

rule that would require just compensation (and thus appropriation of funds) by the federal government in order to survive constitutional challenge under the Takings Clause.

Accordingly, in Bell Atlantic, in reviewing two FCC orders which would have required ILECs to set aside a portion of their central offices for occupation and use by competitive access providers, the D.C. Circuit first considered whether there was guaranteed just compensation to the local telephone companies by private entities that were granted mandatory physical access to the ILECs' property. The court concluded that there was no guarantee that the rate tariffs approved by the FCC, which were designed to allow the ILECs "to recover the reasonable costs of providing space and equipment to co-locators" from the competitive access providers would equal or exceed "the level of compensation mandated by the [Takings Clause of the] Fifth Amendment" for governmentally-ordered physical occupations of private property.²⁴ Only after considering the issue of the adequacy of private compensation did the court consider the FCC's statutory authority to expose the federal government to takings claims arising out of its orders. It finally concluded that absent explicit or implied statutory authority to order a physical invasion of private property, the FCC could not issue a rule that might expose the federal government to millions of dollars in takings claims for uncompensated or inadequately compensated mandated physical invasions of private property.

Neither the Takings Clause nor the analysis in Bell Atlantic limits the authority of the FCC to issue a rule that would require private property owners to grant access to inside wiring to telecommunications service providers on terms that would allow property owners just

compensation from the private service providers, and that accordingly would not require compensation from the federal government. Nor does the Constitution or Bell Atlantic limit the authority of the FCC to provide a private enforcement mechanism for ensuring that the compensation private property owners charge telecommunications service providers for mandatory access is at or above the constitutionally required minimum of "just compensation," and yet reasonable to service providers, so long as this entails an opportunity for judicial review.

In Bell Atlantic, in which the court concluded that there was no guarantee that private compensation would be equal to or in excess of the constitutionally required minimum under the Fifth Amendment, the FCC was to set the rates charged by ILECs -- in compensation for forced physical occupation -- pursuant to a statutory ratesetting standard rather than in reference to the constitutional standard of ensuring "just compensation." If, in contrast, the FCC's rule in this matter requires that the private compensation provided to private property owners for mandatory access to inside wiring must comport with (and be judged strictly against) the constitutional standard, then the FCC's rule and rate determination (subject to judicial review) would ensure that there would be no unconstitutional, uncompensated takings.

The FCC can accomplish this goal by mandating that the access obligation would apply universally, but would allow individual parties to negotiate over "just compensation" and obtain a judicial determination of what justice requires in any particular case. Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), is one vehicle the Commission can use to implement such a system. Under Section 401(b), "[i]f any person fails or neglects to obey any order of the Commission other than for the payment of money. ... any party injured thereby ... may apply to

the appropriate district court of the United States for the enforcement of such order.” The statute directs the court to enjoin anyone duly served with the order from disobeying it.

To create this type of compensation arrangement, the FCC should issue an order directing all property owners to permit any alternative service provider onto the premises. Once access has occurred, a property owner who felt he was being under-compensated would be permitted to raise that issue by way of defense, which would squarely present for judicial resolution the question whether the tendered amount was just and reasonable under constitutional standards.²⁵ Moreover, building access on a reasonable and nondiscriminatory basis is not a new concept for building owners. A market-based, proxy model already exists for building owners to charge wireless CLECs for building access. Building owners themselves have already set the parameters. At a minimum, since 1990,²⁶ the parameters of expected compensation are properly defined by the current rates charged by building owners to ILECs and cable operators. Thus, in determining rates that are just and reasonable in each given instance, the Commission and any reviewing court need look only as far as the rates that are currently paid by the ILEC and incumbent cable operators for access to inside wiring in any given building in question. Consequently, it may reasonably be argued that a proxy model based on existing charges by a

²⁵ CLECs and CAPs would, of course: (1) pay construction costs for installing their network in a building; (2) indemnify building owners for any damage they or their contractors caused to the structure; (3) submit detailed drawings for building owner review; (4) pay to install and maintain their network equipment and wire to customer premises; (5) protect the landlord from any liability associated with the network installation and operation; (6) assume all responsibility for quality of service to customer; and (7) by their very presence, enhance the value of the building for the landlord and the tenants.

