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

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In the Matter of

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

Robert Berger
Russell Merbeth
Barry Ohlson
WinStar Communications, Inc.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Russell M. Blau
Lawrence A. Walke
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for WinStar Communications, Inc.

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SUMMARY

WinStar Communications, Inc. ("WinStar") submits these reply comments to urge the Commission to promptly designate wiring, conduit and riser cables located within multiple tenant environments (collectively, "MTE wiring") as an unbundled network element ("UNE") under section 251(c)(3) of the Telecommunications Act of 1996. WinStar provides its services by means of state-of-the-art wireless loop facilities designed for the rapid and economical deployment of telecommunications services to consumers. However, the current regulatory regime governing MTE wiring allows incumbent local exchange carriers ("ILECs"), and to a lesser degree, owners and managers of MTE buildings, to raise unreasonable and often unsurmountable obstacles to WinStar's actual delivery of its services.

WinStar notes that just this morning the Commission adopted a Notice of Proposed Rulemaking and Notice of Inquiry seeking comment on matters addressed in the instant proceeding including, among other things, its tentative conclusion that MTE wiring should be designated as a UNE and whether the Commission should require building owners to afford nondiscriminatory access to inside wiring. Although this effort is clearly well-intentioned, WinStar implores the Commission to resolve these questions promptly and favorably in the instant proceeding. Let there be no mistake: *Delay is the greatest enemy of local competition and of competitive carriers, without which there can be no competition.* Since 1996, WinStar and others have taken advantage of numerous opportunities presented by the Commission to raise these issues on the record, including in the present proceeding, and all parties throughout the telecommunications industry, private real estate interests and all other affected interests have had opportunities to respond. WinStar submits that the record on these matters is more than sufficient for the Commission to immediately conclude

that consumers in MTEs are being denied competitive telecommunications options, and the Commission's reservation of these issues for consideration in its new proceeding will serve no purpose other than to further delay and hinder competition. Accordingly, WinStar — with the greatest possible sense of urgency — respectfully requests that the FCC explicitly and definitively rule on the matters addressed below in the proper context of this current proceeding.

The initial comments demonstrate a clear preference for competitive local exchange carriers' ("CLECs") use of UNEs in a flexible manner. WinStar submits that MTE wiring qualifies as a UNE because its failure to access such facilities "impairs" its ability to provide telecommunications services, pursuant to section 251(c)(3)(A) of the 1996 Telecommunications Act. An inability to use existing MTE wiring materially diminishes a CLEC's ability to deliver its services because it delays availability of the services, increases the cost of service for certain customers, and provides the ILECs with an artificial and anti-competitive advantage. Moreover, owners and managers of MTE buildings often deny WinStar the ability to overbuild the existing MTE wiring, and in those cases where WinStar is permitted to overbuild, the costs of construction typically are cost prohibitive as a practical business matter. As a result, no reasonable alternative to using the MTE wiring exists, thereby requiring the designation of MTE wiring as a UNE.

WinStar urges the Commission to take certain other actions without which enhanced access to MTE wiring could be useless, including: (1) mandating CLEC access to ILEC-controlled in-building conduits and passageways; (2) designating rooftop and riser access as UNEs to enable fixed wireless CLECs to place antennas on rooftops and to deliver their signals down the risers to the common block for cross-connection with the MTE wiring; (3) establishing a single demarcation point at the minimum point of entry; (4) prohibiting building owners from extracting access

compensation and mandating access to MTE wiring even when such wiring is owned by non-carriers; (5) extending its rules governing cable home run wiring, which have enhanced access for video programming distributors, to telecommunications carriers; and (6) banning "preferred provider" or exclusive contracts among building owners telecommunications providers as unfair impediments to competition.

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REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by the undersigned counsel, submits its reply comments in the above-captioned proceeding,[1] in which the Federal Communications Commission ("Commission") seeks comment on the issues remanded to the Commission by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*.[2] In particular, the Court directed the Commission to consider: (1) *when* network elements must be unbundled, *i.e.*, the proper interpretations of the"necessary" and "impair" standards contained in section 251(d)(2) of the Telecommunications Act of 1996;[3] and (2) *which* network elements must be unbundled pursuant to section 251(c)(3) of the 1996 Act.

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[1] *Second Further Notice of Proposed Rulemaking*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 99-70 (*rel.* April 16, 1999) ("*Second Further Notice*").

[2] 119 S.Ct. 721 (1999) ("*AT&T v. Iowa Utilities Board*").

[3] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (codified in scattered sections beginning with 47 U.S.C. Section 151) (the "1996 Act").

