

Schedule C

Work Plan Rider

THIS WORK PLAN RIDER (this "Rider") is made part of that certain Telecommunications License Agreement (the "Agreement") dated \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_, a(n) \_\_\_\_\_ ("Licensor"), and \_\_\_\_\_, a(n) \_\_\_\_\_ ("Licensee"). This Rider and the Agreement shall be referred to collectively herein as the "License."

Capitalized Terms. Any capitalized terms used but not defined in this Rider shall have the meaning given them in the Agreement.

Prior to commencing any work or installing or allowing any Equipment to be installed in or on the Premises, Licensee, at its sole cost and expense, shall submit to Licensor, for Licensor's written approval, detailed plans and specifications (which includes any amendments to or revisions thereof) of the planned installation, including details of the size and location of Equipment, use of all components of the Premises, and any plans for accessing the Building's Communications Spaces and Pathways in order to provide service to Tenants (the "Work Plan").

Licensee shall submit to Licensor its detailed plans and specifications with a notice, in BOLD type, on the first page of the Work Plan stating that: "THIS IS A REQUEST FOR YOUR APPROVAL. YOUR FAILURE TO RESPOND MAY CONSTITUTE APPROVAL OF THIS REQUEST." Licensor shall have \_\_\_\_\_ ( ) days from the date Licensor receives Licensee's request to approve, deny or request modifications or additions to the Work Plan. If Licensor disapproves Licensee's Work Plan, including modifying the Work Plan or requesting additional information, Licensee may revise its Work Plan to respond to Licensor's objections and resubmit the revised Work Plan, including any additional information Licensor may have requested, to Licensor within \_\_\_\_\_ ( ) days after Licensee receives Licensor's response. Licensor then has \_\_\_\_\_ ( ) days from the date Licensor receives Licensee's response to approve or disapprove the Work Plan. Licensor and Licensee may continue the foregoing response and resubmission mechanism until Licensee's Work Plan have been approved or finally disapproved by Licensor or until Licensee issues a notice to Licensor that Licensee shall not resubmit its Work Plan, in which case this Agreement shall be deemed terminated on the day Licensor issues Licensor's notice of final disapproval or on the date Licensor receives a termination notice from Licensee. Licensor's failure to respond to Licensee's initial request for approval or any subsequent request for approval as to resubmitted Work Plan, shall constitute Licensor's approval of such request.

IN WITNESS WHEREOF, Licensor and Licensee have executed this Work Plan Rider in multiple original counterparts as of the day and year first above written.

LICENSOR:

LICENSEE:

*[INSERT LICENSOR NAME]*

*[INSERT LICENSEE NAME]*

By: \_\_\_\_\_

By: \_\_\_\_\_

Name:

Name:

Title:

Title:



Schedule D

Insurance Rider

THIS INSURANCE RIDER (this "Rider") is made part of that certain Telecommunications License Agreement (the "Agreement") dated \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_, a(n) \_\_\_\_\_ ("Licensor"), and \_\_\_\_\_, a(n) \_\_\_\_\_ ("Licensee"). This Rider and the Agreement shall be referred to collectively herein as the "License."

Capitalized Terms. Any capitalized terms used but not defined in this Rider shall have the meaning given them in the Agreement.

Insurance Maintained by Licensor. Licensor shall maintain fire and extended coverage insurance on the Building in such amounts as Licensor's mortgagees, if any, shall require. Such insurance shall be maintained at the expense of Licensor and payments for losses thereunder shall be made solely to Licensor and/or the mortgagees of Licensor as their interests shall appear.

Insurance Maintained by Licensee. Prior to the commencement of any work, Licensee shall obtain and maintain, with carriers which at all times during the term of this Agreement maintain an A.M. Best rating of A/VIII or Standard and Poor's Insurance Solvency Review of A- or better, at its own expense, in amounts not less than those specified below, the following insurance:

In an amount equal to full replacement costs, all-risks property insurance (including, without limitation, sprinkler leakage and water damage) on all of its personal property, whether owned or leased, including removable trade fixtures and including the Equipment.

Workers' Compensation insurance in accordance with the laws of the state in which the Building is located.

Employers' liability insurance in an amount not less than [\$\_\_\_\_\_].

