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

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In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)
Interconnection between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 96-98

CC Docket No. 95-185

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WINSTAR COMMUNICATIONS, INC.
OPPOSITION TO PETITIONS FOR RECONSIDERATION

Timothy R. Graham
Robert G. Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Counsel for WinStar Communications, Inc.

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SUMMARY OF ARGUMENT

Parties in this proceeding have argued (i) that rooftops and related riser conduit are not “rights of way” which competitive local exchange carriers such as WinStar are entitled to access under Section 224, and (ii) that incumbent LECs and utilities are not obligated under the Telecommunications Act of 1996 to provide access to rights of way to carriers who happen to employ wireless transmission facilities.

Both positions are wrong, and are contrary to the letter and spirit of the Telecommunications Act. If adopted, these positions would egregiously discriminate against carriers seeking to provide competitive local exchange service through innovative wireless technologies in violation of the Act and the Commission’s interconnection rules. These arguments demonstrate, more ably than WinStar ever could, the degree to which incumbent LECs and utilities will seek to avoid their obligation under the Telecommunications Act to make rights of way available to new wireless local exchange carriers such as WinStar. To rectify such obstructions, the Commission should clearly instruct parties that wireless carriers such as WinStar are entitled to access rooftops and related riser conduit in order to place attachments necessary to further their local exchange distribution networks.

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**WINSTAR COMMUNICATIONS, INC.
OPPOSITION TO PETITIONS FOR RECONSIDERATION**

WinStar Communications, Inc. ("WinStar"), a provider of competitive dedicated and switched local exchange services, by its undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 CFR § 1.429(f), hereby files this opposition to certain petitions seeking reconsideration of aspects of the Commission's *First Report and Order* in the above-captioned dockets, FCC 96-325, released August 8, 1996 (the "Order").^{1/}

^{1/} WinStar provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 gigahertz ("GHz") band, a configuration referred to by WinStar as Wireless FiberSM because of its ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions. WinStar's typical installation of 38 GHz equipment has a highly discrete profile. A WinStar "installation" normally is no more than approximately four feet in height, to which several dishes, each of which is approximately the size of a medium pizza, can be attached. No separate power source is needed. This installation is considerably more compact and less intrusive than the typical microwave facilities employed by incumbent LECs and other utilities as part of their network architectures.

I. Introduction and Summary

On September 30, 1996, WinStar filed in these proceedings a petition seeking clarification or reconsideration of a single aspect of the Commission's *Order* ("WinStar Reconsideration Petition"). Specifically, WinStar requested that the Commission make clear WinStar's right, where it operates as a facilities-based local exchange carrier, to locate its 38 GHz microwave equipment on the roof of incumbent LEC and utility premises and to utilize related riser conduit owned or controlled by the incumbent LEC or utility in order to provide competitive local exchange service. This is necessary because, unlike fiber-optic carriers who string fiber in underground conduits and ducts or on pole attachments, a carrier such as WinStar, which employs innovative wireless technology, necessarily needs to place microwave transmission facilities on roofs and utilize related rights of way, owned or controlled by the LEC or utility, both for purposes of collocation and for establishment of its distribution network. Accordingly, access to roofs and related riser is necessary to accomplish interconnection, to further its distribution network and, in some instances, to reach end user customers.

In short, for a wireless local exchange carrier such as WinStar, roofs and related riser conduit are, by definition, the critical right of way. Traditional rights of way relied upon by fiber-based carriers (such as underground conduits) are meaningless to WinStar because the very advantage of the advanced wireless technology employed by WinStar is that it avoids such constraints. This is exceedingly important as carriers seek to secure

more advanced methods of meeting customer need.^{2/} It is not enough to say simply (as parties discussed below do) that the rights of way traditionally employed in the pre-Telecommunications Act era are sufficient in the post-Act era.

In its Reconsideration Petition, WinStar agreed with the Commission that “there are too many variables to permit” anything other than a case-by-case approach to resolving rights of way disputes. See *Order* at para. 1143. However, it has been WinStar’s experience that, without the benefit of additional clarification by the Commission indicating that access to roofs and riser is mandated absent threshold capacity, safety, reliability, or engineering concerns,^{3/} there will be no basis for case-specific adjudications.

