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July 24, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: Ex Parte Presentation in CC Docket No. 96-98 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CS Docket No. 95-184/ Telecommunications Services Inside Wiring; Customer Premises Equipment

Dear Mr. Caton:

During the course of a meeting yesterday afternoon with Meredith Jones, John Logan, Rick Chessen, and JoAnn Lucanik of the Cable Services Bureau, Gunnar Halley and I, on behalf of Teligent, L.L.C., discussed issues raised in Petitions for Reconsideration of the Commission's First Report and Order in CC Docket No. 96-98 concerning access to rights-of-way under Section 224 of the Communications Act as well as issues concerning access to telephone inside wire arising out of the Notice of Proposed Rulemaking in CS Docket No. 95-184. Our discussion centered upon the expansion of Section 224 in the Telecommunications Act of 1996 and the Commission's construction of utility companies' obligations to afford access to conduits, ducts, and rights-of-way in the Order in CC Docket No. 96-98. We also discussed the jurisdictional and policy basis for requiring building owners to offer carriers access to telephone inside wire. Moreover, we discussed the application of the policy issues raised by AT&T Wireless concerning the need for access to single-unit premises to Teligent's building and rooftop access position. Because the meeting did not end until after 5:00 pm, it was not possible to file this notice of the meeting with the Commission yesterday.

Respectfully submitted,

Philip L. Verveer

cc: Meredith Jones
John Logan
Rick Chessen
JoAnn Lucanik

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List ABCDE

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

David S. Turetsky

Vice President, Law and Regulatory Affairs

Teligent

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Good afternoon. Thanks for joining me to talk a little bit about a subject that's been much in the news lately – and one that is dear to my heart – open markets in telecommunications.

Two months ago, I left the Antitrust Division of the Department of Justice to work for a new company called Teligent. Teligent is among those new competitors working hard to open local markets by building facilities – switches and wires and radio transmitters – to challenge the local monopolies. At Teligent, I'm continuing to focus on making sure that consumers see the benefits of competition.

And that's what I'd like to talk about today.

Because consumers won't realize all the benefits of competition – especially the savings envisioned by the architects of the Telecommunications Act of 1996 – until they are able to choose from among a wide variety of local telecommunication competitors.

Much has been written about the battle to open the local exchange. But there is one class of consumers whose special situation deserves the special attention of legislators and regulators at both the State and Federal level. I'm talking about the tenants in commercial office buildings and the residents of apartment buildings.

The problem, simply put, is that some landlords have adopted a monopoly pricing mentality when it comes to leasing rooftop space, inside wiring and riser access to new facilities-based telecommunications competitors. In the end, that means their tenants pay more for their telecommunications service than they should.

We understand that some landlords, and we're told the number is small, are doing business exclusively with incumbent carriers, and flatly refuse to offer their tenants a choice. Others are charging access rates so high that the big savings tenants would normally realize from new competition are greatly diminished – because they drop straight into the landlord's pocket.

So when it comes down to it, landlords, in effect, possess near monopoly power over their tenants' telecommunications options. If the Regional Bell Operating Companies control the "last mile" of the network, then the landlords clearly control the last hundred yards. And the landlord, unlike the Bells, is unregulated.

In our time together today, I'll try to outline the issue in more detail, describe the ways in which some States have already addressed it, and talk about some further solutions.

Although they have been slow in coming, I know that the full benefits of competition in the local market – savings, choice and innovation – will come to consumers eventually. How long it may be before "eventually" arrives is partly a function of how well and how quickly we address the issues I am describing today.

Ultimately, the most effective competitive entry strategy will wrest control from the local monopoly and offer a true alternative to the existing local network. Facilities-based competition achieves this result. Not coincidentally, that also is the strategy that will offer consumers the greatest economic benefits.

I don't mean to discount the benefits of resale and reliance on unbundled network elements. But, these competitive entry strategies, in varying degrees, rely on the underlying incumbent LEC network, its costs, and its level of efficiency or inefficiency.

The dependency and vulnerability of resale was made crystal clear to me by a letter read by a senior New York Public Service Commission staff member as part of a panel concerning competitive developments in Rochester (moderated by then-Commissioner Lisa Rosenbloom). The letter essentially said that due to a billing dispute, Rochester Telephone would no longer provide local resale service to AT&T

after a specified date. Following a flurry of contacts and regulatory participation no suspension ultimately occurred, but the limits of resale were laid bare.

And some carriers have said that Friday's decision by the 8th Circuit Court of Appeals will further complicate business strategies that rely on resale or unbundled network elements.

By contrast, an alternative network does <u>not</u> rely on the local loop or incumbent network. Its independence allows it to compete from the fundamental level of network costs and efficiencies to offer enhanced quality and innovative pricing of services for customers.

Facilities-based competition offers economic dynamism and a complete array of benefits to consumers. It is the <u>ultimate</u> objective of telecommunications competition policy.

A competitor engaged in resale doesn't need access to its customer's building. The same is true of a competitor utilizing unbundled elements—no access to the customer's building is required.

But the true facilities-based competitor, the competitor who seeks to do what Congress most hoped would occur, what you all want, and what provides the greatest benefit for our customers and our country – that new competitor needs affordable and reasonable building access in order to offer the best discounts to its customers. By the way, that's precisely what Teligent will do.

Teligent is entering markets as a facilities-based provider with an independent alternative network. That network is intended, at least initially, to provide small and medium-sized businesses with low-cost, high-quality service for all their telecommunications needs. Later, we will consider expanding our service to residential customers.

Teligent's unique method of delivering service to consumers using spectrum and modern technologies avoids the inefficiencies and unnecessary costs of the traditional wireline network without sacrificing the benefits. Although many regulators are aware of us, they may not have a full understanding of our operations. I would like to take a moment to explain our method of providing service because knowledge of it is critical to effective policy-making.

Teligent uses fixed, digital microwave radio applications to transport communications, using a point-to-multipoint architecture. Conceptually, the airwaves replace the LEC's wires as the transmission medium. Rooftop antennas transmit and receive the signals from location to location. The signals reach customers through inside wire or special connections to the customer's office.

In order for customers to choose Teligent service – and the price discounts it provides – they must be able to link up to the antenna on their building's roof. Customers also need access to riser cables and inside wire within the building.

Teligent's rooftop antennas are not towering cellular-type structures. Instead, they are smaller than a cafeteria tray – and much smaller than a home DBS receiver.

These small antennas will allow the network's transmission capacity to vary so that customers can increase their desired bandwidth for particular applications, but do not waste bandwidth when it is not needed.

The network is powerful, too. Teligent will offer high-quality voice, high-speed data, Internet access, and other enhanced services, with an initial focus on small and medium-sized businesses. We also may offer wholesale "last mile" bypass services for long distance carriers, Internet service providers and resellers.

In short, Teligent will provide a full-service, dynamic alternative telecommunications network.

As I mentioned earlier, building access is not an issue for resellers or those relying upon unbundled network elements, so the issue may not have been raised as often or as loudly as the need for interconnection and unbundling. But it is an issue that affects *all* new, facilities-based competitors, whether they deliver service with copper, fiber or microwaves.

Reasonably priced building access was not much of an issue before competition arose. To make their buildings attractive to potential tenants, owners needed telephone service. So, they voluntarily granted access to the one telephone company which provided that service. For those rare circumstances in which a building owner denied access, the telephone company could avail itself of its State-granted eminent domain authority.

Moreover, the costs of the condemnation could be recovered from its rate base under rate of return regulation. As a result, many companies have access rights to buildings and rooftops because they were there first -- as a monopoly -- before the States, Congress and the President changed public policy and opened local telecommunications markets to new competitors.

The development of competition through the 1996 Act and the efforts of the States and the FCC are encouraging facilities-based competitors to seek access to customers in multi-tenant buildings.

But, as I've said, some building owners don't share the enthusiasm of the States and Congress for allowing tenants to cut their telecommunications costs by choosing among new competitors. And that will siphon off much of the savings envisioned by the authors of the Telecommunications Act.

For the benefit of consumers, the States can and should take immediate action to wring the excess costs out of building access.

Already, many States have been vigorous in their efforts to open local telecommunications markets. Public utility commissions across the nation continue to order interconnection requirements, loop unbundling mandates and wholesale service obligations so that their residents may enjoy the benefits of local competition.

You have accomplished an incredible task in a short period of time. For that, you should be congratulated. But, as I'll note, much work remains to be done.

Before I go further, I must tell you that Teligent's preference is to work cooperatively with building owners. Frankly, that's exactly what we are doing.

