

(affecting the marketability of the property), but the hole in the siding created a structural defect that allowed water to collect behind the siding. The building owner was able to resolve the matter under the terms of its carefully-negotiated agreement with the operator. If the Commission grants operators the right of access, however, building owners may find that they cannot rely on such agreements any longer.

5. Physical and electrical interference between competing providers.

Allowing a large number of competing providers access to a building raises the concern that service providers may damage the facilities of tenants and of other providers in the course of installation and maintenance. It also poses a significant threat to the quality of signals carried by wiring within the building. Competitive pressures may induce service providers to ignore shielding and signal leakage requirements, to the detriment of other service providers and tenants in the building, or they may accidentally cut or abrade wiring installed by other service providers or occupants.

The building operator is the only person with the incentive to protect the interests of all occupants in a building. Individual occupants are only concerned with the quality of their own service, and service providers are only concerned with the quality of service delivered to their own customers. The Commission cannot possibly police all of these issues

effectively. Consequently, building operators must retain a free hand to deal with service providers as they see fit. If one company consistently performs sloppy work that adversely affects others in the building, the building owner should have the right to prohibit that company from serving the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue because of matters over which it has little control.

In short, the associations' members are fully capable of meeting their obligations to their tenants and residents. As keen competitors in the marketplace, they will continue to make sure they have the services they need. It is unnecessary for the government to interject itself in this field, and any action by the government is likely to prove counterproductive.

**V. THE COMMISSION'S COMBINED RULES ON DEMARCATION POINTS AND RELATED ISSUES SHOULD REFLECT THE REALITIES OF THE OPERATION OF MULTI-TENANT BUILDINGS.**

As the joint commenters noted at the outset, the Commission has needlessly complicated the matter by tying the question of a common demarcation point so closely to the issue of access. Beyond the Commission's concerns about a cable company's abandonment of its wiring, or about what is tariffed or not tariffed or put on a telephone company's books or unbundled, the location of the demarcation point is not particularly significant. Nevertheless, the Commission is correct in believing that there are concerns of more immediate and practical

importance that do need to be addressed, not just regarding the demarcation point, but regarding the related issues raised in the NPRM as well.

**A. Demarcation Point.**

In considering questions relating to the demarcation point, the commenters urge the Commission to look at the matter from a different perspective than it has in the past or than it did in the NPRM. We agree that it would be logical and beneficial to have a single demarcation point for both telephone and cable wiring, even without technological convergence. But the commenters also believe that the Commission must consider not just technological issues but must also consider the nature of the property in question. Commercial and residential buildings have different telecommunications needs and will likely continue to do so. Furthermore, they are designed and constructed differently, serve different needs and functions, and conform to different ownership and use patterns.

Thus, the commenters suggest the following:

- o There should be a uniform demarcation point for all commercial properties, and a different demarcation point for residential properties.

- o In the case of commercial buildings, the demarcation point should be inside the premises, preferably at the telephone vault or frame room.
- o For condominiums, the demarcation point should be located outside each resident's premises.
- o For high- and mid-rise apartments, there should be a single demarcation point located outside the building if there is no on-site management, or inside the building if there is on-site management. Building owners should have the right to provide other arrangements, if they determine it is in the best interests of their tenants.
- o Garden apartments and other apartment complexes present a different set of problems than urban high- and mid-rise buildings. Therefore, for apartment complexes the demarcation point should be outside the building, at the complex owner's property line.
- o Mixed-use buildings illustrate the difficulty of this problem; there should probably be at least two demarcation points, one inside the commercial portion of the building, and the other for the

residential portion. If the residential portion is a condominium, then each unit should have its own demarcation point. If the residential portion is an apartment building, however, it may be possible to have a single demarcation point for the entire building, but this depends on the design of the building.

Commercial buildings generally are owned by a single entity and serve a number of different tenants, each of which occupies a different proportion of the building's floor space and each of which has its own peculiar telecommunications needs. Commercial tenants generally retain ownership and control over wiring within their demised premises, subject to the terms of their lease. And commercial buildings are usually designed to permit relatively fast and inexpensive remodeling and rearranging of interior space as tenant's needs change or new tenants move in. Under these circumstances, it would not be practical to establish a separate demarcation point for each tenant. Consequently, there must be a single demarcation point for the building, and it should be located inside the premises, at a location designed for that purpose, such as a telephone vault or frame room.