As a preliminary matter, WinStar appreciates the Commission's June 10, 1999 well-intentioned adoption of a Notice of Inquiry and Notice of Proposed Rulemaking seeking comment on, among other things, its tentative conclusion that wiring, conduit and riser cable within multiple tenant environments (collectively, "MTE wiring") should be designated as an unbundled network element ("UNE"), and whether the Commission FCC should require building owners to afford nondiscriminatory access to inside wiring.[4] However, WinStar implores the Commission to resolve these issues here and now in the present proceeding. Further delay is the single greatest impediment to competition. Since adoption of the Telecommunications Act of 1996, the Commission has provided industry with numerous opportunities to comment on the lack of competitive accessibility to MTE buildings, and industry has taken full advantage of all such opportunities, including in the instant proceeding. The Commission's existing record is more than sufficient for it to determine that consumers in MTEs do not enjoy the same level of competitive telecommunications options as consumers in single tenant environments. Reserving these issues for consideration in yet another rulemaking proceeding will only further delay and hinder competition. WinStar urges the Commission to take decisive and bold action to break the bottleneck that is choking off competition as soon as possible.

I. THE COMMISSION MUST PERMIT ACCESS TO MTE WIRING TO FULFILL THE 1996 ACT'S PRO-COMPETITIVE MANDATE

As the Commission stated in the *Second Further Notice*, "[t]he ability of requesting carriers to use unbundled network elements . . . is integral to achieving Congress' objective of promoting

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[4] *FCC Initiates Proceeding to Promote Development of Competitive Networks*, Press Release, June 10, 1999.

rapid competition in the local telecommunications market."[5] The initial comments exhibit a clear preference for allowing CLECs to use unbundled network elements in a flexible and effective manner. This enables competitive local exchange carriers ("CLECs") to generate an initial customer base and revenues while preparing for the eventual construction of their own facilities.[6] Indeed, and not surprisingly, only the incumbent local exchange carriers ("ILECs") urge the Commission to adopt a narrow view of when, and which, network elements must be made available on an unbundled basis.[7] WinStar endorses the Commission's view expressed in the *Second Further Notice*, and asserts that, pursuant to section 251(d)(2) and the 1996 Act's pro-competitive mandate, the Commission must designate MTE wiring as a UNE under section 251(c)(3).

WinStar is able to build superior efficient networks that deliver state-of-the-art telecommunications services. WinStar provides services by means of state-of-the-art wireless loop facilities. However, WinStar has encountered great obstacles to actually delivering its services to end-user customers. For example, WinStar has faced a variety of restrictions on its placement of equipment on rooftops. Even when WinStar is able to overcome or accommodate rooftop restrictions, ILECs (and to a lesser degree, MTE owners) have raised unreasonable and sometimes unsurmountable barriers to WinStar's delivery of its services within multiple dwelling unit buildings

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[5] *Second Further Notice*, at ¶ 2.

[6] *See, e.g.*, Comments of Qwest Communications Corp. at pp. 6-7; Comments of AT&T Corp. at pp. 19-25.

[7] *See, e.g.*, Comments of the United States Telephone Association at pp. 18-21; Comments of GTE Service Corporation, *et al.* at pp. 14-19.

by hindering its use of existing MTE wiring and/or denying the availability of alternative pathways at reasonable rates and on a nondiscriminatory basis.

These circumstances often have made it costly and difficult for WinStar to deliver its services to consumers. Fixed wireless local exchange services quite possibly represent the most viable alternative physical pathway to the end user, at least in the critical near term. A large proportion of residential and commercial customers are located in MTEs,[8] which, in combination with the economic advantages of providing service within MTEs as compared to single tenant structures, demonstrates that MTEs constitute a vital market entrance strategy for CLECs.[9] Accordingly, the Commission's designation of MTE wiring (including house riser and conduit) as a UNE will foster competition not only within MTEs, but also in the larger service territories encompassing MTEs.

II. THE 1996 ACT REQUIRES THE DESIGNATION OF MTE WIRING AS AN UNBUNDLED NETWORK ELEMENT

Section 251(d)(2) provides that, in determining which network elements should be unbundled under section 251(c)(3), the Commission must consider, "at a minimum, whether - (A) access to such network elements as are proprietary in nature is necessary, and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access

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[8] Approximately one-third of the residential units in the United States are located within MTEs, as are a large proportion of small and medium sized businesses. U.S. Census Bureau, Census of Housing, "Units in Structure" (1990 figures), available at http://www.census.gov/hhes/housing/census/units.

