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## Enhancing Competition: Are Proposed Federal Communications Commission Rules That Treat Local Exchange Carrier Access To Multiple Tenant Environments a Taking?

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# Enhancing Competition: Are Proposed Federal Communications Commission Rules that Treat Local Exchange Carrier Access to Multiple Tenant Environments a Taking?

**Kathryn Gordon\***

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## I. INTRODUCTION

The Telecommunications Act of 1996 (1996 Act)<sup>1</sup> marks a fundamental change in the attitudes of Congress and the Federal Communications Commission (“FCC”) toward local telephone exchange carrier policy.<sup>2</sup> While signing the 1996 Act into law, President Clinton said, “[T]oday, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light.”<sup>3</sup> The 1996 Act codifies a reversal in philosophy from an assumption that local exchange carriers (“LECs”) are natural monopolists, to a belief that market forces are the best mechanism for prompting innovation and service expansion while maintaining fair rate structures for consumers and resellers.<sup>4</sup> This change has impacted LECs in many ways, including their relationships with the owners of multiple tenant environments (“MTEs”), such as office buildings and apartment complexes.<sup>5</sup>

Under the 1996 Act, FCC rulemaking increased access of competitive local exchange carriers (“CLECs”) to the facilities of incumbent local exchange carriers (“ILECs”) by removing competition barriers.<sup>6</sup> Owners of

1. 47 U.S.C. § 251 *et seq.* (2000).

2. See PETER W. HUBER ET AL., THE TELECOMMUNICATIONS ACT OF 1996: SPECIAL REPORT 8 (1996).

3. Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report (Feb. 8, 1996), at <http://clinton4.nara.gov/WH/EOP/OP/telecom/release.html>.

4. See HUBER, *supra* note 2, at 3-4, 7-8.

5. See generally Steven D. Cohen & Jeffrey A. Moerdler, *The Effect of Telecommunications Laws and Regulations on Real Property Interests*, in TELECOM REAL ESTATE STRATEGIES: HOW TO LEASE & DEVELOP THE “SMART BUILDING” IN THE DOT-COM AGE 45-52 (Practicing Law Institute ed., 2001).

6. *Id.*

MTEs, however, can also act as barriers to LEC competition.<sup>7</sup> Here, the possible regulatory responses are less clear and more problematic. One answer is to directly regulate MTE owners by requiring that they not enter into exclusive contracts with LECs. There is concern, however, that this response fails to adequately open the market to competition. The FCC proposed directly imposing a nondiscrimination requirement on MTE owners.<sup>8</sup> In fact, the FCC has little or no authority over non-telecommunications providers. Indeed, for many years the FCC left customer premises issues to the marketplace, or state regulatory authority.<sup>9</sup> As an alternative measure, the FCC proposed a more indirect regulatory approach that would forbid LECs from “dealing with MTE owners who maintain a discriminatory policy against competing carriers.”<sup>10</sup> However, these additional proposals raise both statutory and constitutional concerns.

This Note will first review the general purpose behind the 1996 Act. It will then outline the history of LEC access to MTEs under the 1996 Act. Finally, this Note will examine three questions related to proposed FCC rules for nondiscriminatory LEC access to MTEs: The first question is whether the FCC may prevent MTE owners from adhering to discriminatory policies towards LECs through direct regulation without resulting in a taking. The second question is whether the FCC may alternatively prevent MTE owners from adhering to discriminatory policies towards LECs indirectly through regulations preventing LECs from contracting with landlords who are unwilling to act in accordance with the pro-competition spirit of the 1996 Act, or whether this would also result in a regulatory taking. The final question is whether regulation of access to MTEs is required to enhance competition, and if it is counterproductive to the goals underlying the proposed rules.

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7. See Promotion of Competitive Networks in Local Telecomms. Mkts., *First Report and Order and Further Notice of Proposed Rulemaking in WT Dkt. No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Dkt. No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Dkt. No. 88-57*, 15 F.C.C.R. 22983, paras. 124-26, 22 Comm. Reg. (P & F) 1 (2000) [hereinafter *Promotion of Competitive Networks Report and Order*].

8. See Promotion of Competitive Networks in Local Telecomms. Mkts., *Notice of Proposed Rulemaking and Notice of Inquiry in WT Dkt. No. 99-217, and Third Further Notice of Proposed RM in CC Dkt. No. 96-98*, 14 F.C.C.R. 12673, paras. 58-60, 22 Comm. Reg. (P & F) 2005 (1999) [hereinafter *Promotion of Competitive Networks Notice of Proposed Rulemaking*].

9. See Federal-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11501 at 11648, 11 Comm. Reg. (P & F) 1312 (1998) (noting that Congress originally included jurisdictional limitations on the FCC’s authority; exceptions to these limitations are made explicit).

10. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 144.

## II. THE HISTORY OF THE TELECOMMUNICATIONS ACT OF 1996 AND LOCAL EXCHANGE CARRIER ACCESS RULES

### A. *The Telecommunications Act of 1996*

As a result of the 1996 Act, at the time hailed as the harbinger of a new era of local exchange competition, the FCC began a process of extensive rulemaking in order to implement the wide-ranging provisions of the 1996 Act.<sup>11</sup> This reflects a belief that the change from a highly regulated system to a market-driven system cannot occur without an intermediary period guided by new rules.<sup>12</sup> Whether this belief is accurate or not, it is apparent that the 1996 Act will “fundamentally change[] telecommunications regulation” by supplanting earlier policies that sheltered monopolies with the support of efficient competition.<sup>13</sup>

The dual (and to a degree conflicting) purposes behind the 1996 Act, as it relates to telephony, were to increase the scope, access, and coverage of a nationwide telephone service<sup>14</sup> and to promote competition in all aspects of telephone services.<sup>15</sup> The first goal, nationwide service, was a codification and expansion of the aim of the Communications Act of 1934 (1934 Act) of “providing telephone service to everyone.”<sup>16</sup> The second goal, fostering competition, continued a trend that began in 1954, in the modern era, when Hush-a-Phone Corporation won an action challenging an AT&T tariff prohibiting the attachment of any mechanism not furnished by AT&T to any part of its operating system<sup>17</sup> and persisted with the opening

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11. See HUBER, *supra* note 2, at 51.

12. See *id.*

13. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 F.C.C.R. 15499, para. 1, 4 Comm. Reg. (P & F) 1 (1996) [hereinafter *Implementation of Local Competition Provisions First Report and Order*].

14. 47 U.S.C. § 151 (Supp. V 2000).

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .

*Id.*

15. 47 U.S.C. § 253(a) (Supp. V 2000). “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” *Id.*

16. THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 351 (2d ed. 1998).

17. Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956).

of long-distance service to competition.<sup>18</sup> The 1996 Act finally discarded the long-held belief that LECs were natural monopolies and opened all wire lines to competition.<sup>19</sup> It is this second goal of promoting competition, particularly among LECs, that relates most directly to the subject of this Note.

Competition is now presumed to be “the best means of promoting rapid deployment of advanced information technologies by the private sector, rather than the government.”<sup>20</sup> The 1996 Act enables this increased competition in the communications industry by authorizing the FCC to engage in pro-competitive and, hopefully, deregulatory rulemaking.<sup>21</sup> During this interim, between the pre-1996 Act era and a fully functional competitive market, the industry is moving through informal re-regulation and managed competition in several different ways.

First, the 1996 Act prohibits indirect and direct unjust preferences or discriminatory practices with regard to communication services.<sup>22</sup> The FCC issued a Special Access Collocation Order mandating LEC-owned essential facilities to allow non-discriminatory access at fair rates.<sup>23</sup> Second, in an expansion of the 1934 Act and the Pole Attachments Act,<sup>24</sup> CLECs were given access to rights-of-way and easements owned or controlled by ILECs and other utilities.<sup>25</sup> This provision was found to be a regulatory taking, but was deemed facially constitutional due to adequate provisions for ensuring just compensation.<sup>26</sup> Third, although the 1996 Act “does not preempt the authority of state and local governments ‘over decisions regarding the placement, construction, and modification of personal wireless service facilities’ within their jurisdictions, it nevertheless imposes substantive and procedural limitations on the power of local authorities to make zoning

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18. *See* MCI Telecomms. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977); *see also* MCI Telecomms. Corp. v. FCC, 580 F.2d 590 (D.C. Cir. 1978).

19. 47 U.S.C. § 259(a) (Supp. V 2000).

20. *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1465 (N.D. Ala. 1997).

21. 47 U.S.C. § 259(a).

22. 47 U.S.C. § 202(a) (1994).

