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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 703(e) of the Telecommunications Act of 1996 | ) | CS Docket No. 97-151 |
| | ) | |
| Amendment of the Commission's Rules and Policies Governing Pole Attachments | ) | |

**COMMENTS OF TELIGENT, L.L.C.**

Laurence E. Harris
David Turetsky
Terri Natoli
**TELIGENT, L.L.C.**
Suite 300
11 Canal Center Plaza
Alexandria, VA 22314
(703) 299-4400

Philip L. Verveer
Gunnar D. Halley

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Its Attorneys

September 26, 1997

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## TABLE OF CONTENTS

Page

SUMMARY ..... i

I. INTRODUCTION ..... 1

II. THE COMMISSION SHOULD AVOID NARROWLY DEFINING THE RIGHTS-OF-WAY TO WHICH SECTION 224 GRANTS ACCESS. ..... 2

A. Rights-Of-Way Are Essential Facilities To Which Competitive Carriers Receive Access Under Section 224. ..... 2

B. A Textual Analysis Reveals The Broad Use Of The Term "Right-Of-Way" In Section 224. ..... 6

C. Historic Interpretations Assist In Defining The Term "Right-Of-Way" For Purposes of Section 224. ..... 7

D. Fixed Wireless CLECs Will Use Utilities' Rights-Of-Way To Access Building Rooftops For The Provision And Transmission Of Competitive Telecommunications Services. ..... 9

III. THE COMMISSION SHOULD ADOPT A RIGHT-OF-WAY RATE METHODOLOGY. ..... 10

IV. THE PRINCIPLES OF SECTION 224 SHOULD INFORM THE RIGHT-OF-WAY RATE METHODOLOGY ADOPTED BY THE COMMISSION. . 12

V. CONCLUSION ..... 15

**SUMMARY**

Access to utilities' rights-of-way will play an important role in enabling meaningful local competition to develop. Utility rights-of-way constitute essential facilities. Section 224 accomplishes the traditional antitrust goal of mandating the provision of access to essential facilities in order to avoid the impairment of the development of competition. The Commission must give the strongest and broadest effect to this goal so as to promote to the fullest extent the development of competition in accordance with the goals of the 1996 Telecommunications Act.

Moreover, the term "right-of-way" is not defined in the Communications Act nor do cases interpreting the term present a clearly accepted definition. Nonetheless, it is apparent that "rights-of-way" encompass a broad range of property interests. This should counsel the Commission to avoid a narrow interpretation of the term for purposes of Section 224 and to recognize that rights-of-way encompass those areas of building rooftops for which utilities enjoy a right of use or access.

The Commission should adopt a methodology for right-of-way access rates to provide the clear prospective guidance that will facilitate negotiations and to reduce the administrative burden of dispute resolution. The differences between pole attachments and access to rights-of-way render the pole attachment formulaic components unsuitable for the right-of-way context. Although the general principles expressed in Section 224 can and should be applied to the right-of-way context, a simple methodology which effectuates those goals should be adopted.

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**COMMENTS OF TELIGENT, L.L.C.**

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

## I. INTRODUCTION

Like poles, ducts, and conduit, the rights-of-way owned and controlled by utilities are essential facilities, access to which is a critical component for the development of local competition. Through Section 224, Congress granted the Commission substantial authority to extend to competitors the ubiquitous access previously available only to incumbent monopolists. The Commission must not unnecessarily restrict the use of this pro-

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

2 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Notice of Proposed Rulemaking*, FCC 97-234 (rel. August 12, 1997)("Notice").

competitive provision by narrowly defining the scope of Section 224's right-of-way provisions.

Right-of-way access does not involve attachment to a particular facility, raising unique issues with respect to the assessment of access rates. Teligent suggests the application of a rate methodology to rights-of-way which reflects the broader principles contained in Section 224, but which avoids the complicating formulaic components of pole attachment rates unsuited for rights-of-way.

