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In re Preserving the Open Internet: Reply Comments of Professor Daniel A. Lyons

Daniel A. Lyons
Boston College Law School, daniel.lyons.2@bc.edu

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BEFORE THE
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WASHINGTON, DC  20554

In the Matter of

Preserving the Open Internet  )  GN Docket No. 09-191

Broadband Industry Practices  )  WC Docket No. 07-52

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REPLY COMMENTS OF PROFESSOR DANIEL A. LYONS
BOSTON COLLEGE LAW SCHOOL

Boston College Law School
885 Centre Street
Newton, MA 02459

26 April 2010
REPLY COMMENTS OF PROFESSOR DANIEL A. LYONS
BOSTON COLLEGE LAW SCHOOL

I am pleased to present these reply comments in the Commission’s Open Internet proceeding. I am an assistant professor of law at Boston College Law School, where I teach and write in the fields of telecommunications, administrative law, and property. This submission replies to comments submitted by AT&T, Comcast Corporation, Verizon, and others suggesting that the Commission’s proposed regulations would effect a taking of private property without just compensation in violation of the Fifth Amendment. These reply comments are a condensed version of an article that will appear in the Notre Dame Law Review later this year. A draft of that article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577082.

INTRODUCTION

When the D.C. Circuit recently rejected the Commission’s claimed authority to enforce nondiscrimination norms against Comcast Corporation,¹ it placed this proceeding in legal limbo. To assert jurisdiction over broadband networks, the Open Internet NPRM

relies primarily upon an expansive view of the Commission’s Title I authority, citing directly to arguments made in the Comcast Order that the D.C. Circuit rejected on appeal. The Commission should heed the court’s warning and either refrain from regulating network management practices entirely, or at least seek explicit congressional authority before doing so. Without doubt this would be the wiser course: explicit statutory authority would assuage the court’s concern that the Commission “act only pursuant to authority delegated to [it] by Congress,”2 in a way that reclassification of broadband services under Title II (or finding a new jurisdictional hook under Title I) would not. While commenters will offer many reasons why the Commission should refuse to regulate broadband providers without explicit congressional authority, this reply comment highlights one in particular: the likelihood that the proposed regulations violate the Fifth Amendment.

Under the Supreme Court’s Takings Clause jurisprudence, the Commission’s proposed rules effect a permanent physical occupation of private broadband networks and therefore take broadband network providers’ property without just compensation. In essence, net neutrality would grant content and application providers a permanent virtual easement across privately-owned broadband networks. It thus would deprive broadband providers of the right to exclude others from their networks—a right that the Supreme Court has repeatedly dubbed “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”3 At the very least, the Takings Clause issue raises a serious constitutional question regarding the Commission’s authority to adopt net neutrality regulations without clear authority from Congress to do so. To avoid this

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2 Id. (quoting American Library Ass’n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005).
problem, Commission should seek explicit Congressional approval to promulgate net
neutrality rules, rather than continue to freelance at the periphery of its regulatory
authority.

I. THE OPEN INTERNET NPRM THROUGH THE LENS OF THE
TAKINGS CLAUSE

Over 85 years ago, the Court recognized that a regulation that goes “too far” can
constitute a taking for which just compensation is owed, even if the owner retains title
and even some use rights in its property.4 These “regulatory takings” are usually
governed by the three-part Penn Central5 test, under which the court balances (1) the
economic impact of the regulation and (2) its interference with the owner’s reasonable
investment-backed expectations against (3) the nature of the government’s action.6 But
in Loretto,7 the Court created a narrow exception to the Penn Central test for regulations
that constitute permanent physical occupations of property, either by the government or
by third parties. Justice Marshall, not generally known as a proponent of either bright-
line rules or strong property rights, wrote for the majority that “[s]uch an appropriation is
perhaps the most serious form of invasion of an owner’s property interests” and therefore
constitutes “a taking without regard to the public interests that it may serve.”8

To fit the Loretto rule, a regulation must go beyond mere “restrictions upon the
owner’s use of his property.”9 Rather, as one article notes, “[t]he operative fact in such
cases is that the government is appropriating the use of the property for the benefit of the

6 Id. at 124.
8 Id. at 426, 435.
9 Id. at 441 (emphasis added).
Loretto involved a regulation requiring landlords to allow cable companies to install equipment on their properties to provide service to tenants, without charging more than a nominal fee for access. The Court found the regulation constituted a taking because it effected a permanent physical occupation of the landlord’s property: it limited the owner’s right to exclude, and granted a third party a permanent right to use a portion of the owner’s property. The Court later explained that the line separating a typical regulation from a Loretto taking is “unambiguous distinction between a commercial lessee and an interloper with a government license.” When a regulation grants permanent access rights to a third-party over the owner’s objection, a taking has occurred and compensation must be paid.

