DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

Timothy Graham
Robert Berger
Joseph Sandri, Jr.

WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5678

Philip L. Verveer
Michael F. Finn

WILLKIE FARR & GALLAGHER
Suite 300
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys For WinStar Communications, Inc.

October 21, 1997

0046820.03

No. of Copies rec'd 0+11
List ABCDE

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. ROOFTOP ACCESS IS INCLUDED WITHIN THE MEANING OF "RIGHTS-OF-WAY" IN SECTION 224 4

III. THE COMMISSION MUST ADOPT A RATE METHODOLOGY FOR RIGHTS-OF-WAY 6

A. A Rate Formula Is Necessary To Prevent Anticompetitive Behavior By LECs And Other Utilities Holding Rights-Of-Way 6

B. LECs' Arguments In Favor Of An *Ad Hoc* Complaint Process Are Misguided 8

IV. TELECOMMUNICATIONS CARRIERS MAY -- AS THIRD PARTIES -- ACCESS RIGHTS-OF-WAY HELD BY UTILITIES 13

V. THE FORMULA FOR RIGHTS-OF-WAY SHOULD BE BASED ON INCREMENTAL COST 15

VI. CONCLUSION 18

SUMMARY

THE TERM "RIGHTS-OF-WAY" MUST BE INTERPRETED BROADLY TO INCLUDE ROOFTOP ACCESS:

- ROOFTOP ACCESS IS AN ESSENTIAL FACILITY FOR THE PROVISION OF WIRELESS TELECOMMUNICATIONS SERVICES
- RIGHTS-OF-WAY TYPICALLY MAY INVOLVE ACCESS TO BUILDINGS, LOBBIES STAIRWAYS, ETC.

THE COMMISSION MUST ADOPT A RATE METHODOLOGY FOR RIGHTS-OF-WAY:

- LECS HAVE NO INCENTIVE TO MAKE THEIR RIGHTS-OF-WAY AVAILABLE TO RIVALS WHO WILL USE THE RIGHTS-OF-WAY TO WOO LECS' CUSTOMERS
- A RATE FORMULA WILL REDUCE LECS' OPPORTUNITY AND INCENTIVE TO USE THEIR CONTROL OVER RIGHTS-OF-WAY TO PRICE ANTICOMPETITIVELY

CONTRARY TO THE LECS' ARGUMENTS IN FAVOR OF AN *AD HOC* COMPLAINT PROCESS:

- RATE DISPUTES FOR RIGHTS-OF-WAY CONTINUE TO OCCUR, WILL ALMOST SURELY INCREASE, AND WILL NOT BE RARE
- REQUESTS FOR RIGHTS-OF-WAY WILL NOT BE FEW IN NUMBER
- INEXPERIENCE WITH RIGHTS-OF-WAY CANNOT JUSTIFY THE LACK OF A PRICING FORMULA AS THE COMMISSION HAS CREATED SUCH FORMULAS IN SIMILAR CIRCUMSTANCES
- RIGHTS-OF-WAY ARE NOT TOO COMPLEX TO BE CONDENSED INTO A SINGLE FORMULA

SECTION 224 COMPELS LECS TO OFFER ACCESS TO THEIR RIGHTS-OF-WAY:

- THE INTERCONNECTION ORDER REQUIRES LECS TO USE THEIR EMINENT DOMAIN POWERS TO ESTABLISH "NEW" RIGHTS-OF-WAY TO ACCOMMODATE ACCESS REQUESTS BY ELIGIBLE CARRIERS; SUCH POWERS OVERRIDE ANY CONTRACTUAL LIMITATIONS ON PROVIDING ACCESS
- COURTS HAVE HELD THAT REQUESTING ENTITIES MUST BE ALLOWED TO "PIGGYBACK" ON UTILITIES' EASEMENTS

THE RIGHTS-OF-WAY FORMULA MUST BE BASED ON INCREMENTAL COST:

- RATES MUST BE COST-BASED AND RELATE ONLY TO LECS' ACTUAL DIRECT COSTS OF MAKING ACCESS AVAILABLE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar") hereby submits its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION.

