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TESTIMONY OF STEVEN J. EAGLE

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HEARING BEFORE THE

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION

ON

PRIVATE PROPERTY RIGHTS

AND TELECOMMUNICATIONS POLICY

MARCH 21, 2000

Mr. Chairman, distinguished members of the Subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University, in Arlington, Virginia.

I testify today solely in my own behalf, as a teacher of property and constitutional law whose principal interest is the study of the constitutionality of government regulation of private property rights. I am the author of a treatise entitled *Regulatory Takings* and write extensively on property rights for scholars and the general public. I also lecture at programs for lawyers and judges and serve as vice chair of the Land Use Committee of the American Bar Association. I thank the subcommittee for giving me this opportunity to appear.

Summary of Testimony

New federal statutes or regulations may attempt to increase competition in the telecommunications industry by requiring landlords to accept the presence of communications carriers other than ones they choose to invite. These carriers may install equipment serving individual tenants in common areas or other landlord-controlled parts of the building. However, such forced access would result in a permanent physical occupation of the landlord's property. This would violate the Takings Clause of the Fifth Amendment unless just compensation was paid, under the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982). Neither subsequent cases nor factual distinctions justify a departure from the *Loretto* just compensation requirement.

Background

As members of the Subcommittee know, innovations in technology and an enhanced understanding of the benefits of competition have led to a substantial change in the assumptions underlying federal telecommunications policy. Our focus has changed from close regulation of one dominant wireline carrier to facilitation of competition involving local telephone exchange companies (LECs), competitive access providers (CAPs), and long-distance interexchange carriers (IXCs). Much of this competition involves wireless transmission, although wireline communications will continue to have an important role.

The competition of telecommunications companies to serve owner-occupied buildings has no particular effects on private property. However, attempts to enhance competition in serving customers located in multiple tenant environments (MTEs), such as apartment and office buildings, may well have a substantial effect on the property rights of building owners. Last summer the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking and Notice of Inquiry, considering and inviting comment on ways it could facilitate competition to local wireline services by giving wireless service providers greater access to, among other things, potential customers in multiple tenant buildings. "Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking," FCC 99-141 (rel. July 7, 1999).

While it is important that administrative agencies consider the property rights in this context, I respectfully submit that it is the responsibility of the Congress, in the first instance, to ensure that federal telecommunications policy adequately protects property rights.

Scope of Testimony

My testimony relates to the issue of whether a requirement that building owners suffer mandated physical access to premises under their control by uninvited telecommunications carriers violates the Takings Clause of the Firth Amendment of the Constitution. I conclude that such forced occupation *would* violate the Takings Clause and would trigger the constitutional mandate for just compensation.

I do not contest that the federal government has the power to impose forced access, given its affirmative power under the Commerce Clause. Whether that power has been delegated to the Federal Communications Commission, whether the use of such power ultimately would help or hinder the development of technology, and whether forced access ultimately would benefit building tenants all are issues beyond the scope of my testimony. I respectfully suggest, however, that in considering these matters, Congress give significant attention to the difficult and complex issues of ascertaining just compensation that this new regime of Constitutional takings would generate.

Takings Jurisprudence

Constitutional background

The Takings Clause of the Fifth Amendment imposes the following mandate upon the federal government: "[N]or shall private property be taken for public use, except upon just compensation." For more than a century this mandate has been imposed on the states as well, under the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

The Supreme Court uses three types of tests to determine if statutes and regulations constitute takings. The first and most general test, enunciated by Justice Brennan in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), requires courts to make ad hoc decisions. They must treat three factors with "particular significance." *Id.* at 124. The first two are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* The third factor is "the character of the governmental action." *Id.* The Court explained that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal citation omitted). Under the *Penn Central* test, courts generally have deferred to government. Given that deprivations caused by forced access would generally be mild in the context of building owners entire enterprises, it is unlikely forced access would be found a taking by a court making an ad hoc determination using the multiple factors noted in *Penn Central*.

The Supreme Court also has developed two categorical tests for determining whether a taking has occurred. The first, stated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), finds a taking when a regulation deprives the owner of "all economically beneficial or productive use of land." *Id*. at 1015. That test clearly is inapposite here.

- **Permanent physical occupations are categorical takings under *Loretto***

The other categorical test was developed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto* presented the issue of "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.* at

421. New York law had required that landlords permit cable television companies to install cable equipment on their buildings. Mrs. Loretto objected to a cable company installation on her small apartment house of 36 feet of one-half inch coaxial cable and two switchboxes, all amounting to about one and one half cubic feet, on her premises. The New York Court of Appeals upheld the regulation under a *Penn Central* balancing test. 423 N.E.2d 320 (N.Y. 1981). The Supreme Court disagreed, declaring: "Because we conclude that such a physical occupation of property is a taking, we reverse." 458 U.S. at 421.