²⁶ In the Matter of Review of Sections 68.104 and 68.213 of the Commission’s rules Concerning Connection of Simple Inside Wiring to the Telephone Network. Report and Order and Further Notice of Proposed Rule Making, CC Docket No. 88-57 (1990).

given building owner to the ILEC and/or the incumbent cable operator serving the building in and of itself would be sufficient to avoid the takings problem identified by Bell Atlantic.²⁷

A significant majority of courts have held that even FCC orders that result from rulemakings (as opposed to adjudicatory orders in the APA sense) qualify as “orders” for purposes of section (b).²⁸ As long as the FCC’s order clearly requires particular persons to take particular actions upon the occurrence of specified conditions, there seems little doubt that the order would be enforceable under section 401(b).

A more serious question is whether an action for injunctive relief under section 401(b) would permit the court to determine exactly what amount is just and reasonable, or only whether a just and reasonable amount has been tendered (a binary question). While the possibility that a court might simply say “Not enough” is troubling, the *in terrorem* effect of section 401(b) may prevent such cases from occurring too often. It may be that in many or even most cases, the difference between what a service provider tenders and what a property owner asks for is less than the transaction costs involved in any federal court action. Competitive telecommunications

²⁷ Building owners, should they wish to assert a takings claim based on inadequate compensation, would need to wait until the claim is ripe, *i.e.*, after an unsuccessful attempt to obtain just and nondiscriminatory compensation. See Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991) (citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985)).

²⁸ Alltel Tennessee v. Tennessee Pub. Serv. Comm’n, 913 F.2d 305, 308 (6th Cir. 1990); Hawaiian Tel. Co. v. Public Utilities Comm’n of Hawaii, 827 F.2d 1264, 1271 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); Illinois Bell Tel. Co. v. Illinois Commerce Comm’n, 740 F.2d 566 (7th Cir. 1984). See also, Ambassador, Inc. v. United States, 325 U.S. 317 (1943), which, without specifically considering the question, affirmed an injunction based on a non-adjudicatory FCC order. The Fourth, Fifth, and Eighth Circuits have taken the same position in cases that were vacated on other grounds (cited in Alltel, supra). But see New England Tel. and Tel. Co. v. Public Utils. Comm’n of Maine, 742 F.2d 1 (1st Cir. 1984) (*per* Breyer, J.), *cert denied*, 476 U.S. 1174 (1986).

providers might be willing to litigate such actions for the principle involved, but most private property owners would be less inclined to do so as long as a reasonable offer is on the table, which prima facie would be considered an offer at least equal to rates the ILEC and/or incumbent cable operator currently was being charged.

IV. LARGE-SCALE FIXED LOOP WIRELESS CLEC DEPLOYMENT IS CONTINGENT UPON NONDISCRIMINATORY ACCESS TO INSIDE WIRING FACILITIES AND POINTS OF ENTRY.

Large-scale fixed loop wireless CLEC deployment as a practical matter is heavily dependent upon nondiscriminatory access to inside wiring facilities and points of entry. WinStar is the first wireless CLEC to enter the marketplace, but will certainly not be the last. WinStar's plan for developing wireless local loop systems already is being adopted by other companies who have announced business plans and secured funding for network deployment.²⁹ A number of entities also are in the process of gathering funds on Wall Street or from within their own organizations to participate in the upcoming 28 GHz Local Multipoint Distribution Service auctions with the express purpose of providing wireless local loop operations.³⁰ Additionally, the FCC has announced tentative plans to auction a variety of other spectrum bands suited for

²⁹ For example, Teligent Corp. (formerly Associated Communications, L.L.C.), Advanced Radio Telecom (ART), BizTel, and AT&T have both announced plans to deploy wireless local loop systems throughout the United States.

