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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VIA HAND DELIVERY

February 17, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in CS Docket No. 96-83, CS Docket No. 97-151, CC Docket No. 98-147 and CCB/CPD 98-63

Dear Ms. Salas:

During the course of a meeting yesterday with Thomas Sugrue, Robert Calass, and Kathleen Ham of the Wireless Telecommunications Bureau, David Turetsky and Terri Natoli of Teligent, Inc. discussed issues relating to telecommunications carrier access to multi-tenant environments ("MTEs"). In addition, Mr. Turetsky and Ms. Natoli reiterated the points made in Teligent's written comments in CCB/CPD 98-63. Mr. Turetsky and Ms. Natoli provided the WTB participants with copies of all Teligent's substantive filings with the Commission in various dockets relating to the access issue, as well as other documents mentioned below. I am filing this notice of ex parte presentation in those dockets that remain open through which Teligent has suggested a resolution of this issue might be achieved.

In accordance with the Commission's rules, for each above-mentioned docketed proceeding, I hereby submit to the Secretary of the Commission two copies of this notice of Teligent's ex parte presentation as well as copies of: (1) a summary of the means by which the Commission could accomplish MTE access as well as its jurisdiction to do so; (2) a transcript of a speech by David Turetsky presented to the 1997 Summer NARUC Convention; (3) a copy of the 1998 NARUC Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications

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Carriers; (4) a list of positions and statements by various telecommunications carriers concerning the access issue; (5) a copy of the Texas Public Utility Commission's building access policy; and (6) a list of issues facing fixed wireless carriers that warrant the Commission's attention.

Respectfully submitted,

Gunnar D. Halley

Counsel for
TELIGENT, INC.

Enclosures

cc: Thomas Sugrue (without enclosures)
Robert Calass (without enclosures)
Kathleen Ham (without enclosures)

**A BRIEFING ON THE FCC'S JURISDICTION TO ACCOMPLISH TELECOMMUNICATIONS CARRIER ACCESS TO TENANTS IN MULTI-TENANT ENVIRONMENTS**

That portion of a telecommunications transmission path that is located within a multi-tenant environment ("MTE") constitutes an essential component of the transmission of interstate wire and radio communications. Consequently, the FCC retains jurisdiction over efforts to exert control over that portion of the telecommunications network.

It is important to look at the entirety of the Communications Act to understand the basis for the FCC's jurisdiction. The 1996 Act does not exist in a vacuum; it constitutes a part of a more comprehensive legislative scheme for communications regulation: the Communications Act of 1934. It is critical that the authority of the FCC to secure competitive options for tenants in MTEs, to implement the terms of the 1996 Act and, more generally, to continue its regulation of communications in the public interest, be viewed in its historic context so as not to unnecessarily limit the FCC's ability to accomplish the goals of Congress. Self-imposed restrictions on the scope of the FCC's regulation threaten to impair the ability of the FCC to fulfill its statutory obligations and, consequently, will disserve the public interest.

To the extent that building owners and managers exert control over and charge for telecommunications carrier access to the intra-MTE communications network, they become persons engaged in interstate wire communication (as that term is literally defined in § 3(51) of the Communications Act) and, consequently, bring themselves within the jurisdiction of the FCC. The FCC can accomplish MTE access pursuant to its jurisdiction to regulate persons engaged in interstate wire communication under §§ 1 and 2(a) of the Communications Act.

The FCC retains broad primary authority over interstate wire and radio communications that dates to the passage of the Communications Act of 1934. Section 2(a) provides the FCC's subject matter and <u>in personam</u> jurisdiction over all interstate and foreign communication by wire and radio, and to all persons engaged within the United States in such communication or such transmission of energy by radio.[1] The sweeping language of Section 2(a) suggests a comprehensive jurisdictional mandate.

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[1] 47 U.S.C. § 152(a) ("The provisions of this act shall apply to <u>all</u> interstate and foreign communication by wire or radio and <u>all</u> interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to <u>all persons engaged within the United States</u> in such communication or such transmission of energy by radio . . . ")(emphasis added).

The encompassing definitions of "radio communication"[2] and "wire communication"[3] in Section 3 to include items and services incidental to such communication further emphasize the comprehensive nature of the FCC's authority. All subsequent provisions of the Act are properly considered in the light of this expansive and flexible basis of authority.

The absence of a statutory provision expressly considering the matter of access to tenants in MTEs is not a barrier to the exercise of FCC jurisdiction. The FCC's scope of authority is not limited to those matters expressly mentioned in the Communications Act.[4] Congress' experience in dynamic regulation led it to adopt an approach in which it "define[d] broad areas for regulation and . . . establishe[d] standards for judgment adequately related to their application to the problems to be solved."[5] The D.C. Circuit observed that the Communications Act comprises "a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest."[6] Hence, the FCC retains ample authority to regulate access to tenants in MTEs notwithstanding

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2 47 U.S.C. § 153(33)("The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, <u>including all instrumentalities, facilities, apparatus, and services</u> (among other things, the receipt, forwarding, and delivery of communications) <u>incidental to such transmission</u>")(emphasis added).

3 47 U.S.C. § 153(51) ("The term 'wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, <u>including all instrumentalities, facilities, apparatus, and services</u> (among other things, the receipt, forwarding, and delivery of communications) <u>incidental to such transmission</u>")(emphasis added).

4 <u>See</u>, <u>e.g.</u>, <u>National Broadcasting Co. v. U.S.</u>, 319 U.S. 190, 219 (1943)("While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency").

5 <u>Id.</u>

6 <u>Philadelphia Television Broadcasting</u>, 359 F.2d 282, 284 (D.C. Cir. 1966).

the absence of express reference to such access within the Communications Act.

The regulation of cable television offers an historic analogy. In its Second Report and Order, the FCC considered its authority to regulate microwave and non-microwave CATV systems.[7] In an attachment, the FCC observed that CATV services constitute interstate wire communication as understood by Section 3 of the Communications Act.[8] Although CATV systems were not licensees of the FCC, the FCC determined that they nevertheless engaged in "interstate communication by wire" and, hence, were subject to the FCC's jurisdiction.[9] Moreover, the FCC identified CATV as an interstate communication service despite the fact that cable facilities did not cross State lines. It concluded that "a communications service can be interstate or foreign in nature and subject to the FCC's jurisdiction even though all the facilities are located within the confines of one State."[10]

Having concluded that CATV systems fell literally within the scope of the FCC's jurisdiction, the FCC explained that Sections 4(i) and 303(r), inter alia, provide it broad rulemaking authority over interstate communications and persons coming within that jurisdiction.[11] It noted the Supreme Court's affirmance of the "expansive" and "comprehensive" powers granted to the FCC by Congress through the Communications Act,[12] despite

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7 CATV, Docket Nos. 14895, 15233 and 15971, *Second Report and Order*, 2 FCC2d 725 (1966).

