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August 9, 2001

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Re: FCC 00-366: Competitive Networks, WT Docket No. 99-217

Dear Chairman Powell:

The Commission, in its October, 2000 **First Report and Order and Further Notice of Proposed Rulemaking** in the Competitive Networks docket identified above, referenced regulations enacted by the Commonwealth of Massachusetts' rendering space within a multi-tenanted building (MTU) as utility space subject to Section 224 of the Communications Act.¹

The Real Access Alliance would like to take this opportunity to inform the Commission that the Massachusetts Department of Telecommunications and Energy (MDTE) regulations cited by the Commission in its October Order were recently invalidated as being unconstitutional by a Massachusetts court. Specifically, Justice Sikora of the Suffolk County Superior Court rejected the arguments of the MDTE and the Smart Buildings Policy Program, an intervenor/co-defendant in the matter. Justice Sikora refused to find that by permitting any service provider to access space within an MTU, that such an action rendered that space "utility space," accessible by all carriers pursuant to Section 224 of the Communications Act. In Justice Sikora's words, "A landowner's grant of space to one licensee does not equal a grant of space to all other licensees wanting access...."²

A copy of the full opinion, as yet unpublished by Suffolk County, is enclosed.

¹ See paragraphs 81 – 83 of Order.

² See page 15 of enclosed opinion.

MILLER & VAN EATON, P.L.L.C.

- 2 -

We would also call to the Commission's attention Justice Sikora's careful review of the relevant case law defining what is and is not an impermissible taking. The Judge documents that the MDTE regulations fall clearly within the prohibited category established by Loretto v. Teleprompter, 458 U.S. 419 (1982). Further, Justice Sikora points out that those who would cite to Yee v. City of Escondido, 503 U.S. 519, (1992) and FCC v. Florida Power Corp, 480 U.S. 245 (1987) as being helpful precedent for a mandatory access formulation that is constitutionally acceptable are wrong. Justice Sikora writes, "In fact, the Regulations at bar present the exact fact pattern which the Supreme Court in Yee and Florida Power Corp indicated would constitute a physical taking: namely a law that, on its face or applied, compels a landowner over objection to enter into an attachment agreement."³ (p. 17)

Judge Sikora was also asked by opposing counsel to distinguish his anticipated ruling from the recent D.C. Circuit Court opinion in BOMA v. FCC, 2001 U.S. App LEXIS 15105, *28, ___F.3d___, (D.C. Cir 2001).⁴

In footnote 12 on page 18, Justice Sikora summarizes his position that the OTARD ruling in BOMA v. FCC is "factually inapposite." While the Real Access Alliance believes significant constitutional challenges await the Commission as it seeks to apply the OTARD rules, it is clear as Justice Sikora points out, "Unlike the OTARD rule, the Regulations compel physical invasion of property and, therefore, Loretto and not Building Owners and Managers Ass'n Int'l controls."

Thank you for your consideration of this legal development.

Sincerely,

Miller & Van Eaton, P.L.L.C.

By 
Gerard L. Lederer

Enclosure

cc: Jane Mago
Thomas Sugrue

³ See page 17 of enclosed opinion.

⁴ On June 29th, prior to the July 6th release of the D.C. Circuit Court's opinion in BOMA v FCC, Justice Sikora, of his own initiative issues a preliminary injunction against the MDTE rules going into effect. In issuing that injunction, Justice Sikora outlined his belief that the real estate parties would prevail in their efforts. After releasing his injunction, but prior to issuing his order, opposing counsel provided Justice Sikora with the BOMA v FCC opinion. Justice Sikora distinguished the matter in footnote 12 on page 18.

NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**Superior Court
Civil Action
No. 00-4909-A**

**GREATER BOSTON REAL ESTATE BOARD; MASSACHUSETTS CHAPTER OF
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES;
MASSACHUSETTS ASSOCIATION OF REALTORS; and REAL ACCESS ALLIANCE;**

Plaintiffs,

v.