The comments in this proceeding reflect the tripartite split between incumbent local exchange carriers ("LECs") who wish to limit access to their customers, competitive telecommunications carriers who seek nondiscriminatory access to rights-of-way, and gas, water, and electric utilities who must provide such access. All of the incumbent LECs filing comments -- including several Bell operating companies ("BOCs"), GTE and USTA -- saw no reason for the Commission to enact a rate formula to govern rights-of-way. Arguing that the Commission has too little experience with rights-of-way, these commenters asserted that reliance on a case-by-case complaint process would yield better results. In

---

1 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").

contrast, WinStar, AT&T, Teligent, KMC Telecommunications, and Colorado Springs Utilities contended that a nondiscriminatory rate formula would provide uniformity and guidance to those holding rights-of-way while simultaneously guaranteeing nondiscriminatory access to those rights-of-way by eligible telecommunications carriers.[2] The electric, gas, and water utilities, all of which rejected LECs' *ad hoc* approach, asserted that the Commission should price rights-of-way at each State's eminent domain rate unless the parties otherwise reach agreement.[3]

In Section 224, Congress required LECs and other utilities to make available on nondiscriminatory and reasonable terms all of their poles, ducts, conduits, and rights-of-way used for communications. That action was deliberate. Congress sought to remove those bottleneck facilities from incumbent LECs' and utilities' control in order to facilitate other telecommunications carriers with the building out of their communications networks and, more importantly, the provision of service to end users. At bottom, therefore, Section 224 is designed to guarantee that telecommunications carriers have nondiscriminatory and fair access to LECs' and other utilities'

---

2 See, e.g., Colorado Springs Utilities Comments at 4 (Since CSU "does own many rights-of-way, such a policy may be helpful as guidance.").

3 See EEI/UTC Comments at 30-31; American Electric Comments at 64-65.

customers. Such access is essential for the fruition of Congress' goal of competition in the local loop.[4]

To that end, WinStar's Comments here[5] and in other proceedings[6] demonstrated the necessity for Commission action concerning rights-of-way. Specifically, WinStar showed that:

---

4 The Commission should bear in mind, however, that fair and nondiscriminatory access to poles, ducts, conduits, and rights-of-way of other utilities alone will not bring about competition in the local loop. To help ensure the success of local loop competition, the Commission also must address issues related to fair and non discriminatory access to public rights-of-way. Currently, no standard exists by which municipalities must value the public rights-of-way under their control. Across the country, local governments are assessing tax-like franchise fees against competitive telecommunications providers based not upon the value and extent of the use of the rights-of-way, but upon arbitrary percentages of such companies' gross revenues. Moreover, municipal governments are leveraging improperly their authority over 911 service and billing arrangements to coerce competitive service providers into entering into franchise agreements that are neither competitively neutral, nor nondiscriminatory. Only when the Commission takes decisive action to hold local governments to their mandate under Section 253(c) to require fair and reasonable compensation for the use of public rights-of-way will competition in the local loop be achieved.

5 WinStar recognizes that the Commission's Interconnection Order did not adopt WinStar's position that Section 224 requires utilities to make space available on the rooftop of their corporate offices. See Interconnection Order, 11 FCC Rcd 15499 at ¶ 1185 (1996). However, the Interconnection Order did not address utilities' access obligations with respect to buildings where the utilities have rights-of-way. Those issues, therefore, are properly raised in this proceeding.

6 WinStar has set forth its position on rights-of-way in its Petition for Clarification or Reconsideration, and its Opposition to Petitions for Reconsideration in CC Docket Nos. 96-98 and 95-185 as well. Those pleadings -- which are attached to these Reply Comments -- remain outstanding. Given the essential nature of rights-of-way, WinStar urges the Commission to resolve swiftly those issues raised herein and in CC Docket Nos. 96-98 and 95-185, including those issues deferred from CS Docket No. 95-184. See

- rooftop access is an essential facility for the provision of fixed point-to-point wireless-based local exchange services and that without such access, wireless competitive local exchange carriers ("CLECs") are seriously disadvantaged and in some cases completely precluded from offering competitively-priced services to building tenants and residents;

- the term "rights-of-way" must be interpreted to include rooftop access because rights-of-way generally refer to a right to pass over, under, or through land, buildings and other like property and/or structures;

- the essential nature of rights of way mandates the adoption of a pricing methodology rather than dependence on an *ad hoc* complaint process; and

- just and reasonable pricing mandates that prices be cost-based and that telecommunications carriers pay no more than their proportionate share of the cost to the utility for maintaining the right-of-way.