In response to this straightforward request, several parties have argued: (i) that roof and riser conduit are not “rights of way” (regardless of the use to which they are put by the controlling utility); and (ii) that incumbent LECs and utilities are not obligated under the Telecommunications Act of 1996 (the “Telecommunications Act” or “Act”) to provide access to rights of way to carriers who happen to employ wireless transmission facilities. Not only

^{2/} Even incumbent local exchange carriers are looking to wireless local exchange carriers such as WinStar to assist in meeting customer demand. For example, Pacific Bell has recently purchased considerable wireless local loop transmission capacity from WinStar in order to meet the need for its local exchange service. See Gautam Naik, *PacTel to Buy Wireless Links From WinStar*, *Wall Street Journal*, Oct. 28, 1996, at B4 (“wireless links will help [PacTel] reach customers in areas of California where it was previously barred from offering local phone service.... [Pacific Bell] is also counting on the extra capacity to meet surging demand for Internet connections that its current traditional phone network can’t meet”).

^{3/} The Commission has concluded that the question of access should be decided based upon these factors, at least with regard to utilities. See *Order* at para. 1186.

are both positions contrary to the Congress' fundamental intention to "provide for a pro-competitive, de-regulatory national policy of framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ,"^{4/} but, if adopted, they would unreasonably discriminate in favor of carriers that employ fiber-optic transmission facilities in clear contravention of the Act.^{5/}

For the reasons discussed below, the Commission must reject these arguments and clearly enunciate to incumbent LECs and utilities that they are obliged to provide non-discriminatory access to all rights of way (including, where appropriate, roofs and riser conduit that they own or control) to carriers such as WinStar that employ wireless transmission facilities. The pleadings filed recently in this proceeding demonstrate more ably than WinStar ever could that, absent such clear instruction from the Commission, parties will seek to avoid their obligation under the Act to make rights of way available to new wireless local exchange competitors such as WinStar.

^{4/} H. R. Rep No. 104-458 at 113 (1996).

^{5/} Indeed, many of the commenting parties have built and employed their own fiber loops. Additionally, LECs and utilities routinely utilize their rooftops and riser conduit facilities to operate sophisticated mobile and fixed wireless networks. Often, those wireless networks interconnect with fiber optic facilities.

II. The Commission Should Provide Clear Guidance That Wireless Local Exchange Carriers Are Entitled to Access Roofs and Related Riser Conduit Owned or Controlled by Utilities, Including Incumbent LECs

In its September 30, 1996 Petition for Reconsideration or Clarification (“Duquesne Petition”), Duquesne Light Company correctly notes that telecommunications carriers are seeking to employ “increasingly sophisticated and innovative attachments,” examples of which are “fiber optic cable wrapped around existing coaxial strand, in-line amplifiers and other equipment installed mid-span between distribution poles, wireless antennae, microwave dishes, and so forth.” Duquesne Petition at 17. Duquesne does not oppose these attachments and, at least insofar as pole attachments (upon which WinStar does not rely) are concerned, Duquesne appears confident that technical and reliability issues can be resolved.^{6/} Yet, less than a month later, Duquesne filed a pleading in which it incredibly concludes just the opposite -- that the potential placement of an “innovative” microwave

^{6/} To the extent such attachments constitute a “problem,” Duquesne concluded that:

[t]his problem can be alleviated by the Commission clarifying that the number of pole attachments a given entity makes is not necessarily determined by the number of attachments made to the pole, but by determining the equivalent burden (in terms of a single wire attachment) supported by the pole. Alternatively, the Commission could defer this issue to the forthcoming Notice of Proposed Rulemaking on pole attachment rates, by indexing the presumptive space taken on the pole (currently deemed to be one foot) by a factor calculated with respect to weight and wind loads.