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY;
and THE SMART BUILDINGS POLICY PROJECT;**

Defendants.

**MEMORANDUM OF DECISION
and
ORDER FOR JUDGMENT.**

MEMORANDUM OF DECISION

Introduction.

The plaintiff parties represent the interests of private landowners confronting the implementation of regulations ("the Regulations") promulgated by the defendant Massachusetts Department of Telecommunications and Energy ("the Department" or "the DTE"). They ("the landowners") move for summary declaratory judgment of the invalidity of the proposed Regulations. The defendant Department opposes. The coddefendant intervenor Smart Buildings Policy Project ("SBPP"), a coalition of telecommunications carriers, equipment manufacturers, and organizations supporting nondiscriminatory telecommunications carrier access to tenants, joins in the opposition. The defendants call for the entry of summary declaratory judgment against the private landowner organizations and in favor of the validity of the Regulations, pursuant to Mass. R. Civ. P. 56(c), final sentence.

Specifically at issue is the constitutionality of the so called nondiscriminatory access mandate of the Regulations. The Regulations are codified at 20 CMR 45.00 - 45.11. In most pertinent part, Section 45.03(1) commands that "a utility shall provide a [telecommunications] licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, for the purposes described in M.G.L. c. 166, § 25A, owned or controlled by

it . . .” Proposed Section 45.02, intended for effect as of July 1, 2001,¹ would expand the meaning of a “utility” to encompass private landowners of commercial buildings and residential multiple dwellings of more than three units. It uses the following language:

Utility, for purposes of 220 CMR 45.00, shall include but not be limited to a building that is rented, leased, let or hired out, for office or other commercial purposes and a multiple dwelling unit building that is that is rented, leased, let or hired out, for office or other commercial purposes and a multiple dwelling unit building that is rented, leased, let or hired out for occupation as the residence of four or more residential tenants or lessees living independently of each other.

As the enabling authority for the extension of the nondiscriminatory access mandate from traditional utilities to private landowners, the Department relies upon G.L. c. 166, § 25A. In relevant part, that source provides as follows.

The department of telecommunications and energy shall have authority to regulate the rates, terms, and conditions applicable to attachments, and in so doing shall be authorized to consider and shall consider the interest of subscribers of cable television services as well as the interest of consumers of utility services; and upon its own motion or upon petition of any utility or licensee said department shall determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.

The private landowners contend that the Regulations are facially unconstitutional because the nondiscriminatory access mandate accomplishes a taking of property without just compensation as prohibited by Articles 10 and 15, respectively, of the Declaration of Rights of the Massachusetts Constitution; and by the Fifth and Fourteenth Amendments of the United

¹The court has preliminarily enjoined implementation of Section 45.02 through July 31, 2001.

States Constitution.² They argue that the forced surrender of additional space through conduits, poles, ducts, and rights-of-way constitutes a permanent physical occupation of private property. The Department responds that the equal access mandate comprises a statutorily authorized term or condition for attachments and at most a restriction upon property use well short of a constitutionally forbidden taking.

As we shall see, the answer lies in the case law. For the reasons developed below, the court declares 20 CMR 45.02 and 20 CMR 45.03(1) to be unconstitutional insofar as those provisions make 20 CMR 45.00 through 45.11 applicable to private landowners without a right and process for just compensation.

