

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

ORIGINAL

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reason able)
and Timely Fashion, and Possible Steps)
to Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

CC Docket 98-146

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WASHINGTON, D.C. 20554

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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SUMMARY

In 1996, Congress enacted the Telecommunications Act ("Act") with the goal of establishing real, end-to-end facilities based competition in the local telephone market. Congress realized that absent competition from end-to-end, facilities based providers, this country would never advance beyond the historic wireline infrastructure, and the technical advancements envisioned by Congress would never be realized. It's been over two years since enactment of the Act and, to date, end-to-end facilities based competition does not exist. It is clear that until the FCC acts affirmatively to remove the remaining regulatory barrier, consumers will not realize the benefits of a true competitive market.

Removing the regulatory barriers requires the FCC to prohibit all exclusive arrangements between incumbent local exchange carriers and building owners and to mandate access to the last 100 feet - both access to inside wiring, which is an issue for all CLECs; and access to building rooftops, conduit and internal building pathways, which is an issue unique to wireless carriers. The FCC must also take immediate steps to ensure that tenants in multiple dwelling units ("MDUs") can obtain service from the carrier of their choice, without interference from landlords or ILECs. Despite their technical ability, CLECs are effectively prohibited today from serving many MDU tenants because of restrictions on building access imposed by ILEC, landlords, or both. The FCC must guarantee competitive wireless carriers access to rooftops, conduit and internal building pathways, and prohibit ILECs from restricting access to interior wiring and in-building distribution facilities. The FCC must further act to clarify that ILEC owned facilities within buildings are network elements to which CLECs must be afforded access through interconnection arrangements. Until competitors have access to building facilities, end-to-end facilities based competition, which promises to bring advanced services to the American public, will not exist.

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Inquiry Concerning the Deployment of Advanced Telecommunications 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)	CC Docket 98-146

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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

I. BUILDING ACCESS IS A ROADBLOCK TO TRUE END-TO-END FACILITIES BASED COMPETITION AND THE DISSEMINATION OF ADVANCED SERVICES

In its Notice of Inquiry ("NOI") in this docket, the FCC requested comment on current law or regulation that provides the basis for "open[ing] up access to the last hundred feet in office buildings, MDUs, and other non-residential settings to ensure that customers have easy access to the choices they want."¹ Comments submitted by WinStar and other parties unanimously demonstrate that no law or regulation currently enables competitive local exchange carriers ("CLECs") to gain access to building facilities on a non-discriminatory, reasonable basis.² History demonstrates that

¹ NOI at para. 53.

² *E.g.* Comments of Association for Local Telecommunications Services ("ALTS") at 13-17; Allegiance Telecom, Inc. at 6-11 ("Allegiance"); Optel, Inc. at 4-8 ("Optel"); Personal Communications Industry Association at 40; Sprint Corporation ("Sprint") at 8-10; Technology Entrepreneurs Coalition at 10-11; Teligent, Inc. at 6-10; Wireless Communications Association International, Inc. ("WCAI") at 26-31.

without a law or regulation specifically providing for building access, CLECs will be forced to fight long, time consuming, resource draining battles to gain access to consumers. This wasteful delay frustrates the critical competitive objective of the 1996 Act to encourage true end-to-end alternative facilities-based competition.

Economical and equitable building access is critical to answering the question, also raised in the NOI, of whether CLECs are "likely to enter the mass market, and especially to become full, facilities-based competitors to the incumbent LECs on a large scale."³ The FCC further asked whether CLECs are "utilizing and installing technologies that will bypass incumbent LECs' essential facilities such as the local loop."⁴ As these questions suggest, it is plainly in the public interest to encourage the development of true, facilities-based competition in the local loop in order to achieve the goals of the Telecommunications Act of 1996, including among others the deployment of advanced telecommunications capabilities. Unless the FCC acts to guarantee building access, however, no CLEC can be a fully independent, facilities-based provider.

Chairman Kennard recently remarked that "[w]ireless can and will be a head-to-head competitor against all telecom providers"⁵ and that wireless telephony is "poised to break open the wireline monopoly to competition."⁶ WinStar shares Chairman Kennard's vision. WinStar wireless technology currently has the potential to compete head-to-head with wireline technology, by

³ NOI para. 31.

⁴ *Id.*

⁵ Speech of William E. Kennard to the Personal Communications Industry Association of America, Orlando, Florida (September 23, 1998).

