> 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,

Steven S. Rosenthal
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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/Narragansett	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

Chicago Tribune

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

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.