[9] The Commission has recognized the importance of wiring access in the multichannel video programming distribution environment, as well as in the case of telephone access. *See Inside Wiring Report and Order* at ¶¶ 35-38.

to such network element would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[10]

MTE wiring falls squarely within the definition of "network element" in section 3(29) of the Communications Act because such wiring constitutes a "facility or equipment used in the provision of telecommunications services."[11] Typically, an ILEC has constructed the existing facilities within multiple dwelling unit buildings, which will include equipment at the "minimum point of entry" ("MPOE") to which the ILEC connects its outside plant, a block where the network can be connected to interior wiring, vertical riser cables, horizontal distribution wires on individual floors of a building that connect the risers to individual tenants' premises, and internal wiring closets and connector blocks. Given the circumstances of a particular building and an ILEC's standard operating practices, some of these facilities may fall on the customer side of the demarcation point.

GTE contends that no wiring on the customer's side of the demarcation point can be a network element because its network ends at the demarcation point; thus, this wiring is not part of the network.[12] It is indisputable that these facilities, regardless of their location with respect to the demarcation point, are typically still owned and/or controlled and maintained by the ILEC on a deregulated basis, and are used to provide telecommunications services to the tenants. Therefore, MTE wiring falls within the statutory definition of a "network element."[13]

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[10] 47 U.S.C. § 251(d)(2).

[11] *Id.*, § 153(29).

[12] GTE Comments at p. 89.

[13] This reasoning is supported by the Comments of e.spire Communications, Inc. and Intermedia Communications, Inc., ("Joint Commenters") which explain that, under a functional approach to the definition of "network elements," MTE wiring must be considered part of the

Section 251(d)(2)(A) invokes the question whether an element is "necessary" only with respect to "such network elements as are proprietary in nature." MTE wiring is not proprietary. Typically, MTE wiring is basic wiring with a minimum amount of connecting equipment such as splitters. No proprietary protocols or elements containing proprietary information are involved.[14] Accordingly, under section 251(d)(2)(B), whether MTE wiring should be unbundled turns on whether ILECs' failure to provide access to such wiring would "impair" the ability of CLECs to provide their services.

A CLEC's ability to provide its proposed services is "impaired" if its ability to provide service without a particular network element is materially diminished. A CLEC's ability to provide services is materially diminished if an ILEC's denial of access to an element, given the availability of the element outside the ILEC's network, either hinders the prompt availability of service to any class of customers, increases the cost of service, or gives the incumbent some other significant competitive advantage.[15]

As explained in WinStar's initial comments, the cost of overbuilding existing MTE wiring and conduit with new wiring is prohibitive as a practical business matter. Moreover, in a substantial

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network simply because it is used to provide telecommunications services. Joint Commenters Comments at p. 19. The Joint Commenters note that this functional approach is supported by the Eighth Circuit Court of Appeals, which determined generally that one UNE can be a combination of functions performed by multiple UNES, i.e, the local loop could consist of a NID, distribution cable, and feeder cable, all of which could and should be deemed distinct UNEs. *Id.*, at pp. 19-20.

[14] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 283 (rel. Aug. 8,1996) ("*Local Competition Order*").

[15] *Accord* Comments of MCI WorldCom, Inc. at p. 15; AT&T Comments at pp. 27-38.

percentage of cases the issue is not cost, but rather the building owner's or manager's refusal to permit overbuilding because of the potential disruption caused by construction and the attendant risk to the building's aesthetics.[16] Finally, even for those competitive carriers such as WinStar that are aggressively attempting to deploy their own local loops, there is no reasonable substitute for the existing MTE wiring. As such, ILECs' refusal to allow WinStar to use existing MTE wiring significantly hinders and delays WinStar's delivery of service, and provides the ILEC with a further competitive advantage.

Indeed, even under GTE's interpretation of section 251(c)(2)(B), WinStar's inability to use existing MTE wiring must be considered an "impairment" to WinStar's provision of service. GTE states that an element will meet the "impair" test only if it is essential to competition and there is no convincing evidence that CLECs cannot effectively compete using substitutes for the element.[17] Under GTE's analysis, which relies on antitrust principles,[18] the essential facilities doctrine will compel the sharing of a facility only if, among other things: (i) the facility is essential to competition and (ii) the facility is not practically or reasonably available from other sources.[19]

There can be no doubt that MTE wiring, which is the direct connection to end-user customers over the "last 100 feet" of the network, is essential to competition. As explained above, WinStar and other CLECs have no way of reaching many potential customers located in multiple dwelling unit buildings without use of existing MTE wiring because of the objections of building owners and

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[16] *See* MCI WorldCom Comments at p. 47.