## II. THE COMMISSION SHOULD AVOID NARROWLY DEFINING THE RIGHTS-OF-WAY TO WHICH SECTION 224 GRANTS ACCESS.

The varied historic interpretations of the term "right-of-way," as well as Section 224's application to both public and private rights-of-way, strongly suggest a broad construction of "right-of-way" for purposes of Section 224. The Commission, in order to accomplish the pro-competitive goals of the Act, should confirm that Section 224 provides access to those areas on building rooftops where utilities enjoy the right of access or use.

### A. Rights-Of-Way Are Essential Facilities To Which Competitive Carriers Receive Access Under Section 224.

The Commission is correct to recognize that Section 224 contemplates rights-of-way as separate and distinct from poles, ducts, and conduit.[3] Access to bare rights-of-way will serve an important role in the network construction of facilities-based providers and will facilitate the alternative ubiquitous coverage

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[3] See Notice at ¶ 42.

necessary for meaningful competition. The Commission's development of rules governing access to rights-of-way should be guided by the expectation that competition will arise in various forms, and that regulation should not deter any particular method of offering consumers competitive options.[4] The Commission will promote the development of varied forms of competition by avoiding a narrow construction of rights-of-way.

Historically, utilities obtained their rights-of-way as a function of incumbency and monopoly. Through initial enactment of Section 224 and its extension in 1996 to telecommunications carriers, Congress sought to grant access to the rights-of-way that utilities enjoy as an advantage of incumbency. A broad perspective of the 1996 Act reveals a strategy designed to promote the development of telecommunications competition on the basis of service and rates rather than on the relative ability of a provider to exert monopoly control over facilities essential to the provision of service. Section 224, and the access to rights-

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4 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 ¶ 12 (1996) ("Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. . . . [O]ur obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored")("Local Competition Order"); see also id. at ¶ 993 ("We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise").

of-way that it provides, assumes an important role in that design.[5]

It is important for the Commission to recognize the essential facility nature of utilities' rights-of-way. The historic monopoly status of the utilities allowed them to exercise the power, either unilaterally or through statutorily-granted eminent domain authority, to obtain rights-of-way over land and through buildings. Competitive telecommunications carriers, by definition, do not enjoy the position of the monopolist. Their ability to duplicate the incumbents' rights-of-way is rendered impotent not only by the economics of the venture (a venture which the monopolist financed largely under rate-of-return regulation), but also by the plain refusal of local governments and individual building owners to admit the facilities of a subsequent carrier (or, as is commonly encountered, by raising the cost of entry to levels that make it an uneconomic enterprise). Because access to rights-of-way are a critical component of providing competitive service and because they cannot be duplicated, rights-of-way constitute an essential facility.[6]

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5 See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").

6 See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-1133 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983).

Regulatory oversight traditionally has imposed broad duties to deal upon regulated utilities which operate concurrent with antitrust laws to enforce general antitrust principles. In these efforts, regulators seek to prevent monopolists from leveraging monopoly power over essential facilities in one market, albeit lawfully derived, to foreclose competitive entry in other markets.[7] The Seventh Circuit used this rationale to hold that a monopolist must make essential facilities available to competitors who could not duplicate the facilities.[8]

Section 224 represents a statutory method of achieving this goal. In its efforts to minimize the prospective operation of historic monopoly power over essential facilities, Congress required the provision to telecommunications carriers of access to, inter alia, rights-of-way under utilities' ownership or control. The intent, when viewed through the lens of even a

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The court described the four elements necessary to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

7 See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 787c1 (1996)(noting that "the 'essential facility' doctrine may have some relevance in regulated monopolies where it serves to limit the monopolist's power to expand its monopoly into 'adjacent' unregulated (or less regulated) markets. . . . Although antitrust is not concerned with rates as such, it becomes concerned when the utility's attempt to enlarge profits eliminates competition in a collateral market capable of being competitive").

