

66. In various recent pleadings, several parties have argued that modification of our Part 68 rule governing determination of the demarcation point would facilitate competitive access to multiple tenant environments. For example, it has been argued that fixing the demarcation point in all multiple unit premises at the minimum point of entry, in combination with a nondiscriminatory access obligation on building owners, would constitute an effective alternative to requiring access to inside wiring as an unbundled network element.¹⁶⁸ Other parties advocate a uniform demarcation point independent of this issue in order to prevent incumbent LECs from obstructing competition by designating demarcation points that are inconvenient to access or difficult to determine.¹⁶⁹

67. We seek comment on how the definition of the demarcation point under Part 68 affects access to multiple tenant environments by competitive telecommunications service providers, and whether any Commission action is appropriate.¹⁷⁰ First, we request comment, accompanied by specific evidence, regarding whether, and how, the definition of the demarcation point is in fact affecting competitive providers' access. To the extent there is a deleterious effect, we further request commenters to consider what actions can be taken to remedy the situation. For example, commenters may consider whether the person who controls wire and related facilities for purposes of installation and maintenance must necessarily be the same person who exercises control for purposes of competitive access, and, if not, whether we should apply different standards for each of these purposes. Commenters may also consider whether, as suggested in the comments described above, they believe we should adopt a uniform demarcation point for purposes of competitive access, either at the minimum point of entry or at some other point, for all or some class of multiple-unit premises owners. Among other things, commenters should address the need for and benefits of any regime that they propose, any costs for incumbent providers and building owners, any effects on the competitive installation and maintenance of inside wiring, and how any rule should be drafted and implemented.

thereto as practical. *Id.* at (b)(1) and (b)(2).

¹⁶⁸ See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Joint Reply Comments of Teligent, Inc. and Net2000 Group, Inc. at 8-9 (filed Oct. 16, 1998).

¹⁶⁹ See, e.g., Optel Section 706 Inquiry Comments at 3-7; WinStar Section 706 Inquiry Reply Comments at 6-9. We note that Nebraska, while declining to require a uniform demarcation point, has required incumbent LECs, upon request, to establish a minimum point of entry at the property line and permit access at that location at a specified rate. *Nebraska MDU Order* at 3-5.

¹⁷⁰ We note that certain issues regarding the existing definition of the demarcation point are currently pending, and we do not seek additional comment on those issues herein. See *1997 Telephone Inside Wiring Order*, 12 FCC Rcd. at 11925-27, ¶¶ 49-52 (requesting further comment on applying a single definition of the demarcation point to simple and complex wiring and on whether the demarcation point may be located away from a building); see also Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, Petition for Clarification and Reconsideration of BellSouth (filed Aug. 7, 1997); Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, Petition for Clarification or Partial Reconsideration of Bell Atlantic and NYNEX (filed Aug. 7, 1997).

68. Third, we ask commenters to consider whether our rules governing access to cable inside wiring for MVPDs¹⁷¹ should be extended so as to afford similar access to providers of telecommunications services. Section 76.804 of our rules sets forth procedures governing the disposition of home run wiring (*i.e.*, the wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop) owned by an MVPD when the MVPD ceases to provide service to a building, and governing access to that wiring by other MVPDs after its disposition.¹⁷² In order to take advantage of these procedures, however, a provider must offer multichannel video programming services.¹⁷³ Commenters in other proceedings have argued that this rule offers benefits to providers of video services that are not currently available to telecommunications service providers, and that this distinction not only is arbitrary but creates uneconomic incentives for providers to incorporate video services into their offerings simply to take advantage of the more favorable rules.¹⁷⁴ Indeed, in a world increasingly marked by technological convergence and interchangeable services, we believe a strong argument can be made for applying uniform rules governing access to inside wiring regardless of a provider's service technology or the form of its authorization. Commenters should accordingly address the advantages and disadvantages of extending the MVPD home run wiring rule to benefit telecommunications service providers. In particular, commenters should consider whether extension of the rule in this manner would present practical difficulties for administration, for example, if a telecommunications service provider and an MVPD both seek to use the same wire. We further request comment on whether other of our cable inside wiring rules should also be extended to benefit telecommunications service providers.¹⁷⁵

69. Finally, we request comment on whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act that would protect the ability to place antennas to transmit and receive telecommunications signals and other fixed wireless signals that are not covered by section 207. Section 1.4000 of our rules prohibits, with limited exceptions, any State or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.¹⁷⁶ Section 1.4000 was adopted pursuant to section 207 of the 1996 Act, which applies only to certain

¹⁷¹ 47 C.F.R. §§ 76.800-76.806.

¹⁷² 47 C.F.R. § 76.804.

¹⁷³ See 47 U.S.C. § 522(13); 47 C.F.R. § 76.800(c) (defining "MVPD").

¹⁷⁴ See Section 706 Inquiry, Comments of the Wireless Communications Association International, Inc. at 27-29 (filed Sept. 14, 1998); WinStar Section 706 Inquiry Reply Comments at 15-17.