Residential buildings, however, are very different. Although apartment buildings and cooperatives have a single owner, condominiums do not. Furthermore, the internal structure of a residential building is relatively fixed and not subject to

change. For those reasons, it is more practical to establish demarcation points within a building than it is in the commercial context. This is certainly the preferred model for a condominium, in which each unit owner holds title to his premises.

In the case of an apartment building, however, the matter is more complicated. There the building owner holds title to the entire building. In addition, apartment buildings may or may not have on-site management. Consequently, the logical demarcation point in the apartment context may vary. In the case of a large high- or mid-rise building with on-site management, the demarcation point should be inside the building, as in the commercial context. If there is no on-site management, the owner's need to maintain control over the property would generally dictate that the demarcation point be on the outside of the building.

Garden apartments and other apartment complexes present another set of issues. Because they consist of multiple buildings set on, in many cases, several acres of land, the property owner is responsible for much more than just what happens inside the building. The location of wires crossing the property raises safety and aesthetic concerns just as much as the location of wires inside the building. The need to retain control over the land surrounding the buildings as well as the

buildings themselves thus dictates that the demarcation point be set at the property line, and not at a building.

Nevertheless, a building owner may find that its tenants are better-served if they have greater control over their own wiring, as in the case of commercial tenants. If so, the building owner should be permitted to allow the establishment of individual demarcation points outside each individual unit. Cooperatives are particularly likely to fall into this category, but many apartment buildings may as well.

In short, the demarcation point should be set in a way that respects the ownership rights of the property owner and offers maximum flexibility for the efficient and effective management of the property.

Finally, in setting the demarcation point for cable television cabling, the Commission should take due account of the signal leakage limitations of Sections 76.605(a)(13) and 76.610-.617 of its rules, 47 C.F.R. §§ 76.605(a)(13), 76.610-.617. This concern was explicitly recognized in H.Rpt.102-628 to accompany H.R. 4850 at 118-19 (1992) in connection with Section 624(i) of the 1992 Cable Act, 47 U.S.C. § 544(i).

#### **B. No Commission Action Is Required Regarding Connections.**

The NFRM asks whether the Commission should issue technical standards for connections. The commenters believe that government action in this regard is unnecessary. As the

Commission noted at paragraph 29 of the NPRM, the telecommunications industry has already established standards that are widely followed, and the commenters believe that it is in the interests of the companies and their customers that they continue to be followed.

### C. Regulation of Wiring.

The NPRM requests comment on whether the convergence of cable and telephone technologies means that the current approaches to regulating inside wiring for the two technologies should be revised to reflect that convergence. This is largely a technical issue, but it also raises several nontechnical concerns.

Technically, the physical characteristics of wiring are changing so rapidly that any kind of specification by the Commission that excluded new or more economical types of wiring or wireless connection would stand in the way of natural evolution of the technology. Anyone who is familiar with the variation of wiring for local area networks (LANs) will recognize that there is no "one size that fits all." Section 7 of the Act provides that anyone opposing a variation on existing technology has "the burden to demonstrate that such proposal is consistent with the public interest." Section 7(a), 47 U.S.C. § 157(a).

From a non-technical standpoint, the industry is concerned that any such rules might impose new obligations on building

owners by requiring them to take over ownership and control of inside wiring. Some building owners would welcome such an opportunity, but others have no desire to enter into a new line of business. Building owners will make these decisions on a case-by-case basis as they consider the needs of their tenants and the most efficient ways of accommodating those needs. As discussed in the following section, ownership of inside wiring should be a matter of private contract and state property law.

The commenters are also concerned that the Commission might impose a huge new expense on telecommunications service providers and building owners by requiring retrofitting of existing buildings. The commenters believe such matters should be left to the ongoing discussions regarding amendments to the Model Building Code. Except where safety is involved, amendments to the building and electrical codes are seldom retroactive.

Furthermore, as discussed earlier in the context of the demarcation point, there are substantial differences between residential and commercial buildings. While it may make sense to account for the convergence in technologies, it probably does not make sense to adopt uniform rules for all kinds of property.