8 Id. at 794.

9 Id. at ¶ 12. Parties to the proceeding argued that specific authority over CATV from the Act was required before the FCC could regulate nonlicensees. Otherwise, these parties contended, the FCC could utilize its general rulemaking authority to regulate any business with an impact on broadcasting or which uses communications facilities. See id. at ¶ 11. The FCC rejected the application of this argument to the CATV context because CATV systems were actually engaged in interstate wire communication, "a business to which the Act's provisions are expressly applicable," and because "they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b)." Id. at ¶ 12.

10 Id. at 794.

11 Id. at 795.

12 Id.

the absence of specific reference to the subject matter of regulation in the Act.[13]

The Supreme Court subsequently affirmed the FCC's reasoning, holding that the FCC's authority to regulate CATV was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[14] The Court found "unpersuasive" the argument that "the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions,"[15] a finding particularly relevant to the FCC's consideration of ensuring that MTE owners and managers do not obstruct tenant access to telecommunications carriers.

The FCC should exercise its clear and expansive jurisdiction to ensure that tenants in MTEs have access to their telecommunications carrier of choice. Specifically, the FCC should prohibit building owners as persons engaged in the provision of interstate wire communication from discriminating among telecommunications carriers or otherwise unreasonably restricting access by telecommunications carriers to the tenants in those MTEs.

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13 Id. at 796.

14 See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

15 Id. at n.37.

**Remarks of David S. Turetsky**
**Vice President, Law and Regulatory Affairs**
**Teligent, L.L.C.**
**Convention of the National Association of Regulatory Commissioners**
**San Francisco, California**
**July 1997**

Good afternoon. Thanks for joining me to talk a little bit about a subject that's been much in the news lately - and one that is dear to my heart - open markets in telecommunications.

Two months ago, I left the Antitrust Division of the Department of Justice to work for a new company called Teligent. Teligent is among those new competitors working hard to open local markets by building facilities - switches and wires and radio transmitters - to challenge the local monopolies. At Teligent, I'm continuing to focus on making sure that consumers see the benefits of competition.

And that's what I'd like to talk about today.

Because consumers won't realize all the benefits of competition - especially the savings envisioned by the architects of the Telecommunications Act of 1996 - until they are able to choose from among a wide variety of local telecommunication competitors.

Much has been written about the battle to open the local exchange. But there is one class of consumers whose special situation deserves the special attention of legislators and regulators at both the State and Federal level. I'm talking about the tenants in commercial office buildings and the residents of apartment buildings.

The problem, simply put, is that some landlords have adopted a monopoly pricing mentality when it comes to leasing rooftop space, inside wiring and riser access to new facilities based telecommunications competitors. In the end, that means their tenants pay more for their telecommunications service than they should.

We understand that some landlords, and we're told the number is small, are doing business exclusively with incumbent carriers, and flatly refuse to offer their tenants a choice. Others are charging access rates so high that the big savings tenants would normally realize from new competition are greatly diminished - because they drop straight into the landlord's pocket.

So when it comes down to it, landlords, in effect, possess near monopoly power over their tenants' telecommunications options. If the Regional Bell Operating Companies control the "last mile" of the network, then the landlords clearly control the last hundred yards. And the landlord, unlike the Bells, is unregulated.

In our time together today, I'll try to outline the issue in more detail, describe the ways in which some states have already addressed it, and talk about some further solutions.

Although they have been slow in coming, I know that the full benefits of competition in the local market - savings, choice and innovation - will come to consumers eventually. How long it may be before "eventually" arrives is partly a function of how well and how quickly we address the issues I am describing today.

Ultimately, the most effective competitive entry strategy will wrest control from the local monopoly and offer a true alternative to the existing local network. Facilities-based

competition achieves this result. Not coincidentally, that also is the strategy that will offer consumers the greatest economic benefits.

I don't mean to discount the benefits of resale and reliance on unbundled network elements. But, these competitive entry strategies, in varying degrees, rely on the underlying incumbent LEC network, its costs, and its level of efficiency or inefficiency.

The dependency and vulnerability of resale was made crystal clear to me by a letter read by a senior New York Public Service Commission staff member as part of a panel concerning competitive developments in Rochester (moderated by then- Commissioner Lisa Rosenbloom). The letter essentially said that due to a billing dispute, Rochester Telephone would no longer provide local resale service to AT&T after a specified date. Following a flurry of contacts and regulatory participation no suspension ultimately occurred, but the limits of resale were laid bare.

And some carriers have said that Friday's decision by the 8th Circuit Court of Appeals will further complicate business strategies that rely on resale or unbundled network elements.

By contrast, an alternative network does not rely on the local loop or incumbent network. Its independence allows it to compete from the fundamental level of network costs and efficiencies to offer enhanced quality and innovative pricing of services for customers.

Facilities-based competition offers economic dynamism and a complete array of benefits to consumers. It is the ultimate objective of telecommunications competition policy.

A competitor engaged in resale doesn't need access to its customer's building. The same is true of a competitor utilizing unbundled elements - no access to the customer's building is required.

But the true facilities-based competitor, the competitor who seeks to do what Congress most hoped would occur, what you all want, and what provides the greatest benefit for our customers and our country - that new competitor needs affordable and reasonable building access in order to offer the best discounts to its customers. By the way, that's precisely what Teligent will do.

Teligent is entering markets as a facilities-based provider with an independent alternative network. That network is intended, at least initially, to provide small and medium-sized businesses with low-cost, high-quality service for all their telecommunications needs. Later, we will consider expanding our service to residential customers.

Teligent's unique method of delivering service to consumers using spectrum and modern technologies avoids the inefficiencies and unnecessary costs of the traditional wireline network without sacrificing the benefits. Although many regulators are aware of us, they may not have a full understanding of our operations. I would like to take a moment to explain our method of providing service because knowledge of it its critical to effective policy-making.

Teligent uses fixed, digital microwave radio applications to transport communications, using a point-to-multipoint architecture Conceptually, the airwaves replace the LEC's wires as the transmission medium. Rooftop antennas transmit and receive the signals from location to location. The signals reach customers through inside wire or special connections to the customer's office.

In order for customers to choose Teligent service - and the price discounts it provides - they must be able to link up to the antenna on their building's roof. Customers also need access to riser cables and inside wire within the building.

Teligent's rooftop antennas are not towering cellular-type structures. Instead, they are smaller than a cafeteria tray - and much smaller than a home DBS receiver.

These small antennas will allow the network's transmission capacity to vary so that customers can increase their desired bandwidth for particular applications, but do not waste bandwidth when it is not needed.

The network is powerful, too. Teligent will offer high-quality voice, high-speed data, Internet access, and other enhanced services, with an initial focus on small and medium-sized businesses. We also may offer wholesale "last mile" bypass services for long distance carriers, Internet service providers and resellers.

In short, Teligent will provide a full-service, dynamic alternative telecommunications network.