⁶ *Id.*

delivering end-to-end, innovative, efficient and cost-effective alternatives to classic wireline services.⁷ Facilities-based competitive providers that do not merely copy the current infrastructure by reselling or purchasing ILEC loops will bring real competition to the United States telecommunications market, as well as the accompanying deployment of significantly advanced broadband services. Absent competition from true end-to-end alternative providers such as WinStar, this country will never advance beyond the historic wireline infrastructure, and the technical advancements envisioned by the Act may never be realized.

II. THE FCC MUST ACT AFFIRMATIVELY TO REMOVE THE ROADBLOCK

If the FCC intends to bring the promise of local competition, including advanced telecommunications capabilities, to the American consumers in the foreseeable future, it must take action to assure that residential tenants in multiple dwelling unit developments and commercial tenants in multi-tenant commercial properties (for the sake of brevity, such properties collectively will be referred to hereafter as "MDUs") will have access to the telecommunications service provider of their choice. The history of the telecommunications industry shows us that competition brings about technical advancements that improve the way we live and communicate. History also demonstrates that in order to open a market mired in monopoly, Congress and the FCC must

⁷ WinStar objects to SBC's characterization that 24 GHz and 39 GHz spectrum are not a good medium for the residential market except for MDUs. SBC Comments at 13. WinStar is continuously improving its technology and product offerings in an effort to expand its customer base. In this regard, it currently is operating a point-to-multipoint (PMP) fixed wireless broadband network carrying voice, data, video and other telecommunications services in Washington, D.C. It anticipates deploying this equipment commercially in other WinStar markets by the end of this year. WinStar expects that this equipment will facilitate service to all segments of the communications market including single-family residences. Although WinStar's initial focus is on small and medium sized business and MDUs, it expects to broaden its market penetration to single-family residential markets in two to three years.

affirmatively establish fair rules and guidelines to ensure the development and survival of competitors. The long distance industry provides an excellent example. Competition in the long distance industry has resulted in enhanced and ubiquitous long distance service, lower, flat rates, universal access, as well as the development of debit cards and competitive wireless services, and countless other advancements that benefit consumers. All of these advances resulted directly from, and would not have developed but for, the necessary changes in laws and regulations that released long distance from the grip of monopoly.

Today, unequal building access is a primary obstacle to true local competition between fixed wireless and wireline carriers. Chairman Kennard's vision of wireless providers competing full force with the wireline industry cannot happen if the FCC does not use its authority to open the bottleneck and enable all competitors to serve consumers end-to-end on their own network facilities. Opening the bottleneck requires the FCC to prohibit all exclusive building access arrangements and to mandate access to the last 100 feet – both access to inside wiring, which is an issue for all CLECs; and access to building rooftops, conduit and internal building pathways, which is an issue unique to wireless carriers.

III. THE FCC SHOULD TAKE ACTION TO ENSURE COMPETITIVE BUILDING ACCESS

As discussed above, CLECs are effectively prohibited today from serving many MDU tenants that they are technically capable of reaching, because of restrictions on building access or inside wire imposed by ILECs, landlords, or both. In this section, WinStar proposes a number of concrete steps the FCC can take immediately to ensure that tenants can obtain service from the carrier of their choice, without interference from landlords or ILECs.

A. Require that Wireless Carriers Have Access to Rooftops and Risers

As WinStar discussed in its initial comments,⁸ various provisions of the Communications Act and the Telecommunications Act of 1996 establish the Commission's authority to prescribe regulations to defeat any restrictions on the deployment of wireless services. The Commission should act promptly to implement these provisions, and assure that tenants in MDUs can obtain access to the services offered by wireless CLECs over their own facilities. These rules should encompass (1) placement of antennas on MDU rooftops for provisioning of the local loop, (2) access to riser conduits or other pathways connecting the rooftop antenna to the "common block," typically in the basement, at which outside telecommunications facilities are cross-connected to interior wiring, and (3) direct access to the end user where good engineering practices so dictate.

B. Prohibit ILECs from Restricting Access to Interior Wiring and In-Building Distribution Facilities

1. Prohibit Exclusive Arrangements

WinStar supports Allegiance's recommendation that the FCC issue a declaratory ruling prohibiting "preferred provider" and/or exclusive contracts between building owners and ILECs. Preferred provider and/or exclusive contracts are unlawful and completely contradict the competitive mandate of the 1996 Act and, therefore, should be banned.⁹ The Commission unquestionably has jurisdiction to adopt rules prohibiting the ILECs from entering into such arrangements, since an

⁸ WinStar Comments at 8-11.

⁹ The attached BellSouth agreement is representative of the exclusive agreements used by ILECs in the marketplace.

exclusive access arrangement would impair competition to provide interstate access services to tenants' premises.