Finally, the commenters note that the NPRM treats residential and commercial buildings as distinct entities. Mixed-use buildings, however, are becoming increasingly common and must be considered in any regulatory scheme.

**D. Customer Access to Wiring.**

The NPRM asks a number of questions regarding who should own inside wiring, who should have the right to acquire it, and under what circumstances. As discussed above in other contests in these comments, the answer to those questions lies in the ownership of the property over which the wires run. Commenters have no objection in principle to permitting a customer to install or maintain its own wiring or buy the wiring from a service provider for use in the demised premises, provided that the rights of the owner of the building and fellow-occupants are taken into account.

Under no circumstances, however, should a tenant's rights in wiring extend beyond the limits of the demised premises, and a tenant must be precluded from interfering with wiring installed to serve other parties that happens to cross the tenant's premises. In addition, the landlord must retain the right to obtain access to the wiring and control the type and placement of such wiring. This is essential to address the safety and management concerns discussed earlier; otherwise, for example, the landlord would be unable to correct a fire code violation for improper installation of a cable, even though the landlord could be found liable.

Furthermore, the owner of the premises should have by

contract a superseding right to acquire or install any wiring. In any case, a tenant's right to own, acquire or install wiring should be governed by state property law and the terms of the tenant's lease.

### Conclusion

The Commission should recognize that it lacks jurisdiction to order the owners of multi-unit buildings to allow telecommunications providers to emplace their facilities on private property and that, in any event, there are sound and persuasive reasons why the Commission should not attempt to regulate access to multi-tenant buildings.

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues in its NPRM, (ii) abandon any attempt to deal with access to private property, and (iii) adopt rules for the specific demarcation point and other wiring issues raised by the NPRM that reflect the realities of the diverse physical and market characteristics of multi-tenant

buildings.

Respectfully submitted,



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March 18, 1996

**Attachments:**

1. Anti-Deficiency Act, 31 U.S.C. § 1341
2. Excerpts from Local Competition Report (Feb. 5, 1996).
3. Articles on commercial real estate from CIO, Crain's New York Business, Forbes ASAP, Metropolis, New York, and The New York Times.
4. "The Future of the Apartment Industry"
5. Declaration of Lawrence G. Perry, AIA

WAF2143233.31107375-00001

**ATTACHMENT 2**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Telecommunications Services )  
Inside Wiring )  
 )  
Customer Premises Equipment )

CS Docket No. 95-184

JOINT REPLY COMMENTS OF  
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL  
NATIONAL REALTY COMMITTEE  
NATIONAL MULTI HOUSING COUNCIL  
NATIONAL APARTMENT ASSOCIATION  
INSTITUTE OF REAL ESTATE MANAGEMENT  
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Summary

The overwhelming response of the real estate industry to the Commission's Notice of Proposed Rulemaking in this docket demonstrates the depth of the industry's concern. The prospect of Commission interference in the ability of building operators to effectively manage their properties is of enormous concern to the entire industry and a factor that the Commission should take into account.

The Commission should leave building access to the marketplace rather than attempting to impose one-size-fits-all rules. The commenters, like the industry in general, do not believe that Commission regulation that might affect the ability of operators of commercial and residential buildings to control access to their properties is necessary. The real estate

business is extremely competitive, and landlords have very strong incentives to meet their tenants' needs. Over the long run, the building operators that do so will succeed, and those that do not will fail, because the real estate industry is not a monopoly.

The claims of "discrimination" and "gatekeeping" by telecommunications service providers reflect a lack of understanding of the influence tenants have over their landlords, and the costs to building operators of supervising the activities of service providers in their buildings. Building operators have no incentive to exclude service providers, so long as the additional costs of their presence in the building are met, and they provide services of acceptable quality.

Moreover, the Commission has no authority over building operators that would permit it to impose a right of access. The vast majority of building operators are not in the telecommunications business, and even those that are protected from physical invasion of their property by the Fifth Amendment. See Bell Atlantic v. FCC, 306 U.S. App. D.C., 333, 339, 24 F.3d 1441, 1447 (1994).

In addition, the dominant service providers are large businesses and fully capable of negotiating with their counterparts in the real estate industry. While some of these providers may desire that the Commission grant them certain advantages, the Commission should recognize that what these service providers are requesting is the distortion of the free market.