As I mentioned earlier, building access is not an issue for resellers or those relying upon unbundled network elements, so the issue may not have been raised as often or as loudly as the need for interconnection and unbundling. But it is an issue that affects all new, facilities-based competitors, whether they deliver service with copper, fiber, or microwaves.

Reasonably-priced building access was not much of an issue before competition arose. To make their buildings attractive to potential tenants, owners needed telephone service. So, they voluntarily granted access to the one telephone company which provided that service. For those rare circumstances in which a building owner denied access, the telephone company could avail itself of its State-granted eminent domain authority.

Moreover, the costs of the condemnation could be recovered from its rate base under rate of return regulation. As a result, many companies have access rights to buildings and rooftops because they were there first - as a monopoly - before the States, Congress and the President changed public policy and opened local telecommunications markets to new competitors.

The development of competition through the 1996 Act and the efforts of the States and the FCC are encouraging facilities-based competitors to seek access to customers in multi-tenant buildings.

But, as I've said, some building owners don't share the enthusiasm of the States and Congress for allowing tenants to cut their telecommunications costs by choosing among new competitors. And that will siphon off much of the savings envisioned by the authors of the Telecommunications Act.

For the benefit of consumers, the States can and should take immediate action to wring the excess costs out of building access.

Already, many States have been vigorous in their efforts to open local telecommunications markets. Public utility commissions across the nation continue to order interconnection requirements, loop unbundling mandates, and wholesale service obligations so that their residents may enjoy the benefits of local competition.

You have accomplished an incredible task in a short period of time. For that, you should be congratulated. But, as I'll note, much work remains to be done.

Before I go further, I must tell you that Teligent's preference is to work cooperatively with building owners. Frankly, that's exactly what we are doing.

Most building owners are pleased to grant access to more than one telecommunications competitor, because they realize that their buildings are more valuable if tenants can choose between several competing companies to secure the package that is best for them. The right

"answer" or "package" for one customer may be wrong for another customer. Multiple access then becomes a good will tool and a selling point for these landlords: tenants can negotiate lower cost telephone service and enjoy unique service offerings.

But some building owners, unmindful of the potential benefits for tenants, have assumed the role of monopoly over that last hundred yards that is under their control, artificially inflating the telephone rates of the building tenants who want competitive service.

In other cases, building owners have contracted away access rights to riser and rooftop management companies sometimes in an effort to fully - and unfairly - exploit their market power.

One riser company's brochure states that "new competitors to the local telephone company want access to your tenants. Your 'free' riser space has become a valuable commodity for toady's new telephone service providers." It goes on to proclaim that local competition presents the building owner an "opportunity to realize substantial new revenue from existing unmanaged space" creating "a new monthly revenue source within" the building.

"What's wrong with a landlord making a profit on building access?" you may ask.

Well, if I were a tenant, this is what I'd say.

In this case, the price of access to competitive telecommunications services is not set in relation to a competitive market. It is set through the exercise of monopoly power. (Moreover, some carriers don't pay at all.) As an antitrust lawyer, I can tell you that's bad. But I think you understand that already.

The owner of a building is in the same position that the owner of the local telephone network was in decades past. Generally, competitors cannot reach tenants in that building without going through the owner, just as there formerly was no way to reach local exchange customers without going through the local telephone monopoly.

The argument that all a tenant need do is move to another building is just not real. Given the economics, the tenant simply has no choice but to accept the landlord's monopoly pricing for access to telecommunications services.

Congress changed the local telecommunications paradigm when it enacted the Telecommunications Act. But now the behavior of some "last hundred yard" landlords could potentially thwart the vision of competition and big consumer price cuts that has guided the States and Congress. In effect, some riser and rooftop management companies divert to themselves resources that otherwise should be available for providing lower cost service.

Clearly, Congress intended that most of the benefits of telecommunications competition would accrue to consumers, not to building owners and riser management companies. The opportunity for exploitation exists. And any uneconomic exploitation of the 1996 Act will hurt consumers.

Near-term natural market adjustment is virtually impossible due to the lock-in effect of long-term leases. The lock-in effect also is enhanced by a combination of the high cost of switching locations, coupled with tenants' ignorance of the existence of better deals.

This lock-in notion is well established. In fact, when as Deputy Assistant Attorney General I negotiated an end to the 1956 IBM Consent Decree in consultation with numerous economists and antitrust lawyers, I secured a phase-out over 5 years. This phase-out was intended to guard, in part, against IBM's exploitation of the fact that it would take main-frame users years to switch to any competing mainframe provider because of the tremendous

software investment by customers in IBM compatible equipment. This "lock-in" notion is grounded in much precedent and economic literature.

The United States Supreme Court addressed the concept in its 1992 Kodak case when Kodak sought to impose high service costs on purchasers of its copier equipment, who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated that "[e]ven if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive."

Some sophisticated customers may be able and unwilling to assume the costs of the information gathering and processing. However, as the Court stated, "There are reasons to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . If a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed."

And when it comes to the cost of switching providers, the lock-in effect perpetuates economic inefficiencies. The Court noted that "if the cost of switching is high, consumers who already have purchased the equipment and are thus 'locked in,' will tolerate some level of service-price increases before changing equipment brands."

The situation described by the Supreme Court is closely analogous to that of tenants in long-term leases who want to buy local telephone services from some company other than their incumbent carrier. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option. They had no way of knowing that competitive choices in telecommunications would become available. And therefore, they could never have negotiated for the competitive carrier access in their leases.

The cost of moving is prohibitively high. And even though it is possible that a very few sophisticated customers may have negotiated or renegotiated lease terms to allow for competitive carrier building access, many small businesses and individuals almost certainly have not realized benefits from their sophistication.

Fortunately, there are solutions to the access problems. First, the 1996 Act amended Section 224 to provide telecommunications carriers access to utility rights-of-way. This provision primarily governs federal regulation, but there clearly is an important role for the States. It even affects the method by which the Regional Bell Operating Companies achieve State commission approval under the Section 271 competitive checklist. In short, the States have the incentive to implement rules to accomplish the terms of Section 224.

Section 224 is pro-competitive. But if it is interpreted too narrowly, it could result in a wireline bias. For example, because older technologies are built around wires, utilities historically did not often require access to the roofs of buildings for their distribution facilities. Hence, a new technology that relies on rooftop antennas will bring consumers more benefits if Section 224 is interpreted to include rooftop access. In reviewing compliance with the competitive checklist, the State commissions should require that, pursuant to Section 224, rooftop access for telecommunications carriers be provided In buildings with an RBOC presence.

Section 224 grants broad powers to mandate access to rights-of-way owned or controlled by utilities. For example, in its Interconnection First Report and Order, the FCC recognized that Section 224 grants the power to require utilities to exercise their "eminent

domain authority to expand an existing right-of-way over private property in order to accommodate a request for access." I think you ought to consider these powers in addressing the issue of building access restrictions.

