

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Telecommunications Services) CC Docket No. 95-184
Inside Wiring)
)
Customer Premises Equipment)

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**REPLY COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.**

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Affidavit of Myra Stilfield

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MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these reply comments in response to the Commission's Notice of Proposed Rulemaking¹ in the above captioned proceeding.

INTRODUCTION

Some of the comments filed in this case argue that parity of building access is not a problem for new entrants. Other commentators argue that building owners and managers have no incentive to deny entry to new entrants as diversity of telecommunications services and access to advanced services benefits and attracts tenants. Those comments are wrong and fly in the face of MFS's real-world experiences. In these reply comments, MFS presents the

¹ *In the Matter of Telecommunications Services Inside Wiring*. Notice of Proposed Rulemaking, CC Docket No. 95-184 (Released January 26, 1996). ("Notice")

affidavit of Myra Stilfield, National Director of Real Estate, who describes many real-world examples of buildings where MFS has been unable to obtain parity of access. These reply comments also respond to allegations that the Commission does not have the authority to mandate nondiscriminatory access and that such a requirement is a taking.

I. BUILDING ACCESS FOR NEW MARKET ENTRANTS IS AN EXTREMELY ARDUOUS, EXPENSIVE PROCESS THAT THWARTS COMPETITION

A. Assertions that Building Access is not a Problem and Does not need to be Addressed by the Commission are Untrue

In its comments, Ameritech claims that there is no access to private property problem for the Commission to solve.

[T]he best way for the Commission to promote open access to private property is for it to foster an environment where multiple providers of high quality, low cost services are available to customers. The demand for those services will precipitate open access -- naturally, voluntarily and according to market-based terms and conditions.²

Ameritech's position is wrong. Ameritech already has access to virtually every building in its service areas. New competitors simply cannot gain access to all buildings to provide their "high quality, low cost services" to customers. New entrants often have to negotiate for months with landlords and building managers and pay dearly for access to buildings that Ameritech obtained for free. That is simply not a competitive market and the Commission must do more than cheer for competition from the sidelines.

Several commentators, especially those focused on cable television, provided evidence that building access is difficult for both new and incumbent service providers.³ Some implicitly

² Ameritech's Comments at pg. 20.

³ Marcus Cable et. al. Comments at pg. 10; National Cable Television Association Comments at pp. 17-19; Liberty Cable Comments at pp. 2-22;

acknowledged the competitive difficulties of obtaining building access by arguing that establishing the telephone demaraction as the common demarcation point reduces competitive barriers for cable television providers.⁴

Attached to these reply comments is the Affidavit of Myra Stilfield, MFS's National Director of Real Estate, who describes MFS's difficulties obtaining access to many buildings throughout the United States and provides a listing of the more difficult negotiations she and her staff have encountered in this area. She provides many real-world examples where MFS has been denied access to buildings or is unable to timely conclude negotiations with building owners or managers. In all of the examples, of course, the incumbent local exchange carrier does have access to tenants. The examples are drawn from all areas of the country and illustrate that because of a lack of a national policy on building entry, competitive entry by firms like MFS is stymied while incumbent firms enjoy total and largely free access. Certainly, there are many building managers and owners that do allow nondiscriminatory access to their buildings, but the Commission must develop rules to address the landlords and building owners that simply refuse to allow nondiscriminatory entry.

1. Access Problems Encountered by MFS

As described in Ms. Stilfield's affidavit, MFS experiences four types of building access problems that must be addressed by the Commission in order to advance the pro-competitive goals of the Telecommunications Act:

- a. **No access.** Some landlords and building owners simply refuse to allow a competitive telecommunications company access to their buildings. The refusal may be based on

⁴ People of the State of California and the Public Utilities Commission Comments at pp. 2-3.

past bad experiences with utilities, a desire to obtain service from only one carrier, or simply an inability to decide what to charge for building access.