The FCC is tasked with adopting rules and regulations to further Congress' vision of telecommunications in this Country. Section 201 of the Communications Act, 47 U.S.C. § 201(b), directs the FCC to prescribe rules and regulations "as may be necessary in the public interest to carry out the provisions of this Act." Exclusive contracts discriminate against other carriers and prevent those carriers from competing to provide interstate access service, while also preventing consumers living or working in MDUs from having a choice. Exclusive contracts between ILECs and building owners have been in use since before the 1996 Act was passed, and often contain burdensome penalties for canceling the contract. Moreover, in the post-telecommunications act environment, ILECs including BellSouth and U S West have been aggressively using preferred provider and/or exclusive contracts in what can only be described as a highly anti-competitive manner. ILECs with exclusive contracts to serve an MDU have a captive audience and little or no incentive to provide competitive, advanced services. Exclusive contracts are contrary to the public interest and to the goals of the 1996 Act, and the Commission should expressly declare them unlawful and prohibit ILECs from attempting to enforce any such agreement.

2. Revise Demarcation Point Requirements To Eliminate ILEC Abuse And Facilitate Technical Access To End Users

WinStar supports Optel's recommendation that the FCC "revisit its telephone demarcation point rules and policies."¹⁰ The current rules for establishing the demarcation point enable ILECs

¹⁰ Optel Comments at 3. Optel recommends that the proposed requirement only be imposed on buildings with 50 units or more. WinStar believes that this designation is arbitrary and subject to counterproductive interpretations. MDUs consist of varying structures depending on the use of

to maintain their stranglehold on MDUs by making access difficult or impossible for competitive carriers who have been asked by a tenant to provide service to a MDU. As Optel suggests, the rules should require ILECs to reconfigure MDU wiring to establish a *single* demarcation point at the *minimum point of entry*, which should typically be the closest practical point to where the telephone company's wire crosses the property line, within a *prescribed maximum provisioning time frame*.¹¹ Such reconfiguration will also enable competitive carriers efficiently to connect their equipment to the inside wiring via a cross connection at the network interface device (NID).

The FCC adopted a three-pronged definition of the demarcation point in its 1990 Inside Wire Order.¹² The original 1990 Inside Wire Order, as well as the 1997 Order on reconsideration, provided for a variety of options as to the location of the demarcation point.¹³ Unfortunately, because the rules permit flexibility in how a carrier, typically an ILEC, designates the demarcation point for multi-unit premises, the impact of these rules in practice is devastating to the CLEC who is attempting to gain access to the inside wiring. The configuration of inside wiring and the location of the demarcation

the building, the types of occupants, etc. For example, one floor may have several offices or commercial stores, which are occupied by one business or several. How would a 10 story building owned by one company be viewed? What if that building has a deli shop and clothing boutique on the first floor? This arbitrary definition is fraught with problems and could serve to frustrate efforts by CLECs to access a building and ruin the objectives of such mandated access.

¹¹ Optel Comments at 6.

¹² See 47 C.F.R. § 68.213(a) and (b).

¹³ *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 88-57, 5 FCC Rcd 4686 (1990), *stay denied*, Order, 5 FCC Rcd 5228 (1990), *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 11897 (1997).

point have been used repeatedly and aggressively by ILECs to frustrate a CLEC's ability to gain access to a MDU.¹⁴

A clear and concise placement of a single demarcation point at the minimum point of entry in every MDU would facilitate the existence of true end-to-end facilities-based competition. To begin with, the ILEC's reconfiguration of the building to establish a single demarcation point at the minimum point of entry would ensure that all carriers, ILEC and CLECs, understood the "make up" of an MDU. A single demarcation point would stop ILEC actions from thwarting CLEC attempts to interconnect at the NID.¹⁵ Furthermore, such a configuration should assist all carriers in technically connecting individuals in an MDU.¹⁶

Without access to the inside wiring that connects the carrier to the customer, CLECs will never be true end-to-end competitors unless they are willing to and capable of undertaking the extraordinary expense and burden of rewiring every building they wish to serve. Moreover, under the current rules if more than one CLEC wishes to provide its own local loop to a given building, multiple, duplicative rewiring of the entire building has to occur, as is frequently the case today. This outcome is not viewed as desirable by the new entrant nor by the property owner, and is economically wasteful in a broader sense. Establishment of a single demarcation point at the

¹⁴ Optel Comments at 4-5.

¹⁵ In its comments, Optel attributes the "obstruction and foot-dragging" of ILECs as the cause for the limited deployment of CLEC facilities. Optel describes incidents where the ILEC delayed in establishing MDU demarcation points or refused to reconfigure the ILEC network to accommodate new entrants. Optel Comments at 3-4.