In addition to the federal provisions, ample opportunities exist for States to play a critical role to ensure that consumers reap the maximum benefits of competitive choice. In fact, a number of States have already addressed the issue through legislative action.

Section 16-2471 of the Connecticut General Statutes offers an excellent example. It requires building owners to allow a telecommunications provider to wire the building and provide service so long as a tenant requests services from the provider, the costs are assumed by the telecommunications provider, the provider indemnifies the building owner for any damages caused by the wiring, and the provider complies with State inside wire regulations. The statute allows for reasonable compensation.

Texas also has a statute which prohibits property owners from interfering with or preventing a telecommunications utility from installing telecommunications service facilities on the owner's property at the request of a tenant. Once again, the statute allows for reasonable compensation while prohibiting the private owner from demanding unreasonable payments.

Statutes are not the only method of empowering tenants and removing barriers to building access; regulatory commission action is an effective option, as well.

For example, in a 1994 Order, the Public Utilities Commission of Ohio prohibited any person owning, leasing, controlling, or managing a multi-tenant building from forbidding or unreasonably restricting any occupant, tenant, lessee, or such building from receiving telecommunications services from any provider of its choice, so long as the provider is certified by the Ohio Commission.

In their regulation of Shared Tenant Services, public utility commissions have developed considerable experience with the issue of access to buildings. Often predicated upon the incumbent LEC's carrier-of-last-resort obligations, most State commissions have required STS providers to allow LEC access to tenants in a building who prefer to take service from the LEC over the STS provider (often the owner of the building).

Florida offers a recent example. In April, the Florida Public Service Commission required all Shared Tenant Services providers to allow local exchange companies direct access to tenants who want local service from the local exchange company. Moreover. the Order provides for reasonable compensation for LEC use of the STS provider's or the building owner's cable. In the event that the STS provider and the building owner are not one and the same, the Order requires that the STS provider guarantee and obtain the permission of the building owner for the requisite LEC access. Similar requirements should be adopted to allow building access by competitive facilities-based carriers not only to STS facilities, but to building rooftops and inside wire, as well.

I have heard concerns raised about constitutional takings issues arising from requiring building owners to permit rooftop, conduit and inside wiring access at the request of tenants. This problem, too, is resolved by providing for the payment of just and reasonable compensation to building owners by telecommunications carriers for the access granted.

Section 228 of the New York Public Service Law offers an example. Although this concerns cable television. the principle applies to telecommunications. Section 228, essentially a tenant-protection statute, was intended to ensure that landlords and building

owners could not prevent tenants from receiving cable television service by excluding the cable operator from the building.

In Loretto, the United States Supreme Court held that the New York statute mandating building access was a valid exercise of the police power, but that the landlord must be compensated for the access. As applied to the issue at hand, access to rooftops and inside wire for competitive telecommunications carriers is likely insulated from constitutional attack as long as just compensation is provided to the building owner. And that doesn't mean a monopoly price.

As I said earlier, Teligent has negotiated with many landlords who are anxious to offer their tenants access to more than one telecommunications carrier.

But relying solely on the willingness of building owners to negotiate away their "last hundred yards" will reduce the benefits of competition for tenants of office buildings and residents of apartment houses, co-ops and condominiums.

State commissions can protect the tenants in their jurisdictions and promote competition and its benefits - lower prices, greater choice and better service - by taking this step: Ensure reasonable access to building rooftops, inside wire and riser cables for those facilities-based competitors that tenants want to use.

I urge you to take action to ensure that the great promise of the Telecommunications Act - major price cuts - is not is left unfulfilled for one class of consumer, the building tenant. Thank you very much.

# *Resolution Adopted at NARUC's Summer 1998 Committee Meetings*

Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers

WHEREAS, Historically, local telephone service was provided by only one carrier in any given region; and

WHEREAS, In the historic one-carrier environment, owners of multi-unit buildings typically needed the local telepho company to provide telephone service throughout their buildings; and

WHEREAS, Historically, owners of multi-unit buildings granted the one local telephone company access to their buildings for the purpose of installing and maintaining facilities for the provision of local telephone service; and

WHEREAS, Competitive facilities-based providers of telecommunications services offer substantial benefits for consumers; and

WHEREAS, In order to serve tenants in multi-unit buildings, competitive facilities-based providers of telecommunications services require access to internal building facilities such as inside wiring, riser cables, telephone closets, and rooftops; and

WHEREAS, Facilities-based competitive local exchange carriers, including wireline and fixed wireless providers, have reported concerns regarding their ability to obtain access to multi-unit buildings at nondiscriminatory terms, conditions, and rates that would enable consumers within those buildings to enjoy many of the benefits of telecommunications competition that would otherwise be available; and

WHEREAS, All States and Territories, as well as the Federal Government, have embraced competition in the provisic of local exchange and other telecommunications services as the preferred communications policy; and

WHEREAS, Connecticut, Ohio, and Texas already utilize statutes and rules that prohibit building owners from denyi tenants in multi-unit buildings access to their telecommunications carrier of choice; and

WHEREAS, The President of NARUC testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition that "[f]or competition to develop, competitors have to have equal access. They hav be able to reach their customers and building access is one of the things that state commissions are looking at all across the country."; and

WHEREAS, The attributes of incumbent carriers such as free and easy building access should not determine the relati competitive positions of telecommunications carriers; and

WHEREAS, The property rights of building owners must be honored without fostering discrimination and unequal access; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, urges State and Territory regulators to close evaluate the building access issues in their states and territories, because successful resolution of these issues is importa to the development of local telecommunications competition; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property order to serve a customer that has requested service of the provider.

Sponsored by the Committee on Communications

Adopted July 29, 1998

## TELECOMMUNICATIONS CARRIER ACCESS TO TENANTS IN MULTI-TENANT ENVIRONMENTS

*Positions and Statements of Various Telecommunications Carriers*

### BellSouth Comments Florida (Filed on 7/29/98)

"Telecommunications companies should have 'direct access' to customers."

"Carriers should be free to choose the desired technologies used to deliver these services."

"If the Commission adopts the stance that a property owner has the authority to prevent a carrier from placing its facilities on the owner's property, then this authority is, in effect, a restriction to 'direct access.'"

"Telecommunications companies should not be prevented from offering services to subscribers on multi-tenant properties."

### Southwestern Bell Comments Texas (filed 10/2/97)

"The higher the payment required of telecommunications providers, the less likely it is that tenants will see competitive choices."

"[C]ertain facilities (*e.g.*, conduit cable and wiring) may have been placed by telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider."

"Requiring compensation only as new tenants are served or as new revenues are generated would also be discriminatory. If compensation were so based in buildings served by multiple telecommunication utilities, then the incumbent would be advantaged by making no payment on existing tenants and existing revenues."

"[N]o provider should have to pay anything until the space designed for telephone equipment has been exhausted."

