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FEDERAL COMMUNICATIONS COMMISSION
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Ex Parte Presentation

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

Re: ***Right to Exclude Multi-Functional Equipment from a CLEC's Collocation Space, Second Further NPRM in CC Docket No. 98-147 and Fifth Further NPRM in CC Docket No. 96-98***

Dear Ms. Salas:

This letter responds to the Common Carrier Bureau's request that SBC Communications Inc. address more fully why the Commission may not require incumbent LECs to permit physical collocation of "multi-functional equipment" — that is, equipment that performs not only functions that are "necessary for interconnection or access to unbundled network elements" (47 U.S.C. § 251(c)(6)), but also functions that are *not* necessary for either of those statutory purposes. Specifically, the Bureau has asked whether the Commission may, consistent with statutory and constitutional limitations, require collocation of such multi-functional equipment so long as it occupies no more physical space than would equipment that performs only necessary functions.

The D.C. Circuit has clearly and conclusively resolved this issue. The Commission may not lawfully require incumbents to permit collocation of such multi-functional equipment because it is not "necessary" for the only two purposes that Congress authorized — to interconnect or to access UNEs. *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000).

In any event, and contrary to the Bureau's suggestion, forced collocation of equipment that performs functions not necessary for interconnection or access to UNEs is an unauthorized, and therefore unlawful, taking of property in violation of the Fifth Amendment even if the equipment takes up no more space than would equipment that performs only functions necessary

for interconnection or access to UNEs. As the D.C. Circuit's collocation decisions make clear, the FCC has no power to take private property except to the extent that Congress delegates such power expressly or by necessary implication. *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994); *GTE*, 205 F.3d at 423. There is no such authorization for multi-functional equipment in section 251(c)(6).

I. As a Matter of Statutory Construction, an ILEC Has No Obligation to Permit Collocation of Multi-Functional Equipment

Congress in the 1996 Act specified that an ILEC must permit physical collocation only of "equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). As the D.C. Circuit ruled, any forced collocation for purposes other than those specifically authorized by Congress is simply unlawful. Reviewing the FCC's *Collocation Order*,* the court held that the Commission's interpretation of "necessary" in section 251(c)(6) "diverge[s] from any realistic meaning of the statute, because the Commission has favored the LECs' competitors in ways that exceed what is 'necessary' to achieve reasonable 'physical collocation' and in ways that may result in unnecessary takings of LEC property." *GTE*, 205 F.3d at 421. The court noted that the definition of "necessary" is "fairly straightforward." *Id.* at 422. "Something is *necessary* if it is *required* or *indispensable* to achieve a certain result." *Id.* Thus, the D.C. Circuit made clear that, under the 1996 Act, competitors have a right to collocate only "equipment that is *required* or *indispensable* to achieve interconnection or access to unbundled network elements at the premises of the local exchange carrier." *Id.*

The D.C. Circuit then specifically concluded that the Commission's *Collocation Order* improperly allowed the collocation of multi-functional equipment that does "more than what is required to achieve interconnection or access." *GTE*, 205 F.3d at 423. The court held that allowing collocation of equipment that contains functions that are not necessary for interconnection or access to UNEs "impermissibly invites unwarranted intrusion upon LECs' property rights" and is "overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." *Id.* at 422. In doing so, the D.C. Circuit rejected the Commission's attempt to justify the collocation of multi-functional equipment "by contending that competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers." *Id.* at 424 (internal quotation marks omitted). The court dismissed this as "precisely th[e] kind of rationale, based on

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* *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999).

presumed cost savings, that the Supreme Court flatly rejected in [*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)]." *Id.*

Because the scope of authorized collocation is limited by reference to the equipment's functions, not by reference to the volume of space occupied, the forced collocation of equipment with functions beyond those specified is simply unauthorized and therefore impermissible. No commenter in this proceeding, instituted after the court's remand in *GTE*, supplied a valid reason why additional, unnecessary functions fall within the statute. There is none. The court's interpretation of "necessary" disposes of any contention that the Commission may require collocation of equipment whose functions exceed those specified in section 251(c)(6).

