

judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. Commenters have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

B. Congress Did Not Give the Commission Implied Authority to Impose the Government to Fiscal Liability in the Court of Federal Claims.

The Commission's lack of explicit statutory authority to take private property cannot be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking of private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in Bell Atlantic, supra, declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a

narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in Chevron v. N.R.D.C., 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

In fact, the legislative history of Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use -- upon payment of defined compensation -- compatible utility easements across private property, shows that Congress had not intended to give the Commission power to mandate access to multi-unit buildings generally. In 1984 the House deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.

In Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (1993), aff'g 737 F.Supp. 903 (E.D. Va. 1989), the Fourth Circuit refused to extend Section 621(a)(2) to the installation of cable wires in compatible private easements in common areas of a condominium. Such a construction, the court said, joining the Eleventh Circuit's view earlier in Cable

Holdings, infra, would make Section 621(a)(2) equivalent to the section of the bill that became the 1984 Cable Act that Congress deleted. The court went on to agree that, under such facts, Section 621(a)(2) would be indistinguishable from the New York statute in Loretto. Id. at 1175. The Fourth Circuit also recognized that it had a duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction." Id. at 1174-75.

Other courts have also narrowly construed Section 621(a)(2) of the Cable Act. In Cable Holdings v Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), reh'r'g en banc denied, 988 F.2d 1071 (1992), cert. denied, 506 U.S. 862 (1992), which raised the issue of a cable franchisee's right to access privately owned residential rental property, the Eleventh Circuit Court held that unless Congress provided for a taking under the Fifth Amendment "with the clearest of language", the court would not construe the statute in a manner which raised such constitutional issues. Where the language of Section 621(a)(2) regarding use of private easements by cable franchisees was ambiguous, the court construed it as requiring access to privately owned easements only in cases where private rental property owners had generally dedicated such easements to public use. The court, citing the long-standing canon governing judicial interpretation of statutes so as to avoid raising constitutional issues, determined that such an alternative

interpretation would avoid raising the Fifth Amendment takings issues which were implicated in this case.

Similarly, in Cable Investments v. Woolley, 867 F.2d 151 (1989), the Third Circuit, in reaching a decision on the same issue of whether the Section 621(a)(2) effected a taking, found Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking for which just compensation would be required. The court held that where Congress specifically considered a mandatory access provision and such provision was deliberately omitted in the final version of the Cable Act to avoid a taking, there was no Congressional intent to support takings of private property. Id. at 156-57, citing 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (floor statement of Cong. Fields).

In Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (1994), the Ninth Circuit, following Woolley, reversed the trial court's application of Section 621(a)(2), because there was no evidence of an express dedication. The court found that installation of cable to individual units constituted a physical invasion under Loretto that was not authorized by the statute. Accord, TCI of North Dakota, v. Shriock Holding Co., 11 F.3d 812 (8th Cir. 1993).

The kind of forced building access contemplated here would largely replicate the provisions for forced building access in S.

1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

The general rule on implied takings is similarly given full effect in Exec. Order 12630, 5 U.S.C. § 601n (1988). Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights") requires executive department agencies to review all federal proposed rulemakings, final rulemakings, legislative proposals, and policy statements that, if implemented, could effect a taking under the Fifth Amendment, in order to protect the U.S. Treasury against unnecessary claims for just compensation. "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," published by the Attorney General in June 1988 to implement such Executive Order, requires subject federal agencies to conduct a predecisional Takings Impact Analysis (TIA). The TIA, in part, requires both an assessment of whether the rule or policy in

question would effect a taking and also an analysis of alternative policies or rules that would be less intrusive on the rights of private property owners. See generally CIT Group v. U.S., 24 Cl. Ct. 540, 543 (1991).

Section V of the Attorney General's guidelines contains an analysis of "the general principles and assessment factors which inform considerations of whether a takings implication exists". Op.cit. at 11. The guidelines warn that "as a general rule where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis." Id at 13, citing Loretto in App. at 6.

C. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act.

Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

(A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id. A copy of that section is printed full as Attachment 1 hereto.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. Att'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which "result in Governmental liability under clear line of judicial precedent, such as through claims proceedings." Id.

