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Are You Still Settling For Cable? A Case for Broader Application of the FCC's Over-The-Air Reception Devices Rule

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Are You Still Settling For Cable? A Case for Broader Application of the FCC’s Over-The-Air Reception Devices Rule

by
LAVONDA N. REED-HUFF*

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I. Introduction

For the past several years, the tenants of Camfield Estates, a public housing project in Boston, have participated in a project seeking to narrow the “digital divide” between economically disadvantaged Americans and those with ready access to innovative information technology.¹ The project has provided free computers and high-speed cable lines wired into the homes of housing project residents, enabling them to connect to the Internet. The project anticipates that residents soon will have access to a high-speed Wi-Fi system that will transmit and receive data from four small over-the-air reception antennas placed atop a building in the development.² Residents may purchase wireless cards for a small fee, and the elderly will receive cards for free. Residents will be able to log on at no cost from anywhere within the housing project. The tenants of Camfield are lucky. They are beneficiaries of the foresight and benevolence of a landlord who has recognized the importance of affording all people, regardless of property ownership and wealth, the opportunity to receive vital technologically-advanced wireless communications services.

Not every renter is as lucky. For instance, imagine a woman who rents a unit in a suburban apartment complex. The rates charged by the local cable television company have steadily increased over the last few years, while the quality of service she receives has declined. The tenant wants to subscribe to a satellite television service, which offers lower prices and a wider range of programming choices. When service people arrive to wire the apartment and to install a new satellite dish on her patio, the landlord runs to the apartment waving a copy of the tenant’s lease agreement in his hand. Apparently, the lease agreement strictly prohibits the installation of satellite dishes by the tenant. The tenant is confused when her landlord orders the service people off of his property. The landlord insists that the tenant is nothing more than a renter and has no right to install a satellite dish

1. See Donna Rosato, *Bringing Free Wireless Access To The People*, USA TODAY, Nov. 18, 2002, at 5E; see also Associated Press, *Low-income Housing Goes Wireless* (Feb. 24, 2003), at <http://www.cnn.com/2003/TECH/internet/02/24/housing.hotspot.ap/ap/index.html>.

2. Wi-Fi is short for “wireless fidelity” and is used to refer to a family of technology specifying an over-the-air interface between a wireless telecommunications client and a base station or between two wireless clients. The technology may be used for the provision of Internet service.

anywhere on the premises, and any further attempts to do so would result in a penalty, eviction, and a lawsuit. Even though the tenant does not own any part of the leased premises, unbeknownst to her, she probably has the right to install a satellite dish on the patio.

Next, consider a Spanish-speaking family renting a single-family home in an area serviced by a local cable system that does not carry any Spanish-language programming. The family learns that a direct broadcast service provider carries three Spanish-language networks, and arranges service. After the dish is installed, the family's landlord threatens to remove the dish unless the family first removes it, referencing the family's lease which prohibits the installation of satellite dishes on the property. As this article will show, this family has a powerful tool under federal law.

Finally, imagine a man who rents an apartment in the middle of a densely populated downtown district. Impressed with available satellite services, he wishes to subscribe to satellite service and to install a satellite dish. Unfortunately, because the man's apartment does not have a balcony or patio, he may not share the same protections under federal law. This article suggests that he should.

In 1996, Congress enacted the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), which was intended to be landmark legislation that would change the regulatory landscape of the communications industry and the delivery of communications and telecommunications services in the United States.³ Not since the enactment of the Communications Act of 1934 (the "1934 Act") had the communications industry undergone broad-sweeping legislative change addressing the rapidly changing technological and business environment.⁴ In Section 207 of the 1996 Act, Congress directed the Federal Communications Commission (the "FCC" or the "Commission") to issue regulations prohibiting restrictions on a viewer's ability to receive television broadcast signals, multichannel multipoint distribution service ("MMDS"), or direct broadcast satellite services ("DBS") via over-the-air reception devices.⁵ The

3. Telecommunications Act of 1996, 42 U.S.C. § 101 et seq. (2000).

4. Communications Act of 1934, 47 U.S.C. § 303 (2000).

5. Telecommunication Act of 1996, 42 U.S.C. § 207. Section 207 was not codified but reads in relevant part:

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 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.

Congressional directive to the FCC sought to promote one of the primary objectives of the 1934 Act, which was “to make available, so far as possible, to all people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”⁶

The 1996 Act also added a new subsection 303(v) to the 1934 Act “granting the [C]ommission exclusive jurisdiction to regulate the provision of direct-to-home satellite services.”⁷ In response to this Congressional directive, on August 5, 1996, the Commission implemented Section 207 of the 1996 Act by adopting FCC Rule section 1.4000 (the “OTARD Rule” or the “Rule” or “Rule 1.4000”).⁸ The OTARD Rule prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices (“OTARDs” or “Section 207 Devices”).⁹

The Commission’s initial OTARD Rule prohibited restrictions “on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership in the property.”¹⁰ In other words, it protected those parties seeking to install a reception device on property, which they in fact owned. In 1998, the Commission expanded the OTARD Rule to include rental property, and applied it to installations “on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or *leasehold* interest in the property” upon which the

See also 47 U.S.C. § 303(v).

6. 47 U.S.C. § 303.

7. *Id.* §§ 151, 303(v) (“[T]he term ‘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. . . .”)

8. *Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 F.C.C.R. 19276 (1996) (“First OTARD Order”); 47 C.F.R. § 1.4000 (2004).

9. 47 C.F.R. § 1.4000. Section 207 Devices or OTARDs include antennas that are one meter (39.37”) or less in diameter or diagonal measurement and are designed to receive direct broadcast satellite services, video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, local multipoint distribution services, and television broadcast signals. The Rule also applies to masts extending no more than 12 feet above the roofline which are within the exclusive use or control of the viewer.

10. *See* First OTARD Order, 11 F.C.C.R. at 19279, ¶ 5 (The OTARD Rule initially applied only to property in which the “user” of the satellite services had an ownership interest. It allowed for two exceptions: (1) clearly defined safety objectives; (2) historic district preservation.).

antenna is to be located.¹¹ The OTARD Rule, as amended, permits persons who lease property—tenants—to install such devices without obtaining the consent of the landlord or owner of the property.

The extension of the OTARD Rule to rental property has raised constitutional questions including challenges by property owners, landlords and various real estate organizations and associations who argue that application of the OTARD Rule to rental property constitutes a taking of private property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.¹² A few years ago, the United States Court of Appeals for the District of Columbia Circuit reviewed the constitutionality of the OTARD Rule and answered the pointed question of whether the extension of Rule 1.4000 constituted a taking of private property thus triggering the government's obligation to compensate the affected property owners.¹³ The D.C. Circuit declined to find a compensable taking.¹⁴

Many articles addressing the issue of unconstitutional takings start with the assumption that property is involved and embark upon a discussion of whether a taking has in fact occurred. What often is missing is a discussion of what property right, if any, is actually involved. In other words, as applied to the FCC's OTARD Rule, the takings analysis first must address the precise nature of the tenant's and landlord's property interests. The question becomes whether the tenant actually has property rights distinct from contractual rights under a lease. Likewise, the nature of the landlord's property rights under a leasehold must be identified. If a tenant does have property rights, such rights must be clearly identified and balanced against those of the landlord.

This article agrees that the Commission's Rule 1.4000 as it applies to landlords and tenants does not constitute an

11. *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*, 13 F.C.C.R. 23874, ¶ 4 (1998) (“Second OTARD Order”). The Second OTARD Order became effective January 22, 1999. In general, however, the Commission has characterized rooftops as a common area and has excluded rooftops from areas that are within the exclusive use or control of a tenant. The Commission stated that this amendment to its rules serves two federal objectives of promoting competition among multichannel video providers and of providing viewers with access to multiple choices of video programming.

12. The Takings Clause states that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The OTARD Rule also has raised Equal Protection, First Amendment, and Due Process questions that are discussed in part in this article.

13. *Bldg. Owners and Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89 (D.C. Cir. 2001).

14. *Id.*

unconstitutional taking. Although tenants have fewer property rights than landlords or property owners as they pertain to rental property, when those rights are balanced against the rights of the property owner, no compensable taking is found, considering the goals of Congress and the FCC, and considering policy concerns of fairness. The FCC struck the proper constitutional balance between the interests of consumers, property owners, and the business industry by not extending the Rule to common areas, as such an extension probably would constitute an unconstitutional taking. The FCC properly placed the burden on industry to reach consumers not protected by the Rule by encouraging the development of more innovative technology and methods of transmission and reception of communications, video and data services. Rather than burdening the property rights of owners, it equitably placed the burden on those who stand to benefit most from the application of Rule 1.4000.

However, this article contends that to fully achieve the goals of the 1996 Act, the protections of Rule 1.4000 must be extended to areas outside the exclusive use or control of a rental property lessee. This article, supports the contention of many proponents of the Rule that while the FCC's OTARD Rule is constitutional, Rule 1.4000 has a number of other shortcomings, the most important of which is that because the Rule provides only limited opportunities for viewers to install Section 207 Devices on rental property, the Rule fails to fully achieve the goals of the 1996 Act of ensuring that service is available to all Americans. Also, the Rule raises important social and economic issues. The OTARD Rule fails to reach all people across racial, ethnic, and economic lines. It fails to go far enough to accomplish the goal of making OTARD reception available to all consumers. As is the case in most FCC rulemaking proceedings, the record is very detailed and most legal arguments are made with great clarity and specificity. However, while the Commission and certain commenters identify these issues they fail to fully grasp to gravity of the FCC's failure to make the OTARD Rule applicable to all persons, regardless of property ownership or regardless of access to areas exclusively within a renter's control and use on which to install a satellite reception device.

The FCC's Rule, as supported by the D.C. Circuit's holding in *Building Owners and Managers Association Int'l*, gives consumers only limited access to receive communications services.¹⁵ However, to accomplish the goals of Section 207, the Commission must go a step

15. *Id.*

further to permit tenants either to place reception devices on areas beyond their exclusive use or control or to require landlords to provide satellite video service to tenants within the leasehold. Only by such an extension of the Rule would there be a full meeting of the objectives of the Telecommunications Act of 1996 which is to prohibit rules that “impair a viewer’s 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.”¹⁶

Since adopting the OTARD Rule, the FCC has often touted a great “Digital Migration” which refers to the great efforts by government and industry to deliver a wide range of telecommunications services such as Wi-Fi, digital television, broadband and wireless Internet, Voice Over Internet Protocol (“VoIP”), wireless personal digital assistants (“PDAs”), digital AM and FM radio, and satellite radio. While broadband television and cable offer consumers choice and somewhat competitive markets, many services may be delivered more cheaply and efficiently via satellites. The Congress should seek to equate the right to receive telecommunications services to the right to receive other services such as utilities and postal mail. Therefore, this article contends that the Commission, courts and legislatures should look to expand the rights granted to a tenant under a leasehold. By equating the right to receive telecommunications services to other vital services, we in fact create an important exemption to a compensable taking. Such an exemption is necessary in this case because the Commission did as much as it could constitutionally accomplish because to go further without such an exemption would implicate the Takings Clause. The Commission may have such an opportunity to revisit this issue in the next few years, as some members of Congress have suggested recently that the Congress will revisit certain portions of the 1996 Act.

Part I of this Article provides an explanation of the background of Rule 1.4000. It traces the development of Rule 1.4000 from the Congressional directives in the 1996 Act through the FCC’s rulemaking proceedings and the FCC’s declaratory rulings. Part II reviews the practical shortcomings of the Rule. Specifically, this section contends that the FCC must more adequately address the technical and practical limitations affecting many rental properties and the failure of the Rule to encompass all small antennas. Part III discusses the social and economic issues invoked by the Rule. This

16. 42 U.S.C. § 207.

section specifically addresses the failure of the Rule to span racial and ethnic lines, and the failure to adequately address liability allocation while continuing to promote Congress' objectives. Parts II and III review the rulemaking record and address those arguments made by the Commission and others in the rulemaking proceeding. Part IV discusses the property rights of tenants and landlords and answers the question of what property rights, as distinct from contract rights, landlords and tenants possess with respect to a leasehold. Finally, Part V addresses the constitutional problems associated with Rule 1.4000, focusing on takings jurisprudence and examining the long line of takings cases including the D.C. Circuit's review of the OTARD Rule. Additionally, this part reviews cases that have come before the FCC under this Rule, proposes an expansion of the rights granted to tenants under the modern leasehold, discusses the acceptable wealth redistributions between landlords and tenants, and addresses the FCC's efforts to fully achieve the goals of the 1996 Act without triggering constitutional problems.

II. Background of Rule 1.4000

The objective of the 1934 Act, as stated by Congress, was "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."¹⁷ In 1996, through a dramatic overhaul of the 1934 Act, Congress directed the FCC to adopt rules concerning governmental and nongovernmental restrictions on viewers' ability to receive video programming signals from DBS, MMDS—wireless cable providers, and television broadcast stations ("TVBS").¹⁸ As directed by Congress, the Commission initiated a rulemaking proceeding, issued a

17. 47 U.S.C. § 151.

18. 42 U.S.C. § 207. Direct Broadcast Satellite ("DBS") is a term for a satellite which sends powerful signals to small dishes, typically 18-inch diameter, installed at homes. Multipoint Multichannel Distribution Service ("MMDS") is a way of distributing cable television signals, through microwave, from a single transmission point to multiple receiving points. Television Broadcast Stations ("TVBS") are over-the-air radio or television stations licensed by the FCC or equivalent foreign (Canadian or Mexican) stations. See Harry Newton, *NEWTON'S TELECOM DICTIONARY* (17th ed. 2001).

Notice of Proposed Rulemaking,¹⁹ and ultimately adopted the OTARD Rule. The OTARD Rule was designed to further the objectives of promoting consumer choice and access to an array of video programming services, as well as fostering a competitive marketplace among providers of these services.²⁰

In its *First OTARD Order*, the Commission stated that, while Section 207 requires the Commission to prohibit restrictions that impair viewers' ability to receive satellite signals, it also permits the Commission to minimize possible interference that could result from local and municipal governments as well as homeowners' associations.²¹ The Commission stated in its order that "[w]e have thus attempted to implement Section 207 in a way that produces greater competition and consumer choice by ensuring viewers' ability to receive over-the-air signals, while preserving local control of regulation of safety and historic areas."²² The legislative history of Section 207 states "existing regulation, including but not limited to,

19. In 1986, the Commission adopted a rule restricting potential barriers to the development of satellite-based residential video programming (*Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986)), and in 1996 the FCC promulgated rules to safeguard viewers' ability to use devices designed for direct broadcast satellite services, television broadcast services, and multichannel multipoint distribution services (*Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, 11 F.C.C.R. 6357 (1996); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 F.C.C.R. 5809 (1996); *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 F.C.C.R. 19276 (1996) ("First OTARD Order")), and later adopted amendments to the Rule (*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*, 13 F.C.C.R. 23874 (1998) ("Second OTARD Order"); *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 13 F.C.C.R. 18962 (1998) ("First Order on Reconsideration"); *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 14 F.C.C.R. 19924 (1999) ("Second Order on Reconsideration")).

20. First OTARD Order, 11 F.C.C.R. at 19281, ¶ 6.

21. *Id.*, at 19281-82, ¶6.

22. *Id.*, at 19281-82, ¶¶ 5-6; *see also* Separate Statement of Commissioner Rachelle B. Chong, available at http://www.fcc.gov/Bureaus/cable/orders/1996_WP/fc96328.wp (Aug. 6, 1996) ("[i]n crafting this rule, we have performed a delicate balancing act. On the one hand, we have weighted the federal interests of ensuring that all consumers have access to a broad range of video programming services and promoting competition among those services. On the other hand, we have weighed important local interests in safety and managing land use in their communities.").

zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."²³ Thus, the Rule prohibits governmental and non-governmental restrictions that impair the ability of antenna users to install, maintain, or use Section 207 Devices and, thereby, that impair the ability of viewers to receive video programming signals from DBS and MMDS providers, and TVBS.²⁴ The prohibition includes local zoning, land use, and building regulations. Similarly, the Rule applies to lease restrictions, homeowner, town home, condominium and cooperative association rules and bylaws, restrictive covenants, and private deed restrictions.²⁵

The Rule provides that a restriction impairs installation, maintenance, or use of a protected antenna if it: (1) "unreasonably delays or prevents installation, maintenance or use,"²⁶ or; (2) "unreasonably increases the cost of installation, maintenance, or use"²⁷; or (3) "precludes reception of an acceptable quality signal" of

23. 104th Congress, 1st Session, Report 104-204, Part 1 at 123-24 (July 24, 1995).

24. First OTARD Order, 11 F.C.C.R. at 19279-81, ¶ 5. The Rule became effective on October 14, 1996. Telecommunication Act of 1996, 42 U.S.C. § 207.

25. *See id.*, at 19279-81, ¶ 5; *and see* Second OTARD Order, at 23880, ¶ 12-15.

26. *See* First OTARD Order, 11 F.C.C.R. at 19285-87, ¶¶ 14-17. Local restrictions, both governmental and private, prohibiting all antennas are prohibited by the OTARD Rule. Likewise, governmental and nongovernmental procedural requirements which unreasonably delay installation, maintenance, or use of an antenna covered by the Rule are prohibited. Prior approval and permit requirements generally are prohibited as they cause unreasonable delays in receiving services addressed by the Rule.

27. *See id.*, at 19287-88, ¶¶ 14, 18-19; *and see* First Order on Reconsideration, 13 F.C.C.R. 18962, ¶¶ 42-45 (1998). Also, the required payment of fees for a permit or for permission to install covered antennas generally is considered an unreasonable expense and is not permitted. Also, any governmental or nongovernmental restriction requiring a viewer to incur additional costs may be unreasonable and thus prohibited. To determine the reasonableness of a cost, the Commission considers, among other things, the cost of the equipment and services, and whether similar requirements have been imposed for comparable items, such as air conditioners, mailboxes, or garbage cans. The Commission suggests it might invalidate rules requiring expensive landscaping to screen antennas, but might uphold a requirement to paint an antenna so that it blends into the background, provided painting the antenna would not interfere with reception or impose unreasonable costs. The Commission did not adopt a specific formulaic computation.

a covered Section 207 Device.²⁸ The OTARD Rule applies to video reception antennas including direct-to-home satellite dishes that are less than one meter in diameter,²⁹ TV antennas, and wireless cable antennas.³⁰

The Rule excepts certain clearly defined, legitimate safety restrictions and certain historic preservation restrictions permitting local governments, community associations, and landlords to enforce safety and historic preservation restrictions that do not impair the installation, maintenance, or use of the types of antennas described in the Rule.³¹ The Commission in this order stated that safety restrictions are permitted provided they are necessary to protect public safety and are no more burdensome than necessary to ensure safety.³² Examples of valid safety restrictions include fire codes preventing people from installing antennas on fire escapes, and

28. See First OTARD Order, 11 F.C.C.R. at 19288, ¶¶ 14, 20; see also Telecommunication Act of 1996, 42 U.S.C. § 207. A restriction will be deemed to impair a viewer's ability to receive video programming signals if "reception would be impossible or would be substantially degraded." Any restriction requiring an antenna to be installed in a location where the viewer could not receive a clear signal would be prohibited. The standards are different for devices designed to receive different types of telecommunications services. For example, in order for a digital satellite antenna to receive or transmit an acceptable quality signal, the antenna must be installed where it has an unobstructed, direct view between the transmitting satellite and the reception device. Digital reception devices are subject to a "cliff effect," meaning that the transition between reception of a complete picture and no picture at all occurs almost immediately as if falling over a cliff. Analog antennas are entitled to be installed in a location as well, if one is available, that will allow the viewer to receive a reasonable quality signal.

29. See *id.*, at 19295-96, ¶ 32; and see 47 C.F.R. 1.4000(a)(1)(i). There is no such size limitation on satellite dishes located in Alaska.

30. See 47 C.F.R. 1.4000(a)(2) (2004); and see *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications, Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, 15 F.C.C.R. 22983, 23027-28, ¶¶ 98-99 (2000) ("Competitive Networks Order"). The Rule, as amended effective May 25, 2001, makes the Rule applicable to antennas designed to receive and/or transmit voice and data services, including Internet access, but not to antennas used for AM/FM radio, amateur or "HAM" radio, Citizen's Band ("CB") radio, or Digital Audio Radio Services ("DARS"); and see First OTARD Order, at 19294-95, ¶ 30. The Rule does not apply to television antennas used to receive a distant signal, nor does it apply to very small aperture terminals ("VSAT") that transmit information. VSAT is a commercial satellite service that may use Ku-band satellite antennas less than one meter in diameter. It is not within the purview of the statute because it is not used to provide over-the-air video programming. VSAT systems mostly are used for direct transmission of business data from one central location simultaneously to a large number of receiving points. For example, retail stores use rooftop VSATs to transmit daily receipts and to receive instructions for sales.

31. See First OTARD Order, at 19290-92, ¶¶ 24, 26.

32. *Id.* at 19290-91, ¶¶ 24-25.

restrictions prohibiting the placement of antennas within a certain proximity of power lines. Similarly, requirements directing the proper method to secure an antenna would be permitted.³³ The safety reason for the restriction must be specified in the text, preamble, or legislative history of the restriction, or in a document readily available to antenna users, so as to provide notice of the restrictions.³⁴

Historic preservation restrictions are permitted despite any impairment of installation, maintenance, or use.³⁵ The property must be included in, or eligible for inclusion on, the National Register of Historic Places.³⁶ Such historic restrictions, like safety restrictions, must be no more burdensome than necessary to accomplish the historic preservation goal.³⁷ The restrictions must be narrowly tailored, imposing as little burden as possible, and they must apply in a nondiscriminatory manner as compared to other similarly sized structures.³⁸ The Commission may grant waivers upon the request of a local government or nongovernmental private entity.³⁹

The Commission's *First OTARD Order* applied the OTARD Rule only to property in which the user of the satellite services had "a direct or indirect ownership interest in the property at issue."⁴⁰ The *First OTARD Order* failed to address whether the Section 207 prohibition should apply to property such as common areas in condominium complexes not within the exclusive use or control of a person with an ownership interest. It also left unresolved the issue of whether the prohibitions should extend to restrictions on installations

33. Telecommunication Act of 1996, 42 U.S.C. § 207 (2000); 47 C.F.R. 1.4000 (2004); *see also* First OTARD Order, at 19292, ¶ 25.

34. Telecommunication Act of 1996; 47 C.F.R. 1.4000; *see also* First OTARD Order, at 19292, ¶ 25; 104th Congress, 1st Session, Report 104-204, Part 1 at 123-24 (July 24, 1995).

35. Telecommunication Act of 1996; 47 C.F.R. 1.4000; *see also* First OTARD Order, at 19292, ¶¶ 26-27.

36. The FCC revised the Rule to conform to the National Historic Preservation Act of 1966, which defines protected historic properties as "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on the National Register." Telecommunication Act of 1996; 47 C.F.R. 1.4000; *see also* First OTARD Order, at 19292, ¶¶ 26-27.

37. Telecommunication Act of 1996; 47 C.F.R. 1.4000; *see also* First OTARD Order, at 19292, ¶ 26.

38. *Id.*

39. A waiver is available in instances in which a local government, community association, or landlord acknowledges that its restriction impairs installation, maintenance, or use and is preempted under the OTARD Rule, but believes it can demonstrate "highly specialized or unusual" concerns. Telecommunication Act of 1996; 47 C.F.R. 1.4000; *see also* First OTARD Order, at 19309, ¶ 55.

40. First OTARD Order, at 19279, ¶ 5.

on rental properties.⁴¹ In 1998, the Commission issued the *Second OTARD Order* expanding the OTARD prohibitions to include restrictions that impair the ability of antenna users to install, maintain, or use Section 207 Devices on rental property.⁴² Consequently, it is the Commission's *Second OTARD Order* that has been the source of most of the legal challenges to Rule 1.4000. Specifically, the *Second OTARD Order* extended its prohibition to restrictions on rental property within either the exclusive use or control of a tenant who has a leasehold interest in the property.⁴³ The Rule applies only to restrictions on property where the viewer has an ownership or leasehold interest with either exclusive use or control.⁴⁴ Pursuant to the *Second OTARD Order*, the Rule applies to viewers or consumers who place small antennas on property they own or on areas within their exclusive use or control on property they rent. The Rule protects tenants as well as owners of condominiums, cooperatives, and single family homes, town homes, manufactured homes, and mobile homes.⁴⁵ Renters now are able to install Section 207 Devices inside and on rented space on the outside of the building of the leased premises, such as balconies, balcony railings, patios, yards, and gardens. The Commission reiterated, in its *Second OTARD Order*, that the amended rule promotes competition between video service providers and promotes consumer choice.⁴⁶

41. See generally First OTARD Order.

42. *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*, 13 F.C.C.R. 23874 (1998) (“Second OTARD Order,” and collectively with the First OTARD Order, the “OTARD Orders”). The Second OTARD Order became effective January 22, 1999. See also First Order on Reconsideration, *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 13 F.C.C.R. 18962, 19006-07, ¶ 11 (1998). The Commission also issued an Order on Reconsideration addressing a number of issues related to Rule 1.4000, including, among other things, the safety exception, antenna painting requirements, and federal preemption of permit requirements.

43. See Second OTARD Order, at 23896-97, ¶ 43. The Second OTARD Order became effective January 22, 1999.

44. “Exclusive use” means an area of the property that only the tenant, and persons the tenant permits, may enter and use to the exclusion of other residents. See Second OTARD Order, at 23896-97, ¶ 43. The Rule applies to property used for residential as well as commercial purposes. However, the Rule does not encompass all small antennas. It applies only to those antennas designed to receive video programming or to receive and/or transmit data services. In the information age, a lot of other antennas, such as VSAT antennas also deserve protection.

45. See First OTARD Order, at 19305-07, ¶¶ 49-52.

46. See Second OTARD Order, at 23875, ¶ 1.

The Commission wrote that the new amendment “strikes a balance between the interests of tenants, who desire access to more video programming services, and the interests of landlords, who seek to control access to and use of their property.”⁴⁷ The Commission declined to extend the OTARD Rule to placement of antennas on common property such as outside walls or restricted areas such as rooftops, concluding that Section 207 did not authorize the FCC to do so.⁴⁸

The Commission amended its OTARD Rule once again on October 25, 2000, by extending the application of the Rule to customer-end antennas that receive and transmit fixed wireless signals.⁴⁹ This latest FCC amendment expanded OTARD protections to voice and data services, including the Internet.⁵⁰ Expansion of the protections offered by the Rule to the Internet has important implications as consumers seek alternatives to traditional dial-up, DSL, or cable modem Internet service.⁵¹ Extension of the OTARD Rule is imperative to reaching a number of potentially unserved consumers. Some believe that the FCC’s support of increased deployment of OTARD devices will combat what industry insiders refer to as the “last mile bottleneck,” which describes the last link in the chain of technology that transmits voice and data communications from a service provider to a customer.

The Commission concluded that prohibitions or restrictions on antennas installed in or on common areas are enforceable as the Rule

47. *Id.* at 23875, ¶ 1.

48. *Id.* at 23875, ¶ 1, 23898, ¶ 45 (1998). In general, however, the Commission has characterized rooftops as a common area and has excluded rooftops from areas that are within the exclusive use or control of a tenant; *but see* In the Matter of Philip Wojcikewicz, *Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, CSR-6030-0, DA 03-2971 (2003) (prohibiting a town home association restriction against installing satellite dishes on the roof where the town home owner did not have exclusive ownership of the roof and even though adjoining town homes shared a common roof); *see also* Bldg. Owners and Managers Ass’n Int’l v. F.C.C., 254 F.3d 89, 93 (D.C. Cir. 2001) (Common property refers to property to which viewers may have access but not possession and exclusive rights to use or control. Restricted areas are those areas to which viewers generally do not have any access or possession). For instance, a rooftop may be a restricted area, whereas a courtyard may be a common area.

49. *See* Competitive Networks Order, 15 F.C.C.R. 22983 (2000). This amendment became effective on May 25, 2001. Fixed wireless signals are “commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location.” Examples include wireless signals used to provide telephone service or high-speed Internet access to a fixed location. AM/FM radio, HAM radio, CB radio, and DARS signals are not included.

50. *See* Competitive Networks Order, at 23027-28, ¶¶ 98-99 (2000).

51. “DSL” stands for Digital Subscriber Line, and is a means of accessing the Internet via a high-speed telephone connection.

does not give tenants the right to install devices on common areas owned by a landlord, community association, or by condominium or cooperative owners.⁵² The roof and exterior walls of a building are examples of such common areas.⁵³ The Commission further opined that a restriction on installation that bars damage to the structure of the leasehold likely is reasonable under § 1.4000(a).⁵⁴ Such a restriction might include, for example, a prohibition on drilling holes through exterior walls or piercing the roof of a rented house.⁵⁵ A regulation that, on the contrary, prohibits installations that merely cause ordinary wear and tear, such as marks, scratches, minor damage to carpets, walls and draperies, likely would be unreasonable.⁵⁶

Landlords and community associations may provide service to all residents via a central or common antenna and may restrict the installation of individual antennas based upon the availability of this central or common antenna.⁵⁷ Restrictions based on the availability of a central antenna generally will be permissible provided that: (1) the person seeking service receives the same programming via the central antenna the person could receive with an individual antenna; (2) the signal is at least as good as the signal the consumer would receive from an individual antenna; (3) the costs of using the central antenna are no greater than the costs associated with using an individual antenna; and (4) no unreasonable delay in receipt of service would result from the use of a central antenna.⁵⁸

III. The Commission Must Address the Practical Shortcomings of Rule 1.4000

Section 207 and Rule 1.4000 are outstanding attempts to remove barriers to access to certain communications services. However, Rule 1.4000 fails to fully satisfy the goals of Section 207 of the 1996 Act. Many commenters recognize the importance of applying the OTARD Rule to rental property, but most miss the fact that even though the

52. See Second OTARD Order, at 23893, ¶ 35.

53. *Id.*

54. *Id.*

55. See *id.*, ¶ 32.

56. See *id.*, at 23891, ¶ 32, n.81.

57. See *id.*, at 23901-02, ¶ 49.

58. See First Order on Reconsideration, 13 F.C.C.R. 18962, ¶¶ 88-89. The Commission cautioned that community associations may not use dishonest or delay tactics designed to deter or delay a viewer's ability to receive video programming by, for example, stating an intention to install a common antenna but not taking any efforts toward that goal and never following through on the promise, and prohibiting tenants from installing their own antennas. See also Second OTARD Order, at 23902, ¶ 49.

Rule was extended to apply to renters, it fails to adequately reach all tenants. While the Rule makes satellite reception available to a number of consumers, it fails to reach a large percentage of those consumers who lease their residences and who do not have within their exclusive use or control an area upon which to install an otherwise protected Section 207 Device. The Rule fails to afford the same opportunities to everyone who rents rather than owns property. Not all consumers who rent have an exclusive use or control area on which to install a dish, and therefore do not have the same level of choice as do consumers who own property. Because the FCC declined to apply Rule 1.4000 to common areas and roofs, and because the FCC declined to require landlords to provide Section 207 reception capabilities to tenants, the Rule falls short of making “available, so far as possible, to all people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”⁵⁹ and of ensuring that consumers have access to a broad range of video programming and other services.⁶⁰

The commenters in the rulemaking proceeding have identified a number of practical considerations of placing devices on common or restricted access property.⁶¹ For instance they correctly identify some of the problems which may arise where there are numerous antennas installed on a property, including concerns about maintenance obligations, safety and insurance and liability allocation, the ability of property owners and landlords to adequately control the operations of their property,⁶² and conflicts between the Rule and its policies with the policies and requirements other laws such as U.S. Department of Housing and Urban Development Section 8 public housing requirements.⁶³ The Independent Cable & Telecommunications Association, a trade association representing cable companies, asserts that implementation of the OTARD Rule is problematic in part because it fails to address aesthetic concerns,

59. Communications Act of 1934, 47 U.S.C. § 303 (2000).

60. First OTARD Order, 11 F.C.C.R. at 19281, ¶ 6.

61. Second OTARD Order, 13 F.C.C.R. at 23890, ¶¶ 30-32, 46, citing Comments of National Multi Housing Council, American Seniors Housing Association, National Association of Real Estate Investment Trusts (“NAA”), Community Associations Institute (“CAI”), National Association of Home Builders (“NAHB”) *available at* www.fcc.gov.

62. Second OTARD Order, 13 F.C.C.R. at 23900, ¶ 46. Some states might treat reception equipment as fixtures that once installed belong to the landlord.

63. Second OTARD Order, 13 F.C.C.R. at 23900, ¶ 46, citing Reply Comments of NAHB at 18-19, *available at* www.fcc.gov.

involves the FCC in the cumbersome details of landlord-tenant relationships, and gives tenants an almost unrestricted right to install satellite dishes on their leaseholds.⁶⁴ Nevertheless, a balancing of these practical considerations against the rights of tenants to have access to satellite service tips the scale in favor of tenants.

The OTARD Rule fails to go far enough. The most identifiable problem is that it is virtually impossible for a resident to install a satellite dish in accordance with the OTARD Rule if a tenant does not have a distinct and properly situated balcony, terrace, or porch extending from their individually-leased unit and have exclusive use or control of that area. In most areas of North America, satellite signals cannot be received if the satellite dish does not face the southwestern sky, or if anything such as a building, hill, or tree impedes the path between the satellite dish and the satellite.⁶⁵ In other words, if a tenant lives facing the northeast sky, the viewer probably cannot receive service, yet the landlord need not provide a place elsewhere on the property to which the tenant viewer may attach a satellite. The OTARD Rule does not require a property owner to provide a place for a tenant to install a Section 207 Device if the tenant does not have an exclusive right to use or possess that portion of the property. The statute also fails to authorize the Commission to require landlords to purchase and install video programming devices.⁶⁶ Congress, in Section 207, does not direct the Commission to exercise affirmative power to compel property owners to provide reception devices or to provide any type of cable or to provide any type of cable or satellite services to their tenants.⁶⁷ Nor does the Rule permit tenants to install dishes on other areas of property such as courtyards or rooftops. The Rule should affirmatively require landlords to provide a place for tenant viewers to install covered antennas particularly when the viewer does not have exclusive use of the area from which the appropriate signal may be received.

Because of the rapid pace at which technology changes, one might question whether any substantial amount of time should be devoted to this issue. It is true that despite the periodic economic

64. Comments of Independent Cable & Telecommunications Association, May 6, 1996, at 7, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1606000001.

65. See Larry Kessler, *The Do's and Don'ts of Satellite Dishes; Learn the Locations Limitations and Installation Regulations for Satellite Dishes in Your Community; Taking Back Control, Practical Matters*, UNITS, Apr. 1, 2002.

66. See Second OTARD Order, 13 F.C.C.R. at 23877, ¶ 7.

67. See Kessler, *supra* note 65. See also Second OTARD Order, 11 F.C.C.R. at 23877, ¶ 7.

downturns in the technology sector, things can and often do change very quickly. Perhaps reception devices might get smaller thus proving less of an intrusion, and perhaps mooted this discussion. Also, emerging technologies could also render satellite service obsolete. An inevitable mooted of this discussion of the current OTARD Rule most likely would please the FCC, as such a mooted would be evidence that the free market system has worked to resolve what otherwise could present a perplexing constitutional issue. One of the best aspects of the Commission's decision is that it places the onus of resolving the constitutional takings question on those in the telecommunications and communications industry rather than on the property owners and homeowners' associations. The FCC's and D.C. Circuit's decisions force industry to develop more advanced technology rather than administratively or judicially placing the burden on property owners to provide service to tenants or to permit tenants to occupy space beyond the tenant's exclusive use or control. The introduction of more efficient and effective technology benefits everyone in society.

Despite the shortcomings of the Rule, based on constitutional law takings jurisprudence, the FCC struck the correct balance of the rights of all parties involved. However, because of the different means of regulating cable companies and satellite service providers, the FCC must do more to level the playing field between the different modes of communication. As a practical matter satellite service providers cannot even tap into many Multi-Dwelling Unit ("MDU") or apartment markets. Until the playing field is leveled, there will not be true competition in television, Internet, and other telecommunications markets. As of year-end 2002, DirecTV, a subsidiary of Hughes Communications, Inc., was the largest DBS provider in the United States and Latin America, with 11.2 million subscribers in the U.S. and 1.6 million customers in twenty-eight Latin American and Caribbean markets.⁶⁸ It provides video and bundled global satellite-based broadband service including more than thirty Spanish language special interest channels.⁶⁹

Currently, Comcast is the largest cable provider in the United States, providing analog video, digital cable, high-speed Internet, and

68. See Form 10-K Annual Report of Hughes Communications, Inc., at 7 (2003), available at www.shareholder.com/Common/Edgar/944868/950168-03-639/03-00.pdf.

69. See *id.* at 10-11.

telephone service.⁷⁰ AT&T also is among the world's communications leaders, providing voice, data, and video communications services. It provides domestic and international long distance, regional and local communications services, cable broadband television and Internet communications services to approximately 40 million homes in the United States.⁷¹ Although DirecTV, Comcast, and AT&T provide services via different means—video programming and data services via satellite versus video programming and data services via broadband cable—they are competing for the same customers.⁷² Comcast and AT&T, however, have the benefit of providing a widely available, established, and popular service and of enjoying the status of providing a service that is deeply entrenched in many American households including apartment complexes. For years, cable companies have been the exclusive providers of cable service to multi-unit complexes. Comcast's and AT&T's cable operation is largely unregulated by the federal government, as cable regulation is largely left to local authorities. Conversely, the FCC regulates DirecTV by rules governing the placement of reception antennas. Moreover, DirecTV and other satellite service providers claim that they are shut out from servicing a large number of consumers because many exclusive contracts negotiated between property owning landlords and cable operators preclude DirecTV's access to these properties and the tenants dwelling therein.⁷³

Some have argued that the FCC could seek alternative measures to eliminate these barriers of access to better technology by prohibiting exclusive contracts between landlords and cable television companies because the use of exclusive contracts by incumbent cable television operators has been deemed a method of unfair competition which prevents competitors of cable operators from providing service to subscribers—particularly those who dwell in MDUs.⁷⁴ They correctly claim that cable operators' market power to obtain exclusive

70. See, Form 10-K Annual Report of Comcast Corporation, at 4 (2002), *available at* www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-reportsAnnual#. Comcast has approximately 21.3 million subscribers, including approximately 6.6 million who subscribe to digital cable television, and 3.6 million who subscribe to high-speed Internet service.

71. See, <http://www.att.com/att>.

72. See *id.* See also Form 10-K Annual Report of Hughes Communications, Inc., at 8 (2003), *available at* www.shareholder.com/Common/Edgar/944868/950168-03-639/03-00.pdf.

73. See, e.g., Comments of DirecTV, Inc., at 13 (Sept. 27, 1996), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

74. See Comments of DirecTV, Inc., at 19 (Sept. 27, 1996), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

contracts with landlords and their possible abuse of this power is the type of barrier to competition Congress and the Commission continue to seek eliminate.⁷⁵ Eliminating exclusive contracts is one means of achieving this goal, but as it relates to the OTARD Rule, and the receipt of satellite services, such a ban on exclusive contracts, does not get us to a full realization of the goals of the 1996 Act. Fostering competition is only one side of the equation. On the other side of the equation, are consumers who must be able to take full advantage of the services that are offered in the marketplace. As the OTARD Rule currently applies, not all renters have the ability to install satellite dishes or to receive service due to practical problems of placement, not to mention the high cost of and the financial obstacles to installing and maintaining advanced telecommunications services.

Installation of common antennas or the creation of community technology centers have been identified as solutions to the problem of technology access by those who cannot afford a computer and Internet access.⁷⁶ Access to such common antennas solves the problems of access to information by dwellers of MDUs by making available more service than the dwellers may have had otherwise. However, the availability of common antennas to be shared by all tenants in a property, still deprives a tenant of the same opportunities for choice that property owners have.

Therefore, even though Rule 1.4000 and Section 207 are well-intentioned attempts to make satellite service available to all Americans, they fall far short of this goal and fail to adequately address the practical concerns of consumers who rent their residences as well as those concerns of property owners who rent property. The Rule simply does not go far enough.

IV. Social and Economic Implications of Rule 1.4000

The goal of the FCC is to act in the public interest, convenience and necessity.⁷⁷ The FCC is obligated to represent the interests of the entire public which includes private individuals or the public at large as well as the interests of business entities which offer communication services. Just what constitutes the public interest is a dynamic concept, constantly evolving over time as technology as well as

75. *See id.*

76. RANETA LAWSON MACK, *THE DIGITAL DIVIDE: STANDING AT THE INTERSECTION OF RACE & TECHNOLOGY* 170 (2001).

77. Communications Act of 1934, 47 U.S.C. § 303 (2000).

industry and consumer needs change.⁷⁸ The “public” in question is comprised not only of service providers but also the general public—including, in this case, the general television viewing public and wireless Internet users. To fully evaluate the OTARD Rule, several questions should be addressed such as “What is the public interest, and is it being served?” and “Is this regulation simply a taking for private use?” Congress directed the FCC to promulgate a rule that removes restrictions that impair a viewer’s ability to receive video programming services through OTARDs. The FCC seeks to achieve its goals by promoting competition among providers resulting in choice to consumers, which facilitates the receipt of important services and information by consumers, including urban apartment dwellers who are currently less protected than others in America.

However, the interests of market participants and consumers often are at odds. For example, telemarketing companies make money by contacting as many consumers as possible and convincing them to buy a certain product or service. On the other hand, telemarketers pose a huge inconvenience to consumers, and therefore the federal government has an interest in limiting their ability to contact consumers. Acting in the public interest necessitates a balancing of interests of service providers and consumers. But more importantly, courts must balance the rights of communications service providers, consumers, as well as property owners. With respect to the OTARD Rule, consumers and service providers have some shared interests that conflict with those of property owners—particularly those owners who rent their property to others. The 1996 Act guarantees such providers the opportunity to compete, *albeit*, not the right to do so.⁷⁹ Tenants have a First Amendment right to receive communications, and property owners have a right to exclude others from their property.⁸⁰ However, no property rights are absolute. The right to receive communications,⁸¹ the property right to exclude, and

78. Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, WIS. L. REV. 925, 942 (1989).

79. Senator Sam Brownback, Senate Commerce Committee, Finances of Telecom Companies, C-SPAN (July 30, 2002).

80. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (holding that the First Amendment protects the right “to receive information and ideas”); *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 390 (1969); see also *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 663-64 (1994).

81. See *id.* See also *State v. Shack*, 277 A.2d 369 (N.J. 1971) (where the New Jersey Supreme Court recognized migrant workers’ right to be visited by essential service people, including an attorney and a representative from a nonprofit advocacy group, on the private property of the workers’ employer).

the rights of service providers to pursue legitimate business ventures must be balanced.⁸²

A. Rule 1.4000 Fails to Reach Viewers Across Racial, Ethnic, and Economic Lines

The FCC and the commenters in the rulemaking proceeding generally agree that, on its face, Section 207 applies to all viewers and does not distinguish between owners and renters or between those residing in single family dwellings and those residing in MDUs.⁸³ Additionally, the legislative history suggests that Section 207 applies to all viewers.⁸⁴ In its application, however, the OTARD Rule does not affect all viewers equally. Those who rent their residences must satisfy certain conditions before they can take advantage of the protections of the OTARD Rule. Unfortunately, the Rule in its application does, but should not and need not, impose a digital class stratification depending upon consumers' and viewers' status as property owners and economic status.⁸⁵ The term "digital divide" generally refers to the disparity in access to technology based on economic status.⁸⁶ As Professor Raneta Lawson Mack states, this ever-growing digital divide "has perhaps the greatest potential to doom the 'have nots' to the status of permanent underclass" than any other types of past racial discrimination.⁸⁷

82. See, e.g., *id.*

83. See Second OTARD Order, 11 F.C.C.R. at 23880, ¶ 13; See also, Comments of DirecTV, Inc., at 6, (Sept. 27, 1996), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001. (By using the term "viewer," Congress intended to protect all Americans, not just those who own property). See also, Reply Comments of DirecTV, Inc. to Further NPRM, at 15 (Oct. 28, 1996), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1715860001; see also Reply Comments of DirecTV, Inc. to Further NPRM, Oct. 28, 1996, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1715860001. See also, Comments of DirecTV, Inc., at 8 (Sept. 27, 1996), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001 (Neither the statutory language nor the legislative history refers to a viewer's status as a homeowner, but refers generally to a "viewer.").

84. 104th Congress, 1st Session, Report 104-204, Part 1 at 123-24 (July 24, 1995).

85. See, Second OTARD Order, 11 F.C.C.R. at 23880, ¶ 13. See also, Reply Comments of DirecTV, Inc. to Further NPRM (Oct. 28, 1996), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1715860001. See also, Comments of DirecTV, Inc., at 4-6 (Sept. 27, 1996) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

86. MACK, *supra* note 76, at xiii (The term "digital divide" has become the "political and sociological catch-phrase to describe the growing disparity between the 'haves' and the 'have-nots' in the current digital revolution.").

87. *Id.*

The technology covered by the OTARD Rule generally was conceptualized to facilitate the receipt of television and cable programming. In addition, the amended OTARD Rule also aids access to information that serves an important role in the education of all segments of American society and facilitates the education of those with less means and wealth.⁸⁸ More importantly, because the Commission has extended the OTARD Rule to cover antennas designed to receive and/or transmit data services, including Internet access, the problem of the digital divide is compounded by the inability of those who lack wealth in the form of private real property ownership to benefit fully from the goals set forth in the Rule. The problem is compounded because with respect to property ownership and wealth, those who own property have more wealth than do those who rent. Those who have wealth have more access to valuable communications services and technology than those who do not. Those who have access to communications services are ahead of those who do not with respect to the ability to keep pace with technological advances and the competitive economic and educational advantages afforded those who have access to technology. Those who own their residences, and therefore have wealth, have more opportunities for access to communications services and educational growth via Section 207 Devices than do those who rent their residences. The OTARD Rule, while attempting to level the playing field, does not address this disparity.

Nothing in the language or the legislative history of Section 207 or the Rule indicates that race was a factor in crafting the scope of the rights granted to tenants as to the placement of reception devices on leased property.⁸⁹ It is fairly clear that the racial effects resulting in the application and enforcement of the Rule were not made intentionally

88. *Id.* at 50. (“The Internet and e-commerce show early promise as a playing field ‘leveler’ where entrepreneurial ideas can be realized and wealth can be accumulated in the form of investment opportunities.”); *see also* Comments of DirecTV, at 3, Sept. 27, 1996, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

89. 104th Congress, 1st Session, Report 104-204, Part 1 at 123-24 (July 24, 1995).

based on race.⁹⁰ The scope and application of the Rule present the problem. By not extending Section 207 to common and restricted areas, or otherwise providing access to tenants, the Commission is denying viewers who rent their residences—particularly those residing in urban areas—the same opportunities to receive important telecommunications services. Proponents of the Rule correctly point out that the purpose of Section 207 was and continues to be fostering competition in the video programming industry, which includes cable television and satellite television, as well as promoting access to over-the-air programming to as many viewers as possible. DirecTV, in its filed comments, hits the nail squarely on its head when it argues that the Commission will not accomplish the policy goals of fostering competition and making telecommunications services available to all Americans if its rules, as applied, exclude so many people intended to be protected by the OTARD Rule.⁹¹

Approximately 33.3 million, or 32 percent, of the American population rent their residents.⁹² People of color, particularly Blacks and Latinos/as, lower-income persons, and single-parent families comprise a disproportionate percentage of the country's renters and MDU residents.⁹³ The proceeding's commenters recognized this disparity, but did not adequately address just why this is a problem worthy of concern. These groups are already those most affected by the growing digital divide and are at risk of being passed by on the superhighway of information and social and economic progress, and therefore, need protection related to their ability to access advanced

90. Second OTARD Order, at 23907 ¶ 61. Rational basis is the correct standard to apply because there is no suspect classification and no fundamental rights are involved. Under the rational basis test, a classification need only be rationally related to a legitimate governmental interest. The regulation will not be examined under strict scrutiny unless it can be shown that the disparate treatment of minorities was intentional. A disproportionate impact on minorities is unconstitutional only if traced to a discriminatory purpose or intent. Because of the absence of the requisite discriminatory intent, the statute probably passes constitutional challenge based on a rational basis equal protection analysis.

91. See Comments of DirecTV, Inc., Sept. 27, 1996, at 6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

92. See United States Department of Commerce News, *Census Bureau Reports on Residential Vacancies and Homeownership*, October 28, 2003, available at <http://www.census.gov/hhes/www/housing/hvs/q403tab5>.

93. See Letter of Congressional Black Caucus, dated July 29, 1996, available at www.fcc.gov; see also Comments of DirecTV, Inc., Sept. 27, 1996, at 7-9, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001 (There is a disproportionate negative impact on minorities and low-income Americans); Reply Comments of DirecTV, Inc. to Further NPRM, Oct. 28, 1996, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1715860001.

technological services.⁹⁴ Not only are these groups at risk of being sped by on the so-called Information Superhighway, significant segments of these groups are not even packed or prepared to begin the migration with other Americans to the utopia called the Digital Age. Meaningful access to and the skills to use advanced technology in this country and in the global economy as a whole are as essential to economic survival as having access to transportation to work, having the ability to read and write, and having access to schools and a quality education. In fulfilling its obligations to act in the public interest, the FCC must continue to take efforts to insure that all Americans, regardless of race and economic status, have access to the essential vehicles providing the transportation to the Digital Age.

Leaseholds often are subject to many non-negotiable, boilerplate lease terms skewed in the landlord's favor. Moreover, tenants have little to no bargaining power with landlords when entering into a lease or during the lease term. MDU residents are the viewers most in need of the kind of protections envisioned by Congress. Thus, the Commission acted properly in extending the OTARD Rule to rental property, but because the Rule limits the access of renters only to areas within their exclusive use or control, the current rule potentially will widen the disparity between the haves and the have-nots. In its application, the Rule inflicts a disproportionate hardship on poorer Americans who cannot afford to own their own homes and, therefore, must live in dwellings without a proper area on which to install a reception device.

As of 1996, only 44.1 percent of Black Americans, 42.8 percent of Latino/a Americans, 51.6 percent of Native Americans, and 50.8 percent of Asian Americans owned their residences, compared to 71.7 percent of white Americans.⁹⁵ By 2002 things had improved only slightly. As of 2002, homeownership rates were 67.9 percent for all Americans, 47.3 percent for Black Americans, 48.2 percent for Latino/a Americans, 54.6 percent for Native Americans, and 54.7

94. U.S. Department of Commerce data from 2001 indicated that 78.9 percent of people in families making \$75,000 or more per year had access to the Internet, compared to 25 percent of people from households earning less than \$15,000 per year. *See also* Comments of DirecTV, Inc., Sept. 27, 1996, at 14, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

95. U.S. Census Bureau, Housing Vacancies and Homeownership Annual Statistics: 1996. Homeownership was 65.4 percent overall in the U.S. in 1996; *see also* U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *U.S. Housing Market Conditions, Second Quarter 2001: National Data*, available at <http://www.census.gov/hhes/www/housing/hvs/q403tab5>.

percent for Asian Americans, compared to 74.5 percent for white Americans.⁹⁶ In America, property ownership is the most important avenue to economic security and racial equality. Unfortunately, property ownership historically was denied to and continues to elude the majority of African Americans, Latino/a Americans and the poor.⁹⁷ Equally unfortunate it is that the OTARD Rule does not go far enough to bridge the divide between the haves and have nots with respect to access to advanced technology. Immigrants and non-whites are more likely to rent for a variety of reasons that may include, for instance, lack of sufficient savings for a down payment or inability to secure credit. Because this segment of the population is more likely to rent, but must keep pace with the train chugging toward the Digital Age, these individuals should be protected. In theory, Rule 1.4000 serves this purpose but fails, in practice, to fully achieve the laudable goals of the 1996 Act.

While the Rule as initially enacted applied only to the receipt of video programming services, it has since been expanded to include data services including the Internet. It is crucial that all Americans, regardless of socio-economic status, have access to the Internet and the underlying infrastructure that makes such receipt possible, and that the market for the provision of such services is competitive including as many service providers as the market will bear. Currently, only 23.6 percent of Black Americans and 23.6 percent of Latino/a Americans have access in their households to the Internet, as compared to 46.1 percent of white Americans and 56.8 percent of Asian Americans and Pacific Islanders.⁹⁸ Professor Mack highlights these statistics as one of the bitter ironies of the digital divide—that those groups that could most benefit from the informational resources and convenience afforded by computers and Internet access

96. U.S. Census Bureau, Housing Vacancies and Homeownership Annual Statistics: 2002. Homeownership was 67.9 percent overall in the U.S. in 2002, *available at* <http://www.census.gov/hhes/www/housing/hvs/q403tab5>.

97. MACK, *supra* note 76, at 41. Mack suggests that property ownership, the “most important avenue to economic security and racial equality, had been effectively foreclosed to the former slaves” because slaves and their African American descendants either could not acquire land at all or faced substantial impediments in doing so.

98. Economics and Statistics Administration, U.S. Department of Commerce, U.S. Census Bureau, Home Computers and Internet Use in the United States, August, 2000, Issued September, 2001, Table A, Households with Computers and Internet Access by Selected Characteristics, August, 2000.

are precisely the groups that are lagging behind.⁹⁹ Undoubtedly, the disparities in the statistics are even more shocking when more advanced technology such as Wi-Fi and other wireless and high-speed and digital services are taken into account.

Wi-Fi and high-speed broadband Internet access as well as other advanced personal technological services can no longer be viewed as luxuries available only to the wealthy or those with sufficient disposable monthly income to pay for these services. In more technologically advanced countries such as Japan, wireless use is nearly as common as use of the old-fashioned landline telephone. The ability to obtain information on the Web necessarily narrows the information gap between those of means and the more economically challenged. Surfing the Web using slow traditional dial-up modems is sufficiently frustrating and discouraging to test the patience and perseverance of a person with the traits of the Biblical figure Job. Meaningful access to the Internet and similar services can only be had via high-speed cable or DSL lines, Wi-Fi, or other satellite services. The Commission and Congress must develop methods of removing financial, geographical, and regulatory impediments to access.

Minorities not only are more likely to live in an MDU or rented property, but those who do also are more likely to live in an MDU or rental property without a patio or balcony constituting a part of their leaseholds. MDUs constitute a significant portion of all housing units in the United States. Without such an exclusive area, the affected tenants would have no outside access from which to receive a satellite signal. Minorities and people of color also are highly likely to live in densely populated inner cities that cannot easily receive a sufficient direct and unimpeded satellite signal or in remote rural areas with few broadband alternative and often limited resources to afford today's modern day necessities. Recently, the Commission has expressed great interest in bringing affordable broadband services to underserved remote and rural areas via satellite technology. Such technology, the Commission hopes, will enhance the lives of rural-dwelling Americans by making available distance learning, health care, public safety enhancements, entertainment, and of course widespread Internet access. While the agency's focus on rural areas is much needed, the Commission must not overlook underserved urban areas in the process.

99. MACK, *supra* note 76, at 36. Mack states that “[w]hile computers and the Internet are certainly no panacea for all of society’s ills, these technological resources do have demonstrated potential to assist people in developing and improving their skills, knowledge, marketability and income.”

Additionally, the Commission in its OTARD Orders grossly understates the relative importance in today's society of satellite service in the provision of television, voice, and data services. Courts have failed to identify why OTARDs receive greater protection than other tenant activity such as the placement of laundry, bicycles, and grills in areas within the exclusive use or control of a tenant, but less protection than mail service and the receipt of utilities. Under the current law, a rule prohibiting satellite dishes is impermissible, but rules prohibiting these other items and uses are permissible. The right to receive telecommunications services and the right to install devices which make receipt possible are much more important and than the right to hang out the laundry or to grill steaks on the patio. In today's technological environment, access to telecommunications is essential. It is obvious that the import of the Rule reaches beyond merely protecting the ability of tenants to watch television. Meaningful access to the Internet is a critically important aspect of life today. The Internet is used to access job postings, to learn how to write a resume and to send it to possible employers, to get driving directions or public transportation routes to get to a job interview, to access information on what to wear and how to conduct oneself during that interview, to access information on negotiating a salary, to find out how to participate in an employer-sponsored retirement plan, to access information on quality child care, and so on and so on. The information available on the Internet is endless. The services accessible via Section 207 Devices, including access to the Internet and VoIP, have begun to occupy a place in our everyday culture as important as mail service and utility service. While the decisions of the Commission and the D.C. Circuit make the claim by implication, this rationale should have been clearly stated.¹⁰⁰ The Commission's action begs the question of whether the right to receive telecommunications services should be on parity with the right of a property owner to exclude others. Ultimately, society will make a value judgment about the relative importance of the services received via satellites and how important it is for tenants and those of lesser means to receive these services and related information.¹⁰¹ Making video programming available to MDU residents via satellite service protects these viewers' First Amendment rights to receive

100. See *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89 (D.C. Cir. 2001).

101. See, e.g., *Shack*, 277 A.2d at 303-04 (holding that a private property owner's right to exclude was outweighed by isolated migrant workers' right to receive important information and to receive visits by essential service providers); see also *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 390 (1969).

information, a right the Supreme Court has held to be “paramount.”¹⁰² Making access to advanced technology such as the Internet available to all MDU residents is even more important.

The latest conflicts have been between the desire of recent immigrants to receive native-language programming, which can only be received on special dish networks, and the right of landlords to limit the number of dishes residents of a rental unit may install.¹⁰³ America is a land of immigrants, and consequently, is, and has been, home to many persons who do not speak English as their primary language.¹⁰⁴ At least 200 different languages and dialects are spoken by New York school students.¹⁰⁵ Data collected in October 2002 for the Public School Bilingual Census for the State of Illinois revealed more than 124 languages spoken by students in the state’s schools, with more than 91, or 73 percent, of those languages represented in Chicago’s public schools.¹⁰⁶ More than 110 different languages and dialects are spoken in Massachusetts.¹⁰⁷ At least 26 languages are spoken in Louisville, Kentucky, a significantly smaller Midwestern city with a population of nearly 700,000.¹⁰⁸

The free market will inevitably, through demand by foreign-speaking residents, create a market for more foreign-language programming and stations devoted entirely to foreign-language programming—not only for entertainment purposes, but also for important news programming. The cable companies in most large cities have responded to this changing demographic distribution by carrying a variety of foreign-language programming. Likewise, satellite service providers also are responding, *albeit* at a pace handicapped by the inability to reach all viewing consumers. Because

102. See *Kleindienst*, 408 U.S. at 762-63.

103. Pamela McKuen, *It Goes With the Territory; Pesky Issues Cloud an Otherwise Sunny Climate for Condos*, CHICAGO TRIBUNE, May 5, 2002, at C1.

104. U.S. Census Bureau statistics indicate that in 2000, 11.1 percent of the population was foreign born, and 17.9 percent spoke a language other than English at home.

105. See *Directory of Languages Spoken by Students of Limited English Proficiency in New York State Programs*, (New York State Education Department 1997).

106. See *Public School Bilingual Census Summary: 2002-2003*, (Illinois Latino Council on Higher Education 2003), available at <http://www.ilache.com/PSBCSummary03.pdf>.

107. See *1998 Bilingual Students in Massachusetts Public Schools: Students Whose Primary Language is not English (PLINE)* (Massachusetts Department of Public Health, Bureau of Family & Community Health, Office of Refugee & Immigrant Health, Massachusetts Department of Education, Accountability and Evaluation Services 1998).

108. BEYOND MERGER: A COMPETITIVE VISION FOR THE REGIONAL CITY OF LOUISVILLE, (The Brookings Institution Center on Urban and Metropolitan Policy 2002) (citing U.S. Census Bureau statistics); see also WHAS-3 News, September 21, 2002, 6:00 p.m.

consumer choice and competition are goals of the FCC, its rules must ensure that such programming can reach all Americans regardless of race, ethnicity, or spoken language.

The tragic terrorist attacks on Washington, D.C. and New York City on September 11, 2001, underscored the importance of the ability of news and public safety information and instructions to be communicated to the public. The ongoing security efforts of the nation rely in large part upon the ability to get important information to the American public via all forms of media and in as many languages as are necessary to inform the public adequately. To date, with some exception, most newscasts are delivered in English. With changing demographics and in light of the interest of national security and the safety of citizens, non-citizen residents, and visitors to our country, broadcasts in foreign languages are needed and soon will be demanded. Due to the limited availability of traditional television broadcast licenses and therefore limited broadcast opportunities, any emerging foreign-language programming more likely than not will be provided via cable or some type of wireless satellite service. To complicate matters, the tenant may not be able to obtain all of his or her desired foreign-language programming from one single provider. Consequently, a tenant may desire a traditional broadcast antenna, cable wiring, and one or more satellite dishes.

Interestingly, the Commission declined to make the OTARD Rule applicable to traditional college dormitories.¹⁰⁹ While one might argue that this decision creates an unfortunate result because college students cannot install satellite dishes and take advantage of the choices in the telecommunications marketplace. Any negative impact on college students is not as problematic as is the effect on minorities and lower income persons because most college campuses provide high-level and high-quality telecommunications services, such as high-speed Internet connections and cable television, to its students either in each individual dormitory room, a centralized room in the dormitory, or at some other centralized location or locations on campus. Also, college campuses are themselves repositories for information and knowledge. Therefore the problems of isolation and barriers to access to information are less troublesome in the college or university environment. Additionally, colleges have more of a parental relationship to their students than do ordinary landlords.

109. Second OTARD Order, at 23889, ¶ 173, n. 73. The Rule would apply where there is more of a typical landlord-tenant relationship between the college or university and the resident. The Commission suggests that the Rule would apply where the institution leases a property to a faculty member.

Obviously, no parent must provide his or her children with a panoply of telecommunications services if the parent chooses not to.

B. Solutions to the Problem of Liability Allocation

Application of the Rule actually may pit poor landlords against poor tenants more so than it pits other landlords and tenants against each other. The OTARD Rule is wrought with shortcomings as to allocation of liability for property and personal damage as well as the resolution of disputes arising therefrom. The Rule is not clear about who should bear the costs associated with property damage and personal injuries resulting from the installation of Section 207 Devices. The parties would have to resort to traditional tort law and contract law principles to resolve such disputes. The Rule does not make clear whether a landlord is compelled to accept liability for or indemnify against harm or injury to property and to persons.¹¹⁰ If so, the Rule's application might amount to required acquiescence and therefore present a takings problem. Property owners who rent to low-income persons already are limited in their ability to charge market-based rents. Additionally, they may be limited by law or by the rental housing market in the amount of security deposits they can require new residents to pay. The costs of making basic repairs and conducting basic maintenance on a low-cost MDU or single family dwelling generally is about the same as with any other property. Consequently, lower income landlords may see the OTARD Rule as a disincentive to maintain the rental property because the additional costs of insuring against liability for injuries sustained to property and persons resulting from the installation of satellite dishes outweigh any economic benefits they receive. Consequently, low-cost or low-rent MDUs may fall further into disrepair as landlords may be forced to choose between obtaining insurance against personal liability and performing regular maintenance, improvements, and renovations. Additionally, the property values of low-cost or low-rent MDUs may further decline due to the poor aesthetics resulting from the haphazard, scattered, and poor installation of satellite reception devices.

110. *See id.* at 23902, ¶ 50. Under the Doctrine of Waste, a landlord can bring an action for waste in order to recover for permanent injury and for material damages to the property, but not for ordinary wear and tear. *See also* *Trentacost v. Brussel*, 412 A.2d 436 (N.J. 1980) (where a landlord bore responsibility for personal injuries occurring on the landlord's property due to the landlord's failure to provide adequate security); *Asper v. Haffley*, 458 A.2d 1364 (Pa. 1983) (holding that a landlord would be liable for physical harm suffered by a tenant due to a dangerous condition).

To address the problem of liability allocation, the FCC or Congress could establish a fund similar to the Universal Service Fund, which subsidizes the provision of telecommunications service to rural and underserved areas.¹¹¹ This “OTARD Fund” could be available to reimburse property owners for otherwise unreimbursed costs of maintenance and repair to the common areas on which Section 207 Devices are installed. The OTARD Fund could be used to subsidize costs not adequately met by security deposits, insurance, or fees and penalties paid by tenants. The government could require that all satellite service providers and Internet Service Providers (“ISPs”) pay this surcharge and allow the ISPs and other service providers to pass this fee or surcharge on to their customers.¹¹² In this way, all Americans would be afforded the same opportunities to receive communications services via Section 207 Devices regardless of their status as property owners or renters.

The FCC declined to prohibit all safety restrictions imposed by non-governmental entities, acknowledging that entities such as homeowners’ associations have legitimate concerns about health and safety.¹¹³ The FCC recognized that homeowners’ associations are in a unique position to assess the safety needs of their individual communities, and that to prohibit private safety-based restrictions would preempt state tort liability law.¹¹⁴ In the *First OTARD Order*, the FCC adopted rules that approved the Building Officials & Code Administrators International, Inc. (“BOCA”) code permit provisions on antenna height and setback requirements.¹¹⁵ The BOCA requires a permit for antennas exceeding 12 feet in height above a roof.¹¹⁶ The Commission’s *Order on Reconsideration* affirmed that BOCA code provisions requiring height and setback standards are legitimate safety objectives, and clarified that the BOCA requirement does not constitute a prohibition of all masts exceeding twelve feet in height.¹¹⁷

111. 47 U.S.C. § 254; 47 C.F.R. §§ 54.1-54.904 (most telephone customers pay a small amount in their monthly telephone bills to fund this service which promotes affordable, quality telecommunications service to low income, rural, and other high cost areas, as well as schools and libraries).

112. Public and private partnerships, such as that at Camfield Estates, also have been suggested as means of expanding home access to computers and the Internet for low-income families. MACK, *supra* note 76, at 170.

113. See Second OTARD Order, at 23891, ¶ 31.

114. See *id.*

115. See First OTARD Order, at 19296-301, ¶¶34-40. The BOCA code is a model building code published by Building Officials & Code Administrators International, Inc.

116. See *id.*

117. See First Order on Reconsideration, 13 F.C.C.R. 18962, ¶¶ 27-38 (The BOCA code “does not constitute a blanket per se prohibition of masts of a particular height.”).

The FCC disagreed that the BOCA height provision is discriminatory simply because it requires permits for wireless cable antennas but not for DBS antennas. The Commission noted an action for discrimination might be appropriate where a local governmental authority applies BOCA code safety or permit restrictions to OTARD devices but not to other devices or items that also pose a safety risk.¹¹⁸

An argument could be made that the OTARD Rule actually increases the value of property because tenants and prospective buyers will be willing to pay a higher price for the protection provided by the Rule. This argument, however, fails to account for the fact that the OTARD Rule applies nondiscriminatorily to all private restrictions. Because of the protection provided by the Rule, prospective tenants need not feel obliged to pay a higher rent for property just for the right to install an OTARD Device. No one property owner can use the tenant's opportunity to install a Section 207 Device as a selling point with which to distinguish its property from other properties. Therefore, a tenant need not pay a higher price to rent or purchase as no one property owner will offer more benefits or opportunities to receive satellite service than does the next. This is, of course, unless a landlord gives tenants easy access to common areas. Any landlord choosing to grant such unfettered access, though, would be subjected to greater liability, the allocation of which the Rule does not adequately address, but seemingly reserves for resolution by state laws which undoubtedly will produce diverse outcomes and inconsistent results.

As the Rule currently reads, a landlord in these circumstances would potentially stand to derive more income from the property in the form of higher demand for units on the property and the ability to charge a premium for the access. Generally, all property is equally situated with the exception of historic landmarks and those properties qualifying for the safety exception. Despite the fact that an argument could be made that the Rule effects an increased property value in some cases, the possibility of a diminution in value is far more likely. Satellite dishes do detract from the aesthetic appeal of a property, particularly when more than one device is installed on the same property or where devices are installed on freestanding masts on the property grounds. Additionally, the property may suffer severe damage from improperly as well as properly installed dishes. There is a clear scenario in which a property's value may increase after

118. See First OTARD Order, at 19297-98, ¶ 35.

enactment of the OTARD Rule. The value of a property actually may increase where a building or buildings on the property are so situated such that, as compared to other competing properties, a larger number of the units on the property are oriented toward the southwest sky. In this case, the landlord's property would be more valuable overall because no unit would remain vacant based solely on this particular issue.

V. The Rights of Landlords and Tenants

Takings analysis involves a balancing of private property rights and more general public interests.¹¹⁹ This balancing process has been characterized as “an attempt to reconcile the fundamental tension between constitutional protection of individual property rights and legislative determinations of public benefit.”¹²⁰ The constitutionality of a governmental regulatory scheme generally is presumed, unless the impact on private property rights goes too far or if the public interest is not sufficient enough to tip the scales of justice in favor of the public policy concern.¹²¹ The Commission, as have courts, recognized the tension between the rights of landlords and tenants, and the Commission takes great efforts to make the OTARD Rule applicable to tenants without triggering constitutional problems. However, the FCC swung the pendulum too much in favor of landlords. Traditional and modern concepts of landlord-tenant relationships fail to adequately address changes brought about by technology and the need to access this technology. These concepts of property law must be challenged, changed, and rights redistributed in light of modern advances and the needs of society.

The Fifth Amendment Takings Clause provides “nor shall private property be taken for public use, without just compensation.”¹²² In the case of the OTARD Rule, the claims of unconstitutional takings have come from property owners, landlords, and homeowners' associations who claim that the interests they have in their properties have been unconstitutionally taken without just compensation.¹²³ The Fifth Amendment does not prohibit the

119. See, e.g., *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) (private and public interests must be balanced in a takings analysis).

120. Manheim, *supra* note 78, at 978.

121. *Id.* “[I]f either the public interest is ill-served or the individual impact too great, the balance would theoretically tip against the validity of law.”

122. U.S. CONST. amend. V.

123. See, e.g., *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 91 (D.C. Cir. 2001).

government from taking private property for public use in exercise of its police powers—it simply prohibits taking private property without just compensation.¹²⁴ Therefore, to successfully assert that the OTARD Rule effects a taking of private property, a landlord or property owner must identify his or her property rights under a leasehold. Before a complete Takings Clause analysis can be done, an examination of the leasehold as a property concept must be made to determine, define, and characterize the rights of property owners and landlords under a leasehold as compared to the property rights of the tenant or lessee.

A. Ancient and Modern Concepts of a Leasehold

While leases today generally are viewed as contractual transactions, leases are grounded in principles of property law.¹²⁵ At common law, estates in land were held by the king and other inferior lords to whom estate owners had certain obligations.¹²⁶ The landlord had the obligation to give the tenant a legal right to possession, and in some jurisdictions, actual possession.¹²⁷ In addition, the lord impliedly promised that the tenant would have “quiet enjoyment” of the leased premises.¹²⁸ This promise meant that during the lease term the tenant’s possession would be free from interference by the landlord, or by third persons acting under the landlord’s authority, or by the holder of a paramount title.¹²⁹ Under ancient property concepts, a leasehold was seen as a conveyance of a real property interest.¹³⁰ Because a lease originally was considered a complete conveyance of

124. See *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) (“If the government has provided an adequate process for obtaining compensation, and if resort to that process ‘[yields] just compensation,’ then the property owner ‘has no claim against the Government’ of a taking.”); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999) (“The fact that the Act’s mandatory access provision effects a taking of private property does not, by itself, make it unconstitutional.”).

125. See, e.g., *Beckett v. City of Paris Dry Goods Co.*, 96 P.2d 122, 124 (Cal. 1939); see also *Realty & Rebuilding Co. v. Rea*, 194 P. 1024, 1026 (1920) (a lease is a conveyance as well as a contract, and landlords and tenants are both in privity of contract and privity of estate).

126. See 4 THOMPSON ON REAL PROPERTY § 39.04 (Thomas Ed. 1994).

127. See, e.g., *Mullins v. Brown*, 94 N.E.2d 574, 576 (1950); *Moore v. Cameron Parish School Board*, 563 So. 2d 347, 348 (La. Ct. App. 1990); Restatement (Second) of Property, Landlord and Tenant § 6.2 (1977).

128. *Id.*; and see 1 POWELL ON REAL PROPERTY § 3.06; and see *King v. Reynolds*, 67 Ala. 229 (1880); *West v. Kitchell*, 68 So. 469, 470 (Miss. 1915) (a landlord must ensure a tenant’s right to enjoy leased premises).

129. *Id.*

130. See *id.*

an interest in real property, the law of property rather than the law of contracts governed the duties and obligations of the parties.¹³¹

The modern relationship between a landlord and a tenant, while a remnant of feudal English systems of real property ownership, is quite different from that under common law.¹³² In reality, a lease is “both a contract and a conveyance” of constitutionally protected property rights.¹³³ Because a lease is both a conveyance and a contract, courts look to both bodies of law to determine the obligations of the parties.¹³⁴ Today, leases seldom are seen as complete conveyances of the underlying property for a specified term.¹³⁵

Under modern law, the lease normally defines the rights of the parties.¹³⁶ A lease is an agreement under which an owner of property gives up possession and use of the property for valuable consideration and for a definite term, at the end of which, the property owner has the absolute right to retake, control, and use the property.¹³⁷ A leasehold estate is a possessory interest in land that divides the interests in property between a landlord and a tenant and normally gives the tenant the right to exclusive possession to a defined area for

131. See, e.g., *Marini v. Ireland*, 265 A.2d 526, 532 (N.J. 1970); and see *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972) (under ancient concepts of landlord-tenant law the tenant owned and occupied the leased premises during the lease term).

132. *Manheim*, *supra* note 78, at 978 (citing R. Schoshinski, *American Law of Landlord and Tenant* at v. (1980) (“The law of landlord and tenant, which had remained relatively static for several centuries, has undergone extensive development and modification.”)); see also John J. Constonis, *Presumptive & Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 475 (June 1983) (suggesting that a generalized compensation practice might have overwhelmed the young and developing country had the label “property” been too liberally applied).

133. See, e.g., *Beckett v. City of Paris Dry Goods Co.*, 96 P.2d 124; *Stonehedge Square L.P. v. Movie Merchants*, 715 A.2d 1082, 1083 (Pa. 1998) (leases are both conveyances of property interests and contracts); see also *Echo Consulting Services, Inc. v. North Conway Bank*, 669 A.3d 227, 230 (N.H. 1995) (a lease is a contract to be construed in accordance with the standard rules of contract interpretation and construction); see generally John Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 449-50 (1972) (contract rights have been held to be “property” within the meaning of the takings clause); and see *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Lynch v. United States*, 292 U.S. 571 (1934); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). Under these authorities, if the government condemns a leasehold estate outright, the tenant would appear to be entitled to compensation, whether or not his interest is held to be a property right at common law.

134. *Id.*

135. *Id.*

136. See *Beckett v. City of Paris Dry Goods Co.*, 96 P.2d at 124.

137. See *id.* (“A lease must include a definite description of the property leased and an agreement for rental to be paid at particular times during a specified term.”).

a specified term.¹³⁸ A tenant typically has a “term of years” entitling the tenant to possess the property for that term, while title to the property remains vested in the landlord.¹³⁹ Landlords give away some but not all of their ownership interests in property upon leasing to a tenant.¹⁴⁰ A transfer of all rights would be more characteristic of a conveyance of a freehold estate, such as a fee simple absolute, not a lease. During the term of the leasehold, the landlord has a reversionary future interest that will become possessory at the end of the tenant’s lease term.¹⁴¹

B. A Landlord’s Bundle of Rights

Private property rights are not created by the Constitution, but generally are created by state law.¹⁴² The Commission traditionally relies on state law to address issues and disputes between landlords and tenants.¹⁴³

Ordinarily, the Court goes to great lengths to reject any federal definition of property. “Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent sources such as state law.” But, when the Court finds a state’s definition of property too restrictive, it will apply its own more protective definition. To some extent, rejection of state definitions is necessary in order to avoid evisceration of the takings clause. Without a definition of property having at least minimum normative dimension, states might be encouraged to defeat protection by tautology.¹⁴⁴

138. See, e.g., *Echo Consulting Services, Inc. v. North Conway Bank*, 669 A.2d 227 (N.H. 1995).

139. See 2 POWELL ON REAL PROPERTY § 16.03; see also AMERICAN LAW OF PROPERTY, A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 3.2 (Little, Brown and Co. 1952) (the landlord conveying a leasehold estate to a tenant retains the ownership of the estate, or interest involved, but carves out the present possessory interest for the tenant).

140. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (where a landlord retained the right to sell the property leased to a tenant); 4 THOMPSON ON REAL PROPERTY, *supra* note 126, § 39.03 (by leasing property to a tenant, a landlord does not give away all ownership interest in the property, otherwise, such the transaction would not be a lease but a sale or gift of the entire estate).

141. 4 THOMPSON ON REAL PROPERTY, *supra* note 126, § 39.03.

142. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

143. See Second OTARD Order, at 23890, ¶ 31.

144. See *Manheim*, *supra* note 78, at 986-87; see, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (holding that definitions of property come not from the Constitution but are based in state law); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980); *United States v. Powelson*, 319 U.S. 266, 279 (1943); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (property is defined by state law).

Property ownership often is characterized by a bundle of individual rights that together can be described in terms of a “bundle of rights” or a “bundle of sticks.”¹⁴⁵ Landlords, as well as tenants, have a distinct bundle of rights under a leasehold. That tenants have constitutionally protected rights has been found in other contexts as well, such as when leased property is taken in eminent domain.¹⁴⁶ Property ownership does not confer the absolute right to do whatever the owner wishes to do on or with that property, but property ownership is characterized by a fuller bundle of sticks than are other types of property interests such as easements, leases, and life estates. A landlord or property owner’s bundle of rights includes the rights to exclude, use, control, dispose of, possess, and derive income from the property.¹⁴⁷ The right to exclude is widely recognized as “one of the most essential [and treasured] sticks in the bundle of rights that are commonly characterized as property.”¹⁴⁸

The bundle of rights associated with property ownership can be severed, meaning it is possible for an owner to give away one or more sticks and retain the others.¹⁴⁹ Thus, while clearly, it is important to ask “who is the owner of the property?” it is equally important to ask “the owner of what?” because any parcel of property may have more than one owner, in the sense that each holds a different stick or set of sticks in his or her respective bundle of rights.¹⁵⁰

By leasing property to a tenant, the landlord grants the tenant the exclusive right to possess as well as a non-exclusive right to use and control the property.¹⁵¹ The landlord retains the right to dispose of and the right to derive income from the property. But more

145. See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (the bundle includes the right to possess, use, and dispose of property); and see *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

146. See Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing & Apportioning Condemnation Awards Between Landlord and Tenant*, 34 U.C.L.A. L. REV. 1083, 1086-87 (April 1987) (citing *United States v. Gen. Motors Corp.*, 323 U.S. at 377-78 and *Kohl v. United States*, 91 U.S. 367, 377 (1875)). Goldberg, Merrill and Unumb recognize that landlords and tenants both have a set of distinct property rights.

147. See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. at 378; *Kaiser Aetna v. United States*, 444 U.S. at 176.

148. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. at 176; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

149. See, e.g., *Bldg. Owners & Managers Ass’n Int’l v. F.C.C.*, 254 F.3d 89, 98 (D.C. Cir. 2001); *Yee v. City of Escondido*, 503 U.S. 519, 527 (where landlord voluntarily ceded control of rental property to tenant but retained a fee simple ownership interest and other rights to control, dispose of, and change the use of the property).

150. *Id.*

151. *F.C.C. v. Fla. Power*, 480 U.S. at 252-53.

importantly, the landlord retains rights—*albeit* limited rights—to control and use the leased premises. The landlord retains the right to impose restrictions on the use of the premises by the tenant. For example, the landlord may prohibit a tenant from operating a commercial enterprise on the premises, painting the walls of the unit, installing large appliances such as a washing machine, a dryer, and a waterbed, and from housing pets on the premises. The individual rights that make up the landlord’s bundle of rights are severed and divided up among the parties—namely, the landlord and the tenant.

When a property owner enters into a lease, the owner exercises the right to transfer a stick in the bundle of sticks to the tenant.¹⁵² A landlord, however, generally does not turn over to a tenant the entire “use” strand in his or her bundle of property rights, and may retain limited rights to use the rented property. An owner may rent his or her property to a tenant yet grant the tenant the privilege to use and possess only a part of the landlord’s property for the duration of the lease, or may grant only limited rights of use of the property. Until the lease expires or is terminated, the property owner has no right to exclude the tenant from the specific leased premises whatever the boundaries of the premises may be. Additionally, the landlord must provide the tenant quiet use and enjoyment of the leased premises.¹⁵³

If the Takings Clause is viewed broadly, it applies whenever any of the individual sticks in a property owner’s bundle of rights is taken without just compensation.¹⁵⁴ Every stick in the bundle of property rights would be itself private property.¹⁵⁵ Consequently, the compensation requirement would be triggered by any governmental regulation that alters the distribution of wealth or is claimed to take one of the sticks in the bundle of sticks, such as the right to exclude, control, use, derive income from, bequeath, devise, or sell.¹⁵⁶ Courts routinely decline to find a taking where the government states a

152. *Id.*

153. *See* *Echo Consulting Services, Inc. v. North Conway Bank*, 669 A.2d 227 (N.H. 1995) (holding that an interference that falls short of a constructive eviction, may still interfere with the tenant’s expectations under the lease and constitute a breach of the covenant of quiet enjoyment); *and see* HERBERT T. TIFFANY, *THE LAW OF REAL PROPERTY* § 92 (3d ed. 1939); *and see*; 2 POWELL ON REAL PROPERTY, *supra* note 139, § 16B-27.

154. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992) (finding that there was no compensable taking despite a transfer of wealth from a property owner to a tenant where a rent control statute and another housing statute limited a property owner’s ability to evict tenants and set rents and below-market rates. The property owner retained the rights to sell, devise, bequeath, and to derive income from the mobile home park).

155. *Id.*

156. *Id.*

public interest that promotes the public welfare, safety and morale, and where such public interest outweighs any burden to the affected property owner.¹⁵⁷ The Commission cites to a U.S. District Court case in which the court declined to find a taking in the implementation of the Fair Housing Amendments Act (“FHAA”) to a homeowners’ association restrictive covenant setting an age requirement for residents in the community.¹⁵⁸ In that case, the court found that the relevant FHAA provisions did not constitute a taking and thus did not trigger compensation, even though the regulation effectively altered the distribution of property rights and wealth, because the public interest of promoting the common good sufficiently outweighed any corresponding burdens.¹⁵⁹

C. Tenants’ Bundle of Rights Under a Lease

Even though a landlord who leases property retains ownership of the leased property, the tenant also owns a bundle of constitutionally protected property rights.¹⁶⁰ A lease, however, represents a lesser estate than ownership in fee simple and is a lesser estate than a life estate.¹⁶¹ Generally, a leasehold includes only those rights a landlord gives to a tenant by contract and those rights provided under traditional property law. A tenant’s right to possess the leased

157. *Id.*; and *see, e.g.*, *Westwood Homeowners Ass’n v. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987) (land use regulation does not effect an unconstitutional taking under the Fifth Amendment).

158. First OTARD Order, at 19303, ¶ 44 (citing *Seniors Civil Liberties Ass’n v. Kemp*, 761 F. Supp. 1528, 1559 (M.D. Fla. 1991) (the Fair Housing Act does not effect a taking), *aff’d*, 965 F.2d 1030 (11th Cir. 1992), and *Westwood Homeowners Ass’n v. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987)).

159. *Id.* (citing *Seniors Civil Liberties Ass’n*, 761 F. Supp. 1528 and *Westwood Homeowners Ass’n*, 745 P.2d 976); *see also* *Yee v. City of Escondido*, 503 U.S. 519 (1992) (finding that there was no compensable taking despite a transfer of wealth from a property owner to a tenant).

160. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380 (1945) (“The right to occupy for a day, a month, a year, or a series of years in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.”); *see also* *Goldberg, Merrill, & Unumb*, *supra* note 146 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) and *Kohl v. United States*, 91 U.S. 367, 377 (1876)); *Hicks*, *supra* note 133 (both the landlord and tenant have constitutionally protected rights).

161. *See* 4 THOMPSON ON REAL PROPERTY, *supra* note 126, § 39.04; and *see* *Comments of DirecTV, Inc.*, Sept. 27, 1996, at 11-12, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001 (suggesting that the extension of Rule 1.4000 to tenants produces an unfair result as a life estate holder would be permitted to install a device while a tenant with a long-term lease would not have the same privilege, even where the life estate may be of shorter duration).

premises encompasses the power to use and control the leased premises.¹⁶² As with a landlord, absent any subsequent transfer to a third party such as an assignee or a sublessee, for example, a tenant has the right to possess the property.¹⁶³ The tenant's right of possession also includes the right to exclude others including the landlord and other third parties.¹⁶⁴ While the tenant has the right to exclude, he or she also has the right to control and use the property which includes the right to invite visitors, including service providers, onto the leased property.

Because the lease contract is the source of the property right under modern law, the landlord can contractually, under the lease, prohibit certain uses of the premises by the tenant and may, for example, prohibit hanging laundry on the rails of the balcony and storing articles such as bicycles on the balcony.¹⁶⁵ Therefore, the tenant does not necessarily exercise complete dominion and control over the balcony. Landlords can prohibit other types of activity as well. Also, while the tenant might have the right to possess the leased property, possession is only one stick of many in the bundle of rights that define property ownership. It is the landlord who retains the majority of the sticks in the bundle and who therefore has more rights with respect to the whole of the property and its uses.

Under property law, a tenant also has a right to live in habitable conditions. Many states recognize an implied warranty of habitability and a covenant of quiet enjoyment.¹⁶⁶ The implied warranty of habitability traditionally applies to the bare living essentials such as running water, heat, and operational plumbing.¹⁶⁷ Courts may be reluctant to apply the warranty of habitability to luxury items. The right of access to information is not a luxury, but is essential to modern day existence, and property law must adequately address the modern day relationships of landlords and tenants.¹⁶⁸

162. *Id.*

163. *See, e.g.,* Teagarden v. McLaughlin, 86 Ind. 476, 479 (1882) (holding that a tenant in rightful possession of leased premises may sue landlord for trespass); *see also* HERBERT T. TIFFANY, *THE LAW OF REAL PROPERTY*, *supra* note 153, § 94 (3d ed. 1939).

164. *Id.*

165. Second OTARD Order, at 23920 (dissent by Furchtgott-Roth).

166. *See, e.g.,* Marini v. Ireland, 265 A. 2d 526 (N.J. 1976) (residential leases contain an implied warranty of habitability, under which landlords must provide and maintain vital facilities).

167. *See, e.g., id.*

168. *See, e.g.,* Mease v. Fox, 200 N.W.2d 791, 793-97 (Iowa 1972) (where the court applies an implied warranty of habitability and recognizes that landlord-tenant law must keep pace with the changing relationships between landlords and tenants over time).

D. Application of Rule 1.4000 to Modern Leases

Rule 1.4000 grants tenants the right to install Section 207 Devices on areas over which a tenant has exclusive use or control.¹⁶⁹ Some scholars and regulators have suggested that this rule is best demonstrated using an analogy. The analogy contemplates that one could wrap the property in plastic wrap.¹⁷⁰ Anything that penetrates the plastic wrap is outside the leasehold, while everything within the wrap would constitute the leasehold.¹⁷¹ Based on this analogy, the balcony and patio are within the leasehold estate.¹⁷² Consequently, under property law, the landlord no longer has either the right to possess or the right to occupy the areas covered in plastic wrap—namely the inside of the rented property as well as the patio and balcony. This article suggests a different analogy. To adequately address the practical positioning problems of the Rule as it applies to apartments in particular, a better analogy may be that a leasehold should be viewed as a pocket watch with the main part of the leasehold being represented by the time piece which is connected to another part of the property that attaches to a common area on which a Section 207 Device could be installed.

When a landlord leases to a tenant, both parties have certain expectations under the lease contract. The tenant expects that he or she will possess and have exclusive use over all others including the landlord. The landlord, on the other hand, expects to retain the right to control the use of the property and to protect his or her economic investment. The tenant, in the landlord's view, has only the right to occupy, subject to many restrictions, for a limited period of time. Therefore, if the landlord has retained the rights to use, dispose of, exclude, derive income from, and control, the question becomes which, if any, of these rights has been taken by the government by its extension of the OTARD Rule to rental property.

Then-Commissioner Harold Furchtgott-Roth dissented in the *Second OTARD Order*. Specifically, he dissented from that part of the order which subjects leased property to regulation under Section 207.¹⁷³ Furchtgott-Roth saw the lease as the source of all rights for a tenant and suggested that the scope of the government's authority to regulate property was limited only to those rights that the landlord granted to the tenant under the lease agreement. Furchtgott-Roth

169. See Second OTARD Order, at 23896-97, ¶ 43.

170. See Kessler, *supra* note 65.

171. *Id.*

172. *Id.*

173. Second OTARD Order, at 23919 (dissent by Furchtgott-Roth).

argued against the FCC's prescribing what he terms "general federalized lease terms."¹⁷⁴ The Commission, he argued, may not rewrite the freely negotiated terms of a lease.¹⁷⁵ He argued that allowing tenants to place devices on a balcony or exterior wall, if prohibited by the lease, would indeed subject the owner to an "uninvited" invasion of property. The tenant although not a "stranger" to the lease, would be an "interloper" acting outside the rights granted under the lease agreement when the tenant engages in conduct in violation of the agreed-upon lease terms and restrictions, even if the device was installed within the boundaries of the leased premises.¹⁷⁶

Ignoring basic landlord-tenant law, Commissioner Furchtgott-Roth focused on occupation and possession rather than the rights of landlords and tenants under a leasehold. A landlord expressly gives up the right to possess, occupy and control the leased premises during the term of the lease.¹⁷⁷ The landlord transfers these rights to the tenant, retaining for him or herself only the right to re-enter the premises at the termination of the lease term.¹⁷⁸ The landlord retains ownership, but gives up the rights to exclusive use, possession, and control.¹⁷⁹ The Rule does not transfer any additional rights from landlord to tenant than are already transferred under the lease agreement. While Commissioner Furchtgott-Roth failed clearly to explain the relevant distinction between occupation and possession, property law is clear on this issue. The FCC also supported this conclusion as evidenced by its responses to inquiries by judges for the D.C. Circuit, which suggested that the OTARD Rule was "simply [an] entitlement" of tenants.¹⁸⁰ The OTARD Rule protects rights already granted to tenants.

174. *Id.* at 23920.

175. The Contract Clause of the Constitution states "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." The purpose of clause was to protect creditors against debtor relief laws, by which the obligations of debtors were often postponed or even completely lifted. Any interpretation of a lease agreement after it has been duly executed by the parties could be found to violate this Contracts Clause. CONST. art. I, § 10.

176. Second OTARD Order, at 23920 (dissent by Furchtgott-Roth); *see also* F.C.C. v. Fla. Power, 480 U.S. 245, 252-53 (1987).

177. Second OTARD Order, at 23919, n. 184 (dissent by Furchtgott-Roth); and *see* HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY, *supra* note 153, § 76 (3d ed. 1939).

178. *See* 4 THOMPSON ON REAL PROPERTY, *supra* note 126, § 39.04; and *see* HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY, *supra* note 153, § 76 (3d ed. 1939).

179. *Id.*; and *see* F.C.C. v. Fla. Power, 480 U.S. at 252-53.

180. *SBCA Voices Dissent As Court Grills Landlords and FCC on TV Reception Rules*, SATELLITE WEEK, March 19, 2001.

Notwithstanding the obvious balance of a landlord's and a tenant's property rights to possess, use, and control, another interesting balancing of other rights is triggered by the OTARD Rule. The Supreme Court has held that viewers' First Amendment right of access to information includes the right to receive a variety of information from "a multiplicity" of diverse sources.¹⁸¹ The First Amendment rights of tenants to receive information must be balanced against the property rights of the property owner.¹⁸² Nothing in the First Amendment, however, prohibits property owners from setting limitations on the use of their property through private agreements with others.¹⁸³ The Commission agrees that consumers' and viewers' access to numerous and diverse sources of information affords access and exposure to a panoply of perspectives on the relevant social, political, legal, and moral issues of the day.¹⁸⁴ The Commission correctly concluded that even if we ignore a tenant's right to receive information, neither the language of the statute nor the legislative history suggest that Congress intended Section 207 to create affirmative duties on property owners by guaranteeing every American viewer access to the specific programming of their choice or access to all available programming without considering the burdens imposed on property owners, other neighbors, and visitors to the property.¹⁸⁵ The problem is, Congress and the FCC should have ensured the right of all Americans to have access to the wide variety of programming and data service options currently available, and should have created some mechanism to compensate property owners

181. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 390 (1969); see also *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 663-64 (1994) (where court reviews constitutionality of FCC's cable must-carry rules and acknowledges importance of diverse content and a variety of views presented on cable and broadcast television).

182. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); and see *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 768 (N.J. 1994) (Generally a complainant must show state action in order to support a claim for impairment of First Amendment rights or equally restrictive actions by a private individual entity where the property is sufficiently open to the public).

183. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 77 (1980); and see Second OTARD Order, at 23904, ¶ 57.

184. Second OTARD Order, at 23903, ¶ 54 (citing *Time Warner Entertainment Co., L.P. v. F.C.C.*, 93 F.3d 957, 975 (1996) (quoting *Red Lion Broadcasting Co.*, 395 U.S. at 389 (1969))).

185. See, e.g., *Red Lion Broadcasting, Co.*, 395 U.S. at 390-93 (holding that the First Amendment did not require that the political opponents of those endorsed by a broadcast station be given a chance to communicate with the public via the broadcast station); see also Second OTARD Order, at 23904, ¶ 56; 104th Congress, 1st Session, Report 104-204, Part 1 at 123-24 (July 24, 1995).

or to otherwise create incentives for property owners to voluntarily provide service. What the Congress cannot do, states could by extending tenant protections under state law principles, such as the implied warranty of habitability or provision of vital facilities, or by statute.¹⁸⁶

VI. Takings Analysis

The purpose of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁸⁷ The Takings Clause has replaced the Due Process Clause as an effective means to resolve these issues, as the Takings Clause contains the critical compensation component.¹⁸⁸ In general there are two types of takings—*per se* takings and regulatory takings. A *per se* taking occurs where the government authorizes the permanent physical occupation of property.¹⁸⁹ A regulatory taking occurs where the government, in exercise of its police power, merely regulates the use of property.¹⁹⁰ A regulation of economic interests which “goes too far” constitutes a “taking.”¹⁹¹ Therefore, even if a *per se* taking is not found, a governmental action may constitute a regulatory taking. The extension of Rule 1.4000 to rental property triggers neither a *per se* nor a regulatory taking.

A. *Per Se* Taking

Any permanent physical occupation of real property is a taking regardless of the size of the occupation,¹⁹² the economic impact on the property owner,¹⁹³ or any public interest that might be served by the occupation.¹⁹⁴ The *per se* takings doctrine protects a property owner’s

186. See, e.g., *Mease v. Fox*, 200 N.W.2d 791, 793-97.

187. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (government must not force an individual to bear a burden that would be best borne by the general public).

188. *Id.* at 934. Manheim suggests that the Due Process Clause was unsuitable for monitoring the exercise of police power in the area of economic regulation.

189. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-39 (1982); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (a government action that “denies all economically beneficial or productive use of land” is a *per se* taking).

190. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

191. See, e.g., *id.* at 415; *Keystone Bituminous Coal Ass’n v. DeBenecitis*, 480 U.S. 470 (1987) (upholding the rule that regulations that go too far may be deemed unconstitutional takings of property).

192. *Loretto v. Teleprompter*, 458 U.S. at 436-37.

193. *Id.*, at 434.

194. *Id.* at 426.

right to exclude all others from its property except in cases where the owner has voluntarily invited others to occupy the premises.¹⁹⁵ Where a private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a *per se* taking, but the regulation must be analyzed under the *ad hoc* multi-factor inquiry reserved for nonpossessory regulatory government activity.¹⁹⁶

A long line of Supreme Court cases address both *per se* and regulatory takings. Many of these cases address takings issues within the context of the landlord-tenant relationship.¹⁹⁷ A discussion of the relevant cases follows. *Per se* takings cases are discussed first, followed by regulatory takings cases.

1. *Loretto v. Teleprompter Manhattan CATV Corp.*

The U.S. Supreme Court, in *Loretto v. Teleprompter Manhattan CATV Corp.*, found a taking of a portion of a landlord's property for which she was entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment.¹⁹⁸ The Court defined *per se* takings and affirmed the traditional rule that a permanent physical occupation of property constitutes a taking.¹⁹⁹ In *Loretto*, a cable company, Teleprompter Manhattan CATV, obtained permission from the property's former owner to install a cable on a five-story apartment building located in New York City.²⁰⁰ The cable company installed a small cable on the front and rear of the roof of the building and also attached two large boxes and cables to the roof and masonry using nails and screws.²⁰¹ The State of New York enacted a statute prohibiting landlords from interfering with the installation of cable television facilities upon his or her property and prohibiting a landlord from demanding payment from any tenant in exchange for permission to install cable

195. Second OTARD Order, at 23885, ¶ 22.

196. See, e.g., *F.C.C. v. Fla. Power*, 480 U.S. 245, 252 (1987) (citing *Loretto*, 458 U.S. at 440); see also *Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992); *Penn Cent. Transp. v. New York City*, 438 U.S. 104 (1978) (setting forth the three *ad hoc* factual factors for determining whether a regulation effects a regulatory taking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control).

197. *Gulf Power Co. v. United States*, 187 F. 3d 1324, 1327 (11th Cir. 1999); *Yee v. City of Escondido*, 503 U.S. 519; *F.C.C. v. Fla. Power*, 480 U.S. at 252-53; *Loretto*, 458 U.S. at 441.

198. *Loretto*, 458 U.S. at 438-41.

199. *Id.* at 440-41.

200. *Id.* at 421-22.

201. *Id.* at 422.

equipment.²⁰² The law also prohibited landlords from demanding unreasonable payments from the cable company for the installation of cable equipment.²⁰³ The property owner claimed that the state statute effected an unconstitutional taking of property without just compensation.²⁰⁴

The state statute was upheld by the state court of appeals, which held the statute served a “legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits.”²⁰⁵ Additionally, in declining to find a taking, the appellate court found the statute did not interfere with Loretto’s reasonable investment-backed expectations or present an “excessive economic impact” upon the property owner.²⁰⁶

The tenant’s interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him.²⁰⁷

The U.S. Supreme Court, however, held the cable installation on the landlord’s property constituted a physical occupation and thus a taking, because plates, boxes, wires, bolts, and screws were physically affixed to the building and occupied space on the building’s roof and exterior wall.²⁰⁸

The *Loretto* Court described property rights in a physical thing as the rights “to possess use and dispose of it” and recognized a property owner’s expectation that the owner’s possession and use of the property will be undisturbed by others.²⁰⁹ The Court found that the statute more than simply regulated the use of the property pursuant to the state’s legitimate police power.²¹⁰ It concluded that when government directly or indirectly permanently occupies

202. *Id.* at 423.

203. *Id.*

204. *Id.*

205. *Id.* at 425.

206. *Id.*

207. *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E. 2d 320, 328 (1981), *rev’d*, 458 U.S. 419 (1982) (citing testimony of Joseph C. Swidler, Chairman of PSC, before the Joint Legislative Committee considering the CATV bill, citing Regulation of Cable Television by the State of New York, Report to the New York PSC by Commissioner William K. Jones 207 (1970)).

208. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 438.

209. *Id.* at 435-36 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

210. *Id.*

physical property, it destroys or at least infringes upon the property owner's rights to possess, use, exclude, and otherwise dispose of the property.²¹¹ According to the Court, this constitutes a *per se* taking.²¹² "Permanent physical occupation of property forever denies the owner any power to control the use of the property; he cannot exclude others, but can make no nonpossessory use of the property."²¹³ It makes no difference that the owner may retain the right to transfer the property, the Court opined, because a permanent physical occupation of the property by a third party "will ordinarily empty the right of any value, since the purchaser [or any other transferee] will also be unable to make any use of the property."²¹⁴

The Court made it clear and scholars generally agree that the Court's holding in *Loretto* is "very narrow" and applies only to a permanent physical occupation by a third party, and that all other regulations should be analyzed under the three-prong test of *Penn Central Transportation Co. v. City of New York* discussed in greater detail below in this article.²¹⁵ Therefore, not every physical presence on private property is the type of invasion contemplated in *Loretto* which would constitute a taking.²¹⁶ The Court concluded that an owner suffers a "special kind of injury" when a third-party stranger rather than a tenant directly occupies the owner's property.²¹⁷

2. *Yee v. City of Escondido*

Yee v. City of Escondido involved a challenge to the City of Escondido's mobile home rent control ordinance and answered a question left unresolved by the *Loretto* Court.²¹⁸ The mobile home park owners argued that when read in conjunction with the state's Mobilehome Residency Law, the Escondido city rent control ordinance amounted to a physical occupation of property, and thus, a *per se* taking.²¹⁹ Under the regulation, park owners could no longer set rents or select their tenants.²²⁰ Pursuant to the state Mobilehome Residency Law, a park owner was limited in his or her ability to

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* Temporary restrictions on the right to exclude are distinguished from permanent, exclusive physical occupations.

215. *Id.* at 441; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

216. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441.

217. *Id.* at 436.

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

219. *See id.* at 523 .

220. *See id.* at 526.

terminate the tenancy of a mobile home owner.²²¹ Specifically, a park owner could not require removal of a mobile home that was sold, charge a fee, or disapprove of a potential purchaser.²²² Additionally, the Escondido rent control ordinance set rents back to 1986 levels and prohibited increases without approval of the city council.²²³

Petitioners in the case argued that because mobile home owners were protected from eviction under the California Mobilehome Residency Law, a mobile home owner would become a “perpetual tenant of the park” who could then receive an unfair economic windfall should the mobile home owner ever sell the mobile home because the value of the home was enhanced by the corresponding right to occupy the mobile home pad at a below-market price.²²⁴ Petitioners concluded that the ordinance transferred an interest in the property from mobile park owners to the owners of mobile homes who leased pads in the park which was tantamount to a permanent physical occupation of that mobile home pad, and thus constituted a *per se* taking.²²⁵ The Court in *Yee* acknowledged the redistribution of wealth caused by rent control statutes, but concluded that the Escondido ordinance differed from the typical rent control ordinance which transfers wealth from the landlord to the current tenant and all future tenants, whereas, the Escondido ordinance transferred wealth only to the incumbent mobile home owner.²²⁶

The Court affirmed the government’s authority, pursuant to its police power, to regulate various aspects of the landlord-tenant relationship “without paying compensation for all economic injuries that such regulation entails,” even though some of these regulations “transfer wealth from one who is regulated to another.”²²⁷ The *Yee* Court further opined that regulation of the terms of a landlord-tenant relationship does not constitute, on its face, an invasion of the

221. *See id.* at 524.

222. *See id.*

223. *See id.*

224. *See id.* at 526-27.

225. *See id.*

226. *Id.* at 530-32 (Petitioners in *Yee* cited Footnote 19 in *Loretto* which suggests if the statute in question in that case had required landlords to provide cable installation, the statute “might present a different question from the question before us since the landlord would own the installation.”) Presumably that ownership of the installation equipment by the landlord would vest the landlords themselves rather than a tenant or other third party with rights to manage and control the placement of the equipment.

227. *See id.*

landlord's right to exclude.²²⁸ The pivotal fact in *Yee* was, in the Court's view, that mobile park owners had voluntarily entered into a regulated industry. The Court found, therefore, that because the park owner voluntarily rented the mobile home pad to a tenant mobile home owner, the park owner had voluntarily invited the mobile home owner onto the property and consequently was not subjected to the sort of forced physical occupation of property and *per se* taking as contemplated by the *Loretto* Court.²²⁹ The Court held that the park owners could not assert a *per se* taking and had no right to compensation based on their inability to exclude future tenants.²³⁰ The Court found no "compelled physical occupation," which had it been present, would have entitled the petitioners to compensation.²³¹ Additionally, neither statute compelled park owners to continue renting their property to mobile home owners.²³² Park owners were free to cease renting the property altogether, and the regulations allowed them to evict the tenants upon giving six or twelve months notice if they chose to dissolve their rental enterprises.²³³

3. Federal Communications Commission v. Florida Power

The OTARD Rule bears a striking resemblance to the 1978 federal Pole Attachments Act.²³⁴ The Pole Attachments Act, as originally enacted, required the FCC to set reasonable rates, terms, and conditions for certain attachments to telephone and electric poles.²³⁵ The Pole Attachments Act empowered the FCC, in those states in which access rates were not already regulated, to determine "just and reasonable" rates a utility could charge cable companies for access to its poles, ducts, conduits, and rights-of-way.²³⁶ It provided that if a utility voluntarily chose to provide access, the rate charged for that access was subject to FCC regulation.

228. *Id.* at 527-28 ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.").

229. *See id.* at 527-28.

230. *Id.* at 531 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (no unconstitutional taking was found where Congress prohibited race discrimination by motel owner) and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and rejecting arguments based on Footnote 17 in *Loretto* suggesting that owner could avoid the requirements of the statute by ceasing to rent to tenants).

231. *Id.* at 531-32.

232. *Id.*

233. *Id.*

234. 47 U.S.C. § 224 (2000).

235. *Id.* § 224(b).

236. *Id.*

When faced with a constitutional challenge to the Pole Attachments Act, the Supreme Court in *Florida Power* declined to find a *per se* taking because the Pole Attachments Act, as originally enacted, did not authorize third parties to access utility poles, but merely regulated the terms of the rental once cable companies and utilities agreed to the rental of space on the utility poles.²³⁷ The Court reversed the Eleventh Circuit which found that the 1978 Pole Attachments Act authorized a permanent physical occupation of property.²³⁸ The Court concluded that the act merely authorized the FCC to review rents charged by the power company which voluntarily leased space to cable companies.²³⁹ Generally, statutes regulating the economic relationship between a landlord and a tenant do not trigger a compensable *per se* taking.²⁴⁰ However, where such a statute requires the landlord to permit the physical occupation of any portion of the property by an unrelated third party, a *per se* taking may be found.²⁴¹ It is “the invitation, not the rent, that makes the difference.”²⁴²

With respect to the Pole Attachments Act the troublesome so-called occupier of property—the tenant—had already been invited onto the property by the owner. Nothing in the Pole Attachments Act gave cable companies a right to occupy space on utility poles, or prohibited utility companies from refusing to enter into attachment agreements. The Court relied on case law upholding the government’s authority to regulate various aspects of the landlord-tenant relationship without paying compensation even though the government’s regulations may effect a transfer of wealth from the regulated party to someone else.²⁴³ The regulation of the terms of the landlord-tenant relationship, such as rental rates, is permissible and does not trigger a takings analysis.²⁴⁴ *Loretto*’s holding was limited to requirements that a landlord suffer physical occupation of the landlord’s building by a third party.²⁴⁵ There was no such third party occupying the property in *Florida Power*. The only relevant parties were the property-owning landlord and the tenant who had already

237. *F.C.C. v. Fla. Power* 480 U.S. 245, 254 (1987).

238. *Id.* at 250.

239. *Id.* at 250-51.

240. *Id.* at 252 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

241. *Id.*

242. *Id.* at 252-53.

243. *See, e.g., Yee*, 503 U.S. at 529.

244. *F.C.C. v. Fla. Power*, 480 U.S. at 290-91.

245. *Id.*

been voluntarily invited onto the property. The statute imposed no “required acquiescence” obligations on the property owner.²⁴⁶

4. Gulf Power Company v. United States

The Pole Attachments Act was amended in 1996.²⁴⁷ The amended Pole Attachments Act of 1996 provides that a utility must “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”²⁴⁸ In *Gulf Power Company v. United States*, the Eleventh Circuit reviewed a challenge to the 1996 amendment to the Pole Attachments Act ultimately finding that the statute authorized a taking of a portion of the utilities’ poles when the FCC imposed a mandatory access provision on utilities companies requiring them to provide telecommunications carriers nondiscriminatory access to their utility property.²⁴⁹ The court concluded that the statute imposed an affirmative obligation on utilities, creating a form of “required acquiescence.”²⁵⁰ Such a mandatory access provision, it stated, effects a *per se* taking of property under the Fifth Amendment because under the amended Pole Attachments Act, a utility must permit a cable company or telecommunications carrier to occupy space on its poles, ducts, conduits, and rights-of-way.²⁵¹ The court went on to say, however, that the Act is not facially unconstitutional under the Fifth Amendment because it includes a crucial provision.²⁵² The amended Pole Attachments Act provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation.²⁵³

246. *Id.* at 252.

247. 47 U.S.C. § 224(f) (2000).

248. *Id.* § 224(f)(1); *Gulf Power Co. v. United States*, 187 F. 3d 1324, 1327 (11th Cir. 1999).

249. 47 U.S.C. § 224(f)(1); *Gulf Power Co. v. United States*, 187 F. 3d at 1337 (finding that the nondiscriminatory access provision of the 1996 Act authorizes the taking of a portion of the utilities’ poles when the FCC issues a rent determination order for a particular set of poles, but that the FCC lacks statutory authority to regulate attachments on utility poles by wireless carriers and Internet service providers); *see also* SARA F. LEIBMAN & ANGELA F. COLLINS, *CABLE PROVISION OF TELECOMMUNICATIONS SERVICES* 539, 553 (PLI 2001).

250. *Gulf Power Co. v. United States*, 187 F.3d at 1327, 1331.

251. *Id.* at 1328-29, 1331.

252. *Id.* at 1328-29.

253. *Id.* at 1337 (the FCC has the authority to determine the compensation a utility is entitled to receive for providing access. It determines the compensation a utility may receive for providing access by setting a “just and reasonable” rate within the range of minimum to maximum rates Congress set forth in the act).

5. Application of the Takings Cases to the OTARD Rule

The line of takings cases is troubling to some because the Court appears to be slowly encroaching more and more on the rights of property owners. While the Supreme Court's line of takings cases is troubling, the Court's reasoning is understandable, and so is the Commission's. The cases and the Commission's rulemaking proceeding conclusions are understandable because of the unique nature between the allocation of property rights between landlords and tenants under the modern leasehold and because of takings jurisprudence. In the case of *Yee*, the Court in effect distinguished between property that is taken from the landlord's use and control and that taken from the landlord which the landlord has already put into the stream of commerce.²⁵⁴ Not only was the relevant property in that case placed in the stream of commerce, it was placed within the realm of a regulated area of commerce. Because the property owner had already given up the right to possess the property comprising the leasehold, the ordinance did not compel the park owners to suffer the physical occupation of their property, and did not effect a *per se* physical taking. At least on the face of the regulatory scheme in *Yee*, neither the city nor the State compelled property owners, once they have rented their property to tenants, to continue doing so.

Loretto did not involve a regulation of a landlord-tenant relationship. Instead it involved the relationship between a property owner, who also happened to be a landlord and an unrelated third party. In *Loretto*, property or property rights were taken from the property owner and given directly to the cable company, and not one to whom the property owner had already transferred important property rights. However, such is not the case with the OTARD Rule. The OTARD Rule speaks clearly to the landlord-tenant relationship. The OTARD Rule vests the tenant, not an unrelated third party to the lease, with a right to install a Section 207 Device. As in *Yee*, a landlord subject to the OTARD Rule already has transferred the relevant important rights to use and to possess to the tenant, and government is, thereafter, authorized to regulate the terms of the agreement between the property owners and tenants as it applies to the placement of satellite dishes.

254. *Yee*, 503 U.S. at 527-29.

a. Congress Did Not Authorize a Taking and Did Not Provide a Compensation Mechanism

As properly recognized by the Commission and many commenters in the rulemaking proceeding, Section 207 merely directs the FCC “to promulgate regulations to prohibit restrictions that impair a viewer’s 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.”²⁵⁵ Congress did not expressly authorize the Commission to permit the taking of private property either by expressly granting tenants the right to install Section 207 Devices on common areas, or by granting installation rights directly to satellite service providers, or by compelling property owners to provide service to their tenants.²⁵⁶ Additionally, Section 207 does not contain a compensation clause.²⁵⁷ Because Section 207 does not contain a compensation clause, the FCC correctly concluded that Section 207 does not authorize the Commission to read one into the statute either expressly or impliedly.²⁵⁸ Rules of statutory construction dictate that the Commission should avoid construing a statute in a way that calls into question the constitutionality of the statute.²⁵⁹ In sum, the FCC may not take any of the property rights a landlord has reserved for himself under the express terms of the lease or any rights reserved to the landlord under the aforementioned traditional principles of property law.

255. Telecommunication Act of 1996, 42 U.S.C. § 207 (2000). Reads in relevant part: 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 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.

See *Bldg. Owners & Managers Ass’n Int’l v. F.C.C.*, 254 F.3d 89, 95 (D.C. Cir. 2001); see also 47 U.S.C. § 303(v) (2000).

256. Second OTARD Order, at 23882. Section 207 does not grant eminent domain authority, nor does the Rule provide a compensation mechanism for private property taken pursuant to this authority.

257. See *Bldg. Owners and Managers Ass’n Int’l*, 254 F.3d at 93.

258. Second OTARD Order, at 23882, ¶¶ 17, 44. *Chevron* analysis applies. Under *Chevron*, courts accord substantial deference to administrative constructions of congressionally enacted statutes. See *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); see also *Bldg. Owners and Managers Ass’n Int’l*, 254 F.3d at 93-94.

259. See, e.g. *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (“[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

As written, the OTARD Rule does not effect a taking, but as written, the OTARD Rule fails to fulfill Congress' objectives. Were the Rule to be rewritten to extend its protections to common areas without a compensation mechanism or without a redefinition of property rights, there may be a constitutional problem. Nonetheless, the Commission and Congress must go further than it has. A redefinition or broadening of property rights would accord tenants broader access without a need for compensation. In the alternative, the Congress could rewrite Section 207 to provide for compensation from the government from an OTARD Fund created specifically for this purpose. Such widespread compensation might be economically unworkable, but a redistribution of property rights is not impossible.

b. Rule 1.4000 Extends Property Right Protections to Tenants But Not to Third Parties

The OTARD Rule does not grant third parties rights of access to an owner's property. Such rights are granted directly to the tenant. Opponents of the OTARD Rule contended in the rulemaking proceeding that the Rule should not apply to leases at all. They argued that the Commission exceeded its statutory authority by extending the OTARD prohibition to leased property.²⁶⁰ Additionally, they argued that Congress did not intend to encompass tenants within the scope of Section 207, and that the statute's scope must be limited accordingly.²⁶¹ They contended that nowhere in the legislative history does Congress state or imply that the statute is applicable to leases, and that if Congress intended Section 207 to apply to rental property, the legislative history would have made that clear, especially in light of the large number of apartment dwellers in

260. See generally, Comments of NAHB, Sept. 27, 1996, at 5-6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694520001; Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at iii, 18-20, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001; Joint Comments of NAA, Building Owners and Managers Association, National Realty Committee, Institute of Real Estate Management, International Council of Shopping Centers, National Multi Housing Council, American Seniors Housing Association, National Association of Real Estate Investment Trusts at 14-15, 22, available at www.fcc.gov.

261. See, e.g., Comments of NAHB, Sept. 27, 1996, at 5-6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694520001; and see Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at iii, 18-20, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

the U.S.²⁶² They argued that the legislative history of Section 207 demonstrates that Congress was concerned only with restrictions affecting property owners such as zoning restrictions and homeowners' association restrictions.²⁶³ As the Commission correctly determined, the OTARD Rule must be made applicable to rental property in order to fulfill the spirit of the statute.

The 1934 Act and the 1996 Act conferred upon the Commission broad authority to regulate in the area of interstate communications. The statutes direct the Commission to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."²⁶⁴ The Rule gives tenants broad but not unfettered rights to install DBS, MMDS, and other TV antennas in and around their leased premises. Therefore, opponents of the Rule also argue that by extending the scope of the Rule to rental property, landlords will have lost all control over their property,²⁶⁵ and that a taking of private property will occur on "hundreds of thousands" of properties throughout the country.²⁶⁶

Building Managers and *Yee* support the FCC's decision to extend the OTARD Rule protections to tenants. They are all correct. Because a landlord has a duty not to interfere with a tenant's enjoyment of a leasehold during the lease term, and has no right to possess the leasehold until termination of the lease, and because a tenant may make alterations to the leased premises so long as the tenant does not commit waste upon the premises, a landlord may not maintain a takings action where a tenant installs a satellite device.²⁶⁷ In the FCC rulemaking proceeding, property owners and opponents of the Rule argued that extending rules to require property owners to

262. See, e.g., Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at iii, 18-20, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

263. See, e.g., Comments of NAA, Building Owners and Managers Association, National Realty Committee, Institute of Real Estate Management, International Council of Shopping Centers, National Multi Housing Council, American Seniors Housing Association, National Association of Real Estate Investment Trusts at 14-15, 22, available at www.fcc.gov ("Congress spoke of preempting zoning laws, homeowners' association rules and restrictive covenants because they were perceived to prevent individual property owners from receiving certain signals—but Congress said nothing about apartment leases or other restrictions that affect individuals who do not own the premises they occupy.").

264. 47 U.S.C. § 154(i) (2000); see also 47 U.S.C. § 303(r).

265. SATELLITE WEEK, *supra* note 180.

266. See Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at 2, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

267. See *Rumiche Corp. v. Eisenreich*, 352 N.E.2d 125, 129 (N.Y. 1976); see also *Thompson Develop., Inc. v. Kroger Co.*, 413 S.E.2d 137, 142 (W. Va. 1991).

permit installation on a tenant's leasehold would permit tenants to install equipment on property that they do not own, restricting the property rights of the land owner thereby constituting a *per se* taking under *Loretto* as well as a regulatory taking.²⁶⁸ The rights to possess, to use, and to dispose of, they argued, are destroyed by an uninvited permanent physical occupation of private property by tenants.²⁶⁹ But, they were and are wrong. By leasing property to a tenant, the owner voluntarily relinquishes to the tenant the rights to possess and use which would include installing a satellite reception device.²⁷⁰ The tenant is not a stranger to the landlord's property, but has been granted the exclusive right to occupy. The *Loretto per se* rule does not apply to the FCC's regulation, so long as all the FCC is doing is affecting a landlord-tenant relationship, and does not grant the right to occupy to a third party—namely the satellite service provider.²⁷¹

Opponents also assert that even if a statute such as Section 207 and Rule 1.4000 merely regulate the landlord-tenant relationship, the government's action also authorizes the permanent physical occupation of the property by a third party.²⁷² Even though the tenant is not himself or herself a third party stranger, the satellite service provider is such a third party stranger. The space occupied by the reception devices—for example, the area on the balcony or patio—would be physically and permanently occupied, landlords argue, by a third party stranger—the tenant's satellite service provider. Landlords contend that such providers or installers are not parties they have invited onto the property, but rather are strangers to the leasehold. The only parties to the leasehold are the landlord and tenant. As such, their argument concludes, *Loretto* applies to such an occupation by a satellite service provider, and thus, constitutes a permanent physical occupation triggering the just compensation clause.²⁷³

268. See, e.g., Comments of NAHB, Sept. 27, 1996, at 5-6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694520001; Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at iii, 18-20, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001; Comments of DirecTV to Further NPRM, Sept. 27, 1996, at 9, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001.

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

270. See *Thompson Development, Inc.*, 413 S.E.2d at 142 (affirming that a landlord "has no right to possess the leasehold until the termination of the lease").

271. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440-41.

272. See, e.g., Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at 6, 9, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

273. *Id.*

Because this third party “stranger”—the satellite service provider—may not be excluded under the Rule if the current tenant or any future tenants desire and request service, opponents of the Rule conclude that it effects a permanent physical taking of property. Their argument misunderstands *Loretto* and *Yee*.

While the Court in *Loretto* was not asked to answer the specific question at hand, the constitutionality of the OTARD Rule clearly is supported by its holding.²⁷⁴ The Commission correctly looks to the lease to define the agreed-upon boundaries of the leased premises, but neither the Commission nor the Court is blind to the principles of property law and the policy justifications for transferring some rights and wealth to a tenant.²⁷⁵ Any possession of areas outside these agreed-upon boundaries may accord the property owner a right to assert a *per se* takings claim—particularly with respect to occupations by a third party, but possession, occupation, or use by the tenant or a third party comporting with the agreed-upon lease terms would not be relevant to a *per se* takings analysis.²⁷⁶ During the lease term, landlords have little say about whom his or her invited tenant subsequently invites into or onto the relevant leased property. The fact that the landlord, building management, or a community association may enter an area to inspect and/or repair the premises does not mean that the tenant does not have exclusive use of those leased premises.²⁷⁷ Likewise, the Commission correctly concludes that just because a landlord or association may regulate other uses of the exclusive use areas, such as banning barbecue grills or clothes lines on balconies, does not mean that a taking occurs when the landowners themselves are prohibited from restricting devices protected by the OTARD Rule.²⁷⁸

The OTARD Rule does not introduce a third party stranger of the sort contemplated by *Loretto*.²⁷⁹ Moreover, based on landlord-tenant principles of property law, the *Loretto* Court probably would

274. See *Loretto*, 458 U.S. at 419.

275. See Second OTARD Order, at 23884-90, ¶¶ 19-29.

276. *Id.*

277. See, e.g., *Flanders v. New Hampshire Savings Bank*, 7 A.2d 233 (N.H. 1939) (holding that a landlord became a trespasser when entering a tenant’s leased premises without consent absent a reservation by the landlord of the right to enter or assuming a duty to repair).

278. See Second OTARD Order, at 23922, n. 189. Furchtgott-Roth correctly argues that a landlord does not necessarily give up his or her entire right to use the property to a tenant upon leasing the premises, and that the landlord still has the right to restrict the tenant’s use of the leasehold premises.

279. *Appeals Court Upholds FCC on Over-the-Air TV Receptions Rules*, WARREN’S CABLE REGULATION MONITOR, July 16, 2001.

not have found a taking had it reviewed the OTARD Rule. Because a tenant has the right to use and enjoy the leased premises during the term of the leasehold free from interference by the landlord, a tenant may invite guests or others temporarily onto the leased premises. This would include delivery persons and service providers such as those installing Section 207 Devices. There is no way that landlords can show that service providers occupy a permanent space on the property unless landlords could somehow show that the radio waves transmitted to a Section 207 Device somehow permanently occupy space on the property owner's property. No court has taken this approach.

The landlords have argued that the OTARD Rule broadens the scope of tenants' rights beyond those provided in the lease, negating the landlords' property rights, and thus constituting a taking of the property owner's right to exclude and use the property.²⁸⁰ Unlike the statute in *Loretto* which gave a third party, the cable company, the right to occupy space on the property's roof that was not leased to the tenant, the OTARD Rule gives the right to occupy space rented by the tenant to the tenant rather than to a third party. Therefore, in the case of the OTARD Rule, there is no physical occupation by a third party, and thus, no taking. The fact that tenants' rights are enlarged beyond the scope of those granted by the lease is a result entirely within the parameters of the Commission's authority to regulate the terms of a lease.

An interesting question would arise if a tenant finds a location on the premises within his or her exclusive use or control on which to install a device and then, the landlord wishes to install a wall or plant a tree or build any other structure or object that would obstruct the tenant's unimpeded reception. It is unclear whether the landlord would be free to interfere in this manner with the tenant's ability to receive service. On the one hand, such an action by a landlord arguably would violate the FCC's prohibition on impairments to a viewer's right to receive an adequate satellite signal, and therefore, would be prohibited. On the other hand, the OTARD Rule, as applied to these facts, might be found to constitute a taking. Because the tenant's leasehold does not include the airspace between the satellite transmitter and the Section 207 Device, this space, therefore, could be considered a common area to which the tenant has no right of access. Rights to the airspace between the satellite transmitter and the reception device would be transferred to the satellite service

280. See *Bldg. Owners & Mangers Ass'n v. F.C.C.*, 254 F.3d 89, 97 (D.C. Cir. 2001).

provider who would occupy an area over which the tenant has no right to possess. As such, the third party service provider would acquire rights to occupy the owner's property and trigger a compensable takings problem. In that case the owner's obstruction could be introduced without violating the OTARD Rule and without creating a compensable takings problem. Otherwise, perhaps the property owner would be due just compensation.

Commission Furchtgott-Roth denies the relevance of cases upholding the government's power to regulate the terms of the landlord-tenant relationship, and contends that even if the Rule effects no *per se* taking, there is a regulatory taking under *Penn Central Transportation v. New York City*.²⁸¹ However, he is clearly wrong. There are numerous examples of the government, in exercising its police power, redistributing rights between landlords and tenants.²⁸² Rent control, building codes, and the implied warranty of habitability are perfect examples.²⁸³ In his dissent to the *Second OTARD Order*, he argued that the OTARD Rule does not regulate "the economic status of landlords with respect to tenants," but is an attempt by the Commission to intentionally transfer rights from one private party to another.²⁸⁴ He underestimates the scope of the landlord's consent, and he misunderstands basic principles of property law.²⁸⁵

c. The OTARD Rule Does Not Contain A Required Acquiescence Directive

The OTARD Rule is not a mandatory access rule as contemplated by the courts in takings cases, nor does it authorize an occupation by a third party stranger to the lease. The Rule does not require landlords to provide service or to make any physical alterations to the property in order to facilitate the installation of a Section 207 Device. In light of precedent set by both *Yee* and *Florida Power*, Congress' and the Commission's regulation of a single aspect

281. Second OTARD Order at 23919-21, n. 189 (dissent by Furchtgott-Roth). *Gulf Power* and *Florida Power* are on point because a tenant has distinct property rights in addition to those expressly granted by the lease. Furchtgott-Roth argues that the Rule "goes too far" in granting tenants rights not granted by the lease. See also *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

282. See, e.g., *Yee*, 503 U.S. 519; and see *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (1982) (denying a landlord the right to refuse to rent to a tenant with minor children).

283. See, e.g., *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, cert. Denied 526 U.S. 1131 (1999) (upholding a city rent control ordinance).

284. Second OTARD Order, at 23921 (dissent by Furchtgott-Roth).

285. *Id.* at 23919 (dissent by Furchtgott-Roth).

of the landlord-tenant relationship, where the regulation protects a viewer's access to satellite service, does not result in a *per se* taking.²⁸⁶ Contrary to views espoused in the rulemaking proceeding, applying Section 207 to rental property by granting tenants rights to install satellite dishes on rental property does not turn the OTARD Rule into a mandatory access statute.²⁸⁷ Access has already been granted voluntarily by the landlord.

The judicial reasoning in *Florida Power* and *Gulf Power* are directly on point and relevant.²⁸⁸ A landlord's exercise of his right to rent property may not be conditioned on being forced to submit to a permanent, physical occupation of its property without payment of just compensation.²⁸⁹ Obviously, the government may not compel a landowner to rent private property against his or her will.²⁹⁰ But a property owner who voluntarily enters the regulated rental housing market yields some control. The FCC, by bringing rental property within the purview of Rule 1.4000, does not require a landlord to continue to rent its property to tenants, does not affirmatively require a landlord to provide satellite service, nor does it require landlords to permit the installation of satellite reception devices on common areas. The FCC argues that removing restrictions within a leasehold does not impose a duty on a landlord to relinquish property because the landlord has already voluntarily relinquished possession of the leasehold by virtue of the lease.²⁹¹

A satellite service provider undoubtedly is such an uninvited third party as directly related to the landlord, but not as related to tenants, as tenants have the right to invite guests who are third parties to the landlord-tenant relationship onto the property. However, tenants and guests are temporary while the installment of antennas is of a more permanent nature. Of course at some point, typically at the end of a lease term, the landlord's invitation to the tenant expires.

286. Bldg. Owners & Managers Ass'n Int'l, 254 F.3d at 99 (citing 47 U.S.C. §§ 151, 303(v) (2000)).

287. See, e.g., Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at iii, 14, 15, 17-18, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001. A mandatory access statute is an affirmative governmental requirement that a property owner provide a third party access to its property or that it provide some service to persons on their property.

288. Fla. Power, 480 U.S. at 254; *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999).

289. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n. 17 (1982); see also *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999).

290. Manheim, *supra* note 78, at 996.

291. Second OTARD Order, at 23897, ¶ 43.

Yet, during the lease term, the tenant is still not a “stranger” to the lease, and the satellite service provider and its equipment are not “strangers” to the tenant.²⁹²

The statutory scheme in *Florida Power* is distinguishable from Rule 1.4000 because providers installing devices under the protection of the OTARD Rule are not present at the invitation of the owner. While tenants are not being forced on the owner under the OTARD Rule, the third party service providers in a sense are. However, providers are present at the invitation of the tenant. The statute bears a similarity to the regulation in *Gulf Power* because, as a practical matter, the OTARD Rule does require the landlord to suffer physical occupation by another party. As long as one tenant in an MDU desires satellite service, the landlord must permit a third party satellite service provider to install the requisite reception device on the owner’s property—*albeit* on property within the exclusive use and control of the tenant. Property owners will be forced to permit every DBS provider, as well as providers of other communications services to install dishes, antennas and other equipment as long as each provider can attract the interest of at least one tenant or resident on the premises.²⁹³ As the number of market competitors grows over time, landlords may have to accommodate more satellite devices, and a service provider will be able to install a system permanently on the property owner’s private property and occupy that property so long as it is able to maintain at least one subscriber.²⁹⁴ But, that is exactly the spirit of the law and the FCC’s regulatory policy. This type of market competition and consumer choice is exactly what the FCC has sought to promote for years in radio, video services, as well as in landline and cellular telephone service just to name a few. The difference here is that the third party’s occupation is at the invitation of the tenant—who clearly is an invited party. The right to possess and occupy space on the property does not belong to the satellite service provider or the landlord. The right belongs to the tenant. The Commission has addressed disputes over the placement and installation of an excessive number of dishes in some declaratory rulings after the adoption of the OTARD Rule, but has not entirely

292. Manheim, *supra* note 78, at 996.

293. The Independent Cable & Telecommunications Association argues that this ongoing presence on the property would amount to a permanent physical occupation of the property. Comments of Independent Cable & Telecommunications Association, Sept. 27, 1996, at 5-8, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

294. *See id.* at 8, 10.

foreclosed other state remedies such as recovery under the tort of nuisance law or under state zoning ordinances addressing this issue.²⁹⁵

Those opposed to the Rule argue that the fact that the dish might be owned by the tenant does not matter.²⁹⁶ Just because a tenant owns a washer and dryer, does not mean that a landlord must permit the tenant to install them in the leasehold. Courts, however, have not analyzed the third-party stranger concept in this way.²⁹⁷ They have been more likely to conclude that because the landlord has consented to the possession and occupation of the leased premises by the tenant, and that the landlord has invited the tenant, the government may, therefore, regulate the terms of the invitation.²⁹⁸ This type of consensual, invited occupation of the property has been clearly distinguished from a “permanent physical occupation” contemplated by *Loretto*.²⁹⁹ Although a landlord’s lease restrictions are enforceable property rights, governmental restrictions on the exercise of those rights do not necessarily constitute a *per se* taking.³⁰⁰ For example, “[w]hen a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without [creating a taking].”³⁰¹

295. See, e.g., *In re Stanley and Vera Holliday*, 14 F.C.C.R. 17167 (1999) (where petitioners installed an overwhelming number of seemingly duplicative reception devices on their property).

296. Second OTARD Order, at 23893-94, ¶ 37. Footnote 19 in *Loretto* suggests the Court may take a different view if the landlord rather than the service provider or the tenant owned the equipment. *Yee v. City of Escondido*, 503 U.S. 519, 531-32 (1992) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, (1964) and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978))(rejecting arguments based on Footnote 19 in *Loretto* suggesting that the owner could avoid the requirements of the statute by ceasing to rent to tenants).

297. See, e.g., *Fla. Power Corp.*, 480 U.S. at 252.

298. See, e.g., *id.*

299. *Loretto*, 458 U.S. at 426.

300. *United States v. Gen. Motors*, 323 U.S. 373, 380-82 (1945).

301. See *Yee*, 503 U.S. at 529 (upholding rent control law); see also *PruneYard v. Robins*, 447 U.S. 74 (1980) (holding that no taking occurred where state constitutional provision required private property owner to permit individuals to solicit signatures for a petition protesting a United Nations resolution); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (finding that Congress had the power to prohibit race discrimination by motel owner without triggering an unconstitutional taking); *McAndrews v. Fleet Bank of Mass.*, 989 F.2d 13 (1st Cir. 1993) (holding that a statute could modify a preexisting relationship between parties to lease and finding no unconstitutional taking upon destruction of one “strand” of the bundle of rights because the aggregate bundle of rights must be viewed in its entirety); *Meadows v. Edgewood Management Corp.*, 432 F. Supp. 334 (D. Va. 1977) (upholding the constitutionality of Fair Housing Act).

d. The Boundaries of the Leasehold Must Be Redefined and Rule 1.4000 Must Be Extended to Common Areas

The current OTARD Rule represents only a partially fulfilled obligation. The FCC fulfilled part of its obligation under Section 207 in the *First OTARD Order* by outlawing governmental and homeowners' association rules that impair viewers' abilities to employ reception devices. However, the OTARD Rule fails to go far enough to make wireless service available to all U.S. residents regardless of wealth or property ownership. The Commission, Congress, state courts or legislatures must extend the right of tenants to include access, even if it is limited in nature, to common areas or must require landlords to provide access to telecommunications and video services in the same way that landlords are required to provide running water and other vital facilities. Also, the implied warranty of habitability and the covenant of quiet enjoyment could be extended by state courts or legislatures to encompass modern day necessities such as access to telecommunications services—in this case satellite service.³⁰²

The Commission expressed “sympathy” to all of those viewers it failed to reach and to those renters who are unable to take advantage of the Section 207 rules, but ultimately concluded, in its *Second OTARD Order*, that Section 207 needed to be limited to renter-controlled property, as the expansion of its coverage to common and restricted access property would violate the Fifth Amendment.³⁰³ The FCC realized the constitutional limitations it faced in crafting the OTARD Rule, and went as far as it could based on current understandings of the rights of landlords and tenants. The Commission's expression of compassion is admirable, but of little consolation to many of America's poor and dwellers of MDUs in urban areas.³⁰⁴

Understandably, from a constitutional standpoint, the Commission could only go so far in crafting the OTARD Rule without creating a constitutional takings problem, and the Commission's decision not to extend the OTARD Rule to common areas is mitigated by rules permitting renters to install Section 207 Devices within their leaseholds.³⁰⁵ On the other hand, as argued by

302. See, e.g., *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (acknowledging that relationships between landlords and tenants have changed over time, as have the needs of the parties to a lease, and invoking an implied warranty of habitability which warrants that there are no latent defects in utilities vital for minimum living conditions).

303. See *Second OTARD Order*, at 23906-07, ¶ 60.

304. *Id.*

305. *Second OTARD Order*, at 23880, ¶ 13.

commenters in the Commission's rulemaking proceeding, the FCC should focus on the legal and practical difficulties associated with extending Section 207 rules, not on the personal or economic characteristics of the viewers and consumers.³⁰⁶ In order to meet its objectives, the Commission should reconsider the limits in place under the current regulatory scheme, still keeping in mind that because property owners have rights not shared by tenants, it does seem fair and just to place some limits on the extent to which a tenant may use the property owner's property.

By implementing the OTARD Rule, the government may be doing more than merely regulating the terms of the landlord-tenant relationship or the economic relationship of landlords and tenants. Arguably, the OTARD Rule does not relate simply to the economic relations of landlords and tenants but rather works to redistribute property rights between landlords, tenants, and satellite service providers. However, if property is wealth, and if property is defined as a bundle of rights, then under modern landlord-tenant law an inescapable redistribution of wealth occurs whenever a landlord and tenant enter into a lease. Under modern landlord-tenant law, a landlord transfers certain rights to the tenant for the duration of the leasehold.

How one feels about this wealth redistribution depends on whether one is giving or receiving wealth. Tenants tend to gain rights under the OTARD Rule, while landlords are giving away certain rights. Wealth, however, has for a long time been concentrated in the hands of a few, and there are numerous high and significant barriers to entry into the class of property owners. Under the OTARD Rule, the playing field is leveled somewhat between property owners and those who rent, in that a tenant is given the right to receive certain communications services and the related communications and information that the tenant would not have under contract law.

Wealth via property ownership should not be what stands in the way of bridging the digital divide between the rich and people of lesser means.³⁰⁷ Rule 1.4000 helps to bridge the disparities in access to

306. See Cellularvision Comments at 6, *available at* http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1714140001; Congressional Black Caucus Letter, dated July 29, 1996, *available at* www.fcc.gov.

307. As of the end of 2003, the U.S. homeownership rate was only 68.6 percent. See U.S. Census Bureau, Home Vacancy Survey, Table 5, *available at* www.census.gov/hhes/www/housing/hvs/q403tab5.html; *see also* Comments of DirecTV, Sept. 27, 1996, at 5-6, *available at* http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001 (Neither "the language or the policies of Section 207 . . . supports this 'caste system'.")

technology and income based on income or wealth by providing consumers who rent their residences alternative means of receiving television service, information, and any emerging technologies that will be provided via satellite service. In order to achieve the goals of Section 207, video and data services must be easily accessible by all Americans regardless of wealth, income, property ownership, geographic location, and race. A failure to extend Rule 1.4000 to all Americans, including all tenants, would effectively shut out a large segment of American society from access to information.

One might ask the question of how much wealth is really represented by this transfer of rights from landlord to tenant particularly when the rights transferred are not fee simple absolute ownership rights of the sort that can be sold for profit. At best, the tenant could sublease its leasehold and gain a profit from that transaction. In some cases, that could be quite lucrative.³⁰⁸ However, the wealth distribution in this case and in most cases is small in relation to the overwhelming public benefit of making a variety of information through various sources available to all Americans, not just those with enough wealth to purchase their residences. Therefore, while the Rule fails to reach a number of those in the country, and does transfer wealth from the hands of a few to the hands of the many, where such transfers occur they are inconsequential in most cases.

The physical possession complained of in *Loretto* was on the building roof, possession of which was not granted to anyone but was retained by the property owner, Ms. Loretto.³⁰⁹ The facts with respect to placement of Section 207 Devices pursuant to Rule 1.4000 can be distinguished from the facts in *Loretto*. Section 207 Devices, according to the Rule, must be installed on areas within the exclusive use or control of the tenant. These areas tend to be balconies or patios which are part of the tenant's leased premises. Any requirement of access to common areas such as rooftops would be more like the impermissible statutory requirement in *Loretto*, but not entirely.

In the rulemaking proceeding, electronics manufacturers, DBS licensees, broadcasters, and consumer groups argued that antenna placement on common areas will not constitute a *per se* taking and

308. See, e.g., *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, cert. denied, 514 U.S. 1109 (N.Y. 1995) (where tenant entered into numerous consecutive subleases of its leased premises to its employees under an exemption to a city rent control statute which was found unconstitutional).

309. See *id.*, at 23884-85.

can be distinguished from *Loretto*.³¹⁰ They argued that antenna installation in common areas is temporary and in no way permanent, and thus, does not constitute a taking.³¹¹ Rather, the antenna will most likely be removed when the tenant moves at the expiration of the lease. Additionally, these commenters argued no taking would occur if the FCC granted the tenant rather than the service provider the right to own or request installation of the reception equipment.³¹² They distinguished *Loretto* by the fact that the entitlement is granted to the viewer and not to the provider of the DBS service who is a third party stranger to the landlord-tenant relationship.³¹³ *Loretto* is inapplicable, they argued, where the tenant, rather than the third party service provider, owns and installs the reception device subject to the landlord's control.³¹⁴ While they are on the right track, their argument is not good enough to withstand constitutional muster. In order for tenants to have access to common areas, access to such areas must become a recognized property right under property law or some other pro-tenant legislation, such as was the case in *Yee*.³¹⁵

On the other hand, opponents of any requirement that common areas be made available to tenants argued that Section 207 does not expressly authorize the FCC to take private property so that a viewer may install Section 207 Devices.³¹⁶ Extension of Section 207 rules to common and restricted access property would constitute a *per se* taking requiring just compensation, and the FCC lacks the explicit

310. See, e.g., Comments of National Association of Broadcasters ("NAB"), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1697340001; Reply Comments of DirecTV, Inc., available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1715860001; Reply Comments of Pacific Telesis Group, available at www.fcc.gov.

311. See, e.g., Comments of NAB, at 14, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1697340001 (arguing that the regulation is only a temporary physical occupation by a tenant who already has a property right)

312. *Id.*

313. See, e.g., USSB Comments at 6-7, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698850001; but see CAI Comments at 16, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698730001.

314. See, e.g., USSB Comments at 7, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698850001; and see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 n. 19.

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

316. See, e.g., Comments of Independent Cable and Telecommunications Associate, Sept. 27, 1996, at 11, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

and implicit takings power.³¹⁷ They argued that while a landlord invites the tenant to take possession of the property within the leasehold, the landlord does not invite the tenant to take possession of common and restricted access areas.³¹⁸ Tenants, they argued, are not invited to possess restricted access areas such as the roof or exterior walls, and are not granted exclusive or permanent possession of common areas.³¹⁹ With respect to placement on common areas, it does not matter if the rights are given to a tenant and not a third party. The end result, they argue, is the same. A taking would be present under current definitions of tenants' property rights.

Any permanent physical occupation, no matter how small, constitutes a *per se* taking.³²⁰ The FCC agrees that a rule prohibiting restrictions on the direct attachment of video reception devices to common areas such as hallways or recreation areas or to restricted areas such as building rooftops would constitute permanent access granted to any number of video service providers, and thus a permanent physical occupation of property triggering the requirement of just compensation. Any physical intrusion caused by the installation of a Section 207 Device may be viewed by opponents of Rule 1.4000 as more severe than the intrusion in *Loretto* because in the case of the OTARD Rule, it could be argued that there is a permanent physical occupation by service providers who have a permanent right to occupy so long as a tenant on the property desires to receive service. Additionally, the provider in the case of Section 207 Devices will occupy a larger amount of space than the cable company did in *Loretto*, thus warranting more compensation due to the landlord.

The Commission was not persuaded by those who argued that *Loretto* did not apply as long as the entitlement under Section 207 belonged to the tenant, and not to a third-party stranger to the landlord-tenant relationship.³²¹ The Commission opined that the power to exclude others from one's property is one of the most treasured strands in an owner's bundle of rights. Required acquiescence—which might be affected by interpreting Rule 1.4000 to require a landlord to permit tenants to install a reception device on a

317. *Id.* at 12.

318. *See, e.g.*, Joint Comments of NAA, Building Owners and Managers Association, et al., Sept. 27, 1996, at 9-10, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698570001.

319. *Id.*

320. *See Loretto*, 458 U.S. at 436-37.

321. Second OTARD Order, at 23896, ¶ 42.

common area—is “at the heart of the concept of occupation.”³²² While this might be true under current understandings of state property laws, the law must be flexible and must reflect changing times and the changing needs of individuals. The defined leased premises and the boundaries of the premises of each leasehold should include a portion of the common area, if access to such an area is necessary, for the tenant to install and receive essential telecommunications devices. By redefining a tenant’s property rights, *Loretto* would be rendered relevant but inapplicable. A tenant could be granted a right to a separate area on the property on which to install a Section 207 Device, and then the OTARD Rule indeed would only be a regulation of the terms of the lease.

The Commission apparently was comfortable going only so far constitutionally, by concluding that where a viewer-tenant has exclusive use or control of the property, or where the property is within the viewer’s leasehold, a community association or landlord already is excluded from the space and does not have the right to possess or use it during the term of the leasehold. The Commission agreed that the physical occupation of the common and restricted areas at issue here were very similar to the permanent physical occupation found to constitute a *per se* taking in *Loretto*.³²³ The use would be similarly permanent because so long as an individual viewer wished to receive one of the services covered by Section 207, the property owner would be forced to accept the installation of the necessary reception devices.

Contrary to Furchtgott-Roth’s opinion, the FCC may and must alter property rights created under state law when acting pursuant to Congress’s directive.³²⁴ Perhaps then, the rights under a leasehold should be redefined. Because the Rule fails to make service available to everyone, and because the government may redistribute rights between landlords and tenants, the parameters of the leasehold could be redefined to include the right to possess a portion of a common

322. *Id.* at 23892-93, ¶¶ 33-36 (Fla. Power Corp., 480 U.S. at 252-53).

323. *Id.* at 23894-95, ¶ 40.

324. See David E. Bronston & Andrew D. Fisher, *FCC Scores Rare Win on Satellite Dish Rules*, N.Y.L.J., August 10, 2001 (citing Bldg. Owners & Managers Ass’n Int’l v. F.C.C., 254 F.3d 89, 100 (D.C. Cir. 2001) (citing La. Pub. Serv. Comm’n v. F.C.C., 476 U.S. 355, 368-69 (1986))); Fidelity Fed. Savings and Loan Ass’n v. De la Cuesta, 458 U.S. 141, 153-54 (1982) (finding that federal law, including administrative regulations, may preempt state law even with respect to real property); Capital Cities Cable v. Crisp, 467 U.S. 691, 698-700 (1984); N.Y. State Comm’n on Cable Television v. F.C.C., 749 F. 2d 804, 807-08 (D.C. Cir. 1984) (court upholds FCC’s regulatory preemption of state and local satellite master antenna television (“SMATV”) cable services under certain circumstances).

area for the purpose of receiving a satellite signal via a Section 207 Device. This would alleviate any potential takings problem with respect to installations on common areas. Just who should be responsible for redefining these rights is likely to be controversial. The right of tenants could be recognized judicially, as attempts by agencies and legislatures to do so, while not absolutely prohibited, must pass constitutional muster under a *Loretto*, *Florida Power*, or *Georgia Power*-type analysis. We would be foolish to expect all landlords to universally adopt a broader definition of a leasehold, or to act in their tenants' interests as is the case at Camfield Estates. Courts, Congress, and the Commission could carve out an exception to common law property principles enabling tenants to use common areas for the receipt of important communications services and defining such areas as part of a tenant's leasehold. In order to fulfill its stated goals, the FCC should bestow new rights upon tenants via the OTARD Rule or by separate action, absent such action by the state courts or legislatures.

Because government has the authority to regulate the terms of the landlord-tenant relationship, a requirement that all leaseholds contain an implied or express promise that landlords would make some space on common areas available for the installation of a Section 207 Device could be viewed as nothing more than a regulation of the terms of the lease. The government may so regulate. If property owners choose to rent property, government may allow them to do so subject to certain restrictions such as zoning, fair housing, and the provision of vital utilities of which telecommunications service is one. Perhaps a limit could be placed on the number of units that could be installed on a common area, whereas such a limit on the number of devices that could be installed on an area over which the tenant has exclusive use or control would be prohibited. This would honor the balance of interests of both landlords and tenants.

Some commenters argued before the Commission that *PruneYard v. Robins* does not permit the Commission to infringe a property owner's property rights.³²⁵ In *PruneYard*, the owners of a privately-owned shopping center sought to exclude a group of student protesters.³²⁶ The FCC disagreed with these parties, but agreed with the Court in *Loretto* that, the students in *PruneYard* were invited to the shopping center, the invasion of the shopping center was

325. See, e.g., Comments of NAB, at 14, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1697340001.

326. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

temporary, and the center's owner had not sought to exclude all persons from the property.³²⁷ Rather, the center was generally open to all wishing to enter.³²⁸ Therefore, the state constitution could require the center to allow students to bring a card table with them for the duration of their visit without infringing on the owner's Fifth Amendment rights. Tenants subject to the OTARD Rule are similarly temporary in nature., tTherefore, they should be afforded access not only to the leased premises but also to common areas for the purpose of installing satellite dishes. Permitting the tenant to install a Section 207 Device does not infringe the property owner's Fifth Amendment rights.

The Fifth Amendment does not provide for an exception to the government's just compensation requirement where a tension arises between Fifth and First Amendment rights.³²⁹ A rental property does not become a public forum in the same sense as the town square or a shopping mall just because its owner may serve a public interest by renting available units.³³⁰ Justice Blackmun, dissenting in *Loretto*, acknowledged the importance of telecommunications services, in particular cable television, and acknowledged that access to such services justifies small infringements of a landlord's real property interests as well as small physical encroachments on the property.³³¹ The majority, however, insisted that these cases compel compensation to the property owner when the right is bestowed upon a stranger. Still, the Commission has no unbridled authority to take private property based on an argument that an owner's Fifth Amendment property rights are outweighed by a tenant's First Amendment rights. Extending the Rule to leased property, however, does not constitute a taking. Under current understandings of property law, extending the Rule to common areas is problematic, but not fatal because the tenant's occupation is only temporary like that of the protesters in *PruneYard*. Current understandings of property law and definitions of property rights must be challenged as we move toward the Digital Age.

327. Second OTARD Order, at 23904, ¶ 57.

328. See, e.g., *Loretto*, 458 U.S. at 434 .

329. See, e.g., *Loretto*, 458 U.S. at 426 (holding that a permanent physical occupation of property is a taking without regard to the public interest that it may serve); and see *PruneYard Shopping Center*, 447 U.S. 74 (1980).

330. Manheim, *supra* note 78, at 1002.

331. *Loretto*, 458 U.S. at 445 (Blackmun, J., dissenting).

B. Regulatory Taking

Even if no *per se* taking is effected by a governmental action, such governmental action may constitute a regulatory taking.³³² Regulatory takings cases are those in which the government acting pursuant to its police power, attempts to regulate an economic interest but “goes too far.”³³³ Generally, any economic regulation affects property rights, but compensation is required only if the regulation requires an individual private property owner to bear a burden that should be borne by the public at large.³³⁴ But, it is a widely held view that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”³³⁵ Whether a public action works a taking ordinarily requires a complex *ad hoc* factual assessment of the purposes and economic effects of government actions.³³⁶

1. Penn Central Transportation v. New York City

In *Penn Central Transportation v. New York City*, the airspace above property and “air rights” were at issue.³³⁷ A property owner claimed that a landmark preservation law imposed obligations on property owners constituting an unconstitutional taking under the Fifth Amendment as made applicable to the states through the Fourteenth Amendment. Finding no unconstitutional taking, the Court held that the imposed restrictions substantially promoted the general welfare while permitting the property owner to continue

332. *Penn Cent. Transp. v. New York City*, 438 U.S. 104, 122-24 (1978).

333. *See, e.g.,* *Keystone Bituminous Coal Association v. DeBenecitis*, 480 U.S. 470 (1987) (repudiating the result in *Pennsylvania Coal*, but upholding the rule that regulations that go too far may still be deemed unconstitutional takings of property); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Most cases that arise under the Takings Clause involve condemnations pursuant to the government’s eminent domain authority. Categorically, such action is regarded as a taking. *See also* John J. Constonis, *Presumptive & Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 475-79 (June 1983). Constonis states that police powers and eminent domain powers frequently function at “cross purposes.” On the one hand, some commentators do not object to infringements on private property rights when government seeks to achieve a public benefit, while other scholars reject the notion of redistributing the wealth between private property owners and other private citizens as well as between private property owners and the general public even when the general public welfare is served.

334. *Penn Cent. Transp. Co.*, 438 U.S. 104, 124; *see also* *Yee v. City of Escondido*, 503 U.S. 519, 523.

335. *Manheim*, *supra* note 78, at 934.

336. *See* *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *see also* *Yee*, 503 U.S. at 523; *Penn Cent. Transp. Co.*, 438 U.S. at 124.

337. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

profitable use of the property.³³⁸ The Court held that a finding of physical transfer of control was not required to effect a taking and stated that, although governmental action designating private property as a landmark restricted the owner's control of the property, such a designation also enhanced the economic value of the property and preserved the owner's ability to transfer development rights to other parcels it owned.³³⁹ A taking may be found if the regulation is not reasonably necessary to effect a public purpose or if it unfairly burdens the owner's use of the property, compromises the owner's profit-making objectives, or diminishes the value of the property.³⁴⁰ Where the government does not authorize a physical occupation of property, but merely regulates its use, the following three *ad hoc* factors should be analyzed to determine whether a regulatory taking has occurred: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant—the extent of diminution in value of the property caused by the regulation; and (3) the extent to which the regulation has interfered with distinct reasonable investment-backed expectations.³⁴¹

2. Character of the Government Action

Courts are more likely to find a taking where the government physically invades private property than where interference with property rights arises from a governmental action intended to redistribute wealth or promote the general welfare.³⁴² The Court in *Loretto* limited such a finding to permanent physical occupation of private property by a third-party stranger. Cases after *Loretto* are clear, however, that where occupation of property is voluntarily agreed to by the owner, subsequent government regulation of that relationship is not a government-compelled permanent occupation.³⁴³ It might be, however, the sort of regulatory scheme sufficiently invasive to trigger an analysis of the character of the government action *ad hoc* factor. This is not the case with the OTARD Rule. The OTARD Rule is no more invasive than any other government regulation of the landlord-tenant relationship and is in fact less

338. *See id.*

339. *Id.*

340. *See id.*

341. *Id.* at 124; *see also Yee*, 503 U.S. at 519; *Prune Yard v. Robins*, 447 U.S. at 83.

342. *See, e.g., Penn Cent. Transp. Co.*, 438 U.S. at 124; *United States v. Causby*, 328 U.S. 256 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

343. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992).

onerous than rent control and anti-discrimination statutes which consistently have been upheld.

For instance, any law that forbids a landlord from discriminating amongst tenants transfers wealth to the tenant without triggering a compensable taking. Similarly, a law requiring landlords to provide tenants with utilities and mailboxes transfers wealth and causes a permanent obligation of landlords to dedicate physical space on their property for these purposes, but does not constitute a compensable taking. Government action that invalidates lease restrictions is not a taking under *Loretto*.³⁴⁴ The government has broad power to regulate interests in land and change private contractual relationships that interfere with valid federal objectives such as prohibiting racially restrictive covenants or prohibiting covenants forbidding group homes.³⁴⁵ The fact that legislation disregards or destroys existing contractual rights, does not necessarily transform the regulation into an unconstitutional taking.³⁴⁶ In the case of Rule 1.4000, there arguably is a transfer of wealth from the landlord to the tenant. However, there is nothing special about the amount or severity of the transfer. This statute would result in no more of a taking than a requirement that landlords provide mailboxes or utility connections to their tenants.

In preempting all governmental aesthetic regulations of DBS, the Commission noted that similarly-sized items, such as mailboxes, basketball hoops and air conditioning units typically are not regulated. DirecTV's 18-inch DBS antenna is no larger than various unregulated items commonly found on apartment balconies, such as tables, chairs, planters and barbecue grills.³⁴⁷

3. Economic Impact of the Regulation and Investment-Backed Expectations

The economic impact of Rule 1.4000 may tend to decrease the value of rental property. On the one hand, property values may decrease due to damage to the rental property caused by shoddy

344. *See id.*

345. *See, e.g.,* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive private covenants found to be unconstitutional); *Mayers v. Ridley*, 465 F. 2d 630 (D.C. Cir. 1972) (racially restrictive covenants are void); *Senior Civil Liberties Ass'n v. Kemp*, 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F. 2d 1030 (11th Cir. 1992); *see also* *Westwood Homeowners Ass'n v. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987); *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 223-24 (1986) (holding that transactions are not outside the reach of constitutional power simply because the parties have entered into a contract).

346. *See id.*

347. *See* Reply Comments of DirecTV, Inc., May 6, 1996, at 9, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1606680001.

installation or de-installation of antennas. Also, returns on investment may decrease due to the increased exposure to tort liability that could result from personal and property injuries caused by antennas. Finally, property values may decrease due to the detrimental effects on the aesthetics of a landowner's property. A diminution in value alone, however, is insufficient to constitute a taking.³⁴⁸ The larger the diminution in value, however, the more likely government action will be found to be a taking, while a small diminution in value may more closely resemble a valid exercise of the government's police power.³⁴⁹ There are no bright line tests applicable to those non-categorical takings cases. Even if Rule 1.4000 caused a diminution in value, it does not completely upset all economic expectations nor reduce the value of the property to zero. Property owners still have the right to use, sell, and derive income from their property—just with certain constitutional governmental limitations.

How the relevant property is defined becomes important in this analysis. If the relevant property is defined as the entire rental property, then no taking will be found because any reduction in value is likely to be small. Even if the relevant property is every single right in the bundle of rights, there still is no taking because the property owner already has voluntarily transferred the right to possess the property to the tenant. The landlord has reserved all other sticks in the bundle to himself or herself. Therefore, there is no complete taking of property.

The government frustrates investment-back expectations in a number of ways.³⁵⁰ For instance, zoning laws and building restrictions may affect a property owner's investment-back expectations.³⁵¹ With respect to the OTARD Rule, the only expectations that a landlord has are the expectation of renting property and the expectation of collecting rental income. Neither of these expectations is frustrated by the OTARD Rule. While the property-owning landlord may incur costs of repairing property due to damage caused by installation of Section 207 Devices, these costs easily can be passed on to the tenant in the form of larger security deposits or higher rents to compensate for higher insurance premiums.

348. Penn Cent. Transp. Co., 438 U.S. 104, 131 (1922); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

349. See, e.g., *Lucas*, 505 U.S. 1003 (holding that a 100 percent diminution in value constitutes a regulatory taking).

350. Penn Cent. Transp. Co., 438 U.S. at 124.

351. *Id.* at 125.

On the other hand, however, a landowner's distinct investment-backed expectations surprisingly may be exceeded. In some sense, Rule 1.4000 actually enhances the rental value of property. In addition to other reasons discussed earlier herein, in most cases landlords can charge higher rents to compensate for potential damage to property and loss of the right to exclude. For instance, because a tenant has the protection of Rule 1.4000, he or she may be willing to pay a premium to rent a dwelling in which he or she may receive a sufficient satellite signal. Also, all rentals may see an increase in profits as landlords choose to increase rents thereby raising the average fair market value of all rentals in the market in an effort to pass on to tenants the costs associated with damage that may be caused to property. Not all tenants, however, will cause costly damage to the property due to installation or de-installation of a covered reception device. Therefore, landlords could theoretically raise all rents to account for this potential liability and end up with a revenue and profit increase.

C. Judicial and Administrative Review of Rule 1.4000 Uniformly Upholds the Right to Install OTARDs

The D.C. Circuit, in 2001, specifically addressed extension of the FCC's OTARD Rule to rental property.³⁵² To date, this is the highest court to review Rule 1.4000. The D.C. Circuit found that the FCC had authority under the 1996 Act to extend the OTARD Rule to leased properties.³⁵³ In *Building Owners and Managers Association Int'l v. F.C.C.*, landlords' associations brought a facial challenge against the FCC's extension of the OTARD Rule to leased property. Petitioners argued that the tenant's use of the premises against the express wishes of the landlord was an invasion of property rights that the landlord had chosen to retain, and in effect "enlarged" the tenant's rights beyond the mutually agreed-upon lease terms.³⁵⁴ The Court concluded, however, that the landlord had consented to the occupation of the property, and that *Loretto* only applies narrowly to regulations that require the landlord to suffer a physical intrusion of the landlord's property by an unrelated third party stranger to the lease.³⁵⁵ Tenants were not forced on the landlord, therefore the right

352. See *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d. 89, 95 (D.C. Cir. 2001).

353. *Chevron* analysis applies. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

354. *Bldg. Owners and Managers Ass'n Int'l*, 254 F.3d. at 97.

355. *Id.*

to exclude, a stick in the bundle of rights, was not taken by the government.³⁵⁶ The Court upheld other Court rulings that a tenant does not become a third-party stranger to the property merely because the tenant extends an invitation to others to come onto the leased premises.³⁵⁷ The application of the Rule to leased property was found not to constitute a *per se* taking of the landlord's property.³⁵⁸

Aside from takings-related challenges to Rule 1.4000, many challenges have been related to the issue of the impact of Section 207 Devices on the aesthetics of the affected private property.³⁵⁹ Property owners and landlords certainly have an interest in preserving the aesthetic appeal of the property owned, particularly with respect to residential property and commercial retail property, where an economic interest is closely tied to the beauty and visual appeal of the property. First, well-groomed and physically appealing property can bear higher rents and resale value. Prospective tenants and purchasers most likely will be willing to pay a premium for the location and aesthetic appeal of a property. Conversely, numerous scattered antennas may detract from this aesthetic appeal. For instance, satellite dishes installed on balconies or patios situated on the front of a building or a side of a building facing an entrance or a byway may look messy and project an image of clutter and consequently diminish the property's value. For instance, an existing building with balconies on the front of the property which face the southwest sky may become littered with such reception devices. This undoubtedly is an eyesore, but the OTARD Rule does not consider

356. *See id.*

357. *See id.*

358. *See id.* at 95.

359. Challenges to the Rule have included objections to the installation of numerous antennas by a single viewer, the color of equipment and the location of equipment and devices on highly visible areas of property such as the front of a house. *See, e.g.*, In the Matter of Daniel and Corey Roberts, 16 F.C.C.R. 10972 (2001); In the Matter of Bell Atlantic Video Services Co., 15 F.C.C.R. 7366 (2000); In the Matter of Stanley and Vera Holliday, 14 F.C.C.R. 17167 (1999); In the Matter of Victor Frankfurt, 16 F.C.C.R. 2875 (2001); In the Matter of Otto and Ida M. Trabue, 14 F.C.C.R. 8602 (1999); In the Matter of James Sadler, 12 Comm. Reg. 1034 (1998); In re Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, In re Jay Lubliner and Deborah Galvin, 13 Comm. Reg. 387 (1998); *see also* In the Matter of Philip Wojcikewicz, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, CSR-6030-0, DA 03-2971 (2003) (finding that a town home association restriction against installing satellite dishes on the roof where the town home owner did not have exclusive use of the roof, was prohibited even though the association paid for the maintenance and insurance for the roof and even though adjoining town homes shared a common roof).

the issue of aesthetics.³⁶⁰ The FCC opined that evaluating the appearance of a device is not related to the issue of whether a covered reception device would pose a “legitimate” safety risk to the property owner or to others on the property.³⁶¹ Most affected properties were built and purchased prior to the enactment of the OTARD Rule, and therefore, their owners were deprived of the opportunity to factor global satellite positioning into their architectural designs and placement or into their contract negotiations when the property was purchased.

The Commission provides in its OTARD Rule a procedure by which a person or entity seeking to uphold or invalidate a restriction may file a Petition for Declaratory Ruling with the FCC or a court of competent jurisdiction.³⁶² The entity seeking to enforce the restriction—or to challenge the application of the OTARD Rule—has the burden of proving that the restriction is valid, regardless of who initiates a proceeding.³⁶³ This burden obviously generally falls on the property owner, local government, community association, or management company.³⁶⁴

The FCC has issued declaratory rulings in a number of cases in which the Commission reviewed the legality of nongovernmental restrictions in light of various specific factual scenarios.³⁶⁵ The decisions of the Commission have almost uniformly struck down local regulations and private property covenants established by homeowners’ associations.³⁶⁶ While only one of these cases

360. See First Order on Reconsideration, *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 13 F.C.C.R. 18962, 19006-07, ¶ 11 (1998). The original OTARD Rule considered the appearance of a reception device in evaluating whether a safety restriction discriminated against Section 207 reception devices. When the Commission revised its original OTARD Rule in 1998, it deleted the term “appearance.”

361. *Id.*

362. 47 C.F.R. § 1.4000 (2004).

363. 47 C.F.R. § 1.4000 (2004).

364. *Id.*

365. See, e.g., Daniel and Corey Roberts, 16 F.C.C.R. 10972 (2001); Bell Atlantic Video Services Company, 15 F.C.C.R. 7366 (2000); Stanley and Vera Holliday, 14 F.C.C.R. 17167 (1999); Victor Frankfurt, 16 F.C.C.R. 2875 (2001); Otto and Ida M. Trabue, 14 F.C.C.R. 8602 (1999); James Sadler, 13 F.C.C.R. 12559 (1998); Jay Lubliner, 13 F.C.C.R. 16107 (1998).

366. See, e.g., Daniel and Corey Roberts, 16 F.C.C.R. 10972 (2001); Bell Atlantic Video Services Co., 15 F.C.C.R. 7366 (2000); Stanley and Vera Holliday, 14 F.C.C.R. 17167 (1999); Victor Frankfurt, 16 F.C.C.R. 2875 (2001); Otto and Ida M. Trabue, 14 F.C.C.R. 8602 (1999); James Sadler, 13 F.C.C.R. 12559 (1998); Jay Lubliner, 13 F.C.C.R. 16107 (1998).

tangentially address the issue of whether Rule 1.4000 should be extended to rental property, the cases do provide insight into the Commission's view with respect to the issue of aesthetics and safety. More importantly, these decisions evidence the Commission's commitment to protecting the rights of tenants to receive satellite communications.³⁶⁷

1. In re Stanley and Vera Holliday

In *In re Stanley and Vera Holliday*,³⁶⁸ the petitioners owned a single-family dwelling in a planned community subject to plat covenants and restrictions. The petitioners installed six masts, five television antennas, and three satellite dishes providing reception for ten television sets, nine video cassette recorders and seven satellite receivers. The homeowners' association had an unwritten policy limiting each property to one satellite dish antenna and one television antenna as well as a restrictive covenant requiring approval prior to installation. The FCC found the absolute limit restriction to be arbitrary and thus prohibited. The Commission could find no valid safety basis for the restriction and found the aesthetic concerns insufficient.³⁶⁹ The Commission did allow a landowner to prohibit duplicative equipment that is not necessary for a tenant to achieve an acceptable signal and reception of desired video programming.³⁷⁰

In 2001, the Court of Appeals of Indiana addressed the issue left unanswered by the Commission's declaratory ruling.³⁷¹ The Indiana court addressed the issue of whether all of the Hollidays' satellite dishes, masts, and antennas were necessary to ensure an acceptable quality signal on the televisions in the Hollidays' home or whether the equipment was merely duplicative.³⁷² The equipment was found by the Court of Appeals of Indiana to be duplicative, and the court ruled in favor of the homeowners' association.³⁷³ The Hollidays admitted that they received all of the television programming they wished to receive on one television in their master bedroom.³⁷⁴ The additional receivers, therefore, were excessive.

367. *Id.*

368. *Stanley and Vera Holliday*, 14 F.C.C.R. 17167 (1999).

369. *Id.*

370. *Id.*

371. *Holliday v. Crooked Creek Villages Homeowners Ass'n, Inc.*, 759 N.E.2d 1088, 1093 (Ind. Ct. App. 2001).

372. *Id.*

373. *Id.* at 1094.

374. *Id.*

2. In re Daniel and Corey Roberts

In *In re Daniel and Corey Roberts*,³⁷⁵ petitioners installed an MMDS antenna on a single family home. They argued that in order for them to receive an acceptable signal, the antenna had to be installed in a specific location on the property. The neighborhood homeowners' association's rules required approval prior to any installation of a satellite dish and prohibited dish placement on property unless the dish was fully screened and not visible from neighboring properties.³⁷⁶ The Commission stated that, although the association's requirement that installations not be visible from neighboring properties may be permissible, the association could not delay installation while it examined the required screening proposal.³⁷⁷ The Commission was not persuaded by the homeowners' association's argument that the antenna was for Internet service only and therefore not protected by the OTARD Rule.³⁷⁸ The Commission concluded that the OTARD Rule permits antenna users who cannot receive an acceptable signal in the locations preferred by a community association to place their antennas in an alternative location where they can receive an acceptable signal.³⁷⁹ The Commission went even further to say that an antenna user need not be the owner of the property, or have the owner's permission to install an antenna.³⁸⁰

3. In re Victor Frankfurt

In *In re Victor Frankfurt*,³⁸¹ petitioner challenged a community association's restriction forbidding the installation of any antenna on his town home. The FCC reviewed a town home association's safety requirements finding some legitimate and others more burdensome than necessary to achieve their objective.³⁸² For instance, the Commission found that the association's mounting, windload, grounding, and power line guidelines were intended to accomplish

375. Daniel and Corey Roberts, 16 F.C.C.R. 10972 (2001).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. Victor Frankfurt, 16 F.C.C.R. 2875 (2001).

382. *Id.*

legitimate safety objectives.³⁸³ The Commission found, however, that the prior approval application requirement and the requirement that exterior wiring be hidden were not legitimate.³⁸⁴

4. In re Bell Atlantic Video Services Company

In *In re Bell Atlantic Video Services Company*,³⁸⁵ Bell Atlantic was an alternative video service provider challenging a prior approval requirement and a restriction prohibiting installation of an outside antenna visible from the front yard of the lot. The FCC found that the size and placement restrictions and the prior approval requirement were preempted because they caused unreasonable delay or prevented installation, maintenance and use, increased costs, and impaired signal reception.³⁸⁶

5. In re James Sadler

In *In re James Sadler*,³⁸⁷ a condominium renter sought a declaratory ruling on the installation of a satellite dish on the outside wall of his town home.³⁸⁸ The renter secured a satellite dish to an exterior wall above the patio doors in the patio area.³⁸⁹ The dish did not extend above the ceiling of the first-floor condominium unit.³⁹⁰ The condominium association required that the dish be mounted out of sight from the street, but the renter could not receive an acceptable

383. The requirement that the antenna withstand fifty mile per hour winds was legitimate. Additionally, the requirement that antennas be grounded in compliance with relevant codes also was legitimate to prevent lightning from traveling. The requirement that all antennas exhibit a UL (Underwriters Laboratory) label was not legitimate. The Commission found, however, that as written the restrictions were not enforceable against petitioner because they lacked specificity with respect to a resident's compliance.

384. Victor Frankfurt, 16 F.C.C.R. 2875 (2001).

385. Bell Atlantic Video Services Co., 15 F.C.C.R. 7366 (2000).

386. *Id.*

387. James Sadler, 13 F.C.C.R. 12559 (1998).

388. Sadler did not own the condominium but submitted a letter from the condominium owner who stated that he supported Sadler's petition. The Commission addressed the issue of whether Sadler could file a petition under the Rule even though he was not the owner of the property. The Commission clearly stated that the Rule applied to "antenna users who have a direct or indirect ownership interest in the property on which they desire to install video reception devices." Because the landlord had consented to petitioner's installation of the dish, the Commission reviewed Sadler's petition as it would have had the owner himself filed the petition. The Commission noted though that a different situation would arise if the owner does not consent to the installation. At ¶ 23, n. 50.

389. *Id.*

390. *Id.*

quality signal in an alternative location, and a move would cost him reinstallation charges of \$250 to \$350.³⁹¹

The parties in this case took on the task of defining what constituted the renter's separate interest and leasehold. The Commission concluded that exterior walls generally are part of the common area, while interior surfaces of the walls are included as part of the tenant's separate interest.³⁹² In this case, however, the Commission concluded that the exterior of the condominium wall was part of the patio that was an area within the exclusive use of the tenant.³⁹³ It was not a common area, and thus was covered by Rule 1.4000.³⁹⁴

The prior approval requirement, the inspection requirement, and the requirement that a licensed contractor install the dish were found to be impermissible, unreasonable, and costly.³⁹⁵ The Commission concluded that while it was reasonable to specify that any contractor hired to install DBS dishes must carry personal injury and property damage insurance, the user could not be required to provide the association with documentation of that insurance.³⁹⁶

6. *In re Otto Trabue*

In *In re Otto Trabue*,³⁹⁷ a regulation of a planned community required prior approval and painting of any satellite dish and mounting materials, accessories and cables so that the equipment blended into the background against which it was to be mounted. The association conceded that its restriction was not founded on safety concerns and that it could not enforce the required prior approval, but it asserted an aesthetic concern.³⁹⁸ The petitioner claimed disparate enforcement of the painting requirement from owner to owner and the absence of comparable painting requirements for air conditioning units and trash receptacles that were visible in the community.³⁹⁹

391. James Sadler, 13 F.C.C.R. at 12568, ¶ 30 (1998).

392. James Sadler, 13 F.C.C.R. 12559 (1998).

393. *Id.* at 12567 ¶ ¶ 12, 24. The Association cited to the California Civil Code § 1351 which states that the common area of a condominium development means the "entire common interest development except the separate interests therein." "A separate interest" means the individual condominium unit.

394. *Id.*

395. *Id.* at 12569-72, ¶ ¶ 32-40.

396. *Id.* at 12571-72, ¶ 40.

397. Otto and Ida M. Trabue, 14 F.C.C.R. 8602 (1999).

398. *Id.* at 8606, ¶ 11.

399. *Id.* at 8607, ¶ 16.

In resolving the matter, the FCC stated that in general, a requirement that a satellite dish be painted to blend with the background would not violate the OTARD Rule, provided the requirements would not void the manufacturer's warranty on the dish or impose any other unreasonable expenses.⁴⁰⁰ In this case, painting all of the component parts of the satellite dish such as the cables and accessories, did void the warranty and impose additional costs.⁴⁰¹ Therefore, the restriction was preempted by the federal OTARD Rule as it applied to painting the cables and other accessories.⁴⁰² As to the dish itself, the Commission found no evidence of an unreasonable delay or interference with the reception of an acceptable signal.⁴⁰³ Therefore, the FCC found the requirement that the dish be painted did not impose an unreasonable cost or impair installation, maintenance, or use of the antenna.⁴⁰⁴

The requirement for prior approval, however, was prohibited by the OTARD Rule because it may have imposed an unreasonable delay.⁴⁰⁵ Due to lack of information in the record, the FCC was unable to rule on allegations that the association applied the painting restrictions in a discriminatory manner, but noted that the association did require screening of air conditioning units and trash receptacles if they were visible from neighboring units.⁴⁰⁶

7. In the Matter of Philip Wojcikewicz

In *In the Matter of Philip Wojcikewicz*,⁴⁰⁷ an owner of an interior townhouse bordered on both sides by other units was subject to a community association restriction prohibiting installation of antennas on common areas. The owner sought to install an antenna on the roof of his townhouse, but the association argued that the roof of a townhouse was a common area and a restricted area not protected by the OTARD Rule. The owner petitioned the Commission for declaratory ruling that the association's prohibition violated the OTARD Rule.

400. *Id.* at 8608-09, ¶¶ 17-18.

401. *Id.* at 8609, ¶ 20. A restriction or requirement that would render a manufacturer's warranty void would be deemed to impair maintenance and use by imposing unreasonable expense.

402. *Id.* at 8609, ¶¶ 19-20.

403. *Id.*

404. *Id.*

405. *Id.*, at 8609, ¶ 21.

406. *Id.* at 8610, ¶ 22.

407. In the Matter of Philip Wojcikewicz, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, CSR-6030-0, DA 03-2971 (2003).

The association contended that the roof was a common area as the association insured and maintained it, and that the petitioner did not have exclusive use or control over the roof as any other adjoining townhouse owner was entitled to use the space as well. The Commission, however, referred to the petitioner's deed, which indicated that the petitioner owned the home and the lot in fee simple and that the owner had exclusive use of the home and its exterior. The fact that the roof was burdened by an easement did not defeat the petitioner's claim of exclusive use.

Of the cases reviewed by the FCC, only one has involved a dispute between a tenant and a landlord.⁴⁰⁸ Rather, most of the cases thus far have been disputes between homeowners and tenants or homeowners and community associations. Review of these disputes is relevant to the extent that they provide guidance on the Commission's interpretation of what types of restrictions impose unreasonable expense or cost or otherwise impair the maintenance, use, or installation of Section 207 Devices. Additionally, the cases offer some insight into the nature of the property right a tenant has with respect to rental property.

VII. Conclusion

What can landlords do? One thing they may do is require all tenants to pay larger security deposits or raise rents for all tenants to cover the costs associated with the alleged physical taking that occurs when a tenant installs a dish on a common area and to cover the cost of property damage and other liability. Landlords who want to prohibit all antennas, even those installed on areas over which the tenant has exclusive use or control, also could exclude balconies and patios from the leasehold and classify those areas as restricted or common areas since the outside of the building is itself a restricted area according to the Rule. Each of these options, however, would work to limit the access tenants would have to affordable housing and to advanced technology, and do not further federal goals.

Today, the receipt of a variety of video and data services has become an indispensable part of the lives of average American citizens. Furthermore, the ability to receive information provided via wireless communications services likely will be critical to the nation's security. The U.S. Supreme Court has recognized in *Kleindienst v. Mandel* the right of individuals to receive information despite Congress' power to exclude aliens, and *State v. Shack* recognized that

408. James Sadler, 13 F.C.C.R. 12559 (1998).

a property owner's right to exclude often conflicts with the rights of others to receive information.⁴⁰⁹ These cases were resolved in favor of protecting rights to receive information and against a landowner's perceived absolute right to exclude others from the landowner's property. Therefore, the FCC should take steps to ensure that all Americans are afforded the same opportunities to receive critical information and services via satellite regardless of whether they own or rent property.

Notwithstanding the progress made by the Commission with the enactment of Rule 1.4000, because of the importance in today's society of the ability to gain access to communications services and the clear policy objectives of Section 207, the Commission must do more. The FCC's rulemaking must accord tenants more extensive rights than its rules currently do. As this article addresses, the OTARD Rule, as currently interpreted and applied, falls short of meeting Congress' mandate. Practically speaking, only those tenants occupying a rental unit with a balcony or patio oriented toward the southwestern sky may receive service because there must be an unimpeded direct line from the satellite transmitting service and a reception device. Most buildings are fairly equally divided with apartment units facing opposite each other. Therefore, at best only half the number of units will be able to receive service. Furthermore, even those tenants occupying southwest facing units which have no balcony, patio, or other such area within the tenant's exclusive use or control on which to install a reception device, will not be able to install a device with the protection of Rule 1.4000. Consequently, the Rule currently fails to reach a large segment of the population that the Rule is intended to benefit. If the Rule were extended to common areas, all Americans who desire service would be able to obtain it provided the relevant property would not qualify for an exception for safety or a historic landmark designation.

Interpreting Section 207 to grant viewers a right of access to possess common or restricted access property for the installation of the viewer's Section 207 Device, draws strict opposition from those who argue that extending the Rule in that way would impose on landlords or community associations a duty to relinquish physical possession and occupation of property to tenants, and therefore, constitutes a violation of the Takings Clause since the statute does

409. See *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); see also *State v. Shack*, 277 A.2d 369 (N.J. 1971).

not provide for compensation.⁴¹⁰ Rule 1.4000 is constitutional as enacted, as it does not constitute an unconstitutional taking under the Fifth Amendment. It cannot be overstated, however, that the Commission cannot fully implement Section 207 until it provides viewers who do not have exclusive use areas, particularly residents of MDUs, access to over-the-air reception devices. The Commission should not limit Rule 1.4000 to landowners, nor should the Rule be applicable only to areas over which a tenant has exclusive use or control. Currently, many apartment dwellers are stuck with the incumbent cable company who might provide limited or poor service, even with the adoption of the OTARD Rule. In order to fully achieve Congress' objectives, all consumers must have meaningful competitive choices. Satellite service providers can compete with cable operators only if viewers have access to antennas.

Dwellers of MDUs should have access to common areas. Unfortunately, requirements that property owners grant access to common areas or areas outside the exclusive use or control of the tenant, or that owners provide a central antenna, raise a potentially significant takings issue. Because Congress did not expressly grant the FCC the authority to take private property or to provide compensation for the taking of that property, the opponents of the OTARD Rule argued in the rulemaking proceeding that the Commission could not rewrite Section 207, as it applies to rental property, to somehow make an otherwise unconstitutional statute constitutional.⁴¹¹ The FCC alone, or in conjunction with the states, could simply require landlords to provide service or provide a space for tenants to install a reception device. This space would have to be designated as part of the leasehold in the same way that a mailbox is. To address the problem of liability allocation, the FCC or Congress could establish a fund similar to the aforementioned OTARD Fund, designed to reimburse property owners for the expenses incurred in maintaining and repairing common areas. To give full effect to the goals of Rule 1.4000 without triggering constitutional problems, the FCC or the states would have to provide some incentive for landlords and property owners to voluntarily permit tenants to access common areas such as rooftops. To extend the Rule's applicability to common

410. See generally Second OTARD Order. Similarly, the statute would not require an owner to permit a neighbor to install a device on his property if the neighbor could not receive a sufficient signal on the neighbor's property.

411. See Comments of Independent Cable and Telecommunications Associate, Sept. 27, 1996, at 8, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1694550001.

areas and areas outside the exclusive use and control of the tenant without such voluntary invitation to a lessee would trigger a compensation obligation.

Alternatively, if the ability of a tenant to receive such communications services were equated to the receipt of mail, utility services, and other vital facilities, perhaps no taking would be found. State and federal laws routinely require landlords to provide tenants with utility connections and mail receptacles. These requirements have not been found to be takings. The law must continue to change to address modern developments in society. When electricity and other utilities became widely available, no taking was found. Similarly, U.S. mail receipt has not always been available to residential addresses. Now that it is, there is no question that allowing landlords to claim a compensable taking would be viewed as absurd and would place a crippling financial burden on the U.S. Treasury. Moreover, such a claim seems almost laughable. Practically speaking, the government could never compensate every landlord for such a taking absent some revenue-collecting initiative such as the proposed OTARD Fund. Therefore, it is imperative that any Commission action not be found not to be a taking. To find a taking could bankrupt the government.

FCC Rule 1.4000 does not violate the Takings Clause of the U.S. Constitution. No property right is taken. There is no permanent physical occupation or any complete destruction of rights, as the rights to use, control, possess, and occupy the relevant property are transferred from the landlord to the tenant at the time of leasing. However, the Rule does not fulfill Congress' goals, meet the needs of many Americans, nor does it provide incentives for landlords to make it easier for tenants to receive service. The FCC should be diligent in its quest to find creative solutions to this problem. The FCC also could look for other ways to level the playing field between competitive video and data service providers and to facilitate providers' equal access to America's consumers, while simultaneously encouraging states to amend state laws to expand tenants' rights, to place telecommunications services on parity with essential services such as utilities, or to require landlords to provide space on common areas on which to install Section 207 Devices.⁴¹² Additionally, the FCC should encourage industry to develop a better, smaller and less

412. See, e.g., Comments of DirecTV, Sept. 27, 1996, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1698920001 (suggesting that the FCC prohibit landlords and cable companies from entering into exclusive contracts for the provision of television service).

obtrusive device, looking to the technological advances of more progressive countries such as Japan for inspiration. Perhaps a solution to this problem already is in the making.