8 See MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983).

rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the Commission to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. A narrow interpretation of Section 224 to exclude building access risks perpetuating monopoly control over tenants in buildings, a result at odds with the stated goal of the 1996 Telecommunications Act.[9]

### B. A Textual Analysis Reveals The Broad Use Of The Term "Right-Of-Way" In Section 224.

The rights-of-way to which telecommunications carriers are granted access in Section 224 are not limited to public rights-of-way, but include private rights-of-way, as well. Congress used the term "public rights-of-way" in Section 253(c), but omitted the "public" modifier in Section 224. Canons of statutory interpretation advise interpretations that do not render provisions meaningless.[10] The absence of a modifier in

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9 See Local Competition Order at ¶ 16 (observing that "[v]igorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs").

10 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also, Walters v. Metropolitan Educational Enterprises, 117 S.Ct. 660 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)).

Section 224's use of "rights-of-way" strongly indicates that it is not subject to the restriction in Section 253(c) and, thus, includes private rights-of-way, as well as public.

Because Section 224 rights-of-way are not limited to public rights-of-way, they are not limited to streets and other public thoroughfares. Rather, rights-of-way may include a utility's right to use or access parts of a privately-owned building. If that right extends to a building's rooftop, Section 224 would grant telecommunications carrier access to that rooftop right-of-way.

### C. Historic Interpretations Assist In Defining The Term "Right-Of-Way" For Purposes of Section 224.

The term "right-of-way" is not defined in the Communications Act. Nevertheless, Congress is not unfamiliar with the term in the context of common carriers as evidenced by other statutes. These statutes, and the cases interpreting them, reveal that rights-of-way are not rarely encountered. Rather, they comprise a legal interest, often less than a fee, to use or pass over another entity's property.[11] Some courts have defined this right as an easement[12] while others describe a right-of-way as a

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[11] See Black's Law Dictionary 1326 (6th ed. 1990) (defining a right-of-way as the "[t]erm used to describe a right belonging to a party to pass over land of another"). The Federal Bureau of Land Management's rules offer a definition of right-of-way that supports this broad view: "the public lands authorized to be used or occupied pursuant to a right-of-way grant." 43 C.F.R. § 2800.0-5(g).

[12] See, e.g., Bd. of County Supervisors of Prince William County, Virginia v. United States, 48 F.3d 520, 527 (Fed. Cir. 1995)("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple

license or contractual agreement.[13] Regardless of the particulars, rights-of-way encompass a broad conceptual spectrum of property interests and the Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.[14]

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Northern Rwy Co. v. United States, 315 U.S. 262, 279 (1942)(rights-of-way granted by the 1875 Right of Way Act to constitute easements). The Right of Way Act of 1875 offers an example of the legislative construction of a right-of-way. The goal of the Right of Way Act, which granted rights-of-way to railroads, is closely analogous to the driving force behind Section 224. The law was designed to promote the public interest by facilitating the construction of nationwide common carrier facilities through grants of access to lands not owned by the common carrier. Interpreting the Act, the Supreme Court determined that Congress used the term "right-of-way" interchangeably with easement. See id. The Court observed that "Congress itself in later legislation . . . interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, declaring a forfeiture of unused rights of way, provides in part that: 'the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement.'" Id. at 276 (citations omitted). Moreover, the Court noted that the legislative history of a similar Act passed later that year expressed the view that rights-of-way and easements were to be viewed interchangeably. "The House committee report on this bill said: 'the right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes.'" Id. at 277 (quoting H. Rep. No. 4777, 59th Cong., 1st Sess. at 2).

13 See, e.g., Wilderness Society v. Morton, 479 F.2d 842, 853-54 (D.C. Cir. 1973) ("A right-of-way is most typically defined as the right of passage over another person's land. It has been said that '[a] right of way is nothing more than a special and limited right of use,' a definition that sounds remarkably similar to the special land use permit issued in this case")(citations omitted), cert. denied, 411 U.S. 917 (1973).

14 A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes.

### D. Fixed Wireless CLECs Will Use Utilities' Rights-Of-Way To Access Building Rooftops For The Provision And Transmission Of Competitive Telecommunications Services.

