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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20054**

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| In the Matter of | ) | |
| | ) | |
| Telecommunications Services | ) | CS Docket No. 95-184 |
| Inside Wiring | ) | |
| | ) | |
| Customer Premises Equipment | ) | |

**Comments of**
**WinStar Communications, Inc.**

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Dated: August 5, 1997

## SUMMARY

Access to inside wire is a fundamental element in the provision of wireless local loop and video services. Building access is the most time consuming problem and biggest obstacle to WinStar's success in providing local competition. Current trends in the marketplace reveal that a significant percentage of building owners and operators are not providing competitive telecommunications carriers with the same nondiscriminatory access to inside wire facilities (including riser conduits, connecting equipment, ducts and elevator shafts) that they traditionally have provided and continue to provide to incumbent local exchange carriers and incumbent cable companies. Ultimately, these actions run counter to the goals and provisions of the Telecommunications Act of 1996 (the 1996 Act), which clearly provide for reasonable access to inside wiring facilities nationwide for wireless Competitive Local Exchange Carriers (CLECs).

Fixed loop wireless CLECs and Competitive Access Providers (CAPs) such as WinStar are true facilities-based carriers. Unlike resellers and fiber-based CLECs/CAPs, WinStar offers services over a network which is largely separate from that of the ILEC. The present inability of wireless CLECs like WinStar to access inside wire on a reasonable and nondiscriminatory basis is especially troubling because wireless CLECs can provide service cheaper and faster than incumbent providers. Congress did not intend for wireless providers to acquire spectrum, build a fixed local loop network of rooftop transceivers and interconnected switches, and then not be able to access the inside wire of a building. Inside wiring is absolutely essential to provide services to an end user, and such inside wiring, including pathways for wiring, must be available to wireless CLECs/CAPs on terms comparable to those *already* offered to the incumbent wire-based providers (i.e., cost-based and non-discriminatory).

Moreover, without established mechanisms for accessing inside wire facilities necessary for completing the "last hundred feet" to the end user, it is inevitable that Wall Street and other funding sources will begin to reject efforts to raise sufficient capital for investment in facilities-based CLECs--starting with any forthcoming auctions promulgated by the FCC for broadband fixed local loop spectrum. Such a result would run directly counter to the promise of new and invigorated competition in the local exchange market as contemplated in the 1996 Act.

Fortunately, the FCC has the clear Constitutional and statutory authority to issue a rule giving telecommunications providers physical access to inside wiring facilities on non-discriminatory terms, so long as the building owners are justly compensated. In taking such an action, the Commission will be fulfilling the primary objective of the 1996 Act — promoting competition among telecommunications providers to the benefit of consumers.

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**Comments of**
**WinStar Communications, Inc.**

WinStar Communications, Inc. and its operating subsidiaries (collectively "WinStar"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.[1]

[1] *In the Matter of Telecommunications Services Inside Wiring,* Notice of Proposed Rulemaking, CS Docket No. 95-184 (Released January 26, 1996).

## INTRODUCTION

WinStar is the largest holder of spectrum in the 38.6-40.0 GHz (38 GHz) band in the country, with licenses in forty-eight (48) of the top fifty (50) most populated metropolitan statistical areas in the United States.[2] WinStar is utilizing this spectrum to build local communications networks for the transmission of voice, data, and video traffic in the major metropolitan areas throughout the country. WinStar averages 500 MHZ of bandwidth in each of the top thirty (30) markets. The Company's licenses cover more than 160 major market areas in total, encompassing approximately 180 million people and more than 675 million channel pops (population coverage multiplied by the number of channels).

Through its wireless licenses, WinStar develops, markets, and delivers telecommunications services throughout the United States. 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 features interoperability. Further, WinStar has installed, and is continuing to install, Lucent-manufactured 5ESS switches, in its major markets (see Exhibit I).[3] Point-to-point and wireless hub 38 GHz transmission systems, as illustrated in Exhibit II, are in various stages of buildout in

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[2] WinStar will have licenses in all of the top fifty (50) markets upon completion of pending acquisitions, each of which is subject to FCC approval.

[3] As noted above, WinStar already has operational switches in Boston, Chicago, Los Angeles, New York and San Diego. Additional switch deployment is near completion in Dallas and Washington, D.C. WinStar has attached one of its latest press releases for the Commission's review.

WinStar's installed switch cities, as well as other major markets. The hub sites will be interconnected through a fiber backbone network. In turn, these hub sites will be connected via WinStar Wireless Fiber℠ links to end users. 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 the higher cost facilities of other carriers.

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 equivalent capabilities of 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. First, WinStar's microwave network enables the provision of telephone service without the disruption, cost and delay associated with the installation of underground fiber optic cables (including avoidance of the related problems of conduit rights-of-way). Second, WinStar's high-speed radio network can make wide-band services available to small and medium sized business users on a economically attractive basis due to this ease of implementation. Third, the installation of terminal equipment is relatively simple and inexpensive, and, fourth, it can be accomplished in some cases within several days as compared to the several months required by the engineering and installation of fiber optic cable facilities.

WinStar today is authorized as a facilities-based competitive local exchange carrier (CLEC) in twenty-four (24) jurisdictions[4] and has applications pending in five (5) other jurisdictions.[5] Indeed, WinStar already has initiated switched commercial service as a CLEC in New York City, Chicago, Los Angeles, San Diego and Boston and expects to be operating as a facilities-based switched CLEC in a total of twelve major market areas by the close of 1997. WinStar also has entered into interconnection agreements which cover a vast majority of the networks managed by the Regional Bell Operating Companies (RBOCs), GTE, Sprint, and Southern New England Telephone (SNET).