- b. **Extremely expensive access.** Some landlords and building owners view building access by competitive telecommunications providers as a revenue opportunity and demand extremely high access fees, high monthly rentals for space, risers and conduit, or even a percentage of the telecommunications revenues. As Ms. Stilfield's Affidavit illustrates, there are many examples where landlords and building owners seek to assess access fees of several thousand dollars plus monthly rental fees. These are clearly discriminatory access fees if incumbent providers are not required to pay such fees to access their customers. They also stymie competition as they impose costs on new entrants that incumbent carriers do not face. Indeed, the costs and scope of Ms. Stilfield's department which focuses on obtaining building access is a cost that incumbent telecommunications providers do not face since they already have building access. The costs of Ms. Stilfield's department, in large measure, spring from the lack of a national policy promoting nondiscriminatory access to multi-tenant buildings.
- c. **Delayed access.** It is not unusual for access negotiations to extend for many months. Ms. Stilfield's Affidavit describes negotiations that have lasted more than six months. Obviously, MFS cannot compete effectively if it cannot connect to its customer for six months while a landlord or building owner negotiates building access with MFS. Further, during the time of that delay, the incumbent local exchange carrier will have extended notice of a competitor's attempt to lure away a customer and additional opportunities to develop plans targeted at retaining "at risk" customers that undermine the natural workings of the competitive market.

d. **Tenant demand**. Some landlords or building owners indicate that they will provide access when tenants demand MFS's service. However, that puts MFS in an impossible situation since it cannot offer competitive services to customers until it has building access. Obviously, no customer will subscribe to MFS's services if MFS must delay service installation for six months (or more or even indefinitely) negotiating with the building owner or landlord for building access. In some instances, even though customers have requested MFS service, landlords and building owners have refused to allow MFS access to the building. In contrast, incumbent service providers, like Ameritech which claims there is no access problem for the Commission to solve, were never required to prove there was a demand for their services prior to being given building access.

B. The Commission Should Prohibit Discriminatory Access

The refusal to provide access, delayed access and attempts to extort exorbitant access fees from new market entrants are discriminatory, anticompetitive costs and delays that are not imposed on incumbent service providers. They are a barrier to entry and competition in the telecommunications market. As MFS noted in its comments, the Telecommunications Act prohibits barriers to entry.⁵ Specifically,

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.⁶

⁵ See, also, Telecommunications Industry Association/UPED Comments at pg. 7.

⁶ 47 U.S.C. §253(a).

The Commission is empowered to preempt the enforcement of “any statute, regulation, or legal requirement” that violates this provision.⁷ When a property owner allows an incumbent service provider exclusive access to its tenants and inside wiring, but denies new entrants the same access rights, the owner effectively creates an exclusive easement. Enforcement of such an easement should be preempted by the Commission as a local legal requirement that prohibits new market entrants from providing telecommunications services.

In its comments, MFS requested that the Commission require nondiscriminatory building access. Existing building cables, riser cables, and common areas including ducts and racks used by the incumbent service provider should be made available to all providers on a nondiscriminatory basis. If a building owner allows the incumbent service provider to install its cable in ducts or building risers without charge, then the same access rights should be extended to new entrants since the Telecommunications Act defines new entrants as common carriers just like incumbent providers.⁸ The most direct method to promote equal, nondiscriminatory access is to create and enforce a rule that prohibits discrimination against telecommunications carriers seeking access to demarcation points. However, by itself, such a rule may be impractical and intrusive as it would involve the Commission micro-managing the market by resolving complaints by telecommunications carriers against building owners. As described in its comments, MFS suggests augmenting a general nondiscrimination rule with three practical requirements:

1. ***Flow Through of Building Charges.*** If a building owner provides access to the incumbent telephone company for no charge, then under a nondiscrimination rule it

⁷ 47 U.S.C. §253(d).

⁸ 47 U.S.C. §153(49).

must provide access to new entrants for no charge. However, if a building owner assesses charges for entry into its building, those charges should apply equally to all wireline service providers in the building, and such service providers should be allowed to explicitly reflect those building charges on their customers' bills. MFS recommends that the charges generally be proportional to a carrier's customer base or its facilities. For example, if a building owner charges NYNEX \$100 for access to its building to provide service to twenty tenants in that building, then the building owner may charge MFS \$15 for access if MFS begins to provide service to three of those twenty customers. Both NYNEX and MFS may pass through their respective charges in the form of explicit surcharges on their customers' bills.