Duquesne Petition at 18.

antennae or microwave dish on a utility's rooftops would, without regard to the relevant safety, capacity, and reliability factors, violate the Telecommunications Act.⁷¹

Specifically, Duquesne indicates (wrongly) that the Commission has concluded that the terms "pole, duct, conduit or right of way" in Section 224(f)(1) do not, in any instance, include the roofs of utility buildings. Duquesne Opposition at 3. Duquesne also argues that, in any case, the "rooftop" of a utility building is "most definitely" not a right of way to which wireless carriers such as WinStar are entitled to access. *Id* at 5.

Duquesne is wrong on both counts. First, WinStar is unaware of any legal support for the proposition that roofs are not rights of way (beyond the dicta quoted below which is the subject of WinStar's Reconsideration Petition), and Duquesne's Petition fails to provide any support other than to quote the legal conclusion of another utility's comments in this proceeding. As WinStar noted in its Reconsideration Petition, access to roofs and related riser is, by definition, access to the critical right of way for local exchange carriers such as WinStar that employ 38 GHz or other wireless technology to provide local exchange services.

⁷¹ Opposition to WinStar Communications, Inc. Petition for Clarification or Reconsideration, Duquesne Light Company, CC Docket 96-98 (October 23, 1996) ("Duquesne Opposition"). To paraphrase Gertrude Stein, under the Telecommunications Act, a right of way is a right of way is a right of way (regardless of whether it is currently being used), and telecommunications carriers are entitled to utilize rights of way for the purposes of developing a competitive local exchange network. Roofs and utility poles are both rights of way, and Duquesne fails to explain why problems associated with wireless attachments on utility poles (relatively insubstantial structures) can be "alleviated," but that problems associated with wireless attachments on roofs (relatively substantial structures) cannot.

Whether utility roofs are rights of way within the meaning of the Telecommunications Act is simple to demonstrate. Both incumbent LECs and utilities maintain extensive microwave and wireline networks which are now being used for telecommunications purposes.^{8/} They are free to site these microwave facilities upon their roofs. In this instance, the roof is clearly a right of way and a part of the incumbent LEC's or utility's "distribution network." However, even where the LEC or utility does not utilize the roof (perhaps because it employs fiber), the roof is no less a right of way. This is analogous to a situation where a LEC or utility owns or controls conduit, but, for practical reasons, is not utilizing that conduit at the moment. This does not make the conduit any less a right of way. Thus, roofs owned or controlled by a LEC or utility may or may not be used at a given moment; however, whether or not a LEC or utility currently uses the roof as part of its distribution network is immaterial because it is a potential part of its distribution network. Moreover, even the most established incumbent LECs are rethinking and revising their methods of provisioning local exchange service, as PacBell's purchase of WinStar's wireless loops attests. As a result of the Telecommunications Act, carriers are in a constant state of evolution and are rethinking their own utilization of technology. Adoption of Duquesne's presumption -- that roofs and related conduit are not rights of way -- would

^{8/} As the Commission recognized in its *Order*, "[w]e note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and incentive to use its control over distribution facilities to its own competitive advantage." *Order* at 1150.

unreasonably restrict similar evolution by competitive local exchange carriers such as WinStar in violation of the Telecommunications Act.^{9/}

Further, Section 224 very clearly does not make prior use of a right of way (either by the utility or by a third party) a condition on whether or not a new entrant such as WinStar may utilize the right of way.^{10/} That would void the intent of Section 224 -- to open up rights of way to creative new uses and development. Moreover, it would be contrary to the Commission's conclusion that Section 224 obligates a utility to exercise its eminent domain authority to expand an existing right of way over private property in order to accommodate a request for access. See *Order* at para. 1181. Of course, as WinStar noted above, it recognizes that there may be discrete instances where, for safety, reliability, or other reasons, it would be inappropriate to site an attachment on a utility or other roof; however, that would be the exception, not the rule, and the party opposing use

^{9/} It is relevant to note that Section 704 of the Telecommunications Act and the FCC (through "FCC Wireless Facilities Siting Policies: Fact Sheet #23," released September 17, 1996) clearly recognizes the importance of all property (including, as a subset, rooftops) in the provision of wireless services: "Section 704 of the 1996 mandates that the federal government make available property, rights-of-way, and easements under its control for the placement of new spectrum-based telecommunications services."