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official's wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency's control in creating obligations which exceed its appropriations level is considered by the Comptroller General in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9 (1996), the Court rejected the government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act and subject to precautionary procedures under Executive Order 12630.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT ATTEMPT TO REGULATE ACCESS TO PRIVATE PROPERTY.

There are sound and persuasive reasons why the Commission should not attempt to regulate access to private property, even if it had jurisdiction to do so. First, there is a thriving, competitive market for real estate in this country, which is fully capable of meeting, and is responsive to, the needs of building occupants. Second, Commission regulation would interfere with the on-the-spot management needed to effectively address safety and security concerns, assure compliance with building and electrical codes, coordinate the needs of different tenants and service providers, and in general oversee the efficient day-to-day operations of hundreds of thousands of buildings.

A. Commission Intervention is not Needed Because the Market is Already Providing Building Occupants with the Services They Need.

Owners, managers, and investors in the nation's commercial and residential buildings already are feeling the reverberations of the telecommunications revolution. Owners are constantly reminded by market demands (as well as a barrage of industry educational materials) that the failure to grant access to the most-advanced telecommunications will cost them dearly in lost tenants and lost opportunities.

1. Telecommunications is a Factor in Building Marketability.

By way of background, businesses typically locate their offices in buildings, and because many businesses depend on access to cutting-edge communications technology, real estate necessarily functions as a part of the on- and off-ramp used by business to travel the information highway. Since technology is constantly changing and, with it, building users' (i.e., our tenants') demand for new products and services, buildings must be equipped to accommodate today's -- and tomorrow's -- telecom traffic. The decisions that any building owner (commercial or residential) makes regarding the building infrastructure are made within the context of what will make the real estate marketable to the best possible tenants, those that pay market rents and stay for predictable sustained terms.

In the regulated monopoly-controlled markets of the not-too-distant past the economics and management of telecommunications services in the real estate context were simple, if unexciting. Risks to building owners were limited but so were opportunities to make investments in telecommunications infrastructure that could yield competitive advantages. When tenants needed telephone installation or maintenance services, the Bell companies took care of it. The provision of cable television services was similarly straight-forward and predictable. These monopoly providers were common carriers with social responsibilities factored into their rates. In return for providing

universal service and other societal benefits, the rules of the market place did not apply to our dealings with their representatives. In fairness, many of the risks of a competitive environment were also lacking. For example, when wire management and ownership were in the hands of one provider there was little reason for building owners to be concerned about issues of access, security, and control -- issues with considerable liability consequences to owners of real property. The telephone company was a benign and complementary part of the building infrastructure. Everything in the phone closet belonged to them and was essentially their responsibility.

As the Commission is well aware, this picture has changed radically. Consequently, the market is now generating its own ground rules in response to a new breed of competitive telecommunications providers. These providers are not weighted down by the responsibilities imposed on monopoly carriers, nor do they provide one-stop shopping for building owners seeking services (and wire management) for their buildings. The efforts of competitive access providers (CAPs) to reach untapped (but extremely lucrative markets) for telecommunications services has imposed new risks but also new opportunities for building owners. An owner's failure to work within the new rules of the marketplace results not in monetary fines or sanctions but in the far graver prospect of losing market share in a highly competitive industry.

Three or four years ago, many owners had no experience whatsoever with these "CAPs." By today, however, it is not uncommon for commercial office building owners in major metropolitan markets to find themselves facing some variation of the following scenario:

The owner of an office building is contacted during the same week by representatives from four different telecommunications service providers with news that each has just reached an agreement to provide telecom services (telephony, cable and wireless) to major ("anchor") tenants throughout the building. The building owner is advised that installation of the new systems on eleven floors must begin within the next few days and will require access to a variety of "common areas" throughout the building, including already crowded riser space.

Though the building owner has received short notice of the work order -- and, in fact, only now learned of the contracts between the four service providers and building tenants -- the real estate owner fails to comply with these requests (and to sustain much of the associated costs and liabilities associated with such building access) at his or her own economic peril.

While an initial reaction to this kind of scenario may be nostalgia for the days of monopoly providers, building owners are recognizing opportunities in the face of these new risks and challenges. In reaction to (or in preparation for) situations like these, building owners have felt considerable pressure to manage their building's infrastructure to allow for maximum access to their buildings while, at the same time, retaining traditional control over the terms of entry and use of their real estate asset.