The Court explained why even a minor permanent invasion constitutes a taking:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, 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. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. 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. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property. *Id.* at 435-436 (internal citations and footnotes omitted).

Mandated access constitutes a categorical taking unless an exception to *Loretto* applies.

In considering the takings issue, I respectfully submit that the Subcommittee must determine whether there is a principled basis to distinguish the mandatory access to premises controlled by building owners sought by telecommunications companies from other types of regulations that trigger application of the categorical compensation requirement of *Loretto.*

- **Statutory rights of access imposed under the Commerce Clause may not thereby avoid scrutiny under the Takings Clause.**

The fact that Congress may regulate private property under the Commerce Clause does not permit it to vitiate an owner's rights protected by the Takings Clause. While Congress might conclude correctly that commerce would be facilitated if property belonging to *A* were transferred to *B*, or if *C* were authorized to erect permanent structures on the lands of *D*, regulations implementing those conclusions undeniably would be takings. The Takings Clause is not designed to preclude impermissible governmental actions. To the contrary, it is designed to harmonize the permissible—perhaps even laudatory—exercise of governmental powers with the right of individuals to be secure in their property. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Those seeking statutory authority for the imposition of mandatory access requirements therefore have the burden of demonstrating not merely that such regulation would be appropriate under the Commerce Clause, but also that it passes muster under the Takings Clause. In order to accomplish the latter task, either an effective mechanism for compensation must be put in place or the categorical rule of *Loretto* that a permanent physical occupation constitutes a taking must be distinguished.

- **Regulations may change the terms of a property owner's contract with an existing business invitee.**

Where a property owner has permitted another to occupy his land or building, government may regulate the economic terms of the relationship under the Supreme Court's current view of the Takings Clause. Under this theory, the Supreme Court long has held rent control to be constitutional. See, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944).

Another application of this same principle is *FCC v. Florida Power*, 480 U.S. 245 (1987). The Court there upheld the Pole Attachments Act (1978), codified at 47 U.S.C. § 224. That law pro-

vided that utility companies *choosing* to provide cable companies with access to their facilities had to limit their charges to amounts consistent with FCC regulation. Central to the Court's holding that the Act did not work a physical taking was one crucial distinction between it and the regulation in *Loretto*:

> [W]hile 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. …
>
> Th[e] element of required acquiescence is at the heart of the concept of occupation. … Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates … *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license. … *Id.* at 252-253.

- **The Supreme Court's decision in *Yee*.**

In 1992, the Supreme Court decided *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Yee* addressed a narrow issue: Did a local rent control ordinance, within the context of the California Mobilehome Residency Law, amount to physical occupation of their property allowing mobile home park owners to compensation under the Takings Clause?

The Court took the case in order to resolve the direct conflict between the U. S. Court of Appeals for the Ninth Circuit's decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), which found a taking, and the California Court of Appeal in *Yee*, which did not. Judge Alex Kozinski noted in *Hall* that the state Mobilehome Residency Law forbade the park owner from requiring that a departing tenant take his mobile home with him at the same time that the local rent control ordinance would ensure a prospective new tenant a below-market mobile home pad rent. At the same time, the prospective tenant would be negotiating the purchase price for the mobile home itself.

Judge Kozinski reasoned that a physical taking resulted:

> [B]ecause of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when

> he sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. *Id.* at 1276-77.

The Supreme Court in *Yee* rejected the theory that capitalization of the rent control premium resulted in a physical taking: "The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case, but the existence of the transfer in itself does not convert regulation into physical invasion." 503 U.S. at 529-530 (internal citation omitted).

It is clear from *Yee* and also from *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding public accommodations provisions of the Civil Rights Act of 1954 under the Commerce Clause), that under some circumstances government may mandate the use or occupation of private property by individuals who never obtained the owners' consent. Does that principle extend to access to structures by telecommunications companies?

- **Courts of Appeals have been unwilling to exempt uninvited communications companies from the categorical takings rule of *Loretto*.**

The two leading cases on the application of *Loretto* to mandatory access by uninvited carriers make it clear that the Courts of Appeals do not regard Commerce Clause mandates for nondiscriminatory assess as precluding Takings Clause review. They also make clear that the occupation of premises or structures by competing carriers violates the Takings Clause unless just compensation is paid.

In *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the FCC had ordered local exchange companies to set aside portions of their central offices for occupation and use by competitive access providers. The FCC asserted that it had authority under the Communications Act of 1934 to order this co-location. Courts normally defer to an agency's interpretation of its governing statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, however, the Court of Appeals for the District of Columbia Circuit refused to accord *Chevron* deference, explaining that "statutes will be construed to defeat administrative orders that raise substantial constitutional questions." The court found that the FCC's decision "directly implicates the Just Com-

pensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" 24 F.3d at 1245, quoting *Loretto*, 458 U.S. at 426.