WinStar's views were largely shared by Teligent, the only other wireless-based CLEC to file comments in this proceeding. Likewise, AT&T, KMC Telecommunications, Colorado Springs Utilities, and other utility commenters all supported adoption of a rate methodology or governing principles.

II. ROOFTOP ACCESS IS INCLUDED WITHIN THE MEANING OF "RIGHTS-OF-WAY" IN SECTION 224.

WinStar agrees with Teligent that rooftop access is an essential facility for the provision of wireless telecommunications.[7] Without the ability to place its antennas on the rooftops of buildings in which customers and potential

---

Telecommunications Services Inside Wiring, *Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 ¶ 178 (rel. Oct. 17, 1997)(deferring certain rights-of-way issues to CC Docket Nos. 96-98 and 95-185).

[7] See Teligent Comments at 2-6; WinStar Comments at 5-6.

customers are located, there is literally no way for WinStar or any other wireless-based CLEC to provide its wireless telecommunications services to the building's tenants (especially those interested in accessing wireless telecommunications services).

As a legal matter, there is no barrier to the Commission reaching this conclusion. As demonstrated by both WinStar and Teligent, the rights-of-way in Section 224 include easements and other similar grants of access.[8] More importantly, it is not at all uncommon for easements to provide access to and through structures such as buildings, bridges, etc. The Second Circuit, for example, recently resolved a negligence action involving an easement running through a building including its stairways, lobbies, and vestibules.[9] Likewise, the D.C. Circuit -- in a case involving the scope of a family trust -- noted that a lessor possessed an "easement for parking in an existing garage."[10] Thus, it should be uncontroverted that "rights-of-way" can include rooftop access.

Moreover, as pointed out in WinStar's comments, a utility need not be accessing the rooftop in order for it to be available

---

8 Id.; Teligent Comments at 6-9.

9 See Monaghan v. SZS 33 Assocs., 73 F.3d 1276, 1279 (2d Cir. 1996). See also In re Lamont Gear Company, No. 95-17033DAS, 1997 Bankr. LEXIS 979 (Bankr. E.D. Pa. 1997)(tenants of building possessed easement permitting them to access areas belonging to others in order to make use of the building's entrances).

10 See Burka v. Aetna Life Ins. Co., 56 F.3d 1509, 1511 (D.C. Cir. 1995).

to telecommunications carriers under Section 224.[11] Nothing in Section 224 limits the term "rights-of-way" to those rights-of-way actually being utilized by the utility. Nor has the Commission so limited Section 224. In its Interconnection Order, the Commission expressed its belief that Section 224 obligates utilities to "exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties."[12] Such "new" rights-of-way obviously would not be utilized by the incumbent utility.

III. THE COMMISSION MUST ADOPT A RATE METHODOLOGY FOR RIGHTS-OF-WAY.

A. A Rate Formula Is Necessary To Prevent Anticompetitive Behavior By LECs And Other Utilities Holding Rights-Of-Way.

The Commission is well aware of the fact that incumbent utilities' control over local exchange facilities gives them the opportunity and incentive to discriminate against their rivals. For example, the Commission has observed that competitors seeking access to LECs' telecommunications facilities are "handicapped by the unique circumstances that their success in competing for BOC customers depends upon the BOCs' cooperation."[13] Such cooperation, the Commission has held, will not occur voluntarily:

---

11 See WinStar Comments at 9-11.

12 Interconnection Order, 11 FCC Rcd 15499, ¶ 1181 (1996); see also id. (Section 224(f) requires utilities to exercise their eminent domain powers to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.").