WinStar also has received authority to operate as a competitive access provider (CAP) in thirty-five (35) jurisdictions[6] and has applications for intrastate CAP authority pending in another two (2) jurisdictions.[7] As of January 31, 1997, WinStar had forty carrier customers, including: Ameritech Cellular Services, MCI Communications, Pacific Bell, and Teleport Communications. WinStar Wireless Fiber℠ services are fully capable of carrying voice, data, video, and other broadband and narrowband content.

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[4] California, Colorado, Connecticut, Washington, D.C., Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. (WinStar also has resale CLEC authority in Montana.)

[5] Arizona, Kansas, Louisiana, Missouri, and New Hampshire.

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

[7] Arizona and New Hampshire.

WinStar is the first wireless CLEC to market. Consequently, as it begins its integrated switched network buildout — commenced in the late Fall of 1996 -- it is rapidly learning more about the limitations on its ability to access inside wire. By contrast, when this Rulemaking began, WinStar essentially was unaware of the obstacles that it has subsequently encountered. It is this recent, rapid growth in WinStar's experiential base that has led to WinStar submitting comments for the first time at this stage of the proceeding.

In November 1996, WinStar deployed its first switch. In the intervening months, and as additional switches have been deployed and network constructed, it has become clear that access to existing house riser -- including wire, conduit, and alternate pathways -- in virtually all buildings is being denied or, at best, made available on a highly discriminatory basis. In this regard, WinStar has attached an affidavit and chart detailing some of the limitations on access to inside wiring experienced by WinStar personnel during the past several months (see Exhibit III). WinStar must have the same nondiscriminatory rights of access to existing inside wiring facilities, including wire, conduit, and alternate pathways, as the incumbent local telephone company. "Access" to inside wire directly impacts the Company's ability to offer services to the public on an economically rational basis, and its ability to compete with incumbent local exchange carriers (ILECs) pursuant to the Telecommunications Act of 1996 (the 1996 Act).

## I. THE WINSTAR NETWORK; THE ROLE OF INSIDE WIRE AND THE WIRELESS FACILITIES-BASED CARRIER.

WinStar constructs its Wireless Fiber[SM] loops on a path-by-path basis to deliver switched and non-switched local exchange services to buildings, and ultimately to customers in those

buildings. WinStar's wireless network delivers high quality voice and data transmissions which meet telephone industry standards and are fundamentally equivalent to the transmission quality produced by fiber optic transmission facilities. Multiple paths can be directed to a building.

Unlike the large antennas deployed by cellular and specialized mobile radio (SMR) systems, WinStar's 38 GHz antennas are small and unobtrusive. Normally the dishes are the size of a pizza plate.[8] and are placed on 4 foot tall antenna poles (see Exhibit IV). Despite their small size, the systems are capable of transceiving massive amounts of traffic. Depending on the radio equipment deployed, each path in the wireless network can currently provide up to DS-3 capacity (672 digital voice lines). That extensive amount of traffic needs to be carried from the roof (where the 38 GHz antennas are typically placed) to the customer(s) in the building. WinStar's 38 GHz transceivers, for the most part, will be located initially on the rooftops of buildings containing small- and mid-sized businesses that utilize multiple telephone lines.

The wireless traffic received by the 38 GHz transceiver on the roof is then transmitted through wireline (typically coaxial cable) which runs to WinStar indoor terminating equipment and channel banks located inside the building. Ideally, the WinStar terminating equipment and channel banks can be connected to the host building at an appropriate riser cable termination point: with respect to switched local exchange services, the most economic and effective alternative in most instances will be to establish a common connection point for all ILECs and CLECs to pre-existing inside wire, i.e., house riser, normally in the common area of each building (see Exhibit V).

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[8] WinStar's 38 GHz antennas range from 1-2 feet in diameter. The 38 GHz antennas are in fact smaller than home Direct Broadcast Satellite receivers.

Due to the fact that the inside wiring of most buildings, like the trunk and branches of a tree, is thickest (and thus carries the most capacity) at the base of the building and thins out (or is "tapered") as it runs to the upper floors, it is routinely not feasible to run high capacity traffic from a WinStar rooftop transceiver directly to the inside wire found in the top floors of a building. Accordingly, wireless CLECs, like WinStar, need to access inside wiring facilities which will allow them to get (1) from the roof of the building down through the common spaces and pathways (i.e., unused mail chutes, open conduit space, elevator shafts, etc.) to the main Network Interface Device (NID) and ILEC channel bank locations, and (2) then back up through the building's existing wire to each individual customer. For example, if WinStar has a contract to serve a small company which occupies floors 4, 8, and 9 of a 30 story building, WinStar typically would need to run a coaxial cable from its transceiver to its terminating equipment and channel banks and then down to the main NID, typically located on the ground floor or the basement, and then into the ILEC's 66 block and back up to floors 4,8, and 9 through the existing wire, as is illustrated by Exhibit V.

The problem faced by wireless CLECS is that access to inside wiring, house riser, and rooftops, in many instances, is not being made available on a reasonable and nondiscriminatory basis. Many landlords are exercising their monopoly power when leasing rooftop space, inside wiring and riser access. Without reasonable access, wireless CLECs effectively are precluded from offering their competitively-priced services to building tenants and residents. Consequently, without reasonable access, consumers will be unable to realize all of the benefits of competition -- in particular the ability to choose from a wide variety of telecommunications providers -- as contemplated by the 1996 Act. In addition, cost-savings that are intended to be

passed along to the consumer, essentially will be redirected toward landlords to cover the inflated charges for rooftop, inside wiring and house riser access.