³⁰ In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Services and for Fixed Satellite Services. Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (March 13, 1997). The 28 GHz auction is slated to occur December 10, 1997. FCC Announces Upcoming Spectrum Auction Schedule, FCC Public Notice, DA 97-1627 (July 30, 1997).

broadband wireless local loop.³¹ The plans of all of these parties and the rapid deployment of competitive systems potentially could be *severely compromised* should it become clear that the successful bidders will not have reasonable access to inside wiring facilities from rooftop antennas, and thus will be unable to maximize the use of the spectrum to provide CLEC services. It simply does not make economic sense to bid on spectrum aggressively and build a fixed local loop network of rooftop transceivers and interconnected switches, only then to be unable to use the inside wire elements (riser conduits, connecting equipment, ducts, elevator shafts and/or other alternate pathways) of a building to go the "last hundred feet" necessary to reach down from the antenna on the rooftop to access the end user.

CONCLUSION

Access to inside wire is a fundamental element in the provision of fixed local loop and wireless video services. As contemplated by the Telecommunications Act of 1996, wireless facilities-based CLECs are a critical element of swiftly providing lower cost competitive services to the public. Current trends in the marketplace reveal that a significant percentage of building owners and operators are not providing competitive telecommunications carriers with the same

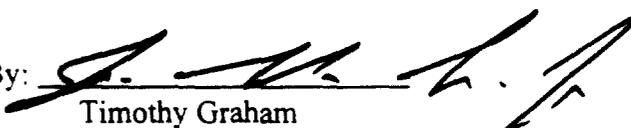
³¹ Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation for Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz Frequency Bands for Government Operations, Notice of Proposed Rulemaking, IB Docket No. 97-95, RM-8811 (Released: March 11, 1997), 62 Fed. Reg. 16129 (April 4, 1997). See also, In re Amendment of Parts 2, 15 and 97 of the Commission's Rules To Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, Second Report and Order, ET Docket No. 94-124 (Released July 21, 1997).

access to inside wire facilities, conduits, ducts and elevator shafts as they traditionally have to incumbent local exchange carriers and incumbent cable companies. These actions run counter to the goals and objectives of the Telecommunications Act of 1996.

Ultimately, the inability of wireless providers to access inside wiring could deny the public the benefit of "alternative technology" competitors -- and thus innovative services -- in the marketplace. Moreover, failure by the FCC in this instance to do what they are statutorily and constitutionally empowered to do, i.e., mandate non-discriminatory access to pre-existing inside wire, house riser, and riser conduit space, may have further significant unintended economic impacts. In particular, query whether the numerous proposed auctions of the millimeter wave bands will be severely compromised. Fortunately, the FCC has the opportunity to issue a rule giving telecommunications providers physical access to inside wiring on non-discriminatory terms, so long as the building owners are justly compensated. In adopting a national framework for inside wiring access, the FCC would be furthering the goals of the Telecommunications Act of 1996, which clearly contemplated reasonable access to inside wiring facilities nationwide for the providers of wireless competitive local exchange carrier services.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

By: 

Timothy Graham
Robert Berger
Russell Merbeth
Barry Ohlson
Joseph Sandri, Jr.

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(202) 833-5678

Date: August 5, 1997

Certificate of Service

I, Meredith A. May, hereby certify that a copy of the foregoing "Comments of WinStar Communications, Inc." has been served this 5th day of August, 1997, via first class mail, postage prepaid or by hand delivery to the following:

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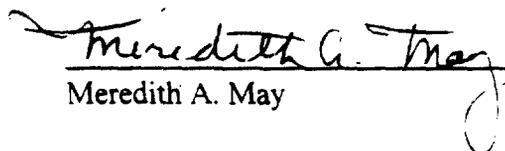
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EXHIBIT I



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**WINSTAR – “THE NEW PHONE COMPANY” – LAUNCHES
SWITCH IN SAN DIEGO**

**WinStar’s National Expansion Continues with Fourth Major Market in 90 Days
New Alternative to Pacific Bell is Dedicated to Customer Satisfaction**

NEW YORK – JUNE 25, 1997, WINSTAR COMMUNICATIONS, INC. (NASDAQ – WCII) has launched its competitive local telecommunications business in San Diego. The installation of WinStar’s fourth switch in the past 90 days demonstrates the company’s ability to build a national network to handle the growing demand for local phone service. WinStar, which markets itself as The New Phone Company, provides small and medium-sized business customers with a single source for local and long distance communications, Internet access, and other data services, in competition with Pacific Bell and other telephone companies.