¹⁷⁵ See 47 C.F.R. § 76.802 (disposition of cable home wiring); 47 C.F.R. § 76.805 (access to molding).

¹⁷⁶ 47 C.F.R. § 1.4000.

video programming services.¹⁷⁷ The Wireless Communications Association International, Inc. (WCAI) has very recently filed a Petition for Rulemaking asking us to extend the principles embodied in section 1.4000 to the placement of antennas used for any fixed wireless service.¹⁷⁸ Although section 1.4000 applies only to antennas used to receive certain video programming services pursuant to section 207, we believe we may have the authority to adopt similar rules pertaining to telecommunications services, services delivered via telecommunications, and other fixed wireless services pursuant to section 4(i) and other provisions, including sections 201(b) and 303(r), granting us general authority to effectuate the provisions and purposes of the Communications Act. We seek comment on whether it is necessary to apply any or all of the principles embodied in section 1.4000 to the placement of antennas for receiving and transmitting telecommunications signals and other fixed wireless signals that are not encompassed within section 207. We seek comment on the nature and extent of any video services that are not included within section 1.4000 or section 207,¹⁷⁹ and how the exclusion of these services can best be addressed. We also seek comment on whether the Commission's authority to promulgate rules that preempt governmental and nongovernmental restrictions on antennas used for telecommunications and video services is limited to those antennas and services specified in section 207, or whether the Commission has authority pursuant to other sections of the Act, including sections 4(i), 201(b), 253(d), 303(r), 705, and 706(a), to preempt State, local, community association and lease restrictions on such antennas. We note that section 207 by its terms directs the Commission to promulgate regulations "pursuant to section 303 of the Communications Act of 1934."¹⁸⁰ We further seek comment on whether rules similar to section 1.4000 but applying to services that are not within the scope of section 207 would be constitutional, consistent with the analysis in the *OTARD Second Report and Order*.¹⁸¹ In addition, to the extent commenters advocate restrictions on State or local regulation of the placement on end user premises of antennas used to receive and transmit personal wireless services, they should address whether our adoption of such rules would be consistent with

¹⁷⁷ See 1996 Act, § 207.

¹⁷⁸ Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service (filed May 26, 1999).

¹⁷⁹ Specifically, WCAI asserts that Wireless Communications Service ("WCS"), Digital Electronic Message Service ("DEMS"), and services using the 38 GHz band provide video services but are not covered by section 1.4000. *Id.* at 2 and note 28.

¹⁸⁰ 1996 Act, § 207. We note that we have previously invoked similar authority to preempt certain State and local government restrictions on the placement of satellite earth station antennas. See Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, *Report and Order*, 51 Fed. Reg. 5119 (Feb. 14, 1986); see also Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, IB Docket No. 195-59, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 5809, 5812, ¶ 16 (1996) (section 207 does not limit Commission's preexisting authority in this area).

¹⁸¹ See *OTARD Second Report and Order*, 13 FCC Rcd. at 23883-88, ¶¶ 19-28.

section 332(c)(7).¹⁸²

C. Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.

70. In order to serve any customers, whether they are in a fixed location or mobile, a telecommunications service provider must have a means of transporting signals between calling and called parties' locations. This transport of signals may be accomplished using either wireline or wireless technology. Where wireline technology is used, it is often most efficient to place the necessary facilities within the public rights-of-way. The incumbent LECs have long been granted authority to use public rights-of-way for this purpose, and they have extensive facilities in place.

71. Full and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals. For competitive carriers using wireline technology, this may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way. Providers of wireless telecommunications services, by contrast, do not need access to public rights-of-way to transport signals between their transmitting and receiving facilities and their customers' locations. However, wireless service providers do need to connect their antenna facilities to each other and to central switches, and these connections are often most efficiently accomplished by means of wireline facilities that traverse the public rights-of-way. Often, wireless carriers lease capacity on facilities owned by other communications providers, but in some instances they install their own cables. Thus, providers of wireless telecommunications services sometimes require access to public rights-of-way in connection with the provision of service. These carriers will, however, typically impose far less burden on public rights-of-way than carriers that offer service primarily by means of wireline technology.

72. Public rights-of-way generally are controlled and managed by local governments and, to a lesser extent, State governments. These governments are responsible for, among other things, ensuring that the rights-of-way are used in a manner that benefits the public and, in particular, that neither threatens public safety, unnecessarily inconveniences the public, nor imposes uncompensated costs. One challenge for State and local governments in the era of competitive telecommunications service is to administer the public rights-of-way in a manner that serves these ends and at the same time does not unfairly favor incumbent carriers or obstruct other providers' ability to compete effectively in the provision of service. We are confident that the majority of State and local governments recognize the advantages to their citizens of encouraging new telecommunications competitors and that they are managing their rights-of-way in a competitively neutral way. Nevertheless, we are aware of claims that this is not the case in all jurisdictions, as well as of arguments by State and local governments that carriers are making unreasonable and unfounded complaints. In this section, we initiate an inquiry into the management of public rights-of-way as it relates to the development of facilities-based competition. We begin by reviewing the principal provisions of the Communications Act that are

¹⁸² 47 U.S.C. § 332(c)(7) (providing that, except as provided in section 332(c)(7), nothing in the Communications Act shall limit or affect the authority of a State or local government over decisions regarding the placement, construction, or modification of personal wireless service facilities).

relevant to management of the public rights-of-way, as well as Commission and judicial precedent interpreting those provisions. We then seek comment regarding carriers' and governments' experiences with respect to rights-of-way management. Our aim is to compile a record on the basis of which we, together with representatives of State and local governments and the affected industry, can evaluate whether, and in what form, further action is appropriate.