13 See Ameritech Michigan Section 271 Order, FCC 97-298, CC Docket No. 97-137 ¶ 17 (rel. August 19, 1997).

> in the absence of significant Commission rulemaking and enforcement . . . directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in the local exchange . . . to any discernible degree.[14]

A like conclusion is required with respect to rights-of-way.[15] Absent Commission rulemaking, LECs have little incentive to provide access to their rights-of-way to competitors who will then use the rights-of-way to woo the LECs' customers.[16] This is especially true because -- as acknowledged by Southwestern Bell -- many LECs have obtained their rights-of-way for free.[17] As recognized above, LECs have no motive to pass on such efficiencies (zero cost facilities) to their competitors.[18] Rather, they must be

---

14 See id. at ¶ 18.

15 Southwestern Bell has expressly stated that the higher the payment required of telecommunications providers for access to a LEC's rights-of-way, the less likely that tenants will see competitive choices. See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 4 (Oct. 2, 1997).

16 See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, 95 FCC.2d 1117, 11136 (1983)(BOCs' "control of access to the network [creates] the potential that BOCs could inhibit access [to competitors].").

17 See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 8 (Oct. 2, 1997)("[Certain facilities . . . may have been placed by [the] telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider.")(emphasis added).

18 See Non-Accounting Safeguards Order, 11 FCC Rcd 21905, 21912 (1996)(noting that BOC has incentive to deprive its rivals of efficiencies that it enjoys); Cable Television and Telecommunications Ass'n of New York Comments at 3 (A Commission policy favoring negotiating of agreements would

compelled to do so by Commission regulation in the form of a rate formula.[19] Such formula comports with the Commission's well-established "philosophy of using regulatory measures to control [] pricing . . . by carriers with control over bottleneck facilities."[20]

B. LECs' Arguments In Favor Of An *Ad Hoc* Complaint Process Are Misguided.

Predictably, all of the commenting BOCs, GTE, and USTA discount the benefits of a rate formula and instead argue that a complaint process is preferable. According to those commenters,

---

permit pole owners to use their vastly greater market power to extract monopoly rents).

19 The Commission has previously held that regulation is the key to curbing BOCs' incentives to harm rivals. See Non-Accounting Safeguards Order, 11 FCC Rcd at 21915 (regulatory framework is needed to enable service providers to enter each other's markets and compete on an equal footing).

That the Commission's regulatory powers affect BOCs' behavior is exemplified by BellSouth's promise -- in seeking the Commission's permission to provide in-region interLATA services -- to make its rights-of-way available to competitors. See Attachment to Affidavit of Victor E. Jarvis, *Access to Poles, Conduits and Rights of Way: Technical Service Description*, BellSouth Section 271 Application, CC Docket No. 97-208, App. A, Vol. 3C at 3 (filed Sept. 30, 1997). This promise, however, does not reach any of the other BOCs nor does it guarantee that prices will be fair.

20 See International Settlements Rates, FCC 97-280, 1997 LEXIS 4397 at ¶ 3 (rel. Aug. 18, 1997). The rate formula along with other rights-of-way guidelines and presumptions should be sufficient to curtail utilities' anticompetitive tendencies; the Commission need not enact comprehensive rules covering every aspect of rights-of-way. See WinStar Petition for Clarification or Reconsideration in CC Docket Nos. 96-98 and 95-185 at 4-5 ("WinStar Reconsideration Petition")(discussing the need for cost-based access to rooftops to be included as part of the Commission's pole attachment regime).

adoption of a rate methodology is unnecessary because: (1) disputes over rates "should be rare";[21] (2) the demand for rights-of-way is small;[22] (3) the Commission is too inexperienced with rights-of-way to properly craft a formula;[23] and (4) rights-of-way implicate too many issues to be captured in a single formula.[24] These arguments are pure sophistry.[25]

The record before the Commission in this and other proceedings should put to rest SBC's claim that disputes over rates for rights-of-way "should be rare."[26] WinStar has repeatedly and continuously encountered difficulties in obtaining rooftop access on fair terms.[27] Such problems will increase exponentially as WinStar and other CLECs -- wireless and wireline -- roll out their services because they will need access to every single building they wish to serve. It also should be remembered

---

21 See SBC Comments at 21.

22 See USTA Comments at 15.

23 See Bell Atlantic Comments at 9; U S West Comments at 11-12; GTE Comments at 14.

24 See Ameritech Comments at 15; U S West Comments at 12; GTE Comments at 14.

25 It should go without saying, of course, that a case-by-case complaint process is lengthy, unwieldy, and encourages recalcitrance by LECs and utilities.