These issues are particularly critical to wireless 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 truly competitive telephone rates. As a facilities-based carrier, for example, 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 often associated with ILEC service. Resale or relying on access to unbundled network elements, in the long run, simply does not provide a reliable, economically attractive model for providing truly competitive local telephone service. Companies providing resale service or leasing unbundled network elements typically would not need access to inside wiring.[9] By contrast, the true end-to-end facilities-based competitor, building a network from the proverbial ground up, needs affordable and reasonable building access in order to compete with the ILECs.

Most fiber CLECs are building principally backbone networks, relying on the unbundled loops of ILECs to supplement their network. By contrast, WinStar is building its own wireless network largely in place of the unbundled local loop, i.e., in practice WinStar is building "the last mile" by deploying its 38 GHz loop to the customer building. Accordingly, the inside wiring issues are of somewhat decreasing importance to fiber-based CLECs because increasingly they

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[9] Resale is an end-to-end service. Unbundled loops purchased by a "facilities-based" carrier to reach the end user effectively includes both the feeder and distribution portion of the loop, as well as the inside wire in the end user's building.

are choosing to reach the end user through purchase of the ILECs' unbundled local loops which include the pre-existing inside wiring of the end user's building, rather than continuing to bear inflated charges for deploying fiber to the building. For WinStar and other wireless fixed loop carriers, therefore, the critical issue is not the "last mile," but rather is the last "hundred feet" between the roof and the end user.

Finally, the Commission must remember that ILECs, and for that matter existing cable operators, already have secured access to buildings presumably on a reasonable and nondiscriminatory basis. Building owners provide access to ILECs to make their buildings attractive to potential tenants. This same treatment, however, is not being extended to CLECs. These building owners are not as motivated to provide their tenants with a choice for telephone service — a direct impediment to the goals of the 1996 Act. Rather, 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. Such a turn of events simply is not fair to tenants, the intended beneficiaries of the 1996 Act. If ILECs were able to access buildings on a reasonable and nondiscriminatory basis, then CLECs, at minimum, should be afforded this same opportunity.[10] Without FCC intervention and the adoption of a national framework regarding access to inside wiring, riser space and rooftops, the objectives of the 1996 Act will never be fully realized.

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[10] To the extent that an ILEC still owns or controls the inside wire, it should make the inside wire available as an unbundled element (just as it makes the NID available as an unbundled element). 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, 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.

## II. THE TELECOMMUNICATIONS ACT OF 1996 CLEARLY CONTEMPLATED REASONABLE ACCESS TO INSIDE WIRING FACILITIES AND POINTS OF ENTRY.

Beyond the general provisions of the 1996 Act which state that all competitive telecommunications carriers shall have unimpeded entry into the telecommunications marketplace, 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 of 1996 Act, sets forth 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.

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 State's particular jurisdiction, Congress clearly

contemplated *that every building in the country* would have its inside wire property reasonably available to providers of telecommunications services that are dependent upon the utilization of spectrum.

In addition, Congress in Section 332(c)(7) of the Communications Act of 1934, as amended, set 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).[11] 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 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:

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[11] 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. (See Exhibit VI).

> [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 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.[12]

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.[13] 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.[14]

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[12] On a related basis, Section 628(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 programming 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 prevented from accessing inside wire.

[13] 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 a new technology that will service the public.

[14] Indeed, Senate and FCC probes into the lack of competition in the local telecommunications market were recently announced. *Telephone Market Probes Planned: FCC,*

## III. THE FCC'S ABILITY TO ISSUE A RULE GIVING TELECOMMUNICATIONS PROVIDERS PHYSICAL ACCESS TO INSIDE WIRING ON NON-DISCRIMINATORY TERMS, SO LONG AS THE BUILDING OWNERS ARE ALLOWED JUST COMPENSATION, IS NOT COMPROMISED BY THE 5TH AMENDMENT'S TAKINGS CLAUSE.

In the NPRM, the FCC requested comments, *inter alia*, on access rights of service providers to cable and telephone network inside wiring located on private property. Specifically, the FCC recognized that "[p]arity of access rights to private property may be a necessary predicate for any attempt to achieve parity in the rules governing cable and telephone network inside wiring, because ... [a]n inequality in access can unfairly benefit one provider over another."[15] In this, as access to inside wire is an operational and economic necessity with regard to WinStar and its fixed point to point wireless services, the FCC was absolutely right.

Further, the FCC requested comment on the authority of service providers under state, federal and common law to obtain mandatory access to private property and on:

> whether the Commission can and should attempt to create access parity among service providers, and what our rules should say regarding the terms of such access. We also seek comment on any statutory or constitutional impediments to this goal. In particular, we ask commenters to address the concern that any right of access to private property may constitute an impermissible 'taking' in violation of the property owner's Fifth Amendment rights.[16]

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*Senate Ask Why Competition Is On Hold,* Washington Post, at A1 and C11, July 16, 1997. (See Exhibit VII).

[15] NPRM at ¶ 61. "For instance, if one service provider has an unrestricted right of access to private property -- even over the objection of the property owner -- that service provider would be able to compete for individual subscribers in every multiple dwelling unit building, private housing development and office building, while the other provider without such a right could only compete in those buildings in which it had managed to obtain the property owner's consent." Id.

[16] Id. at ¶ 64.

Noting that telephone companies "[a]s common carriers ... can exercise the power of eminent domain,"[17] the FCC also stated that "[w]e realize that a number of these potential service providers are not common carriers and their right to access is not well established in state or federal law."[18] The Commission is quite correct in its observation. While nascent proof exists that a small number states have recognized the eminent domain rights of competitive carriers,[19] the state-by-state approach invariably acts to slow competitive entry because: (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 would clearly not be in the public interest and would be a tremendous burden to developing competition in the local exchange.