The Commission’s proposed restrictions violate Loretto by converting third-party content and application providers from “commercial licensees” to “interlopers with a government license.” In essence, these third parties receive an unlimited, continuous right of access to broadband providers’ private property. This access allows them to physically invade broadband networks with their electronic signals and permanently occupy portions of network capacity, all without having to pay the network provider for access. The effect is to appropriate the use of these private networks for the public’s benefit, in the form of unfettered and nondiscriminatory access to the content and applications of the consumer’s choosing.

To draw a parallel to real property law, content and application providers receive the equivalent of a virtual easement to traverse broadband providers’ networks. In Nollan

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11 Loretto, 458 U.S. at 421.
v. California Coastal Commission, the Court explained that the imposition of an easement across a privately-held beach would unquestionably constitute a Loretto taking, even though it meant that different members of the public might occupy different parts of the property at any given time. “‘[P]ermanent physical occupation’ has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”

Moreover, as in Loretto, the net neutrality rules are not mere restrictions on an owner’s ability to use its property. Rather, the proposed rules “chops through the bundle” of property rights, “taking a slice of every strand.” Most obviously, broadband providers lose the right to exclude, which “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” Indeed, the very purpose of net neutrality is to deny broadband providers the right to exclude others from their networks. Broadband providers also lose the ability to control the use of their networks: they can neither use for their own purposes bandwidth that has been already occupied by a third party, nor may they send their own signals through their network if doing so will disproportionately “degrade” third party content (for example, by adversely rerouting third-party data packets in a way that would cause delays or packet loss). Finally, net neutrality infringes on the right to dispose. The prohibition against charging for preferred network access limits network providers’ ability to “lease” scarce broadband for a profit, and also limits the value of the network to prospective buyers.

14 Id. at 831.
15 Loretto, 458 U.S. at 435.
16 Id.
insofar as they are unable to use for their own purposes that portion of the network occupied by third-party content.\textsuperscript{17}

Nor does it matter that the beneficiaries receive a right to access electronic networks rather than to real property. \textit{Loretto} has never been limited to physical occupation of \textit{real} property.\textsuperscript{18} Indeed, Justice Blackmun’s dissent notes that the majority’s opinion, when “[l]iterally read,” must include compelled access to electronic networks: “[s]o long as Teleprompter continuously passed its electronic signal through the cable...a ‘physical touching’ by a stranger was satisfied and that § 828 therefore worked a taking.”\textsuperscript{19} Moreover, as a factual matter, the transmission of content over broadband networks is not merely a metaphysical act.\textsuperscript{20} It takes place in a real physical space, specifically the fiber-optic and copper wires that comprise the broadband network, which are themselves mounted in above-ground or underground easements across real property. Transmission of internet content primarily involves the movement of electrons, which are physical particles, that occupy rivalrous limited space on those fiber-optic and copper wires en route from the Internet to the end-user consumer. While the electrons are invisible to the naked eye and travel very quickly within a sheathed wire, the physical act

\textsuperscript{17} It is no answer to respond that, as long as some bandwidth is available, the broadband provider can make use of other network capacity for its own purposes. “The retention of some access rights by the former owner of property does not preclude the finding of a per se taking.” Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992).

\textsuperscript{18} See Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992).

\textsuperscript{19} \textit{Id.} at 450 (Brennan, J, dissenting).

\textsuperscript{20} Cf. Turner Broadcasting Sys. v. F.C.C., 819 F. Supp. 32, 64 n.10 (D.D.C. 1993) (Williams., J., dissenting) (“The [National Association of Broadcasters] responds that \textit{Loretto} is limited to ‘physical’ occupations of ‘real property.’ But the insertion of local stations’ programs into a cable operator’s line-up presumably is not a metaphysical act, and presumably takes place on real property.”)
of transmission is nothing more than a microscopic version of vehicles traveling along a highway—or pedestrians traversing an easement.\footnote{Moreover, it is worth noting that several courts have found takings where third-party interference with an owner’s property rights falls short of actual placement of physical objects on the owner’s property. See, e.g., United States v. Causby, 328 U.S. 256 (1946) (regular low-level flyovers by military aircraft) (cited as example of physical taking in \textit{Loretto}); Richards v. Wash. Terminal Co., 233 U.S. 546 (1914) (smoke and gases from nearby tunnel constructed under act of Congress).}