26 See SBC Comments at 35.

27 See WinStar Petition For Clarification or Reconsideration in CC Docket Nos. 96-98 & 95-185 at 2 (noting LECs' reluctance to permit WinStar to access rooftops at cost-based rates); WinStar Comments in CS Docket No. 95-184 at 7 (rooftop access is not being made available on a reasonable and nondiscriminatory basis).

that WinStar and other CLECs seek access to rights-of-way in order to compete with the incumbent telephone companies. The Commission has long recognized that LECs, especially the BOCs, have little incentive to price fairly or otherwise facilitate entry by competing telecommunications carriers.[28] Consequently, there is no reason to believe that disputes over the proper rate for rights-of-way will be rare.

Likewise, there is no credible basis for USTA's assertion that the demand for rights-of-way is too small to justify creation of a rate methodology.[29] WinStar is in the process of becoming a nationwide wireless CLEC.[30] It has rolled out its switches in eight major markets and expects to be in at least twenty markets by the end of 1998. WinStar presumes that other wireless CLECs have similar plans. As noted, such carriers will need to access LECs' or other utilities' rights-of-way in each building they wish to serve. And, they will not be alone: the comments of both AT&T and KMC Telecommunications illustrate that wireline carriers also will be demanding access to rights-of-

---

28 See CMRS Safeguards Order, FCC 97-352, 1997 FCC LEXIS 5475 ¶ 55 (rel. Oct. 3, 1997)(LECs have "the incentive and the ability" to hinder competition by denying access to their facilities or setting the rates at excessive levels); Ameritech Michigan Section 271 Order, FCC 97-298, CC Docket No. 97-137 (rel. Aug. 19, 1997) at ¶ 14 ("BOCs, however, have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets.").

29 See USTA Comments at 15 ("[I]t is not clear that there is sufficient demand for access to rights-of-way that adopting a methodology would be worthwhile.").

30 It is certified as a CLEC in twenty-nine jurisdictions and as a competitive access provider in thirty-eight.

way.[31] Thus, the Commission should give little heed to LECs' self-serving estimates concerning the demand for rights-of-way.[32]

Equally self-serving is the LECs' assertion that the Commission is too inexperienced with rights-of-way to craft a proper rate formula.[33] That argument is belied entirely by the fact that the Commission often is called upon to craft rules -- including ratemaking -- in areas where it has not previously regulated actively. Prior to the Cable Act of 1992, for example, the Commission had virtually no experience in rate regulation of cable services. Yet, pursuant to that Act's requirements for reasonable rates,[34] the Commission adopted a comprehensive formula for the regulation of cable rates.[35] Apparently, inexperience did not hinder the Commission's cable rate

---

31 See AT&T Comments at 18-19 (discussing need for rights-of-way methodology); KMC Telecommunications Comments at 9 (rights-of-way may be the only means of access to serve customers in a multi-tenant environment).

32 GTE's belief (GTE Comments at 35) that rules are unnecessary because attaching carriers have not needed rules for twenty years is specious as telecommunications carriers did not possess access rights under Section 224 prior to the enactment of the 1996 Telecommunications Act. Furthermore, CAPs and CLECs were not in operation for most of the twenty-year period relied on by GTE.

33 See Bell Atlantic Comments at 9; U S West Comments at 11-12; SBC Comments at 35; GTE Comments at 14; USTA Comments at 14.

34 See Section 623(a), (b) & (c), 47 U.S.C. § 543(a), (b) & (c).

35 See First Rate Order, 8 FCC Rcd 5631 (1993).

regulation as its formulaic approach thereafter was upheld by the D.C. Circuit.[36]

Contrary to LECs' suggestions, the need for a rate formula is bolstered by the LECs' own asserted lack of experience with rights-of-way.[37] Assuming that is true -- which is highly problematic[38] -- guidance in the form of a rate formula should ease negotiations between LECs and competitive telecommunications carriers by eliminating this area of possible contention. For this reason, at least one State-owned utility -- which is therefore entirely exempt from Section 224[39] -- "encourages the FCC to adopt a policy for attachment rates for the use of rights-of-way."

