Proceeding: INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNI
CAPABILITY TO ALL AMERICANS IN A REASONABLE AND TIMELY FASHI
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	**CC Docket 98-146**
Capability to All Americans in a Reasonable	)	
and Timely Fashion, and Possible Steps	)	
to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

ERRATA

On September 14, 1998, WinStar Communications, Inc. ("WinStar"), by its counsel, filed its Comments in the above referenced proceeding. Subsequent to the filing, WinStar discovered that certain information regarding the Company's technical licenses and active deployment of switches in the United States had not been updated to reflect advancements over the past few months. Attached hereto are an original and four copies of the corrected Comments.

Respectfully submitted,

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Counsel for WinStar Communications, Inc.

Dated: September 18, 1998

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COMMENTS OF WINSTAR COMMUNICATIONS, INC.
REVISED TO INCLUDE ERRATA*

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September 18, 1998
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SUMMARY

WinStar Communications, Inc. currently offers innovative, advanced communications services to the American public. Many consumers are eager to use WinStar's advanced services. Unfortunately, a significant sector of the public cannot access WinStar's advanced services due to a 100 foot bottleneck. This bottleneck consists of actions by incumbent carriers and/or building owners preventing access to building rooftops, risers (horizontal and vertical), inside wiring and related facilities. WinStar implores the Commission to address this critical barrier to competition and mandate building access. Until such access is mandated and nondiscriminatory guidelines are set, numerous Americans will be denied competitive telecommunications services, including advanced services.

The 1996 Act mandates that advanced services be deployed to *all* Americans. In examining the status and deployment of advanced capabilities, the Commission must be aware that people living or working in multi-tenant buildings are in danger of being denied competitive telecommunications services, including advanced services. The Commission has the authority, and the responsibility, to facilitate a tenant's access to telecommunications services offered by competitive carriers.

In addition to requiring nondiscriminatory access to building facilities, WinStar recommends that the Commission address certain spectrum issues. The Commission should process outstanding applications in the 38.6-40.0 GHz band. The delay in processing WinStar's applications, in some cases over four years, is obstructing WinStar's efforts to fully expand its network and compete with wireline carriers. Furthermore, while spectrum sharing between terrestrial and satellite systems is

not practicable in the upper bands, WinStar believes spectrum sharing may be explored in other, more feasible areas.

Finally, WinStar applauds the universal service schools and libraries program which promises to assist companies in providing Internet access and other advanced communications services to America's schoolchildren. This program will enable competitive carriers serve the schools that require assistance the most – schools in low-income communities.

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COMMENTS OF WINSTAR COMMUNICATIONS, INC.
REVISED TO INCLUDE ERRATA

WinStar Communications, Inc. and its operating subsidiaries (collectively "WinStar"), by its undersigned counsel, submits these comments in response to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.[1] The Commission has invited comment on a number of issues pertaining to the arrival of advanced telecommunications services ("ATS").

WinStar is a pioneer in offering local exchange service using fixed wireless technology. This technology has the potential to bring ATS to large sectors of the population more rapidly and efficiently than competing technologies. However, residents and businesses in multi-tenant buildings may often be unable to receive fixed wireless services because of a bottleneck in the "last 100 feet" – that is, access to the building rooftops, equipment rooms, and internal wiring needed to distribute telecommunications signals to individual tenants' premises. As explained in these Comments, the Commission should immediately take a series of actions to promote tenant access to competitive telecommunications services, and thereby spur the deployment of ATS in multi-tenant buildings.

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[1] FCC 98-187 (released August 7, 1998).

I. INTRODUCTION

The Commission's NOI is exceedingly timely. Although various ILECs may submit information on intended ATS, or on ostensible technical barriers that have allegedly delayed the deployment of such technology, there *are* carriers, like WinStar, that are – and have been – able to offer ATS and innovative telecommunication services directly to end-users *now*. Furthermore, there are many consumers eager to avail themselves of the type of services that innovative carriers, such as WinStar, are able to offer. However, one critical, almost insurmountable, barrier continues to exist between many consumers and carriers like WinStar: the 100 foot bottleneck. If the FCC intends to fulfill the promise of true local competition, including the accompanying expedited deployment of ATS to a wide spectrum of the American populace, then the FCC must take action to remove *the* critical barrier, the 100 foot bottleneck. Once this barrier is removed, the benefits of innovative services that are currently being offered by carriers such as WinStar may be accessed by the widest possible spectrum of Americans.