The construction of the term "right-of-way" will affect the ability of competitive carriers to provide services to buildings as well as the speed with which they do so. Consequently, so, too, is affected the competitive options for the vast number of business and residential building tenants to receive the competitive facilities-based telecommunications service contemplated by the Act. Fixed wireless CLECs will seek access to building rooftops through their right-of-way access rights under Section 224. Rather than attaching distribution facilities to a utility's poles, fixed wireless CLECs transport traffic using radio spectrum. To provide service to a tenant within a building, fixed wireless CLECs such as Teligent will place a small antenna on a building rooftop to transmit and receive the digital microwave telecommunications signals. The antenna must be located on the building being served because a coaxial cable runs from the antenna through a modulator and to the building's cross-connect (often in the basement) where connection with the customer's telephone system is accomplished.

The fixed wireless CLEC use of radio communication promises a number of consumer benefits, not the least of which is lower service rates, but the technology used necessitates a method of accessing the customer that is quite different from the method used by traditional wireline carriers. Teligent's facilities-based service is one of the varied forms of competition the Commission seeks to encourage (and certainly not to

disadvantage). Section 224 contemplates a variety of technologies and must be interpreted to account for varying distribution mechanisms, including those that use rooftops in lieu of telephone poles, so that benefits of competition, in its many forms, can accrue to end users.

## III. THE COMMISSION SHOULD ADOPT A RIGHT-OF-WAY RATE METHODOLOGY.

Section 224's formula for calculating reasonable pole attachment rates assumes occupation or sharing of a utility's facility such as a pole or a duct. For this reason, it does not lend itself to application in the right-of-way context. Rights-of-way may hold utility facilities, but the competitive carrier seeking right-of-way access generally will not attach to the utility facility. Instead, the party seeking access will construct its own facility on the utility's right-of-way. Because the utility's actual facilities are not used, an alternative method must be developed to determine whether rates for access to utilities' rights-of-way are reasonable.

A case-by-case approach to the resolution of right-of-way rate and access complaints would fail to provide parties adequate guidance on reasonable negotiation parameters and could increase significantly the administrative burdens of the Commission.[15] By

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[15] The Commission has noted the administrative burdens and lack of guidance that often accompany a case-by-case method of establishing operating guidelines. See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, 4 CR 484 at ¶ 228 (1996)("Requiring carriers to litigate the meaning of 'reasonable' notice through our complaint process on a case-by-case basis might slow the introduction and implementation of new technology and services, and burden

contrast, a methodology for right-of-way access would minimize the transaction costs of all parties incurred by obtaining or granting access to rights-of-way. Moreover, a methodology would offer prospective guidance for negotiations (negotiations which, the Chief of the Cable Services Bureau recognized, will not be pursued from equal bargaining positions)[16] and, consequently, would decrease the number of complaints for Commission consideration. Finally, the Commission's waiver rules remain available for those circumstances in which a generally applicable methodology would accomplish an injustice.[17] In short, a methodology would serve the public interest and should be developed by the Commission.

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both carriers and the Commission with potentially lengthy, fact-specific enforcement proceedings"); see also International Settlement Rates, IB Docket No. 96-261, *Report and Order*, FCC 97-280 at ¶ 212 (rel. August 18, 1997)("we believe a rule of general applicability is more administratively efficient, and more importantly, would result in greater regulatory certainty . . . than a case-by-case determination").

16 See Letter from Meredith J. Jones, Chief, Cable Services Bureau, Federal Communications Commission to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA 97-131, at 2 (Jan. 17, 1997)("Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant"). The Commission, too, took notice of Congress' recognition of the general unequal bargaining power between the ILECs and new entrants. See Local Competition Order at ¶ 15 ("Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of [interconnection, UNE and resale] agreements would be quite different from typical commercial negotiations").

17 See 47 C.F.R. § 1.3.

The Commission has recognized the significant discretion granted to it by Congress to select a methodology for just and reasonable pole attachment rates.[18] Moreover, it has observed that Congress intended a program "that would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[19] Consistent with these intentions, the Commission should fashion a simple method of determining just and reasonable right-of-way access rates.

