more than directly regulate telecommunication providers. That a taking has occurred is obvious for two independent reasons: (1) The purported regulation of the communications providers was undertaken for the purpose, and with the intended effect, of extracting forced occupation and use of the building owner's property; and (2) the property has been drained of its economic value by the purported regulation, since no commercial tenants would occupy a building which could not be serviced by any communications providers.

The proposed prohibition on LECs provision of service to MTEs unless the owners of the MTEs grant forced use of their property to communications providers is a taking of property for both of the reasons given in the illustration. The proposed prohibition on the provision of service by LECs is undertaken for the purpose of, and with the intended effect of, compelling forced access to MTEs. The proposal is, thus, no different than the administrative action invalidated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). In *Nollan*, the Supreme Court invalidated an attempt by the Coastal Commission to condition a building permit for an ocean-front residence on the grant to the public of a permanent easement across the beach. The Court stated that it was "obvious" that a direct appropriation of the easement would constitute a classic taking of property—the right to exclude others. *Id.* at 831. The permit condition did not cease to be a taking merely because it did not directly appropriate the easement.[10] The

[10] Because the permit condition did not serve the same governmental purpose as would an outright ban on construction, the permit condition was "not a valid regulation of land use but an out-and-out plan of

purpose and intent of the proposed building permit condition in *Nollan*, like the purpose and effect of the proposed conditional prohibition on LECs provision of service, is to compel forced access to property. The proposed regulatory action is no less a taking in both cases because it was not accomplished through a direct appropriation.

The conclusion that a taking occurs under the proposed regulation draws further support from *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the line of cases of which it is part. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The effect of denying communications services to an MTE is to deny it any economically beneficial uses. "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). Indeed, it can hardly be denied that the Commission's express purpose is to force owners of MTEs to grant access to communications providers on pain that otherwise they will be unable to rent (or use) their buildings. Clearly, for takings purposes, the proposed regulation is indistinguishable from a direct requirement of forced access imposed on owners of MTEs. A forced access requirement, in turn, is a taking under *Loretto*.

3. None of these principles are undercut in the slightest by *Yee v. City of Escondido*, 503 U.S. 519 (1992), decided prior to *Lucas*.[11] The property owners in *Yee*

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extortion." *Id.* at 873 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

[11] The plaintiffs in *Yee* contended that owners of mobile home parks were subject to forced physical occupation of their land. They contended that this was the combined result of a local rent control ordinance and of a state Mobile-home Residency Law, which limited the bases upon which a park owner may terminate a mobile home owner's tenancy.

were not compelled by the state to provide access to their property. "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." *Id.* at 528. As a result, the Court found that the right to exclude had simply not been taken from the property owners in that case.

To be sure, the laws at issue in *Yee* did regulate the owners' "use of their land by regulating the relationship between landlord and tenant." *Id.* However, such forms of regulation are analyzed differently to determine where the regulation has gone so far that a regulatory taking has occurred, *id.* at 529, and do not fall within the category of *per se* takings identified in *Loretto* in which the government "*requires* the landowner to submit to the physical occupation of his land." *Id* at 527 (emphasis in original).

Moreover, contrary to the suggestion in the Notice, *Yee* was not a case in which an "indirect regulation" left a property owner no choice but to submit to a physical occupation. The Court held that there had been no physical taking because the property owners had made a decision to rent specific property to mobile home tenants. While the regulations in *Yee* may have indirectly affected the owners' right to change the relationship with tenants who were *already invited* onto the owner's property, they did not, like the FNPRM, eviscerate the owners' right to exclude tenants who were *never* invited onto the property in the first place. Even so, the Court in *Yee* reserved the question whether, under all the facts and circumstances, a regulatory taking had occurred since the question had not been presented in the petition for certiorari. *Id.* at 535-38.[12]

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[12] Similarly, neither *Andrus v. Allard,* 444 U.S. 51 (1979) nor *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) involved "indirect regulation" that left a property owner no choice but to submit to a physical occupation. *Andrus* did not involve real property at all, but a prohibition on the sale of eagle

Since the Notice is proposing a regulation that falls in the category of *per se* physical takings, *Yee* is simply inapposite and provides no support to a contention that what the Commission is proposing does not implicate the Takings Clause.