A. WinStar's Innovative Technology And Services Are Available to the Public

WinStar currently is able to offer highly advanced, innovative services, and has invested significant time and financial resources in entering as many markets as possible as rapidly as possible, so that WinStar can provide those services – including the full complement of broadband services – that are most desirable to end-users. WinStar is using spectrum principally in the 38.6-40.0 GHz ("38 GHz") band to build a wireless local telephone network that is capable of delivering the full range of broadband services, including voice, data and video traffic, in many areas in the United States.

WinStar is the largest holder of radio spectrum licenses and terrestrial spectrum in the 38 GHz band in the country, with licenses in the top fifty (50) most populated metropolitan statistical areas in the United States. WinStar also has just recently been authorized for fifteen LMDS licenses.[2] Collectively, the Company's licenses cover approximately 180 major market areas and average 740 MHz of bandwidth in each of the top fifty (50) markets. WinStar's licenses also cover approximately 200 million people and include over 1 billion channel pops (population coverage multiplied by the number of 100 MHz channels). WinStar develops, markets, and delivers telecommunications services throughout the United States. Point to point, point to multipoint, and wireless hub 38 GHz transmission systems, as illustrated in Exhibit II attached hereto, are in various stages of buildout in WinStar's installed switch cities, as well as other major markets. The hub sites are interconnected through leased fiber backbone network. In turn, these hub sites are connected via WinStar Wireless Fiber℠ links to end users.[3] WinStar believes that a limited number of hub sites (generally less than a dozen) in each metropolitan area will allow it to address more than 70% of its targeted customers' buildings and to carry the majority of its customers' traffic on its own network instead of on the higher cost facilities of other carriers.

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[2] WinStar ranked as the third highest bidder in the FCC LMDS auction.

[3] WinStar developed Wireless Fiber℠ which basically duplicates the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions. WinStar Wireless Fiber℠ services are fully capable of carrying voice, data, video, and other broadband and narrowband content.

WinStar's switching and inter-office transport facilities utilize common channel signaling (commonly referred to as CCS or SS7) along with its prerequisite database capabilities. These facilities also have a matched pair of Service Transfer Point/Service Control Point (STP/SCP) facilities to enable CCS signaling between WinStar and other carriers for advanced call set-up and CLASS feature interoperability. WinStar has installed, and is continuing to install, Lucent manufactured 5ESS switches in each of its major markets.[4] Each WinStar city network is monitored on a twenty-four (24) hour a day, seven day a week, basis. Safeguards from link outages can be engineered through the installation of "hot standbys" that can switch on-line in the unlikely event that a primary link fails.

The high frequency microwave technology employed in WinStar's network offers capabilities equivalent to a fiber optic network, but with several distinct advantages that militate toward the use of wireless services as the preferred method of building future telecommunications infrastructure. WinStar's microwave network enables the provision of broadband telecommunications service without the disruption, cost and delay associated with the installation of fiber optic cables (including avoidance of the related problems of conduit rights-of-way). WinStar's high-speed radio network can make wide-band services available to small and medium sized business users, as well as to residential tenants of MDUs, on a economically attractive basis due to this ease of implementation.

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[4] WinStar today has operational switches physically located in Atlanta, Baltimore, Boston, Chicago, Columbus (Ohio), Dallas, Denver, District of Columbia, Houston, Kansas City, Los Angeles, Minneapolis, New York, Philadelphia, Phoenix, San Diego, San Francisco, Seattle, and Tampa. Additional switches are actively being deployed in Detroit, Cleveland, Miami and St. Louis. By the end of this year, 23 switches will serve 30 markets.

The installation of terminal equipment is relatively simple and inexpensive. It can be accomplished in some cases within several days as compared to the several months required for the engineering and installation of fiber optic cable facilities.