23. Alexander C. Larson et al., *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 419, 434 (1994). *See also* GTE South Inc. v. Morrison, 957 F. Supp. 800, 801-02 (E.D. Va. 1997) (“The Act mandates that existing local exchange carriers . . . like Plaintiff . . . allow interconnecting services providers access to local networks in order to provide competing local telephone service.”) (citing Telecomm. Act of 1996, 47 U.S.C. §§ 251-52 (1996)).

24. 47 U.S.C. § 251(b)(4) (Supp. V 2000).

25. 47 U.S.C. § 224(f)(1) (Supp. V 2000). “A utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” *Id.*

26. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999).

decisions affecting such matters.”<sup>27</sup> States may not enact legislation that would impede the purpose of the 1996 Act.<sup>28</sup>

*B. Ongoing Discriminatory Local Exchange Carrier Access to Multiple Tenant Environments Under the 1996 Act*

As noted *infra*, the purpose behind section 251 of the 1996 Act is facilitation of LEC competition.<sup>29</sup> To further this purpose, the section contains a listing of ILEC requirements such as interconnection access for CLECs.<sup>30</sup> As CLECs develop competitive facilities-based networks, they too will become subject to the cooperative components of section 251.<sup>31</sup> Initial implementation disputes occurred and led Congress to enact section 252 to provide for mediation or arbitration.<sup>32</sup> In the long run, section 251(b)(4) of the 1996 Act was largely unnoticed by LECs because they had already worked out methods for sharing equipment. However, the statute was read by the FCC to include MTEs and again became a source of controversy.<sup>33</sup>

Telephone companies, like other utilities, normally gain access to property through right-of-way agreements, easements, and less commonly the power of eminent domain.<sup>34</sup> LEC access to MTEs, in particular, developed in a very different environment, due to the long-held monopoly

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27. *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1465 (N.D. Ala. 1997).

28. *See supra* note 15; *RT Comm., Inc. v. FCC*, 201 F.3d 1264, 1269 (10th Cir. 2000) (giving “*Chevron* deference” to FCC decisions regarding whether or not a state regulation is a barrier to the 1996 Act or is competitively neutral; FCC ruling preempted the state law).

29. *See* Deonne L. Bruning, *The Telecommunications Act of 1996: The Challenge of Competition*, 30 CREIGHTON L. REV. 1255, 1259 (1996).

30. *Id.*

The six [ILEC] obligations [under § 251(c)] are: (1) the ILEC must negotiate with [CLECs] the terms of section 251 in good faith; (2) the ILEC must provide, at just and reasonable rates, interconnection with competitors so that calls may be transmitted and routed between their networks; (3) the ILEC must provide access to network elements on an unbundled basis so that competitors are allowed to combine such elements to provide complete telecommunications services; (4) the ILEC must offer services it provides at retail to competitors at wholesale prices so that the competitors may offer such services for resale; (5) the ILEC must give reasonable notice of any changes made in its networks or facilities that would affect interoperability with competitors; and (6) the ILEC must allow competitors to physically locate on their premises, unless physical location is not practical due to technical limitations or because of space limitations.

*Id.* at 1259-60.

31. *See id.*

32. *Id.* at 1265 (stating that all 50 states have received requests for arbitration or mediation).

33. Cohen & Moerdler, *supra* note 5, at 35.

34. *Id.* at 45.

status of ILECs, such as Bell operating companies and GTE.<sup>35</sup> Several early efforts by the FCC to introduce competition into local markets prior to 1996 failed when courts held that “the Commission’s authority at that time did not encompass the power to order such physical collocation.”<sup>36</sup> Therefore, MTE owners were unable to choose between competitors when installing phone service.<sup>37</sup> Furthermore, if they wished to attract renters, MTE owners had no choice but to allow the LEC to wire their buildings. MTE owners, accordingly, have generally given phone companies free access, despite the absence of a mandate to do so. Assumed access also led phone companies to bypass the formality of negotiating easements in MTEs.<sup>38</sup> Consequently, most agreements between LECs and MTE owners amounted to little more than written or even verbal licenses.<sup>39</sup> The absence of existing easements giving perpetual access and control to ILECs would become important when local exchanges were opened to competition.<sup>40</sup>

When competition among LECs was authorized by the 1996 Act, access to MTEs became a valuable commodity and sparked a struggle between ILECs, CLECs, and MTE owners for favorable legislation.<sup>41</sup> LECs began vying for “special statutory or regulatory rights of access” to MTEs.<sup>42</sup> MTE owners began to see the profit potential and started charging LECs access fees. They are interested in maintaining the right to negotiate for the highest possible fees.<sup>43</sup> Because ILECs never acquired easements, wires in MTEs are often the building owner’s property. Thus, the 1996 amendment to the Pole Attachment Act, held constitutional in *Gulf Power v. United States*, is inapplicable in this setting.<sup>44</sup>

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35. *Id.* After the divestiture of AT&T, Bell operating companies and GTE, as LECs, were allowed to maintain monopolies due to the widely held belief that local loops were natural monopolies. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d* 460 U.S. 1001 (1983).

36. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 8.

37. See generally KRATTENMAKER, *supra* note 16, at 348.

38. Cohen & Moerdler, *supra* note 5, at 45.

39. *Id.* “Unlike easements, a license is a revocable, non-assignable privilege to use the land of another.” *Id.* at 46.

40. *Id.* at 46-47.

41. See *id.* at 46.

42. *Id.*

43. *Id.* Jeffrey A. Moerdler, *Found Money: New Opportunities in Telecommunications Leases*, in TELECOM REAL ESTATE STRATEGIES: WHAT YOU NEED TO KNOW IN TODAY’S ECONOMY 361, 361-62 (Practicing Law Institute ed., 2002) (talking to renters about the new opportunities created by new telecommunications environment for charging fees for access to buildings).

44. 187 F.3d 1324 (11th Cir. 1999).



*C. Proposed FCC Rulemaking Regarding Nondiscriminatory Access to Multiple Tenant Environments*

In the 1996 Act, Congress required LECs to make their facilities available, at reasonable rates, for interconnection with other LECs sharing the same market to promote the entry of competitive LECs into all local markets.<sup>45</sup> Facilities-based competition is essential to a truly competitive market.<sup>46</sup> In fact, ILECs must show either that facilities-based competition exists or that no requests to interconnect were made before they can offer in-region interLATA services—those that cross designated local service area boundaries.<sup>47</sup> This approach is intended to be helpful to consumers because it will end dependence on ILECs. Dependence on ILECs is problematic in two respects: ILEC lines may not support new, innovative technology—CLECs may be better at bringing new technology to consumers;<sup>48</sup> and in the absence of competition, ILECs may lack the necessary incentive optimally to create and employ new technology.<sup>49</sup>

The FCC responded to Congress's mandate, in part, with its *First Report and Order* regarding competitive access in local markets.<sup>50</sup> This order began implementing the interconnection, unbundling, and resale provisions of the 1996 Act.<sup>51</sup> It also asked for commentary on nondiscriminatory access to MTEs. A *Second Report and Order* closely followed the *First Order*.<sup>52</sup> In this order, the FCC promulgated rules regarding toll and local dialing parity, and universal service support services.<sup>53</sup> However, the FCC failed to enforce these provisions when it appeared that enforcement would inhibit CLECs from competing.<sup>54</sup>

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45. *Implementation of Local Competition Provisions First Report and Order*, *supra* note 13, para. 3.

46. See D.R. Stewart, *Competition Stiffens Among Local Carriers*, TULSA WORLD, June 28, 2001, at 3 (stating that facilities-based CLECs are more likely to succeed).

47. See *Implementation of Local Competition Provisions First Report and Order*, *supra* note 13, para. 4.

48. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 23.

49. *Id.*

50. *Implementation of Local Competition Provisions First Report and Order*, *supra* note 13.

51. *Id.* para. 4.

52. *Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, Second Report and Order and Memorandum Opinion and Order*, 11 F.C.C.R. 19392 (1996).

53. *I.e.*, nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listings, disclosure of network info, and numbering administration. *Id.*

54. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 8.

A *Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking*<sup>55</sup> closely followed. The FCC described its purpose in this order as initiating “a rulemaking proceeding to consider certain actions to facilitate the development of competitive telecommunications networks, and [to] commence[] an inquiry into certain other issues related to this goal.”<sup>56</sup> This order contained several findings relevant to this discussion.

