Study Em-451 November 18, 1999

Memorandum 99-86

Condemnation by Privately Owned Public Utility (Status of Study)

At the October 1999 meeting the Commission decided to defer work on the telecommunications access issue and to revisit the matter at the November meeting. The additional time would allow interested parties a further opportunity to work out issues in connection with AB 651 (Wright) before we decide whether to reactivate our study.

SIGNIFICANT DEVELOPMENTS

To the staff's mind, there are three significant legal developments that bear on this decision — the enactment of SB 177 (Peace & Burton), the status of AB 651 (Wright), and the opening of a Federal Communications Commission inquiry (WT Docket No. 99-217).

SB 177 (Peace & Burton) — Limitation on Public Utility Condemnation Authority

SB 177 (Peace & Burton) has been enacted as 1999 Cal. Stat. ch. 774. It prohibits condemnation by a public utility for competitive purposes unless the Public Utilities Commission makes a finding, after a local public hearing, that the condemnation would serve the public interest. Pub. Util. Code § 625. This is analogous to the Law Revision Commission's initial proposal in this area — to subject condemnation by a privately owned public utility to the regulatory authority of the Public Utilities Commission.

AB 651 (Wright) — Administrative Procedure for Access to Buildings

AB 651 (Wright) has passed the Assembly and is awaiting action in the Senate. The bill has stalled over issues involving compensation to the building owner for the telecommunication provider's occupancy of space in the building. The bill adopts a Connecticut-style administrative approach to telecommunications access to multiple-occupant structures, similar to the approach the Law Revision Commission has worked on in the past.

WT Docket No. 99-217 — Federal Communications Commission Inquiry

The FCC has opened an inquiry into whether a building owner who allows a telecommunications provider access to the premises should be required to make comparable access available to all telecommunications providers on a nondiscriminatory basis. In this connection, the FCC notes that several states have enacted legislation or taken regulatory action on this issue, citing the Connecticut statute among others. The inquiry also requests comment on the constitutional and statutory issues that would be raised by such a requirement.

> In addition to continuing to work with State and local governments, industry, and building owners, we seek comment here on the necessity and prospects for adopting a national nondiscriminatory access requirement. If we were to consider such a national requirement, we seek comment on how it could be tailored to ensure that consumers in all parts of the country will in fact have a choice of competitive service providers without infringing on the rights of property owners and the authority of other regulating jurisdictions.

An extract of the FCC document is attached as Exhibit pp. 1-7.

The FCC inquiry deals with a number of related telecommunications access issues, but this is the most controversial of them. In fact, several FCC Commissioners have dissented on this aspect of the inquiry, raising questions of the FCC's statutory authority as well as constitutional issues concerning regulatory taking of building owners' property and the right to compensation.

Discussions we have had with FCC staff indicate that their resolution of this inquiry will likely occur in spring of 2000.

STAFF RECOMMENDATION

The question here is whether the Law Revision Commission can bring any additional value to the process at this point. We have held off further involvement in light of the prospect that the interested parties would be able to make progress resolving their issues.

We are informed that the Building Owners and Managers Association takes the position that it is preferable to await the outcome of the FCC inquiry before engaging in further activity on this matter. We do not know what Assemblyman Wright's present position is; our most recent information is that he believes the Law Revision Commission can make a useful contribution to resolving the issues.

The staff is skeptical of the value of continuing Law Revision Commission study of this matter.

The main problem we set out to address — inappropriate exercise of eminent domain authority by privately owned public utilities in a deregulated competitive environment — has been addressed in SB 177. The staff thinks this legislative solution is generally sound (it is based in part on the Commission's work), and we see no need for further study of that issue.

The alternative approach being explored by the Commission — a Connecticut-type administrative access provision — is currently under legislative consideration in connection with AB 651. The issues have been joined and are before the Legislature. The sticking point is the fundamental question of compensation, not the details of the access procedure. The staff questions whether the Commission has anything further useful to contribute at this point on what appears to be primarily a political issue.