### GTE Comments Florida (Filed on 7/29/98)

"Certified telecommunications companies should have direct access to tenants in a multi-tenant environment. The multi-tenant location owner manages access to an essential element in the delivery of telecommunications to the tenants, and telecommunications is essential to the public welfare. The owner should therefore be required to permit certified telecommunications companies access to space sufficient to provide telecommunications services to tenants."

"Any restrictions on direct access should be strictly constrained to reasonable security, safety, appearance, and physical space limitations."

"GTE does not believe that exclusionary contracts are ever appropriate."

"A multi-tenant location owner should not be allowed to charge for access to an essential element in the delivery of telecommunications to the tenants."

"Telecommunications firms should not be required to pay multi-tenant location owners for the ability to terminate network facilities that are needed to provide services to tenants of that multi-tenant location and that are essential to the public welfare and a necessary part of the building or property infrastructure.

Multi-tenant location owners do not charge other firms providing essential services (e.g., electric, gas, water, and sewage) for the right to provide such services. The space used by telecommunications, electric, water and other essential services firms is common area that benefit all tenants. This type of common area is analogous to the space required to provide elevator service, stairways and shared rest rooms in multi-story buildings. Costs for all types of these and other common areas should be recovered from tenants through normal rent payments."

**GTE Reply Comments Florida (Filed 8/28/98)**

"In order to promote a technologically advanced and competitive telecommunications infrastructure . . . tenants in multi-tenant environments should have nondiscriminatory, technology neutral, and direct access to telecommunications service providers of their choice."

"Direct access to tenants in a multi-tenant location is not an unconstitutional taking."

**GTE Comments Texas (Filed 10/3/97)**

"The building owner, by controlling building access, manages an essential element in the delivery of telecommunications to the tenants in that building."

**Sprint Comments Florida (Filed on 7/29/98)**

"Telecommunications carriers should have direct access to customers in multi-tenant environments . . . The public policy of the United States . . . includes the development of local exchange competition and giving consumers the power to choose between competing telecommunications carriers and the services they offer."

"This kind of competitive environment requires non-discriminatory equal access by certificated carriers at some point on or at the premises of an MTE. To allow otherwise would subordinate the interests of end user customers and the development of competitive local exchange markets to the landlords."

"The Commission has historically regulated persons who own and/or operate telecommunications facilities for hire to the public. If landlords demand monopoly control over the facilities on their property needed to serve end user customers, impose a separate charge on tenants for service, or seek to extract a fee from a carrier for the right to serve an MTE, the landlords should be regulated by the FPSC in some fashion as telecommunications carriers, especially regarding the obligation to interconnect on a non-discriminatory basis with other telecommunications carriers."

**AT&T Comments Texas (Filed 10/2/97)**

"[B]uilding owners should be required to provide new entrants with comparable rates, terms, and conditions as might already exist with incumbent LECs or other telecommunications providers."

"[A]ll new entrants must be permitted . . . non-discriminatory use of any building distribution facilities "free of charge" as long as the incumbent LEC has use of those facilities.

"Property owners should be responsible for affording non-discriminatory access to their building to all telecommunications providers."

**MCI Comments Nebraska (Filed on 9/8/98)**

"All Nebraska customers should have access to competitive local exchange carrier ("CLECs") services. Thus, no matter which incumbent local exchange carrier ("ILEC") initially serves a particular apartment, building, campus, or business park, individual customers or tenants -- rather than the owner of the multiple dwelling units ("MDUs") -- should be able to choose their local exchange carrier."

**WorldCom Comments Florida (Filed 8/26/98)**

"[I]f competition is to develop in the multi-tenant environment, carriers must have direct access on a nondiscriminatory basis and without restrictions or limitations. . . ."

**e.Spire, TCG, Teligent, & Time Warner Joint Comments Florida (Filed on 8/26/98)**

"Tenant end users in multi-tenant environments should have direct access to their certificated telecommunications company of choice;"

"Ensuring telecommunications companies' nondiscriminatory and technology-neutral direct access to tenant end users in MTEs is important to the achievement of effective telecommunications competition in Florida;"

"Direct access includes access to those spaces and facilities within an MTE used by a telecommunications company to provide telecommunications services to a tenant end user, including, but not limited to, inside wiring, telephone closets, riser cables, and rooftops;"

**TCG Comments Florida (Filed 7/29/98)**

"Where competitive providers require access to install facilities to provide telecommunications services to customers in a MTE such as a modern commercial office building, building owners and managers have acted individually and in concert to prevent competition by denying access or by demanding discriminatory compensation from competitive service providers and their customers as tenants. Such actions deny consumers of telecommunications services the benefits of the competition intended by the federal and state laws and Commission policy."

"The discriminatory actions of MTE owners and managers in depriving their tenants and occupants access to their local provider of choice eviscerates the benefits of facilities-based competition intended by the federal Act and the Commission."

"Landlords and owners of MTEs, and building managers as their agents, do not have the right to select on behalf of their tenants between competing providers of telecommunications services on behalf of their tenants. . . ."

**Time Warner Communications Comments Texas (Filed 10/2/97)**

"If the incumbent is paying no fee for building access, it certainly will have a cost advantage over its new entrant competitors that are paying such a fee."

"Exempting incumbents from paying for building access inevitably impacts competitors adversely because of the comparative cost advantage the incumbent gains as a result."

# *Public Utility Commission of Texas*

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## Memorandum

TO: Chairman Pat Wood, III
Commissioner Judy Walsh
Commissioner Patricia Curran

FROM: Ann M. Coffin
Assistant Director
Office of Customer Protection

Bill Magness
Director
Office of Customer Protection

DATE: October 29, 1997

RE: On Agenda for November 4, 1997 Open Meeting

Project No. 13000: Informal Dispute Resolution

Office of Customer Protection Enforcement Policy regarding Rights of Telecommunications Utilities and Property Owners under PURA Building Access Provisions.

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The Public Utility Commission of Texas (Commission) has recently been asked to address implementation and compliance issues concerning the "building access" provisions of the Public Utility Regulatory Act (PURA) §§54.259 and 54.260. The building access provisions of PURA were adopted during the 1995 legislative session in an effort to guarantee telecommunications utilities access to public and privately owned property for the provision of competitive telecommunications services. To date, the Commission has not addressed compliance issues associated with the building access provisions of PURA. As competition becomes a reality, telecommunications utilities have begun to raise concerns regarding their ability to access multi-tenant buildings in order to provide telecommunications services to the building's tenants. Specifically, the telecommunications utilities are concerned that property owners may be placing unreasonable terms and conditions on building access to the detriment of the developing competitive telecommunications market.

In order to quickly respond to these concerns and provide both telecommunications utilities and property owners the benefit of our interpretation of the provisions set forth in PURA §§54.259 and 54.260, the Office of Customer Protection (OCP) has developed the following enforcement policy. In no way is this policy intended to affect shared tenant

service (STS) providers' right of entry contracts with property owners. Rather, OCP seeks to facilitate negotiated building access arrangements between incumbent local exchange carriers, new entrants, and building owners by providing parties with OCP's position on these complex issues. Although the policy paper is intended to reduce the need for formal enforcement actions, in the event that parties allege violations of PURA §§54.259 and 54.260, OCP intends to use this policy to guide its determination of whether enforcement actions against parties should be initiated.