^{10/} Duquesne's Petition illustrates a presumption that wireless carriers are not entitled to access a right of way unless and until they prove that the access they seek is the same or similar to that previously sought by fiber-based carriers. As WinStar noted in its Reconsideration Petition (at 8, n 5), whether any specific utility or incumbent LEC has chosen to utilize microwave transmission media is irrelevant to the question of whether WinStar is entitled, under the Telecommunications Act, to access roofs and riser conduit. Accordingly, the Commission should clarify that WinStar's right to access such rights of way is not, in any sense, dependent upon whether fiber-optic based carriers have previously sought to utilize the same or similar rights of way.

of the right of way must bear the burden of demonstrating why use of the right of way is inappropriate. See *Order* at para. 1150.

Second, Duquesne is wrong that the Commission has concluded that telecommunications carriers are not entitled to access to utility roofs. As WinStar recognized in its Reconsideration Petition (at 5), the Commission concluded that Section 224(f) (1) *likely* does not mandate

that utility make space available on the roof of its corporate offices for installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

Order at para. 1184 (footnotes omitted). This dicta was the subject of WinStar's request for reconsideration.

As WinStar explains in this filing, it is not seeking "access to every piece of equipment or real property owned or controlled by the utility." Simply put, it is seeking access to legitimate rights of way that will be effective in enabling wireless local exchange carriers to expand their local exchange distribution networks. This is no more nor less than the Act requires. Grant of Duquesne's Petition would exempt incumbent LECs and utilities from having to provide access to roofs and riser without reference to: (i) whether the roof is a right of way under Section 224; (ii) relevant safety, reliability, or capacity factors; (iii) whether the roof is being used by the incumbent LEC or utility for telecommunications

services; (iv) whether the incumbent LEC or utility has previously provided access to the roof to another carrier; or (v) whether the roof could reasonably be interpreted to be “piggybacking” along a distribution network owned or controlled by the incumbent LEC or utility. Thus, the exemption would be unprincipled, would be contrary to the Telecommunications Act, and would discriminate against wireless carriers such as WinStar in favor of traditional fiber-based carriers that traditionally utilize conduit and pole attachments to develop local exchange distribution networks.^{11/} In short, in violation of the Act, grant of Duquesne’s Petition would enable utilities to use their “control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.” *Order* at para. 1123.

III. The Commission Must Reject Arguments That Would Limit the Definition of Reasonable Attachments

Several parties have mounted headlong attacks on the ability of wireless carriers to attach wireless facilities. The Commission should reject these spurious claims out of hand. In its *Order*, the Commission correctly recognized that the Telecommunications Act does not describe the “specific types of telecommunications or cable equipment that may

^{11/} See also *Order* at para. 1170 (prohibiting an incumbent LEC from reserving space or control of a right of way for its own future provision of local exchange service to the detriment of a would-be entrant and would favor the future needs of the incumbent over the needs of a new entrant, in violation of Section 224(f)(1) which “prohibits such discrimination”). WinStar recognizes that this specific prohibition does not apply where an electric utility is reserving space solely for electric service (*see id.*).

be attached when access to utility facilities is mandated,” and concluded that the question of access will be dependent upon a number of issues, including size and weight of attaching equipment and such factors as “capacity, safety, reliability and engineering principles.” See *Order* at para. 1186.