¹⁶ A single demarcation point at the minimum point of entry and a CLEC's access to the NID will enable an occupant in the building to obtain access to any service provider through a single cross-connect at the NID.

minimum point of entry for all MDUs would be consistent with the goals of the 1996 Act by facilitating competitive access to individual consumers in an MDU and ensuring the existence of true end-to-end alternative providers.

3. Clarify that ILEC-Owned Facilities Within MDUs Are "Network Elements"

One of the key market-opening provisions of the 1996 Act is Section 251(c)(3), which requires ILECs to offer "nondiscriminatory access to network elements on an unbundled basis" to competitive providers. The purpose of this requirement is to "permit new entrants to offer competing local services by purchasing from incumbents, at cost-based prices, access to elements which they do not already possess . . ." ¹⁷ However, this purpose is being frustrated today in the case of MDUs by some ILECs' refusal to offer access to facilities within MDUs on a meaningful, unbundled basis. In many buildings, it is difficult if not impossible for a CLEC to serve individual tenants without access to the house and riser cables owned by the ILEC, even if the CLEC can provide its own facilities (such as WinStar's wireless facilities) up to the entrance of the building.

Typically, the ILEC has installed and continues to own and operate a variety of facilities within an MDU, including building entrance facilities (connecting its outside plant to the "minimum point of entry," or MPOE, within the building), a common block where the building entrance facilities can be cross-connected to interior wiring, vertical riser cables to upper floors of the building, horizontal distribution wires connecting the risers to individual tenants' premises, and internal wiring closets and connector blocks. Depending on the age of the building and the practices

¹⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, at para. 231 (rel. Aug. 8, 1996).

of the particular ILEC, some of these facilities are on the customer side of the demarcation point.¹⁸ However, the facilities are still owned and maintained by the ILEC on a deregulated basis, and are used to provide telecommunications services to the tenants. They therefore fall within the definition of "network element" in Section 3(29) of the Act.

The Commission should declare that (1) wiring, terminal blocks, and other facilities owned by ILECs within MDUs are network elements, regardless of which side of the demarcation point they happen to fall on; and (2) the ILEC, upon request, must offer access to these network elements unbundled from other facilities, including the local loop.¹⁹ At least one state commission has already implemented this level of unbundling, providing a model for other states to emulate.²⁰ The Commission should exercise its authority under Section 251(d)(2) to require unbundling of these in-building network elements, and allow the remaining state commissions to implement this unbundling as contemplated by Sections 251 and 252.

4. Clarify that ILECs Must Provide Competitive Access to In-Building Conduits and Pathways

In some buildings, it may be technically and economically feasible, and preferable as a matter of engineering and provisioning, for CLECs to construct their own distribution wiring to tenant

¹⁸ See Section III.B.2, above.

¹⁹ Some ILEC facilities within MDUs may be part of the "local loop" element, but this does not prevent the ILECs from offering access to the inside wiring portion of the loop on an unbundled basis. See Local Competition Order, para. 259.

²⁰ See *Joint Complaint of AT&T Communications of New York, Inc., et al. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Opinion and Order in Phase 2, Case 95-C-0657, Opinion No. 97-19 (N.Y.P.S.C. Dec. 22, 1997).

premises instead of purchasing unbundled access to ILEC wiring. However, carriers will be unable to take advantage of this opportunity if the ILEC physically controls the only available passageways through the building for placement of such wiring. Critically, wireless CLECs similarly need to be able to access all in-building rights-of-way controlled by the ILEC, including that owned by ILEC corporate affiliates such as a sister cellular company, which generally include easements, licenses, etc., granting rooftop rights along with associated pathways off the roofs.

Section 224(f)(1) of the Communications Act provides that "a utility shall provide a cable television system or any telecommunications carrier access to any pole, duct, conduit, or right-of-way owned or controlled by it."²¹ Section 251(b)(4) extends the same duty to all local exchange carriers (both incumbents and new entrants). The Commission has explained that this requirement was enacted to ensure that "*no party* can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."²²

Significantly, the statutory duty expressly encompasses "*any* pole, duct, conduit, or right-of-way owned or controlled" by a carrier (emphasis added). Ducts, conduits, and rights-of-way into or within an MDU (regardless of which side of the demarcation point they may fall on) are within the ambit of Section 224. Therefore, to the extent that any easement, license, or agreement (written or unwritten) grants an ILEC or other utility the right to place telecommunications facilities into or within an MDU, the ILEC or utility in turn is required by Sections 224 and 251(b)(4) to allow other

²¹ "Incumbent local exchange carriers," as defined under § 251(h), are excluded from this section's definition of "telecommunications carrier." See 47 U.S.C. § 224(a)(5).