## Overview of PURA, Sections 54.259 and 54.260

In 1995, the Texas Legislature passed legislation that introduced sweeping changes in the way in which telecommunications utilities may operate and the way they are regulated in Texas. Specifically, the legislation encouraged competitive entry into the Texas local exchange telecommunications market. Since that time, the Commission has actively undertaken its responsibility to introduce competition into the local telecommunications marketplace. Inevitably, the statutory mandate to "open up" the telecommunications marketplace has caused an increase in the number of telecommunications utilities seeking access to multi-tenant buildings in order to provide, install, maintain, and operate facilities necessary for the provision of service to the buildings' tenants. This demand for access has raised a fundamental question regarding a telecommunications utility's "right" to access commercial buildings in order to install facilities to serve tenants of the building. In adopting PURA §54.259, the state legislature answered this question by creating a right of access by the telecommunications utility to public and private property. In exchange for allowing the telecommunications utility access to the building, the state legislature adopted PURA §54.260, which allows the property owner to charge reasonable compensation for the access privilege.

The provisions of PURA §54.259 govern the right of a telecommunications utility to access public and private property by mandating access, on a nondiscriminatory basis, to any telecommunications utility whose services are requested by a tenant. Sections 54.259(a)(4) and (5) prohibit discrimination against a tenant or in favor of another tenant based on their selection of a telecommunications utility and prohibit a demand for payment from a tenant for allowing their chosen provider access to the building. These provisions protect tenants who exercise their "right" to choose among service providers from being subjected to actions such as increased rental charges or surcharge assessments that may occur as a result of requiring the building to give access to multiple providers. Similarly, Sections 54.259(a)(1-4) protect the telecommunications utility, whose services are requested by a tenant, against discriminatory actions by the property owner. These provisions prohibit the property owner from preventing or interfering with a telecommunications utility's installation of a service requested by a building tenant; discriminating against the telecommunications utility in regard to installation, terms, or compensation issues; and requiring "unreasonable payments" in exchange for access to the property. The principle underlying these provisions is that a

property owner may not treat similarly situated tenants or utilities on a different basis and that access and rental charges must be assessed on an equal basis among telecommunications service providers.

In recognition that property owners have the right to impose reasonable conditions and/or limitations on a telecommunications utility's ability to access the property owner's property, the state legislature enacted PURA §54.260. Specifically, PURA §54.260(a)(1)-(2) authorizes the imposition of conditions or limitations that are "reasonably necessary" to protect the security, appearance, and condition of the property and the safety of the property and persons on it, as well as the imposition of "reasonable" limitations on times available for installation. In addition, PURA §54.260(a)(3)-(5) permits the property owner to limit the number of telecommunications utilities that may access the owner's property if space constraints dictate such a limitation; require indemnification for certain costs, and; require the tenant or utility to bear the entire cost of installing, operating, or removing any facilities. Most significant, however, is PURA §54.260(a)(6), which allows the property owner to require the utility to pay compensation that is "reasonable and nondiscriminatory" among telecommunications companies.

## PUC Jurisdiction

A number of parties that filed comments in this project raised the issue of whether the Commission has jurisdiction over matters involving building access. Specifically, parties challenge the constitutionality of the provisions, as well as the Commission's authority to enforce PURA §§54.259 and 54.260 against property owners.

Pursuant to PURA §§15.021, 15.023, and 54.260, the Commission is clearly vested with jurisdiction to enforce the building access provisions of PURA. Specifically, PURA §54.260(b) states that "[n]otwithstanding any other law, the commission has jurisdiction to enforce this section." (emphasis added). Without question, the Commission has jurisdiction over the operations and services of telecommunications utilities operating in Texas. In light of the statutory language in PURA §54.260(b) and the telecommunications expertise that the Commission brings to resolving building access issues, the Commission can reasonably conclude that it has primary jurisdiction over building access issues involving disputes between telecommunications utilities and property owners. Thus, any remedial relief or administrative penalty action ordered by the Commission would extend to property owners on issues which involve the rights of telecommunications utilities in building access situations.

## Enforcement Policy

In enacting PURA §54.259, the Legislature sought to encourage competition in the local telecommunications market by facilitating competitive provider access to customers in

privately owned multi-tenant buildings. It is with this in mind that OCP has crafted an enforcement policy on the building access issue that attempts to balance the rights of both service providers and property owners. OCP emphasizes that this enforcement policy does not constitute a rule or order of the Commission. Rather, the policy seeks to establish the parameters for interpreting PURA §§54.259 and 54.260 and guide compliance efforts in this area.

The positions of the parties affected by this issue are diverse. The primary areas of conflict center around the parties' positions regarding the limits of the "discrimination" and "unreasonable payment" terms in PURA §§54.259 and 54.260, respectively. Specifically, the telecommunications utilities argue that absent some regulatory limits on the compensation issue, property owners have an incentive to extract monopoly rents for access. The utilities argue that competitive telecommunications options enhance the market value of the building and that any compensation to property owners must be minimal and take into consideration the building enhancement that results from the provision of competitive telecommunications services. Representatives of property owners, on the other hand, argue that the free market must be allowed to dictate terms, conditions, and compensation for access to a building's risers and conduits. These parties also argue that simply looking at the quantity of space to be used by the telecommunications utility does not take into account the value of the property, the nature of the improvements, its location, or the quality or size of the "market" created by the property owner for the telecommunications utility.

## I. Basis for determining reasonable compensation.

Given the complexity of the issue, it is unlikely that a single compensation method can be found for each type of space requirement. The basic underlying principle, however, for any cost methodology related to building compensation issues is that property owners must impose the same costs, methodology, and rates on any telecommunications utility which gains access to the building. This approach ensures that competitive telecommunications services are available to tenants without the imposition of unreasonable building restrictions by property owners. Granting building tenants access to competitive carriers is central to achieving PURA's goal of making competitive telecommunications service alternatives available for all Texans and their businesses, regardless of whether they live and work in a single family home or a multi-tenant building. Although the real estate industry, in general, is controlled by the free market, building access is a market segment that is not subject to free market forces. Rather, the property owner, by virtue of his ability to control access to the tenant, acts as a gatekeeper through whom telecommunications utilities must gain passage. The exercise of this control enables the property owner to dictate terms and conditions of the building access arrangement that may grant access to one telecommunications utility, but deny access to another. In addition, the telecommunications utility cannot freely "walk away" from the terms and conditions placed by the building owner on the access arrangement, because the utility must have access to that particular building in

order to provide service to its customer who is a tenant in that building. In order to address the absence of free market control over building access issues, the Legislature established compensation requirements for property owners. Specifically, the Legislature required that compensation for access be reasonable and nondiscriminatory.