Consolidated argues (without support of any kind) that “the Commission misunderstands the intent of the law,” and that the only equipment permitted to be attached to utility facilities are cables.” Consolidated Petition at 12. Similarly, Florida Power and Light (“FP&L”) erroneously concludes that “utility poles, ducts, conduits or rights of way are unsuited for placement of wireless equipment,”^{12/} and further argues that the Commission should find that utilities are not obligated to provide access to poles, ducts, conduits or rights of way to carriers that employ wireless transmission equipment, because wireless equipment “has not been considered a ‘pole attachment’” and because Section 224(a) defines “utility” to exclude carriers that utilize wireless equipment.^{13/}

These carriers are simply wrong on the law (neither is able to cite any support for the position that utilities should be able to discriminate against wireless carriers by refusing attachments), and their comments misapprehend the basic goals and intentions of the

^{12/} Florida Power & Light, Petition for Reconsideration and/or Clarification of the First Report and Order, CC Docket 96-98 (September 30, 1996) at 24-25. The FP&L conclusion is extremely surprising considering the utility industry’s heavy usage of poles, ducts, conduits, and rights of way for their own wireless equipment and operations.

^{13/} The Commission should note that FP&L’s argument is in apparent conflict with Duquesne’s position that problems associated with wireless attachments can be resolved. See footnote 6, *supra*.

Telecommunications Act. As it stated in its Reconsideration Petition (at 6), WinStar does not challenge the Commission's conclusion that the reasonableness of conditions limiting access to rights of way should be considered on a case-by-case basis. However, Section 224(f)(1) is entirely clear: utilities must grant access to any pole duct, conduit, or right of way that is "owned or controlled by it." There is no basis in law or policy for excluding carriers simply because they employ wireless transmission equipment. This has been WinStar's point all along: as Consolidated's and FP&L's comments demonstrate, there is an acute need for the Commission to provide additional instruction to incumbent LECs and utilities that WinStar and other similarly situated wireless local exchange carriers are entitled to access all rights of way, including roofs and related riser cable, absent (in the utilities' case) adequate demonstration of safety, reliability, or capacity limitations.^{14/}

^{14/} FP&L makes several curious legal claims. For example, it asserts (correctly) that, in Section 224(a)(1), Congress defined "utility" as "any person who is a local exchange carrier or an electric, gas, water steam, or other public utility, and who owns or controls poles, ducts, conduits or other rights of way used, in whole or in part, for any *wire communications* . . . ," and then claims that carriers that employ wireless transmission facilities are not "utilities" entitled to access rights of way.

This is a nonsensical claim. Section 224(a)(1) defines who must provide access to rights of way, not who can claim access to rights of way. Section 224(f)(1) provides that any "utility" must provide access to rights of way to any "telecommunications carrier." "Telecommunications carrier" is defined broadly in Section 3(44) to include "any provider of telecommunications services, except that such term does not include aggregators of telecommunications service." Wireless carriers are thus clearly "telecommunications carriers" entitled to access rights of way. Even if they were not, 38 GHz carriers such as WinStar employ a combination of wireless and wireline transmission facilities in order to provide service to end user local exchange customers, and the end device is attached via wireline.

Obviously, without such further guidance, incumbent carriers and utilities will employ a variety of arguments, some sophisticated, some not so sophisticated, in order to deny WinStar and other similarly situated carriers the access that is mandated by the Telecommunications Act.

CONCLUSION

For the foregoing reasons, the Commission should clarify that incumbent LECs and utilities must provide wireless competitive local exchange carriers, such as WinStar, cost-based access to roofs and related riser conduit for the purpose of developing their local transmission and distribution facilities.

Respectfully submitted,



Timothy R. Graham
Robert G. Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Counsel for WinStar Communications, Inc.

Dated: October 31, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 1996 copies of WinStar Communications, Inc.'s Opposition To Petitions For Reconsideration were served on the attached list by first class mail, postage prepaid.


Katherine Swall

**American Network Exchange, Inc.
and U.S. Long Distance, Inc.**

Danny E. Adams
Steven A. Augustino
Kelley, Drye & Warren, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036

American Public Communications Council

Albert H. Kramer
Robert F. Aldrich
Dickstein, Shapiro & Morin, LLP
2101 L Street, NW
Washington, DC 20037-1526

Ameritech

Antoinette Cook Bush
Linda G. Morrison
Skadden, Arps, Slate, Meagher & Flom
1440 New York Ave., NW
Washington, DC 20005

Arch Communications Group, Inc.