²The Supreme Judicial Court has held that the Constitution of the Commonwealth affords protection parallel to that of the U.S. Constitution in the takings context. Steinbergh v. City of Cambridge, 413 Mass. 736, 738 (1992) ("the plaintiffs have advanced no reason why we should create takings principles more favorable to them than those developed under the Federal Constitution"); see e.g. Attorney General v. M.C.K., Inc., 432 Mass. 546, 554, n.17 (2000) ("A court-ordered sale of the property of a third-party landowner could, in some instances, constitute an improper "taking," in violation of the Fifth Amendment to the United States Constitution and art. 10 of the Declaration of Rights of the Massachusetts Constitution"); Dining v. Secretary of Com., 427 Mass. 704, 708-709 (1998) (holding that because bondholders' rights to toll revenues under trust agreement was property protected by art. 10 of the Massachusetts Declaration of Rights and by the takings clause of the Fifth Amendment to the United States Constitution, the elimination of tolls constituted an appropriation of private property requiring just compensation); infra n.3 (Waltham Tele-Communications v. O'Brien, 403 Mass. 74, 750-753 (1988) and Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F. Supp. 1244, 1251 (1985) adopt the position that c.166A, § 22 accomplished a taking under Federal and State law for which just compensation was required). Here, the parties do not argue that this court should apply different principles stemming from our state constitution than those established by the United States Supreme Court. Accordingly, the court's "discussion of these issues will focus on the claimed violations of the Constitution of the United States." Steinbergh, 413 Mass. at 738.

Discussion.

I. The Standard for Summary Judgment.

Under Mass. R. Civ. P. 56 (c) summary judgment becomes appropriate if no material facts are disputed and if the moving party is entitled to judgment as a matter of law. See e.g. Highland Ins. Co. v. Aerovox, Inc., 424 Mass. 226, 232 (1997). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and the legal entitlement to judgment in its favor. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). A moving party which does not bear the burden of proof at trial is entitled to summary judgment if it submits affirmative evidence, unmet by countervailing materials, that either negates an essential element of the nonmoving party's case or demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of its case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The opposing party cannot rest on the pleadings or on mere assertions of disputed facts to defeat the summary judgment motion. "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact. . . ." Pederson, 404 Mass. at 17. Finally, in its inspection of the summary judgment record, the court must credit facts in the light most favorable to the opposing party. Bisson v. Eck, 430 Mass. 406, 407 (1999); Gray v. Giroux, 49 Mass.App.Ct. 436, 437 (2000).

II. The Standard for Declaratory Relief.

Under G.L. c. 231A, a petition for declaratory relief is proper so long as (1) an actual controversy exists and (2) the particular plaintiff has standing to request its resolution. See G.L. c. 231A; Enos v. Secretary of Environmental Affairs, 432 Mass. 132 (2000); see e.g. Pazolc v. Director of Div. of Marine Fisheries, 417 Mass 565, 569-570 (1994) (adjudication of title to tidal flats, as well as public use of private property, is appropriate subject for declaratory judgment decree); Williams v. Secretary of Executive Office of Human Services, 414 Mass. 551, 567, 570-571 (1993) (statute governing declaratory relief to secure determinations of right, duty, status, or other legal relations under statute or administrative regulation is appropriate route by which to challenge administrative agency's noncompliance with its statutory mandate"); Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 266 (1992) (where government action occurring under statute is allegedly unconstitutional, it is appropriate for courts, as soon as reasonably possible, to resolve challenges to validity of statute).

III. Facial Challenges of Regulations.

As the Department correctly points out, a duly promulgated administrative regulation is entitled to the same rational presumptions of validity as a statute. The presumption respects the independent authority and the competence of the legislative and executive branches. Thomas v. Department of Public Welfare, 411 Mass. 587, 595-596 (1992); Borden, Inc. v. Commissioner of Public Health, 389 Mass. 707, 723 (1983).

To prevail on a facial challenge to a regulation a plaintiff must establish that no set of

circumstances exists under which it would be valid. United States v. Salerno, 481 U.S. 739, 745 (1987). Recently, the Supreme Judicial Court explained plaintiff's burden in such an attack:

Our review of the validity of a regulation promulgated by a State agency is guided by the established principle that "[r]egulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." . . . "These principles of deference, however, are not principles of abdication" . . . "An agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts.

Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000) (regulation's financial eligibility test found to be inconsistent with statutory language and purpose of Welfare Reform Act) (citations omitted); see also Nuclear Metals, Inc. v. Low-level Radioactive Waste Management Bd., 421 Mass. 196, 211 (1995); City of Quincy v. Massachusetts Water Resources Authority, 421 Mass. 463, 468 (1995).

IV. The Uncompensated Permanent Physical Occupation Of Property Constitutes An Unconstitutional Taking.

The Taking Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Clause was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Cape Ann Citizens Ass'n v. City of Gloucester, 1997 U.S. App. LEXIS 21315, *16 (1st Cir. 1997) [quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)]. The Supreme Court has established a critical distinction between regulations restricting the use

of private property, on the one hand; and regulations imposing permanent physical occupation of property, on the other. The former do not constitute a taking; the latter do. The leading statement and application appear in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). "We 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 intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." Id.

This categorical rule governing physical invasion of private property controls the present dispute.³ Loretto applies to the undisputed facts. There the New York statute required a landlord to allow the installation of cable television facilities upon his property (cables and switching boxes installed on roof of apartment building) for an amount determined reasonable by the state regulatory agency. Loretto, 458 U.S. at 423, and n.3; see also the discussion of Loretto in Federal Communications Commission v. Florida Power Corp., 480 U.S. 245, 250 (1987). The Court held that uncompensated permanent physical invasions are unconstitutional takings *per se*. "We conclude that a permanent physical occupation authorized by government⁴ is a taking without

³Courts in Massachusetts have ruled that the procedure for determining compensation in a similar statutory scheme granting cable operators a right of entry to install cable television facilities in multiple-dwelling units was unconstitutional. See Waltham Tele-Communications v. O'Brien, 403 Mass. 74, 750-753 (1988) and Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F. Supp. 1244, 1251 (1985). In both cases, the parties agreed that the entry and installation of equipment and lines for cable television, under G.L. c. 166A, § 22, would constitute a taking under federal and state law. Nonetheless these cases are instructive. For example, the First Circuit specifically stated, "[w]hen the Commonwealth exercises its right of eminent domain - as it did when the Legislature enacted section 22 and authorized franchised cable operators to take land - 'the act granting the power must provide for compensation, and a ready means of ascertaining the amount.'" Greater Worcester Cablevision, Inc., 682 F. Supp. at 1251 (quoting Haverhill Bridge Proprietors v. County Comm'rs of Essex, 103 Mass. 120, 124-125 (1869)). Similarly, in ruling that c. 166A, § 22 was unconstitutional because it failed to provide for a jury determination of just compensation, by implication, the Supreme Judicial Court of Massachusetts concluded that 166A, § 22 effected a taking for which just compensation was required. See Waltham Tele-Communications v. O'Brien, 403 Mass. at 753.

⁴The Court held that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." Loretto, 458 U.S. at 432 n.9.

regard to the public interests that it may serve.” Loretto, 458 U.S. at 426; see also Florida Power Corp., 480 U.S. at 251 (citing same); Capc Ann Citizens Ass’n, 1997 U.S. App. LEXIS 21315, at *16 (citing same); McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13, n.7 (1st Cir. 1993) (citing same). “[W]hen the ‘character of the governmental action’ is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*”⁵ Loretto, 458 U.S. at 434-435 (emphasis supplied).

The Court reasoned that protected property rights include possession, use, and disposition; and that, to the extent that government permanently occupies physical property, these rights are destroyed. Id. It reasoned further that once the government authorizes physical occupation by a third party “the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” Loretto, 458 U.S. at 426.

[T]he 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. Although deprivation of the right to use and obtain a profit from property is not in every case independently sufficient to establish a taking, it is clearly relevant...the permanent occupation of [the occupied] space by a stranger will ordinarily empty the right [legal right to transfer or sell] of any value, since the purchaser will also be unable to make any use of the property.

Id. at 436 (quotations and citations omitted).