The ability of the property owner to charge compensation which is reasonable and nondiscriminatory does not, however, imply that every telecommunications utility must be treated identically. Rather, it requires that a telecommunications utility be offered the same terms, conditions, and compensation arrangement as its similarly situated counterpart. This interpretation preserves not only the right of the parties to freely engage in commercial transactions wherein a service provider seeks access to private property, but also ensures that the property owner does not exert control over the building access arrangement in a manner that is unreasonable or discriminatory to the telecommunications utility.

In establishing the parameters applicable to the term "reasonable" compensation, it is important to distinguish between buildings in which the property owner has moved to a single minimum point of entry (MPOE), and thus owns all wiring inside the point of demarcation where the main line enters the building. In such instances, the telecommunications utilities must compensate the property owner for the use of cable distribution facilities. In multi-tenant buildings where telecommunications utilities maintain ownership of their wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), telecommunications utilities must compensate the property owner for use of building space.

### A. Basis for determining reasonable compensation in a single demarcation point system.

In instances in which the property owner has assumed responsibility and ownership of wiring beyond the MPOE, the telecommunications utility may decide to utilize the building's existing cable distribution facilities. A property owner may charge for use of distribution facilities on the owner's side of the demarcation point in a number of different ways. For instance, the property owner may base compensation on a per pair, per circuit, or per conduit or sheath basis. Without question, the charge for use of distribution facilities on the owner's side of the demarcation point may take into consideration the type of facilities need by the property owner in providing telecommunication services. In negotiating compensation terms for the use of the property owner's distribution facilities, parties may consider factors such as the amount of facilities investment, the useful life of the facilities, tax and a reasonable rate of return.

A property owner may also seek compensation for the physical space used by the utility in the building's equipment room and any actual costs associated with the utility's use of the building. The property owner, by controlling building access, manages an essential

element in the delivery of telecommunications to the tenants in that building. As such, the price of equipment room space leased to utilities to provide service to tenants in that building should be based on the actual economic cost of the space and not on the number of tenants served or the revenues generated by the carrier for the provision of telecommunications services to the building's tenants. Compensation in this manner is reasonable because it ensures similar terms and conditions for all providers.

### B. Basis for determining reasonable compensation in a multiple demarcation point system.

In multi-tenant buildings, where the telecommunications utility maintains ownership of the wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), the property owner may receive compensation for the telecommunications utility's use of the rental space in the equipment room, use of the building's conduit facilities, and any actual costs associated with the utility's use of the building. Compensation for rental floor space, as well as the use of the building conduit facilities should be based on the rental value in the marketplace of the property used by the provider, not on the type of facilities used, the revenues generated, or the number of customers served.

Compensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space.

The basis of any compensation mechanism should be to compensate the property owner for the space used, regardless of the number of end use customers served or the revenues generated by the telecommunications carrier. For this reason, use of the square foot rental rate for use of the basement and riser space is a reasonable basis of compensation in buildings with multiple demarcation systems. Lease rates for commercial property are an appropriate guide for determining compensation for access to the building because commercial leases not only reflect the variation in rental rates depending on the location and desirability of a particular building, but indicate what tenants are willing to pay for the amount of square footage being used by the tenant in the same marketplace and for the same type of space. This method of compensation ensures that the property owner is paid the fair market value for the use of the space and also recognizes that space in the basement of an office is not as valuable as retail space in a section of the building open to the public, or a corner office on the top floor of an office building.

## II. Applicability of the discrimination provision in PURA §54.259 to existing service arrangements with incumbent local exchange carriers.

PURA §54.259 specifically prohibits a property owner from discriminating in favor of or against a tenant or telecommunications utility in any manner. This prohibition against discriminatory treatment is consistent with the overall terms of PURA which sought to advance the public welfare by promoting competition in the provision of telecommunications services in Texas. *See* PURA §51.001(a)-(c). While recognizing that many existing access arrangements were made prior to competitive entry, it is OCP's position that prior contractual agreements which provide for exclusivity or preferential terms for the incumbent telecommunications utility disserve the goals of PURA specifically and telecommunications competition generally. Accordingly, OCP interprets the PURA §54.259 nondiscrimination provision to be applicable to pre-September 1, 1995 business arrangements between incumbent local exchange carriers and property owners.

Although the nondiscrimination provisions of PURA §54.259 are applicable to pre-September 1, 1995 service arrangements, the non-discrimination provisions are triggered only at the time a competitive carrier seeks access to the building served by the incumbent telecommunications carrier. Therefore, service arrangements made prior to September 1, 1995, should be allowed to stay in place until a second carrier invokes the nondiscrimination requirement. Once a competitive carrier seeks access to the building, the nondiscrimination provisions are triggered, and the property owner must either treat all carriers the same as the incumbent "in relation to the installation, terms, conditions, and compensation of telecommunications services facilities to a tenant on the owner's property"[1], or re-negotiate with the incumbent to treat it the same as all other carriers seeking access.

Because the legislative intent behind PURA §§54.259 and 54.260 is to foster competition, not provide protected status to the incumbent, compensation arrangements for building access that apply only to new entrant telecommunications utilities or new customers of an incumbent telecommunications utility are not reasonable. Every provider of telecommunications service must charge rates that recover its costs. At the same time, every provider's prices are constrained by the prices of its competitors. If the incumbent is paying no fee for building access, it certainly will have a cost advantage over its new entrant competitors that are paying such a fee. Exempting incumbents from paying for building access inevitably impacts competition adversely because of the comparative cost advantage the incumbent gains as a result. Accordingly, when a new provider enters a commercial property, the treatment of the incumbent must be revised to match that accorded to the new provider. Thus, if private property owners require new providers to pay a fee, the incumbent should begin to pay a fee calculated in the same manner and on the same basis.

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[1] *See* PURA §54.259(a)(3).

## III. Prospective Customers as a Condition of Access

As more and more telecommunications utilities seek access to a building to provide service to the building's tenants, space limitations associated with access will inevitably arise. PURA §54.260 authorizes a property owner to reasonably limit the number of utilities that have access to the property if the owner can demonstrate that space constraints justify such a limitation. OCP is concerned, however, that some carriers may attempt to preemptively "reserve" space in the building to the exclusion of subsequent carriers who may have the intention of serving the building on a more immediate basis. OCP will interpret such behavior on the part of the telecommunications utility to be anticompetitive. In addition, any restrictions on building access that impose unreasonable delays on a competitive carrier's provision of telecommunications service to a customer will be considered discriminatory actions on the part of the property owner. OCP believes that the appropriate remedial course for either activity is enforcement action by the Commission.

## IV. Carrier of Last Resort Obligation and Building Access

Several parties commented regarding a telecommunications utility's carrier of last resort (COLR) obligation in the context of the building access issue. Specifically, parties sought clarification on whether a telecommunications utility with COLR obligations may refuse to serve a building if a property owner seeks compensation for access. Because the policy implications associated with the COLR obligations extend beyond the building access issue, OCP declines to address the issue in this enforcement policy.