Carl W. Northrop
Christine M. Crowe
Paul, Hastings, Janofsky & Walker
1299 Pennsylvania Avenue, N.W., 10th Floor
Washington, DC 20004

AT&T Corporation

Mark E. Haddad
James P. Young
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

American Personal Communications

Anne P. Schelle, Vice President,
External Affairs
One Democracy Center
6901 Rockledge Drive, Suite 600
Bethesda, MD 20817

American Public Power Association

James Baller
Lana Meller
The Baller Law Group
1820 Jefferson Place, NW, Suite 200
Washington, DC 20036

Anchorage Telephone Utility

Paul J. Berman
Alane C. Weixel
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

**Association for Local Telecommunications
Services**

Richard J. Metzger
Emily M. Williams
1200 19th Street, NW, Suite 560
Washington, DC 20036

**Bay Springs Telephone Co., Inc.; Crockett
Telephone Co.; National Telephone
Company of Alabama; Peoples Telephone
Company; Roanoke Telephone Company;
and West Tennessee Telephone Company**

James U. Troup
Arter & Hadden
1801 K Street, N.W., Suite 400 K
Washington, DC 20006

360° Communications Company
Kevin C. Gallagher, Sr. Vice President
-- General Counsel and Secretary
8725 West Higgins Road
Chicago, IL 60631

**Ad Hoc Telecommunications Users
Committee**
Laura F. H. McDonald
Levine, Blaszak, Block & Boothby
1300 Connecticut Ave., NW, Suite 500
Washington, DC 20036-1703

Alabama Public Service Commission
Mary E. Newmeyer
John Garner
100 N. Union Street
P.O. Box 991
Montgomery, AL 36101

Alliance for Public Technology
Dr. Barbara O'Connor, Chairwoman
Mary Gardiner Jones, Policy Chair
901 15th Street, Suite 230
Washington, DC 20005

American Communications Services, Inc.
Brad E. Mutschelknaus
Steve A. Augustino
Marieann K. Zochowski
Kelley Drye & Warren
1200 19th Street, NW, Suite 500
Washington, DC 20036

**Ad Hoc Coalition of Corporate
Telecommunications Managers**
Rodney L. Joyce
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, DC 20036

AirTouch Communications, Inc.
David A. Gross
Kathleen Q. Abernathy
1818 N Street, N.W., Suite 800
Washington, DC 20036

Alaska Public Utilities Commission
Don Schröer
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

ALLTEL Telephone Services Corporation
Carolyn C. Hill
655 15th Street, N.W., Suite 220
Washington, DC 20005

**American Mobile Telecommunications
Association, Inc.**
Alan R. Shark, President
1150 18th Street, NW, Suite 250
Washington, DC 20036

Bell Atlantic

Michael E. Glover
Leslie A. Vial
James G. Pachulski
Lydia Pulley
1320 North Court House Rd, 8th Floor
Arlington, Va 22201

BellSouth

M. Robert Sutherland
Richard M. Sbaratta
A. Kirvin Gilbert III
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

Cable & Wireless, Inc.

Danny E. Adams
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Washington, DC 20036

Cincinnati Bell Telephone

Thomas E. Taylor
Jack B. Harrison
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Bell Atlantic Nynex Mobile, Inc.

John T. Scott, III
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Buckeye Cablevision

Mark J. Palchick
Stephen M. Howard
Vorys, Sater, Seymour & Pease
1828 L Street, N.W., Suite 1111
Washington, DC 20036

**Cellular Telecommunications Industry
Association**

Michael F. Altschul, Vice President,
General Counsel
Randall S. Coleman, Vice President for
Regulatory Policy and Law
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036

Centennial Cellular Corp.