The FCC found that the 1996 Act contains provisions for CLEC access to pole attachments<sup>57</sup> and requires ILECs to provide nondiscriminatory access to facilities and equipment, services at wholesale to resellers, and unbundled network elements—all at fair and reasonable rates.<sup>58</sup> Together, these provisions provide evidence of Congress’s concern that consumers have a choice, and that ILECs and other utility access providers (e.g., electric utility pole owners) do not act as a barrier to competition and choice.<sup>59</sup> However, although nondiscriminatory access to facilities is now a reality, the certainty of CLEC access to pole attachments, while clearly Congress’s hope, is less assured. Furthermore, these provisions do not guarantee that choice will be there even if their implementation is successful. The availability of choice and access to a variety of competitive service providers for all consumers, regardless of whether they are commercial or private, renters or owners, is mandated.<sup>60</sup> The FCC, therefore, looked at other means of achieving its desired end. Consequently, in this order the FCC considered actions that would “ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments.”<sup>61</sup>

Competitive providers include CLECs with end-to-end facilities, CLECs that use ILECs’ unbundled elements to provide service, and resellers.<sup>62</sup> CLECs are less than five percent of the market share but are making rapid gains.<sup>63</sup> They are “deploying fiber in their networks at a faster rate than incumbent LECs and are rapidly acquiring numbering resources necessary to provide switched telephone services over their own

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55. *See generally id.*

56. *Id.* para. 1.

57. 47 U.S.C. § 224 (Supp. V 2000).

58. 47 U.S.C. § 251(c)(2)-(4) (Supp. V 2000).

59. *See Promotion of Competitive Networks Notice of Proposed Rulemaking, supra* note 8, para. 33.

60. *Id.*

61. *Id.* para. 1.

62. *See id.* para. 4.

63. *Id.* para. 11.

facilities.”<sup>64</sup> CLECs may challenge ILECs by using new broadband technology to compete with the old narrowband technology used by ILECs, an endeavor that could require new facilities.<sup>65</sup>

The FCC characterized these findings as positive but noted that more efforts are needed as only select market segments are currently benefiting from competition.<sup>66</sup> Furthermore, only a small portion of CLECs are facilities-based competitors.<sup>67</sup> This is important because the FCC has reason to believe that the only long-term and effective way to dismantle the ILECs’ “bottleneck control” over physical facilities is to develop strategies that will encourage and support facilities-based competition.<sup>68</sup> The FCC does not address whether owners of networks other than LECs should be required to make their facilities accessible to third parties.<sup>69</sup> However, the Commission recognizes that, in promoting competition, it may need to take action to remove competitive barriers created by third parties.<sup>70</sup> In MTEs this issue is central because the owner, rather than the ILEC, frequently controls access. Therefore, after discussion, the FCC requested commentary on nondiscriminatory access to buildings where the existing wires are owned and controlled by building owners rather than by ILECs.<sup>71</sup>

Access to MTEs is critical.<sup>72</sup> As of 1990, approximately twenty-eight percent of all housing units were in MTEs.<sup>73</sup> Furthermore, many commercial enterprises are located in MTEs, and business customers are among the most lucrative clients of LECs.<sup>74</sup> Access is not a problem for

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64. *Id.*

65. *Id.* See also KRATTENMAKER, *supra* note 16, at 344 (“Because voice (and simple data) transmission does not require much bandwidth, telephone wires until very recently have been relatively ‘thin’ in the sense that they are incapable of carrying messages (such as television pictures) that require more bandwidth.”).

66. *Promotion of Competitive Networks Notice of Proposed Rulemaking, supra* note 8, para. 13.

67. *Id.* para. 21.

68. *Id.* para. 4.

69. *Id.* para. 19.

70. *See id.* para. 28.

71. *See* Telecomms. Servs. Inside Wiring; Implementation of the Cable TV Consumer Prot. and Competition Act of 1992, *Report And Order and Second Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 3659, para. 179, 10 Comm. Reg. (P & F) 193 (1997) [hereinafter *Telecomm. Servs. Inside Wiring Report and Order*].

72. *Promotion of Competitive Networks Notice of Proposed Rulemaking, supra* note 8, para. 29.

73. *Id.*

74. Not only do businesses typically require more extensive and technologically advanced telephone systems than the average individual consumer, but they have historically paid higher rates for service than residential consumers as an “implicit subsidy” of universal service. Access Charge Reform, *First Report and Order*, 12 F.C.C.R. 15982 paras. 30, 38, 7 Comm. Reg. (P & F) 1209 (1997).

resellers and purchasers of unbundled elements, but facilities-based CLECs, the group most essential to long-term competition, must either obtain permission to install their own wires or to gain access to existing wires from the ILEC, the MTE owner, or both.<sup>75</sup> Although two states have enacted mandatory access rules,<sup>76</sup> and other states have more limited provisions,<sup>77</sup> this patchwork approach may not be adequate for achieving the 1996 Act's goals of competition and access. In fact, the FCC found that denial of access at a reasonable and fair rate to CLECs is a valid problem potentially requiring a regulatory remedy.<sup>78</sup> To this end, the FCC included discussions on section 224 and access to unbundled elements per section 251 and its ability to force ILECs to grant CLECs the required access.<sup>79</sup> These provisions, however, are not controlling when the facilities in question are controlled by the MTE owner.<sup>80</sup> A discussion of nondiscriminatory access to facilities controlled by the premises owner therefore ensued.<sup>81</sup> First, the Commission agreed that nondiscriminatory access to buildings would enhance competition.<sup>82</sup> Then, the FCC asked for comment on whether MTE owners should be directly regulated and required by law to allow nondiscriminatory access or, alternatively, regulated indirectly by prohibiting LECs from servicing MTEs with discriminatory access practices. In other words, the FCC sought input on whether owners who allow one LEC access must allow others access on similar terms.<sup>83</sup> The last *Order and Notice of Proposed Rulemaking* was

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75. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 30.

76. Texas only allows property owners to impose reasonable limits on the number of telecommunication services with access to the property. TEX. UTILITIES CODE ANN. § 54.260 (Vernon 1998). *See also* CONN. GEN. STAT. § 16-247i (2001).

77. Minnesota law requires that MTE owners who use a CLEC provider must, upon a tenant's request, allow the ILEC to provide services to tenants. MINN. STAT. § 237.68.3 (2001).

78. *See Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, paras. 31-34.

79. *Id.* *See also* *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999).

80. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 52.

81. *See id.* para. 51.

82. *Telecomm. Servs. Inside Wiring Report and Order*, *supra* note 71, para. 178.

83. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8 (seeking comment on: (1) "the effectiveness of existing State statutes and regulations governing building access," *id.* para. 54; (2) is a "national nondiscriminatory access requirement" needed, *id.* para. 55; (3) "whether the imposition of a nondiscrimination requirement on building owners would be within [the FCC's] statutory authority," *id.* para. 56; (4) whether a "constitutional impediment" exists, *id.* para. 58; and (5) any practical problems related to enforcement of nondiscriminatory access, *id.* para. 63).

adopted on October 12, 2000.<sup>84</sup> In it, the FCC took further action to enhance services to consumers in MTEs<sup>85</sup> and, once again, asked for comment on, among other things,<sup>86</sup> nondiscriminatory access.

Since the *Fifth Report and Order and Memorandum Opinion and Order*, the FCC issued a Public Notice on June 25, 2001. The Public Notice postponed the request for comment on telecommunications services in MTEs. The delay was because the FCC wanted analysis based on up-to-date, state-of-the-market information gathered after the implementation of the best practices model advocated by the Real Access Alliance, a real estate industry group active in this rulemaking process.<sup>87</sup> However, the Real Access Alliance best practices model, which was made public on May 22, 2001, has not yet been fully implemented in a manner allowing educated commentary on its impact.<sup>88</sup> Then on November 30, 2001, the FCC issued another Public Notice again requesting commentary on a variety of MTE-related issues surrounding LEC access.<sup>89</sup>

### III. A SUMMARY OF CASE LAW DEALING WITH THREE TYPES OF TAKINGS PROHIBITED BY THE FIFTH AMENDMENT

Property is a fundamental and important part of our society and our market economy. It defines people's relationships with things and encompasses a "bundle of rights," including the right to use and dispose of private property.<sup>90</sup> Arguably, the most essential aspect of a right in property is the "right to exclude" others from using one's property.<sup>91</sup> However, the

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84. *Promotion of Competitive Networks Report and Order*, *supra* note 7.

85. *Id.* para. 1. The FCC's order mandated the following: it forbade telecom carriers in commercial MTEs from contracts with building owners, including exclusivity contracts; it established procedures to reduce CLECs' dependence on ILECs regarding gaining access to on-premises wiring in part by allowing owners the right to request a change in the demarcation point; and it determined that Section 224 does assure CLECs fair and reasonable access to conduits and rights-of-way in buildings that are controlled by a utility.