II. A REQUIREMENT THAT CARRIERS PAY BUILDING OWNERS JUST COMPENSATION IS BEYOND THE COMMISSIONS' AUTHORITY AND WOULD NOT SATISFY THE GOVERNMENT'S LIABILITY UNDER THE TAKINGS CLAUSE.

The Commission has also requested "comment on whether the constitutional concerns regarding a nondiscrimination requirement (either indirect or direct) would be resolved if the Commission were to specify that an MTE policy is not discriminatory merely because it requires a competing carrier to pay 'just compensation' to the building owner for access, and if the Commission's review of the policy were subject to judicial review. Similarly, we ask whether a similar compensation mechanism would resolve questions over the constitutionality of a direct regulation on the owners of MTEs."[13] The answer to both questions is that a regulatory requirement that competing carriers pay just compensation would not satisfy the government's Takings Clause liability arising from the compelled access being granted to the competing carriers. There are two reasons for this: (1) The Commission lacks the requisite statutory authority to engage in a taking and to establish a compensation mechanism to be funded by carriers; and (2) even if the

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feathers. No physical invasion or restraint upon personal property was involved. *Heart of Atlanta* is easily distinguished from the wealth of more recent Supreme Court precedent that has articulated the current scope of the Takings Clause. *Heart v. Atlanta* involves the consideration of specially protected constitutional interests that arise from immutable human characteristics. It also involved the regulation of temporary lodging in contrast to the permanent occupation by a party pursuing commercial activities on the property at issue.

[13] FNPRM, ¶ 147.

Commission had such authority, the Notice has failed to specify a compensation mechanism that would satisfy Takings Clause requirements.

1. There is no provision in the Communications Act that expressly provides the Commission with the power of eminent domain over the property of building owners. In its original proposal of a general nondiscrimination requirement in the *Competitive Networks NPRM*, the Commission relied upon its general jurisdiction to enforce the Communications Act with respect to "all interstate and foreign communication by wire or radio," and then pointed out that the definition of both "wire communication" and "radio communication" includes "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication.[14] This statute hardly supports the Commission's claimed authority to take private property and to provide just compensation for that property in accordance with the Takings Clause.

Likewise, the statutory authorities relied upon in the *Competitive Networks NPRM* for the extension of section 224 and of the *OTARD Ruling* both involve rules broadly authorizing the Commission to enforce certain access rights, but by no means contemplating that the Commission would or could infringe upon the established property rights of building owners in fulfilling its enforcement duty.[15] For example, neither of these rules contain any language that refers to the need to pay just compensation to building owners.

Accordingly, the Communications Act provides no explicit authority allowing the Commission to promulgate rules that will effect a taking of the private property of

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[14] Competitive Networks NPRM, ¶ 56.

building owners, so that if the power of eminent domain is somehow granted by that legislation, it must be implicit rather than explicit. As Commissioner Powell explained in his separate statement regarding the NPRM, however, the Commission cannot rely on *implicit* authority to effect a taking of property: "We have no specific statutory provision that directs, or 'empowers,' us to assert regulatory authority over owners of private property. Instead, this item proposes to rely solely on 'ancillary' jurisdiction. Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf."

It is well established that, in the absence of express statutory language, courts will avoid interpreting legislation in a manner that either raises a serious question as to its constitutionality or otherwise implicates constitutional concerns. The Supreme Court has repeatedly stated that it construes statutes to defeat administrative orders that raise substantial constitutional considerations. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). This doctrine of invalidating constitutionally questionable regulations and orders reflects the broader doctrine of interpreting statutes narrowly so as to avoid raising serious constitutional questions. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 473 (1991).

This principle must be followed in cases that raise a question whether an administrative order might constitute a taking of private property under the Fifth Amendment, notwithstanding the fact that a taking is not strictly speaking unconstitutional unless it goes uncompensated. *See United States v. Security Industrial*

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[15] Competitive Networks NPRM, ¶¶ 36, 69.