B. Regulatory Authority To Serve End User Customers

WinStar is currently authorized as a facilities-based competitive local exchange carrier (CLEC) in thirty six (36) jurisdictions.[5] Indeed, WinStar has already initiated commercial service as a CLEC in Atlanta, Baltimore, Boston, Chicago, Columbus (Ohio), Dallas, Denver, Detroit, District of Columbia (Metro Area), Fort Worth, Houston, Kansas City, Los Angeles, Minneapolis, Milwaukee, Newark, New York City, Oak Brook (Illinois), Oakland, Orange County (California), Philadelphia, Phoenix, San Diego, San Francisco, Seattle, Stamford, and Tampa, and will be operating as a facilities-based switched CLEC in a total of 30 markets by the end of 1998 and more than 40 markets by the end of 1999. WinStar also has entered into more than 35 separate interconnection agreements covering a vast majority of the networks throughout the United States. Finally, WinStar has received authority to operate as a competitive access provider (CAP) in forty three (43) jurisdictions.[6]

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[5] Alabama, Arizona, California, Colorado, Connecticut, Delaware, Washington, D.C., Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

[6] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Washington, D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

C. Despite Its Advanced Technology and Legal Authority, WinStar Cannot Effectively Reach A Great Many End User Customers

WinStar was the first wireless CLEC to enter the local market. As it began its integrated switched network buildout in the late Fall of 1996, it rapidly learned about the limitations on its ability to access inside wire and to place its equipment on rooftops (two essential components to serving end users in multi-tenant buildings). Since its entry into the market, WinStar has continually run into substantial – often insurmountable – roadblocks when attempting to reach a customer requesting service. That roadblock, in particular, is accessing "the last 100 feet." Access to existing house riser – including wire, conduit, and alternative pathways – is frequently being denied or, at best, made available at high cost on a highly discriminatory basis. WinStar attaches an affidavit detailing some of the limitations on access to inside wiring experienced by WinStar personnel (see Exhibit III).

WinStar is a primary example of a telecommunications carrier that embodies the type of competitor envisioned by the Act. There *are* facilities-based carriers, like WinStar, that currently are able, willing and eager to offer highly advanced telecommunications services to end-users desiring such services, and have both the organizational know-how and capital resources to support an aggressive rollout. But under the current regulatory regime, with no competition in the last 100 feet, these technologies remain significantly underused, and hence to that extent wasted, and consumers are left without choice and with services that do not adequately meet their needs. Those who control the bottleneck continue to benefit from the delay and damage to competition, while the new competitor bears the financial loss and loss of goodwill. The biggest loser is the end-user who is denied realization of the financial and technological benefits of the competitive environment. If the public is to receive ATS, the Commission must assure tenants in multi-unit developments that

the carrier of their choice will be able to access building facilities[7] and that building owners and ILECs will cooperate with such access.

II. THE COMMISSION HAS AUTHORITY TO FACILITATE TENANT ACCESS TO TELECOMMUNICATIONS SERVICES

A. The Commission Has A Mandate To Promote The Public Interest

WinStar submits that the primary objective in this proceeding is to service the public interest. The consumer is entitled to choose a telecommunications carrier that best suits its individual needs and to have access to ATS. Both of these concepts are mandated by the 1996 Act and supported by the FCC. However, in reality, over two years after the enactment of the 1996 Act, the majority of Americans have neither a choice of competitive providers nor access to ATS.

Not only does the Commission have the authority,[8] but it has the obligation, to mandate tenant access to competitive carriers. The Commission is tasked with adopting rules and regulations that further the public interest. As mandated by the 1996 Act, the competitive offering of local telecommunications services and the accessibility of ATS are clearly in the public interest. In its NOI, the Commission described the numerous benefits of ATS:

> Advanced capability and services can create investment, wealth, and jobs. They can meaningfully improve the nation's productivity and educational, social, and health

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[7] All references to "building facilities" includes a building rooftop, network interface devise ("NID"), house riser, wire, conduit, and alternative pathways from the rooftop to the common space and/or to the end user.

[8] Provisions of the 1996 Act mandating access are discussed *infra*.

care services. They can create a more productive, knowledgeable, and cohesive nation.

Congress intended the 1996 Act to bring about the "deployment . . . of advanced telecommunications capability to ***all Americans***."[9] This includes tenants living and/or working in multiple tenant buildings. This vast sector of the population must be considered by the Commission when it determines whether the benefits and advancements envisioned by the 1996 Act are being adequately deployed to the American public. Without mandated access, the only interests that are being served are the building owner and ILECs' interests.