86. Those other things included status of market, whether exclusive contract prohibition should be extended to residential buildings, preferential marketing agreements (should they be allowed?), definition of right-of-way in MTEs, and extension of cable inside wiring rules. *Id.*

87. *See* Wireless Telecomms. Bureau Postpones Request for Comment on Current State of the Market for Local and Advanced Telecomms. Servs. in Multitenant Env'ts, *Public Notice*, 16 F.C.C.R. 12830 (2001).

88. *Id.*

89. *See* Wireless Telecomms. Bureau Requests Comment on Current State of the Market for Local and Advanced Telecomms. Servs. in Multitenant Env'ts, *Public Notice*, 16 F.C.C.R. 20971 (2001).

90. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 286 (2001).

91. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

Fifth Amendment's takings clause<sup>92</sup> does not prohibit the government from taking property—physically, through regulation, or derivatively.<sup>93</sup> Instead, it allows for government takings as long as the original owner is compensated for his or her loss.<sup>94</sup> In physical takings, even minute infringements will trigger the need for compensation.<sup>95</sup> For a regulatory taking to occur, the regulation must eliminate the economic value of the property.<sup>96</sup>

The purpose behind the compensation clause is disputed. One reason suggested is “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.”<sup>97</sup> Another reason is that compensation may prevent the overuse of the government's power of eminent domain.<sup>98</sup> Finally, the libertarian approach argues “a natural right to property . . . that exists independent of custom or positive law,”<sup>99</sup> suggesting that any interference with property without compensation violates the property owner's rights.<sup>100</sup>

The law surrounding physical takings is clearly summarized in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>101</sup> The Court drew on decisions from the turn of the century and held that regardless of diminution of value (or lack thereof) and the existence of a competing public good served by the action in question, if a permanent physical occupation of private property results from the government's regulations, it is a per se taking and compensation is therefore required under the Fifth Amendment.<sup>102</sup>

This approach would almost amount to black letter law, except for the holding of the Court in *Yee v. City of Escondido* that a rent control

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92. U.S. CONST. amend. V.

93. Bell & Parchomovsky, *supra* note 90, at 280.

94. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 (2nd ed. 1977).

95. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (finding a taking occurred even though the total loss of property value was one dollar).

96. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (noting that if the taking is ascribable to nuisance prevention, then no compensation is required).

97. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

98. POSNER, *supra* note 94, at 41 (noting that compensation is intended to function as a guarantee that condemned land is in fact more valuable to the condemnor than the owner).

99. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 396 (2000).

100. *Id.*

101. 458 U.S. at 426-38. *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999) (holding that a taking had occurred under the per se physical takings rule established in *Loretto*).

102. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982); U.S. CONST. amend. V.

ordinance did not constitute a taking.<sup>103</sup> The pertinent regulation required mobile home park operators to accept replacement tenants whom they found undesirable.<sup>104</sup> In *Yee*, however, the Court relied on the fact that by ceasing to let out space for trailers altogether, the landlords could still legally evict the unwanted tenants.<sup>105</sup> In this way, the Court characterized the forced rental as a use requirement.<sup>106</sup> As a land use requirement, the regulation was not an unconstitutional taking.<sup>107</sup>

A second kind of taking, a regulatory taking, can occur if a regulation so completely destroys a property's value as to render the property worthless.<sup>108</sup> "[I]t is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use . . . ."<sup>109</sup> However, in contrast with cases in which a physical occupation of property occurs, land-use regulations that "substantially advance legitimate state interests"<sup>110</sup> without depriving "an owner [of] economically viable use of his land" are not takings.<sup>111</sup> A test for whether a regulatory taking has occurred can be found in *Penn Central Transportation Co. v. New York City*, a case involving a historic preservation regulation that prevented the owners of Grand Central Terminal from building an office building over the station.<sup>112</sup> The Court concluded that there was not a taking after applying factors that amounted to a three-part test: "owner's reasonable investment-backed expectations," "the nature of the government action," and "the degree of diminution in property value."<sup>113</sup>

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103. 503 U.S. 519, 539 (1992).

104. *Id.* at 524.

105. *Id.* at 519-20.

106. *Id.*

107. *Id.* at 539.

108. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J., recognizing that a taking may occur without physical occupation of land).

109. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992).

110. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

111. *Id.*; see also *Pa. Coal Co.*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). The all-or-nothing theory behind regulatory takings leads to the ironic result that a property holder whose property value is decreased 100% gets full value, a property holder whose property value is decreased 95% by a regulation gets no compensation, and property holders who suffer a physical invasion, no matter how trivial, are fully compensated. *Lucas*, 505 U.S. at 1019 n.8.

112. 438 U.S. 104 (1978).

113. *Id.* (concluding that the transportation company was not barred from continuing to use the train station for the purpose for which it was built; that the regulation did, in fact, serve a valuable public good; and that the train station should provide a reasonable return on the owners' investment).

*Nollan v. California Coastal Commission*, a case involving a rule that conditioned new building permits on landowners acquiescing to public easements on their property, expanded on the *Penn Central* assertion that “a use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose.”<sup>114</sup> In *Nollan*, the Court required that a nexus exist between the regulation’s purpose and the regulation’s effect.<sup>115</sup> The Court found that a regulatory goal of reducing barriers, both physical and psychological, to the public’s ability to see and appreciate the beach was not rationally furthered by a rule that allowed people to build and thus obstruct the public’s view of the water, so long as an access easement was granted.<sup>116</sup>

The Court in *Nollan* asked whether an “essential nexus” connected the regulation and the government’s interest.<sup>117</sup> It failed to find a nexus and therefore chose not to address the relative strength or weakness of the connection.<sup>118</sup> In *Dolan*, the Court elucidated upon this additional factor for identifying valid regulatory takings.<sup>119</sup> *Dolan* involved a decision by city officials to require a building permit applicant to set aside land to be used as a greenway for flood management and for a bicycle path.<sup>120</sup> The Court found that because building up the commercial district did in fact add to flood runoff, a nexus did exist. However, because a mere use restriction would have created the greenway and findings did not support the assertion that one store would add enough traffic congestion to warrant making the applicant alone bear the cost of public works, the city had not met its burden.<sup>121</sup> In essence, the remedy was out of proportion to the applicant’s role in creating the problem. This led to the second expansion on the rules from *Penn Central*: “rough proportionality.”<sup>122</sup> Under *Nollan* and *Dolan*, therefore, a property owner can be forced to suffer an uncompensated taking if the taking is regulatory, rationally related to the government interest, and roughly proportional.<sup>123</sup>

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114. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (quoting *Penn Cent.*, 438 U.S. at 127).

115. *Nollan*, 483 U.S. at 837.

116. *Id.* at 836.

117. *Id.* at 837.

118. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (citing *Nollan*, 483 U.S. at 838).

119. *Dolan*, 512 U.S. at 386.

120. *Id.* at 379.

121. *Id.* at 394-95.

122. *Id.* at 391 (holding that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

123. See *id.*; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).



*A. Whether Either, or Both, Nondiscriminatory Access Requirement Proposals Constitute Takings Under the Fifth Amendment*

Under the proposed nondiscriminatory access requirement, MTE owners in control of wire routes to which facilities-based CLECs must gain access in order to provide services to tenants will be either (a) required to allow CLECs access under “nondiscriminatory rates, terms, and conditions,”<sup>124</sup> or (b) pressured into nondiscriminatory access by a regulation prohibiting LECs from dealing with MTE owners who engage in discriminatory practices.<sup>125</sup> A concern is that either, or both, of these proposed rules would constitute a taking under the Fifth Amendment.<sup>126</sup> The analysis will first examine the direct regulation of MTE owners in relation to takings and will then analyze the indirect regulation of the matter via LECs. The ramifications of these analyses will be discussed in the following Section.

*B. Whether the FCC May Prevent MTE Owners from Adhering to Discriminatory Policies Toward LECs Through Direct Regulation*

One proposed version of the rule would require MTE owners to allow CLECs access to their buildings “under nondiscriminatory rates, terms and conditions.”<sup>127</sup> Under this approach, MTE owners would be forced to allow CLECs to use unbundled services on lines already in existence or to lay new line in the building.<sup>128</sup> This rule essentially eliminates a property owner’s ability to exclude—a right, as mentioned *infra*, normally believed to be at the heart of property rights.<sup>129</sup>

In the case of facilities-based CLECs, the FCC would authorize LECs to physically occupy a portion of an MTE owner’s property.<sup>130</sup> Even within the context of access through purchase of unbundled services, an attenuated argument could be made that the signals passing through the wire constitute

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124. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 53.

125. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 127.

126. *Id.* para. 125.

127. *Id.*

128. *Promotion of Competitive Networks in Local Telecomms. Market, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 F.C.C.R. 12673, paras. 4-5, 52 (1999).

129. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

130. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 125.

physical occupation.<sup>131</sup> The question is: What type of taking, if any, occurs under this rule? If the rule directly authorizes physical occupation of private property it would constitute a physical, or per se, taking. If the rule is not a per se taking, it should be subjected to a different analysis, such as a regulatory taking.<sup>132</sup>

In *Loretto*, the Court laid out the law for situations involving the required physical occupation of property.<sup>133</sup> *Loretto* involved a claim by the Petitioner that the existence of cable lines in an MTE building she purchased constituted a taking in light of a New York statute requiring MTE owners to allow cable companies access to their buildings.<sup>134</sup> The Court held that if the access is required, and it results in a permanent physical occupation, the access is, in fact, a physical taking and compensation must be provided.<sup>135</sup> The Court established this as a per se rule so long as the rule is not outweighed by benefit to the public or other valid government interest.<sup>136</sup>

The lower courts follow the *Loretto* rule without any meaningful modification or interference.<sup>137</sup> The *Gulf Power* court restated the *Loretto* rule: “[A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent, physical occupation by a third party.”<sup>138</sup> In *Gulf Power*, a utility brought suit against the federal government regarding section 224(f)(1) of the 1996 Act, known as the Pole Attachment Act.<sup>139</sup> The Court of Appeals held that *Loretto* required the court to find a taking of the power utility’s property because of the “Act’s mandatory access provision.”<sup>140</sup> The Pole Attachment Act requires utilities to “provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”<sup>141</sup> In *Bell Atlantic Telephone Cos. v. FCC*, the District of Columbia Court of Appeals held that because it could identify situations where the FCC order for ILEC/CLEC collocation before the 1996 Act

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131. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 450 n.8 (1982) (Blackmun, J., dissenting).

132. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 144.

133. See *Loretto*, 458 U.S. 419.

134. *Id.* at 421-22.

135. *Id.* at 441.

136. *Id.* at 434-35.

137. *E.g.*, *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citing *Loretto*, 458 U.S. at 439-40).

138. *Id.*

139. *Gulf Power*, 187 F.3d 1324.

140. *Id.* at 1328.

141. 47 U.S.C. § 224(f)(1) (Supp. V 2000).

would create a taking, in the absence of explicit statutory authority, the regulation must be overturned.<sup>142</sup> These cases mean that the proposed regulation requiring MTE owners to allow CLECs access would constitute a taking requiring compensation, regardless of whether line was laid or signals were merely passed through the lines. However, it is not clear whether the proposed rule requires actual access or merely asserts that if an MTE owner chooses to allow any access at all, it must be equal access.

Under this interpretation, the *Loretto* element of “required” is absent and the precedent set in *FCC v. Florida Power Corp.* may be more pertinent.<sup>143</sup> *Florida Power* involved an FCC order regulating the rates utilities could charge cable television providers for access to the utilities’ power lines.<sup>144</sup> The lower court, relying on *Loretto*, held this to be a taking. The Supreme Court, however, pointed out that the holding in *Loretto* was narrow, and inapplicable to a situation where access was not *required* by a regulation. The directive only regulated the fees that could be imposed by utilities and was not possessory.<sup>145</sup>

The Supreme Court in *Yee* again upheld the notion that the “required” element is “at the heart of . . . occupation.”<sup>146</sup> The Court stated that the ordinance did not *require* mobile home park owners to allow occupation of their property, but rather regulated the rental process should an owner choose to rent his or her land.<sup>147</sup> Rather, the ordinance regulated land use because it did not compel the owners to allow occupation, and furthermore, it allowed for eviction should the owner wish to change the use of the land.<sup>148</sup>

The Petitioners argued that their inability to set rental rates or select their tenants resulted in renters occupying their land at a rate below the market rate. Furthermore, renters can sell their right at a premium that would not have existed without the regulation, causing the transfer of “a discrete interest in land . . . from the park owner to the mobile home owner.”<sup>149</sup> This argument failed because no physical taking was demonstrated.<sup>150</sup> The Court explicitly chose not to address the question of whether a regulatory taking occurred because the parties had not briefed

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142. 24 F.3d 1441, 1446 (D.C. Cir. 1994).

143. 480 U.S. 245 (1987).

144. *Id.*

145. *Id.* at 252-53.

146. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

147. *Id.* at 539.

148. *Id.* at 528.

149. *Id.* at 527.

150. *Id.*

that issue, but a regulatory takings analysis would have been the correct framework for the inquiry.<sup>151</sup> A colorable argument exists that the “required” element is absent from the proposed rule as in *Florida Power and Yee*, and that *Loretto* is, in fact, inapplicable.<sup>152</sup>

Nowhere in the proposed rule does the FCC require MTE owners to allow LECs access to their buildings.<sup>153</sup> The rule is only concerned that if access is granted, it be nondiscriminatory. The proposed rule is a response to complaints by CLECs that building owners have “obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises.”<sup>154</sup> The lack of any explicit requirement for granting access takes the proposed rule outside *Loretto*’s rubric. As a property use requirement, which regulates “the relationship between landlord and [CLEC],” no undesired physical invasion occurs and thus no physical taking.<sup>155</sup> The imposed inability to freely select a carrier is analogous to the mobile home park owners’ inability to always select a tenant of their own choosing.<sup>156</sup> The fact that value was transferred from the MTE owner to the CLEC, in that the right to charge high fees becomes the right to access at lower fees, does not equal physical occupation.<sup>157</sup> The government can clearly regulate the rates of a public service—even if conducted on private property<sup>158</sup>— “[s]o long as the rates set are not confiscatory.”<sup>159</sup>

The argument falters, however, because of the nature of the service in question. Unlike utilities in *Florida Power* that could take or leave cable services renting access to their lines, MTE owners most likely see telephone service as essential. By not allowing access to any phone

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151. *Id.* at 535.

152. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Yee*, 503 U.S. at 539.

153. See generally *Promotion of Competitive Networks Report and Order*, *supra* note 7 (requiring nondiscriminatory access if an owner decides to wire his or her building, but not requiring owners of MTEs to wire their buildings in the first place).

154. *Promotion of Competitive Networks Notice of Proposed Rulemaking*, *supra* note 8, para. 31.

For example, WinStar’s Vice President for Real Estate has stated in an affidavit that “many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other” charges that are not based on their costs and are not imposed on incumbent carriers.

*Id.*

155. *Yee*, 503 U.S. at 528.

156. *Id.* at 527.

157. *Id.* at 526-27.

158. *Munn v. Illinois*, 94 U.S. 113, 133 (1877).

159. *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

company, MTE owners would so decrease their property values as rental property as to effectively lose the right to act as a lessor of property. “[A] landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.”<sup>160</sup>

*Yee* holds, however, that *Loretto*’s bar on conditioning continued use on accepting an unconstitutional taking is not relevant to a regulatory takings analysis.<sup>161</sup> As in *Yee*, the landlord can avoid the access requirement and additional phone lines within the building by changing the building’s use—the commercial tenants reside in the building by invitation, not by government intervention.<sup>162</sup> The rule covers only MTEs that house commercial tenants; noncommercial buildings or single-tenant buildings would not be covered.<sup>163</sup>

However, due to market realities such as long-term leases and the low probability of a single tenant, MTE owners would be forced to comply long before finding a viable alternative use for their property. Therefore, it is likely that although a regulatory takings analysis is facially appropriate, the court would find that it essentially amounted to a physical taking that required compensation. This is especially true due to the Court’s strong aversion to allowing a physical taking, no matter how insignificant. This rule tracks the facts in *Loretto* too closely. The holding in that case is too uncompromising to make it likely that a court would allow the FCC to take property owners’ rights to physically exclude third parties without compensation. The court is likely to hold, as in *United States v. Causby*, that “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.”<sup>164</sup> In fact, the argument that a direct imposition of an access

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160. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). Cf. *Cable Holdings of Ga. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (“Congress does not have the constitutional power to authorize such a permanent physical occupation of an owner’s private property. That principle would seem to apply *even when* a property owner has privately allowed other occupations which are ‘compatible’ with a government-sanctioned invasion.”). Additionally, if the landlord receives compensation implicitly by adjusting the rent, the so-called takings may actually be compensated—assuming the additional services add value. See Thomas W. Merrill, 80 NW. U. L. REV. 1561 (1986); Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083 (1987).

161. *Yee*, 503 U.S. at 527.

162. *Id.* at 528.

163. *Promotion of Competitive Networks Report and Order*, *supra* note 7, paras. 15, 27.