The BOCs also attack the creation of a Commission rate formula on the grounds that rights-of-way are too complex to be condensed into a single formula.[40] Not so. Rights-of-way are

---

36 See Time Warner Ent. Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 911 (1996).

37 U S West and GTE both argued that they had little experience with rights-of-way and thus adoption of a rate formula would be counterproductive. See U S West Comments at 11-12; GTE Comments at 14.

38 In contrast to LECs' alleged lack of experience, BellSouth states in its application for Section 271 authority that it has provided "companies with access to . . . rights of way in South Carolina and throughout its region for many years. Such arrangements are 'business as usual.'" See BellSouth Section 271 Application, CC Docket No. 97-208, at 41 (filed Sept. 30, 1997).

39 Utilities owned by State or local government are outside the reach of Section 224. See 47 U.S.C. § 224(a)(1).

40 See Ameritech Comments at 15-16; U S West Comments at 12; GTE Comments at 14.

surely susceptible to certain basic principles such as incremental cost. The Commission is well-acquainted with incremental cost formulas and should be able to develop a formula listing those elements which may properly be included. Although rights-of-way may be complex, such complexity merely cautions that exceptions may exist to the rule. That exceptions may exist does not mean that a formula should not be created; rather, it teaches that the Commission should be prepared to grant exceptions or even modify its rules depending on the circumstances. In the cable regulation context, the Commission has taken both actions as opposed to discarding the formula altogether. Given the above, adoption of a rate methodology for rights-of-way is entirely appropriate and good public policy. Further, as demonstrated in Section V, *infra.*, such formula must be nondiscriminatory such that if a LEC pays nothing for access so too should the competitive telecommunications provider.

IV. TELECOMMUNICATIONS CARRIERS MAY -- AS THIRD PARTIES -- ACCESS RIGHTS-OF-WAY HELD BY UTILITIES.

Several utilities contend that Section 224 cannot be used to compel them to provide access to their rights-of-way in circumstances where the underlying agreement provides the rights-of-way only for the utility's use[41] or where the utility has no need of the rights-of-way.[42] That view flies in the face of the Interconnection Order which (1) commands utilities to "exercise

---

41 See Bell Atlantic Comments at 9-10; American Electric Power Comments at 61.

42 See U S West Comments at 12 n.29.

their powers of eminent domain to establish new rights-of-way for the benefit of third parties"[43] and (2) requires utilities to exercise their eminent domain powers to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."[44]

Moreover, statutory interpretations by both the Eleventh and Fourth Circuits further weaken the LECs' arguments. For example, the Eleventh Circuit has interpreted the Cable Act's language permitting cable franchisees to use public rights-of-way and easements dedicated for compatible uses as allowing cable operators to "'piggyback' on easements dedicated to electric, gas or other utility transmissions."[45] Likewise, the Fourth Circuit held that:

> the use of a wire for the transmission of television signals is substantially compatible with the use given for the transmission of telephonic data and . . . the addition of a television transmission wire, [which accordingly is] indistinguishable in appearance from other communication wires authorized under the grant, does not impose an unnecessary or even increased burden

---

43 Interconnection Order, 11 FCC Rcd 15499 at ¶ 1181.

44 Id. With respect to Texas law, Southwestern Bell has noted that a LEC has the right to condemn "[a]ny identifiable interest in real property . . . including conduit and riser space." See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 6 (Oct. 2, 1997).