As the Commission is no doubt aware, courts have previously entertained the notion that \textit{Loretto} applies to electronic networks. For example, Judge Stephen Williams suggested, in his dissent from a decision to uphold the 1992 Cable Act’s must-carry provisions, that a law creating an “entitlement in some parties to use the facilities of another” seems to invite a challenge under \textit{Loretto}.\footnote{\textit{Turner Broadcasting Sys.,} 819 F. Supp. At 64 n.10 (Williams, J., dissenting)} In \textit{Turner I}, four Justices recognized that a common carriage obligation placed on some of a cable system’s channels would raise a Takings Clause questions even though the question was not squarely presented before that Court.\footnote{\textit{Turner I,} 512 U.S. 622, 684 (1994) (O’Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part) (“Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or time-sharing arrangement. \textit{Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies.”) (emphasis added).} Professor Laurence Tribe built upon these discussions in his 2002 comments to the Commission, in which he argued that digital must-carry rules would effectively condemn a portion of the cable network under \textit{Loretto} by allowing broadcasters the unfettered right to use portions of cable networks.\footnote{Laurence H. Tribe, \textit{Why the Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligation}, Comments filed with Commission July 9, 2002, at 13-14.}

\section*{II. DISTINGUISHING COMMON CARRIAGE}

Proponents may argue that the proposed rules are simply a species of common carriage. Admittedly, a regulatory takings claim is unlikely to succeed if the restriction lies in the background norms that the common law would place on property, including
common carriage restrictions. In such cases, the Court has explained, no taking can occur because the law has not “taken” anything to which the owner is entitled under the common law.\textsuperscript{25} But to fit this safe harbor, the proposed rules must “do no more than duplicate the result that could have been achieved in the courts” under a common law property claim, or otherwise make explicit a limitation implied in the owner’s title by “existing rules or understandings.”\textsuperscript{26} In this case, the net neutrality restrictions go far beyond whatever limitations common carriage placed upon network owners at common law.

In \textit{NARUC v. FCC}, the DC Circuit struggled with how to apply the “long and complicated history” of the “common law definition of common carrier” to the telecommunications industry.\textsuperscript{27} As interpreted by subsequent courts and Commission decisions, the two-part \textit{NARUC} test finds a business to be a common carrier “[\(1\)] if it will ‘make capacity available to the public indiscriminately’ or [\(2\)] if ‘the public interest requires common carrier operation of the proposed facility.’”\textsuperscript{28} The first prong focuses upon whether the business “undertakes to carry for all people indiscriminately…. [A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”\textsuperscript{29} The second focuses primarily upon market dominance: “In ascertaining the public interest, the focus of our inquiry here is whether the license applicant has sufficient market power to warrant

\begin{itemize}
\item \textsuperscript{25} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992).
\item \textsuperscript{26} \textit{Id.} at 1029-30.
\item \textsuperscript{27} National Ass’n of Reg. Util. Comm’rs v. FCC, 525 F.2d 630, 640 (D.C. Cir. 1976) (hereafter “\textit{NARUC I}”).
\item \textsuperscript{28} Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921, 924 (D.C. Cir. 1999) (quoting In re Cable & Wireless PLC, 12 FCC Rcd. 8516, paras. 14-15 (1997)).
\item \textsuperscript{29} \textit{NARUC I}, 525 F.2d at 641 (emphasis added).
\end{itemize}
regulatory treatment as a common carrier.”30 This disjunctive test thus captures the broad range of industries traditionally considered common carriers: utilities such as electricity and traditional telephony are common carriers by virtue of their market power, while industries such as trucking and lodging can become common carriers even without market power if they voluntarily hold themselves out to serve the public indiscriminately.

Broadband providers satisfy neither prong of the disjunctive NARUC test. First, as regards content and application providers, broadband providers explicitly have not held themselves out to carry for all entities indiscriminately. Rather, they reserved the right to make, and in many cases actually have made, “individual decisions, in particular cases, whether and on what terms to deal.” Moreover, the Commission has repeatedly found that the marketplace for broadband services is competitive, thus foreclosing a finding of market power. Indeed, this finding was central to the Commission’s decision to classify broadband as a Title I service free of the common carrier obligations that would have come had it instead been classified as a Title II telecommunications service.31 Because broadband service does not satisfy either prong of the NARUC test, it does not fit the traditional common law definition of common carriage.