“As the controller for a small business, I’m responsible for finding the best deal for my company,” commented Marie Malaca, Controller of MailPro, a direct mail agency, and one of WinStar’s initial San Diego customers. “WinStar has made the decision simple by delivering superior customer service, and creates a real value proposition with its competitive rates.”

This is the fifth major market in which WinStar has installed a switch as part of the nationwide rollout of its competitive local, long distance, Internet access, and other communications services. WinStar first provides its services on a resale basis in each city, and follows initial marketing efforts with the installation of Lucent Class 5 switches within a few months. The company already has switches installed and operating commercially in New York, Chicago, Los Angeles, and Boston.

“Today, WinStar is giving San Diego business customers a real choice in local calling,” said Dave Schmieg, President and Chief Operating Officer of WinStar’s operating subsidiary, WinStar Telecommunications. “San Diego area customers now can enjoy the simplicity of one contract, one point-of-contact and one bill for local, long distance and other telecommunications services. WinStar is dedicated to providing more responsive service, integrated billing and faster access to communications services.”

WinStar's advertising campaign will begin in mid-July, in San Diego, to create brand recognition. This advertising campaign will emphasize WinStar's commitment to customer satisfaction and introduce the WinStar brand name to small and medium-sized businesses looking for an alternative to Pacific Bell.

WinStar's competitive local telephone offering is based on its Wireless FiberSM service, which is a broadband wireless local communication service provided using WinStar's licenses in the 38 GHz frequency band. WinStar's Wireless Fiber service is the functional equivalent of fiber optic cable in terms of reliability, data transmission quality, and bandwidth provided to the end user.

WinStar is rolling out its competitive telecommunications services in the top thirty markets in the United States over the next three years. WinStar already offers competitive local telephone services in 12 cities in addition to San Diego, including Atlanta, Boston, Chicago, Dallas, Hartford, Los Angeles, Milwaukee, New York, Philadelphia, San Francisco, Stamford, and Washington, D.C. The company currently fields over 400 sales and support people in these markets.

WinStar currently holds 38 GHz licenses in 47 of the top 50 U.S. markets. Upon completion of pending acquisitions, each of which is subject to FCC approval, WinStar will have license coverage in 49 of the top 50 markets in the country, and more than 160 major market areas in total, covering approximately 180 million people, and more than 650 million channel pops (population coverage multiplied by the number of channels).

WinStar Communications, Inc. is a national local communications company serving business customers, long distance carriers, fiber-based competitive access providers, mobile communications companies, local telephone companies, and other customers with broadband local communications needs. The company provides its Wireless FiberSM services using its licenses in the 38 GHz spectrum. The company also provides long distance and various information services and entertainment content.

Wireless Fiber is a service mark of WinStar Communications, Inc.

