The Free State Foundation

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*Perspectives from FSF Scholars*
*October 25, 2007*
*Vol. 2, No. 25*

# The FCC Shouldn't Stand for the Forgotten Constitution Commission: Property, Contract and FCC-Mandated Access to Apartment Buildings

**By Solveig Singleton***

The Federal Communications Commission appears poised to adopt rules that would treat private property in a fashion similar to the public streets, abrogating the choice that some apartment building owners wish to make or have made to allow only one video service provider access to their buildings. The FCC not only is considering prohibiting building owners and video service providers from entering into exclusive contracts going forward. It is also considering retroactively abrogating existing contracts that were freely negotiated.

The FCC's proposed new regulations would affect apartments and similar properties with "multiple dwelling units." Some building owners have negotiated exclusive agreements with cable operators or small new innovative broadband service providers like Ygnition and Openband. Building owners and some video providers assert that these exclusive arrangements often provide residents of the properties with lower prices and better service quality than they would otherwise enjoy because they assure the video provider that it will have time to recoup its investment. At the same time, the lower prices and improved service may enhance the value of the property, helping the building owner retain tenants in the competitive rental marketplace.

The Constitution reflects the Founder's appreciation of the role of the institutions of property and contract law as important foundations of liberty. The FCC's proposal to ban exclusive contracts between building owners and service providers, and especially to abrogate existing ones, flies in the face of the values embodied in these key constitutional principles. Yet the FCC's Notice of Proposed Rulemaking alludes only obliquely and without elaboration to potential "constitutional considerations" at stake.

The Fifth Amendment of the United States Constitution states that private property may not "be taken for public use, without just compensation." Private property includes both traditional physical property and rights obtained under contract. Should the FCC's rules for multiple dwelling units set aside property owners' and broadband providers' rights under existing contracts, this action almost certainly would constitute a taking.

Even without the extreme step of abrogating existing contracts, the FCC rules regulating building access may run afoul of the Constitution. In *Loretto v. Teleprompter Manhattan CATV Corp*, the Supreme court ruled that a state law that required owners of rental property to allow cable television companies to wire their properties--in effect disallowing exclusive contracts with other types of video providers--was a taking for which the owners of the property must be compensated.[i] Ultimately, upon remand, the property owner was awarded only a few dollars in compensation, suggesting an unfortunate reluctance on the part of the New York authorities to recognize the value of certain property rights.

The law at issue in *Loretto* required landlords to accommodate a permanent physical intrusion of their property. Since then, lawmakers and regulators sometimes have evaded the result of *Loretto* by avoiding rules that *overtly* require physical intrusions. So-called "regulatory takings" such as rent controls or land use requirements are less closely scrutinized than physical takings. So, for example, a regulator might in effect force a landlord to allow access to his property indirectly, by enacting a rule prohibiting video service providers from entering into exclusive contracts with landowners. The bottom line, however, is that these baroque legal structures are likely to be viewed with increasing skepticism by ordinary people, courts, and legislators. The FCC should be wary of adding to this skepticism by minimizing the import of acknowledged constitutional values.

For example, the District of Columbia Court of Appeals ruled that an FCC order that would force one telephone company' to house another company's equipment would create a taking.[ii] The court said that unless Congress had explicitly authorized such a step, the rule must be overturned. The FCC's suggestion that exclusive agreements to serve multiple dwelling units be outlawed follows a similar pattern. The FCC's authority to require such a rule is doubtful. The Communications Act certainly never explicitly confers such authority. The courts are likely to look particularly hard at the abrogation of existing contracts. And especially when it results in the disruption to a small firm's bargained-for revenue stream, the compensation required surely would be more than a few dollars.

The FCC's public policy reasoning in support of a new access regulation is sparse. There seems to be no compelling reason for the proposal. Tenants are already free to move to another building if they are unhappy with a given landlord's choice of laundry machines, soda vending machines, janitorial services, or communications services. Landlords are free to choose among communications service vendors to provide such services, on an exclusive or some other basis. Exclusive agreements are not common, and

usually have terms of only a few years. On the whole, competition for broadband and video services in residential areas is growing and thriving --as is competition among landlords for tenants.

Over the past several years, the courts have been more willing to reject the FCC's pro-regulatory approach to communications policy, especially when the FCC has dictated that the value of stable, basic institutions property and contracts be ignored. The D.C. Circuit's repeated rejection of the FCC's proposed rules under the Triennial Review offers the best example.[iii] Forced sharing undermines the incentives protected by the institutions of property and contract, incentives that drive the superior performance of free markets. The deployment of new technology has risks as well as rewards; contractual arrangements and respect for the boundaries of property helps investors predict and limit that risk.

As it decides what action to take regarding MDUs, the FCC should have uppermost in its mind contract and property rights protected by the Constitution of the United States. For it is no whim or pie-in-the-sky notion that lead the Founders of the United States to protect the institutions of property and contract. The philosophy of natural rights that informed the Founder's view of rights is based in concern for people's wealth, health, and well-being. Respecting contract and property rights in the first place will only lead the FCC to better reasoned, more effective policymaking.

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[i] 458 U.S. 419 (1982).

[ii] Bell Atl. Tel. Cos. V. FCC, 24 F. 3d 1441, 1447 (D.C. Cir. 1994) (finding FCC physical collocation order a physical taking of property under the Fifth Amendment).

[iii] See United States Telecom Ass'n v. FCC, 290 F. 3d 554 (D.C. Cir. 2004), and the earlier decisions cited therein.

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