Bank, 459 U.S. 70 (1982). Thus, whenever "there is an identifiable class of cases in which application of a [rule] will necessarily constitute a taking," the Supreme Court has stated that it will adopt a narrowing construction of the rule so as to avoid this outcome. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5. Accordingly the deference to administrative action ordinarily afforded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable, and statutes shall *not* be read to delegate the congressional power to take property unless they do so "in express terms or by necessary implication." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904); *see also Regional Rail Reorganization Act Cases*, 419 U.S. at 127, n. 16.

Indeed, federal executive or administrative action which effects a taking--and therefore triggers Congress' exclusive powers of lawmaking, raising revenue, and appropriating money from the Treasury, Art. I, § 8, cl. 1; Art. I, § 9, cl. 7--must be enjoined unless there is clear congressional authorization for the action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *id.* at 631-32 (Douglas, J., concurring). "When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive *is unlawful* because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985) (emphasis added).

Based on the well-established authority that the power to take property cannot be inferred from a statute, the D.C. Circuit decided in 1994 that the Commission did not have authority to order physical collocation of competitive access providers ("CAPs") to

the central offices of LECs. *Bell Atlantic v. FCC*, 24 F.3d 1441 (DC Cir. 1994). In *Bell Atlantic*, while the Commission concededly did have statutory authority to order "physical connections," this authority could be satisfied by a form of collocation known as "virtual" collocation, where the CAP simply strings its own cable to a point of interconnection near to the LEC central office, and did not necessarily require physical collocation. As a result, the court ruled that the Commission did not have authority to order physical collocation, since this form of collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." *Id.* at 1445 (citing *Loretto*). Indeed, the court stated that it would uphold the Commission's authority only if "*any* fair reading of the statute would discern the requisite authority," or if the Commission's authority would "as a matter of necessity" be defeated absent such authority. *Id.* 1445-46 (emphasis added). Unable to find the authority the Commission sought either in the express or the necessarily implied understanding of the statute, the court invalidated the Commission's rule, reasoning that "[w]here administrative interpretation of a statute" effects a taking, "use of a narrowing construction prevents executive encroachment on Congress' exclusive powers...." *Id.* at 1445.

The decision in *Bell Atlantic* also demonstrates that the requirement of expressly stated authority to effect a taking is unaffected by whether compensation is to be paid by the government or by a third party. The court invalidated the physical collocation requirement even though the Commission had allowed for tariffs permitting LECs to recover from new entrants the reasonable costs of providing space and equipment. The court explained that the plain statement rule still applied:

> Because the Commission allowed LECs to file new tarriffs under which they will obtain compensation from the CAPs for the reasonable costs of co-location, it might be thought that there is no threat to the appropriations power at all. But in fact the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment.

Id. at 1445, n.3

In addition to *Bell Atlantic*, a number of other cases have narrowly construed the Communications Act in order to avoid possible Takings Clause problems. Indeed, these cases primarily involved the question as to the scope of forced access requirements, and whether they could be read to extend to rights of way that had previously been granted to specific carriers, or applied only to clearly dedicated "easements." Courts have construed the statutes narrowly so as to avoid the question whether the broader construction urged by the plaintiffs would constitute a taking. *See, e.g. Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (rejecting the plaintiffs broad interpretation of "dedicated" easement as raising "serious questions" under the Takings Clause); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (adopting result of *Cable Holdings*); *Cable Investment Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (construing section 621(a)(2) narrowly to avoid constitutional concerns about a potential taking without just compensation).