2. ***Unbundled Access to Local Loops.*** In some instances it will not be practical or possible for competitive local telephone companies to install their own wiring to reach a demarcation point. For example, an underground conduit that runs into the minimum point of entry may be full, and a new entrant may be faced with drilling through a foundation wall to place a new conduit to encase a single circuit to serve a few customers in the building. In that instance, the incumbent telephone company should be required to provide nondiscriminatory interconnection and unbundled access to that portion of its network that allows connection with the customer's demarcation point. As US West observes in its comments,⁹ interconnection at any technically feasible point within a carrier's network and unbundled access are explicitly required of incumbent

⁹ US West Comments at pg. 7. US West, however, argues that deregulated wiring is not a network element for which the incumbent would have to allow unbundled access

local telephone companies in the Telecommunications Act¹⁰ at the nondiscriminatory rate offered to others for similar functionality,¹¹ a rate negotiated by the interconnecting carriers, or the incremental cost of the unbundled network element.¹² MFS's proposal is consistent with other commentors' suggestions that building owners and managers provide access that meets tenants' demands. For example, Harbert Properties Corporation stated that "we believe that the best approach to the issues raised in the request for comments is to allow building owners (if they choose) to retain ownership and control over their property -- including inside wiring -- so long as they make sufficient capacity available to meet all the needs of the occupants of a building."¹³

3. **Enforcement Mechanisms.** MFS recommends that local franchising authorities and state regulatory commissions play an active role in enforcing and resolving nondiscrimination requirements. Just as the Commission has delegated the responsibility for resolving complaints about interference with hearing aids to state commissions,¹⁴ it could delegate shared responsibility for resolving disputes about inside wiring to state commissions and local franchising authorities. For example, complaints

¹⁰ 47 U.S.C. §§251(c)(2) and 251(c)(3). Section 251(c)(3) defines the duty to provide unbundled access as "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory ... An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

¹¹ 47 U.S.C. §252(i) requires that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

¹² 47 U.S.C. §252(d)(1).

¹³ Harbert Properties Corporation Comments at pg. 2. [emphasis added] This phrase appeared in many comments, as it was apparently part of common draft of comments circulated among building owners and managers. See, e.g., Tulsa Properties Management, Inc. Comments at pg. 2.

¹⁴ 47 C.F.R. §68.414 (1995).

about a building owner that refuses to provide nondiscriminatory access to a building could be referred to a state commission for informal resolution within 30 days, just as complaints about hearing aid interference are referred to state regulators under the Commission's rules. Of course, if the matter is not resolved by state commissions, it would have to be resolved by the Commission under its complaint procedures. MFS also suggests that the Commission periodically review its inside wiring rules (every three years or sooner if parties can demonstrate that the existing rule harm competition).

II. BUILDING OWNERS AND MANAGERS WHICH RESTRICT ENTRY INTO THEIR BUILDINGS STYMIE THE DEVELOPMENT OF COMPETITION

The claims made by BOMA/Chicago are typical of the assertions made by many building owners, property managers and building associations.

Access to modern telecommunications is critically important to our commercial tenants, therefore it is critically important for our buildings to ensure that our customers -- our tenants -- have those services available at a reasonable cost. In a fiercely competitive office leasing marketplace such as Chicago, our members could not secure new or retain old tenants if they did not provide the telecommunications access needed by tenants. As a result, our commercial tenants have been able to obtain access to a wide range of modern telecommunication services, *without government intervention*.¹⁵

Claims that tenants have been able to obtain access to telecommunications services are simply not true and fly in the face of MFS's experience negotiating building-by-building access. In a significant number of buildings, including many of the properties described in Ms. Stilfield's affidavit, tenants simply cannot choose their service provider because the building owner or manager prohibits new market entrants from entering the building and providing the facilities

¹⁵ Comments of BOMA/Chicago, pg. 2.

necessary to serve tenants. Government intervention is appropriate and necessary to proscribe discriminatory actions by building owners and managers that stymie competition.