EXHIBIT II

WinStar City Model

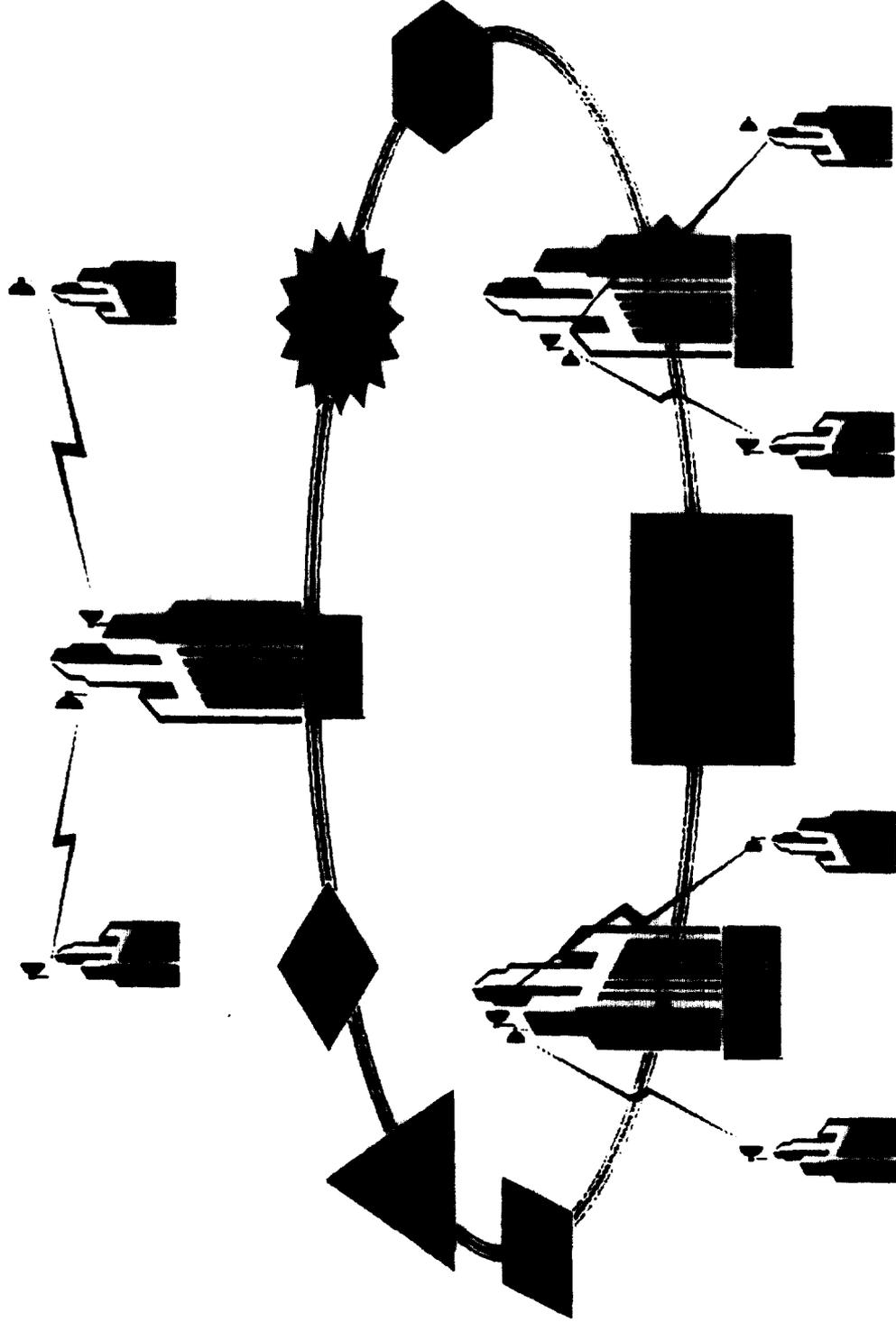


EXHIBIT III

Affidavit

As Vice President - Real Estate for WinStar Wireless, Inc., it is my assessment that access by a wireless fixed service provider to inside wire in many buildings throughout the nation is being either thwarted or made on a discriminatory basis due to the demands or obstacles placed by some building owners and/or building management. Based on field observations, it is clear that many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other methods designed to obtain a revenue stream and/or up-front payment which is not based on the reasonable or actual costs of doing business. Moreover, it is evident that incumbent local exchange and wireline cable providers are not asked to pay these fees. Generally, many building owners and/or building management seek to characterize inside wire building access requests by WinStar as an opportunity to gather revenues in a manner which fails to reflect reasonable and non-discriminatory prices or conditions.

Signed:

A handwritten signature in black ink, appearing to read "Mark Ahasic", written over a horizontal line.

Mark Ahasic
Vice President - Real Estate
WinStar Wireless, Inc.