73. *Statutory Background.* Section 253 of the Communications Act addresses State and local government authority to manage the public rights-of-way. Section 253(a), considered alone, generally proscribes State and local governments from imposing legal requirements that either directly prohibit the ability of any entity to provide any interstate or intrastate telecommunications service or have the effect of prohibiting any entity's ability to provide such service.¹⁸³ Sections 253(b) and 253(c), however, permit State and local governments to take certain actions that meet the requirements of those subsections notwithstanding section 253(a). Specifically, section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."¹⁸⁴ Under section 253(d), the Commission is directed, after notice and an opportunity for public comment, to preempt the enforcement of any statute, regulation, or legal requirement that "violates subsection (a) or (b)," to the extent necessary to correct such violation or inconsistency.¹⁸⁵ Section 253(d) does not, however, on its face grant the Commission any direct authority over section 253(c).

74. Where a CMRS provider seeks to use public rights-of-way for its facilities, the permissible exercise of State and local authority may also be affected by section 332(c)(3). Under section 332(c)(3), in general, "no State or local government shall have any authority to regulate the

¹⁸³ 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service)."

¹⁸⁴ 47 U.S.C. § 253(c). Section 253(b) permits States to impose competitively neutral requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C. § 253(b).

¹⁸⁵ 47 U.S.C. § 253(d). Thus, when presented with a petition to preempt under section 253(d), the Commission first asks whether the regulation or requirement in question violates the terms of section 253(a) standing alone. If so, we then ask whether it is permissible under section 253(b). We will preempt enforcement of a regulation or legal requirement only if it is impermissible under subsection (a) and does not satisfy the requirements of subsection (b). See *Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, *Memorandum Opinion and Order*, 13 FCC Rcd. 3460, 3480 at ¶ 42 (1997), *recon. pending, aff'd sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

entry of or the rates charged by any commercial mobile service or any private mobile service."¹⁸⁶ However, section 332(c)(3) does not "prohibit a State from regulating the other terms and conditions of commercial mobile services."¹⁸⁷ Thus, a State or local rights-of-way management procedure or requirement, as applied to CMRS providers, is permissible under section 332(c)(3) if it constitutes regulation of terms and conditions of service other than rates or entry. Any requirement that functions as an entry regulation, however, is not permissible as applied to CMRS providers.

75. *Commission and Judicial Precedent.* During the period since the 1996 Act became law, the Commission and the courts have discussed or applied section 253(c) on several occasions. These decisions recognize that State and local governments have an important interest in managing the public rights-of-way to promote the public good, and in obtaining fair and nondiscriminatory compensation for use of the rights-of-way. Thus, for example, we have stated that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage . . . facilities" in the rights-of-way, including such activities as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."¹⁸⁸ At the same time, the cases consistently recognize that certain types of practices are inimical to competition and are not consistent with section 253. For one thing, section 253(c) plainly requires that compensation requirements for use of the public rights-of-way must be imposed "on a competitively neutral and nondiscriminatory basis." Thus, we have made clear that we are troubled by any rights-of-way regulations that, either explicitly or in practical effect, favor incumbent LECs over competing carriers.¹⁸⁹

76. We have also expressed concern about requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage. Thus, where the record was "inadequate to establish that the Cities' actions reflect[ed] an exercise of public rights-of-way

¹⁸⁶ 47 U.S.C. § 332(c)(3). Section 332(c)(3) permits a State to regulate CMRS rates, but not entry, if the State demonstrates in a petition to the Commission that certain conditions are met. *Id.* To date, the Commission has not granted any State's petition under section 332(c)(3). *See, e.g.,* Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995), *aff'd sub nom.* Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

¹⁸⁷ 47 U.S.C. § 332(c)(3).

¹⁸⁸ TCI Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, FCC 97-331 at ¶ 105 (rel. Sept. 19, 1997) (*TCI*), *recon. denied*, FCC 98-216 (rel. Sept. 4, 1998); *see also, e.g.,* Classic Telephone, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13104 at ¶ 39 (1996) (*Classic*) (citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein), *petition for emergency relief, sanction and investigation denied*, 12 FCC Rcd. 16577 (1997); Bell Atlantic-Maryland v. Prince George's County, 1999 WL 343646 at *9 (D.Md. May 24, 1999) (*Prince George's County*)).