164. 328 U.S. 256, 265 n.10 (1946) (citing *Butler v. Frontier Tel. Co.*, 79 N.E. 716, 718 (N.Y. 1906)).

requirement constitutes a per se taking is exactly the analysis accepted last year in one state court.<sup>165</sup>

If, however, the court chooses instead to analyze the rule under regulatory takings law, the outcome could be quite different. As noted, *Penn Central Transportation Co. v. New York City* defines the test for regulatory takings.<sup>166</sup> In this case, applying this test likely leads to the conclusion that the proposed rule does not constitute a taking.

In choosing to comply with the proposed rule, MTE owners can still recoup the “reasonable investment-backed expectations” they held upon determination to purchase a large office building—the addition of phone wires takes nothing from owners in terms of their ability to rent space. In fact, as long as the CLEC bore the costs of wiring and indemnified the process, the only real cost to the MTE owner would occur during construction due to potential inconvenience offset by the potential overall increase in value resulting from improved technological services. This is not a case where a regulation goes too far and “frustrate[s] distinct investment-backed expectations as to amount to a ‘taking.’”<sup>167</sup>

Furthermore, the government action will promote the important goal of increasing LEC competition, a goal Congress defined as serving the public interest. Unlike the clear case posed in physical takings, it is harder to demonstrate a taking “when interference [with property] arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>168</sup> It is assumed that good governance will require infringement upon property values at times, and that to require an absolute reckoning in all cases would be unreasonable.<sup>169</sup> In fact, the Supreme Court held that it is constitutional for a state actually to destroy “one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.”<sup>170</sup> It is rational for the FCC to promulgate a rule for the public’s benefit that incidentally subjects MTE owners to temporary inconvenience and minimal, if any, diminution of property value.

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165. *Greater Boston Real Estate Bd. v. Mass. Dept. of Telecomms. and Energy*, 24 Comm. Reg. (P & F) 462 (2001) (holding that a state regulation imposing a nondiscriminatory access requirement on MTEs was a physical rather than a regulatory occupation. The regulation, therefore, constituted a taking under *Loretto* analysis.).

166. 438 U.S. 104, 124 (1978) (creating the following test: owner’s reasonable investment-backed expectations, the nature of the government action, and the degree of diminution in property value).

167. *Penn Cent.*, 438 U.S. at 105.

168. *Id.* at 124.

169. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

170. *Penn Cent.*, 438 U.S. at 126 (quoting *Miller v. Schoene*, 276 U.S. 272, 279 (1928)).

Finally, the diminution of value in MTEs resulting from CLEC access would be minimal at best.<sup>171</sup> In *Penn Central*, the Court noted that besides the continuing ability of the Appellants to use the station for its historical purposes they also had been compensated for the loss of their airspace by transferable building rights.<sup>172</sup> This principle of average reciprocity may exist in the case of CLEC access to MTEs. The short-term losses to MTE owners may be offset by the increased attractiveness of their property to potential high-tech renters due to more choice and/or capacity.

However, the extraction doctrine may support finding a taking within the regulatory takings framework. *Dolan* held that “the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”<sup>173</sup> Thus, the Court held that if a nexus existed between the building permit and the city’s purpose the action would be constitutional. In *Dolan*, the Court found such a nexus.<sup>174</sup> However, *Dolan* added to *Nollan*’s reasonable nexus test a “rough proportionality” test.<sup>175</sup> The sacrifice required of the property owner must be reasonable given the government’s purpose.<sup>176</sup> In *Dolan*, city officials could have requested that the owner build a drainage system for the proposed parking lot, rather than asking for the property without showing why a public drainage system was preferable to a private one.<sup>177</sup> Furthermore, a showing that a bike path might reduce traffic does not prove that the proposed expansion would be responsible for the increase in traffic to such an extent as to warrant seizing her property.<sup>178</sup>

*Nollan* and *Dolan* together are inapplicable to the proposed rule because the rule compels MTE owners to provide the equivalent of an easement or greenway to CLECs without compensation. In *Dolan*, the Petitioner could build if she gave the city a greenway;<sup>179</sup> in *Nollan*, the Appellant could build if he granted a public easement.<sup>180</sup> Here, MTE owners may open access to ILEC services if they also allow CLECs access. The questions are whether a “reasonable nexus” and a “rough proportionality” exist between the access and the rule. It seems likely that

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171. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

172. *Penn Cent.*, 438 U.S. at 137.

173. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

174. *Id.* at 387-88.

175. *Id.* at 391.

176. *Id.* at 388.

177. *Id.* at 393-94.

178. *Id.* at 395.

179. *Id.* at 393.

180. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

the rule would meet the nexus test. The rule's purpose is to increase competition among LECs and it provides them the means with which to compete. The question of rough proportionality is more difficult. If the regulation actually will increase competition, then the minor imposition seems reasonable. However, if the access makes competition more likely or just feasible, the uncertainty of the result makes it less reasonable to impose on property rights. Furthermore, although commercial MTE owners are essential to the LEC market, are they so important as to warrant being singled out to bear the cost of this public benefit alone? Is this reasonable? The proposed FCC rule does not create a strong enough fact pattern to justify extending the *Nollan* and *Dolan* doctrines to situations where the potential plaintiffs have not sought a benefit from the government and the government has not granted such a benefit conditioned upon access to a portion of the plaintiff's property.<sup>181</sup>

*C. Alternatively, Whether the FCC May Prevent Multiple Tenant Environment Owners from Adhering to Discriminatory Policies Toward Local Exchange Carriers Indirectly Through Regulations Preventing Local Exchange Carriers from Contracting with Landlords Unwilling to Act in Accordance with the Pro-competition Spirit of the Telecommunications Act of 1996*

The alternative rule proposed by the FCC is an indirect regulation that would promote MTE owner compliance indirectly by barring LECs from engaging in business transactions with owners who chose not to allow CLECs nondiscriminatory access to their buildings.<sup>182</sup> Here, there is clearly no physical, or per se, taking. Furthermore, because in most cases the MTE owner is not the subject of the regulation, the case is inapplicable to traditional regulatory takings cases.<sup>183</sup> It is the LECs who are being regulated, not the MTE owners, except where the MTE owner is the service provider. Moreover, the FCC has found that the LECs will not suffer a taking under this rule because their property would not be occupied.<sup>184</sup>

Nonetheless, the court could choose to find a derivative taking.<sup>185</sup> Derivative takings are based on the premise that a direct taking from a third party also indirectly diminishes the property of another. Here, the unofficial

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181. *Id.*; *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

182. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 64.

183. *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

184. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 144.

185. *See* Bell & Parchomovsky, *supra* note 90 (arguing that derivative taking must follow either a physical or regulatory taking, but given the telecommunications fact pattern, the situation seems highly analogous).



taking from the ILECs also takes value from the MTE owner: the right to exclude, temporary decreases in value during the wiring process due to the construction, the loss of space, and so on. Although the ILEC regulation does not rise to the level of an unconstitutional taking, according to the FCC it does take away certain rights from these companies, such as contract rights and valuable rights of access to property. As a result of this sub-constitutional “taking,” a derivative taking forces the MTE owners to accept physical occupation—the very thing that likely would be unconstitutional if pursued directly.

Remember, however, in *Yee* the Court allowed a requirement to stand that forced mobile home park owners to accept undesired tenants who had purchased mobile homes from previously accepted tenants.<sup>186</sup> The Court noted that no one compelled the petitioners to rent their property to mobile home tenants. The landlord could, after all, change the use of their land upon proper notice.<sup>187</sup>

Yet, the *Yee* scenario is more closely analogous to situations already dealt with by the FCC, such as when CLECs install new equipment in a tenant’s apartment. As long as the FCC has statutory authority and the physical occupation is not a new occupation, the Commission can order property owners to allow the installation of telecommunications equipment.<sup>188</sup> Thus, if the CLEC is installing new equipment within apartments already under tenants’ control and is either sending signals via wireless devices or via ILECs’ lines, no taking has occurred.

Furthermore, the worrisome aspects of takings in general also exist in this context: The right to exclude is infringed upon and value is potentially lost.<sup>189</sup> Additionally, in a traditionally uncompensated derivative taking, the government is not forced to internalize the negative externalities of its actions—it is likely to take property even when the taking is inefficient.<sup>190</sup> Bell and Parchomovsky were able to demonstrate this in their recent article through an analysis of the *Lucas* case.<sup>191</sup> The government was willing to let

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186. See generally *Yee v. City of Escondido*, 503 U.S. 519 (1992).

187. *Id.* at 528.

188. Implementation of Section 207 of the Telecomms. Act of 1996, *Second Report and Order*, 13 F.C.C.R. 23874, paras. 12-15, 14 Comm. Reg. (P & F) 192 (1998) [hereinafter *Implementation of Section 207 Report and Order*] (stating that Section 207 of the 1996 Act grants the Commission the authority to force landlords to allow tenants to install over-the-air signal reception devices on property already occupied by the tenant).