Finally, the importance of a plain statement from Congress is heightened by the dialogue between the Commission and Congress on takings issues in recent years. When the Supreme Court held that the Pole Attachment Act did not mandate access, *see FCC v.*

Florida Power Corp., Congress responded by authorizing takings (in the form of mandatory access to utility poles) with a clear statement. 47 U.S.C. § 224(f)(1). Similarly, when the D.C. Circuit held that the FCC lacked authority to mandate physical collocation, *see Bell Atlantic Tel. Cos. v. FCC*, Congress responded with 47 U.S.C. § 251(c)(6). Indeed, even *after* Congress enacted the physical collocation rule in section 251(c)(6), the D.C. Circuit once again has had to invalidate part of the FCC's implementing regulation, finding that it was not narrowly tailored to the statutory mandate, and "may result in unnecessary takings of LEC property." *GTE v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000). Hence, Congress understands the need for a plain statement authorizing an administrative taking, and its silence with respect to the Commission's power to take the property of MTE owners speaks volumes.

Thus, because the Communications Act, which was enacted two years after the D.C. Circuit's decision in *Bell Atlantic*, in no way speaks to the question of how to exercise the power of eminent domain or of how to compensate building owners, it is clear that the Commission lacks statutory authority to issue these regulations.

2. Two further aspects of the Commission's discussion in connection with *Bell Atlantic* require comment. First, it is not true that the government can avoid any possible liability for takings claims under the Tucker Act by the mere expediency of saying a private party must pay the claim. If the private party does not, in fact, pay after entering upon a landowner's property, the government is still liable since the taking has occurred at the government's insistence. This is a very substantial potential liability given the financial status of a number of the potential carriers that would be demanding access. Moreover, there would almost certainly be as-applied litigation under the Tucker

Act as to the constitutional adequacy of the amounts paid by carriers, in which the landowners would be contending the amounts paid, under the facts and circumstances of individual cases, do not meet Fifth Amendment standards.

Second, the government would be faced with the tactical and procedural nightmare of defending takings claims in circumstances in which no government official will have had any involvement in the taking or have any first hand information concerning the property in question or the circumstances of the taking. This is in stark contrast to the circumstances found in virtually all the takings cases litigated under the Tucker Act in which much more particularized knowledge is in the possession of the government since it was a government official or agency (not a private party acting independently of the government, as is true here) that took the action which constitutes the taking. One could easily anticipate the owner of a large number of commercial properties being in a position to bring claims under the Tucker Act relating to hundreds or thousands of takings, with an aggregate value in the tens or hundreds of millions of dollars. It bears emphasis that plaintiffs are entitled to interest on takings running from the time forced access commences. *Seaboard Air Line Ry. v. United States,* 261 U.S. 299 (1923).

3. Even if the Commission could overcome its lack of authority to take property and to establish a compensation scheme, the Notice does not set out any formula for the determination of the just compensation to be paid by carriers. The Notice is, therefore, in stark contrast to *Gulf Power Co. v. U.S.*, 187 F.3d 1324 (11th Cir. 1999) (*Gulf Power I*), on which the Commission so heavily relies. In that case, Congress conditioned access to utility property upon the payment of a "just and reasonable" rate.

The Commission was required to set by order a "just and reasonable" rate for access within a range of minimum to maximum rates set by Congress, one range for cable companies' access and one for communications carriers' access. *Id.* at 1327 (citing 47 U.S.C. § 224(d),(e),(f)). With congressional authority and direction, this Commission issued an extensive and detailed Report and Order, which implemented the requirement that "just and reasonable" rates be paid to the utilities that have been compelled to provide access to their property. *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power II*).

Gulf Power I, because it implemented an *express statutory* formula for compensation, stands on a far different footing than the FNPRM under the Takings Clause. In order to meet the Fifth Amendment's command that no takings occur without just compensation, what "is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking." *Williamson County Regional Planning Common v. Hamilton Bank,* 473 U.S. 172, 194-95 (1985). Since, the Commission lacks clear statutory authority either to engage in a taking or to provide compensation in the event of a taking, it can hardly be said that a "certain" or "adequate" provision exists for the payment of compensation. *Sweet v. Rachel,* 159 U.S. 380, 404 (1895) (just compensation includes the assurance that the property owner "can certainly obtain the amount of such compensation" to which it is entitled).

