

SCHEDULED FOR ORAL ARGUMENT ON MARCH 5, 2001

Case No. 99-1009 and consolidated case

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL,
INSTITUTE OF REAL ESTATE MANAGEMENT,
NATIONAL APARTMENT ASSOCIATION,
AMERICAN SENIORS HOUSING ASSOCIATION,
NATIONAL MULTI HOUSING COUNCIL,
NATIONAL ASSOCIATION OF REALTORS,
REAL ESTATE ROUNDTABLE,
AND NATIONAL ASSOCIATION OF HOME BUILDERS
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

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Respondents.

**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES AND
CORPORATE DISCLOSURE STATEMENT**

A. Parties and amici. The following include all parties and amici in this Court. The Petitioners include the Building Owners and Managers Association, International (“BOMA”); the Institute of Real Estate Management (“IREM”); the National Apartment Association (“NAA”); the American Seniors Housing Association (“ASHA”); the National Multi Housing Council (“NMHC”); the National Association of Home Builders (“NAHB”); the National Association of Realtors (“NAR”); and the Real Estate Roundtable (“RER”). The petitioners are

referred to jointly as the “Real Access Alliance” or the “Alliance.”¹ The Respondents are the Federal Communications Commission (“FCC” or “Commission”) and the United States of America. the Satellite Broadcasting and Communications Association (“SBCA”), United States Satellite Broadcasting Company (“USSB”), DIRECTV, Inc., the Consumer Electronics Manufacturers Association (“CEMA”) and the Wireless Communications Association International were accepted as intervenors by this Court in orders filed February 16, 1999. Since this date, USSB and DIRECTV have merged, dissolving USSB. As this case is being heard as a review of an agency order under FRAP Rule 15, there were no parties before the district court.

B. Rulings under review. The ruling at issue in this court is a final order issued by the FCC, entitled *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, Second Report and Order, 13 FCC Rcd 23874 (1998) (the “*Second OTARD Order*”). The *Second OTARD Order* was published in the Federal Register on December 23, 1998, 63 Fed. Reg. 71027. It can be found in the Joint Appendix (“JA”) at ____.

C. Related cases. There are no related cases.

¹ The Real Access Alliance is a coalition of eleven trade associations representing approximately 1 million members. The Alliance was formed to encourage free market competition among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America’s real estate owners. In addition to the Petitioners named above, the members of the Alliance are the International Council of Shopping Centers (“ICSC”), the Manufactured Housing Institute (“MHI”), the National Association of Industrial and Office Properties (“NAIOP”), and the National Association of Real Estate Investment Trusts (“NAREIT”). ICSC, MHI and NAREIT all participated in the rulemaking below. The RER was formerly known as the National Realty Committee (“NRC”), and participated under that name.

DISCLOSURE STATEMENT

The Petitioners are each trade associations under Circuit Rule 26.1(b). The Petitioners have no parent corporations, and no publicly held company owns 10% or more of any of their stock.

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GLOSSARY

- ASHA** - American Seniors Housing Association
- BOMA** - Building Owners and Managers Association, International
- CAP** - Competitive Access Provider
- DBS** - Direct Broadcast Satellite
- DTH** - Direct-to-Home
- FCC** - Federal Communications Commission
- ICSC** - International Council of Shopping Centers
- IREM** - Institute of Real Estate Management
- LEC** - Local Exchange Carrier
- MHI** - Manufactured Housing Institute
- MMDS** - Multichannel Multipoint Distribution Service
- NAA** - National Apartment Association
- NAHB** - National Association of Home Builders
- NAIOP** - National Association of Industrial and Office Properties
- NAR** - National Association of Realtors
- NAREIT** - National Association of Real Estate Investment Trusts
- OTARD** - Over-the-Air Reception Devices
- RER** - Real Estate Roundtable

STATEMENT OF JURISDICTION

This case involves a challenge to an order of the Federal Communications Commission (“FCC” or “Commission”), amending 47 C.F.R § 1.4000, known as the Over-the-Air Reception Devices, or “OTARD” rule. The Court has jurisdiction to review final orders of the Commission pursuant to Section 402(a) of the Communications Act of 1934 (the “Communications Act”), 47 U.S.C. §402(a); the Hobbs Act, now 28 U.S.C. § 2844; and Section 10 of the Administrative Procedure Act, now 5 U.S.C. ch 7. The order in question, *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, Second Report and Order, 13 FCC Rcd 23874 (1998) (the “*Second OTARD Order*”), is such a final order and was published in the Federal Register on December 23, 1998.

The members of the Real Access Alliance were parties in the rulemaking before the Commission. BOMA, IREM, NAA, ASHA, NMHC, NAR and RER filed a timely joint Petition for Review on January 7, 1999. The NAHB filed a timely Petition for Review on January 15, 2000, Case No. 99-1021.

STATEMENT OF ISSUES

1. Whether the FCC had the authority, under the Communications Act of 1934, to adopt the OTARD rule, 47 C.F.R. § 1.4000, which modifies the terms of leases for residential and commercial property by requiring building owners to permit tenants to install various types of video receiving antennas and associated cabling?

2. Whether Section 207 of the Telecommunications Act of 1996 is a grant of new authority to the FCC, or merely a directive to exercise existing authority?

3. Whether the FCC's adoption of the OTARD rule improperly raises a substantial constitutional question, in violation of this Court's holding in *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994)?

4. Whether the OTARD rule effects a *per se*, physical taking of the property of building owners, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution and the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)?

5. Whether the OTARD rule effects a regulatory taking of the property of building owners?

6. Whether the justification for the OTARD rule stated in the *Second OTARD Order* was illogical and contrary to law, and the Commission's order therefore arbitrary and capricious?

STATUTES AND REGULATIONS

The principal statute involved in this case is Section 207 of the Telecommunications Act of 1996, which appears in the Statutory Appendix at p. SA1. Other statutes reproduced in the Statutory Appendix include 2 U.S.C. § 285b(1) (SA at 2) and 47 U.S.C § 303 (SA at 3). The FCC regulations in the Statutory Appendix are 47 C.F.R. § 25.104 as originally adopted (SA at 8); 47 C.F.R. § 25.104 as amended in 1996 (SA at 8); 47 C.F.R. § 1.4000 as originally adopted (SA at 11); and 47 C.F.R. § 1.4000 in its current form (SA at 13).

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

This case arises out of the FCC's failure to recognize in a rulemaking proceeding that the implementation of its policy goals must be defined by the scope of its authority, rather than the other way around. In *Preemption of Local Zoning Regulation of Satellite Earth Stations*,

Implementation of Section 207 of the Telecommunications Act of 1996 Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996) (the “*First OTARD Order*”), the Commission issued its original OTARD rule preempting local zoning rules, restrictive deed covenants and homeowners’ association rules that restrict the placement of video receiving antennas. The *First OTARD Order* also sought further comment regarding whether the rule should be extended to allow tenants to install antennas on leased property.

On November 20, 1998, the Commission released the *Second OTARD Order*, extending the OTARD rule to leased property. BOMA, *et al.* filed a Petition for Review of the *Second OTARD Order* with this Court on January 7, 1999, and the NAHB filed a separate Petition for Review on January 15, 1999. On April 15, 1999, the court granted the FCC’s motion that the case be held in abeyance pending a decision on petitions for reconsideration. The cases were consolidated upon order of the Court on May 11, 1999. The Commission denied the petitions for reconsideration on November 24, 1999, and moved to reactivate the case on December 14, 1999. On December 27, 1999, an order was entered returning the case to the Court’s active docket.

II. STATEMENT OF THE FACTS

Before its amendment by the *Second OTARD Order*, 47 C.F.R. § 1.4000 applied only to state and local zoning and building codes, and to restrictive deed covenants and homeowners’ association rules. The *Second OTARD Order*, however, expanded the OTARD rule to require owners of leased property to permit tenants to install antennas for receiving various types of over-the-air signals, regardless of the terms of their leases. The OTARD rule also provides that once a lease provision has been challenged as a violation of the rule, the property owner must suspend all enforcement efforts until the FCC or a court of competent jurisdiction has ruled on

the matter. Finally, the person seeking to enforce a restriction has the burden of proving that a restriction is not prohibited by the rule. *See* 47 C.F.R. § 1.4000 (SA 13).

A. Background: FCC Preemptions Before Enactment of The Telecommunications Act of 1996.

Since the 1980's, the Commission has been under pressure to preempt zoning restrictions on the placement of satellite receiving antennas. Max D. Paglin, *et al.*, *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*, at 264-265 (1999). This pressure arose from homeowners who used large dish antennas to intercept satellite signals intended to be received by cable system headends.² In 1985, citing as its authority Sections 1, 303, 403 and 705 of the Communications Act, 47 U.S.C. §§ 151, 303, 403 and 605, the FCC proposed to preempt local zoning rules governing satellite antennas. *Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 100 FCC 2d 846 (1985) (the “*First Earth Station Notice*”). The *First Earth Station Notice* said nothing about leased property.