Commercial General Liability Insurance on an "occurrence basis" with a combined single limit per location of not less than [\$\_\_\_\_\_] per occurrence. The Commercial General Liability Insurance shall also include independent contractors coverage, broad form property damage endorsement, coverage for collapse, explosion and underground property damage, products liability and completed operations coverage for a two-year period following acceptance of the work, an endorsement naming Licensor, Licensor's Indemnitees and Licensor's designees as additional insureds, and blanket contractual liability insurance covering all indemnity agreements. The Commercial General Liability Insurance shall also include provisions for cross-liability and severability of interests, and an endorsement providing that the insurance afforded under Licensee's policy is primary insurance as respects Licensor and that any other insurance maintained by Licensor is excess and non-contributing with the insurance required hereunder.

Business Automobile Liability Insurance covering owned, hired and non-owned vehicles with limits of \$\_\_\_\_\_ and a combined single limit of \$\_\_\_\_\_ for bodily injury liability and property damage liability.

Excess liability (umbrella liability insurance) with limits of [\$\_\_\_\_\_].

All Risk Property Insurance covering all contractor's materials, equipment and supplies which are not paid for by Licensor and not intended to become a permanent part of the Building until completion and Final Acceptance (as described below) of the work by Licensor. Coverage is to be on a replacement cost basis and is to include the interests of Licensor, as its respective interests may appear.

Upon completion of the work, Licensee will deliver a notice to Licensor notifying Licensor of such completion. Licensor shall then have \_\_\_\_\_ ( ) business days to notify Licensee of its "Final Acceptance" of the work or its reason for not accepting the work; *provided*, that Licensor shall not unreasonably fail to provide its Final Acceptance. If for any reason Licensor shall fail to deliver a notice to Licensee as set forth in the previous sentence, then the Final Acceptance of the work by Licensor shall be deemed to have been given. If Licensor has timely notified Licensee of its reason for not accepting the work, Licensee shall use its best efforts to address the matters set forth in the notice by Licensor and shall again notify Licensor of its completion of the work as set forth herein and the other provisions set forth herein shall apply.

Except for the insurance called for in subsections (a), (b) and (c) above, all of Licensee's insurance required by this Agreement shall, without liability on the part of Licensor for premiums thereof, include the following: endorsement providing Additional Insureds of Licensor and the other Indemnitees and Licensor's designees \_\_\_\_\_ ( ) days' prior notice of cancellation, non-renewal or material changes to the terms of coverage to each named insured; and waiver of subrogation rights by Licensee in favor of Licensor and the other Indemnitees. Licensee shall, at Licensor's request from time to time, provide Licensor with a current certificate of insurance evidencing Licensee's compliance with this Schedule D.

Any type of insurance or any increase of its limits of liability not described above which Licensee requires for its own protection, or on account of statute, shall be its own responsibility and at its own expense.

The carrying of the insurance described herein shall in no way be interpreted as relieving Licensee of any responsibility or liability under this Agreement.

Should Licensee engage a contractor or subcontractor, the same conditions applicable to Licensee under this Agreement shall apply to each contractor or subcontractor, including but in no way limited to the indemnity and insurance clauses.

IN WITNESS WHEREOF, Licensor and Licensee have executed this Insurance Rider in multiple original counterparts as of the day and year first above written.

LICENSOR:

LICENSEE:

*[INSERT LICENSOR NAME]*

*[INSERT LICENSEE NAME]*

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**Exhibit H**

**Cooper, Carvin Constitutional Analysis**

**CONSTITUTIONAL ANALYSIS OF THE FCC'S FURTHER  
NOTICE OF PROPOSED RULEMAKING, FCC 00-366**

January 22, 2001

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## INTRODUCTION

In 1999, the Commission issued its *Competitive Networks NPRM*, in which it proposed a rule that would require all owners of multiple tenant environments ("MTEs") to provide any and all communications providers nondiscriminatory access to their properties. In two voluminous submissions, the Real Access Alliance submitted comments arguing, *inter alia*, that this proposed rule would constitute a taking of property under the Takings Clause of the Constitution. In response, the Commission has now proposed a rule in the FNPRM whereby all communications providers will be prohibited from serving any MTE owner who refuses to provide the nondiscriminatory access that would have been required under the NPRM's nondiscriminatory access rule.