Richard Rubin
Steven N. Teplitz
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, DC 20036

Colorado Independent Telephone Association

Norman D. Rasmussen
Executive Vice President
3236 Hiwan Drive
Evergreen, CO 80439

Colorado Public Utilities Commission

Robert J. Hix, Chairman
Vincent Majkowski, Commissioner
1580 Logan Street, Office Level 2
Denver, CO 80203

**Competitive Telecommunications
Association**

Robert J. Aamoth
Wendy I. Kirchick
Reed Smith Shaw & McClay
1301 K Street, NW, Suite 1100 East Tower
Washington, DC 20005

**Connecticut Department of Public
Utility Control**

Reginald J. Smith, Chairperson
10 Franklin Square
New Britain, CT 06061

Cox Communications, Inc.

Werner K. Hartenberger
Leonard J. Kennedy
Laura H. Phillips
J.G. Harrington
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, NW, Ste. 800
Washington, DC 20036

Department of Defense

Robert N. Kittel, Chief Regulatory Law Office
Cecil O. Simpson, Jr., General Attorney
Office of the Judge Advocate General
U.S. Army Litigation Center
901 N. Stuart Street, Suite 713
Arlington, VA 22203-1837

**Communications and Energy Dispute
Resolution Associates**

Gerald M. Zuckerman
Edward B. Myers
International Square
1825 I Street, N.W., Suite 400
Washington, DC 20006

Competition Policy Institute

Ronald J. Binz, President
Debra Berlyn, Executive Director
1156 15th Street, N.W., Suite 310
Washington, DC 20005

**Consumer Federation of America (CFA)
and Consumers Union (CU)**

Bradley C. Stillman, Esq.,
Consumer Federation of America
1424 16th Street, N.W.
Washington, DC 20036

Department of Defense, Office of the Secretary

Rebecca S. Weeks, Lt Col, USAF
Staff Judge Advocate
Carl W. Smith, Chief Regulatory
Counsel Telecommunications, DOD
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204

Department of Justice

Anne K. Bingaman, Assistant Attorney
General
Antitrust Division
555 4th Street, N.W., Room 8104
Washington, DC 20001

**District of Columbia Public Service
Commission**

Lawrence D. Crocker, III
Acting General Counsel
450 Fifth Street, NW
Washington, DC 20001

Florida Public Service Commission

Cynthia Miller
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

General Communication, Inc.

Kathy L. Shobert
Director, Federal Affairs
901 15th Street, N.W., Suite 900
Washington, DC 20005

Georgia Public Service Commission

Dave Baker, Chairman
B.B. Knowles, Director of Utilities
244 Washington, Street, SW
Atlanta, GA 30334-5701

Guam Telephone Authority

Veronica M. Ahern
Nixon Hargrave Devans & Doyle LLP
One Thomas Circle, NW, Suite 800
Washington, DC 20005

Excel Telecommunications, Inc.

Thomas K. Crowe
Law Offices of Thomas K. Crowe, P.C.
2300 M Street, N.W.
Washington, DC 20037

Frontier Corporation

Michael J. Shortley, III
180 South Clinton Avenue
Rochester, NY 14646-0700

General Services Administration

Emily C. Hewitt, General Counsel
Vincent L. Crivella, Associate General
Counsel, Personal Property Division
18th & F Streets, N.W., Room 4002
Washington, DC 20405

GTE Service Corporation

Richard E. Wiley
R. Michael Senkowski
Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

GVNW Inc.

Robert C. Schoonmaker, Vice President
P.O. Box 25969
(2270 La Montana Way)
Colorado Springs, CO 80936 (80918)

Home Telephone Company, Inc.
H. Keith Oliver, Accounting Manager
200 Tram Street
Moncks Corner, SC 29461

Idaho Public Utilities Commission
P.O. Box 83720
Boise, ID 83720-0074

Illinois Independent Telephone Association
Dwight E. Zimmerman, Executive Vice
President
RR 13, 24B Oakmont Road
Bloomington, IL 61704

Indiana Utility Regulatory Commission
Robert C. Glazer, Director of Utilities
Indiana Government Center South
302 West Washington, Suite E306
Indianapolis, IN 46204

Information Technology Industry Council
Fiona Branton, Director, Government
Relations and Regulatory Counsel
1250 Eye Street, N.W.
Washington, DC 20005