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. In turn, each such attempted exercise routinely has taken many months, and at times up to two years, and involved the

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[17] Id. at ¶ 59.

[18] Id. at ¶ 64.

[19] See Generally, Conn. General Stat. Section 16-2471. Texas Utilities Act, Title III--Telecommunications Utilities, Section 3.2555 Discrimination. See also, Eastern TeleLogic., 1992 Pa. PUC LEXIS 95 (Aug. 10, 1992).

expenditure of thousands upon thousands of dollars in attorneys' 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.

The FCC must order that mandatory access to inside wiring on private property, especially multiple tenant units (business and residential), be provided to telecommunications service providers on reasonable, nondiscriminatory terms. The Takings Clause of the Fifth Amendment does not prevent the FCC from requiring private property owners to grant telecommunications service providers access to private property for purposes of placing rooftop antennas or laying inside wiring so that they may access individual subscribers on that property. It is well established that a federal agency can mandate a compensated physical occupation of private property in the absence of explicit statutory authority.[20]

Indeed, in the recently released Iowa Utilities Board v. FCC, the court supported the FCC's clear authority to mandate physical access. Specifically, the court upheld "the Commission's rules and policies regarding the ILECs' duty to provide for physical collocation of equipment to be consistent with the [1996] Act's terms contained in subsection 251(c)(6)."[21] Iowa Utilities underscores the fact that the Takings Clause in and of itself does not preclude the FCC from directing that a requesting CLEC be allowed physical access to the premises of the another entity (property owner) for purposes of furnishing a telecommunications service. (The Iowa Utilities court also went on to reference Section 51.323(f) of the FCC's rules which

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[20] Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic).

[21] No. 96-3321, slip op. at 151 (8th Cir. July 18, 1997).

specifically requires ILECs to take account of projected demand for collocation of equipment when planning renovations or new constructions.) Iowa Utilities clearly supports the FCC's ability to mandate access to inside wiring in the instant proceeding.

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." Underlying the Supreme Court's application of the Takings Clause has been the principle that a few landowners should not be forced to bear disproportionately " the economic injuries caused by public action."[22] If, however, "just compensation" is provided the landowner either through private compensation or governmental compensation for use of the property, then no unconstitutional taking occurs when the government mandates physical occupation of private property for public benefit.[23]

The Takings Clause therefore places no limit on the FCC's ability to issue a rule that would require owners of multiple tenant units to grant telecommunications service providers physical access to inside wiring on nondiscriminatory terms, so long as the owners were allowed to demand just compensation for the costs of such access from the telecommunications service providers *after* access has occurred. It is only when owners are not guaranteed just compensation from private entities that the question arises concerning the FCC's statutory authority to issue a

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[22] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[23] 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). In a later proceeding, it was 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).

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

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[24] Bell Atlantic at 1444 and 1445, n.3.

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 that 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

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[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 Eight 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

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[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

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[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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Washington, D.C. 20036
(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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Susan Ness
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Meredith A. May

Meredith A. May

# EXHIBIT I

WINSTAR

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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 Fiber℠ 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.

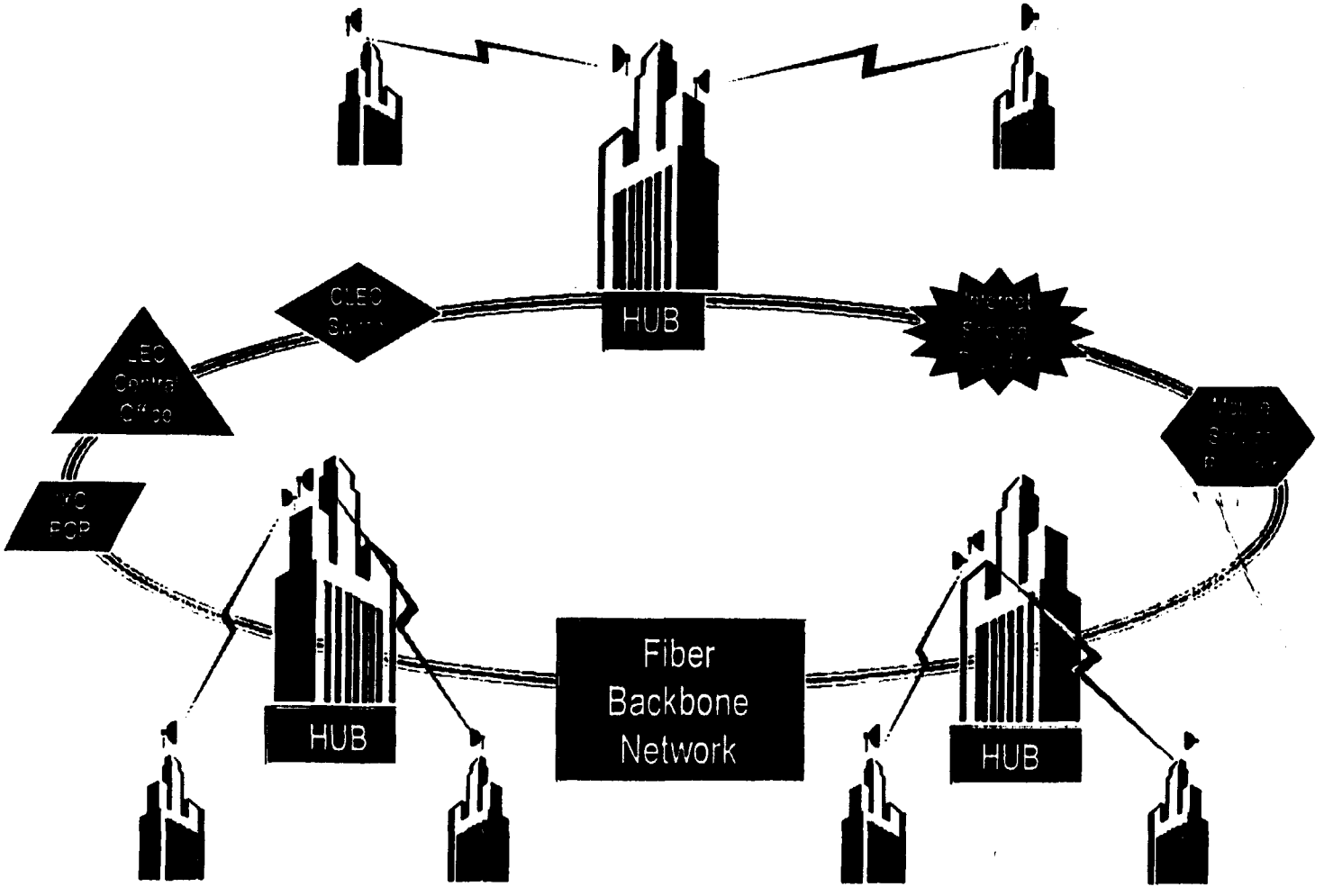
WinStar currently holds 38 GHz licenses in 47 of the top 50 U.S. markets. Upon completion of pending acquisitions, each of which is subject to FCC approval, WinStar will have license coverage in 49 of the top 50 markets in the country, and more than 160 major market areas in total, covering approximately 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 Fiber℠ 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