[17] GTE Comments at p. 14.

[18] WinStar does not necessarily agree that antitrust principles are applicable to this proceeding.

[19] *Id.*, at p. 15 citing 3A Philip. E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 202 (1996).

managers to over-building the wiring. Similarly, CLECs have no reasonable or practical alternatives to using the existing MTE wiring.

GTE rather disingenuously argues that the market for installing MTE wiring must be robust, for example, in Washington, D.C. because more than 50 electrical contractors are listed in the Yellow Pages.[20] On its face, this is an embarrassingly weak makeweight. Of course, the critical issue is not whether ILEC competitors that can install wiring are available, but whether the installation of MTE wiring as a reasonable or practical alternative is available. As explained above, given MTE owner's and manager's objections to over-building the existing wiring, and the exorbitant cost and time associated with over-building in those instances where permitted, in practice there is no reasonable or practical alternatives to using the previously installed MTE wiring exist.

Accordingly, CLECs' inability to access MTE wiring satisfies the statutory impairment standard. WinStar thus urges the Commission to find that (1) wiring, terminal blocks, and other facilities owned and/or controlled by ILECs within MTEs are network elements, regardless of which side of the demarcation point they happen to fall; and (2) the ILEC, upon request, must offer access to these network elements unbundled from other facilities, including the local loop.[21]

With respect to the latter, the Public Utilities Commission of the State of Ohio ("PUCO") supports the unbundling of MTE wiring separate and distinct from the local loop. PUCO notes that it is "uneconomical to require the CLEC to purchase the entire loop (i.e., from the ILEC's central

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[20] GTE Comments at p. 90.

[21] Some ILEC facilities within MTEs otherwise may be part of the "local loop" element as previously broadly defined, but this does not prevent the ILECs from offering access to this discrete portion of wiring on a separate unbundled basis. *See Local Competition Order* at ¶ 259.

office to the customer" to gain access to the riser cable installed at the dwelling."[22] PUCO thus urges the Commission to allow individual states to require ILECs to further unbundle the regulated loop to create sub-loop element that would include MTE wiring. WinStar wholeheartedly endorses PUCO's view, though WinStar submits that the Commission designate MTE wiring as a UNE for purposes nationwide thereby obviating the need for any state action.[23]

III. THE COMMISSION SHOULD ACT PROMPTLY TO ENABLE ACCESS TO MTE WIRING AND TAKE OTHER ACTIONS WITHOUT WHICH ACCESS TO MTE WIRING COULD BE USELESS

The Commission should be aware that a major roadblock for fixed wireless CLECs is ILECS, and to a lesser degree MTE owners and managers, not making access to MTE wiring available on a *timely* and nondiscriminatory basis. Both ILECs and building owners use their control over rooftops, wiring and riser access to hinder competitors' provision of service and increase competitors' costs of providing service. As a result, many potential consumers cannot enjoy the full panoply of service carriers and options available in a timely manner. With respect to rates, the cost savings that WinStar and other CLECs typically can offer as compared to ILECs often get redirected away from consumers and towards building owners and managers as payments for access.

In addition to fostering access to MTE wiring, the Commission should be aware that, without certain other regulatory responses, such technical legal access to MTE wiring could be useless in

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[22] PUCO Comments at pp. 19-20.

[23] At least six state commissions already have implemented this level of unbundling, providing a model for the Commission to emulate: New York, Florida, Georgia, Louisiana, Oregon, and Kentucky.

practice since a CLEC's ability to reach the end user customer would remain blocked for all intents and purposes. The following briefly summarized these important and critical steps.

Access to Conduits. It is imperative that the Commission clarify that ILECs must provide competitive access to in-building conduits and pathways. Often, CLECs may prefer to install their own MTE wiring, for example, if the ILECs facilities are antiquated. However, this option is denied to CLECs when an ILEC can assert control over the only passageways through the building available for the installation of such wiring.[24]

Access to Rooftops and Risers. It is also important that the Commission designate rooftop and riser access as UNEs because such facilities also are necessary for the transmission of telecommunications services, and an inability to access rooftops and risers clearly impairs CLECs' offering of services. Obviously, if WinStar is unable to access a building's rooftop to place its antenna, access to the MTE wiring is reduced to a pyrrhic victory. Accordingly, the Commission's rules should address: (1) the placement of antennas on rooftops for provisioning; (2) access to risers and other passageways connecting the rooftop antenna to the block where the network outside the building is connected to interior wiring; and (3) direct access to the end user where good engineering practices permit.[25]

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[24] This includes access to passageways controlled by ILEC affiliates such as a cellular company which typically grants easements or licenses to rooftops together with associated pathways.