Unsurprisingly, the Real Access Alliance once again must point out that the Commission's proposed rule, which in substance will accomplish the identical result as would have been accomplished under the NPRM, will constitute a taking under the Fifth Amendment. The Constitution cannot be bypassed through the elevation of form over substance, and it is quite clear from the FNPRM that the intended effect as well as the actual effect of the proposed "prohibition" would be to require MTE owners to provide nondiscriminatory access to their properties to any and all communications carriers. The proposed requirement would therefore mandate a permanent, physical occupation of the MTE owners' property, triggering a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). While the Commission may try to argue that it is only regulating the *terms* by which communications carriers and MTE owners may do business with one another, "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at

439 n.17. Indeed, in rejecting exactly the argument on which the Commission's new proposal must rely, the Supreme Court explained that "[t]he right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Id.*

The Real Access Alliance also must echo their earlier opinion that the Commission does not have, and has not been given, the authority to effect the taking that would ensue if the proposed rule were finalized. Nothing in the Communications Act supports the notion that the Commission can exercise Congress' power of eminent domain with respect to MTE owners, and there is abundant support for the proposition that absent very clear legislative authority, the Commission may not exercise that power. Moreover, the authorities hold that the legislation itself must be interpreted narrowly, so as not to imply or infer the existence of such a power. Thus, even if the Commission arranges for the MTE owners to receive some form of payment as putative just compensation for their loss of property, the absence of statutory authority to effect a taking would nonetheless prove fatal to the legality of the proposed rule. Indeed, it is far from clear whether the Commission may create a mechanism for just compensation whole cloth out of a statute in which Congress clearly made *no* provision for such a mechanism. Thus even if Congress could conceivably be seen to have granted the Commission the bare authority to take property from the MTE owners, the Commission's proposed mechanism would fall short of satisfying the Takings Clause.

As argued below, the Real Access Alliance believes that the constitutional problem with the FNPRM is every bit as serious and insurmountable as was the constitutional problem initially raised in the NPRM's proposed universal access requirement.

**I. THE FCC CANNOT AVOID CONTRAVENING THE TAKINGS CLAUSE BY REGULATING LECs**

In its FNPRM, the FCC has proposed prohibiting LECs from providing service to customers in MTEs if the owners of the MTEs “maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE.”<sup>1</sup> As the Commission acknowledges, the proposed prohibition “would almost certainly influence MTE owners to act in a manner similar to that which would be required by direct regulation.”<sup>2</sup> Indeed, there is no question that the Commission’s purpose in imposing the proposed prohibition is to have the desired “effect on the behavior of the owners of MTEs.”<sup>3</sup> The FCC does not disguise that in proposing to regulate the owners of MTEs “indirect[ly],” and not through the direct regulation proposed in the prior NPRM, it is seeking to avoid the Takings Clause obstacles that would be presented by direct regulation.<sup>4</sup>

The FCC cannot avoid a taking under the Takings Clause of the Fifth Amendment by substituting indirect regulation for direct regulation. If the effects of a direct regulation of MTE owners would constitute a taking, then a regulation of LECs which has the same effect on MTE owners as the direct regulation would also constitute a

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<sup>1</sup> FNPRM, ¶132.

<sup>2</sup> FNPRM, ¶144

<sup>3</sup> FNPRM, ¶136

<sup>4</sup> FNPRM, ¶144

taking. Despite the suggestion in the FNPRM,<sup>5</sup> nothing in *Yee v. City of Escondido*, 503 U.S. 519 (1992) is to the contrary.

1. The Fifth Amendment of the United States Constitution provides “No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.” U.S. Const., Amendment V. Based on the fundamental principle that some property owners should not be required “to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Takings Clause has matured into a robust protection of private property rights against a range of government actions and regulations. In particular, the Takings Clause provides an absolute protection against uncompensated *per se* takings, which are defined as occurring whenever there is a government-authorized, permanent physical occupation of private property. Central to this doctrine is the principle that if the government overrides a property owner’s right to exclude others from his property, it has effected a taking, regardless of the level of economic harm suffered by the private party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto*, the Supreme Court held that a New York statute authorizing a cable television company to place cable equipment onto Ms. Loretto’s building constituted a taking under the Fifth Amendment. The decision rested upon the following basic principle:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings clause. Our cases further establish that when the physical

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<sup>5</sup> *Id.*

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*.<sup>6</sup> 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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<sup>6</sup> 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.”<sup>7</sup>

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 . . . .”<sup>8</sup>

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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<sup>7</sup> *Competitive Networks NPRM*, separate statement of Susan Ness.

<sup>8</sup> *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."<sup>9</sup>

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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<sup>9</sup> 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.<sup>10</sup> The

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<sup>10</sup> 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*.<sup>11</sup> 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)).

<sup>11</sup> 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.<sup>12</sup>

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<sup>12</sup> 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.”<sup>13</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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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<sup>14</sup> *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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<sup>15</sup> 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: