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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 11, 1997

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:

Teligent, L.L.C. filed comments today in CCBPol 97-9 in response to the July 18, 1997 Public Notice requesting recommendations on actions the Commission could take to facilitate local competition. Because Teligent's comments address substantive issues raised in CC Docket 96-98 and CS Docket 95-184, Teligent wishes to include these comments in the record of those proceedings and intends to deliver a copy of these comments to those persons named on the attached list. Therefore, on behalf of Teligent, L.L.C., I hereby file with the Secretary of the Commission two copies of the attached comments as a written ex parte presentation in CC Docket No. 96-98 and CS Docket No. 95-184. The comments discuss the technical, jurisdictional and policy basis for requiring building owners and utilities to provide competitive carriers access to multi-unit buildings' telephone inside wire, risers and rooftops.

Respectfully submitted,

Philip L. Verveer

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Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Commission Actions Critical to the Promotion of Efficient Local Exchange Competition	)))	CCBPol 97-9

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SUMMARY

In order to provide facilities-based alternatives to building tenants, competitive carriers such as Teligent require access to buildings' telephone inside wire, riser cables, and rooftops. Some building owners and ILECs restrict access to these bottleneck facilities or impose unreasonable costs or conditions for access. These restrictions reduce the benefits that would otherwise accrue to building tenants from competition.

The Commission should mandate building access through an interpretation of Section 224 that encompasses private rights-of-way to building rooftops. Moreover, the Commission should also ensure that competitive carriers can obtain access to the risers within a building, as well as the telephone inside wire to the customers' premises.

Although Teligent supports the efforts of those few states that have addressed the building access issue in an effective manner, the Commission should adopt rules for those states that have not eliminated the building bottleneck. The Commission retains authority to mandate building access for competitive carriers and can accomplish this effort to promote local competition by exercising direct or indirect jurisdiction. Finally, the Commission should ensure that the exercise of right-of-way management authority by other governmental units does not impede competitive entry.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Commission Actions Critical to the Promotion of Efficient Local Exchange Competition	)))	CCBPol 97-9

COMMENTS OF TELIGENT, L.L.C.

Teligent, L.L.C. ("Teligent")[1] hereby submits its Comments in the above-captioned proceeding.[2]

I. INTRODUCTION

The Telecommunications Act of 1996[3] exhibits a landmark commitment by Congress and the President to bring all consumers the full benefits of competition by opening local telecommunications markets across the country. At the time of enactment, few thought that this could and would occur immediately. But, over a year and a half later, despite very impressive efforts by the Commission, competitive options in local telephone service exist today only for very few Americans.

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1 Teligent was formerly known as Associated Communications, L.L.C.

2 *Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition*, CCBPol 97-9, *Public Notice*, DA 97-1519 (rel. July 18, 1997) ("Public Notice").

3 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

Entrenched monopolies in vital and complex industries are not easily challenged. But, the scarcity of local exchange competition today underscores that strong and diverse tools, as well as unyielding focus and persistence, are required to eliminate anticompetitive barriers and the powerful legacy of monopoly, and facilitate rapid and vigorous competitive entry.

Although several major requirements for competition are theoretically available to competitors (i.e., interconnection, unbundled network elements and wholesale rates), some pieces of the network essential to the competitive provision of service remain subject to monopoly control. Negotiations of interconnection agreements are unlike most other negotiations: they involve requests made to a monopolist for cooperation in breaking open its monopoly. These negotiations are slow, not all ILECs are willing to commit adequate resources to the negotiation process given the number of requests pending, only one party really needs what the other has, and choosing arbitration to secure what the law requires-- let alone making the choice repeatedly -- involves substantial delay, burden, and expense.

Nor do these negotiations necessarily address all of the monopolist's advantages or provide a forum for competitors to overcome all of the serious barriers to entry that the Commission is empowered to attack by the Act. As Teligent demonstrates below, the barriers to entry that help maintain monopoly control and favor the incumbent need not be tended assiduously by the incumbent local exchange carrier. In the case of access to building rooftops, telephone inside wire, and riser cables, some

building owners raise very substantially the cost of competitive entry and pocket the benefits of competition which would otherwise reach consumers. At the same time, the monopolist typically enjoys free access to the building and its customers, and all of the access that is necessary for it to provide local and interstate service using its chosen technology. In response to the Commission's request for recommendations, Teligent explains the anticompetitive restrictions on building access, some of the possible remedies available to the Commission, and the sources of Commission authority to open the "last hundred yards" of the local network to competitive entry.

II. TRUE FACILITIES-BASED PROVIDERS WILL NEED BUILDING ACCESS IN ORDER TO PROVIDE AN ALTERNATIVE TO THE ILEC LOCAL LOOP.

A. Facilities-Based Providers Will Offer The Most Effective Form Of Competition.

There is no question that, 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. Entry strategies reliant upon resale or unbundled network elements ("UNEs") offer improvements for consumers over the local monopoly environment. They may even represent important steps for competitors toward making facilities-based competition possible. However, these strategies, to varying degrees, rely on the incumbent LEC network, its costs, and its level of efficiency or inefficiency. Moreover, the Eighth Circuit's recent decision may complicate significantly business strategies that rely on

resale or UNEs, slowing the development of competitive choices.[4] Without true facilities-based entry, competitors and regulators will continue to battle the anticompetitive incentives of an entity with monopoly control over the foundations of the telephone network.

By contrast, an alternative facilities-based network places no reliance on the incumbent LEC's network. Its independence permits it to compete from the fundamental level of network costs and efficiencies to offer enhanced quality, innovative services and features, and lower prices to customers. Facilities-based competition offers economic dynamism and a complete array of benefits to consumers. Notwithstanding the benefits of resale and UNE strategies, telecommunications competition policy requires that facilities-based competition be achieved as quickly as possible in order to bring the greatest benefit to consumers.

As Teligent explains in further detail below, the true facilities-based competitor needs affordable and reasonable access to buildings to secure the opportunity to provide consumers competitive options and to offer those consumers the best discounts. By contrast, a non-facilities-based competitor usually does not require independent access to its customer in a building because it uses the ILEC's facilities. Because building access is not an issue for these carriers, the issue may not have been raised as often or as loudly as the need for

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[4] Iowa Utilities Board v. F.C.C., No. 96-3321 (8th Cir. July 18, 1997).

interconnection, unbundling, or wholesale discounts. But the issue of building access affects all new, facilities-based competitors, whether they deliver service with copper, fiber, or microwaves.

Congress and the Commission have accomplished much in their efforts to bring competition to local telephone markets by affording carriers the right to interconnect, lease UNEs, and purchase services for resale at wholesale discounts. However, the cost and difficulty for competitors to obtain the requisite building access needlessly impairs facilities-based competition to the detriment of consumers, and threatens to diminish considerably the effectiveness of the Commission's other local competition efforts.

B. Teligent Will Provide Facilities-Based Service To Offer A True Alternative To The ILEC Local Loop.

Teligent will enter markets primarily as a facilities-based provider, developing an independent, alternative network. Teligent's method of delivering service to consumers using spectrum and modern technologies avoids many inefficiencies and unnecessary costs of traditional wireline distribution without sacrificing the benefits. An understanding of Teligent's network design is critical to effective policy making.

Teligent's facilities do not consist of wires running under streets or between poles. Rather, Teligent uses fixed, digital microwave radio applications to transport communications, and will deploy a point-to-multipoint architecture. Conceptually, the airwaves replace the LEC's wires as the transmission medium. Small rooftop antennas receive and transmit radio signals from

location to location. The signals reach customers in the building through telephone inside wire or special connections to the customer's office.

The antennas permit variances in network transmission capacity so that the bandwidth used by customers will increase or decrease in accordance with the needs of a particular application. This technology avoids waste and maximizes efficient spectrum utilization.

The Teligent network is powerful. 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. Teligent may also offer wholesale "last mile" bypass services for IXCs, Internet service providers, and resellers. In short, Teligent will provide a full-service, dynamic alternative telecommunications network. Moreover, construction of Teligent's local network does not involve the time and expense involved in the construction of competitive wireline networks. Therefore, with the requisite building access, Teligent could provide dynamic, low cost competitive local telephone service to businesses in major metropolitan areas within a relatively short time frame.

C. Building Access Involves Access To Rooftops, Riser Cables, and Telephone Inside Wire At Just And Reasonable Rates And Terms.

To provide facilities-based service to a tenant in an office building, Teligent must first obtain rooftop access for the placement of its small antenna. The antenna allows Teligent to receive and transmit radio signals which are converted to or from

wireline frequencies for customer communication. Most of the Teligent antennas are very small -- smaller than a cafeteria tray or a DBS home receiver. When viewed on a rooftop, they are dwarfed in size by satellite dishes and broadcast television antennas. Hence, rooftop access for Teligent's antenna is unobtrusive (particularly in relation to existing rooftop structures) and would not interfere with other uses for the rooftop.

However, Teligent generally cannot serve a tenant requesting service unless Teligent can place its antenna on the rooftop of that tenant's building. The antenna must be located on the building being served because a coaxial cable runs from the Teligent antenna through a modulator ("IDU" or Indoor Unit, which is smaller than the racks used by most LECs) and to the building's cross connect where connection with the customer's telephone system is accomplished.[5] Hence, rooftop access is important.

Access to riser cables or other conduit within the building is necessary to carry the signal over wires from the rooftop antenna to the IDU and through the building to the customer's connect point, often located in the basement of the building in a telephone closet or equipment room. The riser space within a building frequently has excess capacity or contains unused cables. Use of this excess capacity or removal of the unused

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[5] See Attachment A which contains a diagram of Teligent's facilities within a building's telecommunications infrastructure.

equipment would allow use or sharing of the risers by competitive carriers without the need for costly construction of additional through-ways from the roof to the basement.

Finally, Teligent requires access to the telephone inside wire from the cross-connect to the tenant's premises. Often, a building's equipment room contains a wall board which connects the ILEC's network to the inside wire of the building. Teligent must have the ability to remove the LEC's wires from the that portion of the cross connect pertaining to a customer who chooses Teligent over the LEC (a technically simple and routine procedure),[6] and connect directly into and use the building's wires that connect the telephone network cross-connect with the individual tenants' premises.

D. Barriers To Building Access Slow Development Of A Competitive Environment.

The need for reasonably priced building access did not present a barrier to carriers before the development of competition. In order for building owners to make their buildings attractive to potential tenants, telephone service needed to be available within their buildings. Hence, they

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6 The ILEC or building owner should also be required to provide an access to databases depicting accurately to competitive carriers the wiring layout within a building. While connections are simple from a technical standpoint, the difficulty of identifying the proper wiring and routing system can make use of existing facilities within a building a logistical impossibility (leading to an unnecessary waste of riser space, building disruption due to rewiring, and customer expense for the labor costs). Access to accurate databases or maps of telephone inside wiring systems ultimately benefits building owners, competitive carriers, and consumers.

voluntarily granted access to the one telephone company that provided that service. For those rare circumstances in which a building owner denied access, the telephone company often could avail itself of its State-granted eminent domain authority, an authority which today is rarely granted to competitive new entrants. Moreover, the costs of the condemnation were recovered from the telephone rate base under rate of return regulation, a cost recovery mechanism not used by competitive new entrants today. As a result, ILECs retain valuable access rights to buildings and rooftops that derive from their incumbent monopoly status.

The development of competition through the efforts of the Commission under the 1996 Act encourages facilities-based competitors to seek access to customers in office buildings and multiple dwelling units. However, ILECs fully understand that refusal to share in-building distribution facilities with competitors will impair the ability of the building's tenants to switch carriers. Absent Commission action, ILECs will continue to impede efforts to open access to the building bottleneck for competitors.

III. SOME BUILDING OWNERS USE THEIR CONTROL OVER BOTTLENECK FACILITIES TO REFUSE BUILDING ACCESS ENTIRELY WHILE OTHERS SEEK TO EXTRACT UNREASONABLE RATES AND CONDITIONS FOR ACCESS.

Some building owners are pleased to grant access to more than one telecommunications competitor because they realize that their buildings (and lease agreements) are more valuable if tenants can choose between several competing companies to secure the package that is best for them. Multiple access then becomes

a goodwill tool and a business selling point for these building owners: tenants can negotiate lower cost telephone service and enjoy unique service offerings.

By contrast, other building owners assume the role of the monopolist over the last hundred yards of the network under their control by either denying building access entirely, or extracting unreasonable rates or conditions from competitors in exchange for access. This building owner behavior artificially inflates tenants' rates for telecommunications service and decreases competitive choices.

Moreover, some building owners contract away access rights to riser and rooftop management companies in an effort to fully exploit their market power. One riser management 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. These companies retain the unwholesome incentive and ability to extract monopoly rents from competitive telecommunications carriers at the expense of consumers.

A. Building Owners' Restrictions On Access Reduce Competitive Benefits To Tenants.

Access to telephone inside wire and riser cables is not only an issue of telecommunications competition, but also an issue of tenant protection.[7] The protection of the interests of U.S. business and residential telecommunications consumers is one of the core obligations of the Commission. The philosophy underlying the 1996 Telecommunications Act is to encourage the availability of competitive telecommunications service alternatives for all Americans and their businesses, regardless of whether they live and work in a single family home or a multi-unit building. Granting building tenants access to competitive carriers is central to the achievement of that goal.[8]

In effect, some building owners pocket the rate reductions and other benefits of competition that would otherwise accrue to their tenants. Congress clearly intended and expected that most of the benefits of telecommunications competition would accrue to

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[7] Commissioner Ness recently observed that over 30% of Americans live in multiple dwelling units. See "...And Miles To Go Before I Sleep," by Commissioner Ness (as prepared for delivery before the New England Chapter of the Federal Communications Bar Association, May 29, 1997). This figure does not include the number of American businesses that are located in office buildings. Hence, restrictions on building access affect an enormous number of U.S. telecommunications consumers.

[8] Others around the world are recognizing that resolving this issue is vital to competition. For example, Hong Kong offers guidelines to secure building access for the provision of telecommunications services. A copy of the Hong Kong Building Access Guidelines is attached to these Comments as Attachment B. The Guidelines are also available on the Web at http://ofta.gov.hk/tas/t-ftn/95e181a.html.

consumers. Some building owners and their management companies siphon off these benefits from the tenants to whom Congress intended those benefits to flow.

Moreover, the issue is not limited to the distribution of benefits; there are spill-over effects of this behavior, as well. The building owners' access restrictions can leave some consumers without any facilities-based alternative for telecommunications services. Any reduction in the addressable market for wireline and wireless competitors will reduce competition and dynamism throughout the greater telecommunications market, not just the market of tenants in buildings.

The effect of access restrictions mirrors the uneconomic effects of local monopolies that Congress sought to open to competition through the 1996 Act. Because some building owners prohibit or assess unreasonable fees for competitive carrier building access, the price of access to competitive telecommunications services for office building tenants is not set in relation to a competitive market. Rather, it is established through the exercise of monopoly power. The owner of a building is in the same position that the owner of the local telephone network has been for decades. Generally, competitors cannot reach tenants in the building without going through the building owner, just as formerly there was no way to reach local exchange customers without going through the local telephone monopoly. Because the uneconomic exploitation of the 1996 Act through exertion of bottleneck control will hurt consumers and

undermine the goals of the 1996 Telecommunications Act, it should be remedied by the Commission.

B. The Lock-In Effect Hinders Natural Market Adjustment.

The argument that all a tenant need do is move to another building misapprehends the economic realities of commercial tenancy. Natural market adjustment will be slowed substantially due to the lock-in effect of long-term leases. This phenomenon was noted by the Building Owners' Management Association ("BOMA") in its effort to argue that building owners should not have to bear the maintenance costs of riser cable in multiunit buildings. As the Commission noted in its Inside Wire Reconsideration Order, BOMA asserted that "many tenants have long term leases that will prevent building owners from passing on [the] additional costs [of riser maintenance] to their tenants."[9]

The lock-in effect, a concept well-grounded in legal and economic precedent, was addressed by the Supreme Court in its 1992 Kodak decision.[10] Kodak was charged with seeking 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

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9 Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-209 at ¶ 25 (rel. June 17, 1997) ("Inside Wire Reconsideration Order") (emphasis added).

10 Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

that "even 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."[11] Although some sophisticated customers may be able and willing to assume the costs of the requisite information gathering and processing, the Court noted that

> [t]here are reasons . . . to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . . [I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.[12]

Even those customers with sufficient information may suffer uneconomic exploitation from the lock-in effects. As the Court observed,

> [i]f 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.[13]

The economic concept of "lock-in" effects is well established and also was part of the explanation for the Department of Justice's recent insistence on a phase-out period for the 1956 IBM consent decree; the Department sought, among other things, to ensure that any mainframe users who wanted to switch computer platforms due to termination of the decree could

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[11] Id. at 474.

[12] Id. at 475.

[13] Id. at 476.

do so over time since their enormous software investment would leave them "locked-in" for years to IBM.

The situation described by the Supreme Court in Kodak is closely analogous to that of small to mid-size commercial tenants in long-term leases who wish to take local telephone service from a competitor. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option and had no way of knowing that these choices would become available. Therefore, such tenants could not and would not have negotiated for the competitive carrier access in their leases necessary to allow them competitive local exchange service.

Moreover, the cost of breaking a commercial lease and moving is prohibitively expensive (and, nonetheless, should not be a precondition to enjoying the benefits of local telephone competition). Although it is possible that a few sophisticated customers may have negotiated or renegotiated lease terms to provide for competitive carrier building access, many smaller businesses and individuals almost certainly have not realized the benefits of their sophistication, particularly due to the building owner's ability to discriminate among tenants with respect to lease terms and conditions. Therefore, many tenants find themselves locked-in to arrangements that preclude affordable access to competitive options in local exchange service.

IV. THE COMMISSION SHOULD ENSURE THAT CARRIERS RECEIVE THE REQUISITE BUILDING ACCESS THROUGH ITS INTERPRETATION OF SECTION 224 AND ITS REGULATION OF INSIDE WIRE.

A. Section 224 Should Be Interpreted To Include Access To Rooftops With A Utility Presence.

In an effort to reduce barriers to competition by facilitating access to rights-of-way, Congress enacted Section 224 and recently amended the provision in the 1996 Act.[14] The provision offers the Commission a pro-competitive tool to remove building access restrictions. However, a narrow interpretation of Section 224 could result in a wireline bias and unnecessarily restrict the possible sources of local exchange competition. For example, due to the wireline nature of older technologies, incumbent utilities did not often require access to the roofs of buildings for their distribution facilities. A new technology that relies upon rooftop antennae to transmit wireless signals does not fully realize the competitive value in Section 224 if that provision is interpreted from an historical wireline perspective to exclude rooftop access. The Commission should clarify that rooftop access is mandated under the Act.

Utility-owned or controlled rights-of-way are bottleneck facilities and access to them is an essential precondition to local exchange competition.[15] Although rights-of-way are not

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[14] See 47 U.S.C. § 224(f)(1) which states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

[15] See, e.g., "Pepco Plans Phone, Web, Cable Service" by Martha M. Hamilton and Mike Mills, The Washington Post at A12 (In reporting on the PEPCO/RCN venture to offer telephony and

defined in the Act, the express application to "any . . . right-of-way"[16] and the absence of any limitation in Section 224 to public rights-of-way, as in Section 253(c), demonstrates an intention to give the Commission authority over all rights-of-way, private and public, owned or controlled by utilities.[17] Hence, a plain reading of Section 224 demonstrates that it applies whether a right-of-way allows a utility to place its distribution facilities under a city street or on a building's rooftop.[18] When a general right-of-way throughout a building is

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video services in the District of Columbia, the article notes that "Pepco's more important contribution to the venture is its vast network of access to the region's homes and businesses through the rights of way it owns to provide electrical power." The incumbent advantage of not encountering right-of-way entry barriers is reflected by a Bell Atlantic vice president's comment: "They've already got rights of way and conduits. They certainly have the skills and the work force to pull more fiber in, just like they could pull in electrical wires." The underlying transaction only underscores that electric company rights-of-way should be equally available to all telecommunications carriers.)

16 See 47 U.S.C. § 224(f)(1)(emphasis added).

17 Section 253(c) specifically applies only to "public rights-of-way." 47 U.S.C. § 253(c)(emphasis added).

18 In its Interconnection Order, the Commission declined to interpret Section 224 as requiring a utility generally to make space available on the roof of all of its own corporate offices for the installation of a telecommunication carrier's antenna. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1185 (1996) ("Interconnection Order"). This decision does not reach a utility's building access obligations under Section 224 when its distribution facilities extend to the rooftop of a building pursuant to a right-of-way from the building owner. The Commission has recognized that "[t]he intent of Congress in section 224(f) was to permit . . . telecommunications carriers to 'piggyback' along distribution networks owned or controlled