The following year, the Commission preempted local zoning rules and other regulations that differentiated between satellite reception antennas and other types of antennas. *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 59 R.R.2d (P&F) 1073 (1986) (“*First Earth Station Order*”). As its authority for this decision, which applied only to state and local laws and regulations, the Commission cited “the broad mandate of Section 1 of the Communications Act . . . and the numerous powers granted by Title III of the Act” *Id.* at ¶ 23. The new rule, which was codified as 47 C.F.R. § 25.104, contained exceptions for

² These antennas were typically eight to twelve feet in diameter, but local zoning restrictions often limited the permissible size to six feet or less. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Notice of Proposed Rulemaking, IB Docket No. 95-59, 10 FCC Rcd 6982 at ¶¶ 12, 14 (1995) (the “*Second Earth Station Notice*”).

health, safety and aesthetics, as well as state or local requirements that did not impose unreasonable limitations on reception of signals.

In 1995, prompted by petitions seeking strengthening of the rule, the Commission proposed to expand the scope of the preemption and clarify the procedural requirements of the rule. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Notice of Proposed Rulemaking, 10 FCC Rcd 6982 (1995) (the “*Second Earth Station Notice*”). The *Second Earth Station Notice* noted that many new types of services were becoming available, such as “Direct Broadcast Satellite” (“DBS”) service,³ which used much smaller receiving antennas than the older “C-band” dishes. The new antennas ranged from 18 inches to a little under a meter in diameter. Consequently, the *Second Earth Station Notice* suggested that the Commission’s prior deference to local aesthetic concerns might be less important in the future. *Second Earth Station Notice* at ¶¶ 26-29. The Commission did not, however, address deed covenants or homeowners’ association rules, merely noting that it might need to address “such private restrictions” at a later date. *Id.* at n. 14. Lease provisions restricting antenna installation were not mentioned at all. The Commission cited as its authority for proceeding Sections 1, 4(j), 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 151, 154(j), 154(i) and 303(v). *Id.* at ¶ 82.

B. The Adoption of Section 207.

The following year, while the *Second Earth Station Notice* was pending, Congress enacted the Telecommunications Act of 1996, 110 Stat. 114, which was signed into law on February 8, 1996 (the “1996 Act”). Section 207 of the 1996 Act stated:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s

³ Also known as “Direct-to-Home,” or “DTH.”

ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

The legislative history of Section 207 is sparse. The Conference Report on the 1996 Act merely summarizes Section 207 without explanation. H.R. Conf. Rep. No. 104-458 at 166 (1996). The only explication of Section 207 appears in the House Report on H.R. 1555, H.R. Rep. No. 104-204 at 124 (1995) (the “*House Report*”), which states:

Section 308⁴ directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer’s ability to receive video programming from over-the-air broadcast stations or direct broadcast satellite services. The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners’ association rules, shall be unenforceable to the extent contrary to this section.

Id. at 123-124.

Section 207 was accompanied by Section 205 of the 1996 Act, which amended Section 303 of the Communications Act to add a new subsection 303 (v). Section 303(v) states that the Commission shall:

Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the terms “direct-to-home satellite services” means the distribution or broadcasting of programming or services by satellite directly to the subscriber’s premises without the use of ground receiving or distribution equipment, except at the subscriber’s premises or in the uplink process to the satellite.

⁴ Section 308 of H.R. 1555 is practically identical to Section 207 of the 1996 Act. The only difference is that Section 207 refers to over-the-air and MMDS antennas in addition to DBS antennas.

C. The OTARD Rulemaking.

Shortly after the 1996 Act became law, the Commission adopted its amendment of Section 25.104, and in the same order opened a new phase of Docket No. 95-59 to implement Section 207 with respect to DBS antennas. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809 (1996) (“*Second Earth Station Order*”) (JA ____). As before, the amended rule applied only to state and local zoning laws and other regulations. The FCC’s order did not address restrictive covenants or homeowners’ association rules, except in the Further Notice of Proposed Rulemaking, where it noted that the 1996 Act had been enacted, and that the *House Report* referred to restrictive covenants and homeowners’ association rules in its discussion of what became Section 207. *Second Earth Station Order* at ¶ 56 (JA ____). The *Second Earth Station Order* proposed to implement that facet of Section 207 by simply adding a new paragraph (f) to Section 25.104 of the Commission’s rules:

- (f) No restrictive covenant, encumbrance, homeowners’ association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer’s ability to receive video programming services over a satellite antenna less than one meter in diameter.

Id. at ¶ 62 (JA ____).

Shortly thereafter, the Commission issued a Notice of Proposed Rulemaking to implement Section 207 with respect to other types of antennas in a new docket. *Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 6357 (1996) (“*Broadcast Notice*”) (JA ____). The *Broadcast Notice* contained the text of a proposed rule, paragraph (c) of which was identical to paragraph (f) of the rule proposed by the *Second Earth Station Order*, except that it referred to broadcast

and multichannel multipoint distribution (“MMDS”) antennas. Commissioner Quello issued a separate statement regarding the *Broadcast Notice*, stating that he believed that the Commission’s proposed preemption of nongovernmental restrictions might be too broad. *Broadcast Notice*, 11 FCC Rcd at 6362 (JA ____).

Neither the *Second Earth Station Order* nor the *Broadcast Notice* suggested that Section 207 or the Commission’s authority might extend to leased property or would permit the Commission to modify the terms of leases. The *Second Earth Station Order* appeared to rely primarily on the Commission’s traditional views regarding its preemption authority: The ordering clauses cite 47 U.S.C. §§ 151, 154, 303(r), 403 and 405. *Second Earth Station Order* at ¶ 67 (JA____). The text of the order discussed Section 207, but never explicitly stated that Section 207 gave the Commission new authority:

We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user’s right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in section 207) or that inhibit the use of transmitting antennas. Indeed, we believe section 207 evidences Congress’s recognition that the federal interests at stake here warrant preemption

Id. at ¶ 16 (JA____).

Later, in defending its preliminary decision to accommodate some local concerns, the *Second Earth Station Order* appeared to read some new authority into Section 207, but even this was ambiguous:

We note, however, that Congress did not simply preempt all “restrictions that impair a viewer’s ability to receive video programming services” from DBS providers. Instead, Congress required that “the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services” from DBS providers (emphasis added). Section 303, authorizes the Commission to issue rules and regulations “as public convenience, interest, or necessity requires. Because *Congress*

invoked the Commission's normal rulemaking authority, and because Congress did not prohibit all regulations but rather only those that impaired reception, we think accommodation of local concerns remains permissible under the statute.

Id. at ¶ 59 (JA ____) (emphasis added).

The *Broadcast Notice*, released some three weeks after the *Second Earth Station Notice*, implied that Section 207 constitutes a grant of new authority, but did not expressly say so.

Broadcast Notice at ¶¶ 2, 10, 12 (JA ____).

The members of the Real Access Alliance responded to both the *Second Earth Station Order* and the *Broadcast Notice*.⁵ The Alliance made the following arguments: (1) Section 207 did not direct the Commission to preempt any nongovernmental restrictions; (2) there was no evidence that Congress wanted the Commission to invalidate lease restrictions; (3) requiring landlords to permit the placement of antennas on their property would constitute a *per se* taking under the rule of *Loretto*, 458 U.S. 419; (4) the Commission has neither the power of eminent domain, nor the authority to expose the government to financial liability for a taking; (5) Commission regulation would interfere with the safe and effective management of rental property; and (6) the Commission's refusal to consider aesthetic considerations was unreasonable.

The Commission adopted the OTARD rule on August 5, 1996. *First OTARD Order* at ¶ 89 (JA ____). This is Section 1.4000 of the FCC's rules as it stood before the order appealed

⁵ Joint Comments of NAA, BOMA, NRC, IREM, ICSC, NMHC, ASHA and NAREIT, IB Docket No. 95-59 (filed April 15, 1996) (JA____); Joint Comments of NAA, *et al.*, CS Docket No. 96-83 (filed May 6, 1996) (JA____); Joint Reply Comments of NAA, *et al.*, IB Docket No. 95-59 (filed May 6, 1996) (JA____); Joint Reply Comments of NAA *et al.*, CS Docket No. 96-83 (filed May 21, 1996) (JA____).

from here.⁶ (SA 11). The *First OTARD Order* specifically addressed the issue of leased property for the first time, and found that the Commission did not have an adequate record to decide whether the rule should apply to leased property. *Id.* at ¶ 59 (JA ____). Accordingly, the Commission asked for further comment.