Perhaps the most serious invasion of an owner’s property interests, the Court continued,

⁵These factors would be considered in a use regulation case. Most regulatory taking cases turn upon the balance of the public and private interests at stake: (1) the economic impact of the regulation on the parties, (2) the extent which it interferes with investment-backed expectations, and (3) the character of the government action. Id. at 426 (citing Penn Central Transportation v. New York City, 438 U.S. 104, 127-128 (1978)).

occurs in the circumstance in which a third party is authorized to use and obtain a profit from the landowner's property without just compensation because "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . To require [in addition to dispossession] that the owner permit another to exercise complete dominion literally adds insult to injury" because "such an occupation is qualitatively more severe than a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature, of the invasion." *Id.* at 435-436.

Finally, the Loretto Court concluded that the size of the physical occupation is constitutionally irrelevant.⁶ See Loretto, 458 U.S. at 438 n.16. In response to the dissenting view that the degree of space invaded in Loretto, allegedly one-eighth of a cubic foot of space, was not of constitutional significance, the majority stated: "Whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." A landowner is entitled to the absolute and undisturbed possession of every part of his or her premises no matter the size of the space invaded. "Constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 430. Such possession includes "the space above, as much as a mine beneath." *Id.* at 436 n. 13 (citing United States v. Causby, 328 U.S. 256, 265-266 (1946)). For example, it is well settled that "permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings *even if they occupy only relatively insubstantial amounts of space* and do not seriously interfere with the landowner's use of the rest of his land."

⁶Although the extent of occupation is not relevant to whether compensation is constitutionally due, it may be relevant to the determination of the amount of "just compensation."

Id. at 430 (emphasis supplied).⁷

Three additional takings cases are instructive. In Yee v. City of Escondido, California, 503 U.S. 519 (1992), plaintiff challenged an ordinance and mobile home residency law that caused the park owners' interest in land to be transferred to the mobile home owner, i.e. "the right to occupy a pad at a rent below the value that would be set by the free market." Yee, 503 U.S. at 526-527. However, the Court ruled that the existence of a transfer of economic interest itself could not convert a regulatory taking claim into a physical taking claim. It found that these laws did not effect a taking because "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. Significantly, the Court added that a "different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." Id. (cases collected).

Similarly, in Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245,

⁷The Court provided the following two examples to demonstrate that size is not relevant to the determination of physical occupation. First, it explained that there would be no constitutional difference between a law requiring the installation of the physical attachment of plates, boxes, wires, bolts, and screws to landlords' rooftops for the installation of cable, as was the case in Loretto, and a law requiring landlords to install swimming pools. "Few would disagree that if a State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." Id. at 436. The Court also quoted an earlier holding that physical occupation exists even when a mere telephone wire is strung across property:

An owner is entitled to the absolute and undisturbed *possession of every part of his premises*, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.

Id. at 436 n. 13 (citing Causby, 328 U.S. at 265-266 (quoting in turn Butler v. Frontier Telephone Co., 186 NY 486 (1906) (emphasis provided)). Clearly, a difference in degree does not alter the principle.

251-252 (1987), the Court ruled that the Federal Pole Attachment Act (pre-1996 amendment), which authorized the FCC to review the rents charged by public utility landlords who had voluntarily entered into leases with cable company tenants renting space on utility poles, was not subject to the *per se* taking rule because it did not require utility companies to enter into or to continue pole attachment agreements. *Id.* “While the statute we considered in Loretto specifically required landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.” *Id.* The Court concluded that the coerced acquiescence necessary for occupation was missing. “The line which separates [this case] from Loretto is the unambiguous distinction between commercial lessee and an interloper with a government license.” *Id.* at 252-253. However, it stressed, “We do not decide today what the application of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.” *Id.* at 252 n.6.

In Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit concluded that a similarly worded nondiscriminatory access provision contained in the Federal Telecommunications Act of 1996 accomplished a taking of a utility’s property.⁸ *Id.* at 1328-1329. “Because § 224(f) requires a utility to acquiesce to a permanent, physical occupation of its property, we conclude that the Act’s mandatory access provision effects a *per se* taking of a

⁸Congress amended the Pole Attachments Act as part of the Telecommunications Act of 1996. This amendment contains a nondiscriminatory access mandate that reads, in pertinent part: “utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of way owned or controlled by it.” 47 U.S.C. 224(f)(1).

utility's property under the Fifth Amendment." Id. The court reasoned that, under the federal nondiscriminatory access provision, "a utility has no choice but to permit a cable company or telecommunication carrier to permanently occupy physical space on its poles, ducts, conduits and rights-of-way. . . . Such a permanent, physical occupation of property falls squarely within the Loretto rule." Id. at 1329.

V. Because The Nondiscriminatory Access Mandate Accomplishes A Taking, The Justifications Of A Regulatory Restriction Are Inapplicable.

The Department and the SBPP advance a number of factual and legal justifications for the nondiscriminatory access duty imposed on private landowners by Section 45.03(1) and proposed Section 45.02. The Regulations have received the usual presumption of validity at the beginning of the analysis. The arguments have received careful consideration. However, as detailed below, these rationales rest upon the inadequate premise that the Regulations impose merely a restriction upon use rather than a physical appropriation of the landowners' space.

1. Taking Analysis Precludes Consideration Of Public Benefit And Minimal Economic Burden

The DTE emphasizes the efficacy of the Regulations, the importance of their public purpose, and the limitation of their operation to commercial landlords and to landlords of residential units housing four or more families "in order to avoid imposing unreasonable

regulatory burdens on the owners of smaller multiple dwelling units.”⁹ (Department’s Opposition at 15-16; Plaintiff’s Motion for Summary Judgment, Ex. 3.) However, the doctrine of Loretto renders these considerations immaterial in the case of a physical taking, as distinguished from the mere restriction of a landowners’ use of its property and space. See the discussion above at 8-10. The controlling physical reality is that the Regulations take space away from the landowner. Each licensee entitled to nondiscriminatory access will receive some incremental space through a right-of-way, pole, duct, or conduit for its cable, wire, or other means of transmission. The rental nature of the spatial property does not diminish the interest of the landlord. As the Court observed in Loretto in response to the government’s emphasis upon the rental nature of the compromised space, “We fail to see, however, why a physical occupation of one type of property but not of another type is any less a physical occupation.” Loretto, 458 U.S. at 439.

2. DTE May Regulate Rates, Terms, And Conditions Of Voluntary Attachments; However, It May Not Require Utilities, Over Objection, To Enter Into Attachments.

By redefining *attachment* to mean *access*, the DTE and SBPP contend that the nondiscriminatory access condition does not effect a physical taking; rather that it merely restricts the landowner’s use of his property (Department’s Opposition at 15 (citing Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409, 410 (1993) (DTE has the authority

⁹ 220 CMR 45.02 reads, in pertinent part: “This definition exempts buildings that house fewer than four families living independently of one another and exempts four-unit buildings where one of the four units is owner occupied. Condominiums, homeowners’ associations, tenancies of less than 12 months in duration and transient facilities such as hotels, rooming houses, continuing care retirement communities, including assisted living apartments, and nursing homes shall also be exempted from 220 CMR 45.02: Utility.”

under G.L. c. 166, § 25A to set reasonable rates for both pole and conduit attachments in which the utility and licensee fail to agree); SBPP Memorandum at 12-15 (discussing easement law). They stress the broad governmental authority to regulate the landlord tenant relationship, and argue that the coerced acquiescence necessary for occupation, namely the landlord's submission to physical occupation of his land, is not present because (1) the Regulations permit landlords to deny access to *all* telecommunication carriers if they wish; and because (2) the Regulations apply only to landowners who have already provided one communication carrier access to his poles, ducts, conduits, and rights of way¹⁰ (Department's Opposition at 15).