From the perspective of the building industry, these new telecom service providers are a "new" form of tenant service only in the sense that they are different in kind from monopoly providers of the past. In fundamental respects they are comparable to other service companies seeking access to the tenant/customer base in which the owner has invested thousands, if not millions, of dollars.⁵ Like other merchants in a building complex, telecom companies seek access to markets within the building for a profit-driven enterprise. If the building is not or cannot be made a profit center for the telecom company, they will bring their services elsewhere. As is the case with such diverse services as restaurants, retailers, or even laundry services, they are attracted to a particular building only when there is a sizable, essentially captive customer base. These merchants recognize that but for the landowner's marketing and management success, this potential customer base would not have collected in large (and profitable) numbers in that building. Indeed, they might have sought office or residential space in a different urban center. The service providers -- including telecom providers -- are the witting beneficiaries of the owner's.

5/ Attached as Attachment 2 are selected charts excerpted from the February 5, 1996, issue of Local Competition Report. These charts illustrate the tremendous growth in the deployment of fiber optic cable by competitive access providers in the last two-to-three years. Of particular interest is the last chart, which shows that between 1994 and 1995 Teleport Communications Group increased the number of buildings it serves from 1,228 to 3,100, an increase of 250% in only one year. Clearly, building operators are not standing in the way of competition in telecommunications.

core business skills, including his or her ability to provide secure, well-managed office, retail or residential space.

2. Owners Act on Market Demand for Optimum Access.

Building owners are well aware of this market dynamic and they welcome the opportunities it presents. Indeed, owners and managers of America's real estate increasingly are focused on improving wire management within buildings and targeting investments in what is sometimes called "smart building" technology. The highly competitive office market demands no less of owners, who by nature are inclined to satisfy their tenants by providing ample access to the expansive array of telecommunications products and services needed to facilitate information flows. In acknowledgment of this investment prerequisite, a number of real estate owners have even devised systems on a building-specific basis that provide cabling (copper or fiber optic) that is accessible to any and all telecommunications providers; this approach is one of the most cost-effective means of ensuring that tenants have the widest possible access to the ever-proliferating number of service providers.

For example, the thirty-one-story, 400,000-square-foot office building located 55 Broad Street in lower Manhattan used to be a "hollow headstone for the Eighties" ("If you wire it, will they come?" *Metropolis*, October 1995 p. 35). It was vacant for more than five years following the bankruptcy of its anchor

tenant in the late 1980s. New York City's moribund downtown real estate market left little hope that the building could ever return to life again. ("Real Estate" *The New York Times*, Wednesday, January 10, 1996). That was before it was retrofitted by its owner (at a cost of more than fifteen million dollars) with fiber optic and high-speed copper wire as well as ISDN, T-1, and fractional T-1 lines to enable Internet, LAN and WAN connectivity; voice, video and data transmissions; and satellite accessibility. The building owner suggests that prospective tenants need only "plug in," and this message has been getting the attention of potential tenants as far away as the West Coast ("...high tech building a plug for downtown plan" *Crain's New York Business*, October 16-22, 1995).

Dubbing the building the New York Information Technology Center (ITC), the owner has highlighted a trend in technology investments by building owners aimed at attracting up and coming high tech companies. It is, in fact, part of a larger plan by the city to promote the lower Manhattan financial district as "silicon alley." ("Trendlines: Smart Buildings," *CIO*, January 1, 1996). Copies of articles demonstrating the high level of interest in this new breed of office building are attached hereto. Perhaps the most persuasive argument, that these kinds of investments will pay dividends, is the success the ITC's owner has had in renting space. According to the owner's Chief Operating Officer, six months earlier "you couldn't give this building away" ("'Silicon Alley' puts NYC atop cyber world",

Boston Globe, page 1). By January it was a "deal a week," and the owner expects the building to be fully leased by the end of the summer of 1996. (*The New York Times*, *supra*).

Building owners are developing showcase buildings for the high-end commercial market that will not only afford tenants access to the latest telecommunications technologies, but do so in an efficient, integrated manner. Other technologies that are being built into such buildings are videoconferencing facilities, speech recognition devices to enhance security, and software and electronics that allow tenants to reduce their costs through more efficient use of electrical and HVAC systems.