A. Building Owners and Managers Which Treat Building Access as a Revenue Opportunity Stymie Competition

In their comments describing the incentives of building owners and managers, the Building Owners and Managers Association (“BOMA”) declared that:

The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms with the owner’s business plan for the property.¹⁶

Attached to Ms. Stilfield’s affidavit is simple listing of major commercial properties throughout the United States where the building owners and managers have denied MFS entry, in many instances in spite of tenants’ requests for service, and in some instances in properties managed by BOMA’s officials. The incentives that BOMA writes about are, unfortunately, not present among a significant number of building owners and managers. Indeed, in a newsletter sent to its St. Louis members, BOMA describes the competitive dynamics of the telecommunications industry very differently than it does in its comments.

The bottom line of the telecommunications bill for BOMA members is that many new and additional parties will be coming to you and your tenants to offer local, long distance and cable services. These telecommunications providers will not be armed with federal right to access your property. Therefore unless your state law mandates such access, these providers will have to obtain your permission to enter your property.

This competitive telecommunications environment presents new business opportunities for building owners and revenue resources to be identified by building managers. BOMA members are encouraged to pursue such business opportunities.¹⁷ [emphasis added]

¹⁶ BOMA Comments at pg. 23.

¹⁷ *The Impact of Telecommunications Legislation on BOMA Members*, BUILDING VIEWS 3 (March 1996).

In its comments filed with the Commission, BOMA paints a picture of building owners and managers incited to provide tenants with access to all forms of competitive telecommunications services. The above quoted message from BOMA to its members has the direct effect of encouraging members to block access, and to view access as a source of revenues. The problem that the Commission must address is that a significant segment of building owners and managers are doing exactly what BOMA encourages its members to do -- blocking building entry and attempting to charge new entrants exorbitant, discriminatory access fees. As demonstrated in Ms. Stilfield's affidavit, MFS has frequently been forced to pay exorbitant access fees in order to meet customers' urgent demands.

In addition, in a recent memo circulated to its National Advisory Council,¹⁸ BOMA described a proposed alliance with MCI Metro where one of the chief benefits of the alliance to BOMA members is that members who participate in the alliance, which includes a Model Telecommunications License Agreement, "will receive premium compensation that is considerably above current market rates." BOMA's memo also indicates that a benefit of the alliance is that it advances BOMA's legislative agenda by requiring MCI to make a public statement, accompanied by a press release, announcing a policy change opposed to forced building entry. While the alliance with MCI has not yet been formally announced, these actions are not consistent with BOMA's assertions in this docket but evidence that some building owners and managers are interested in restricting building access and using their market power to sell building access at rates inflated above the market level. Certainly, government intervention along the lines suggested by MFS is warranted to prevent such abuses and advance the pro-competition objectives of the Telecommunications Act.

¹⁸ Memorandum from G.A. "Chip" Julin, III, President of BOMA International to National Advisory Council regarding BOMA/MCI Metro Alliance Conference Call dated March 4, 1996

Several of the comments filed in this proceeding indicate that many building owners and managers view building access as a profit/revenue opportunity to be exploited. For example, in the comments filed by Sentinel Real Estate, which manages a portfolio of 45,000 apartment units, it observed that “[i]n certain cases owners are able to realize income by “selling” exclusive rights of entry to cable operators willing to pay for them.”¹⁹ The comments of Marcus Cable, *et al.* suggested that landlords and developers have not generally imposed onerous entry conditions on incumbent service providers, like electric utilities or incumbent telephone companies, but they impose differential treatment when a competitor seeks access.²⁰ Some comments gave examples of building owners and managers granting exclusive access rights that were designed to enrich building owners and managers, effectively thwarting competition and harming consumers. For example, the National Cable Television Association presented the following:

The massive resistance by landlords was well illustrated in the West Virginia resort community of Shannondale. The developer granted a purportedly exclusive contract to one company charging \$30.20 for basic cable, and forbade the franchised cable operator from installing facilities on the property to offer basic at his standard rate of \$17.40. The residents of Shannondale adopted a resolution declaring “[The developer] does not speak for the Association and the Association strongly disagrees with [the developer’s] position. The Association wants C/R TV Cable to have access to its members’ property so that residents may have the opportunity to subscribe to C/R TV Cable’s television service.” Over 100 residents signed a similar petition, but the developer resisted, holding his residents hostage to the exclusive contract that enriched him. It took over two years of litigation to bring Shannondale residents the C/R TV’s cable service.²¹ [emphasis added]

¹⁹ Sentinel Real Estate Comments at pg. 2, footnote 2.