Moreover, since the Notice provides no methodology for determining what amounts are to be paid to property owners for access to MTEs, there is no basis for knowing whether the amounts to be paid will meet constitutional standards. For the Commission to simply announce that carriers must pay just compensation to property

owners does not constitute a "reasonable," "certain," or "adequate provision for obtaining compensation." *Id.* The Takings Clause requires, at a bare minimum, that some governmental entity (be it the Commission, the Congress, or a court) determine in the first instance what constitutes just compensation. Such a determination cannot be made in the first instance by the carrier. *See Gulf Power I*, 187 F.3d. at 1332-34. Indeed, by analogy, the Supreme Court's modern line of cases upholding from Takings Clause challenges various rate-making orders are predicated on the existence of a governmentally-established rate methodology, which, in turn, can be judged against applicable constitutional standards. *See Duquesre Light Co. v. Barusch,* 488 U.S. 299, 310-16 (1989). Because the Notice does no more than propose a scheme in which carriers pay whatever they deem to be just compensation, the scheme does not meet the requirements of the Takings Clause. Thus, even assuming the existence of statutory authority (which is not present), the Commission would have to promulgate a constitutionally adequate methodology that must be used by carriers to pay just compensation *before* any carrier could seek "forced access."

CONCLUSION

For these reasons, the Commission cannot, consistent with the Takings Clause, require owners of multiple tenant environments (or any other property) to provide communications providers access to their properties, whether such requirement is imposed through direct regulation or through a regulation imposed upon carriers.

Respectfully submitted,

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Exhibit I

Cable Services Bureau: Average Time Taken to Resolve Cable Regulation Proceedings in 2000

Federal Communications Commission Cable Services Bureau: Average Time Taken to Resolve Cable Rate Regulation Proceedings in 2000[1]

Cable Operator Cited in Complaint	Date of Initial Complaint (Or Order to Review LFA Decision) – Release of Order	Approxiate Months Taken to Resolve
Comcast SCH	2/28/94 – 10/23/00	81
Rifkin/Narrangansett	9/1/93-08/1/00	84
Adelphia	7/31/95 – 7/28/00	61
Cox	4/14/94 - 7/28/00	76
Cox	2/25/94 – 7/28/00	78
Suburban Cable	6/12/95 – 7/26/00	62
Bresnan	2/12/96 – 7/24/00	54
Comcast	12/14/93 - 6/16/00	79
Charter	1/3/94 – 6/14/00	78
TWFanch-One	1/30/95 – 6/13/00	65
Suburban Cable	11/2/93 – 6/13/00	80
Falcon Telecable	1/12/95 – 6/13/00	66
Suburban Cable	3/10/95 – 5/12/00	63
Cable One	10/14/93 – 5/11/00	80
Marcus Cable	2/23/95 – 5/11/00	63
Suburban Cable	10/26/93 – 5/10/00	79
Comcast GPCI	12/7/93 – 5/10/00	78
Comcast	2/17/94 – 5/9/00	75
Comcast	2/28/94 – 5/9/00	75
Comcast	9/12/95 – 5/9/00	57
Suburban	3/15/95 - 5/9/00	62
Suburban	3/14/95 – 5/9/00	62
Suburban	3/13/95 – 5/9/00	62
U.S. Cable	5/5/97 – 4/2/00	36
RCN	9/2/99 – 2/25/00	6
Suburban Cable	3/15/95 – 2/15/00	60
Bresnan	10/26/93 – 2/14/00	78
Time Warner	10/21/98 – 2/2/00	16
Media General	5/5/97 – 1/20/00	33
AVERAGE TIME TO RESOLVE COMPLAINT		**63.75 mos.**

[1] Based on an audit of all Cable Service Bureau decisions related to enforcement of, 47 U.S.C. 623(c) Regulation of Unreasonable Rates, as reported in the Federal Communications Commission Record between January 1, 2000, and December 31, 2000. Of 36 reported decisions, 7 did not specifically mention the date of the initial complaint or date of order granting review of Local Franchising Authority decision.