¹⁸⁹ *See TCI*, FCC 97-331 at ¶ 107.

management authority or the imposition of compensation requirements for the use of such rights-of-way," we have held that the cities' actions did "not trigger section 253(c)."¹⁹⁰ Furthermore, we have expressed concern that local regulation should not "reach[] beyond traditional rights-of-way matters and seek[] to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public."¹⁹¹ In particular, while recognizing local governments' continued authority to manage the public rights-of-way, we noted that regulation of matters such as interconnection, fees, and provision of services would be "difficult to justify under section 253(c)."¹⁹² In addition, the United States District Court for the Northern District of Texas has held that although a municipality may require a provider of local telephone service to obtain a franchise in order to use its rights-of-way, the franchise may not be conditioned on anything other than the carrier's agreement to comply with the city's reasonable regulations of its rights-of-way and the fees for use of those rights-of-way.¹⁹³ Thus, the court held, the carrier may not be required to complete a wide-ranging franchise application including matters unrelated to use of the rights-of-way, or to comply with conditions that are unrelated to its use of the rights-of-way.¹⁹⁴ Similarly, the United States District Court for the District of Maryland has struck down a franchise ordinance that required a franchise applicant to supply broad-ranging information that was not directly related to the county's right-of-way management, including undefined "financial information" and information about "technical standards," and that conferred on the franchising authority complete discretion to grant or deny a franchise application, including authority to consider such factors as managerial, technical, financial, and legal qualifications and the public interest.¹⁹⁵

77. The courts have also held that local governments may not impose fees, conditions, and franchise requirements on service providers, such as resellers, purchasers of unbundled network elements, and wireless service providers, that do not use any public rights-of-way for their own facilities.¹⁹⁶ In *Dallas II*, in particular, the court specifically rejected arguments that the city had

¹⁹⁰ *Classic*, 11 FCC Rcd. at 13104, ¶42.

¹⁹¹ *TCI*, FCC 97-331 at ¶105.

¹⁹² *Id.*

¹⁹³ *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 1999 WL 324668 at *5 (N.D. Tex. May 17, 1999) (*Dallas III*); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F.Supp.2d 582, 592-93 (N.D. Tex. 1998) (*Dallas I*).

¹⁹⁴ *Dallas III*, 1999 WL 324668 at *5-6; *Dallas I*, 8 F.Supp.2d at 593.

¹⁹⁵ *Prince George's County*, 1999 WL 343646 at *9-10; see also *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 1999 WL 149769 at *3-4 (S.D. Fla. Jan. 25, 1999) (similar).

¹⁹⁶ See *Prince George's County*, 1999 WL 343646 at *12-13 (carriers that use facilities owned, installed, and maintained by others); *Dallas III*, 1999 WL 324668 at *6-9; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 1998 WL 386168 (N.D. Tex. July 7, 1998) (*Dallas II*) (wireless service provider); *AT&T*

jurisdiction over the carrier because calls made over the carrier's network would traverse the city's rights-of-way after being transferred to other carriers' networks or because some calls on the carrier's network might travel in part over wireline facilities in the rights-of-way leased from other carriers, holding that local authority to manage the rights-of-way extends only to regulation of physical facilities located in the rights-of-way.¹⁹⁷ In addition, the court held that the principle of competitive neutrality did not require that carriers that use the rights-of-way differently, or do not use the rights-of-way at all, be charged the same fees; indeed, the court noted that charging usage fees to a carrier that leases facilities in the rights-of-way from another carrier would amount to discrimination against that carrier, because it would likely have to pay both its own fees directly to the city and the underlying carrier's fees passed on through its rates.¹⁹⁸

78. Also, some courts have struck down compensation schemes that they found were not reasonably related to a carrier's rights-of-way usage and the costs that use imposes on the local government and its citizens. Thus, for example, the court in *Dallas I* held that the city could not require a carrier to pay four percent of its revenues from all services provided with the city.¹⁹⁹ Similarly, the *Prince George's County* court held that rights-of-way fees must be based on a government's cost of maintaining and improving the rights-of-way and on a provider's rights-of-way use, not on the "value" of the "privilege" of using the rights-of-way, and it therefore struck down a fee of three percent of gross revenues, broadly defined.²⁰⁰

79. *Inquiry*. Notwithstanding the case law discussed above, several carriers and their associations have alleged that many State and local governments continue to engage in rights-of-way management and compensation practices that the carriers believe are unreasonable, anticompetitive, and contrary to federal law. While these carriers state that they have generally been successful in challenging such regulations in court, they believe Commission action could help reduce the incidence of those regulations and the need for litigation. At the same time, State and local governments assert that the carriers' complaints are unreasonable, unfounded, and merely designed to impede local jurisdictions' legitimate exercise of their public rights-of-way authority. We note that the rights-of-way regulations that have been brought to our attention, either formally or informally, cover only a relatively small number of communities, and we believe most communities and carriers have arrived at solutions that both protect State and local governments' authority to manage the public rights-of-way

Communications of the Southwest, Inc. v. City of Austin, 975 F.Supp. 928 (W.D. Tex. 1997) (carrier that provided service only by means of resale and use of unbundled network elements).