²⁰ Marcus Cable, *et al.* Comments at pg. 8, footnote 6.

²¹ National Cable Television Association, *Inc.* Comments at pg. 18.

While the access requirements for cable television are different than telecommunications, the example cited by the National Cable Television Association contradicts claims by BOMA that building owners and managers are motivated exclusively by tenants' demands.

In their comments, Charter Communications and Comcast Cable Communications described an instance where a satellite master antenna television systems ("SMATV") paid a building owner \$30,000 for exclusive access to a multi-dwelling unit and the incumbent provider was forced to remove its cable.²² Obviously, that is not an example of a building owner motivated by a desire to provide tenants with service from competing providers. It also illustrates the urgency of MFS's proposal that the Commission prohibit discrimination in building access. Without a regulation that building owners and managers provide nondiscriminatory access to all telecommunications providers, the market will disintegrate into a system of bribes and kick-backs that have nothing to do with building access costs or a desire to provide tenants with access to diverse and advanced telecommunications services. Rather, the payments to building owners and managers will reflect their localized monopoly power over building access.

It is important to emphasize that MFS is not suggesting that building owners and managers be prohibited from charging appropriate access fees. MFS is merely suggesting that building owners and managers assess nondiscriminatory access fees -- if the incumbent telecommunications provider is provided building access and access to the demarcation point for no cost, then the same no cost access should apply to new entrants. It is anticompetitive for building owners and managers to charge exorbitant fees to new entrants while giving building access for free to incumbent telecommunications providers.

²² Charter Communications, Inc and Comcast Cable Communications, Inc. Comments at pg. 9, footnote 11.

B. Building Access by Multiple Service Providers is Feasible in Many Cases

The comments of Guam Cable TV were instructive since it has accommodated competitive access by multiple cable television providers since 1992. It described government standards that accommodate multiple providers of cable television and telecommunications services.

Today, by using RG-59 and miniature co-axial cable, and by the building owner insisting each user leave in a pull cord for the next provider to use, half-inch conduits can accommodate three or four cables with minimal inconvenience to the occupants who want more than one service. In the near future, one might expect that a 24-fiber cable run through old half-inch conduits could serve MUD residents in old buildings with a vast choice of services, and the interior wiring would be a highway instead of a roadblock to competition.

Our experience in this area is instructive. Guam Cable TV has shared interior half-inch conduits with Guam Telephone Authority's twisted pairs for over 20 years. Since 1972, we have furnished the Government of Guam Building Permit Office with design plans for various size buildings, to distribute to builders, recommending 3/4" be the minimum size interior conduit, with larger sizes for larger buildings. Almost all contractors follow our guidelines and six or seven cables can be pulled into existing buildings. In older buildings with blocked conduits, we have had contractors install exterior wire mold on the outside. Their work is not noticeable and does not mar the appearance of the buildings. We point out the above experience as evidence that it is not necessary to restrict the public's choice to only one cable to each unit.

... The country's future framework should not allow the landlord to be any citizen's telecommunications decision maker.²³

The Commission should consider the very pragmatic solution that Guam Cable Television has implemented. Namely, require the installation of conduit large enough to accommodate multiple cables on new construction, and include a pull wire in the conduit that could be used by future service providers. That suggestion is consistent with the option identified by Liberty Cable that state/local officials adopt building codes that require multi-

²³ Guam Cable TV Comments at pp. 4-5. [emphasis added]

dwelling unit owners to install conduits, wires and/or antenna sites to facilitate multiple service providers.²⁴

III. THE COMMISSION HAS THE AUTHORITY TO PROHIBIT DISCRIMINATORY ACCESS

In its comments, BOMA makes several arguments concluding that the Commission cannot order mandatory building access. Specifically, its principle legal arguments amount to:

- ▶ The Commission lacks authority over building owners and managers; and,
- ▶ Forced access is an unconstitutional taking, and only market prices constitute “just compensation.”