## V. Conclusion

In enacting PURA §§54.259 and 54.260, the legislature sought to facilitate the development of local competition by ensuring that new entrants receive access to tenants on private property based on reasonable compensation and equal, non-discriminatory terms. Only under these conditions, will residential and business customers in multi-tenant buildings experience the benefits of competition in the form of lower rates and expanded choices for products and services. OCP encourages telecommunications utilities and property owners to negotiate building access arrangements that will enable utilities to compete for business on the basis of price and the provision of expeditious service. These types of access arrangements will benefit not only telecommunications utilities and property owners, but their customers as well.

Although OCP's enforcement policy regarding building access issues is intended to facilitate building access arrangements between parties and reduce the necessity for formal enforcement actions, parties should be aware that the policy statements and proposals for resolving disputes developed in Project No. 18000 do not constitute commission rules and

resolving disputes developed in Project No. 18000 do not constitute commission rules and orders, and do not deprive parties of rights under PURA or the Administrative Procedure Act. Project No. 18000 represents the Commission's effort to expedite settlement of business disputes in the increasingly competitive markets for telecommunications and electric services.

Please contact Ann Coffin (6-7144) or Bill Magness (6-7145) if you would like additional information on this matter.

Attachment

cc: Adib, Parviz
Balion, Paul
Bertin, Suzanne
Davis, Stephen
Dempsey, Raul
Featherston, David
Hamilton, Kathy
Jenkins, Brenda
Kjellstrand, Leslie
Kyle, Sandra
Laskso, John
Mueller, Paula
Prior, Dianne
Sappenstein, Scott
Silverstein, Alison
Slocum, Brat
Srinivasa, Nara
Whittington, Pam
Wilson, Martin
Vogel, Carole

# ISSUES FACING FIXED WIRELESS CARRIERS THAT WARRANT FCC ATTENTION

Presentation of Teligent, Inc. to the Federal Communications Commission
*December 2, 1998*

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***Telecommunications Carrier Access to Tenants in Multi-Tenant Environments***

- The FCC should prohibit owners and managers of multi-tenant environments ("MTEs") from discriminating among telecommunications carriers or otherwise restricting a tenant's access to the carrier of its choice through unreasonable demands on carriers.

- To the extent that building owners and managers exert control over the intra-MTE network and charge for telecommunications carrier access to tenants on that network, they become persons engaged in interstate wire communication and bring themselves within the jurisdiction of the FCC. The FCC can assert jurisdiction in these circumstances and accomplish MTE access through its authority to regulate providers of interstate wire communication. Specifically, it should prohibit building owners from discriminating among telecommunications carriers or otherwise unreasonably restricting access by telecommunications carriers to the tenants in those MTEs. In addition, should prohibit common carriers from entering into contracts with MTE owners or managers that provide or allow for discriminatory or unreasonable treatment of other carriers.

- The FCC should interpret "right-of-way" as including the right of any utility, including incumbent LECs, to access or use intra-MTE space and facilities (even if such spaces are not actually being used). These spaces can and should include riser space, telephone and other equipment closets, in-building wiring, and rooftops. Telecommunications carriers should be granted access to these utility rights-of-way pursuant to § 224. Of course, this option only provides a solution in those States subject to the FCC's § 224 jurisdiction.

***Equal Access to Inside Wiring in Multi-Tenant Environments***

- The FCC should move the demarcation point in all MTEs to the minimum point of entry so that all carriers, including the incumbent, access the premises at the same location, on the same terms and conditions, and at the same cost. It is important to note that this option requires MTE owner permission for telecommunications carrier entry, so nondiscriminatory access obligations would remain necessary.

- Alternatively, where the demarcation point is not located at the minimum point of entry, a substantial portion of intra-MTE facilities may be a part of the incumbent LEC network. Some facilities-based carriers can bring their networks up to the entrance of an MTE. By providing unbundled access to intra-MTE facilities (e.g., inside wiring as a subloop element), the FCC will allow facilities-based carriers to avoid the wasteful purchase of an entire loop simply to reach a tenant from the entrance of an MTE.

***Clarification of Municipal Right-of-Way Management Authority***

- The FCC should clarify that transmission via leased facilities and radio signals does not constitute use of the public rights-of-way and should confirm that a municipality's imposition of franchise fees and other requirements on fixed wireless carriers pursuant to right-of-way management authority operates as an entry barrier contrary to § 253(a). To this end, the FCC should take note of the Federal cases

interpreting § 253 which hold that local governments may not lawfully assess right-of-way fees for the provision of resold services or wireless services.[1]

***Include fixed wireless carriers within the ambit of Section 207***

- The FCC should including fixed wireless carriers within the scope of § 207's protections. The FCC could then preempt zoning restrictions on the installation of a fixed wireless carrier's rooftop antenna (insofar as the antenna is installed with the building owner's consent).
- This interpretation is consistent with prior FCC § 207 decisions concluding that services technologically and functionally similar to MMDS should also be included within the scope of § 207. Fixed wireless service providers offering high-speed Internet access are reasonably included within this provision: Teligent's antenna are approximately 12 inches in diameter, well within the antenna size limits established by the FCC. Moreover, Teligent has the capacity to offer conventional multi-channel video programming should it choose to do so. Finally, Internet-based video offerings continue to proliferate and increasingly appear similar to video programming offered by a television broadcast station.

***Streamline DEMS Nodal Station Licensing Process***

- The FCC should allow a DEMS licensee to construct and operate nodal stations anywhere within its licensed service area, subject to any frequency coordination rules, without prior individual nodal station authorization. This is consistent with the area licenses for LMDS and 39 GHz.

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1 See, e.g., AT&T v. City of Austin, 975 F.Supp. 928,941-42, n.13 (W.D.Tex. 1997)("[F]ederal . . . law abrogate[s] any municipal authority to subject a non-facilities-based provider like AT&T to any kind of local regulation."); see also AT&T v. City of Dallas, CA 3-98-CV-003-R, *Memorandum Opinion and Order*, slip op. at 9-10 (N.D. Tex. July 4, 1998)("All of the legislative history surrounding the adoption of § 253(c), and the cases that have since been decided on the issue, have interpreted the provision to apply to physical occupation of a city's rights-of-way . . . . This Court is also unpersuaded that . . . leasing the facilities of other providers constitutes 'use' of [a city's] rights-of-way."); see also AT&T v. City of Dallas, 8 F.Supp.2d 582, 593 (N.D. Tex. 1998)("[T]he City does not have the authority to impose fees on a telecommunications provider except as compensation for use of the City's rights-of-way. . . . . [R]equiring AT&T to pay franchise fees on its revenue from the resale of SWBT services would amount to double billing. . . . [A]ny fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the [Federal Telecommunications Act] as an economic barrier to entry.").