B. The 1996 Act Specifically Provides That Wireless Competitors Have Access Rights

The 1996 Act presents clear evidence that Congress intended to provide wireless CLECs with nondiscriminatory access to inside wiring. Not only did Congress support the efforts of wireless CLECs in building out the vast majority of their systems, it also took the necessary steps to ensure that these carriers are able to complete the last few feet of their connections to end users.

For example, Section 704(c) of 1996 Act directs that:

> Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services.... Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

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[9] Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153 (emphasis added).

Section 704 is significant because Congress mandated that procedures would be established by which all Federal departments and agencies may make their property, rights-of-way, and easements reasonably available for the placement of services that depend on the use of spectrum. Such property undoubtedly includes inside wire facilities. Moreover, Congress gave the Commission the clear requirement to encourage States "to make property, rights-of-way, and easements ***under their jurisdiction*** available for such purposes" (emphasis supplied). Thus, because every building in every state is under that particular State's jurisdiction, Congress clearly contemplated *that every building in the country* would have its inside wire property reasonably available to providers to telecommunications services that are dependent upon the utilization of spectrum.

In addition, Section 332(c)(7) of the Communications Act, as amended, sets forth parameters regarding the placing of personal wireless service facilities. While Section 332(c)(7) was primarily intended to ease restrictions on the siting of communications towers for commercial mobile service offerings, Congress specifically included a fixed service – "common carrier wireless exchange access service []" – under the definition of "personal wireless services" in Section 332(c)(7)(C)(I).[10] This specific provision ensures that WinStar's wireless CLEC services are included under 332(c)(7) and that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services." By including common carrier wireless exchange access service in the definition of personal wireless services, Congress specifically

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[10] For further explanation as to why Congress decided to include fixed services, such as WinStar's, in the plain language of the 1996 Act, see the *Joint Explanatory Statement of the Committee of Conference*, located in the Conference Report to the 104th Congress, 2d Session (Report 104-230)(February 1, 1996) of the Telecommunications Act of 1996, concerning Section 704.

enunciated its intention to extend this favorable treatment to a non-mobile service, the wireless CLEC service.

Finally, another example of Congressional efforts to promote competitive telecommunications services can be found in Section 207 of the 1996 Act, which provides, in part that:

> [T]he Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

WinStar has the ability to provide both one-way and two-way video programming to end users through its over-the-air systems. A restriction on the ability to access the inside wire of a building could certainly prevent WinStar from delivering a video signal from a WinStar transceiver to, for example, an end user in a multiple tenant unit. Thus, the FCC, pursuant to Section 207, clearly has the authority to "promulgate regulations to prohibit" such a restriction.[11]

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[11] On a related basis, Section 638(e) of the Communications Act of 1934, as amended, provides the FCC with both the authority to encourage diversity in the development of competition in video programing and the power to exact remedies when multichannel video programming distributors are aggrieved. As such, it is likely that other wireless systems which require rooftop access, such as Direct Broadcast Satellite providers, shall also benefit from 628(e) if otherwise prevented from accessing inside wire.

Taken together, these statutory provisions give the Commission the clear authority to adopt a national framework ensuring the reasonable and nondiscriminatory access to inside wiring.[12] In passing the 1996 Act, Congress intended to change the telecommunications marketplace, especially the local exchange business, to encourage competition. In promulgating procedures for the opening of the local loop, it did not intend for building owners and landlords to "hold hostage" the development of competition and the goal of better services and prices for consumers.[13]

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[12] It should also be noted that the Commission has an existing statutory mandate "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. WinStar suggests that the wireless CLEC service clearly deserves Commission consideration under Section 157 as new technology that will service the public.

[13] Indeed, Senate and FCC probes into the lack of competition in the local telecommunications market were recently announced. *Telephone Market Probes Planned: FCC, Senate Ask Why Competition Is On Hold*, *Washington Post*, at A1 and C11, July 16, 1997.