Even if broadband providers satisfied the NARUC test, the proposed net neutrality regulations would fail because they impose a burden on the industry far greater than traditional common carriage would. Traditional common carriage regulations impose, at most, rate regulations and nondiscrimination obligations on broadband providers. The

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The essence of common carriage is to provide service to all customers at just and reasonable rates. Under this formula, broadband providers would be able to provide “tiered” service to content and application providers for a fee, as the U.S. Postal Service does to its customers, as long as they offer similar service tiers at similar rates to similarly-situated providers. But the Open Internet initiative, by contrast, would ban such agreements outright, whether or not this service is provided on a common carriage basis.

III. THE NEED TO AVOID A SERIOUS CONSTITUTIONAL QUESTION

Broadband providers need not have an airtight Takings Clause claim to impact the present proceeding. The fact that the proposed rules present a “serious constitutional question” suggests that the Commission should reconsider its decision to promulgate net neutrality restrictions without a clear mandate from Congress. As a general matter, the deference normally afforded to administrative action under Chevron is inapplicable where the administrative action raises serious constitutional issues. The Supreme Court has explained that

Where an administrative interpretation of a statute invokes the outer limits of Congress’[s] power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that

32 See Munn, 94 U.S. at 126-28; see, e.g., 47 U.S.C. §§ 201, 202.
33 See Comments of AT&T Inc. at 131-32. As AT&T notes, the fact that common law common carriage originates in the law of bailments only magnifies broadband providers’ claims: “under the common law, a bailee assumes special duties to care for packages that need special care. Here, broadband providers seek the right to act as bailees in this respect—to sell special packaging ([Quality of Service] enhancements) to merchants (application or content providers) that wish to contract for extra care in the delivery of their services to recipients. And the Commission’s proposed line-of-business restriction would paradoxically bar them from doing so.”). Id. at 132.
35 See, e.g., Bell Atlantic Corp. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).
Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.\textsuperscript{36}

The canon of constitutional avoidance carries particular importance in the context of the Takings Clause, because a successful claim would require the payment of just compensation and thus would raise separation-of-powers concerns. Congress possesses the exclusive power to appropriate funds from the Treasury. Without a clear mandate from Congress, the Commission may not impose rules that create a substantial risk of takings in an identifiable class of cases. As the D.C. Circuit has explained, granting “Chevron deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.”\textsuperscript{37} Where, as here, “administrative interpretation of a statute effects a taking, use of a narrowing construction prevents executive encroachment on Congress’s exclusive powers to raise revenue and to appropriate funds.”\textsuperscript{38}

At the very least, \textit{Loretto} presents a “serious constitutional question” for the Open Internet initiative. When coupled with the First Amendment implications of the proposed rules discussed by other commentators, and the D.C. Circuit’s ongoing concern about the Commission’s ability to regulate without explicit authorization from Congress, the

\textsuperscript{36} Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 172-73 (2001); see also INS v. St. Cyr, 533 U.S. 289, 299 (2001) (“[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.”).

\textsuperscript{37} \textit{Bell Atlantic}, 24 F.3d at 1445. The Court has explained that the mere fact that a regulation may “in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions…if compensation will in any event be available in those cases where a taking has occurred.” \textit{United States v. Bayview Homes}, 474 U.S. 121, 128 (1985). But it distinguished cases such as \textit{Bell Atlantic} and the present case, where “there is an identifiable class of cases in which application of a statute will necessarily constitute a taking.” \textit{Id.} at 128 n.5. While an idiosyncratic takings claim should not undermine an otherwise legitimate regulatory purpose, a meritorious claim by a broad class of claimants presents much greater separation-of-powers concerns.

\textsuperscript{38} \textit{Bell Atlantic}, 24 F.3d at 1445.
Commission would be better served to seek explicit Congressional authority before carrying the net neutrality project forward. A legislative stamp of approval would assuage any separation-of-powers concerns should the government ultimately required to pay just compensation for taking broadband providers’ property. Equally importantly, it would assuage the D.C. Circuit’s concerns that the Commission “act only pursuant to authority delegated to [it] by Congress.” Without such authority, the court is likely to continue viewing the Commission’s efforts with skepticism, while the serious constitutional question could prove fatal to the initiative on judicial review.

Respectfully submitted,

/s/________________

26 April 2010 Daniel A. Lyons
Boston College Law School
885 Centre Street
Newton, MA 02459