¹⁹⁷ *Dallas II*, 1998 WL 386186 at *4-5.

¹⁹⁸ *Id.* at *5 & n.22.

¹⁹⁹ *Dallas I*, 8 F.Supp 2d at 593; see also *Dallas II*, 1998 WL 386186 at *5 and n.22; *Dallas III*, 1999 WL 324668 at *5.

²⁰⁰ *Prince George's County*, 1999 WL 343646 at *10-11; but see *TCG Detroit v. City of Dearborn*, 1998 WL 493128 (E.D. Mich. Aug. 14, 1998) (holding that franchise fee of 4 percent of gross revenues did not violate requirement that fees be fair and reasonable).

and avoid imposing unreasonable or discriminatory burdens on competitive service providers. Nonetheless, in light of the persistent assertions of concern expressed in this area, we believe it is appropriate to compile a record regarding local rights-of-way management as it affects telecommunications service providers. We therefore seek comment from both service providers and State and local governments regarding their rights-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experience. In addition, we note that several States have enacted guidelines to govern the requirements that local governments may impose on telecommunications rights-of-way users.²⁰¹ We seek comment on the success or failure of these efforts.

80. We particularly welcome the participation in this process of our Local and State Government Advisory Committee (Advisory Committee). The Advisory Committee has been an important vehicle for facilitating constructive cooperation among the Commission, carriers, and State and local governments. For example, in August 1998, following an extensive period of discussions, the Advisory Committee and several trade associations entered into an agreement on voluntary, non-binding guidelines and informal dispute resolution procedures for disputes involving local government moratoria on personal wireless services facilities siting.²⁰² The Advisory Committee has expressed a consistent interest in rights-of-way issues and a willingness to participate in finding appropriate solutions.²⁰³ Through the participation of the Advisory Committee as well as industry representatives, one outcome of this inquiry could be a greater agreement on principles that could be broadly accepted both by carriers and by State and local governments.

D. Notice of Inquiry on State and Local Taxes.

81. The assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments' other functions. Virtually all businesses are subject to a wide array of State and local taxes, and there is no reason that telecommunications businesses should be any exception. At the same time, State and local tax policies that impose excessive or unequal burdens on competitive service providers have the potential to inhibit the development of competitive facilities-based networks in local telecommunications markets. In this section, we commence an inquiry concerning these issues.

82. We believe that State and local governments share our goal of ensuring that tax burdens on telecommunications providers are imposed fairly so as not to impede competition. Carriers have

²⁰¹ See, e.g., Fla. Stats. § 337.401; Ill. Stats. ch. 35, §§ 635/25, 635/30; La. Rev. Stats. title 48, § 381.2; Minn. Stats. § 237.163.

²⁰² See Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, <http://www.fcc.gov/statelocal/agreement>.

²⁰³ See FCC Local and State Government Advisory Committee Advisory Recommendation No. 1, "Policy Statement on State and Local Rights-of-Way and Telecommunications Service Competition" (June 27, 1997).

alleged, however, that some State and local taxes are excessive or are applied in a discriminatory manner. For example, in July 1996, Western PCS I Corporation (Western) filed a petition seeking preemption under sections 253 and 332(c)(3) of the Communications Act of the State of Oregon's assessment of property tax on Western.²⁰⁴ Western alleged that Oregon had calculated the value of Western's property by including the amount Western had paid at auction for its license to serve the Portland Major Trading Area, and that this method of assessment resulted in Western's bearing a substantially higher tax burden than other telecommunications service providers that had not purchased licenses at auction. Subsequently, Western and the Oregon Department of Revenue reached a settlement of most of the issues that were the subject of Western's petition, and Western moved to dismiss its petition without prejudice.²⁰⁵ We granted Western's motion on January 20, 1999.²⁰⁶

83. Other allegations of unfair State and local taxes surfaced in a petition for rulemaking filed by the Cellular Telecommunications Industry Association (CTIA).²⁰⁷ The CTIA Petition asks the Commission to preempt State and local governments from imposing discriminatory or excessive taxes or similar burdens on CMRS providers and services and other telecommunications providers and services. By way of example of the taxes that CTIA finds objectionable, the petition cites the Oregon tax challenged by Western PCS and other property taxes in West Virginia and Kentucky,²⁰⁸ as well as an excise tax imposed on mobile telephone use by Montgomery County, Maryland.²⁰⁹ The Personal Communications Industry Association also has recently filed with us a study detailing what it considers to be the excessive cumulative burden of Federal, State, and local taxes and fees on wireless telecommunications service providers.²¹⁰

²⁰⁴ See "Commission Seeks Comment on Petition for Preemption and Motion for Declaratory Ruling filed by Western PCS I Corporation," *Public Notice*, DA 96-1211 (July 30, 1996).