45 See Centel Cable Television v. White Development Corp., 902 F.2d 905, 909 (11th Cir. 1990). See also id. at 910 ("It would be inconsistent with the [access] policy of the Cable Act to hold that cable operators cannot piggyback on these rights of access granted to other utilities "where those rights are necessary to full enjoyment of the related easements.").

on the servient estate, [*i.e.*, the underlying property owner].[46]

Although both Circuits have held that the Cable Act does not permit access to private easements, Section 224 is not so limited.[47] Consequently, Centel and C/R TV should apply with full force to both public and private easements under Section 224.[48] In short, third party telecommunications carriers must be provided access to the rights-of-way held by utilities.[49]

V. THE FORMULA FOR RIGHTS-OF-WAY SHOULD BE BASED ON INCREMENTAL COST.

As addressed repeatedly in its initial Comments, WinStar agrees with both AT&T and Teligent that rates for rights-of-way

---

46 See C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

47 At least two circuit courts have held that the Cable Act's access provisions do not reach private easements. See Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993); Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992). As noted by both WinStar and Teligent, Section 224 applies fully to private easements and rights-of-way. See WinStar Comments at 3-4; Teligent Comments at 6-7. Thus, Media General and Cable Holdings are inapposite here.

48 The Commission recently held that "we do have the authority in certain instances to review restrictions imposed upon [] use [of rights-of-way.]" See Telecommunications Services Inside Wiring, *Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 ¶ 180 (rel. Oct. 17, 1997).

49 Assuming that a general cost-based rule for rooftop access is adopted, WinStar supports the use of a case-by-case approach for those limited exceptions in which a utility contends that it lacks authority to provide access to its rights-of-way. See WinStar Opposition to Petitions for Reconsideration in CC Docket Nos. 96-98 and 95-185 at 3 (filed Oct. 31, 1996). That is precisely the type of case-by-case review discussed in WinStar's filings in those dockets.

should be based on incremental cost and should be no more than (1) what the utility pays for its access or (2) the proportionate cost to the utility of obtaining access for the requesting telecommunications carrier.[50] According to Southwestern Bell, the incremental cost may well be nothing since many LECs obtained their rights-of-way for free.[51] Furthermore, as appropriately pointed out by AT&T, it should be presumed generally that utilities have already recovered the capital costs of obtaining their rights-of-way.[52] Thus, under both Southwestern Bell's and AT&T's views, access fees would be limited to only those out-of-pocket expenses actually incurred by the utility in making its rights-of-way available, such as clerical costs for recordkeeping, etc.[53] Anything more would be unjust and unreasonable given that the utility either paid nothing or has already recovered its capital costs.

Further support for incremental cost-based rates is found in the Interconnection Order which suggests that rooftop access may be available as an unbundled network element under Section

---

50 See WinStar Comments at 14-15; AT&T Comments at 17-18; Teligent Comments at 12-15.

51 See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 8 & 12-13 (Oct. 2, 1997)(stating that "often [LECs] facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider" and that new providers should be provided access and space "on the same basis as the incumbent")(emphasis added).

52 See AT&T Comments at 18.

53 See AT&T Comments at 18-19.

251(c)(6).[54] As a UNE, an incremental cost-based formula -- such as TELRIC -- would be entirely appropriate.

In any event, access rates should be no more than the telecommunications carrier's proportionate share of the cost to the utility of maintaining the rights-of-way. That view has been espoused by Southwestern Bell, which has said that where room is no longer available among all telecommunications utilities in the building, "charges for additional space . . . should be allocated among all telecommunications utilities in the building."[55] Finally, the rate formula must be simple to apply as otherwise it may lead to lengthy debates and complaints over its proper application.[56]

---

54 See Interconnection Order, 11 FCC Rcd 15499, ¶ 1185.

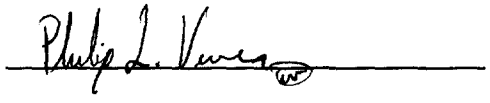
55 See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 12 (Oct. 2, 1997).

56 WinStar, as a facilities-based carrier, strongly disagrees with MCI's view that a rate formula is unnecessary as utilities do not possess market power over rights-of-way. As MCI admits, it has "experienced difficulty" in obtaining access to private rights-of-way. See MCI Comments at 22. Such difficulties demonstrate the utilities' power.

VI. CONCLUSION.

WinStar respectfully asks the Commission to carry out Congress' mandate in Section 224 by enacting rules defining rights-of-way broadly and setting forth a cost-based rate formula ensuring just and reasonable access prices to rights-of-way.