WINSTAR

# 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:

Mark Ahasic

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

# WinStar

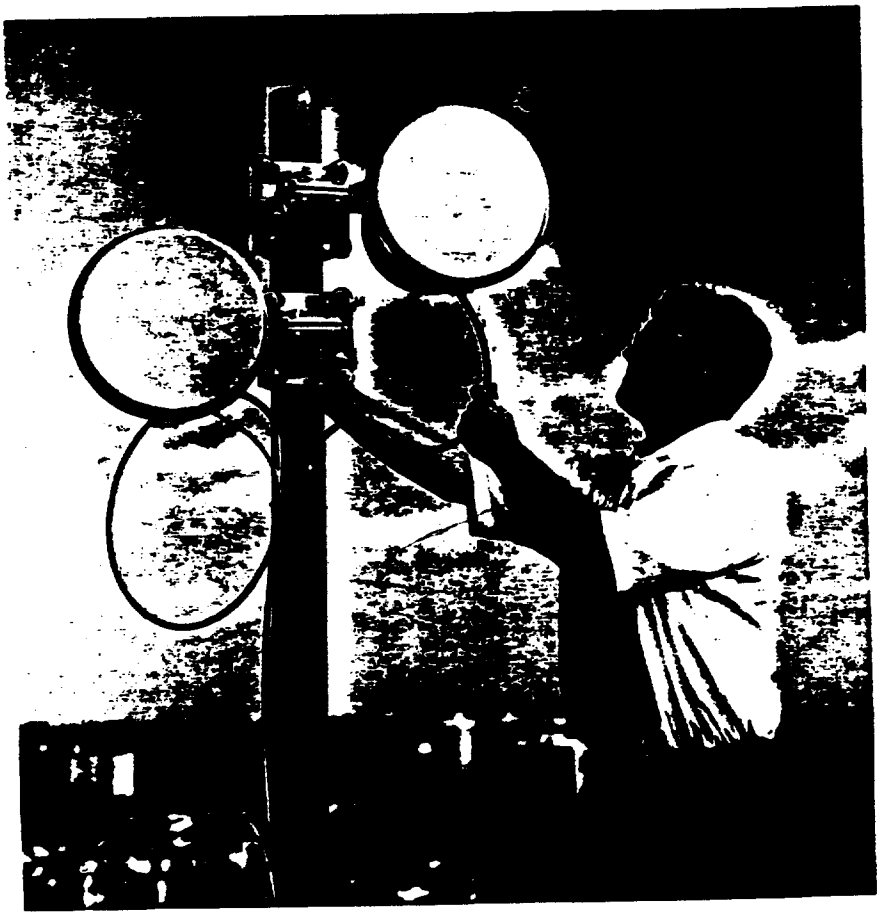
## Unreasonable Building Owner/Management Fees, Delays or Conditions Encountered When Attempting to Access Inside Wire