## IV. THE PRINCIPLES OF SECTION 224 SHOULD INFORM THE RIGHT-OF-WAY RATE METHODOLOGY ADOPTED BY THE COMMISSION.

The Commission is not without statutory guidance as to the substance of a right-of-way methodology. The statute recommends the application of existing pole attachment and rights-of-way principles to a right-of-way rate methodology. The principles of fair and reasonable rates and nondiscriminatory assessment are contained throughout Section 224. These principles also appear in the only other provision of the Act expressly mentioning rights-of-way: Section 253(c). Section 253(c) retains State and local government authority over management of public rights-of-way insofar as the requisite compensation is "fair and reasonable" and assessed on a "nondiscriminatory basis."[20] The

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18 See Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 at ¶ 29 (rel. March 14, 1997)("The Commission has significant discretion in selecting a methodology for determining just and reasonable pole attachment rates").

19 Id. at ¶ 4.

20 47 U.S.C. § 253(c).

reappearance of the term "right-of-way" in Section 253(c) along with the same principles found in Section 224 strongly suggests that Congress believed these principles could and should be applied in the right-of-way context as reasonable right-of-way management criteria.[21]

The Commission has interpreted, on several occasions, the meaning of the "just and reasonable" requirement.

> The zone of reasonableness is bounded on the lower end by the utility's incremental costs, and on the upper end by the . . . telecommunications carrier's share of the utility's fully allocated costs of owning and maintaining the poles to which an attachment has been made. Incremental costs are those costs that the utility would not have incurred "but for" these attachments.[22]

Application of this requirement to the right-of-way context is possible in a general sense, but application of the specific formulaic components used for pole and conduit attachments would be awkward, if not unworkable. Teligent recommends the development of a simplified method of calculating what is a just and reasonable rate for access to rights-of-way.

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21 See Kokoszka v. Belford, 417 U.S. 642, 650 (1974)("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature'") (citations omitted).

22 Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 at ¶ 2 (rel. March 14, 1997); see also Notice at ¶ 5.

Moreover, rates for access to utilities' rights-of-way must be assessed on a nondiscriminatory basis. Both Section 253(c) and Section 224 contain this requirement. The nondiscrimination principle requires, at minimum, that a utility assess a telecommunications carrier no greater share of right-of-way costs than it pays itself. The Commission should ensure that any methodology for right-of-way access rates conforms with this central principle.

## V. CONCLUSION

In conclusion, Teligent urges the Commission to ensure that the rights-of-way access granted by Section 224 is not narrowly defined and that just and reasonable rates for such access may be calculated pursuant to a simple methodology. A construction of "right-of-way" to include those areas of building rooftops to which utilities have a right of use or access, and a just and reasonable right-of-way rate methodology, will promote the accrual of the benefits of telecommunication competition to tenants in multi-unit buildings while reducing transaction costs and increasing administrative efficiencies.

Respectfully submitted,

TELIGENT, L.L.C.

By: Gunnar D. Halley

Philip L. Verveer
Gunnar D. Halley

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Laurence E. Harris
David Turetsky
Terri Natoli
**TELIGENT, L.L.C.**
11 Canal Center Plaza
Suite 300
Alexandria, VA 22314
(703) 299-4400

ITS ATTORNEYS

Dated: September 26, 1997

**CERTIFICATE OF SERVICE**

I, Gunnar D. Halley, do hereby certify that on this 26th day of September, 1997, copies of the foregoing "Comments of Teligent, L.L.C." were delivered by hand to the following parties:

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Meredith J. Jones, Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, D.C. 20554

JoAnn Lucanik
Chief, Policy Division
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 406A
Washington, D.C. 20554

Rick Chessen
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 406-F
Washington, D.C. 20554

John E. Logan
Deputy Chief
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W.
Suite 918
Washington, D.C. 20554

Claire Blue
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 406-A
Washington, D.C. 20554

Donnie Fowler
Special Advisor to
Meredith Jones
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 917
Washington, D.C. 20554

Michael Lance
Deputy Chief
Engineering & Technical
Services Division
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 201-O
Washington, D.C. 20554

John P.Wong
Division Chief
Engineering & Technical
Services Division
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W.,
Room 201-N
Washington, D.C. 20554

Gunnar D. Halley