Respectfully submitted,



Timothy Graham
Robert Berger
Joseph Sandri, Jr.

WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5678

Philip L. Verveer
Michael F. Finn

WILLKIE FARR & GALLAGHER
Suite 300
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys For WinStar Communications, Inc.

October 21, 1997

RECEIVED

OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

WINSTAR COMMUNICATIONS, INC.
PETITION FOR CLARIFICATION OR RECONSIDERATION

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

Dana Frix
Antony R. Petrilla
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 3000
Washington, D.C. 20007
(202) 424-7500

Counsel for
WinStar Communications, Inc.

Dated: September 30, 1996

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

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

WINSTAR COMMUNICATIONS, INC.
PETITION FOR CLARIFICATION OR RECONSIDERATION

WinStar Communications, Inc. ("Winstar"), a provider of competitive dedicated and switched local services, by its undersigned counsel, hereby petitions the Commission for clarification or reconsideration of a single aspect of the *First Report and Order* in the above-captioned dockets, FCC 96-325, released August 8, 1996 (the "*Order*").[1]

I. INTRODUCTION AND SUMMARY

While the Telecommunications Act of 1996 ("1996 Act") established the initial framework for competition in local exchange markets around the country, the Commission's *Order* successfully translated the broad outline of the 1996 Act into more specific —

[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 Fiber℠ 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 as part of their network architecture.

and consequently more worthwhile — rules and regulations. True to its guiding principles, the Commission promulgated rules that are appropriately pro-competition, rather than pro-competitor, and has facilitated the resolution of interconnection negotiations between many new entrants and incumbent local exchange carriers ("LECs").

This Petition requests that the Commission clarify WinStar's right, where it operates as a facilities-based competitive local carrier, to locate its 38 GHz microwave equipment on the roof of utility premises and to utilize related riser conduit owned or controlled by the utility, in order to provide competitive local services to end user customers, as well as for purposes of interconnection. Although WinStar believes that the framework for competition outlined in its *Order* clearly provides that incumbent LECs cannot discriminate against a carrier because of the nature of its distribution technology (in WinStar's case, 38 GHz microwave transmission), incumbent LECs have been reluctant to enter into binding arrangements that would enable WinStar to utilize, at cost-based rates, rooftops and related riser conduit owned or controlled by the incumbent LEC absent clear instruction from the Commission. As demonstrated below, WinStar believes that minor clarification by the Commission would eliminate this very significant barrier to competition and would expedite and simplify interconnection negotiations, thus speeding competition for local services to end user customers.

II. THE COMMISSION SHOULD CLARIFY THAT WIRELESS CARRIERS ARE ENTITLED TO ACCESS ROOFS AND RELATED RISER CONDUIT OWNED OR CONTROLLED BY UTILITIES, INCLUDING INCUMBENT LECS

In its comments in this proceeding, WinStar noted that, in contrast to fiber based carriers, WinStar will utilize technologically unique, state-of-the art 38 GHz transmission equipment as a central component of its transmission and distribution network. Further, as a fixed-point-to-point wireless carrier, WinStar noted that it will need to place its microwave transmission facilities on roofs and utilize related rights of way (most importantly, riser conduit) owned or controlled by utilities, including incumbent LECs.[2] In practice, the rights of way utilized by WinStar's fiber based competitors chiefly include pole attachments as well as underground conduit and ducts, through which fiber optic cable is strung. In contrast, local exchange carriers such as WinStar that rely upon wireless microwave facilities have virtually no use for pole attachments or underground conduits or ducts, precisely because their transmission facility avoids the need for these conventional right of way obstacles.

In its *Order* the Commission interpreted in substantial detail the broad nondiscriminatory access requirements of Section 224(f)(1) which provides that a utility must grant telecommunications carriers such as WinStar access to all rights of way owned or controlled by the utility. *Order* at ¶¶ 1119-1187. Analyzing this provision, the Commission correctly recognized the broad mandate of Section 224(f) when it stated that: "[t]his directive seeks to ensure that no party can use its control of the enumerated facilities and

[2] *See* WinStar May 20, 1996 Comments in this proceeding (at 2-6).