²² *Interconnection Order* at ¶1123 (emphasis added).

carriers to "piggyback" on those rights, so that the other carriers may place their facilities within any pathways, ducts, or conduits, including rooftops and riser conduits, subject to the conditions of Section 224 and the Commission's regulations implementing it.²³

C. Prohibit Landlords From Restricting Access to Inside Wire

1. The FCC Has Jurisdiction to Establish Conditions Governing the Connection of Inside Wire to Carrier Networks

Contrary to Sprint's assertion,²⁴ the FCC has jurisdiction over the inside wiring in a building and, therefore, may direct how the building owner of that wiring may use, maintain and/or operate the wiring. The FCC enjoys this authority as a result of its jurisdiction over facilities used for interstate communications, even if those facilities may physically be intrastate or local.²⁵ Indeed, the Commission exercised its authority over inside wiring when it adopted the rules and regulations

²³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WinStar Communications, Inc. Petition For Clarification or Reconsideration, CC Docket No. 96-98 (filed Sept. 30, 1996). WinStar's Petition in this regard has now been pending for more than two years. It is imperative that the FCC reach an expedited decision on this Petition if facilities-based competition is to become a reality.

²⁴ Sprint Comments at 9. Sprint stated that "[a]lthough the Commission lacks jurisdiction over these private property owners, it can and should adopt rules prohibiting regulated service providers from entering into exclusive arrangements with building owners, developers, etc., since such agreements inhibit the development of local competition."

²⁵ Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1621 (1992) (quoting *New York Tel. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980)); see also *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977); *MCI Communications Corp. v. AT&T*, 369 F. Supp 1004, 1028-1029 (E.D.Pa. 1974), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974). See *NARUC v. FCC*, 746 F.2d 1499 (D.C.Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and state depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines'" (citations omitted); *id.* at 1498 ("[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used").

over inside wiring found in Part 68 of the FCC rules.²⁶ The FCC's regulations governing the terms and conditions under which customers may connect customer premise equipment, including inside wiring, to the telephone network are a direct result of the FCC's jurisdiction in this area.²⁷

The Communications Act directly empowers the FCC to establish rules and regulation in the public interest and in furtherance of Congress' vision of a competitive, advanced telecommunications industry in this Country. Section 201 of the Act specifically provides that the "Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Indeed, in the context of inside wiring, the FCC itself already has found that Section 4(i) of the Act calls for the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."²⁸ The FCC added that it may "properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance

²⁶ *E.g.* 47 C.F.R. §§ 68.213 and 68.215 (1997).

²⁷ *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, n.4 (1986). *See also Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C.Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1217); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (D.C.Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

²⁸ *Telecommunications Services - Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659, 3700 (rel. Oct. 17, 1997) ("*R&O*"), *citing* 47 U.S.C. § 154(i); *see also North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1289-93 (7th Cir. 1985) (Section 4(i) "empowers the Commission to deal with the unforeseen - even if that means straying a little way beyond the apparent boundaries of the Act - to the extent necessary to regulate effectively those matters already within the boundaries.").

of the Commission's functions."²⁹ As was the case with cable home run wiring,³⁰ the Communications Act does not prevent the FCC from adopting rules governing inside wiring for telecommunications use³¹ and the adoption of such procedures is necessary to meet the critical goal of the 1996 Act to promote true end-to-end alternative competition.

Pursuant to this authority, WinStar recommends that the Commission adopt rules requiring building owners to permit nondiscriminatory access to inside wiring under their control, as a condition of attaching that wiring to the facilities of any telecommunications carrier.³² Such rules would not raise any Fifth Amendment "takings" issue, because they would not require landlords to permit the initial physical occupation of their property by any carrier. Indeed, this proposal would not require landlords to connect their buildings to telecommunications services at all - - the nondiscrimination requirement would apply only if a landlord *chooses* to attach its inside wiring to a regulated telecommunications network. A requirement that a property owner offer access to

²⁹ *Id.* at 3700, citing *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975); *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996).

³⁰ In adopting home run wiring rules for cable, the FCC stated that its rules would "fulfill Congress' mandate in the 1996 Act to 'provide for a pro-competitive, de-regulatory national policy frame work designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans.'" 1996 Conference Report at 1. Congress has mandated the same result for the telecommunications industry, which requires the same intervention by the FCC.