Most building owners are pleased to grant access to more than one telecommunications competitor, because they realize that their buildings are more valuable if tenants can choose between several competing companies to secure the package that is best for them. The right "answer" or "package" for one customer may be wrong for another customer. Multiple access then becomes a good will tool and a selling point for these landlords: tenants can negotiate lower cost telephone service and enjoy unique service offerings.

But some building owners, unmindful of the potential benefits for tenants, have assumed the role of monopoly over that last hundred yards that is under their control, artificially inflating the telephone rates of the building tenants who want competitive service.

In other cases, building owners have contracted away access rights to riser and rooftop management companies sometimes in an effort to fully – and unfairly – exploit their market power.

One riser company's brochure states that "new competitors to the local telephone company want access to your tenants. Your 'free' riser space has become a valuable commodity for today's new telephone service providers." It goes on to proclaim that local competition presents the building owner an "opportunity to realize substantial new revenue from existing unmanaged space" creating "a new monthly revenue source within" the building.

What's wrong with a landlord making a profit on building access?, you may ask.

Well, if I were a tenant, this is what I'd say.

In this case, the price of access to competitive telecommunications services is not set in relation to a competitive market. It is set through the exercise of monopoly power. (Moreover, some carriers don't pay at all.) As an antitrust lawyer, I can tell you that's bad. But I think you understand that already.

The owner of a building is in the same position that the owner of the local telephone network was in decades past. Generally, competitors cannot reach tenants in that building without going through the owner, just as there formerly was no way to reach local exchange customers without going through the local telephone monopoly.

The argument that all a tenant need do is move to another building is just not real. Given the economics, the tenant simply has no choice but to accept the landlord's monopoly pricing for access to telecommunications services.

Congress changed the local telecommunications paradigm when it enacted the Telecommunications Act. But now the behavior of some "last hundred yard" landlords could potentially thwart the vision of competition and big consumer price cuts that has guided the States and Congress. In effect, some riser and rooftop management companies divert to themselves resources that otherwise should be available for providing lower cost service.

Clearly, Congress intended that most of the benefits of telecommunications competition would accrue to consumers, not to building owners and riser management companies. The opportunity for exploitation exists. And any uneconomic exploitation of the 1996 Act will hurt consumers.

Near-term natural market adjustment is virtually impossible due to the lock-in effect of long-term leases. The lock-in effect also is enhanced by a combination of the high cost of switching locations, coupled with tenants' ignorance of the existence of better deals.

This lock-in notion is well established. In fact, when as Deputy Assistant Attorney General I negotiated an end to the 1956 IBM Consent Decree in consultation with numerous economists and antitrust lawyers, I secured a phase-out over 5 years. This phase-out was intended to guard, in part, against IBM's exploitation of the fact that it would take main-frame users years to switch to any competing mainframe provider because of the tremendous software investment by customers in IBM compatible equipment. This "lock-in" notion is grounded in much precedent and economic literature.

The United States Supreme Court addressed the concept in its 1992 Kodak case when Kodak sought to impose high service costs on purchasers of its copier equipment, who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated that "[e]ven if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive."

Some sophisticated customers may be able and willing to assume the costs of the information gathering and processing. However, as the Court stated, "there are reasons to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . If a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed."

And when it comes to the cost of switching providers, the lock-in effect perpetuates economic inefficiencies. The Court noted that "if the cost of switching is high, consumers who already have purchased the equipment and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands."

The situation described by the Supreme Court is closely analogous to that of tenants in long-term leases who want to buy local telephone services from some company other than their incumbent carrier. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option. They had no way of knowing that competitive choices in telecommunications would become available. And therefore, they could never have negotiated for the competitive carrier access in their leases.

The cost of moving is prohibitively high. And even though it is possible that a very few sophisticated customers may have negotiated or renegotiated lease terms to allow for competitive carrier building access, many small businesses and individuals almost certainly have not realized benefits from their sophistication.

Fortunately, there are solutions to the access problems. First, the 1996 Act amended Section 224 to provide telecommunications carriers access to utility rights-of-way. This provision primarily governs federal regulation, but there clearly is an important role for the States. It even affects the method by which the Regional Bell Operating Companies achieve State commission approval under the Section 271 competitive checklist. In short, the States have the incentive to implement rules to accomplish the terms of Section 224.