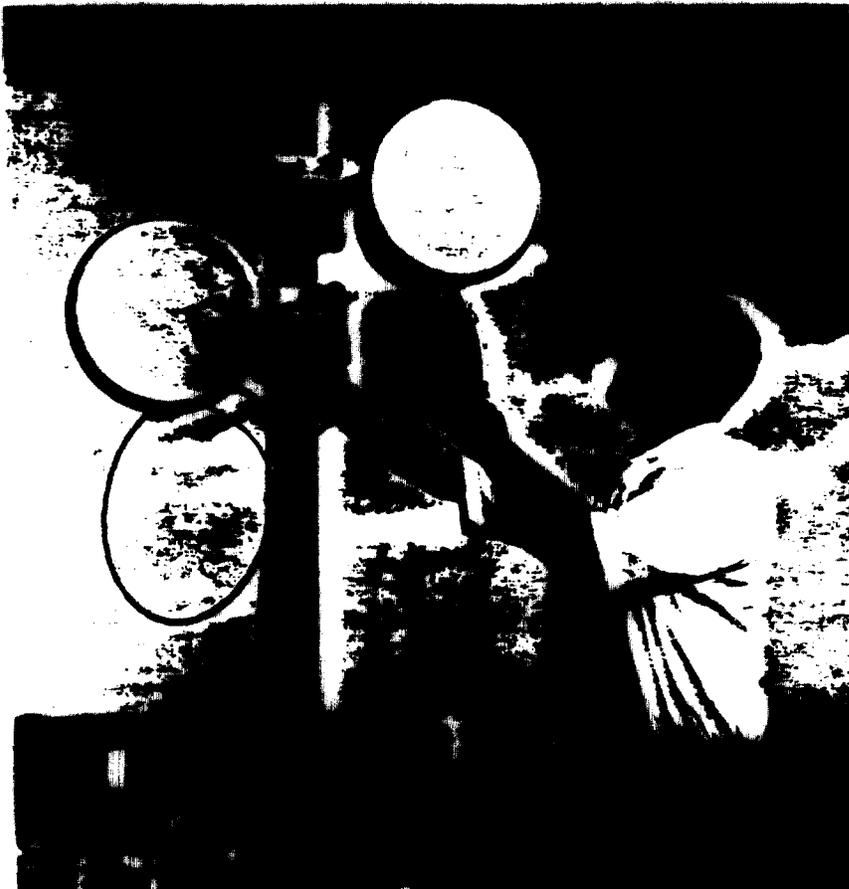
WinStar**Unreasonable Building Owner/Management Fees, Delays or Conditions
Encountered When Attempting to Access Inside Wire**

Representative Cities	Unreasonable Rooftop Access Fees or Conditions	Unreasonable Non- Recurring Fees	Unreasonable Recurring Fees	Unreasonable Per Linear Foot Charges for Conduit	Capacity Charges (Per DS1 or DS3)	Unreasonable Percent of Revenue	Unreasonable Monthly Rents	Free Service Requested for Building Owners/ Managers	Unreasonable Length of Negotiation	Low Number of Buildings Secured After Conducting Multibuilding Negotiations
Boston	X	X	X	X	X	X	X	X	X	X
Chicago	X	X	X	X	X	X	X	X	X	X
Los Angeles	X	X	X	X	X		X		X	X
New York	X	X	X	X	X	X	X	X	X	X
San Diego	X						X		X	X
San Francisco	X	X	X	X	X		X	X	X	X
Washington, D.C.	X	X	X	X	X	X	X	X	X	X

EXHIBIT IV

WinStar Elements

WinStar installs a small, unobtrusive (12" diameter) millimeter wave dish(es) on the building rooftop (often invisible from the street). Installation is quick and simple, and requires no underground construction or right-of-way acquisition.





Does WinStar Limit Our Choice of Telecommunications Providers?

- NO

WinStar increases your tenants' choice of communications by providing "access" facilities for telecommunications carriers who are trying to service your tenants without having to lay fiber optic cables.

Is WinStar Asking Owners to Purchase a Product For Themselves or for the Building?

- NO

WinStar provides the tenant amenities as outlined in the enclosed materials at no cost to the building owner.

Will the Aesthetics of the Building Be Maintained?

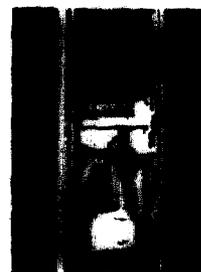
- YES

WinStar installs a small, unobtrusive (12" diameter) millimeter wave dish(es) on the building rooftop (often invisible from the street) and connects the unit to an indoor unit mounted inside a 22-inch telecommunications equipment cabinet in an existing closet or mechanical space via a single coaxial cable.

The installation is quick and simple, and requires no underground construction or right-of-way acquisition. It is equivalent to high capacity fiber links, without digging up streets or sidewalks.