The Commission is without lawful authority to reach any conclusion that conflicts with the D.C. Circuit's ruling. "The decision of a federal appellate court establishes the law binding further action," and the Commission "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case." *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnote, internal quotation marks omitted); *see also Iowa Utils. Bd. v. FCC*, 135 F.3d 535 (8th Cir. 1998) (issuing mandamus where FCC attempted indirectly to enforce pricing regulations vacated as beyond the Commission's jurisdiction under the 1996 Act), *vacated on other grounds*, 525 U.S. 1133 (1999); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 597 (D.C. Cir. 1978) (ordering compliance with the court's mandate where subsequent FCC order was "clearly inconsistent with the basic themes of our [prior] decision" and "frustrates [its] intended effect").

II. Because Congress Authorized Collocation Only of Equipment Necessary for Interconnection or Access to UNEs, an FCC Requirement To Collocate Equipment That Performs Additional Functions Would Be an Unauthorized and Therefore Impermissible Further Taking

An order allowing competitors to collocate equipment with additional, unnecessary functions would also deprive the property owner of rights beyond those that Congress authorized the FCC to appropriate — namely, the rights (1) to exclude equipment whose functions exceed those identified in the statute, and (2) to control the use of its property. Because Congress has nowhere authorized these additional deprivations, they would amount to an unauthorized, and therefore unlawful, taking of property.

Central to the Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), was that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435 (holding that the required placement of a tiny attachment for cable television service on the roof of an apartment building constituted a *per se* taking of private property); *see also College Sav. Bank v. Florida*

Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (2000) ("The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal quotation marks omitted); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (in holding that the imposition of a navigational servitude upon a private marina was a taking, the Court stated: "[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.") (footnote omitted); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 973 (2000) ("The Court's takings decisions suggest that governmental interference with the right to exclude is more likely to be considered a taking than are interferences with other traditional elements of property.").

In addition, the Court in *Loretto* explained that "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." 458 U.S. at 436; *see also United States v. Causby*, 328 U.S. 256, 265 (1946) (holding airplane overflights constituted a taking because they limited the owner's "exploitation" of the property).

Collocation of equipment with unnecessary functions necessarily entails a "permanent physical occupation" of the ILEC's premises, even if those functions require no additional space. *Loretto*, 458 U.S. at 435.* There would also be an increase in the CLEC's physical presence on the ILEC's premises, because the additional functions will have to be maintained and repaired.

Moreover, the required collocation of multi-functional equipment would impinge on the property owner's right to exclude its competitors and to control the use of its property to a much greater degree than the limited taking Congress authorized. An incumbent should not, simply because one use is authorized, have to permit its competitors to set up shop on its premises for any and all uses in that same space. That is precisely how Congress drafted the collocation statute. It confined the authorized taking by reference, not to volume of space, but to the "necessary" functions to be performed by the collocated equipment. Indeed, at oral argument in *GTE* the court made clear that it was concerned with the Commission's decision to allow multi-

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* We note, moreover, that it is incorrect to assume that the additional functions would require no additional space. *See* Comments of SBC Communications Inc. at 12 n.10, CC Docket No. 98-147 (FCC filed Oct. 12, 2000) ("[M]uch of the multi-functional equipment falling under a broad definition of 'necessary' utilizes more power, is considerably heavier (thus requiring greater floor loading parameters), and uses more HVAC than equipment that is truly necessary for interconnection or access. More importantly, in many instances this equipment *consumes more floor space* than basic interconnection equipment.").

functional equipment, even based on the assumption that the equipment would not require more space. *See* GTE Tr. at 18 (the court noted that "the real imposition on your property rights is not on your physical property, not your volumetric loss, but on the intrusion into your otherwise valid right to exclude a competitor from your premises"). Accordingly, the court held that the Commission may not lawfully require "collocation of a competitor's equipment that include[s] unnecessary multi-purpose features, such as enhancements that might facilitate payroll or data collection features," as well as equipment that "unnecessarily 'includes a switching functionality, provides enhanced service capabilities, or offers other functionalities.'" *GTE*, 205 F.3d at 424 (quoting *Collocation Order* ¶ 28). The court found this conclusion particularly compelling in the case before it, not only because of the plain meaning of the statute (*see* Point I, above), but also because "a broader construction of 'necessary' under § 251(c)(6) might result in an unnecessary taking of private property." *Id.* at 423.