Section 224 is pro-competitive. But if it is interpreted too narrowly, it could result in a wireline bias. For example, because older technologies are built around wires, utilities historically did not often require access to the roofs of buildings for their distribution facilities. Hence, a new technology that relies on rooftop antennas will bring consumers more benefits if Section 224 is interpreted to include rooftop access. In reviewing compliance with the competitive checklist, the State commissions should require that, pursuant to Section 224, rooftop access for telecommunications carriers be provided in buildings with an RBOC presence.

Section 224 grants broad powers to mandate access to rights-of-way owned or controlled by utilities. For example, in its Interconnection First Report and Order, the FCC recognized that Section 224 grants the power to require utilities to exercise their "eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access." I think you ought to consider these powers in addressing the issue of building access restrictions.

In addition to the federal provisions, ample opportunities exist for States to play a critical role to ensure that consumers reap the maximum benefits of competitive choice. In fact, a number of States have already addressed the issue through legislative action.

Section 16-2471 of the Connecticut General Statutes offers an excellent example. It requires building owners to allow a telecommunications provider to wire the building and provide service so long as a tenant requests services from the provider, the costs are assumed by the telecommunications provider, the provider indemnifies the building owner for any damages caused by the wiring, and the provider complies with State inside wire regulations. The statute allows for reasonable compensation.

Texas also has a statute which prohibits property owners from interfering with or preventing a telecommunications utility from installing telecommunications service facilities on the owner's property at the request of a tenant. Once again, the statute allows for reasonable compensation while prohibiting the private owner from demanding unreasonable payments.

Statutes are not the only method of empowering tenants and removing barriers to building access; regulatory commission action is an effective option, as well.

For example, in a 1994 Order, the Public Utilities Commission of Ohio prohibited any person owning, leasing, controlling, or managing a multi-tenant building from forbidding or unreasonably restricting any occupant, tenant, lessee, or such building from receiving telecommunications services from any provider of its choice, so long as the provider is certified by the Ohio Commission.

In their regulation of Shared Tenant Services, public utility commissions have developed considerable experience with the issue of access to buildings. Often predicated upon the incumbent LEC's carrier-of-last-resort obligations, most State commissions have required STS providers to allow LEC access to tenants in a building who prefer to take service from the LEC over the STS provider (often the owner of the building).

Florida offers a recent example. In April, the Florida Public Service Commission required all Shared Tenant Services providers to allow local exchange companies direct access to tenants who want local service from the local exchange company. Moreover, the Order provides for reasonable compensation for LEC use of the STS provider's or the building owner's cable. In the event that the STS provider and the building owner are not one and the same, the Order requires that the STS provider guarantee and obtain the permission of the building owner for the requisite LEC access. Similar requirements should be adopted to allow building access by competitive facilities-based carriers not only to STS facilities, but to building rooftops and inside wire, as well.

I have heard concerns raised about constitutional takings issues arising from requiring building owners to permit rooftop, conduit and inside wiring access at the request of tenants. This problem, too, is resolved by providing for the payment of just and reasonable compensation to building owners by telecommunications carriers for the access granted.

Section 228 of the New York Public Service Law offers an example. Although this concerns cable television, the principle applies to telecommunications. Section 228, essentially a tenant-protection statute, was intended to ensure that landlords and building owners could not prevent tenants from receiving cable television service by excluding the cable operator from the building.

In Loretto, the United States Supreme Court held that the New York statute mandating building access was a valid exercise of the police power, but that the landlord must be compensated for the access. As applied to the issue at hand, access to rooftops and inside wire for competitive telecommunications carriers is likely insulated from constitutional attack as long as just compensation is provided to the building owner. And that doesn't mean a monopoly price.

As I said earlier, Teligent has negotiated with many landlords who are anxious, to offer their tenants access to more than one telecommunications carrier.

But relying solely on the willingness of building owners to negotiate away their "last hundred yards" will reduce the benefits of competition for tenants of office buildings and residents of apartment houses, co-ops and condominiums.

State commissions can protect the tenants in their jurisdictions and promote competition and its benefits – lower prices, greater choice and better service – by taking this step: Ensure reasonable access to building rooftops, inside wire and riser cables. for those facilities-based competitors that tenants want to use.

I urge you to take action to ensure that the great promise of the Telecommunications Act – major price cuts – is not left unfulfilled for one class of consumer, the building tenant. Thank you very much.