²⁰⁵ Western PCS I Corporation Request for Dismissal Without Prejudice, File No. WTB/POL 96-3 (dated Dec. 9, 1997).

²⁰⁶ Western PCS I Corporation Petition for Preemption of the Oregon Department of Revenue Notice of Proposed Assessment and Request for Declaratory Ruling, File No. WTB/POL 96-3, *Order*, DA 99-203 (CWD rel. Jan. 20, 1999).

²⁰⁷ Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments, Petition for Rule Making of the Cellular Telecommunications Industry Association (filed Sept. 26, 1996) (CTIA Petition).

²⁰⁸ *Id.*, Attachment at 2-3.

²⁰⁹ *Id.*, Attachment at 2 n.2.

²¹⁰ M. Katz and J. Hayes, "Unintended Consequences: Public Policy and Wireless Competition" (Oct. 1, 1998), filed as an Attachment to Letter from Mary McDermott, Chief of Staff and Senior Vice President, Government Relations, Personal Communications Industry Association to John Berresford, Industry Analysis Division, Common Carrier Bureau in CC Docket No. 98-146 (dated Nov. 12, 1998).

84. In recognition of the limits on our expertise and out of respect for principles of federalism, we conclude that it is not appropriate for us to initiate a rulemaking proceeding at this time, and we therefore deny CTIA's petition. Indeed, we note that our legal authority to preempt State and local tax policies is extremely limited. In particular, section 601(c)(2) of the 1996 Act provides, with limited exceptions, that "nothing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation."²¹¹ Nonetheless, we are concerned about the potential discriminatory and anticompetitive effects of certain State and local tax policies, and we are therefore initiating an inquiry on this issue. We seek comment generally on the nature and prevalence of unreasonable or discriminatory tax burdens on competitive telecommunications service providers, whether most tax schemes have successfully avoided these shortcomings, and what tax regimes have best promoted the interests of all parties. We also seek comment regarding the availability of State remedies to correct any harmful inequities. We are eager to work closely with those State and local government bodies that are most responsible for the formulation of tax policy, such as the Multistate Tax Commission and the Federation of Tax Administrators, on these issues.

E. Other Means of Promoting Competitive Networks.

85. We also, through means of a notice of inquiry, seek comment regarding any other actions that we should take to facilitate the development of competitive networks not already being considered in another proceeding. As discussed above, the rapid development of competition requires that competing carriers be free to innovate, enter into business arrangements, and offer the services of their choice through the means of their choice without incurring unnecessary costs. In this item and in other proceedings, we have identified and requested comment regarding several potential obstacles to this freedom, including obstacles that may arise both from our own rules and from the actions of third parties. However, there may be additional extraneous factors impeding the development of competition that we have not identified. We ask commenters to identify any such impediments with as much specificity as possible, discuss with particularity the nature and extent of the impediment, and suggest specific remedial actions.

IV. CONCLUSION

86. Over the last several years, legal and market developments have come a long way toward bringing competition to all United States communications markets. In the 1996 Act, Congress established a national policy in favor of competition and made legal changes that are essential to achieving this policy goal. Nonetheless, much remains to be achieved. In particular, most local telecommunications markets have not yet experienced the type of facilities-based competition that will bring innovative services and service choices to all Americans, and will eliminate the market power of the incumbent LECs. We believe that the proposals we explore and the inquiry we initiate here are a useful step towards promoting the rapid and efficient development of competitive networks in local telecommunications markets. In this way, we hope to advance the goals of the 1996 Act and advance

²¹¹ 1996 Act, § 602(c)(2), published as a note to 47 U.S.C. § 152.

the public interest in competitive telecommunications.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act.

87. As required by the Regulatory Flexibility Act (RFA),²¹² the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking. The IRFA is set forth in the attached Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, as set forth in Section V.C *infra*, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.²¹³ In addition, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA (or summaries thereof), will be published in the Federal Register.²¹⁴

B. Ex Parte Rules.

88. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking initiate and constitute a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²¹⁵ Persons making oral *ex parte* presentations relating to the Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.²¹⁶ Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve International Transcription Services (ITS) with copies of any written *ex*

²¹² See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²¹³ See 5 U.S.C. § 603(a).

²¹⁴ See *id.*

²¹⁵ See Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, *Report and Order*, 12 FCC Rcd 7348, 7356-57, ¶ 27, citing 47 C.F.R. § 1.1204(b)(1) (1997).

²¹⁶ See 47 C.F.R. § 1.1206(b)(2), as revised.

parte presentations or summaries of oral *ex parte* presentations in these proceedings in the manner specified below for filing comments.

89. This Notice of Inquiry commences an exempt proceeding in accordance with the Commission's *ex parte* rules.²¹⁷

C. Filing Procedures.

90. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before August 13, 1999, and reply comments on or before September 3, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

91. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

92. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325; Washington, D.C. 20554.

93. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 445 Twelfth Street, S.W., Room CY-B402, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, S.W., Washington, D.C. 20554.

94. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49, 47 C.F.R. § 1.49, and all other applicable sections of the Commission's rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents,

²¹⁷ See 47 C.F.R. § 1.1204(b)(1).

regardless of the length of their submission.

D. Further Information.

95. For further information about this proceeding, contact Jeffrey Steinberg at 202-418-0896, jsteinbe@fcc.gov, or Joel Taubenblatt at 202-418-1513, jtaubenb@fcc.gov.

VI. ORDERING CLAUSES

96. Accordingly, IT IS ORDERED, pursuant to sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412, this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking is ADOPTED.

97. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Wireless Communications Association International, Inc. on May 26, 1999, is GRANTED.

98. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 253, and 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 253, and 332(c)(3), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Cellular Telecommunications Industry Association on September 26, 1996, is DENIED.

99. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),²¹⁸ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, as set forth in Section V.C *supra*, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.²¹⁹ In addition, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA (or summaries thereof), will be published in the Federal Register.²²⁰

I. Need for and Objectives of the Proposed Rules

2. We are issuing this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking to seek comment on proposals to facilitate competition to the incumbent local exchange carriers (LECs) by competitors who use their own end-to-end facilities. Extensive facilities-based competition will provide consumers with a choice of telecommunications providers that will compete to offer traditional, voice-grade telephone service, as well as high-speed data and other advanced services, at reasonable prices and conditions -- a major goal of the Telecommunications Act of 1996. We particularly expect this proceeding to further the availability of competition to the many consumers and businesses that are located in multiple tenant environments, such as apartment and office buildings.

3. Specifically, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking seeks comment on the following issues: (1) the tentative conclusion that, to the extent that LECs or other utilities own or control rooftop and other rights-of-way or riser conduit in multiple tenant environments, section 224 of the Communications Act, 47 U.S.C. § 224, requires that they permit competing providers access to such rights-of-way or conduit under just, reasonable and nondiscriminatory rates, terms, and conditions; (2) whether we should require incumbent LECs to

²¹⁸ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²¹⁹ See 5 U.S.C. § 603(a).

²²⁰ See *id.*

make available to any requesting telecommunications carrier unbundled access to riser cable and wiring that they control within multiple tenant environments, subject to the Commission's future interpretation of the "necessary" and "impair" standards of section 251, 47 U.S.C. § 251; (3) whether we should require building owners who allow access to their premises to any telecommunications provider to make comparable access available to all such providers on a nondiscriminatory basis; (4) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; (5) whether we should modify our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the landowner on multiple unit premises;²²¹ (6) whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services;²²² and (7) whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act²²³ protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207.

II. Legal Basis

4. The potential actions on which comment is sought in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking would be authorized under sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412.

III. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply

5. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."²²⁴ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small

²²¹ See 47 C.F.R. § 68.3.

²²² See 47 C.F.R. §§ 76.800-76.806.

²²³ See Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000, which prohibits, with limited exceptions, any State or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.

²²⁴ 5 U.S.C. § 605(b).

organization," and "small governmental jurisdiction."²²⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²²⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²²⁷ For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

6. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking could result in rule changes that, if adopted, would impose requirements on local exchange carriers and other utilities, building owners and managers, multichannel video program distributors, neighborhood associations, and small governmental jurisdictions. To assist the Commission in analyzing the total number of potentially affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking.

a. Local Exchange Carriers

7. Many of the potential rules on which comment is sought in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, if adopted, would affect small LECs. Neither the Commission nor the SBA has developed a small business definition specifically for small LECs. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.²²⁸ The SBA has defined establishments engaged in providing "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.²²⁹ According to November, 1997 Telecommunications Industry Revenue data, 1,371 carriers reported that they were engaged in the provision of local exchange services.²³⁰ We do not have data specifying the number of these carriers that are either

²²⁵ 5 U.S.C. § 601(6).

²²⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²²⁷ Small Business Act, 15 U.S.C. § 632.

²²⁸ See 13 C.F.R. § 121.201, SIC Code 4813.

²²⁹ 13 C.F.R. § 121.201. See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987) (*1987 SIC Manual*).

²³⁰ FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (Telecommunications Industry Revenue).

dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small incumbent LECs that may be affected by the potential actions discussed in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, if adopted.

8. Above, we have included smaller incumbent LECs in our analysis. Although some incumbent LECs may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."²³¹

b. Other Utilities

9. The proposal in this Third Further Notice of Proposed Rulemaking with respect to Section 224 of the Communications Act, 47 U.S.C. § 224, if adopted, would affect utilities other than LECs. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The Commission anticipates that, to the extent its section 224 proposal affects non-LEC utilities, the effect would be concentrated on electric utilities.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

10. Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.²³² The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues do not exceed five million dollars.²³³ The Census Bureau reports that 447 of the 1,379

²³¹ See 13 C.F.R. § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such incumbent LECs.

²³² 1987 SIC Manual.