To the extent the Commission has power to adopt regulations, the Commission should reflect the distinctions between various types of commercial and residential properties that require different treatment.

Finally, the Commission's power to establish any demarcation point is limited. The Commission's authority to prescribe demarcation points derives from its statutory authority to establish the rate base and regulate carrier services and does not include the right to preempt state property law. The Commission may define the demarcation point for these regulatory purposes, but such a definition neither implies nor requires that a service provider have the absolute right to physical access to the property. Congress did not withdraw from building operators their authority to control access to and the use of their property. Consequently, although there may be a general presumption that the demarcation point is at the property line, property owners retain the discretion to enter into agreements with service providers granting them access and perhaps establishing different demarcation points for different purposes. Under no circumstances should a tenant or resident have any right of access or ownership interest in wiring lying in the property of others outside the tenant's or resident's demised premises.

In summary, the comments of others in this docket fully support the proposition that Commission regulation of access to multi-unit buildings is unnecessary.

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Before the  
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INSTITUTE OF REAL ESTATE MANAGEMENT  
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Introduction

The real estate industry strongly supports the positions taken by the joint commenters in our initial comments. We note that before the comment period closed on March 18, 1996, the Commission had received comments from approximately 220 firms and associations connected with the real estate industry, all fundamentally supporting the positions taken by the joint commenters. When comments received after the deadline are included, 80% of the approximately 339 submissions responding to the January 26, 1996, Notice of Proposed Rulemaking (the "NPRM") were filed by owners and managers of commercial and residential buildings. The prospect of the Commission's intervening in the ownership and management of real property obviously concerns the industry enormously. The Commission should consider the

magnitude of the real estate industry's opposition to any Commission intrusion into the real estate market.

**I. THE COMPETITIVE CHARACTERISTICS OF THE REAL ESTATE MARKET OBVIATE THE NEED FOR COMMISSION REGULATION OF ACCESS TO PRIVATE PROPERTY.**

As we stated in our initial comments, the real estate market in the United States is free and competitive. The Commission has no authority to regulate the real estate industry, and it should not attempt to do so in a misguided and ill-conceived attempt to give the telecommunications industry leverage in its relationship with the real estate industry. Telecommunications service providers, like building operators, are managed by capable and rational business executives, who can protect their own interests. The Commission should not distort an otherwise free marketplace for no reason.

**A. Marketplace Dynamics Will Foster Access to Property.**

Commercial tenants and apartment residents have options, and they frequently exercise them. Building owners that respond to the market will succeed, while those that do not will fail. Access to telecommunications services is one of the property features that are factored into the decisions of tenants and residents, and landlords accordingly take the issue of access into consideration as well.

William F. Tynan, Vice President of LCOR Incorporated, an owner and developer of commercial and residential property, put it this way in responding to the NPRM: "The real estate industry is fragmented and very competitive. If a particular wiring

configuration is demonstrably more beneficial to a meaningful number of tenants, property owners will offer it for competitive reasons."

Indeed, Commission regulation would almost certainly be counterproductive and in any case could not improve on the actions of the free market that currently exists. Market forces, on the other hand, will encourage property owners to allow service providers access to their tenants. Allowing building owners to freely contract with service providers is the only way to assure competition. Comments of RTE Group, Inc., at 4.

Furthermore, market negotiations are the best way to resolve the issues associated with access to private property. The simple fact is that such questions as space limitations cannot be adequately handled through regulation, but the market can and does allocate scarce resources very efficiently. See Comments of the International Council of Shopping Centers at 6-7. For example, the shared tenant services industry responds to the problems of space allocation and management of safety, security, and maintenance while still offering building tenants competitive choices. See Comments of National Private Telephone Association.

A leading telecommunications service provider, Ameritech, has acknowledged not only that forced access is not necessary, but that the market will ensure that access is available:

Where there is no statutory right to access private property, cable operators and telephone companies alike will be required to negotiate access rights with property owners. Those owners will have no incentive not to grant reasonable access rights if the company seeking the access provides high quality, low cost services to which the owners, or

their tenants, want to subscribe. Therefore, the 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,

Comments of Ameritech at 20.