Of course, many other building owners prefer not to get into the business of owning or operating telecommunications facilities. But this does not mean they ignore the occupants' needs. The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and that no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms to the owner's business plan for the property. Even during the lease term, it is important for building owners and managers to keep their customers satisfied. Happy tenants are more likely to renew their leases and less likely to break them -- and building operators have a strong incentive to reduce the administrative costs and disruption that accompany high turnover rates.

Access to efficient telephone and cable systems is no less important to occupants of multi-unit residential buildings. Residents of coops, apartments buildings and condominiums not only demand these services for home entertainment; they demand these services as part of the trend toward telecommuting. Meeting these tenants needs is also a matter of financial survival for building owners and managers. Attachment 4 is a segment of a report funded by NMHC and NAA entitled "The Future of the Apartment Industry." This recent report notes the many changes that information technology is bringing to the apartment industry. For example, the report notes that some buildings already use cable television to allow residents to see who is buzzing them at the front door of the building. Buildings also offer internal medical or emergency alert lines so the front desk can take immediate action. The report also discusses the increase in the number of Americans who work at home and the implications this has for apartment owners. Ever larger numbers of apartment residents are operating fax machines and personal computers, requiring additional telecommunications capacity, even if they are not running businesses out of their apartments.

In sum, the industry is aware of the importance of telecommunications in the home and the office, and is already acting to address it out of its own self-interest. There is no evidence that mandating access or regulating the service packages provided by owners and operators of real property is necessary.

B. Commission Regulation is Undesirable Because it Would Interfere with Effective On-the-Spot Management.

Not only is government intervention unnecessary, since property owners are already taking steps to ensure that telecommunications service providers can serve their tenants and residents, but it is undesirable. Such intervention could have the unintended effect of interfering with effective, on-the-spot property management. Building owners and managers have a great many responsibilities that can only be met if their rights are preserved, including compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and service providers; and managing limited physical space. Needless regulation will not only harm our members' interests but those of tenants, residents, and the public at large.

1. Safety considerations: code compliance.

Building owners are the frontline in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For the Commission to limit their control would unfairly increase the industry's exposure to liability and would adversely affect public safety.

For example, building and fire codes require that certain elements of a building, including walls, floors, and shafts, provide specified levels of fire resistance based on a variety of

factors, including type of construction, occupancy classification, and building height and area. See Declaration of Lawrence G. Perry, AIA, Attachment 5 hereto. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairways) must meet higher fire resistance standards than other portions of a building. The required level of fire-resistance typically ranges between twenty minutes and four hours, depending on the specific application. These "fire resistance assemblies" must be tested and shown to be capable of resisting the passage of floor and smoke for the specified time.

Over the past ten years, penetrations of fire-resistance assemblies have been a matter of great concern, as such breaches have been shown to be a frequent contributor to the spreading of smoke and fire during incidents. The problem arises because fire-resistance assemblies are routinely penetrated by a wide variety of materials, such as pipes, conduits, cables, wires, and ducts. An entire industry has been built around the wide variety of approaches that must be used to maintain the required rating at a penetration. It is not a simple issue of just filling up the hole -- the level of fire resistance required, the type of materials of which the assembly is constructed, the specific size and type of material penetrating the assembly, and the size of the space between the penetrating item and the assembly are all factors in determining the appropriate fire-stopping method.

Mandating access to buildings, without adequate supervision and control by a building's owner or manager, would allow people unfamiliar with a building the opportunity to significantly compromise the integrity of fire-resistance-rated assemblies. Telecommunications service personnel are not trained to recognize the importance of such elements in a building's construction, much less to accurately assess the types of assemblies they are penetrating or assuming any responsibility as to code compliance. Thus, while perfectly competent to drill holes and run wire, they would be unable to determine the appropriate hourly rating of a particular wall, floor or shaft, and would not know how to properly fill any resulting holes or recognize those areas that they should not penetrate at all.

In fact, it is unlikely that a person punching holes and pulling cables would even consider patching the holes after they pulled their cables through. Many of these penetrations are made above suspended ceilings or in equipment rooms where there is little or no aesthetic concern.