The Takings Clause does not prohibit takings for which just compensation is paid and a building owner aggrieved by forced access would have a claim for compensation under the Tucker Act, 28 U.S.C. § 1491. Strictly speaking, therefore, an FCC ruling that failed to provide compensation would not *ipso facto* raise a substantial constitutional question. Nevertheless, the court set aside the FCC's co-location order. Its justification for doing so was the Supreme Court's opinion in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In its invocation of *Riverside Bayview*, the Federal Circuit recognized a principle of judicial review of agency decisionmaking made a substantive determination on the merits of the FCC's contention:

> But precedent instructs that the policy of avoidance should nonetheless take effect when "there is an identifiable class of cases in which application of a statute will *necessarily constitute a taking*." 24 F.3d at 1245, quoting 474 U.S. at 128 n. 5 (emphasis added).

The other leading case is *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999). This case revisited the Pole Attachments Act of 1978, which, as noted earlier, had been sustained in the face of a physical takings challenge in *FCC v. Florida Power*, 480 U.S. 245 (1987). In 1996, however, the Pole Attachments Act was amended so as to require that a "utility *shall* provide a … communications carrier with nondiscriminatory access…." 47 U.S.C. § 224(f)(1) (emphasis added). The U. S. Court of Appeals for the Eleventh Circuit noted that *Florida Power* explicitly had left undecided "what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection to enter into … pole attachment agreements." 187 F.3d at 1329, quoting 480 U.S. at 251-252 n. 6 (brackets in original).

In its consideration of the merits, the court found that in *Florida Power* the voluntary nature of the agreement by utility companies to permit cable company occupation of their property was determinative.

> In reaching that result, the Supreme Court stressed that unlike the statute in *Loretto* where the landlord was required to submit to permanent, physical occupation, the pre-1996 version of the Act did not require a utility to give a third party access to its property. Without the "element of required acquiescence," there was no taking under *Loretto*. 187 F.3d at 1329, quoting *Florida Power*, 480 U.S. at 252.

Given the Supreme Court's observations in *Florida Power* that "it is the invitation, not the rent, that makes the difference," and that "[t]he line which separates … *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license," *Id.* at 252-253, I view *Gulf Power* as correctly decided.

Other issues bearing upon the application of *Loretto* in the "multiple tenant environment" context.

- **Are landlords burdened with an obligation of nondiscriminatory access by dint of the regulated nature of their industry and the fact that telecommunications services are increasingly valuable to tenants and to society as a whole?**

A variant of this argument was raised in *Loretto* itself, with regard to the importance of access to educational television for the often low- and moderate-income residents of multiple family housing. A similar public benefit argument was made in *Gulf Power*, with regard to the "partly public" status of public utilities. In both cases, the answer is the same:

> That argument fails because it ignores the *Loretto* rule that "[a] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Gulf Power*, 187 F.3d at 1330, quoting *Loretto*, 458 U.S. at 426.

In fact, *Loretto* had noted and rejected the notion that one utility might occupy the land belonging to another without having to pay compensation. 458 U.S. at 429-430 (discussing approvingly the holding that a telegraph company could not operate lines over a railroad's right of way without compensation in *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904)).

The "character" of a government regulation is one factor that courts must consider in determining whether the regulation works a taking of property under the Supreme Court's ad hoc balancing test

of *Penn Central*. What distinguishes *Loretto* is that it is not a balancing test—it is a categorical test holding that permanent physical occupation is so akin to a taking that the Court will not inquire further.

In any event, of course, office and residential buildings in no way constitute natural monopolies and the level of regulation imposed upon them is vastly less pervasive. Furthermore, owners do not receive the types of public benefits, including the right of eminent domain and protection from competition, that have been enjoyed by regulated utilities.

- **"Would constitutional problems be mitigated if a requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property, if it enabled a property owner to obtain from a new entrant the same compensation that it has voluntarily agreed to accept from an incumbent LEC …?"**

This question is posed by the FCC, in its "Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking," FCC 99-141, para. 60 (rel. July 7, 1999). It raises by inference an array of constitutional doctrines, most of which are not relevant to the permanent physical occupation categorical takings test of *Loretto* and none of which provide a basis for distinguishing mandatory access for telecommunications companies from *Loretto*'s categorical application.

"Mitigation" is a concept introduced by Justice Brennan in *Penn Central*. It refers to a *quid pro quo* from the government imposing the regulation. As Brennan put it, rights so conferred are not compensation, but "nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137. There are two problems with employing the concept of mitigation here. The first is that governmental forbearance from making a regulation more harsh is not a quid pro quo. Second, and more fundamental, mitigation reduces the economic impact of a regulation on the property owner, which gets to the *Penn Central* balancing test. It has nothing to do with the *Loretto* categorical test.