In any event, the ongoing FCC inquiry raises the question whether the Commission would be well-advised to devote further time to this study at present. An FCC action could well preempt anything we do here. Simply as a matter of conservation of Commission resources, it appears to the staff preferable to let the matter rest.

Given this constellation of circumstances, the staff recommends that the Commission continue its suspension of work on this study.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

any additional rules should be adopted, to avoid these problems.[122] We also seek comment regarding how this network element should be defined, whether any other facilities controlled by incumbent LECs within multiple tenant environments should be included, whether and to what extent these facilities must be unbundled from each other, and any other issues relating to the implementation of this potential requirement. For example, commenters may wish to address whether, in addition to or instead of the network unbundling obligation discussed above, we should require incumbent LECs to permit unbundled access to a remote terminal or other point outside the walls of a multiple tenant building. Commenters should consider to what extent alternative proposals would satisfy the needs of all classes of competing providers.[123]

4. Nondiscriminatory Access to Facilities Controlled by the Premises Owner.

52. The potential actions discussed above under sections 224 and 251(c)(3) would help ensure that utilities, including LECs, provide competitive telecommunications carriers with reasonable and nondiscriminatory access to rights-of-way and facilities in multiple tenant premises that they own or control. These provisions, however, do not provide access to areas or facilities controlled by the premises owner.[124] In the *Inside Wiring Report and Order and Second Further NPRM*, we observed that nondiscriminatory access to facilities for video and telephony service providers would enhance competition.[125] We declined, however, to adopt a Federal mandatory access requirement, finding that the record in that proceeding did not provide a sufficient basis for addressing the issues.[126]

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[122] If radiofrequency signals are applied to the wiring, the systems must comply with the standards contained in Part 15 of the Commission's rules. See 47 C.F.R. Part 15, esp. §§ 15.107 and 15.109(e).

[123] We note that the issue of whether to unbundle facilities owned by the incumbent LEC on the end user's side of the network demarcation point under section 251(c)(3) is pending in the *UNE Further NPRM*, FCC 99-70. To the extent commenters have previously addressed the unbundling of in-building cable and wiring in their Comments and Reply Comments on the *UNE Further NPRM*, they may incorporate those pleadings by reference in this proceeding. Commenters should supplement these pleadings as appropriate to address the more specific questions posed herein. We note that the issue of whether to unbundle facilities owned by the incumbent LEC on the end user's side of the network demarcation point under section 251(c)(3) is pending in the *UNE Further NPRM*, FCC 99-70.

[124] We note that we are considering in another proceeding certain issues relating to the determination of the demarcation point between facilities controlled by the telephone company and by the property owner under Part 68, and that we request comment below regarding how the definition of the demarcation point affects competitive access and whether we should take action to address any such impact. *See* paras. 65-67, *infra*. For purposes of this section, we assume that control over facilities will be determined according to existing law, and we seek comment on whether building owners should be subject to obligations regarding whatever facilities they may control on any particular premises under such law.

[125] *Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3742, ¶ 178.

[126] *Id.*

53. Consistent with our statement in the *Inside Wiring Report and Order and Second Further NPRM*, we now seek comment on whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions. In light of the information discussed above that a number of building owners may be imposing unreasonable and discriminatory charges on competitive carriers,[127] we seek comment on whether adoption of this principle may be necessary to ensure that consumers in multiple tenant environments have the ability to access the service provider of their choice. We also seek comment on whether there are circumstances in which exclusive contracts may promote competition and serve the public interest (*e.g.*, where the service provider lacks market power or when the period of exclusivity is reasonably related to the time needed for the provider to recoup its investment in the property).[128]

54. We note that several States have enacted legislation or taken regulatory action to prevent building owners from discriminating or demanding unreasonable payments or conditions with respect to access by telecommunications service providers.[129] Furthermore, the National Association of Regulatory Utility Commissioners (NARUC) has resolved that it "supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications providers in multi-tenant buildings," and that it "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider."[130] We seek comment on the effectiveness of existing State statutes and regulations governing building access. Furthermore, we note that the Building Owners and Managers Association, International (BOMA) has stated that it offers its members model license agreements that do not discriminate between incumbent and competitive providers.[131]

55. In addition to continuing to work with State and local governments, industry, and building owners, we seek comment here on the necessity and prospects for adopting a national nondiscriminatory access requirement. If we were to consider such a national requirement, we seek comment on how it could

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[127] *See* para. 31, *supra.*

[128] *See* para. 61, *infra.*

[129] *See* Conn. Gen. Stats. § 16-2471; Tex. Util. Code § 54.259; Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 (Pub. Util. Comm. of Ohio Sept. 29, 1994). A number of other States have similar rules for providers of video services. *See Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3744, ¶ 182.