The arguments are misplaced. The Commission does have the authority to order nondiscriminatory access to building demarcation points as MFS has demonstrated. For the reasons discussed below, a nondiscrimination rule is not an unconstitutional taking.

A. The Commission has the Authority to Prevent Building Owners and Managers from Interfering with the Communications Act

The Telecommunications Act plainly prohibits barriers to entry. Specifically,

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.²⁵

The Commission is empowered to preempt the enforcement of any “statute, regulation, or legal requirement” that violates this provision.²⁶ A restriction by a building owner or manager that restricts building entry to one telecommunications service provider is an exclusive easement

²⁴ Liberty Cable TV Comments at pg. 21.

²⁵ 47 U.S.C. §253(a).

²⁶ 47 U.S.C. §253(d).

that violates this provision. Likewise, attempts by a building owner or manager to impose unreasonable delays or excessive building entry fees on new entrants is a local legal requirement that has the effect of prohibiting the ability of new entrants to provide telecommunications service.

Commentors, including BOMA, argue that the Commission does not have the authority to regulate building owners and managers because they are not communications carriers.²⁷ However, the Commission's preemption powers from the Telecommunications Act are not limited to the acts of common carriers, but extend to any "State or local statute or regulation, or other State or local legal requirement" and are not limited to the actions of communications companies. Thus, contrary to BOMA's argument, there is no need to reach the question as to whether building owners and managers are under the Commission's common carriage jurisdiction. The Telecommunications Act gives the Commission the authority to preempt enforcement of discriminatory easements designed to exclude new entrants or that have the effect of excluding new entrants.

In other contexts, however, the Commission has argued that similar "access" functionalities are Title II common carrier services within the Commission's jurisdiction. For example, the Commission has held that 800 Service Management System ("SMS") is a Title II common carrier service even though the SMS is a service that is not provided by a traditional telecommunications carrier, but a service provided by an independent database administrator. In its 800 Service Order, the logic by which the Commission found that SMS was a Title II service over which it had jurisdiction applies equally well to access to demarcation points in a multi-tenant building.

²⁷ BOMA Comments at pg. 4.

[I]n view of the broad language of section 3(a), we think it reasonable to find that access to the SMS falls under that provision. Specifically, we find that SMS access is incidental to the provision of 800 access services. The data input into the SMS derive from the provision of 800 access service. More significantly, SMS access is absolutely necessary to the provision of 800 service using the data base system. IXCs do not have the option of providing 800 service information directly to each individual LEC or each LEC with its own data base; the information can only be loaded through the SMS. Thus, SMS access is technologically necessary to the provision of 800 access service, and is incidental to the provision of such access.

... [W]e find that the better course at present is to treat SMS access as a common carrier service under section 3(h) of the Act. ... We reach this conclusion in light of the importance of ensuring that SMS access is provided at reasonable rates and on nondiscriminatory terms, and because of the untried nature of the proposed alternative mechanisms ...²⁸ [emphasis added]

The logic of the above quoted Commission decision applies just as strongly if one substitutes “access to building demarcation point(s)” for “SMS access” and “telecommunications service” for the phrase “800 access service.” Access to building demarcation points, like SMS access, is incidental to the provision of telecommunications services; it is also technologically necessary for the provision of telecommunications services. Like SMS access, access to building demarcation points is important to ensuring reasonable rates on nondiscriminatory terms, and ensuring that the pro-competitive goals of the Telecommunications Act are met.

In other cases, such as billing and collection, the Commission has distinguished between services that were offered as part of wire or radio communications and services that are not. Billing and collection, the Commission has reasoned, is not a Title II common carrier service because it is not offered via wire communications nor incidental to wire communications.²⁹ Access to the building demarcation point, however, is essential to the

²⁸ *In the Matter of Provision of Access for 800 Services*, Order, CC Docket 86-10, 8 FCC Rcd 1423, 1426 (released Feb. 10, 1993). Also see, *In the Matter of Beehive Telephone, Inc. v. The Bell Operating Companies*, Order, FCC 95-358, 10 FCC Rcd 10562 (released Aug. 16, 1995).