III. WITHOUT FCC INTERVENTION AND THE ADOPTION OF A NATIONAL FRAMEWORK REGARDING ACCESS TO INSIDE WIRING, RISER SPACE AND ROOF TOPS, THE OBJECTIVES OF THE 1996 ACT WILL NEVER BE FULLY REALIZED

A. The 100 Foot Bottleneck

Between the tenant wishing to receive the benefits of competitive services and the carrier eager and able to provide such services exists two entities: the ILEC and building owner. When one of these entities prevents a CLEC from accessing a consumer, it is difficult to know what to do. The rules and regulations surrounding building access are confusing and complex. One thing is clear, the competitive carrier has little to no rights to access the consumer. In such a situation, the new entrant must have the deep pocket financial resources and time to deal with the barriers erected by the ILEC and building owner.[14]

Negotiations under circumstances where a competitive carrier effectively has no leverage require tremendous time and expense, without the assurance that the carrier will succeed in getting access to customers. Furthermore, the extensive delay often results in an opportunity loss to serve customers who grow tired of waiting for new service, which is negatively attributed to the new competitive carrier. This loss of good will compounded by the financial loss reduces the competitive carrier's ability to offer lower cost services and to approach other buildings and fight for access.

1. Building Owners Interfere with the Consumer's Ability To Enjoy the Benefits of the 1996 Act.

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[14] WinStar attaches and hereto by reference incorporates its Comments previously filed in the Commission's inside wiring docket. *Telecommunications Services Inside Wiring*, Comments of WinStar Communications, Inc., CS Docket 95-184 (filed August 5, 1997).

Many building owners, for whatever reasons, have resisted allowing their tenants access to the facilities of competitive carriers - directly impeding the goals of the 1996 Act. In many instances, building owners are treating access by CLECs and alternative video providers as a significant new revenue generating opportunity, and thus present them with discriminatory rate treatment or outright rejection. This turn of events is not fair to tenants, the intended beneficiaries of the 1996 Act.

Numerous cases of abuse by building owners have been cited by competitive carriers attempting to gain access to serve tenants. For example, Teligent, Inc. (another fixed wireless CLEC, using spectrum in the 24 GHz band), in recent comments filed with the Florida Public Service Commission described a situation where "a manager of one Florida property demanded from Teligent a rooftop access fee of $1,000 per month and a $100 per month fee for each hook up in the building."[15] Teligent estimated that the fee for accessing this building alone would be well over

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[15] *Access by Telecommunications Companies to Customers in Multi-Tenant Environments*, Comments of Teligent, Inc., Special Project No. 980000B-SP, at 12 (Fla. PSC, filed July 29, 1998).

$100,000 per year.[16] This type of abuse creates a deadlock between the competitive carrier and the building owner with the obvious loser being the tenant.[17]

Building owners must not be permitted to unilaterally mandate a tenant's telecommunications carrier. The choice of a telecommunications carrier belongs to each American as mandated by the 1996 Act. Not surprisingly, the concept of choice in local telecommunications market is a relatively new concept and building owners, like many people, resist change.

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[16] *Id.*

[17] In an informal discussion with a Massachusetts Department staff member, counsel for WinStar was told that any tenant living in a building not accessible to competitive telecommunications carriers could simply move. This is a fallacy. First, many tenants are confined by a lease, sometimes for several years, and may be subject to significant financial penalties if the lease is breached. Other conditions such as customer familiarity to a location, investment in advertisements, letterhead and other publications using the location address prevent consumers from moving out of a multiple tenant building. For many small businesses in multiple tenant buildings, these expenses cannot be overlooked. Furthermore, moving a business to a new location incurs other significant expenses (ie. moving costs, moving notices to customers, etc.).

The Takings Clause of the Fifth Amendment does not prevent the FCC from requiring private property owners to grant telecommunications serve providers access to private property for purposes of placing rooftop antennas or laying inside wiring so that they may access individual subscriber on that property. If the compensation is "just," then no unconstitutional taking occurs when the government mandates physical occupation of private property for public benefit.[18]

2. The ILEC Frustrates a Consumer's Choice of Service Provider

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[18] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (remanding for consideration of whether just compensation has been paid by the cable operator to the landlord pursuant to a state law that prohibited any owner of rental property from interfering with the installation of cable television facilities upon his property or premises). On remand, the state court noted that in most cases $1.00 should amount to just compensation within the meaning of the Constitution. *Loretto v. Group W. Cable, Inc.*, 522 N.Y.S.2d 543, 546 (1st Dep't 1987), *appeal denied*, 527 N.Y.S.2d 768 (1988), *cert. denied*, 488 U.S. 827 (1988).