[130] "Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers" (adopted July 29, 1998).

[131] May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Brent W. Bitz, Executive Vice President, Charles E. Smith Commercial Realty L.P. at 10.

be tailored to ensure that consumers in all parts of the country will in fact have a choice of competitive service providers without infringing on the rights of property owners and the authority of other regulating jurisdictions.

56. Specifically, we seek comment on whether the imposition of a nondiscrimination requirement on building owners would be within our statutory authority. First, we seek comment on whether the use of in-building facilities to provide interstate and foreign communication is within our subject matter jurisdiction to regulate under Title I of the Communications Act. Sections 1 and 2(a) of the Act, read together, give the Commission jurisdiction to enforce the Act with respect to "all interstate and foreign communication by wire or radio. . . ."[132] Pursuant to section 3, "radio communication" and "wire communication" are defined to include "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication.[133] We seek comment on whether or not the use of inside wire for interstate and foreign communication may be feasibly severable from its use for intrastate communication for purposes of carrier access, and whether the partial intrastate usage of these facilities would obstruct our jurisdiction.[134] Thus, for example, in connection with the Commission's decision to detariff the LECs' provision of inside wiring, the Commission also preempted the States from tariffing this service, and the Commission found that such preemption was consistent with its statutory authority under Title I.[135] We seek comment on whether our subject matter jurisdiction for purposes of imposing a nondiscriminatory access requirement is subject to a similar analysis, and whether any other grants of authority are applicable.

57. To the extent that in-building facilities are within our subject matter jurisdiction, we further seek comment on whether we have authority to impose a nondiscriminatory access requirement on building owners pursuant to the provisions of the Communications Act and the doctrine of ancillary jurisdiction. Section 4(i) of the Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[136] Section 303(r) of the Act authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary

[132] 47 U.S.C. §§ 1, 2(a).

[133] 47 U.S.C. § 3(33), 3(51).

[134] *See* Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986); *see also, e.g.,* People of the State of California v. FCC, 39 F.3d 919, 933 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1497 (1995); Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989).

[135] Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd. 1190, 1192-93, ¶¶ 13-18 (1986).

[136] 47 U.S.C. § 154(i).

to carry out the provisions of this Act . . . ."[137] These provisions, among others,[138] have been understood to give the Commission broad flexibility to promulgate regulations that may not fall strictly within any particularly enumerated statutory power where necessary to carry out the purposes and provisions of the Act.[139] Indeed the Supreme Court held that the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities. . . ."[140] As discussed above, several provisions of the Communications Act, as amended by the 1996 Act, are designed to promote consumers' ability to choose from among competing providers of communications services.[141] We seek comment on whether the addition of a nondiscrimination requirement with respect to access to facilities used to provide interstate and foreign telecommunications services owned or controlled by premises owners is sufficiently closely related to the regulation of those services under Title II as to confer jurisdiction. Would such an exercise of Commission authority be sufficiently necessary to carry out the provisions and intent of the 1996 Act to promote competition and consumer choice?[142] In addition, we seek comment on any other potential sources of or conflicts with Commission jurisdiction.

58. We also ask for comment on whether there would be any constitutional impediment to our adoption and enforcement of a nondiscrimination requirement. Under the Fifth Amendment to the United States Constitution, government may not effect a taking of private property without just compensation.[143] In the *Loretto* case, the United States Supreme Court considered a challenge to a New York statute that required building owners to permit cable television service providers to install facilities on their premises in exchange for compensation determined by a State regulatory commission to be reasonable.[144] The Court

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[137] 47 U.S.C. § 303(r).