[25] As explained in WinStar's initial comments, WinStar needs to be able to deliver its signals from the roof of a building down through common pathways to the main NID and ILEC channel bank locations, and then back up to individual end users by means of the building's existing wiring to each individual customer.

Demarcation Point. The Commission's rules allow an ILEC latitude in locating the demarcation point.[26] Certain ILECs have taken advantage of this latitude located the point to hinder a CLEC's ability to access MTE wiring. WinStar urges the Commission to take steps to establish a single demarcation point at the MPOE in every MTE. Such an approach would enable a tenant to choose from among the ILEC or multiple CLECs having access to the NID. This approach also would greatly foster the development of true, end-to-end facilities-based competition by permitting competitors to deploy their own local loops without the concern that they will not be able to connect the loop to the wiring within MTEs.

MTE Obstacles to Wiring. In many cases, building owners treat access by CLECs as well as alternative video providers as a new source of revenue, i.e., access rental. However, this cuts directly against the Act's goal of bringing the benefits of competition to consumers, rather than private real estate interests. It is imperative that the Commission open this bottleneck so that competitors may deliver true end-to-end facilities-based competitive services. WinStar recommends that the Commission follow the lead of the California Public Utilities Commission by banning all exclusive building access arrangements and mandating competitive access to MTE wiring even when such wiring is owned by non-carriers.

Home Run Wiring. The Commission should extend its rules governing the horizontal cable wiring running down hallways within an MTE to individual customer premises ("home run wiring") to telecommunications carriers. In its *Inside Wiring Report and Order,* the FCC concluded that a regulatory response was needed to enhance the ability of a subscriber who lives in a MTE to choose

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[26] 47 C.F.R. §§ 68.213(a) and (b).

among competing service providers.[27] The record in that proceeding demonstrated the same concerns that WinStar has raised here; namely, that building owners objected to the overbuilding of their properties because of space limitations and the disruption and inconvenience of construction. The Commission determined that MTE owners' resistance to overbuilding may deny MTE residents choice among competing service providers, thereby undermining the purposes of the Communications Act.[28] Accordingly, the Commission took action. The predicament of these consumers was no different from that of consumers seeking choice in their telecommunications services. WinStar urges the Commission to take similar bold action in the present context to promote competition in the local exchange market.

Exclusive Contracts. Finally, WinStar requests that the Commission bar ILECs from constraining access to MTE wiring by securing "preferred provider" or exclusive contracts with MTE owners. BellSouth and U S West recently have accelerated their use of such agreements to hinder competition for and within MTE buildings. WinStar believes that exclusive arrangements are patently unlawful under the 1996 Act and again urges the Commission to follow the lead of the California Commission by barring exclusive access arrangements as unfair impediments to competition.

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[27] *Inside Wiring Report and Order,* 13 FCC Rcd. at ¶ 36. "[O]ne of the primary competitive problems in [MTEs] is the difficulty for some service providers to obtain access to the property for the purpose of running additional home run wires to subscribers' units." *Id.* at ¶ 35.

[28] *Id.,* citing 47 U.S.C. 528(i).

CONCLUSION

The Commission's policy goal, as mandated by the 1996 Act, must be competition in the provision of local telephone services. However, the current regulatory regime allows ILECs to impede fulfillment of that goal by hindering if not completely blocking CLECs' access to MTE wiring. The goals of the 1996 Act demand that the Commission take action. Bold and decisive actions are required. This proceeding provides the Commission with the opportunity to break the bottleneck that occurs over the "last 100 feet" to the customer and finally permit CLECs to bring the benefits of competition to all consumers, including those located within multiple tenant environments.

Respectfully submitted,

Russell M. Blau
Lawrence A. Walke
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for WinStar Communications, Inc.

Robert Berger
Russell Merbeth
Barry Ohlson
WinStar Communications, Inc.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036

June 10, 1999

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CERTIFICATE OF SERVICE

I, Deborah Walker, hereby certify that I have on this 10th day of June 1999, served copies of the foregoing Reply Comments of WinStar Communications, Inc. on the following via hand delivery:

Magalie Roman Salas, Esq. (orig. + 12)
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

Janice Myles (1)
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington, DC 20554

ITS (1)
1231 20th Street, N.W.
Washington, DC 20554

Deborah Walker

Deborah Walker