| 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 |

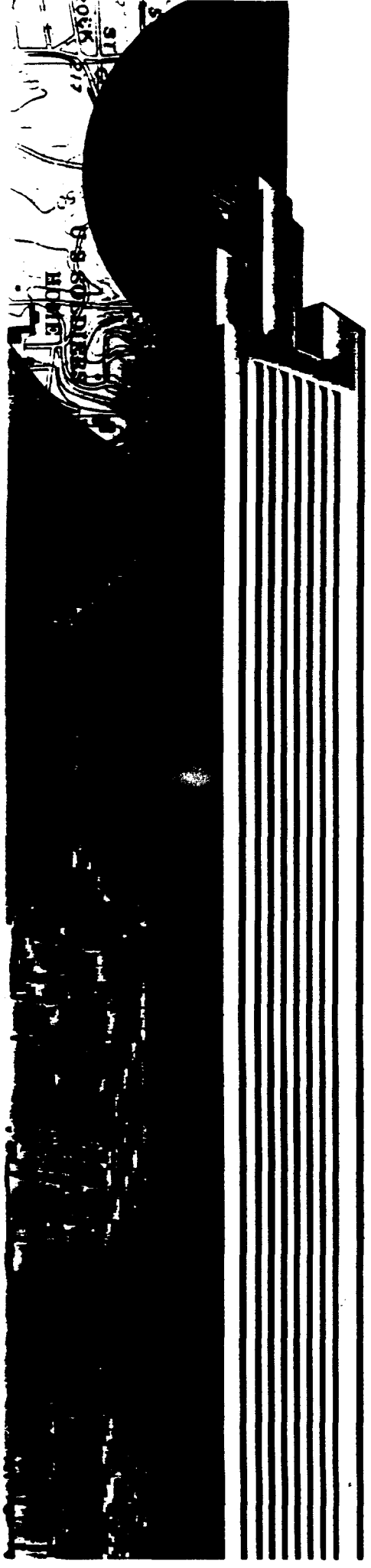
# EXHIBIT IV

# 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.



WINSTAR



**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

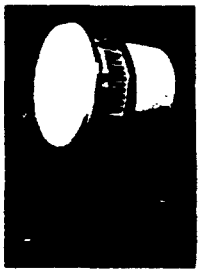
WinStar provides the tenant amenities as outlined in the enclosed materials at no cost to the building owner.

**Will the Aesthetics of the Building Be Maintained?**

• YES

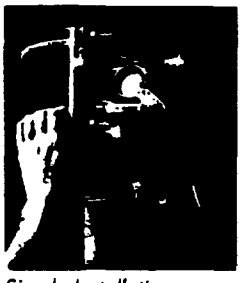
WinStar installs a small, unobtrusive (12" diameter) millimeter wave dish(es) on the building rooftop (often invisible from the street) and connects the unit to an indoor unit mounted inside a 22-inch telecommunications equipment cabinet in an existing closet or mechanical space via a single coaxial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