[138] *See, e.g.*, 47 U.S.C. § 201(b) (authorizing the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act").

[139] *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); United Video, Inc. v. FCC, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting).

[140] *Southwestern Cable*, 392 U.S. at 178; *see also Iowa Utilities Board*, 119 S.Ct. at 731 (noting that "'ancillary' jurisdiction . . . could exist even where the Act does not 'apply'").

[141] *See, e.g.*, 47 U.S.C. §§ 224, 251, 332(c)(7); 1996 Act, §§ 207, 706.

[142] *See* 1996 Conference Report at 1 (purpose of the 1996 Act is to accelerate the competitive deployment of services to all Americans).

[143] U.S. Const., Amendment V.

[144] Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982) (*Loretto*).

held that because the installation of these facilities constituted a permanent physical occupation of the landlord's property, it amounted to a *per se* taking for which just compensation is constitutionally required, regardless of the minimal extent of the occupation or the importance of the public interest served.[145] The Court therefore remanded the matter to State court to determine whether the nominal compensation prescribed by regulation was just.[146] In *Bell Atlantic*, the United States Court of Appeals for the D.C. Circuit narrowly construed the Commission's pre-1996 statutory authority to overturn a requirement that LECs offer physical collocation to competing telecommunications carriers.[147] The Court held that because the Commission's order created an identifiable class of cases in which application of the regulation would necessarily constitute a taking, it could not be sustained in the absence of express statutory authority.[148]

59. We recently applied *Loretto* and *Bell Atlantic* in the *OTARD Second Report and Order*, where we considered our authority under section 207 of the 1996 Act to require building owners to allow devices for the reception of over-the-air video signals to be placed on their premises. We concluded that section 207 authorizes the Commission to prohibit restrictions on the placement of such antennas in areas within a tenant's exclusive use and control,[149] and that such a prohibition does not constitute a *per se* taking of private property within the meaning of the Fifth Amendment because it does not result in a new physical occupation of the landowner's property, but only affects the use of areas that the landlord has voluntarily allowed the tenant to occupy.[150] We further concluded, upon balancing the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations, that such regulation does not effect a regulatory taking.[151] With respect to common and restricted access areas, however, we were concerned that a prohibition on restrictions on the placement of antennas would constitute a *per se* taking because it would authorize a permanent physical occupation of the landlord's property.[152] In addition, we found that section 207 did not explicitly authorize us to permit a tenant to install a device on common or restricted access property, over which the tenant did not otherwise have exclusive use or control, over the property owner's objection.[153] Under these circumstances, and in light of case law indicating that an agency's authority is construed narrowly not to authorize a *per se* taking unless

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[145] *Id.* at 426, 436-37.

[146] *Id.* at 441.

[147] Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*).

[148] *Id.* at 336-39.

[149] *OTARD Second Report and Order*, 13 FCC Rcd. at 23880-81, ¶¶ 12-15.

[150] *Id.* at 23882-85, ¶¶ 19-23, distinguishing *Loretto* and FCC v. Florida Power Corp., 480 U.S. 245 (1987).

[151] *Id.* at 23886-88, ¶¶ 24-28, applying Pennsylvania Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[152] *Id.* at 23894-96, ¶¶ 39-43.

[153] *Id.* at 23893, ¶ 35.

such authority is expressly granted or must necessarily be implied in order not to defeat a grant of substantive authority to the agency,[154] we declined to extend our rules implementing section 207 to cover the placement of antennas in common and restricted access areas.[155]

60. We seek comment on the extent to which a nondiscrimination requirement on private property owners can be sustained consistent with *Loretto* and *Bell Atlantic*, and with the application of those decisions in the *OTARD Second Report and Order*. For example, 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, or if a property owner could satisfy a nondiscrimination obligation in many instances simply by allowing transport of a competing carrier's signals over existing wire that the building owner owns and controls? Under the last of these circumstances, the competing carrier would not physically occupy the building owner's property. We therefore seek comment on whether either a *per se* or regulatory taking would be involved under any of these situations, or any combination of these situations. We further request comment regarding whether such arrangements will be sufficient to allow competing providers to offer telecommunications service, and on whether providers utilizing such arrangements will also require additional access to premises facilities, such as physical connection to the existing wire.

61. If we decide to adopt any nondiscrimination requirement, we seek additional comment on how that requirement should be structured to achieve our procompetitive objectives. In particular, commenters should consider whether it is sound policy, and would promote competition, to permit exclusive contracts between property owners and service providers under some circumstances. On the one hand, an exclusive contract prevents carriers from competing to serve customers on the covered premises during the period that the contract is in effect. On the other hand, it has been argued that new entrants often need exclusive contracts for a limited period of time in order to recoup their investment, and that if exclusive contracts are not permitted incumbents might face no competition at all.[156] We seek comment on the extent to which, and under what circumstances, the ability to enter into exclusive contracts materially advances the ability of competitive carriers to serve customers in multiple tenant environments. We also seek comment on whether end users may benefit from a property owner's ability to enter into an exclusive contract, for example by negotiating a discount with the carrier. Commenters that favor permitting exclusive contracts should

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[154] *Id.* at 23882, ¶ 17, citing *Bell Atlantic*.

[155] *Id.* at 23897, ¶ 44. We note that two petitions are pending asking us to reconsider our decision not to extend the section 207 rules to placement of antennas in common and restricted access areas. Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, Petition for Reconsideration of the Personal Communications Industry Association, *et al.* (filed Jan. 22, 1999); Petition for Reconsideration of the Association for Maximum Service Television and National Association of Broadcasters (filed Jan. 22, 1999). Nothing herein is intended to prejudice our consideration of these petitions or any other petitions relating to the *OTARD Second Report and Order*.

[156] *See, e.g.*, May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Jodi Case, Manager of Ancillary Services, AvalonBay Communities, Inc. at 5.

address the circumstances under which such contracts should be allowed. For example, a rule might permit only exclusive contracts that are limited to some defined period of time, or contracts between building owners and carriers that do not exercise market power. Commenters should also consider whether any rule should be applied in a manner that abrogates existing contracts, and whether doing so would raise constitutional concerns. For example, commenters should consider whether any unfairness might arise, and whether the effectiveness of any rule might be compromised, if the compensation provided for in a contract that contemplated exclusivity were to become the nondiscriminatory standard for non-exclusive contracts.

62. In addition, we invite commenters to address whether we should establish any special mechanism for enforcing any nondiscrimination obligation on private premises owners. We also invite comment on whether, and under what circumstances, we should preempt any State regulation of access that may be inconsistent with any regulations that we may adopt, or whether our regulations should apply only in States that do not enforce their own nondiscriminatory access rules.[157] In addition, commenters should consider whether we should limit the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners.[158] For example, both the Texas and Connecticut nondiscriminatory access statutes require a property owner to afford nondiscriminatory access to a carrier only after a customer has requested that carrier's service.[159] In addition, a rule could exempt buildings that house fewer than a certain number of tenants or are under a certain size.

63. Finally, we request comment on any practical issues that a nondiscrimination requirement may engender. For example, we request comment on any technical issues that may be raised by requiring nondiscriminatory access to existing wire, such as power or electromagnetic compatibility problems, and what rules, if any, we should adopt to address those issues. Commenters should particularly consider any different issues that may arise depending on whether a building is wired by means of dedicated facilities to each unit or shared media. We further request comment on how any rule should address situations in which space constraints may prevent the addition of new facilities. Commenters should further consider safety questions, insurance and liability issues, and any other relevant factors.

5. Other Building Access Issues.

64. In addition to the proposals discussed above, we seek comment on several other potential actions that might help to ensure that customers located in multiple tenant environments have access to their choice of telecommunications service providers. First, if we do not adopt a nondiscrimination requirement, or adopt a nondiscrimination rule that applies only under some circumstances, we request comment on whether, as an alternative, we should forbid telecommunications service providers, under some

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[157] *See, e.g.*, 47 U.S.C. § 224(c).

[158] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[159] *See* Conn. Gen. Stats. § 16-247l(c); Tex. Util. Code § 54.259(a)(1),(2).