However, DTE's equation does not work. A landowner's grant of space to one licensee does not equal a grant of space to all other licensees wanting access to his tenants. The Department is not empowered to create easements and access, but only to regulate attachments voluntarily created by landowner and licensee. General Laws c. 166, § 25A, defines attachment as "any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television. . . installed upon any pole or in any telegraph or telephone duct or conduit." Literally, an attachment is a "wire or cable." The Department's argument tends to equate the first attached wire or cable with the entire space of the right-of-way, pole, duct, or conduit which the later compelled wires and cables of additional licensees will occupy. The

¹⁰These arguments flow from the defendants' definition that *attachment* means *access*, "once a large landlord voluntarily opens his (decidedly non-Walden) property to telecommunications equipment, he must grant nondiscriminatory access to other carriers...since the regulations merely require nondiscriminatory access for carriers to existing poles, ducts, and conduits, they do not on their face constitute a taking of property for which just compensation must be paid" (Department's Opposition at 15-16). DTE broadens the scope of what property the private landowner originally granted in order to argue that no additional space or physical occupation is effected by the challenged Regulations. For example, had the private landowner granted the first communication carrier occupation of the entire conduit rather than an attachment within the conduit, DTE's argument that the Regulations merely restrict use seems more plausible. Or, were the subsequent communication carriers seeking to use preexisting wires within the ducts or conduits or on the poles, then the utilities would not be forced to acquiesce to physical occupation of any additional space. However, these are not the facts of the case at bar. The Regulations command the property owner to surrender *additional incremental* space to the licensees.

rationale is that the later occupants are merely "piggy-backing" upon the space voluntarily granted to the original licensee.

However, even a piggy-back rider needs its own space. The assertion that the nondiscriminatory access provision does not require the landowner to submit to physical occupation of his land is factually incorrect; it ignores the fact that the required installation of second and subsequent attachments *uses space that belongs to the landowner.*¹¹ The private landowner owns the poles, ducts, conduits, rights of way, and all of the *space* on and in every part of his premises. The amount of space that the subsequent attachments physically occupy is not determinative because constitutional protection for the rights of private property does not depend on the size of the area permanently occupied. See discussion above at 10-11. There is no distinction, in degree or principle, between (a) authorizing physical occupation of space by attachment of wires to poles and (b) authorizing physical occupation of space by attachment of wires within a conduit or duct. Occupied space is occupied space.

The characterization of the nondiscriminatory access mandate as a condition upon the initial attachment does not alter the physical reality that the Regulations compel private landowners to submit to physical occupation of additional space. In the Gulf Power Co. case, the court of appeals for the eleventh circuit reached the same elemental conclusion in its assessment of analogous federal regulations:

Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects

¹¹In fact, 220 CMR 45.02 underscores this point in its definition of "usable space:"

Usable Space means the total space which would be available for attachments, without regard to attachments previously made, (a) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code, or (b) within any telegraph or telephone duct or conduit.

a taking by requiring a utility to submit to a permanent, physical occupation of its property. However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property.

Gulf Power Co., 187 F.3d at 1329.

Similarly, in the present case, the nondiscriminatory access mandate imposes more than affirmative duties on the private landowner with respect to the initial voluntary attachment; it requires the landowner to suffer physical occupation of additional space by the subsequent telecommunication carriers (third parties), over objection. In fact, the Regulations at bar present the exact fact pattern which the Supreme Court in Yee and Florida Power Corp. indicated would constitute a physical taking: namely a law that, on its face or as applied, compels a landowner over objection to enter into attachment agreements. See discussion above at 11-13.