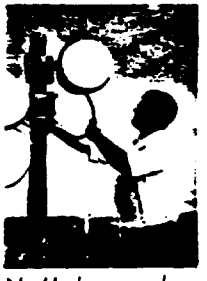


*12-Inch Antenna with Indoor Unit (IDU)*

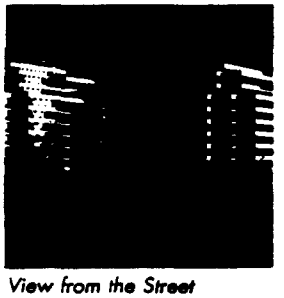
*Telecommunications Equipment Cabinet*



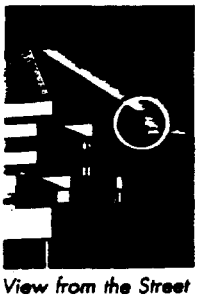
*Simple Installation*



*No Underground Construction*



*View from the Street (Distant)*

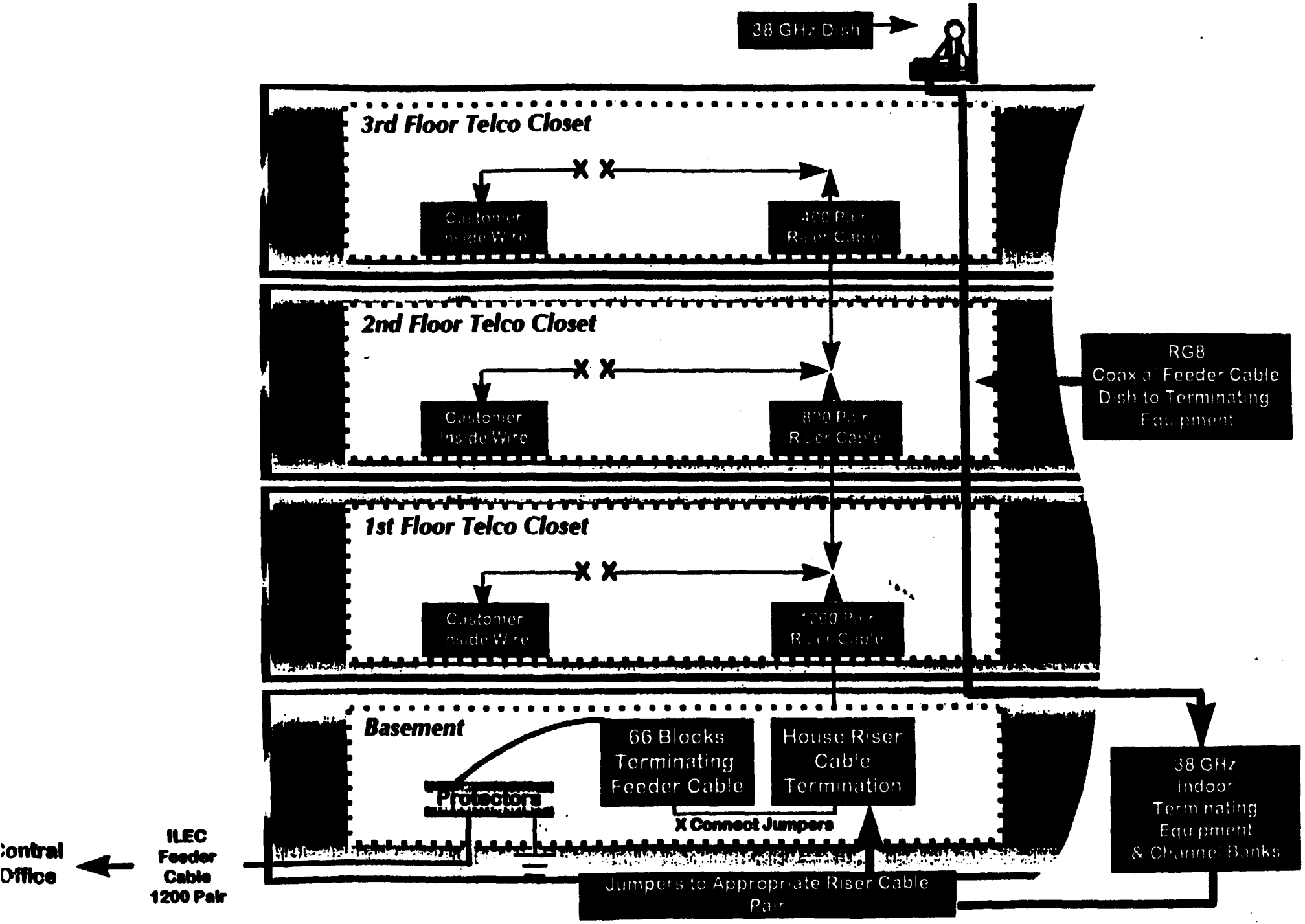


*View from the Street (Close-up)*

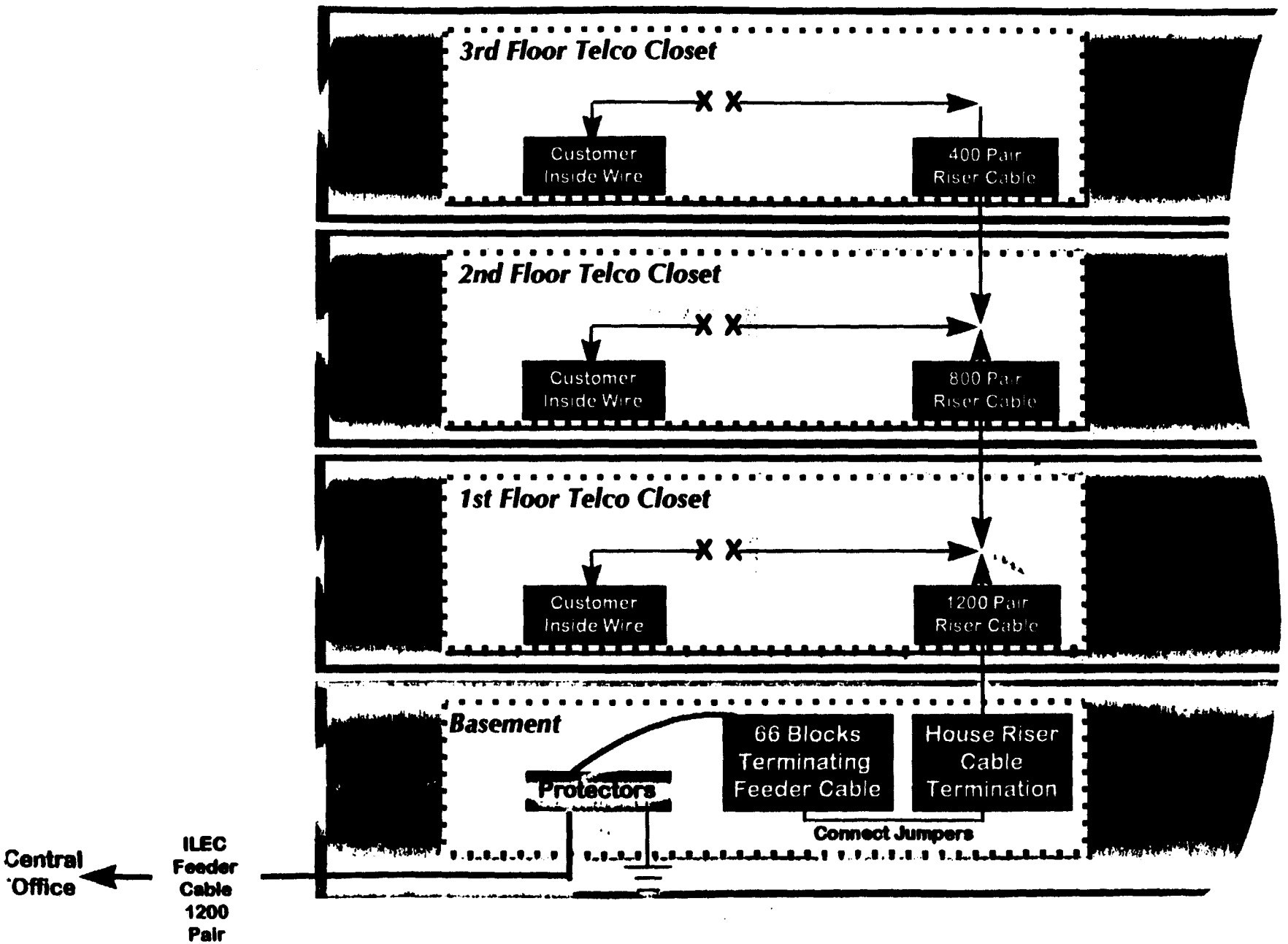
WINSTAR

# EXHIBIT V

# WINSTAR HIGH-RISE 38 GHZ APPLICATION



# SIMPLIFIED TELECOMMUNICATIONS RISER WIRING DIAGRAM



# EXHIBIT VI

104TH CONGRESS
2d Session

SENATE

REPORT
104–230

# TELECOMMUNICATIONS ACT OF 1996

FEBRUARY 1, 1996.—Ordered to be printed

Mr. PRESSLER, from the committee of conference, submitted the following

## CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

***SECTION 1. SHORT TITLE; REFERENCES.***

*(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".*

*(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).*

***SEC. 2. TABLE OF CONTENTS.***

*The table of contents for this Act is as follows:*

*Sec. 1. Short title; references.*
*Sec. 2. Table of contents.*
*Sec. 3. Definitions.*

22–358

portionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.