³¹ To the contrary, as WinStar demonstrated in its initial Comments, several provisions of the Act require the FCC to regulate inside wiring.

³² Specifically, the rule should provide that, if a building owner controls inside wire that is connected to the facilities of any telecommunications carrier and used to provide interstate telecommunications services to the premises of customers (other than the building owner itself), then the building owner must permit any other telecommunications carrier to connect its facilities to that inside wire at the demarcation point upon request of a customer located in the building, on nondiscriminatory terms.

certain facilities on a nondiscriminatory basis once it chooses to use those facilities in connection with a regulated service is not a "taking."³³

2. Allow Telecommunications Competitors To Take Advantage Of The Cable Home Wiring Rules

In addition to imposing a nondiscrimination requirement, the FCC should extend its home run wiring rules to telecommunications carriers. The same problems that previously plagued the cable industry in the MDU marketplace currently plague the CLEC industry. In its *R&O*,³⁴ the FCC believed that more was needed to foster the ability of a subscriber who lives in a MDU to choose among competing service providers.³⁵ The FCC found that "one of the primary competitive problems in MDUs is the difficulty for some service providers to obtain access to the property for the purpose of running additional home run wires to subscribers' units."³⁶ The record demonstrated that building owners objected to the installation of multiple home run wires in the hallways of their properties, for reasons such as aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential of property damage. The FCC also found that building owners' resistance to the installation of multiple sets of home run wiring in their buildings may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes of the Communications Act, and particularly Section 624(i), which was intended to

³³ *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107 (U.S. 1987); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S.Ct. 1522 (U.S. 1992).

³⁴ *Telecommunications Services - Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659 (rel. Oct. 17, 1997) ("*R&O*").

³⁵ *R&O* at 3678.

³⁶ *R&O* at 3678, citing *Inside Wiring Further Notice* at para. 25.

promote consumer choice and competition . . .”³⁷ It concluded that the impact was substantial and, therefore, adopted rules to ensure that consumer located in MDUs could have access to competitors.³⁸ The exact situation is substantially impacting consumers living in MDUs who wish to receive service from competitive local exchange carriers. There is no legitimate basis for treating inside wiring used by CLECs differently.

All wireless broadband providers should be permitted to take advantage of these home run wiring rules. Under current rules, a wireless provider must redesign all service offerings to include multichannel video programming in order to gain access to the protections provided under the FCC’s home run wiring rules. Alternatively, it could be deemed sufficient if the wireless provider had a demonstrated technological capability to provide such services, regardless of whether such service currently was offered. The current rules create an environment that is contrary to the benefits of competition whereby the market (*i.e.*, the consumer) determines what service products should be developed and offered. WinStar supports WCAI’s recommendation that expansion of the inside wiring rules is consistent with the FCC’s broader objective of promoting consumer choice in the market for advanced telecommunications services.³⁹ As noted by WCAI, “the cable inside wiring

³⁷ *R&O* at 3678.

³⁸ In determining that the effect was substantial, the FCC appeared to focus on a statistic for MDU housing, stating that “[a]s of 1990, there were almost 31.5 million [MDUs] in the United States, comprising approximately 28% of the total housing units nationwide. Moreover, the trend between 1980 and 1990 indicates that the number of MDUs is growing at a much faster rate than the number of single family dwellings.” The impact for telephone inside wiring is likely more substantial since it includes housing and business MDUs and since eight years have passed since this census.

³⁹ WCAI Comments at 28.

rules address a fundamental reality of serving MDUs.”⁴⁰ This reality of serving MDU’s equally impacts the telecommunications industry. As such, there is no valid reason not to extend the cable inside wiring rules to wireless providers who offer telecommunications services, whether or not they also offer multichannel video programming.

CONCLUSION

The Commission’s policy goal is true end-to-end alternative facilities-based competition. The roadblock to that goal is the last 100 feet, one of the remaining vestiges of the old monopoly system. The roadblock will not be removed under the status quo and time alone will not rectify it. The FCC must act affirmatively to allow for true competition. It took the bold actions on the part of Congress and the FCC to break down those barriers in existence prior to 1996. WinStar now asks the FCC to finish the job it started and remove this remaining barrier that stands between the benefits of a truly competitive environment and the American public.