The members of the Real Access Alliance also submitted comments and reply comments in response to the *First OTARD Order*.⁷ Here the Alliance argued that (1) Nothing in the language of Section 207 or the legislative history justified extending the OTARD rule to leased property; (2) Section 207 did not confer new jurisdiction or authority on the Commission, and Congress had not given the Commission the power to regulate the landlord-tenant relationship in the Communications Act; (3) the proposed rule would effect a taking under *Loretto*; (4) the proposed rule needlessly raised the takings issue, in violation of the rule of *Bell Atlantic*, 24 F.3d 1441; (5) mandating installation of antennas in leased property would raise numerous practical problems; and (6) that *FCC v. Florida Power Corp.*, 480 U.S. 245 (1981), could not be used to justify the proposed rule.

After the release of the *First OTARD Order*, seven petitions for reconsideration were filed, the only issue relevant to this discussion being whether a tenant would have the same rights to install an antenna as the owner would. On September 25, 1998, the Commission released its decision, *Implementation of Section 207 of the Telecommunications Act of 1996*, Order on

⁶ The *First OTARD Order* also amended 47 C.F.R. § 25.104 to state that DBS antennas were not subject to the OTARD rule. This version of Section 25.104 is not attached.

⁷ Joint Comments of NAA, *et al.*, CS Docket No. 96-83 (filed Sep. 27, 1996) (“*September 1996 Reply*”) (JA ____); Comments of MHI, CS Docket No. 96-83 (filed Sep. 27, 1996) (JA ____); Comments of NAHB, CS Docket No. 96-83 (filed Sep. 27, 1996) (JA ____); Comments of NAR, CS Docket No. 96-83 (filed Sep. 27, 1996) (JA ____); Joint Reply Comments of NAA, *et al.*, CS Docket No. 96-83 (filed Oct. 28, 1996) (JA ____) (“*October 1996 Reply*”); Reply Comments of NAHB, CS Docket No. 96-83 (filed Oct. 28, 1996) (JA ____).

Reconsideration, 13 FCC Rcd 18962 (1998) (“*First Recon. Order*”), ruling that a tenant may install an antenna, so long as the owner has consented. The *First Recon. Order* added the following new subsection (h) to the OTARD rule:

(h) So long as the property owner consents, a person residing on the property owner’s property with the property owner’s permission shall be treated as an antenna user covered by this rule and shall have the same rights as the property owner with regard to third parties, including but not limited to local governments and associations, other than the property owner.

Id. at 19008.

Less than two months later, on November 20, 1998, the Commission released the *Second OTARD Order*. Over a strong dissent filed by Commissioner Furchtgott-Roth, the Commission rescinded subsection 1.4000(h) and amended the rule to apply it to contracts and leases. The operative language of the rule now states:

(a)(1) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, *contract provision, lease provision, homeowners’ association rule or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of [a covered antenna] . . . is prohibited to the extent it so impairs, subject to paragraph (b) of this section.*

(New language italicized.) 47 C.F.R. § 1.4000(a)(1) (SA 13).

The *Second OTARD Order* stopped short of permitting antennas to be installed in restricted use or common areas because such a rule would have violated the Fifth Amendment. *Id.* at ¶ 7 (JA ____). Commissioner Furchtgott-Roth pointed out that there was no legal difference between requiring antennas to be installed in common areas and requiring them to be installed within leased premises. The Commission, however, disagreed, asserting that under *Florida Power*, when a person rents space to another, he or she completely surrenders any right

to object to a *per se* taking of property within the leased premises. *Second OTARD Order* at ¶ 21 (JA ____).

In addition to rejecting the Alliance's arguments regarding the scope of the Commission's authority and the constitutionality of the amended OTARD rule, the Commission gave short shrift to the Alliance's practical concerns. The *Second OTARD Order* contains no discussion of the aesthetic harm caused by the installation of multiple antennas on building exteriors, the Commission presumably having disposed of the issue in the *First OTARD Order*, where it stated that it was not inclined to respect aesthetic considerations more in the context of lease restrictions than it was in the case of zoning rules. *First OTARD Order* at ¶ 46 (JA ____). Consequently, property owners can do nothing to prevent the appearance of their buildings from being marred by unsightly antennas. The Commission also refused to give property owners any leeway regarding safety requirements. A building owner can defend a restriction on the grounds of safety, but the owner has the burden of proof, and is prohibited from taking action against a tenant once a formal petition is filed at the Commission.⁸ 47 C.F.R. § 1.4000(b)(1), (c)(3).

Three petitions for reconsideration of the *Second OTARD Order* were filed, one of which sought to allow individual property owners to consent to the installation of antennas, on the theory that if a tenant violated a permissible restriction, the property owner could be held liable

⁸ The FCC staff applies the OTARD rule stringently. The FCC's Cable Bureau has found that the rule preempts restrictions that require any advance written authorization before an antenna can be installed. *In Re Jason Peterson: Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 13 FCC Rcd 2501 (1998). The Bureau has declared a \$5.00 permit fee unreasonable. *In re Michael J. MacDonald: Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 13 FCC Rcd 4844 (1997). And the Bureau has overturned a homeowners' association rule forbidding the installation of antennas on balcony railings, because the record did not show that the prohibition was necessary for safety reasons. *In re Victor Frankfort, Vernon Hills, Illinois: Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 12 FCC Rcd 17631 (1997). Consequently, although the rule permits enforcement of safety restrictions while a petition is pending, owners do so at their own peril.

even though the owner had no authority to object to the installation. The Commission denied all of the petitions for reconsideration in *Petitions for Reconsideration of the Second Report and Order, Implementation of Section 207 of the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 19924 (1999).

SUMMARY OF ARGUMENT

The *Second OTARD Order* must be vacated because the order violates the Takings Clause of the Fifth Amendment to the United States Constitution.

The Court need not address the constitutional issue, however, for three reasons: (1) the Commission had no statutory authority to extend the OTARD rule to leased property; (2) the Commission has no inherent takings power, and Section 207 does not expressly direct the Commission to take the property of building owners, so the Commission was obligated not to raise the takings question in the rulemaking; and (3) if the OTARD rule does not effect a taking, then under the Commission's own reasoning the rule is illogical and unnecessary, and therefore arbitrary, capricious, and an abuse of discretion.

The OTARD rule violates the Takings Clause because the rule mandates a permanent physical invasion of property, contrary to the rule of *Loretto*. The OTARD rule authorizes a tenant to install physical facilities -- antennas and cables -- without the owner's permission and without compensation. Such a physical occupation constitutes an enlargement of the tenant's rights under the lease and a taking of the owner's corresponding right to exclude.

Nor is the Supreme Court's decision in *FCC v. Florida Power* to the contrary. That case is nothing more than a rent control case, and involves no transfer of any property right. *Florida Power* does not stand for the proposition that once a person allows another to use his property, he or she has surrendered the right to assert a *per se* taking claim. If a lessor has retained the right

to object to the physical installation of certain facilities in a lease, and the government gives a tenant the right to install those physical facilities, a permanent physical occupation has occurred.

The OTARD rule also meets the factors for a regulatory taking identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). First, the installation of antennas on the exterior of a building will harm the aesthetic qualities of the building, and thus reduce the building's value. Second, the rule affects the investment-backed expectations of owners, who could not have anticipated adoption of such a regulation by an agency that has never regulated the real estate industry before. And third, the character of the governmental action is of a sort that the Supreme Court has found most intrusive, because it involves an actual physical invasion as well as the complete appropriation of a strand in the owner's bundle of rights.

Regardless of the nature of the taking, the Commission has no power to order building owners to do anything, because the Communications Act only gives the Commission jurisdiction over "communications" and "persons ... engaged in communications." 47 U.S.C. § 152(a). The courts have repeatedly held that the FCC has no jurisdiction or authority over the real estate industry or property owners generally. *See, e.g., Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972). This Court has held that the Commission has no inherent authority over real property owned by regulated telecommunications carriers. *Bell Atlantic*, 24 F.3d at 1447. Consequently, the FCC cannot direct property owners that are otherwise outside the FCC's jurisdiction to take or refrain from any action.

In the past, the FCC has preempted local zoning regulations affecting the installation of certain antennas. Those FCC rules, however, did not extend to private property owners, and the

Commission's authority to preempt state and local laws and regulations does not apply to leases for private property.

Section 207 of the 1996 Act does not add to the Commission's pre-existing authority, but merely directs the FCC to use its authority under Section 303 of the Communications Act. Furthermore, Congress did not incorporate Section 207 into the Commission's organic statute, and Section 207 has not been codified as a "general and permanent" law. Consequently, Section 207 must be construed as a one-time directive to use existing authority. In any case, neither the text of Section 207 nor the legislative history refer to leases or in any way identify them as the types of restrictions Congress had in mind.

The Court also need not address the constitutional question, because by raising the Takings Clause issue, the *Second OTARD Order* contravened the rule of *Bell Atlantic*, 24 F.3d at 1446-1447. The Commission has no authority, either in Section 207, nor in the Communications Act, to exercise the power of eminent domain on behalf of the United States. *See Bell Atlantic* at 1446-47. Without an express statement from Congress, the FCC must avoid raising any issue that would subject the federal Treasury to financial liability.

Finally, the Commission's *Second OTARD Order* asserts that no taking has occurred, because "the landlord has already voluntarily relinquished possession of the leasehold by virtue of the lease" *Second OTARD Order* at ¶ 15. This statement, however, is a tautology: if true, the OTARD rule is meaningless, because it grants no rights that a tenant did not already have. Conversely, if the OTARD rule in fact grants rights to tenants, it can only do so by taking them from property owners. Either the rule is of no effect, or it raises a taking claim. Consequently, the OTARD rule is arbitrary, capricious and an abuse of discretion.

For all these reasons, the *Second OTARD Order* should be vacated.

ARGUMENT

I. THE FCC LACKS AUTHORITY TO REQUIRE BUILDING OWNERS TO ALLOW TENANTS TO INSTALL ANTENNAS.

This case presents a classic example of the need for close judicial oversight of agency decisions. Without any authority from Congress whatsoever – other than its desire to advance its own policy goals – the Commission has extended its reach over an entire industry, which represents over 11% of the nation’s Gross Domestic Product.⁹ It is remarkable that under such circumstances, the *Second OTARD Order* contains no analysis of the statutory basis for the Commission’s authority to extend the OTARD rule to leased property.

A. The Communications Act Does Not Give the FCC Any Authority Over Building Owners or the Real Estate Industry.

1. The Communications Act gives the FCC no express or implied authority to modify leases.

The scope of the Commission’s jurisdiction is defined in Section 2(a) of the Communications Act. The Commission has jurisdiction over “communications” and “persons engaged in communications.” 47 U.S.C. § 152(a). The Commission’s authority to act within that jurisdiction is defined -- in both negative and positive terms – throughout the remainder of the Act. Nowhere does the Act so much as hint that the Commission might have the authority to regulate building owners as building owners. Accordingly, the Commission has no such authority. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) (“[T]he Commission’s expansive power under the Act does not include the ‘untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission

⁹ United States Department of Commerce, Bureau of Economic Analysis, *Industry Accounts Data, Gross Domestic Product by Industry* (1995) (<http://www.bea.doc.gov/bea/du2/gposhr.htm>). The communications industry, by contrast, represents less than three percent of GDP. *Id.*

authority,” quoting *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)); *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) (“[T]he Commission must find its authority in its enabling statutes”).

The United States Supreme Court has made it clear that Commission orders have no power to alter rights created under state law. In *Radio Station WOW v. Johnson*, 326 U.S. 120, 131-32 (1945), the Court upheld the power of the Nebraska courts to set aside a lease of station facilities on the ground of fraud, even though the Commission had already approved the transfer of the station license to the lessee. And in *Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950), the Court upheld a state court decision enforcing a stock purchase contract that had served as the basis for the Commission’s refusal to consent to a transfer of a license. The Court concluded by saying that the Communications Act does not give the Commission authority “to determine the validity of contracts between licensees and others.” *Id.* at 602. The FCC may take into account the effects of state law, but cannot adjudicate it. Consequently, no matter what the Commission’s OTARD rule purports to do, the rule cannot modify a lease between an apartment owner and an apartment resident, or force an apartment owner to permit the installation of an antenna in violation of a lease. If a resident installs an antenna over the owner’s objections, the owner retains the right to enforce the lease, and the Commission is powerless to construe the lease differently.

The Commission itself has recognized that it has no authority to regulate the real estate industry. In *Illinois Citizens Committee for Broadcasting v. Sears, Roebuck & Co.*, 35 FCC 2d 237 (1972), the Commission refused to assume jurisdiction over the construction of the Sears Tower in Chicago, even though the petitioners argued that construction of the building would interfere with television reception in the vicinity. The Commission found that while it might

regulate devices and facilities that are capable of emitting radio frequency energy in a way that interferes with radio communications, the Sears Tower was not such a device or facility. *Id.* at 238. The Commission concluded that it simply had no basis for asserting jurisdiction over the Sears Tower. *Id.* at 239.

The Seventh Circuit affirmed the Commission's decision in *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972), agreeing that the Commission's authority was limited to transmission and signal generating facilities, and rejecting the argument that the Commission had the power to regulate all activities that "substantially affect communications. . . ."

In another case, the Commission concluded that it did not have the authority to regulate the rates at which electric utilities allowed cable operators to use their poles, because cable television pole attachments do not constitute "communication by wire or radio." *California Water and Tel. Co.*, 64 FCC 2d 753, 758 (1977). The Commission stated:

The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, *or even access and rents for antenna sites.*

Id. at 759 (emphasis added).

In response to the *California Water* case, Congress adopted the Pole Attachment Act, 92 Stat. 35 (1978). That legislation was narrowly drawn. S. Rep. No. 95-580 at 15 (1977) ("expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communication space to CATV systems"). Nothing in Section 224 of the Communications Act, which was added by the Pole Attachment Act, authorizes the Commission

to regulate real property or rewrite the terms of leases. If the Commission needed specific Congressional authorization to regulate attachments to utility poles, it would surely need similar specific authority to regulate the installation of video receiving antennas on buildings.

Finally, if the Commission does not have jurisdiction over carrier-owned central office buildings, as in *Bell Atlantic*, then it cannot possibly have jurisdiction over non-carrier or non-licensee-owned property of any kind.

2. The authority relied upon by the FCC for past zoning preemptions does not extend to leased property.

The Commission's pre-1996 Act orders have variously cited as the Commission's authority Sections 1, 4(i), 4(j), 7, 303, 309(j), and 705.¹⁰ The *First OTARD Order* cited Sections 4(i), 4(j) and 303 as well as Section 207. (JA ___) Most of these provisions are clearly inapposite, and none gives the Commission the power to modify leases between private parties for the use of real property.

In the *First Earth Station Order*, for example, the Commission relied on the "broad mandate" of Section 1 and Section 705 of the Communications Act. 47 U.S.C. §§ 151, 605. Section 1, 47 U.S.C. § 151, states the purposes of the Commission and is relevant to determining its jurisdiction, but it is not a grant of authority. Section 705, 47 U.S.C. § 605, provides, among other things, for the right to receive certain unscrambled satellite signals. Citing that provision to justify local zoning preemption was stretching the statute considerably, since it contains no grant of authority to the Commission whatsoever. The *First Earth Station Notice*, the *Second Earth Station Notice*, and the *Second Earth Station Order* lean on equally weak reeds. Section 4(j), 47 U.S.C. § 154(j), authorizes the FCC to establish its own internal procedures. Section 7, 47

¹⁰ Respectively, 47 U.S.C. §§ 151, 154(i), 154(j), 157, 303, 309(j) and 605.

U.S.C. § 157, states that it is the policy of the United States to encourage new technologies and services, and authorizes the Commission to determine whether new technologies or services are in the public interest. Section 309(j), 47 U.S.C. § 309(j), specifies procedures and other requirements related to competitive bidding for licenses.

Because Section 303 is specifically referred to in Section 207, it is reasonable to suppose that Congress meant the Commission to use its powers under Section 303 in some respect. The question is, how far do those powers go? Section 303 contains 25 subsections, (a) through (y) (SA 3). None of these subsections contains any express authority to deal with leases, real property, or building owners. Section 303 authorizes the Commission to regulate broadcasting, radio communications, electromagnetic spectrum allocation, and television reception equipment. The two exceptions are Section 303(r) and Section 303(v).

Section 303(r) provides authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter” Thus, Section 303(r) merely assures that the Commission can issue rules to implement its other grants of authority. It does not mean that the Commission can take any step it finds necessary or desirable to perform its duties.¹¹ For example, in *Turner v. FCC*, 514 F.2d at 1355, this Court held that Section 303(r) does not give the Commission authority to order payment of a licensee’s legal expense. Therefore, unless Congress has given the FCC authority elsewhere in the Act to regulate lease terms, Section 303(r) does not apply.

Section 303(v) gives the FCC exclusive jurisdiction over the DBS industry. That does not mean that the Commission can take any action it chooses simply because it is in some way

¹¹ “[T]he use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare.” *NAACP v. Federal Power Commission*, 425 U.S. 662, 669 (1976).

connected to the DBS industry. It simply means that the Commission can preempt local and state regulation of the industry.¹² A grant of exclusive jurisdiction does not include a grant of general regulatory authority that extends to private parties.

In fact, Section 303(v) was necessary because of continuing uncertainty over the Commission's ability to preempt local zoning rules. Although the Commission had preempted local zoning rules before, its authority had always been questionable.¹³ Furthermore, the Commission had been hesitant about intruding in this field out of sensitivity to local concerns. *See e.g., First Earth Station Order* at ¶¶ 34-35 (JA ____). Section 303(v) gave the Commission clear authority to do what it saw fit with respect to state and local regulation of the DBS industry.

The principal provision cited by the prior preemption orders is Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). That section, however, confers no authority to regulate activities that are not otherwise within the Commission's jurisdictional ambit. *North American Telecomms. Assn. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (“Section 4(i) is not infinitely elastic”). For example, the Commission may not regulate an activity — such as leasing office space — that is unrelated to the communications industry. *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (Section 4(i) did not authorize FCC to regulate data processing services provided by regulated entities). Similarly, even in the case of a matter that

¹² *See House Report* at 123: “Federal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service.” One motivation for the *Second Earth Station Notice* and the addition of Section 303(v) to the Communications Act was the decision in *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), which held that the FCC could not review a decision of a state court upholding a local zoning ordinance in the face of a challenge under the FCC's then-current antenna preemption rule.

¹³ *See supra* at 19-20.

affects the communications industry, Section 4(i) does not authorize FCC regulation of building owners. *Illinois Citizens Committee*, 467 F.2d at 1400.

The purpose of Section 4(i) is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g., Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction under Section 4(i) to impose upon *telecommunications carriers* interim billing method for interconnection charges); *New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (Commission could order *telecommunications carriers* to reduce telephone rates) *cert. denied sub nom. Southern Bell Tel. & Tel. Co. v. FCC*, 490 U.S. 1038 (1989), not to expand that authority to include otherwise unregulated entities or activities. Building owners do not engage in the business of communications by wire or radio. It therefore follows that none of the authority conferred by the Communications Act can be applied to building owners as building owners - it does not matter whether that authority is express, or based on ancillary jurisdiction under Section 4(i).

The furthest afield the courts have allowed the Commission to go under Section 4(i) has been the regulation of cable television as an extension of the Commission's authority over television broadcasting, *see United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and the regulation of telephone holding companies to prevent cross-subsidization, *see North American Telecomms. Ass'n*, 772 F.2d at 1282. Both of these activities involve regulating entities that are clearly engaged in some facet of the communications business, unlike building owners.

B. Section 207 Did Not Give the FCC the Authority To Adopt the OTARD Rule.

As noted earlier, the *Second OTARD Order* contains no discussion of the source of the Commission's authority to regulate building owners. The only reference to the Communications

Act is in the ordering clauses, which cite Sections 4(i) and 303 of the Act, as well as Section 207. *Second OTARD Order* at ¶ 81. The *Second OTARD Order* simply assumes that Section 207 grants the necessary authority, without even noting that Section 207 is not part of the Communications Act.¹⁴

1. Section 207 is not itself a grant of authority, but a directive to exercise preexisting authority.

Section 207 cannot be a delegation of new authority from Congress. The structure of the Communications Act, the plain language of Section 207, and the Commission's prior preemption of zoning regulations all show that Section 207 was merely a one-time directive to the Commission to use its existing authority under Section 303 of the Communications Act, 47 U.S.C. § 303, to allow certain people to install antennas.¹⁵ *October 1996 Reply* at 9-13 (JA ____).

First, Section 207 is not a part of the Commission's organic statute; this seems to have been intentional on the part of Congress, since it could easily have added a new section to the Communications Act, and in fact added numerous new sections in the 1996 Act.¹⁶ It seems very unlikely that Congress would have granted the FCC broad new authority over the real estate industry in a provision that is not part of the Communications Act, particularly when Congress

¹⁴ The Commission first applied Section 207 in the *First OTARD Order* in August 1996, which also failed to analyze the source of the FCC's authority. *First OTARD Order* at ¶ 9 (JA ____).

¹⁵ Furthermore, as discussed *supra* at pp. 8-9, the *Second Earth Station Order*, March 1996, can be read as relying only on that prior authority to adopt the OTARD rule, and the *Broadcast Notice*, April 1996, is ambiguous at best.

¹⁶ *See e.g.*, 47 U.S.C. §§ 160, 161, 230, 251-261, 271-276, 336, 571. Furthermore, Section 207 is not unique. Numerous provisions of the 1996 Act were left uncodified. These sections either (1) direct the FCC to take specific actions or to modify or adopt certain rules (§§ 202, 207, 302, 402, 551(b)(2), 552(e), 704, 706); (2) represent policy statements by Congress (§§ 551(a), 552, 708); (3) apply to entities other than the Commission (§§ 561, 601(a), 601(e), 708, 709); or (4) are administrative provisions (§§ 561, 601(c), 710). Several arguably limit the Commission's authority (§ 601(b), 601(d)), but none of these uncodified provisions constitute a grant of new authority. *See* 1996 Act, 110 Stat. 56 (1996).

was engaged in a wholesale revision of that Act. Section 207 has not been codified as part of Title 47 of the United States Code, and it is not an amendment to the Communications Act. Instead, Section 207 has been inserted in the Revision Note to 47 U.S.C. § 303.¹⁷

The placement of statutes within the United States Code is the responsibility of the Office of the Law Revision Counsel. 2 U.S.C. § 285a (2000). Some laws – such as appropriations legislation and other special legislation – are never codified, because the standard for codification is that a law must be of a “general and permanent” nature. 2 U.S.C. § 285b(1) (2000); Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 Geo. Wash. L. Rev. 1, 237-238 (1998). The failure to codify Section 207 implies that the Office of Law Revision Counsel did not see the provision as being a “general and permanent” law; if the Commission were being given new authority, that authority would need to be available on a continuing basis, and would therefore be a general and permanent law. But a one-time directive to exercise existing authority would not be a general and permanent law; once the Commission adopted the *First OTARD Order*, Section 207 was no longer needed.

Second, the text of Section 207 does not say that the FCC “shall have the authority” to adopt rules prohibiting certain restrictions; instead, it says that the Commission shall promulgate regulations “pursuant to Section 303 of the Communications Act” If Section 207 were a

¹⁷ This appears to have been at the direction of congressional staff. The slip law printed after the 1996 Act was signed by the President contains marginal notations specifying where the various provisions of the new law are to be codified. The marginal note next to Section 207 states: “Regulations 47 U.S.C. 303 note.” 110 Stat. 56, 114 (1996). In addition, the *House Report* on H.R. 1555 contains those sections of the Communications Act affected by H.R. 1555, indicating those added by the bill. Section 308 (the original version of Section 207) does not appear. *House Report* at 172, 169-170. In any event, reviser’s notes to the United States Code are considered authoritative in interpreting the Code. *United States v. National City Lines, Inc.*, 337 U.S. 78, 81 (1949); *Acron Invs., Inc. v. FSLIC*, 363 F.2d 236, 240 (9th Cir.) *cert. denied*, 385 U.S. 970 (1966).

separate grant of authority, the reference to Section 303 would not be necessary. Section 303, on the other hand, does grant the Commission authority over different aspects of broadcasting and wireless communications. That Congress added Section 303(v) to the Communications Act at the same time that it adopted Section 207 is particularly telling, both because Congress did not see fit to add Section 207 to the Communications Act, and because Section 303(v) expressly gives the FCC exclusive jurisdiction over DBS services. Thus, the most plausible reading of Section 207 is that Congress was directing the Commission to use its newly-granted exclusive jurisdiction to preempt efforts to regulate the installation of the controversial DBS dish antennas by other government entities. The only plausible purpose for the reference to Section 303 is to identify the authority that Congress meant for the FCC to employ to meet the desired end.

Third, Section 207 must be read in the context of the FCC's past decisions. For over 15 years, the Commission has been citing various provisions of the Communications Act, primarily Sections 4(i) and 303, as authority for preemption of local zoning laws affecting the placement of satellite receiving antennas. *First Earth Station Notice* at ¶ 31; *First Earth Station Order* at ¶ 47; *Second Earth Station Notice* at ¶ 82. During the consideration of what became the 1996 Act, Congress would have known that the Commission had preempted local zoning rules in the *First Earth Station Order* under its existing authority and that the FCC had deferred to local zoning concerns. Congress would also have known that the Commission had noted that at some point it might have to deal with restrictive covenants, and that the Commission was considering amendments to its rules. *Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (Congress deemed aware of agency interpretation of statutory term); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts”). Congress presumably also knew that part of the Commission's

hesitancy in preempting zoning regulations derived from concerns about the scope of its authority. Because of this background, Congress needed to make sure that the FCC overcame its earlier doubts. Hence the directive to the FCC to exercise its newly-existing authority within 180 days.

Finally, it is simply inconceivable that Congress could have meant for the Commission to regulate an entire major new industry by enacting a single sentence that makes no mention at all of buildings, leases, or the commercial real estate industry. When Congress decided to clarify the scope of the Commission's authority over cable television in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2787, it added an entire new title to the Communications Act. When Congress decided to impose additional obligations regarding interconnection and unbundling on incumbent carriers, Congress adopted two extremely detailed new sections of the Communications Act as part of the 1996 Act. 47 U.S.C. §§ 251, 252 (2000). The complex issues raised by those new provisions were not relegated to a reviser's note or an uncodified section.

In fact, Congress has a long history of giving the FCC narrow grants of authority to enable the agency to regulate entities hitherto beyond the FCC's reach. One example is the Pole Attachment Act, discussed *supra* at 18, which gave the Commission narrow authority over electric utilities. Another example is the All Channel Receiver Act of 1962, 76 Stat. 151, which added Section 330 to the Communications Act and authorized the FCC to require television sets to be capable of receiving all television channels, largely to promote the growth of UHF television service. In fact, the legislation was amended before final passage because of concerns

that it might have given the FCC broader authority than necessary.¹⁸ S. Rep. No. 87-1526, at 1873 (1962).

For all these reasons, Section 207 simply cannot be a separate grant of authority.

2. Congress intended for the FCC to restore property rights, not to restrict them.

In the *First OTARD Order*, the Commission went as far as it could within the scope of its authority, and as far as Congress intended it to. The plain language of Section 207 contains no reference to leases. The *House Report* refers only to “State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of [certain receiving] antennae *House Report* at 123-24. Congress wanted the Commission to restore property rights that had been restricted by local requirements and never contemplated imposing new restrictions on property rights. *See September 1996 Comments* at 21-23 (JA ___); *October 1996 Reply* at 32-33 (JA ___)

In preempting zoning laws, the Commission began by restoring to property owners the freedom to install antennas. In preempting restrictive covenants, the Commission was also restoring rights to property owners. Requiring a property owner to permit the installation of physical facilities by a third party, however, constitutes a restriction of the property owner’s rights, not an enlargement or restoration. This is a fundamental distinction, which the Commission has completely ignored. *October 1996 Reply* at 42-44 (JA ___)¹⁹

¹⁸ Other such sections include 47 U.S.C. §§ 303(q) (authority over radio towers no longer used by FCC licensee); 223(b)(5)(B) (authority to assess fines for indecent telephone uses); 610 (authority regarding access to telephone service for the hearing impaired, including package labeling); 302 (authority over any person selling or manufacturing home electronic equipment); and 226(d) (authority over hotels and other telephone service aggregators).

¹⁹ Tenants and owners have very different incentives with respect to preserving the safety, long-term life and aesthetic condition of a building. If the owner of a building chooses to install equipment that poses a threat of harm to the building or the public, or alters the appearance of the

II. THE FCC'S RULES CONSTITUTE A TAKING OF THE PROPERTY OF BUILDING OWNERS.

The OTARD rule takes the property of building owners, both under the *per se* physical taking rule of *Loretto*, 458 U.S. 419, and under the regulatory taking rule of *Penn Central*, 438 U.S. at 124. *September 1996 Comments* at 4-10 (JA ____); *October 1996 Reply* at 6-9 (JA ____).

The rule violates the Takings Clause of the Fifth Amendment because the taking is uncompensated.²⁰

A. Forcing a Lessor To Permit Installation of an Antenna Entails the Physical Occupation of Property and Is Therefore a *Per Se* Taking Subject to *Loretto*.

In *Loretto*, the Supreme Court held that a New York statute authorizing a cable television company to place cable equipment onto Ms. Loretto's building constituted a taking under the Fifth Amendment. The decision rested upon the following principles:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case,

property, the owner bears the risk of the consequences. Tenants are freer to ignore those considerations, because the owner is ultimately responsible. Despite this, the FCC applies the same rule to both owner-occupants and tenants. This has led to disturbing results. In one case, a tenant filed a petition with the Commission objecting to his townhouse development owner's restrictions on antenna placement. *Petition for Declaratory Ruling of John Sabrowski*, File No. CSR-5421-O (filed June 23, 1999) (JA ____). Over the owner's objections, he was permitted to install the antenna pending the resolution of the petition. The owner then learned that the installer hired by the resident had breached a fire wall and disturbed exterior weather flashing in the course of connecting the antenna to the unit's internal wiring. *Id.*, Response of Stuart Management Corporation, File No. CSR-5421-0 (filed August 30, 1999). (JA ____). Both actions violated the building code, and the first was a clear safety violation. This case has now been pending for over a year, without resolution by the Commission. The owner has not taken action against the tenant because the owner's rights are unclear: on the one hand, the OTARD rule arguably does not apply because of the fire code violation, but on the other hand the rule seems to forbid the owner from acting against the tenant until the Commission decides the case.

²⁰ The OTARD rule precludes charging any sum in connection with an installation.

“the character of the government action” not only is an important factor in resolving whether the action works a taking but also is determinative.

Loretto, 458 U.S. at 426.

Thus, no balancing test is required when the government authorizes a physical occupation of property. In reaching this conclusion, the Court emphasized that a physical occupation of another’s property “is perhaps the most serious form of invasion of an owner’s property interests.” *Id.* at 435. In discussing the long line of authority that supports the view that “physical intrusion[s]” are property restrictions of “an unusually serious character,” the Court paid special attention to the importance of protecting a landowner’s “right to exclude.” *Id.* at 426, 433. The court stated that “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights,” and ““one of the most essential sticks in the bundle of rights that are commonly characterized as property.”” *See id.* at 435 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979)). The decision therefore leaves no doubt that a property owner is constitutionally entitled to the right to exclude others from his property, no matter what may be the reasons for, or the degree of, the potential invasion.

The *Second OTARD Order* acknowledges the force of *Loretto*. Indeed, the Commission applied *Loretto* correctly in finding that permitting tenants to install antennas in common areas or restricted use areas would constitute a taking. *Second OTARD Order* at ¶ 40-41 (JA ____). The *Second OTARD Order*, however, insists that *Loretto* does not apply to installations within leased premises. The Commission’s argument comes down to the claim that in granting a tenant the right to possess the property, the owner has surrendered all control over the tenant’s use of the premises.

A lessor does not necessarily surrender all rights to control a lessee's activities. It is axiomatic that the parties to a lease can agree to impose a broad range of duties on each other.²¹ The rights of a tenant therefore remain subject to the restrictions on activities agreed to by the tenant in the lease itself, which may frequently include the installation of any fixture (including a satellite dish) in any exterior space. The rights of a tenant are also limited by the background principles of state landlord-tenant law.

Indeed, as Commissioner Furchtgott-Roth points out in his well-reasoned dissent, a landlord may prohibit a tenant from hanging laundry on a balcony or storing a bicycle on a porch. Furchtgott-Roth Statement at 13 FCC Rcd at 23922 (JA ____). A landlord may prohibit a tenant from keeping pets. *Clifford V. Miller, Inc. v. Rent Control Bd. of Cambridge*, 575 N.E.2d 356 (Mass. App. Ct. 1991) (rent control statute did not forbid owner from evicting tenant who violated no-pets clause); *Hollywood Leasing Corp. v. Rosenblum*, 442 N.Y.S.2d 833 (N.Y. App. Term 1981); *Pollack v. J.A. Green Constr. Corp.*, 338 N.Y.S.2d 486, 487 (N.Y. App. Div. 1972) (“prohibition against keeping animals . . . is reasonable and enforceable”) *aff’d*, 32 N.Y.2d 720 (1973); *First Mortgage Bond Co. v. Saxton*, 20 N.W.2d 294, 295 (Mich. 1945) (“the keeping of a dog in an apartment house, in violation of an express written agreement, . . . entitles the landlord to repossess himself of the premises”). A landlord may prohibit a tenant from making structural alterations. *Nguyen v. Manley*, 363 S.E.2d 613 (Ga. Ct. App. 1987). A lease may prohibit the installation of a washing machine. *77-34 Austin St. Corp. v. Haas*, 154 N.Y.S.2d 702 (N.Y.

²¹ Indeed, even the *Second OTARD Order* admits that a property owner retains some rights in the property, when it states that *to a large extent*; “the property owner relinquishes its right to control the use of its property when it leases the property.” *Id.* at ¶ 19 (emphasis added) (JA ____). So even the Commission must acknowledge, however grudgingly, that its theory overstates its case, and that an owner does retain rights beyond the right to dispose of the property and to recover possession at the end of the lease.

Mun. Ct. 1956). A lease may also prohibit assignment of the lease without the consent of the owner, even in a rent-controlled setting. *Slavin v. Rent Control Bd. of Brookline*, 406 Mass. 458 (1990).

In fact, there are cases upholding an apartment owner's right to prevent a resident from installing a television antenna on the premises. *See, e.g., 5701 Fifteenth Ave. Realty Corp. v. Rosenberg*, 94 N.Y.S.2d 560 (N. Y. Sup. Ct. 1949) (under clause prohibiting placing anything in windows); *Scroll Realty Corp. v. Mandell*, 92 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (under clauses prohibiting defacing of building and projecting anything from windows); *Kanon v. Hefgold Realty Corp.* 85 N.Y.S.2d 581 (N.Y. Sup. Ct. 1949) (same).

A lease of space in real property grants a property right, *United States v. General Motors*, 323 U.S. 373, 382 (1945), and the rights retained by the lessor are a property right. *See id.* at 378 (“The constitutional provision is addressed to every sort of interest the citizen may possess”). Consequently, if a lessor has the right to prohibit a lessee from installing an antenna – whether under an express provision, or under the type of general language referred to in the New York antenna cases cited above – that is a property right. By taking that property right from the lessor, the OTARD rule engages in a *per se* taking in direct contravention of the rule of *Loretto*.

B. *FCC v. Florida Power Does Not Define the Scope of the Per Se Takings Doctrine.*

To avoid *Loretto*, the Commission relies heavily on *Florida Power*, 480 U.S. 245, and distorts the holding of that case almost beyond recognition. Once an owner surrenders possession of property under a lease, claims the FCC, it is not possible to effect a *per se* taking of that property. This argument proves far too much. *Florida Power* is nothing more than a rent control case: once a property owner leases his property, the government may regulate the rent charged by the owner.

In *Florida Power*, the FCC had ordered a reduction in the annual pole rental fees paid to Florida Power by various cable television companies, under the authority of the Pole Attachment Act. When Florida Power appealed, the Eleventh Circuit held that the Act violated the Fifth Amendment because it authorized a permanent physical occupation under *Loretto* and allowed the FCC rather than the courts to set compensation. The Supreme Court reversed, stating that *Loretto* did not apply. Unlike the New York statute in *Loretto*, the Pole Attachment Act did not give the cable companies the right to use the electric company's poles; it only regulated the terms of the attachment, once the owner allowed the cable companies to use the poles. The only terms of the attachment agreements in question in *Florida Power* were the pole rental fees. Consequently, the Court ruled that there had been no taking.

This does not mean, however, that the government can mandate attachment by others. *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (holding that amendment of 47 U.S.C. § 224 requiring utilities to grant access to any requesting telecommunications or cable company was a taking). For the same reason, it does not mean that the government can mandate attachment by a tenant: any such expansion of the tenant's rights under the lease would be a taking. The Commission cites no case in which the government granted a tenant an enlargement of its property rights as defined in a lease, yet it leaps to conclusions: "the right to assert a *per se* taking is easily lost: once a property owner voluntarily consents to the physical occupation of its property by a third party, any government regulation affecting the terms and conditions of the occupation is no longer subject to the bright-line *per se* test" *Second OTARD Order* at ¶ 21 (JA ____).

1. A property owner does not acquiesce to any and all potential uses of the demised premises upon agreeing to lease the premises.

The *Second OTARD Order* wrongly construes a key passage in *Florida Power*, which states “it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.” *Florida Power*, 480 U.S. at 252-253. The Commission reads this to mean that if one is a commercial lessee one cannot be an interloper with a government license, but there is no logic to that conclusion. It is perfectly possible for a person to be both a lessee and an interloper with a government license. If the government gives a tenant a right that was denied under a lease, then as to its exercise of that right, the tenant is an interloper.²²

The *Second OTARD Order* assumes that by signing a lease, an owner gives up all right to control the use of the property, and retains no interest in the property other than the right to recover possession at the end of the lease term. As discussed above at pp. 30-31, this is simply not the law. A lessor can retain a specific bundle of rights, defined by the terms of the lease. If the owner has retained certain rights, such as the right to prevent installation of antennas on a patio, and the government deprives the owner of those rights by requiring the owner to permit the installation of physical facilities, then the *per se* takings rule still applies. See *Gulf Power*, 187 F.3d at 20 (“the bundle of rights that a utility has in its property includes the right to permit its use for wire communications . . .”).²³

²² In *Florida Power*, the FCC’s rules governing terms of the pole attachment agreements other than the rent were not at issue, but even if they had been *Florida Power* would not apply in this case. The FCC’s pole attachment rules govern the same occupancy that is permitted under a pole attachment agreement. The OTARD rule, however, attempts to establish a different occupancy. Rather than govern an occupancy the property owner has consented to, the OTARD rule expands the scope of the occupancy, against the owner’s wishes.

²³ The *Second OTARD Order*, at ¶ 22 (JA ____), accuses Commissioner Furchtgott-Roth of “muddying” the issue for making this point: the *Order*, however, sets up a straw man, because

Florida Power says nothing at all on this point. *Florida Power* does say that “statutes regulating the economic relations of landlords and tenants are not *per se* takings.” *Florida Power*, 480 U.S. at 252. But that is just another way of saying that rent control does not cause a physical occupation. The OTARD rule is not a rent control regulation, and it does not regulate “economic relations” – it permits a new physical occupation, of a type not agreed to by the owner. See *Gulf Power*, 187 F.3d at 20.

In short, *Florida Power* simply does not extend as far as the Commission needs it to: *Florida Power* would not permit a cable company to build a railroad track alongside the utility poles, within the power company’s easement. All *Florida Power* said was that there was no *per se* taking in that case, because the right to attach was not ordered or granted by the government. *Florida Power* does not qualify or define the limits of the *per se* doctrine.

2. Unlike the utilities in *Florida Power*, a building owner has no choice other than to lease its property.

Even if *Florida Power* could conceivably apply in this case, the case is still distinguishable. The power company in that case was not primarily in the business of leasing property, and only leased pole space to a few select companies, essentially as an ancillary business. Consequently, the power company could avoid FCC regulation simply by choosing not to open its rights-of-way to third parties. In this case, however, the building owners have no such option. They cannot escape the OTARD rule by merely refusing to lease apartment units or office space to tenants without going out of business. Therefore, building owners have not voluntarily subjected themselves to the prospect of the OTARD rule. Furthermore, in *Loretto* the

Commissioner Furchtgott-Roth did not say that a modification of any lease term constitutes a taking. His point, and ours, is that modifying a lease term in a way that permits a previously unauthorized physical occupation effects a taking. If anything, it is the Commission’s reading of *Florida Power* that muddies the issue.

Supreme Court limited any such reading of *Florida Power*, specifically stating that “a landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.” *Loretto*, 458 U.S. at n. 17.

C. Even if *Loretto* Did Not Apply, the OTARD Rule Would Effect a Regulatory Taking.

A regulation falling outside the *per se* rule of *Loretto* can still violate the Takings Clause. In *Penn Central*, 438 U.S. at 124, the Supreme Court identified three factors that are significant in determining whether a taking has occurred: (1) “the economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with investment-backed expectations;” and (3) “the character of the governmental action.” Applying these factors to the OTARD rule demonstrates that it creates a taking of leased property.

Economic Impact. The market for both residential and commercial property depends a great deal on the appearance of the building and the surrounding area. Common sense tells us that people prefer to live and work in attractive buildings in attractive settings. Therefore, if tenants are permitted to install antennas on every balcony or porch, the value of such buildings can be expected to decrease.²⁴

Furthermore, as discussed above, the OTARD rule interferes with the ability of building owners to manage their property. Effective property management requires an owner to analyze consumer demand and then design, retrofit or renovate a building to meet that demand. The

²⁴ As noted earlier, the *First OTARD Order* rejected aesthetics as a justification for upholding local zoning rules in the face of federal preemption. The *Second OTARD Order* extended this view to leased property, despite the observation by Professor Charles Haar that “aesthetic controls are a significant component of property values and property rights.” *October 1996 Reply*, Declaration of Professor Charles Haar at 15 (JA ____). Professor Haar added that “some may discern a Philistine air in the Commission’s rule” as a result of its denigration of aesthetic value. *Id.* at 10 (JA ____).

owner must consider decor, landscaping and other aspects of the building's appearance, along with potential amenities, facilities and services. The OTARD rule replaces management by the owner with government interference and tenant license. *September 1996 Comments* at 26-28 (JA ___).

Investment-Backed Expectations. Any rule that interferes with the market value of a building will obviously affect the owner's investment-backed expectations. This is especially true when an agency with no prior authority or history of regulating an industry imposes a rule of unprecedented nature. Unlike the employers in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 726 (1986), who knew that if they adopted pension plans Congress might change the laws governing the plans, the real estate industry has never been regulated by the FCC before and had no reason to anticipate that it would be.

Character of the Governmental Action. The OTARD rule authorizes every tenant in perpetuity to install antennas at will. This is the sort of "permanent and continuous right" that the Supreme Court has found to constitute a taking. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.") Even if granting tenants the right to install antennas is not a physical invasion, it is a permanent appropriation of an asset. *See Connolly*, 475 U.S. at 225. The OTARD rule takes all of a particular strand in the owner's bundle of rights, and such a "total abrogation" of a property right is a taking. *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *see also Armstrong v. U.S.*, 364 U.S. 40, 48 (1960).

In sum, the OTARD rule takes property without authorization and without compensation, and must be vacated.

III. THE FCC IS REQUIRED TO INTERPRET SECTION 207 AND THE COMMUNICATIONS ACT IN A MANNER THAT DOES NOT RAISE CONSTITUTIONAL ISSUES, UNLESS CONGRESS EXPRESSLY AUTHORIZED A TAKING OF PRIVATE PROPERTY.

While we have shown that the OTARD rule effects a taking of property, this Court need not decide this issue. As discussed under point I, *supra*, the FCC had no authority to extend the OTARD rule to leased property. Furthermore, the Court can invoke the rule that statutes should be construed to avoid serious constitutional questions. This rule has special force in the takings context, since the effect of a taking is to force an expenditure from the Treasury, which can only be authorized by Congress. Consequently, unless the Commission can show that it has the express authority to effect a taking, Section 207 and the Commission's authority under the Communications Act must be construed in a manner that avoids a serious risk of taking the property of building owners. By expanding the OTARD rule to include leased property, the Commission violated this principle.

A. In the Absence of Express Statutory Language, this Court Should Avoid Interpreting the Communications Act in a Manner that Raises a Serious Question as to Its Constitutionality, Especially When a Potential Taking of Private Property Is at Issue.

The Supreme Court has repeatedly stated that it construes statutes to defeat administrative orders that raise substantial constitutional considerations. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). This doctrine of invalidating constitutionally questionable regulations and orders reflects the broader doctrine of interpreting statutes generally so as to avoid raising serious constitutional questions. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

This principle must be followed when an administrative order might constitute a taking of private property under the Fifth Amendment, notwithstanding that a taking is not strictly speaking unconstitutional unless it goes uncompensated. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982). Thus, whenever “there is an identifiable class of cases in which application of a [rule] will necessarily constitute a taking,” the Supreme Court has stated that it will adopt a narrowing construction of the rule so as to avoid this outcome. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), 128 n.5. Indeed, based in part on this doctrine of construing statutes so as to avoid constitutional questions, this Court held in *Bell Atlantic*, 24 F.3d at 1445, that the Commission did not have authority to order physical collocation of competitive access providers (“CAPs”) to the central offices of local exchange carriers (“LECs”). The Commission had statutory authority to order “physical connections.” The record showed, however, that “virtual” collocation, where the CAP simply strings its own cable to a point of interconnection near the LEC central office, was a feasible alternative. As a result, the Court ruled that the Commission did not have authority to order physical collocation, since this form of collocation “would seem necessarily to ‘take’ property regardless of the public interests served in a particular case.” *Id.* at 1446 (citing *Loretto*). Indeed, the Court stated that it would uphold the Commission’s authority only if “any fair reading of the statute would discern the requisite authority,” or if the Commission’s authority would “as a matter of necessity” be defeated absent such authority. *Id.* at 1445-46 (emphasis added).

In addition to *Bell Atlantic*, a number of other cases have construed the Communications Act narrowly in order to avoid possible Takings Clause problems. These cases involved whether 47 U.S.C. § 541(a)(2) could be read to extend to rights-of-way that had previously been granted to specific carriers, or applied only to clearly dedicated “easements.” Courts have construed the

statute narrowly so as to avoid deciding whether the broader construction urged by the plaintiffs would constitute a taking. *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.) *cert. denied*, 506 U.S. 862 (1992); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (rejecting broad interpretation of “dedicated” easement as raising “serious questions” under the Takings Clause); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (adopting result of *Cable Holdings*); *Cable Inv. Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989) (construing statute narrowly to avoid potential taking).

An unauthorized taking is especially problematic because it violates appropriations law, and courts therefore require a higher standard to be satisfied in determining whether authority exists.²⁵ The Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, provides: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” The Supreme Court has relied on this clause in ruling that no funds shall be transferred from the Treasury other than in accordance with the letter of the difficult judgments made by Congress. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990). Thus, the Court has held that plaintiffs with established legal remedies against the Government nevertheless cannot recover monetary damages, absent a clear congressional appropriation. *Id. at 425* (holding that equitable doctrine of estoppel could not grant respondent a remedy that Congress has not expressly authorized); *Knote v. United States*, 95 U.S. 149, 154 (1877) (pardon power of the President “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress”).

²⁵ Any attempt by the FCC to condemn property would also violate the Anti-Deficiency Act, codified in part at 31 U.S.C. § 1341.

For an agency to order the taking of private property, it must have authority from Congress to spend the public funds needed to pay just compensation. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (reasoning that Congress is the only branch of government able to raise revenue and therefore the only branch able to authorize a taking). This constitutional principle was recognized by this Court in *Bell Atlantic*, where the Court explained why the deference to administrative action articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), did not apply:

Chevron deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.

Bell Atlantic, 24 F.3d at 1445; *see also GTE Northwest Inc. v. Public Utility Comm'n*, 900 P.2d 495, 501 (Or. 1995) (ruling that “the power of eminent domain may be exercised by an agency only if the agency has express statutory authority.”), *cert. denied*, 517 U.S. 155 (1996).

Thus, because Congress is the only branch of government constitutionally entitled to raise and spend revenue, the Executive’s power to create financial liabilities for the government requires an express statutory authorization. There is no provision in the Communications Act that can plausibly be read to provide the Commission with this authority.

B. The Plain Language of Section 207 Shows that Congress Did Not Expressly Authorize a Taking of Any Property.

Even if Section 207 constituted a grant of authority to the FCC, Section 207 does not authorize the Commission to adopt rules that will create a taking of property. Section 207 merely directs the Commission to adopt rules prohibiting certain types of restrictions. Nothing in Section 207 can plausibly be argued to expressly grant takings authority, and *Bell Atlantic*

established that the Commission has no inherent takings authority under the Communications Act. Indeed, the FCC's *Second OTARD Order* itself states that Section 207 contains no express grant of such authority. *Second OTARD Order* at ¶ 17 (JA ____).

The OTARD rule, on the other hand, creates an open-ended liability for the federal government. As long as the rule is in place, the government faces potential claims from property owners who are now subject to having physical facilities installed on their premises without their approval. The Commission did not need to create this controversy: Section 207 and the Communications Act can easily be read in a way that avoids raising the issue entirely.

IV. IF THE OTARD RULE DOES NOT EFFECT A TAKING, THEN IT IS ARBITRARY AND CAPRICIOUS.

Well aware of the obstacle posed by *Bell Atlantic*, the *Second OTARD Order* tries to sidestep the issue by claiming that there is no taking involved: “[r]emoving a restriction on installing an antenna within a leasehold does not impose a duty on the landlord to relinquish property because the landlord has already voluntarily relinquished possession of the leasehold by virtue of the lease” *Second OTARD Order* at ¶ 15 (JA ____); *see also* ¶¶ 17 - 21 (JA ____).

The problem with this statement is that it is a tautology: if true, it renders the OTARD rule meaningless. The Commission says it has taken nothing, because the owner already gave it away, but if that is the case, then why is the rule necessary? If tenants already have the right to install antennas as a matter of law, then the rule is not needed to accomplish the FCC's goals. Conversely, if the rule is needed, it can only be because the owners have something that tenants do not.

Consequently, if the Commission has not violated the Takings Clause, it has violated the Administrative Procedure Act. 5 U.S.C. § 706. Enactment of a purposeless or illogical rule is arbitrary, capricious, and an abuse of discretion. *See, e.g., Citizens to Preserve Overton Park v.*

Volpe, 401 U.S. 402, 416 (1971) (“[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”); *Motor Vehicle Mfrs. Ass’n. v. State Farm*, 463 U.S. 29, 48 (1983) (“agency must cogently explain why it has exercised its discretion in a given manner”); *United States Tel. Ass’n v. FCC*, 188 F.3d 521, 526 (D.C. Cir. 1999) (“Commission failed to state a coherent theory supporting its choice”); *Bell Atlantic v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000) (Commission failed to supply “real explanation for its decision”).²⁶

²⁶ Furthermore, as discussed *supra* at 30-31, it is simply not the law that a lessor retains no rights to control a lessee’s activities. The Commission blatantly disregarded the law and deliberately adopted a simplistic view of the landlord-tenant relationship. This is the very definition of an abuse of discretion. And finally, the OTARD rule should be found void for vagueness. It is impossible for a property owner to discern from the text of the rule what installations must be permitted, or what restrictions are permitted under the rule.

CONCLUSION

The Court should vacate the *Second OTARD Order*, insofar as it requires owners of leased property to permit tenants to install antennas within leased premises.

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CERTIFICATE OF COMPLIANCE
(Cir. Rule 32.1)

I certify that Pursuant to Fed. R. App. P. 32(a)(7)(C) the attached Brief of Petitioners contains 13,979 words. The Brief has been prepared in proportionally-spaced typeface using Word 97 in 12 point Times New Roman.

Matthew C. Ames

October 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2000, I caused to be mailed copies of the foregoing

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