Exhibit J

CUB to Challenge Long Distance Rules,
Chicago Tribune, May 27, 1986 at C5

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May 27, 1986 Tuesday, SPORTS FINAL EDITION

SECTION: CHICAGOLAND; Pg. 5; ZONE: C

LENGTH: 170 words

HEADLINE: CUB TO CHALLENGE LONG DISTANCE RULES

BODY:

The Citizens Utility Board said Monday it will challenge Federal Communications Commission rules that allow a customer's long distance telephone company to be changed at the request of another long distance company and without the customer's approval. This means a consumer may not find out about a switch until he receives a phone bill, the board said. To remedy the situation, Susan Stewart, CUB executive director, said, the customer often must pay two $5 change-of-carrier fees: one for the unauthorized switch and one for the correction. For businesses, Stewart said, the toll can be even higher. She said the board has received dozens of complaints about the situation. On Tuesday, she said, the board will file a petition with the FCC asking that phone companies pay for all change charges made without written customer authorization and that the companies refund any overpayment caused by a difference in rates between the customer's carrier of choice and the unauthorized carrier.

LOAD-DATE: September 14, 1993

Exhibit K

Jonathan Weber, *Long-Distance Client 'Theft' Common*, Los Angeles Times, Aug. 20, 1989. at D5

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Los Angeles Times

August 20, 1989, Sunday, Home Edition

SECTION: Business; Part 4; Page 5; Column 1; Financial Desk

LENGTH: 550 words

HEADLINE: LONG-DISTANCE CLIENT 'THEFT' COMMON

BYLINE: By JONATHAN WEBER, Times Staff Writer

BODY:

There's one very easy way for long-distance telephone companies to get new customers: Steal them.

Margaret Horton of Escondido came home from vacation recently and found a long-distance bill from American Telephone & Telegraph, even though she had long been a US Sprint subscriber. She called AT&T, and the clerk's initial response to her complaint was "they do it to us all the time."

Four hours and many phone calls later, Horton was able to get switched back to Sprint at no charge. But she remains indignant that her long-distance service could be switched without her permission.

"They just stole us, kidnapped us. The whole thing infuriated me," Horton said. "And nine times out of 10 they probably get away with it."

Duane Filer, a telecommunications supervisor for the California Public Utilities Commission consumer affairs branch, said the agency gets about 10 complaints a week in Los Angeles alone from customers who were switched to another carrier without their permission, and he noted that most consumers wouldn't even think to call the PUC.

Changes on Computer Tapes

Regulators and others believe that the problem of customer theft is rooted in the use by competing long-distance phone companies of independent sales agents. The agents are often compensated on a commission basis according to how many customers they sign up, and they can simply say that a customer has agreed to switch and pass the name along to the long-distance company.

That company, in turn, periodically transfers a computer tape containing the names and numbers of new subscribers to a local telephone company such as Pacific Bell or GTE California, where the switch is actually performed. A Pacific Bell spokeswoman said the long-distance company is supposed to have written authorization for any changes, but that authorization does not have to be produced for Pac Bell to make the switch.

Another type of marketing abuse involves sales agents who use misleading explanations to persuade customers to sign the form that authorizes the switch. At a recent street festival in New York, for example, US Sprint agents touted 30 minutes of free long-distance calls without indicating that signing up for the promotion meant switching carriers.

Customers soon begin receiving long-distance bills from a different company after the switch is made. But since long-distance calls would be made just as before -- and many people aren't very attentive to the intricacies of the modern telephone bill -- not all customers are aware that they've been stolen.

Switched Back at No Charge

"This has been a fairly consistent problem since 1984," said Ken McEldowney, executive director of San Francisco-based Consumer Action.

When a customer complains, the local telephone company asks to see a signed change authorization, and if the long-distance company can't produce one, the customer is switched back at no charge.

Officials at AT&T, MCI Communications and Sprint acknowledged that customer theft has been a problem, and all said they have quality-control programs to prevent abuses by marketing agents. PUC and Federal Communications Commission officials in Washington said they regularly talk with the companies about the problem, and that if it grows worse, legal action could result.