Respectfully submitted,



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October 8, 1998

⁴⁰ *Id.*

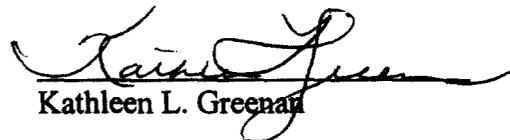
CERTIFICATE OF SERVICE

I, Kathleen L. Greenan, hereby certify that I have on this 8th day of October, 1998, served copies of the foregoing Reply Comments of WinStar Communications, Inc. on the following via hand delivery:

Magalie Roman Salas, Esq. (orig. + 9)
Secretary
Federal Communication Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Janice Myles (1)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

ITS (1)
1231 19th Street, N.W.
Washington, DC 20554


Kathleen L. Greenan

LETTER OF AGREEMENT

THIS AGREEMENT, which is dated and effective as of _____, 19____, is made between BellSouth Telecommunications, Inc. ("BellSouth"); and _____ ("Property Management"); hereinafter referred to collectively as the "Parties"; in contemplation of the following:

- A. The real estate property covered by this agreement is described as the _____, which is located at _____.
- B. Property Management is engaged in the leasing and management of office space to tenants and desires to retain and attract building tenants with high-quality, value-added local telecommunications technologies and support services.
- C. BellSouth intends to provide reliable, high-quality, value added, telecommunications technologies and support services to building tenants as requested as Property Management's designated provider of choice for communications products and services to the _____ property.
- D. Both Parties wish to engage jointly in improving the quality of the collective services provided to building tenants and in promoting the property and the BellSouth telecommunications products, services, and support as value-added amenities to tenants.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants hereinafter set forth, BellSouth and Property Management hereby mutually agree as follows:

1. The term of this Agreement shall be one (1), two (2) or three (3) years (delete as appropriate) commencing on _____. Inasmuch as close cooperation between the Parties is essential to the success of the alliance, if either Party shall, in its sole discretion, find that the alliance is not satisfactory, either Party shall have the right to terminate this Agreement by giving thirty (30) days written notice, one to the other. Upon such termination, Property Management shall forfeit all remaining incentive credits as described in Paragraph 3, shall immediately cease using BellSouth registered names and marks as described in Paragraph 10, and shall return, or certify destruction of, any media bearing BellSouth names and marks. This agreement may be extended at any time by mutual written agreement. Property Management agrees to provide BellSouth with access to building entrance conduits, equipment room space, and riser/horizontal conduits as required for placement of telecommunications facilities to meet the needs of building tenants. Such access shall be provided at no cost to BellSouth.
2. BellSouth agrees to establish and maintain an incentive Credit Fund for use by Property Management consisting of (1) an annual signing bonus of \$_____ beginning with the execution of this agreement and on the anniversary of each subsequent year for the term of this agreement, and (2) annual occupancy space credits of \$0.05 per square foot of tenant occupied space (rentable area) using BellSouth services. For purposes of this agreement rentable area refers to that actual usable measured space within a tenants space. The tenant occupied space credits shall be computed once each year based on the tenants existing occupied space upon the execution of this Agreement, and on the anniversary of each subsequent year, in the building (s) covered by this Agreement. The Credit Fund shall be used in a manner consistent with the objectives and goals of this plan. Credit Fund amounts can be used by Property Management, or upon Property Management request, by specified tenants of the building to be applied to purchases of BellSouth requested services including service installation charges and/or monthly service fees; towards Property Management and/or building tenant attendance at BellSouth-sponsored seminars; or, for reimbursement of Property Management costs for advertisements or newsletters, or other promotional efforts mutually agreed upon by BellSouth and Property Management. Billing credits shall not be accrued from year to year with respect to this Agreement. Unused annual credit amounts will expire at midnight on the day preceding the anniversary date of each year. BellSouth further agrees to provide Quarterly reports to Property Management regarding the current status of the credit fund, and remaining credits. All provisions of this paragraph are subject to compliance with all applicable state and federal laws and regulations governing BellSouth's participation in these activities.
3. Property Management agrees to designate BellSouth as the provider of choice for local telecommunications services to building tenants at _____ and promote BellSouth as such. Property Management further agrees not to enter into a similar agreement with any other telecommunications vendor to perform the activities provided for in this Agreement for the term of this Agreement.
4. BellSouth shall designate a management representative as a point-of-contact for Property Management and building tenants with responsibility for management and administration of all BellSouth responsibilities in connection with the implementation of this Agreement. Property Management shall designate an appropriate contact to work with the BellSouth representative.

Upon commencement of the Agreement, each Party will give written notice of the identity of their designated contact to the other Party.