Moreover, the challenged Regulations authorize *third parties* physically to occupy space that belongs to the landowner. The landowner would be deprived of using this space himself or of obtaining a voluntarily negotiated profit from this space. See discussion above at 10. Although the landowners' tenants would benefit from the Regulations, so too would the communication carrier industry. The Regulations authorize subsequent telecommunication carriers to use and to obtain a profit from private landowners' property without specific, rationally determined compensation. The Loretto Court viewed this category of permanent physical third party occupation of property to comprise an unconstitutional taking *per se*. See the discussion above at 8-10.

The Department and SBPP suggest that a landowner's freedom to refuse all attachments will free him from the scope of the Regulations and from the legal injury of an unconstitutional taking. They cite Yee v. City of Escondido, 503 U.S. at 528-529 for this proposition. Yee does

not provide support. It is not a physical taking case. *Id.* at 528-529. The rule enunciated in *Loretto*, 458 U.S. at 53, is still controlling: “[A] landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . .” Consequently, the defendants cannot argue that the governmentally coerced acquiescence of the surrender of spatial property is absent because the landlord is able to deny access altogether.¹²

Finally, the determination of an unlawful taking by these particular Regulations in “no way alters. . . the State’s broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such [use] regulation[s] entail.” *Loretto*, 458 U.S. at 440.

Conclusion.

The installation of additional wires on the landowner’s poles, in the landowner’s ducts and conduits, and on the landowner’s rights-of-way by telecommunication carriers and cable system operators constitutes permanent occupations of physical space. Therefore, the nondiscriminatory access mandate promulgated by the DTE in the present case authorizes a

¹²SBPP also cites *Building Owners and Managers Ass’n Int’l v. FCC*, 2001 U.S. App. LEXIS 15105, *28, ___ F.3d ___, (D.C. Cir. 2001), as authority for this proposition. (Salinger Letter, dated July 10, 2001.) The case is factually inapposite. The challenged FCC rule prohibits landlords from impairing tenants’ use of over-the-air reception devices on property in which the tenant has a leasehold interest that is within the exclusive use or control of the tenant (the “OTARD rule”). *Id.* at *9 (rule permits tenants to install broadcast satellite devices “whenever they rent space outside of a building, such as balcony railings, patios, yards, gardens. . . and, in some instances, rental units”). The OTARD rule did not extend to “the placement of antennas on common property such as outside walls (where viewers may have access but not possession and exclusive rights of use or control) or restricted access areas such as rooftops (where viewers generally do not have access or possession).” *Id.* In the instant case, the tenants do not have a leasehold interest in access, nor possession or exclusive rights of use or control of the rights-of-way, poles, ducts, and conduits. Neither does the original telecommunications carrier; it merely has a leasehold interest in an attachment. Thus, distinguishing critical factors place the OTARD rule outside the scope of *Loretto*, (1) consent to the occupation of the property (landlord voluntarily ceded control to tenant); and (2) no third party occupation. See *id.* at *22-28. Unlike the OTARD rule, the Regulations compel physical invasion of property and, therefore, *Loretto* and not *Building Owners and Managers Ass’n Int’l* controls.

physical taking. The Regulations would operate categorically. The Plaintiffs have established that no set of circumstances exists under which the 20 CMR 45.02 and 20 CMR 45.03(1) would operate validly to private landowners. See Salerno, 481 U.S. 739, 745 (1987); Smith, 431 Mass. at 646 (2000); Nuclear Metals, Inc., 421 Mass. at 211. Accordingly, the court declares the challenged regulations facially unconstitutional.

ORDER FOR JUDGMENT

1. For the foregoing reasons, summary judgment shall enter as a declaration that proposed 20 CMR 45.02 and 20 CMR 45.03(1) constitute the taking of property without just compensation in violation of Articles 10 and 15, respectively, of the Declaration of Rights of the Massachusetts Constitution; and in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

2. A permanent injunction shall enter so as to prohibit the defendant Department of Telecommunications and Energy from the implementation of 20 CMR 45.02 and 20 CMR 45.03(1).

Mitchell J. Sikora, Jr.
Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: *July 25, 2001.*