189. Bell & Parchomovsky, *supra* note 90, at 288. According to the authors, Michelman “insisted that, at the very least, one of the costs to be taken into account is the demoralization that may result from the feeling of having been victimized by a government taking.” *Id.*

190. See generally POSNER, *supra* note 94.

191. Bell & Parchomovsky, *supra* note 90, at 292.

a private citizen bear the costs associated with preserving beachfront at a cost of \$425,000 per lot, but was unwilling to bear the cost of preservation itself at the lesser fee of \$77,500.<sup>192</sup> Efficient allocation of the property cannot be ensured because, without a formal determination of gains and losses, it cannot be determined whether the winners' gains outweigh the losers' losses.<sup>193</sup> Nor can it be determined whether the gains are worth paying for or if, at the very least, something like average reciprocity exists.<sup>194</sup>

There is case law to support the idea that this type of indirect regulatory approach would constitute a taking.<sup>195</sup> The Eleventh Circuit Court of Appeals noted in dicta that a regulation that indirectly forces a *Loretto*-style per se taking likely would be unconstitutional.<sup>196</sup> The case involved a district court's interpretation of a statute to allow cable companies to "piggyback" on existing lines because the property owner had already allowed other "compatible" occupations of his property.<sup>197</sup> The court based its concern on the fact that the MTE owners would be forced to submit to a *Loretto* taking or lose the services of the other utilities/service providers already serving tenants in the building.<sup>198</sup>

This scenario relates to the extraction doctrine of both *Nollan* and *Dolan* in that the regulation allows the government to seize private property for a public use by manipulating the choices of private property owners rather than by awarding appropriate compensation to the owners for their loss.<sup>199</sup> In effect, MTE owners are compelled to bear alone the cost of nascent LEC competition rather than spreading the burden of this public benefit among the general population.<sup>200</sup> It may be that the imposition and resultant loss in property value are too small to create a taking through such an attenuated argument—simple loss of economic rent is not a cost. But is it sound policy to manipulate the law to achieve what would otherwise be an unconstitutional outcome? This road will lead to the same problems that

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192. *Id.*

193. *Id.* at 291.

194. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

195. *Cable Holdings of Ga. Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 604-05 (11th Cir. 1992).

196. *Id.* at 605.

197. *Id.* at 601-02.

198. *Id.* at 605.

199. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

200. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that "[t]he Fifth Amendment's guarantee . . . 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").

the compensation clause attempts to address, such as infringement on property and demoralization of persons subject to the effects of this approach. Furthermore, will allowing the government and CLECs to avoid paying for the access they desire actually spur competition, or will it create an artificial market in which noncompetitive services are propped up via regulation? If a CLEC's service is competitive and beneficial to consumers, it should be able to access the market without the government mandating use of its services. Finally, practical considerations may make the constitutionality of the alternative rule unimportant: Can the FCC really enforce a rule that would cut off the phone service of thousands of businesses to force a few MTE owners into compliance?

#### IV. WHETHER EITHER OF THE PROPOSED RULES FURTHER THE UNDERLYING GOALS OF THE TELECOMMUNICATIONS ACT OF 1996 IN A MANNER PROVIDING JUSTIFICATION FOR GOVERNMENT-AUTHORIZED INTRUSIONS INTO PRIVATE PROPERTY

A goal of the 1996 Act and the proposed FCC rule is to enhance competition in telecommunications.<sup>201</sup> Congress intended that the Act be “pro-competitive and deregulatory.”<sup>202</sup> It is therefore puzzling that the means of achieving this goal is more regulation. It is true that established monopolies started out with an advantage, but this advantage is now lessened by the availability of unbundled services for resale, cable telecommunications services, and wireless services.<sup>203</sup> Forcing property owners to allow access to CLECs may amount to “well-placed regulatory dynamite [that] can certainly accelerate the [deregulatory] process” but may also amount to a new regulatory system standing between LECs and real competition.<sup>204</sup> Bypassing the need to compensate property owners for the loss of even small amounts of property enables the government and CLECs to ignore externalities and to act in ways that may be counterproductive to fully functional competition and future resource use. The FCC spent years fostering the old integrated phone system only to be

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201. HUBER ET AL., *supra* note 2, at 8.

202. Randolph J. May, *A Revolution that has yet to Occur: Why Deregulation Is The Only Solution for A Telecom Industry in Crisis*, FindLaw's Legal Commentary, at [http://writ.news.findlaw.com/commentary/20021003\\_may.html](http://writ.news.findlaw.com/commentary/20021003_may.html) (Oct. 3, 2002).

203. *Promotion of Competitive Networks Report and Order*, *supra* note 7, para. 11. *But see* T. Randolph Beard et. al., *Why ADCo? Why Now?: An Economic Exploration into the Future of Industry Structure for the “Last Mile” in Local Telecommunications Markets*, 54 FED. COMM. L.J. 421 (2002) (noting that because ILEC incentives have not been altered by the 1996 Act, the resale of unbundled services environment remains unsupportive of the effective CLEC competition).

204. HUBER ET AL., *supra* note 2, at 8-9.

forced to dismantle it in the name of competition. This new plan may be leading the FCC to a similar outcome.<sup>205</sup>

Given stated goals, the optimal approach is one that will encourage minimal regulation even during this transitional period while discouraging CLEC reliance on governmental policies for achieving a competitive market position. Finally, this approach avoids unnecessarily distressing property owners. These interests appear disparate. However, although complete satisfaction of all parties is unlikely, it should be possible to reasonably accommodate all three goals.

Market pressures in real estate will force owners eventually to allow CLECs access due to tenant demands—for example, not renewing leases or threatening to move. If tenants fail to request these services and to exert pressure on landlords, it may be that CLEC services are unattractive or neutral and that the construction required for laying new lines is more inconvenient than the CLECs are valuable. Promoting competition without regard for the actual relative values of the services offered is likely to result in an inefficient use of resources. It also is unlikely to spur research and development to create a superior telecommunications system that Congress envisioned when it called for deregulation. It is well accepted that businesses only internalize costs that translate into dollars. If access to a building is achievable at just the cost of actual wiring, and the CLECs are protected through regulation from any barriers that building owners or tenants might raise, CLECs are likely to wire buildings that result in a net loss for all involved.<sup>206</sup>

For example, if a building has 100 tenants, only twenty-five of whom desire a different LEC service, the MTE owner is likely to charge the CLEC an amount that will compensate the owner and the seventy-five tenants who would prefer no building construction and its resultant disruption to business. The CLEC then must set a price for services that will cover the higher access costs and the twenty-five potential customers must determine if the service is worthwhile at that price. The CLEC will only go forward if the value to the customers is equal to or greater than the loss suffered by the non-customer portion of the building. If, on the other hand, CLECs are given access without compensation or negotiation, they will go ahead and wire the building as long as the return from twenty-five customers outweighs the baseline nondiscriminatory access fee and the cost of wiring. They will not be forced to consider the additional cost to the remaining residents and to the owner of the building, and inefficient results are likely to occur.

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205. *Id.* at 8.

206. Levinson, *supra* note 99, at 354.

One could respond that a forced adherence to the *Loretto* rule<sup>207</sup> is inefficient and that bypassing it by constructing rules to regulate indirectly, such as the alternative FCC rule, is the most effective way in which to proceed. Otherwise, a policy of forcing companies into negotiations with MTE owners and into hearings over the miniscule spaces that telephone companies require to wire buildings would become an overwhelmingly inhibitive barrier to CLECs. Case-by-case approaches may be acceptable on a small scale but as more and more businesses require access to advanced technology and more companies enter into competition, the transaction costs of resolving individually each small takings/access issue may far outweigh the end value transfer. However, this argument presumes that MTE owners will never voluntarily request that a CLEC rewire a building due to the desirability of the service being offered. If the CLECs produce a valuable product, negotiating access will not remain fraught with contention and costs.

It may appear that no regulation at all would be the best alternative. However, it is clear that the long monopoly status of ILECs and their current near-monopoly on facilities-based services in MTEs does give them an advantage, especially when combined with MTE owner resistance to CLECs. The proposed rule requiring nondiscriminatory access is likely to help CLECs overcome MTE owners' self-interest, if they operate their own system, or merely inertia. It is the attempt to avoid a compensation requirement that is problematic. Without compensation, MTE owners are likely to feel resentment—which could translate into political pressure that could endanger the program altogether. CLECs are likely to wire buildings at an inefficient level, and are less likely to develop truly competitive services, and the government, which unlike businesses, is able to internalize purely social externalities, is likely either to ditch the effort or to promulgate new rules to address the problems created by the old.<sup>208</sup> However, although compensation usually is beneficial whenever rights are taken from property owners, asking the government to pay would not achieve the desired results. The government's behavior is not likely to be influenced, at least in any predictable way, from being required to pay.<sup>209</sup> Furthermore, because government is already responsive to political pressures, other methods of deterring or encouraging different levels of regulation are available besides a costly individualized approach to the development of CLEC facility-based services in MTEs.