*Conference agreement*

The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities. The conferees also agree to three additional provisions from the House amendment. First, subsection (g) requires utilities that engage in the provision of telecommunications services or cable services to impute to its costs of providing such service an equal amount to the pole attachment rate for which such company would be liable under section 224. Second, new subsection 224(h) requires utilities to provide written notification to attaching entities of any plans to modify or alter its poles, ducts, conduit, or rights-of-way. New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.

## SECTION 704—FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS

*Senate bill*

No provision.

*House amendment*

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

*Conference agreement*

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

SECTION 705—MOBILE SERVICE DIRECT ACCESS TO LONG DISTANCE CARRIERS

*Senate bill*

Subsection (b) of section 221 of the Senate bill, as passed, states that notwithstanding the MFJ or any other consent decree, no CMS provider will be required by court order or otherwise to provide long distance equal access. The Commission may only order equal access if a CMS provider is subject to the interconnection obligations of section 251 and if the Commission finds that such a requirement is in the public interest. CMS providers shall ensure that its subscribers can obtain unblocked access to the interexchange carrier of their choice through the use of interexchange carrier identification codes, except that the unblocking requirement shall not apply to mobile satellite services unless the Commission finds it is in the public interest.

*House amendment*

Under section 109 of the House amendment, the Commission shall require providers of two-way switched voice CMS to allow their subscribers to access the telephone toll services provider of their choice through the use of carrier identification codes. The Commission rules will supersede the equal access, balloting and prescription requirements imposed by the MFJ and the AT&T-McCaw consent decree. The Commission may exempt carriers or classes of carriers from the requirements of this section if it is consistent with the public interest, convenience, and necessity, and the

# EXHIBIT VII

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## INSIDE

BUSINESS

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### Phone Probes

■ The FCC and a Senate committee want to know why competition has not increased among telephone carriers 18 months after passage of a law designed to encourage such rivalry.

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# Telephone Market Probes Planned

## *FCC, Senate Ask Why Competition Is On Hold*

By Paul Farhi
Washington Post Staff Writer

Frustrated over the lack of progress in opening up the nation's telecommunications markets to competition, the nation's top telephone overseers said yesterday they want to investigate the problem.

Sen. John McCain (R-Ariz.), chairman of the powerful Commerce Committee, and the Federal Communications Commission both said they will launch separate inquiries into what's wrong and what can be done about it.

Nearly 18 months after Congress passed the Telecommunications Act of 1996, it's clear that consumers have seen little of the competitive frenzy that lawmakers said would result from allowing local and long-distance phone companies and cable TV companies to enter one another's businesses. In fact, the opposite has happened: Local phone and cable rates have continued to rise, while would-be telephone competitors have merged rather than fought.

What's not clear is who, or what, is to blame. Both sides of the phone industry continue to point fingers at the other, and some argue that the government itself is responsible for the stalemate.

Long-distance companies such as AT&T Corp. and MCI Communications Corp. accuse the regional Bell companies of failing to open their local networks to companies that want to use the lines to provide a competing dial tone, as the law requires. Would-be local competitors need to piggyback on those lines to avoid the prohibitive expense of building duplicate local networks.

Last week, MCI said it expects its new local phone division to lose about $800 million this year, and still more next year, partly because of what MCI termed "anti-competitive tactics" by local phone companies. At the same time, MCI said it expects its long-distance revenue to fall about 10 percent below expectations in the next 18 months because of intensifying price competition.

JOHN McCAIN
*... committee to launch inquiry*

The Bells, which hold regional monopolies, say they have been as hospitable to competitors as possible. They also complain that the FCC has placed too many regulatory barriers in front of their efforts to enter the long-distance market.

The Bells say that long-distance companies don't really want to get into the $100 billion local phone market anyway, since doing so

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# Regulators Ask Why Phone Firms' Rivalry Is Sluggish

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would make the deep-pocketed Bells eligible to enter the $70 billion long-distance business that AT&T, MCI and Sprint dominate.

"If anyone is having a real problem [entering a local market], we will rectify it," BellSouth Corp. spokesman John Schneidawind said yesterday. "But most of these problems are baloney. As long as [long-distance companies] keep crying fire in a crowded theater, we'll be kept from seeing the movie—we'll be kept out of long distance."

Responds AT&T's Mark Rosenblum: "It's a natural tendency of monopolists to want to hold on to their monopolies as long as possible."

McCain, whose committee holds sway over the telecommunications sector, said he will hold hearings to focus public attention on the problem.

"We'll try to build a case that the promise of the Telecommunications Act has not come to fruition," said McCain, who has long maintained that the law wasn't sufficiently deregulatory to promote competition faster. But McCain added that it was unlikely Congress would make changes in the law soon.

The FCC announced yesterday it will create a task force of commission employees to "identify trouble spots" and investigate actions that may be delaying competition. The task force appears to have been prompted by complaints made to the FCC in the past two weeks by AT&T and MCI.

Indeed, the agency yesterday singled out the local phone market as the primary target of its investigative actions, which officials said could lead to new rules to tighten any loopholes in existing regulations.

FOR MORE INFORMATION

*To read recent Post coverage of the FCC or MCI, click on the above symbol on the front page of The Post's Web site at www.washingtonpost.com*