MFS Communications Company, Inc. ("MFS"), however, claims that building operators unfairly discriminate among service providers and that the Commission should act to prevent this. Comments of MFS at 3-12. As we noted in our initial comments, however, MFS and other competitive access providers ("CAPS") have no grounds for complaint. Over the last five years, the CAP industry has grown enormously, because tenants have requested that landlords allow them access to the services provided by the CAPs, and landlords have complied. Indeed, there would be no CAP industry today if building owners were intent on discriminating and erecting barriers to entry. The CAP industry is a perfect illustration of how the real estate industry responds to market demands by tenants, without any Commission regulation.

MFS also asserts that building operators should not be allowed to charge service providers different fees for access to a building, but should charge a pro rata fee based on the number of customers served in the building. Once again, MFS calls for the Commission to distort the free market. MFS is perfectly capable of negotiating access terms with building owners. Building owners have no incentive to charge so called "arbitrary"

or "discriminatory" fees in the face of tenant demands for service from MFS or any other provider.

In addition, landlords must be free to negotiate access fees that compensate them fairly for the use of their property and the associated management costs. Otherwise, a landlord would have to give access to every service provider that requested it, regardless of the increased costs of dealing with the additional service providers. For example, a building operator might have five service providers in a building, four of whom might be serving only a single tenant, and a fifth serving the remaining 20 tenants in the building. Under MFS's plan, the landlord would quintuple the number of service personnel it has to deal with, while receiving exactly the same amount of compensation as it did with one service provider in the building.

Thus, the Commission need not concern itself with the claimed "discrimination." It either does not exist or is simply a rational response to market conditions. The Commission cannot possibly handle the matter any more efficiently than the market can.

**B. The Commission Has No Authority to Regulate the Real Estate Industry.**

The Commission has the authority to regulate the activities of telecommunications service providers and other entities that are active in the field of telecommunications. It may even regulate the manner in which telecommunications service providers enter other areas -- but it does not have the authority to regulate entities whose activities fall outside its jurisdiction

over telecommunications. See GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In other words, the Commission may not regulate the real estate industry and may only regulate building operators to the extent that they subject themselves to its jurisdiction by providing telecommunications services or facilities. And even that authority is limited. See Bell Atlantic v. FCC, 306 U.S. App. D.C., 333, 24 F.3d 1441, 1447 (1994).

Accordingly, the comments of MFS notwithstanding, the Commission cannot order building operators to allow service providers access to their risers and conduits, or to any other part of their property.<sup>1</sup> Indeed, any such requirement would constitute a taking under the Fifth Amendment, as discussed in our initial comments herein. Op. cit. at 5-8.

MFS also urges the Commission to require property owners who restrict access to inside wiring to the minimum point of entry to provide access to that point so that the traffic of more than one service provider may be carried over the same set of internal wiring. Such access would be granted to any service provider

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<sup>1</sup> The Commission may have authority over building operators that do provide telecommunications services to their tenants or residents. In such cases, however, the fact remains that tenants choose buildings because of the amenities and services offered by the building owner. Were the Commission to prohibit building owners from providing such services by requiring them to provide access to all comers, the Commission would actually be reducing the choices available to consumers, when looking at the market as a whole. See attached advertising supplement describing telecommunications services available to residents of certain properties operated by Charles E. Smith Residential Realty. Washington Post, April 3, 1996.

that requests it. Comments of MFS at 5. DIRECTV, Inc. makes the same argument with respect to property owners who own inside wiring. Comments of DIRECTV at 2.

Here again, the commenters are proposing a right of access to the building owner's property. Access to a telephone vault in the basement still imposes costs on the building owner. Such costs may not be as great as those imposed by a right of access to risers and conduits throughout the building, but they are finite. And any physical occupation of property by a service provider's facilities that is mandated by the Commission -- however small -- remains a taking.

For the same reasons, the Commission has no authority to adopt the equivalent of a state mandatory access statute, as suggested by the New Jersey Board of Public Utilities and Guam Cable TV.

MFS likens exclusive access arrangements to easements and asserts that they are preempted by Section 253 of the Telecommunications Act of 1996. Comments of MFS at 4. This is an incorrect interpretation of the law. The 1996 Act prohibits only barriers to entry erected by "State or local statute or regulation, or other State or local legal requirement . . . ." This language was clearly intended to apply to local laws, ordinances and regulations adopted by State and local governments, and not private agreements. Even if a grant of access were an easement under state law (a matter which probably