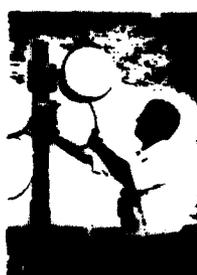
12-Inch Antenna with Indoor Unit (IDU)



Telecommunications Equipment Cabinet



Simple Installation



No Underground Construction



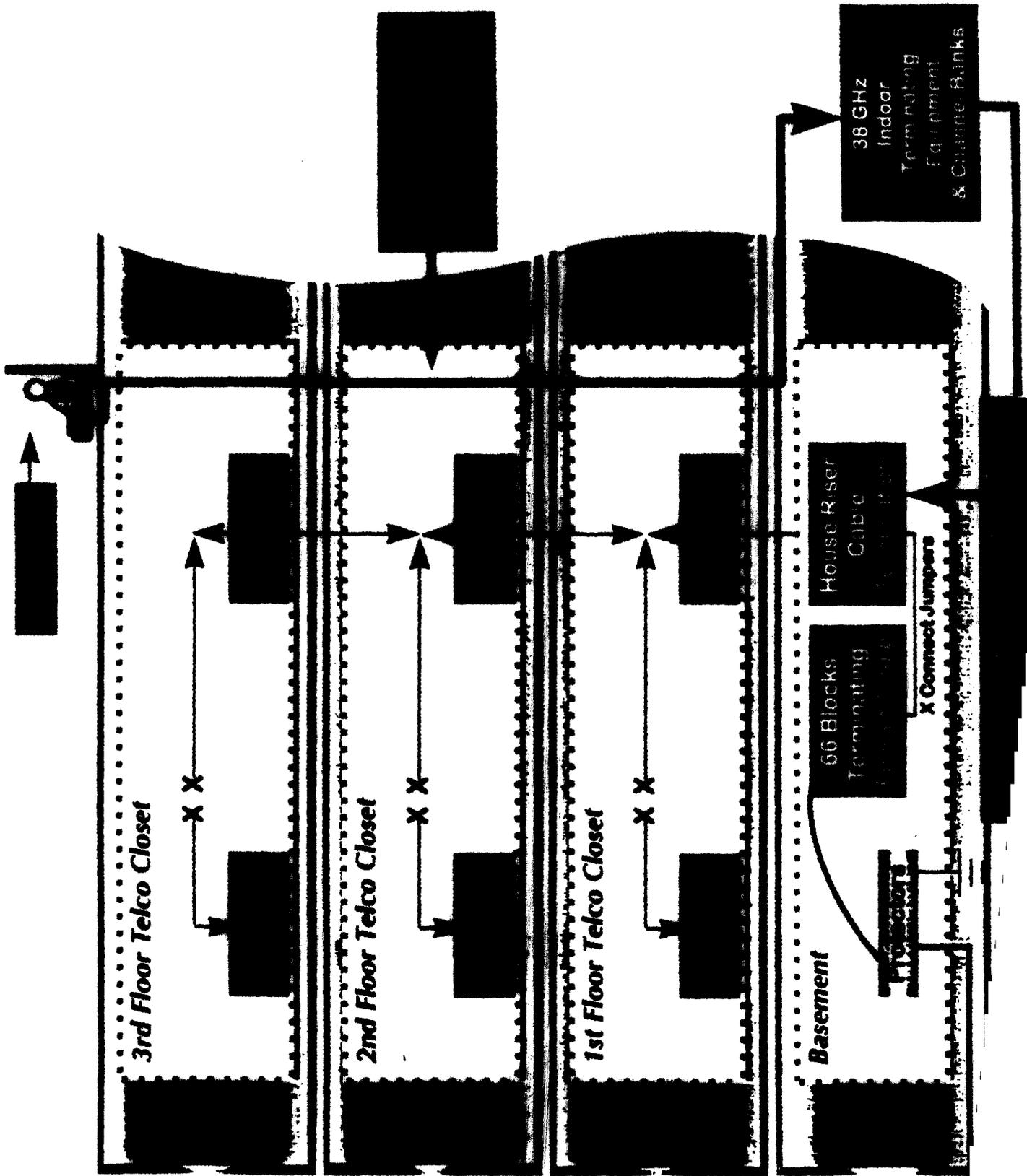
View from the Street (Distant)