To the extent that an ILEC still owns or controls the inside wire, it should be required to make the inside wire available as an unbundled element (just as it makes the NID available as an unbundled element).[19] For example, U S West largely divested itself of inside wiring, and thus would not have the underlying ownership to make inside wiring available on an unbundled basis. However, SBC, Bell Atlantic (f/k/a NYNEX), Ameritech and others – to varying degrees – retain ownership and/or control over inside wire and thus must be required to make it available on an unbundled basis (as Bell Atlantic - North in New York, and BellSouth in four separate jurisdictions, currently do).

As with many areas of the telecommunications marketplace, the ILEC monopolistic stronghold over telecommunications infrastructure enables it to place significant barriers before competitive carriers. Competitive carriers such as OpTel have cited instances where the ILEC prevented OpTel from providing service to requesting customers by using delay tactics and protesting that the ILEC was busy expanding its own network. Competitive carriers in this situation have no recourse but to wait for the ILEC. Delays such as this continue for a significant time – sometimes indefinitely – and prevent the competitive carrier from provisioning its ATS service.

B. A Patchwork of State Laws Fails To Assist The Consumer Who Desires Access To Competitive Carriers

If tenants are forced to wait for their competitive carrier of choice to fight out access issues before various state commissions, the tenant may be waiting indefinitely. While a small number states have recognized the eminent domain rights of competitive carriers, these instances are rare and

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[19] *Joint Complaint of AT&T Communications of New York, Inc., et al.*, Opinion and Order in Phase 2, Case 95-C-0657, Opinion No. 97-19 (NY PSC, Dec. 22, 1997)..

require substantial time and money. In fact, the past and continuing real-world experiences of several fiber-based CLECs, such as Eastern TeleLogic and TCG, have repeatedly proven that the attempted exercise of eminent domain powers, even where ultimately successful, in virtually all instances must be done on a building-by-building basis, even within the same jurisdiction. Each such attempted exercise routinely has taken many months, and at times up to two years, and involved the expenditure of thousands upon thousands of dollars in attorney's fees, to achieve access to each discrete building. As such, even where available, the exercise of eminent domain powers does not in reality lend itself to the rapid or economic deployment of a facilities-based network.

Moreover, the state by state approach has an additional critical downside, because it invariably acts to slow competitive entry. In particular, under the state by state approach (1) there is no guarantee that all 50 states will ever enact (and their courts and administrative agencies uphold and enforce) the legislation to require that building owners provide nondiscriminatory and timely access to competitive providers; (2) compliance parameters would not be uniform from state to state; and (3) building owners would invariably challenge the multiple state laws from multiple angles, thus creating a delay-producing, resource-sapping, inefficient 'building-by-building" struggle which clearly would not be in the pubic interest and would be a tremendous burden to developing competition in the local exchange market.

C. The Current Regulatory Regime Discourages Facilities-Based Competition

The ability to access building facilities is critical to CLECs, like WinStar, that are striving to compete in the local exchange market as facilities-based carriers. Entering the market as a facilities-based carrier is critical to providing effective competition to the ILECs and to offering consumers competitive phones rates and a variety of services, including ATS. As a facilities-based

carrier, WinStar is able to build highly efficient networks that provide state-of-the-art telecommunications services. In addition, the Company is not subject to the economic inefficiencies or antiquated technology often associated with ILEC services. Resale or relying on access to unbundled network elements, in the long run, simply will not result in innovative ATS. However, the current regulatory regime encourages almost exclusive reliance on resale or on access to unbundled network elements because such provisioning does not confront the 100 foot bottleneck barrier to reaching the end user consumer (*i.e.* resale or UNE carriers do not need access to inside wiring). By contrast, the true end-to-end facilities-based competitor, building apart from the ILEC, needs affordable and reasonable building access in order to compete with the ILECs. Understanding this, it is not surprising that true facilities based services and the associated ATS have not been deployed.

Absent the deployment of at least a second (and ultimately a third) alternative physical pathway to the end user capable of delivery broadband services, it is a virtual certainty that truly sustainable competition can never be realized on a broad-scale basis. WinStar, as the CLEC that pioneered the wireless, fiber-equivalent, local loop, represents the single most readily available means of provisioning an alternative local loop to the end user available today and in the immediate future. As such, the fixed wireless local loop (such as being deployed by WinStar, Teligent, OpTel, ART, and the various successful LMDS bidders) is capable at once of breaking the last mile bottleneck even while making broadband services available on a ubiquitous basis to a greatly expanded universe of small and mid-sized businesses, as well as MDU residential consumers, nationwide.