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207. The *Loretto* rule states that a physical occupation, no matter how small, is held to be a taking. See *infra* Part III.B.

208. Levinson, *supra* note 99, at 357.

209. *Id.*

Compensation will further regulatory goals if CLECs are required to provide it to MTE owners. This allows CLECs to overcome unreasonable barriers created by MTE owners through the nondiscriminatory access requirement in a way that will help them move into a market dominated by powerful, erstwhile monopolies. However, the extra compensation requirement will force them to internalize the fact that their services are not always desired. The actual payment may be minimal, but the process itself will force CLECs to at least acknowledge the MTE owners' position, and thus will encourage them to develop competitive strategies in an effort to cause MTE owners to waive the compensation. Rather than becoming reliant on regulatory access, a compensation requirement borne by CLECs will facilitate movement toward a truly negotiation-based and competitive system.

The alternative proposed rule may avoid the compensation requirement of a *Loretto*-style taking, but it is not the better choice; given the goals driving this rulemaking process and more practical considerations. The emphasis set on physical space as opposed to actual value has played a role in the inequitable results of regulatory takings in which up to 99% of a property's value can be decimated, but, because it is still 100% physically owned, no taking is found. At least in the area of advanced technologies, including telecommunications, this framework for takings is archaic and leads to irrational and arbitrary results—such as recovery of one dollar in *Loretto* but no recovery in *Penn Central*, despite a multimillion-dollar loss.<sup>210</sup> In the long run, this artificial absence of real valuation and supply-and-demand economics is unlikely to lead to a valid system of competition.

Furthermore, this approach is out of step with modern views on property. It is no longer viewed as a physicality but rather a more malleable legal construct, an “almost infinitely divisible [bundle of] rights.”<sup>211</sup> The old emphasis on physical space has led to odd results.<sup>212</sup> For example, in *Causby*, property owners directly under a flight path were compensated whereas those who owned adjacent property were not:<sup>213</sup> “[E]ntrance into protected airspace, not the disturbance it generated, forms the gist of the government wrong.”<sup>214</sup> But, the disturbance, not the use of airspace, was the problem and the decision created a situation where a group of homeowners

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210. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

211. *Bell & Parchomovsky*, *supra* note 90, at 286.

212. *See United States v. Causby*, 328 U.S. 256 (1946).

213. *Id.*

214. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 50 (1985) (commenting on the *Causby* Court's reasoning).

who had all suffered the same loss was divided into those who would receive compensation and those who would receive nothing.<sup>215</sup> Not only is this unfair and likely to demoralize the population directly involved, but it is inefficient.<sup>216</sup> In ignoring real losses, the government fails to account for an important variable before determining whether the taking is efficient—”a taking is justified only if the net gains to the winners outweigh the net costs to the losers.”<sup>217</sup> If the people suffering less tangible or more minimal invasions form a large enough group, a taking that looked efficient under current doctrine may really amount to a societal net loss.

Finally, the FCC is unlikely to adopt the alternative rule for more political reasons; even if it does choose to adopt that rule, the Commission is unlikely to engage in vigorous enforcement. The government may act unpredictably when monetary factors alone are at issue, but it reacts more predictably when the pressure is political and judicial. Adopting the alternative rule would create discontent in MTE owners and other real estate entities, and would lead to more lobbying of the FCC and Congress. More importantly, upon MTE resistance and attempted enforcement, prohibiting any LEC from providing services would almost certainly lead to legal action by businesses renting space in MTEs. It is highly unlikely that any business would agree to shoulder the cost of opening up the market for CLECs with revenue and goodwill losses caused by losing their phone service altogether. Even short-term cuts in phone services are critical in certain industries.

Forcing CLECs to enter into the market without any protection may lead to a detrimental level of failures, but it is also more likely to spur real innovation and development of technology. By promulgating the first proposed rule, while requiring CLECs to bear the burden of compensating MTE owners for the taking, the rule passes constitutional muster; prevents unduly anticompetitive behavior by MTE owners without raising fairness concerns; and forces CLECs to internalize the transaction costs of forced access. Forcing this internalization will lead to high short-term transaction costs but, over time, will prompt CLECs to improve their services through technological innovation and marketing strategies, in order to reduce the barrier created by the takings compensation process. The MTE owners themselves will drop the barrier when the CLECs begin offering competitive services that are more desirable to MTEs than either ILEC services or their own private system. Some valuation must be allowed for if

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215. *Causby*, 328 U.S. at 265.

216. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1215 (1967).

217. Bell & Parchomovsky, *supra* note 90, at 290.

this intermediate regulatory system is to lead to free competition rather than to another government-backed phone system.

## V. CONCLUSION

This Note examined the application of takings law to the FCC's proposed MTE access rules. This Note first reviewed the 1996 Act and identified how the proposed rules might encounter legal as well as political opposition. The proposed rules potentially constitute takings and thus may require compensation—keeping in mind that compensation is not necessarily a bad thing.<sup>218</sup> Second, this Note examined the proposed FCC rules either requiring that MTEs allow nondiscriminatory access to their buildings or, alternatively, preventing LECs from contracting with landlords unwilling to “voluntarily” allow LECs nondiscriminatory access. Through an analysis of both proposals it is clear that either rule is likely to receive similar treatment in a court. Although the second proposed rule is facially within the scope of FCC authority and avoids direct regulation of MTEs, it effectively leverages the FCC's unquestioned authority over LECs into an unregulated area. This expansion of the FCC's authority may not be legitimate, at least without some sort of essential facility analysis of MTEs that provides proof that MTEs are essential both to the CLECs' ability to enter the market and to maintaining a competitive market overall. If it is a legitimate exercise of authority, however, it is effectually a taking and should be analyzed as such by the court. Therefore, either both proposed rules constitute takings or both do not. The question is whether a physical, regulatory or derivative takings analysis is applicable.

This Note concludes that it is unlikely a court will find that either rule authorizes actions classified as takings. The first proposal, which requires nondiscriminatory access, although potentially subject to a physical takings analysis similar to *Loretto*, seems more amenable to a regulatory analysis under *Nollan* and *Dolan*. Under this approach, unless it can be demonstrated that access requirements will not increase competition, the rule should pass the “reasonable nexus” and “rough proportionality” tests and be held constitutional.<sup>219</sup>

The alternative proposal, to achieve nondiscriminatory access by prohibiting LECs from contracting with discriminatory MTEs, poses a

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218. Compensation requirements prevent the government from overusing its Fifth Amendment power to take property and, if placed on CLECs, a compensation obligation will spread service development costs among those consumers who desire the new service rather than placing the burden on one small group—MTEs.

219. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).



muddier question. It is not a traditional regulatory takings issue because the MTE owner is not subject to the pertinent regulation. As noted above, however, in effect the results of the alternative proposal are identical to those of the first proposed rule. Therefore, a court could approach the rule through a derivative takings analysis. However, the court is likely to find that the rule is reasonably related to a legitimate purpose and that the costs, if any, are proportional to the benefits. Consequently, either proposal is likely to withstand a constitutional challenge.

The proposals, however, remain fundamentally flawed in two respects. First, if successful, this rule will allow CLECs, contrary to public policy, to rely on regulation and government backing rather than becoming consumer driven and innovative, thus frustrating the purpose behind the rule. If the goal is competition, the regulations already in place require only minimal modification to provide CLECs with adequate entry points into the market. Commercial tenants are not without resources and are capable of exerting pressure on MTE owners if a desired service is valuable to them. CLECs should be capable of developing marketable services, and if they are not, artificially propping up the CLEC will only overburden the market with a glut of unnecessary services and lower profitability in the industry. This will prolong the CLEC's inevitable demise while further entrenching the government in the regulation business.

Second, the rules are not practicably enforceable. To compel compliance, the FCC would be forced to block all phone service to noncompliant MTEs, an action certain to inspire massive objections in the form of lobbying and lawsuits by commercial tenants, many of whom are powerful in their own right. It is therefore questionable whether the rules, if passed, will be of any real consequence regarding LEC competition. The rules will, however, be of more general consequence due to the fact that either rule increases regulation of the industry contrary to the 1996 Act's mandate. In addition, the alternative proposal actually extends FCC regulatory power beyond the telecommunications industry. Therefore, if implemented, neither rule will produce the desired outcome, nor will either rule further our current public policy goals under the 1996 Act.