The idea that regulations might be "tailored" to ensure constitutionality invokes the concept that laws impinging upon a fundamental personal right will be given strict judicial scrutiny to determine that

they are narrowly tailored to a compelling or substantial governmental interest. Again, this concept plays no part in takings determinations under *Loretto.*

The notion that the owner be forced to accept CAPs on the same terms as LECs builds upon the notion that, having voluntarily invited LECs onto their property, owners have created a physical occupation. Government may now regulate that existing occupation by inviting other telecommunications on the same terms as the owner already has accepted.

There are several problems with this approach.

First, *Loretto* simply does not distinguish between "initial" and "subsequent" physical occupations. However, it did discuss "permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires [that] occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." 458 U.S. at 430. These, "relying on the character of a physical occupation" "are takings." *Id.* (citing cases). The fact that a subsequent involuntary occupation may result in little interference with an owner's property beyond that produced by the initial voluntary occupation may reduce the economic impact of the regulation under *Penn Central* but it does not change the regulation's character as a permanent physical occupation under *Loretto.*

To the extent that *Yee v. City of Escondido* and *Heart of Atlanta Motel, Inc. v. United States* might be asserted to depart from this analysis, it is important to note the particular property rights that those cases do and do not implicate.

In *Yee*, the state and city had established regulations ensuring the ability of a mobile home owner to sell his home and of the buyer to enjoy the protection of rent control, respectively. The state was not even a party to the litigation. In this context, the Court held that the assignment of the sitting tenant's contractual rights to occupancy to a successor did not constitute a physical taking. There was no new interest in land created.

In *Heart of Atlanta,* the Court held that the public accommodations provisions of the Civil Rights Act of 1954 are valid under the Commerce Clause. 379 U.S. at 261. This does not preclude a takings analysis, and there are at least two distinctive aspects of the hotel occupancy that greatly weaken the use of *Heart of Atlanta* as precedent for the proposition that government can force landlords to accommodate all telecommunications carriers who want admission. First, given the dangers of travel in medieval England and the scarcity of lodgings, the common law required that innkeepers accommodate all unobjectionable persons for whom they had room. This requirement had been maintained in the laws of every state, a proposition for which *Heart of Atlanta* cited the Court's 1883 opinion in *The Civil Rights Cases*. 379 U.S. at 260, citing 109 U.S. 3, 25 (1883). While customarily viewed through the lens of civil rights law, the nondiscrimination requirement in *Heart of Atlanta* might be viewed as an element of the "background principles" limiting an owner's property rights. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (asserting in dicta that owners have no takings claim with respect to iterations of "restrictions that background principles of the State's law of property and nuisance already place upon land ownership"). In addition, the right to occupy a hotel room for a night generally is considered a license and does not include a right to exclude members of the hotel cleaning and maintenance staff. It is certainly not a "permanent physical occupation" as described in *Loretto.*

More generally, anti-discrimination provisions of civil rights law seek to vindicate the ability of classes that systematically had been excluded from the real estate market to freely purchase and sell real property. As such, they vindicate the right of alienation and also might be thought of as inhering in the property right itself. *See, e.g.*, 1 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 29.02 n.83 (David A. Thomas ed., 1994) (citing Coke on Littleton, 201 b. 2 WILLIAM BLACKSTONE, COMMENTARIES ch. 7).

Given that access to modern telecommunications at a reasonable price is of prime importance to many tenants, there is a substantial disincentive for landlords to limit choices arbitrarily or to impose high fees on access the incidence of which ultimately will fall on tenants. Certainly there is no history of regulatory relief from possible systematic discrimination against telecommunications companies that remotely could be considered to inhere in the law of property and thus possibly vitiate landlords' takings claims.

It is, of course, up to the Congress to decide if the benefits of mandatory access legislation outweigh the costs. The arguments just considered, however, do not support the assertion that the cost and complexities of providing just compensation might be avoided.

Conclusion

Given the clarity of the Supreme Court's "permanent physical invasion" standard in *Loretto v. Teleprompter Manhattan CATV Corp.*, the interpretation given *Loretto* in *Bell Atlantic* and *Gulf Power*, and the lack of any persuasive rational to distinguish those cases in the matter of mandatory access to buildings for telecommunications companies, I conclude that such forced access would constitute a physical taking and require just compensation.

Appendix

Pursuant to the disclosure requirements for nongovernmental witnesses of House Rule XI, clause 2(g)(4), I state that I have not received a federal grant, contract or subcontract in the current and preceding two fiscal years. I appear only in my personal capacity as a scholar of takings law and I do not represent any entity at this hearing. I have received no remuneration or reimbursement of expenses for my testimony.

My curriculum vita, which also must be appended to my testimony under the Rule, begins on the next page.

[C. V. Omitted]