Maintaining the integrity of fire-resistance-rated assemblies is already a challenge for building managers because of the large number of people and different types of service providers that may be working a building. Nevertheless, currently a building operator can restrict access to qualified companies and can seek recourse, by withholding payment

or denying future access, if the work is not done correctly. If building operators were forced to allow unlimited access to alternative service providers, or were prohibited from restricting such access, the level of building fire safety could be significantly jeopardized. It is essential that building owners and managers be able to continue to ensure in the future that those personnel performing work in a building do so in a manner that does not compromise other essential systems, including fire protection features; this has not been a generic problem in the past, where building owners and managers have retained control. We emphasize that these are not merely theoretical dangers -- we have received reports of actual breaches of firewalls from our members. The only way fire safety can be assured in the future is by allowing building owners and managers to determine who is permitted to perform work on their property.

The same applies to all other codes with which a building owner must comply. See, e.g., Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Commission

regulation in this area could thus have severe unintended consequences for the public safety.

While the Commission presently requires telephone companies to comply with local building and electrical codes, see Section 68.215(d)(4) of the rules, 47 C.F.R. § 68.215(d)(4), it could not practically enforce the codes, particularly where competing providers would have unrestricted access to common space.

2. Occupant security.

Building operators are also concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors; they may even commit illegal or dangerous acts themselves. Of course, these possibilities exist today, but at least building operators have the right to take whatever steps they consider warranted. The commenting associations' concern is that in requiring building operators to allow any service provider physical access to a building, the Commission may specifically grant -- or be interpreted as granting -- an uncontrolled right of access by service personnel.

It is simply impracticable for the Commission to develop any set of rules that will adequately address all the different

situations that arise every day in hundreds of thousands of buildings across the country. Consequently, any maintenance and installation activities must be conducted within the rules established by a building's manager, and the manager must have the ability to supervise those activities. Given the public's justifiable concerns about personal safety, building operators simply cannot allow service personnel to go anywhere they please without the operator's knowledge, and the Commission should respect that authority.

3. Effective coordination of occupants' needs.

A building owner must have control over the space occupied by telephone lines and facilities, especially in a multi-occupant building, because only the landlord can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. Although this has traditionally been more of an issue for commercial properties, such coordination may become increasingly important in the residential area as well. Large-scale changes in society -- everything from increased telecommuting to implementation of the new telecommunications law -- are leading to a proliferation of services, service providers, and residential telecommunications needs. With such changes, the role of the landlord or manager and the importance of preserving control over riser and conduit space is likely to grow.

Therefore, the commenting associations submit that the best approach to the issues raised in the NPRM is to allow building

owners to retain maximum flexibility over the control of inside wiring of all kinds. If a building operator chooses to retain complete ownership and control over its property -- including inside wiring -- it should have that right. Presumably, if this proves to be a good business practice, the market will reward building owners who decide to retain control over coordinating such issues.

On the other hand, other building operators may find that their tenants' needs require less hands-on management and control by the operator. There may be a market for buildings in which tenants and service providers work these issues out themselves. If there is, property owners will respond by letting the market grow on its own, simply because it is in their interests to serve their tenants as efficiently as possible.

Indeed, it is likely that there is demand for both approaches to managing a building. If so, any Commission action is likely to distort the market and interfere with the efficient operation of the real estate industry. Thus, to serve tenants' needs most effectively, building owners should be allowed to make their own decisions regarding the most efficient way to coordinate the activities of multiple service providers and tenants.

4. Effective management of property.

A building has a finite amount of physical space in which telecommunications facilities can be installed. Even if that space can be expanded, it cannot be expanded beyond certain limits, and it can certainly not be expanded without significant expense. Installation and maintenance of such facilities involves disruptions in the activities of tenants and residents and damage to the physical fabric of a building. Telecommunications service providers have little incentive to consider such factors because they will not be responsible for any ill effects.

As with the discussion of fire and building codes above, telecommunications service technicians are also unlikely to take adequate steps to correct all the damage they may cause in the course of their work. They are paid to provide telecommunications service, and as long as the tenant has that service they are likely to see their job as done. Since they do not work for the building operator, he has little control over their activities. If building management cannot take reasonable steps in that regard, building operators and tenants will suffer financial losses and increased disruption of their activities.

In one instance reported by a member, a cable operator installed an outlet at the request of a tenant but without notifying building management. To do so, the operator drilled a hole in newly-installed vinyl siding and strung the cable across the front of the building. Not only was this unsightly