Intelcom Group (U.S.A.), Inc.
Albert H. Kramer
Robert F. Aldrich
Dickstein, Shapiro & Morin, LLP
2101 L Street, NW
Washington, DC 20037-1526

Intermedia Communications, Inc.
Jonathan E. Canis
Reed Smith Shaw & McClay
1301 K Street, NW
Suite 1100 East Tower
Washington, DC 20005

International Communications Association
Brian R. Moir
Moir & Hardman
2000 L Street, NW, Suite 512
Washington, DC 20036-4907

Iowa Utilities Board
William H. Smith, Jr., Chief
Bureau of Rate and Safety Evaluation
Lucas State Office Building
Des Moines, IA 50319

John Staurulakis, Inc.
Michael S. Fox, Director, Regulatory Affairs
6315 Seabrook Road
Seabrook, MD 20706

Jones Intercable, Inc.

Christopher W. Savag
Navid C. Haghighi
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW, Ste. 200
Washington, DC 20006

Kansas Corporation Commission

David Heinemann, General Counsel
Julie Thomas Bowles, Asst. Gen. Counsel
1500 SW Arrowhead Road
Topeka, KS 66604

Kentucky Public Service Commission

May E. Dougherty
PO Box 615
Frankfort, KY 40602

LCI International Telecom Corp.,

Robert J. Aamoth
Reed Smith Shaw & McClay
1301 K Street, NW, Suite 1100, East Tower
Washington, DC 20005

LDDS Worldcom, Inc.

Peter A. Rohrbach
Linda L. Oliver
Kyle Dixon
Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

**Lincoln Telephone and Telegraph
Company**

Robert A. Mazer
Albert Shuldiner
Mary Pape
Vinson & Elkins
1455 Pennsylvania Avenue, N.W.
Washington, DC 20004-1008

Lucent Technologies, Inc.

Stephen R. Rosen
Theodore M. Weitz
475 South Street
Morristown, NJ 07962-1976

Maine Public Utilities Commission

Joel B. Shifman, Esq.
242 State Street, State House Station No. 18
Augusta, ME 04333-0018

Maryland Public Service Commission

Bryan G. Moorhouse, General Counsel
Susan Stevens Miller, Asst. General Counsel
6 St. Paul Street
Baltimore, MD 21202

**Massachusetts Attorney General Scott
Harshbarger**

Daniel Mitchell, Asst. Attorney General
Regulated Industries Division, Public
Protection Bureau
200 Portland Street, Fourth Floor
Boston, MA 02114

**Massachusetts Department of Public
Utilities**

John B. Howe, Chairman
Mary Clark Webster, Commissioner
Janet Gail Besser, Commissioner
100 Cambridge Street, 12th Floor
Boston, MA 02202

Metricom, Inc.

Henry M. Rivera
Larry S. Solomon
J. Thomas Nolan
Ginsburg, Feldman & Bress, Chtd.
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Michigan Public Service Commission

John G. Strand
Ronald E. Russell
John L. O'Donnell
6545 Mercantile Way
Lansing, MI 48911

Missouri Public Service Commission

Harold Crumpton, Commissioner
P.O. Box 360
Jefferson City, MO 65102

Montana Public Service Commission

Karen Finstad Hammel, Esq.
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

MCI Telecommunications Corporation

Don Sussman
Larry Fenster
Charles Goldfarb
Mark Bryant
Mary L. Brown
1801 Pennsylvania Ave., NW
Washington, DC 20006

Michigan Exchange Carriers Association

Glen A. Schmiede
Mark J. Burzych
Foster, Swift, Collins & Smith, P.C.
313 South Washington Square
Lansing, MI 48933

Minnesota Independent Coalition

Richard J. Johnson
Michael J. Bradley
Moss & Barnett
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

MobileMedia Communications, Inc.

Gene P. Belardi, Vice President
2101 Wilson Boulevard, Suite 935
Arlington, VA 22201

Municipal Utilities

James N. Horwood
Scott H. Strauss
Wendy S. Lader
Spiegel & McDiarmid
1350 New York Avenue, NW
Washington, DC 20005