²⁹ *In the Matter of Detariffing of Billing and Collection Services* 102 FCC 2d 1150 (1986).

provision of wire communications since the demarcation point is where a carrier connects its "wire" to the wires owned by the customer. Clearly, access to a building's demarcation point falls within the Commission's jurisdiction under this analysis, as well.

MFS is not suggesting that the Commission regulate the charges that building owners and managers might charge for building access. MFS suggests that, consistent with the authority granted it under the Telecommunications Act, the Commission preempt state law efforts that would allow building owners and managers to impose discriminatory access rights or fees on telecommunications carriers, effectively prohibiting building owners and managers from imposing discriminatory access rights or fees. As described above and in MFS's comments, such preemption actions must include effective enforcement mechanisms.

B. Prohibiting Discriminatory Access is not a Taking

As MFS noted in its comments, prohibiting discriminatory access is not an unconstitutional taking. Under MFS's proposal, building owners and managers would be required to offer the same access to new telecommunications entrants that they extend to incumbent telecommunications companies. If building access is provided free of charge to incumbent local telephone companies, then building owners and managers have an obligation to provide the same access to new entrants.

The facts and arguments of the *Centel Cable Television*³⁰ case parallel the arguments made by BOMA and others in this docket. In *Centel Cable Television*, a developer attempted to plat utility easements as private rights of way in order to deny a cable television company access to those easements. Basically, the developer's utility easement allowed access to

³⁰ *Centel Cable Television Co. of Florida v. Thomas J. White Development Corporation*, 902 F.2d 905 (11th Cir. 1990).

Florida Power and Light, Southern Bell and St. Lucie West Utilities for video services. St. Lucie West Utilities was affiliated with the developer and the developer intended that St. Lucie West Utilities be the exclusive provider of cable television services even though both Centel Cable Television and St. Lucie West Utilities had the authority to provide cable television services. The developer allowed Florida Power and Light and Southern Bell to have access to use the private road system in the development to gain access to the public utility easements to connect service to customers. When Centel Cablevision attempted to use the same private roads to access the dedicated public utility easements and install its cable television lines, the developer prohibited their entry. Centel Cablevision sued for and was granted a permanent injunction prohibiting the developer from blocking its access to the development and public utility easements. On appeal, the Court upheld the District Court's grant of the permanent injunction and flatly rejected the developer's arguments that provisions of the Cable Act that allowed multiple service providers was an unconstitutional taking.

The Supreme Court has observed that the case law regarding takings has "generally eschewed any set formula for determining how far is too far, preferring to engag[e] in ... essentially ad hoc, factual inquiries."³¹ Even though the Court has acknowledged that no single test exists for distinguishing when a regulation becomes a taking, it has identified four major factors that it considers significant:³²

1. **Physical Invasion**. Regulations that compel the property owner to suffer a physical "invasion" of his property are often considered a taking.³³

³¹ *Lucas v. South Carolina Coastal Commission*, ___ U.S. ___, 112 S.Ct. 2886, 2893 (1992).

³² See, *Multi-Channel TV v. Charlottesville Quality Cable Corporation*, 65 F.3d 1113, 1123 (4th Cir. 1995)

³³ *Lucas v. South Carolina Coastal Commission*, ___ U.S. ___, 112 S.Ct. 2886, 2893 (1992) citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982)

2. **Destruction of Economic Value**. Regulations that destroy the economic value of property or deprive a property owner of all economically viable uses of his property have been viewed as takings.³⁴
3. **Investment Expectations**. Regulations that interfere with the investment expectations of property owners may be considered takings.³⁵
4. **Legitimate State Interests**. Regulations may not be a taking if they substantially advance legitimate state interests.³⁶

MFS's proposal that the FCC prohibit discriminatory access does not meet any of the traditional criteria that the courts concluded makes a regulation a taking. In contrast with a requirement that building owners and managers must allow access to buildings,³⁷ a requirement that building owners and managers grant new entrants the same access rights as incumbents does not mandate a physical invasion of property since building owners and managers have already consented to an "invasion" by incumbent providers. A nondiscrimination requirement does not deprive building owners or managers of the economic value of their property, nor does it interfere with or diminish in any way their investment expectations. Fundamentally, building owners and managers' investment expectations are determined by the rent and payments they receive from tenants, and not from the provision of telecommunications services to tenants.