View from the Street (Close-up)

EXHIBIT V

WINSTAR HIGH-RISE 38 GHZ APPLICATION



SIMPLIFIED TELECOMMUNICATIONS RISER WIRING DIAGRAM

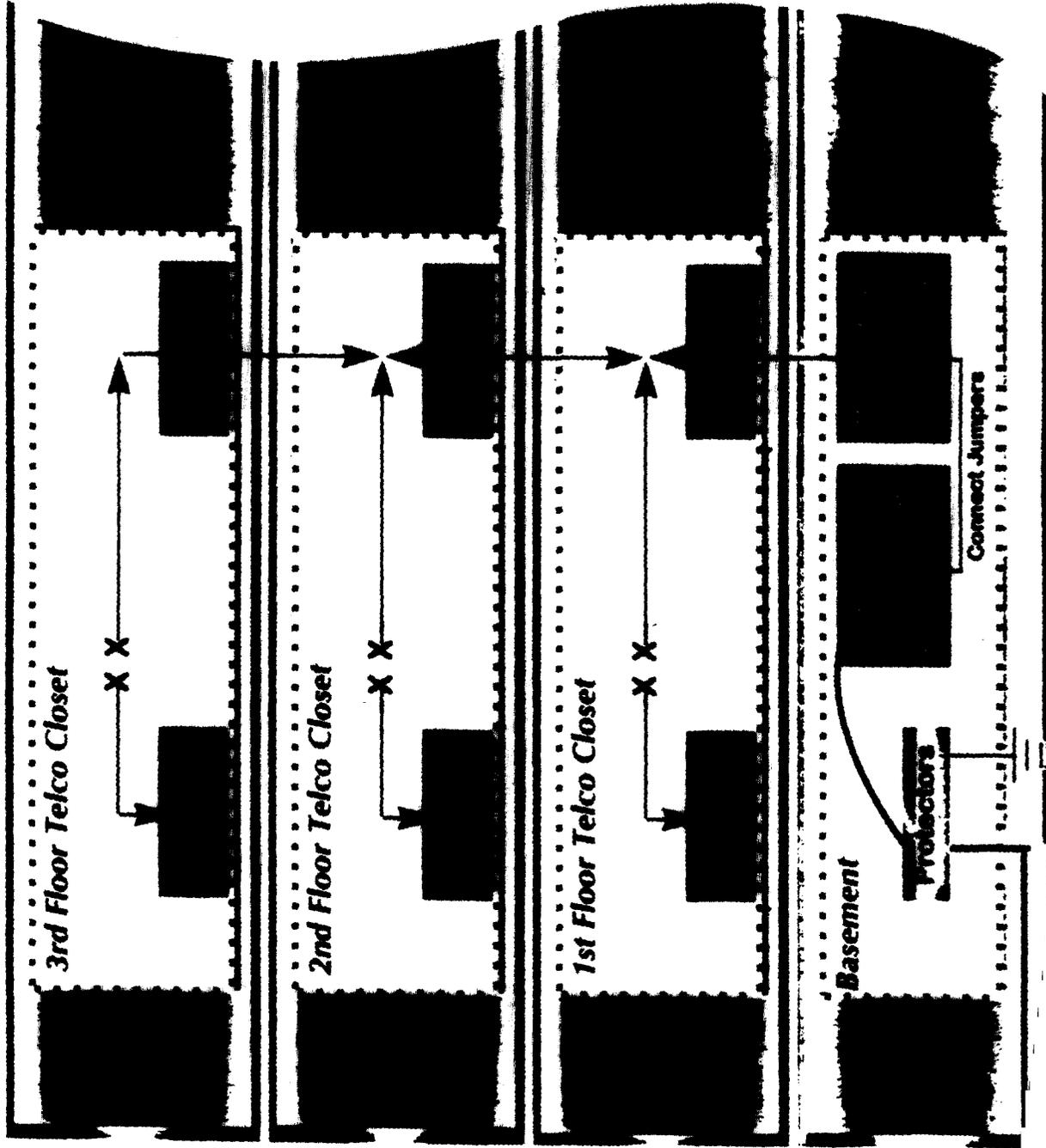


EXHIBIT VI