Under the opposite theory, of course, a city that had required a property owner to set aside land for conservation could then freely require billboards advertising city services on the same volume of land — without effecting a further taking. Likewise, a bank required, as a condition of its state or federal charter, to dedicate an office for regulators to perform audits would then lose its right to exclude those regulators from performing other, unrelated official (or even personal) activities in the same office.

Those outcomes are wrong on their face. And precedents addressing analogous situations confirm that, when the government has lawful access to private property for a particular limited purpose and asserts the right to use the same property for other, unauthorized purposes, its actions amount to an additional taking of property. The Federal Circuit accordingly held, for example, that a rails-to-trails conversion constituted a taking because the right-of-way easements originally taken did not encompass their use for nature trails. *Preseault v. United States*, 100 F.3d 1525, 1541-44 (Fed. Cir. 1996) (en banc) (plurality opinion); *see also id.* at 1550 ("[T]he public recreational trail . . . could not be justified under the terms and within the scope of the existing easements for railroad purposes. The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation."); *id.* at 1554 (concurring opinion) (concluding that "present use of that property inconsistent with the easement" was a taking).

Similarly, the Supreme Court held that a taking occurred where a city, which had legitimately conditioned the grant of a redevelopment permit on the property owner's dedication of a greenway in order to control flooding, illegitimately required in addition that the greenway be open to the public. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Court held that the requirement of public access was a taking even though the additional burden affected no more physical space than had been legitimately burdened by the greenway requirement itself. By analogy to the present case, the city's requirement that the greenway be open to the public was

not *necessary* to the legitimate purpose of flood control and therefore constituted an impermissible further taking. "The difference to petitioner, of course, is the loss of her ability to exclude others." *Id.* at 393. Thus the collocation of equipment with unnecessary functions is a taking even where it occupies no more physical space than equipment with only necessary functions. Indeed, the Court noted that, "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 384 (citations and internal quotation marks omitted).

The D.C. Circuit applied the *per se* rule of *Loretto* in holding that the government had taken former President Nixon's presidential papers without just compensation. *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). The court relied on the rights of a property owner to control the use of his property and to exclude others from it. Although Mr. Nixon could still use and access his papers, "he ha[d] lost all bargaining power with respect to them." *Id.* at 1286. "More importantly, [the Presidential Recordings and Materials Preservation Act] has completely abrogated Mr. Nixon's right unilaterally to exclude others from the materials. As the Court has confirmed time and time again, the right to exclude others is perhaps the quintessential property right. Without this right, one's interest in property becomes very tenuous since it is then subject to the whim of others — an interest more akin to a license than to ownership." *Id.* (citing, *inter alia*, *Kaiser Aetna*, 444 U.S. at 176, and *Loretto*, 458 U.S. at 433). Thus, "since PRMPA effectively destroyed the most essential attributes of ownership, it constituted a *per se* taking of that property." *Id.* at 1270.

When Congress authorizes a taking in narrow terms, depriving a property owner only of the right to exclude others for the performance of enumerated functions, the property owner necessarily retains the right to exclude others for the performance of any *non*-enumerated function. An agency has no statutory or constitutional power to expand the deprivation authorized by Congress. Even though that additional deprivation may not require the use of any additional space on the owner's property, it would nonetheless extinguish elements of the owner's property rights that Congress itself chose not to extinguish. Those rights are not trivial: in this case, for example, an FCC order forcing ILECs to permit the collocation of multi-functional equipment would deprive the ILECs of the opportunity to bargain with a CLEC, without regard to the statute's pricing provisions, over the amount it would pay for the right to use its collocation space for unauthorized functions. The further deprivation necessarily results in an additional, *unauthorized* taking that is foreclosed by the above precedents.

In sum, these cases demonstrate that collocation of equipment performing functions not necessary to interconnect or to access UNEs is no less an unauthorized taking because the

equipment takes up the same or less space than legitimately collocated equipment. In any event, such collocation violates section 251(c)(6) as a matter of pure statutory interpretation, whether or not it also constitutes a taking under the Fifth Amendment.

Pursuant to the Commission's rules governing ex parte communications, I am enclosing four copies of this letter. Please file stamp and return the additional copy. Thank you very much.

Respectfully submitted,

Michael K. Kellogg

cc: Brent Olson
International Transcription Services, Inc.