³⁴ *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980).

³⁵ *Lucas v. South Carolina Coastal Commission*, ___ U.S. ___, 112 S.Ct. 2886, 2895 footnote 8 (1992).

³⁶ *Lucas v. South Carolina Coastal Commission*, ___ U.S. ___, 112 S.Ct. 2886, 2897 (1992).

³⁷ The Court has held that a requirement by New York that required building owners to allow cable television providers to emplace cable facilities is a taking even though the space required would be *de minimis*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982). In this case, however, MFS is not suggesting that the Commission mandate entry, but that it prohibit discriminatory treatment where building owners and managers allow entry by incumbents by impose entirely different terms and conditions on new entrants.

Indeed, if the comments of BOMA are taken at face value, namely, that tenants value access to diverse and advanced sources of communications, then a nondiscrimination requirement cannot be a taking because it will enhance the value of multi-tenant properties rather than diminish it. Certainly, a nondiscrimination requirement will advance a legitimate state interest in promoting competition.

Moreover, under the Telecommunications Act, telecommunications carriers have common carrier status.³⁸ Thus, if incumbent telecommunications providers have building access by virtue of being considered a public utility with condemnation powers, then under the Telecommunications Act which declares all telecommunications carriers to be common carriers, new entrants have exactly the same powers and should be granted exactly the same access rights as incumbent providers.

BOMA also argues that just compensation requires that the Commission look to the market to set the appropriate compensation.³⁹ Under a nondiscrimination rule, the Commission merely requires that building owners and managers extend the same “market” rate to new entrants that they extend to incumbent telephone companies. Thus, even if a nondiscrimination rule was a taking (which it is not), it would not be an unconstitutional taking under BOMA’s analysis because it would require compensation at the market rate, namely the rate that building owners and managers already charge incumbent providers.

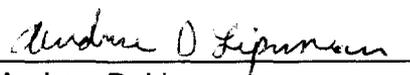
³⁸ 47 U.S.C. §153(49).

³⁹ BOMA Comments at pp. 7-8.

IV. CONCLUSION

Customers' access to their chosen service provider and competitors' access to customers are critically affected by the Commission's inside wiring rules and policies. Parity of access rights is critical to the development of competition. In these reply comments MFS presents several real-world examples of how MFS has been denied access to buildings and emphasizes the critical role that the Commission must play to promote the pro-competition objectives of the Telecommunications Act.

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Dated: April 17, 1996

**AFFIDAVIT OF
MYRA STILFIELD
OF BEHALF OF
MFS COMMUNICATIONS, INC.**

CC Docket 95-184

1. I, Myra M. Stilfield, am the National Director of Real Estate for MFS Communications, Inc.. My business address is One Tower Lane, Suite 1600, Oakbrook, Illinois 60181.
2. I have been employed by MFS performing building access activities for nearly seven (7) years, in my present position for two and one-half (2 1/2) years. Prior to working for MFS, I spent 11 years in the commercial real estate industry, primarily in corporate real estate departments, and held real estate administration and acquisition positions for Barclays Bank of New York, Dean Witter, Hallmark Cards, and US Sprint.
3. I am responsible for obtaining building access for MFS throughout North America. In that role, I direct five (5) Regional Directors of Real Estate, each responsible for obtaining building access in six (6) respective regions. They accomplish this task by managing some 18 consultants, mainly real estate brokers, who are paid retainers and commissions, and are reimbursed for their expenses.
4. In my role as the National Director of Real Estate, I regularly work with landlords and building owners to obtain building access for MFS. Similarly, the Regional Directors who report to me also negotiate with landlords and building managers to obtain access for MFS. In total, my department's salary, commission and expense budget is about \$1.7 million. Those are salary and expenses devoted entirely to obtaining access to buildings that are already served by incumbent telecommunications providers and represent expenses that incumbent telecommunications providers do not face. This amount does not include sums paid for building access in rental or license fees to the