5. Upon commencement of this Agreement, Property Management, at its expense, shall provide to BellSouth, all contact information, introductions, and, as permitted, all information about tenant occupied space and number of employees for all existing tenants at _____. As lease proposals are submitted to prospective tenants, Property Management will ask for the prospect's approval to provide BellSouth's designated representative the name, address, telephone number, and contact person of such prospect. BellSouth shall hold all such information as strictly confidential and shall not divulge such information to any third party or utilize such information for any purposes not contemplated by this Agreement. In the event a prospective tenant declines to have certain information provided to BellSouth at the time of lease proposal, Property Management agrees to provide all information authorized by the tenant to BellSouth as soon as such information is made available to Property Management.
6. BellSouth shall, at its expense, develop tenant survey media and conduct tenant quality review surveys on a semi-annual basis to determine ways to improve tenant telecommunications service at _____. Property Management, at its option, may elect to participate jointly in BellSouth quality surveys at no cost. To the extent legally permitted, BellSouth agrees to provide Property Management with survey results. Subject to the foregoing, following each survey, BellSouth and Property Management agree to discuss and for joint surveys, develop coordinated plans to improve tenant satisfaction. BellSouth, at its expense, agrees to undertake a personal contact program with all tenants upon commencement of this Agreement and, thereafter, agrees to periodic contacts and follow up as necessary as a result of feedback from tenants.
7. BellSouth shall, at its expense, develop and provide promotional materials including, but not limited to, brochures and newsletters which describe advanced telecommunications services available to tenants and benefits of the alliance, and will provide ongoing information to tenants about the alliance and new BellSouth products and services. Upon request by Property Management, and if feasible, BellSouth shall, at its expense, provide telecommunications planning/consulting, sales proposal, presentation, and contact support to Property Management for requested tenant lease proposals. The parties understand that BellSouth does not provide InterLATA services. Property Management agrees to never infer or represent that BellSouth provides InterLATA services, designs InterLATA networks, or recommends any InterLATA service providers.
8. Property Management, at its expense, shall distribute all promotional materials provided by BellSouth to existing and prospective or new tenants during and after lease negotiations. Property Management and BellSouth further agree to cooperate in the development and distribution of introductory letters, tenant surveys, and other tenant communications as required to effectively promote the objectives of the alliance.
9. Property Management agrees to submit to BellSouth all advertising, sales promotion, press releases, and other publicity matters relating to this Agreement or mentioning or implying the trade names, logos, trademarks or service marks (hereinafter "Marks") of BellSouth Corporation and/or any of its affiliated companies or language from which the connection of said Marks therewith may be inferred or implied, or mentioning or implying the names of any personnel of BellSouth Corporation and/or any of its affiliated companies, and Property Management further agrees not to publish or use such advertising, sales promotions, press releases, or publicity matters without BellSouth's prior written consent. BellSouth shall have the right to use Property Management's name and associated marks for _____ in BellSouth publicity and advertising materials subject to the prior review and written approval of Property Management.
10. Even though Property Management shall recommend BellSouth as the provider of choice for local telecommunications services to tenants, nothing in this Agreement shall be construed to preclude any building tenant from obtaining telecommunications services from others legally authorized to provide such services.
11. Both Parties agree to hold this Agreement, and all specific details and compensation provisions of such agreement as confidential, proprietary information not to be divulged to any third party for a period of three (3) years from the termination of this agreement unless with the express written consent of the other Party. Other aspects of this Agreement may be disclosed as mutually agreed upon in writing.
12. This Agreement shall not be construed to create a joint venture, general partnership, or create the relationship of principal and agent between the Parties hereto. This Agreement is strictly for the purpose of permitting joint promotional and marketing activities as well as to provide for the installation of telecommunications facilities and services.
13. Each party agrees to indemnify and hold harmless the other party from and against any loss, costs, damages, claims, expenses (including attorneys' fees) or liabilities by reason of any injury to or death or disease of any person, damage to or destruction of

loss of any property or any other damages arising out of, resulting from, or in connection with the performance or nonperformance of the obligations contemplated by this Agreement which is caused in whole or in part by an act, omission, default or negligence of the party or its employees, the failure of the party to comply with any of the terms and conditions herein or the failure to conform to statutes, ordinances, or other regulations or requirements of any governmental authority in connection with the performance of the obligations provided for in the Agreement. Each party shall, at its own cost, expense, and risk, defend any claim, suit, action or other legal proceeding for which that party is hereunder obligated to indemnify an indemnitee.

IN WITNESS WHEREOF, the Parties have executed this Agreement by their respective duly authorized representative as of the date first written above.

For BellSouth Telecommunications, Inc.:

For Property Management:

By its Authorized Agent, BellSouth Business Systems Inc.

By _____
(Signature)

By: _____
(Signature)

By _____
(Printed Name)

By: _____
(Printed Name)

Title: _____

Title: _____