²³³ 13 C.F.R. § 121.201.

firms listed had total revenues below five million dollars in 1992.²³⁴

11. Electric and Other Services Combined (SIC 4931). The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.²³⁵ The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues do not exceed five million dollars.²³⁶ The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars in 1992.²³⁷

12. Combination Utilities, Not Elsewhere Classified (SIC 4939). The SBA defines this type of utility as providing a combination of electric, gas, and other services which are not otherwise classified.²³⁸ The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues do not exceed five million dollars.²³⁹ The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars in 1992.²⁴⁰

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

13. Natural Gas Transmission (SIC 4922). The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.²⁴¹ The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues do not exceed five million dollars.²⁴² The Census Bureau reported that 70 of the 144 firms

²³⁴ U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA) (*1992 Economic Census Industry and Enterprise Receipts Size Report*).

²³⁵ 1987 SIC Manual.

²³⁶ 13 C.F.R. § 121.201.

²³⁷ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²³⁸ 1987 SIC Manual.

²³⁹ 13 C.F.R. § 121.201.

²⁴⁰ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁴¹ 1987 SIC Manual.

²⁴² 13 C.F.R. § 121.201.

listed had total revenues below five million dollars in 1992.²⁴³

14. Natural Gas Transmission and Distribution (SIC 4923). The SBA has classified this type of entity as a utility that transmits and distributes natural gas for sale.²⁴⁴ The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues do not exceed five million dollars.²⁴⁵ The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.²⁴⁶

15. Natural Gas Distribution (SIC 4924). The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.²⁴⁷ The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.²⁴⁸ The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.²⁴⁹

16. Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925). The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.²⁵⁰ These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.²⁵¹ The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.²⁵²

17. Gas and Other Services Combined (SIC 4932). The SBA has classified this entity as a

²⁴³ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁴⁴ 1987 SIC Manual.

²⁴⁵ 13 C.F.R. § 121.201.

²⁴⁶ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁴⁷ 1987 SIC Manual.

²⁴⁸ 13 C.F.R. § 121.201.

²⁴⁹ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁵⁰ 1987 SIC Manual.

²⁵¹ 13 C.F.R. § 121.201.

²⁵² 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

gas company whose business is less than 95% gas, in combination with other services.²⁵³ The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do not exceed five million dollars.²⁵⁴ The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars in 1992.²⁵⁵

(3) Water Supply (SIC 4941)

18. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.²⁵⁶ The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues do not exceed five million dollars.²⁵⁷ The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars in 1992.²⁵⁸

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

19. Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.²⁵⁹ The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.²⁶⁰ The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars in 1992.²⁶¹

20. Refuse Systems (SIC 4953). The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such

²⁵³ 1987 SIC Manual.

²⁵⁴ 13 C.F.R. § 121.201.

²⁵⁵ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁵⁶ 1987 SIC Manual.

²⁵⁷ 13 C.F.R. § 121.201.

²⁵⁸ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁵⁹ 1987 SIC Manual.

²⁶⁰ 13 C.F.R. § 121.201.

²⁶¹ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

materials."²⁶² The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues do not exceed six million dollars.²⁶³ The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars in 1992.²⁶⁴

21. Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.²⁶⁵ The Census Bureau reports that a total of 1,214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.²⁶⁶ The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.²⁶⁷

(5) Steam and Air Conditioning Supply (SIC 4961)

22. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.²⁶⁸ The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.²⁶⁹ The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.²⁷⁰

(6) Irrigation Systems (SIC 4971)

23. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.²⁷¹ The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm

²⁶² 1987 SIC Manual.

²⁶³ 13 C.F.R. § 121.201.

²⁶⁴ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁶⁵ 1987 SIC Manual.

²⁶⁶ 13 C.F.R. § 121.201.

²⁶⁷ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁶⁸ 1987 SIC Manual.

²⁶⁹ 13 C.F.R. § 121.201.

²⁷⁰ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

²⁷¹ 1987 SIC Manual.

whose gross revenues do not exceed five million dollars.²⁷² The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars in 1992.²⁷³

c. Building Owners and Managers

24. Several of our inquiries in this Notice of Proposed Rulemaking would affect multiple dwelling unit operators and real estate agents and managers, if such inquiries lead to adopted rules. Such inquiries include the following issues: whether we should require building owners who allow access to their premises to any telecommunications provider to make comparable access available to all such providers on a nondiscriminatory basis; whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; and whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that were not covered under section 207.

(1) Multiple Dwelling Unit Operators (SIC 6512, SIC 6513, SIC 6514)

25. The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$5 million or less in revenue annually.²⁷⁴ According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.²⁷⁵ Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.²⁷⁶ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

(2) Real Estate Agents and Managers (SIC 6531)

26. The SBA defines real estate agents and managers as establishments primarily engaged

²⁷² 13 C.F.R. § 121.201.

²⁷³ 1992 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

²⁷⁴ 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

²⁷⁵ 1992 *Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration) (1992 *Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*).

²⁷⁶ 1992 *Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*, Table 4, SIC 6513.

in renting, buying, selling, managing, and appraising real estate for others.²⁷⁷ According to SBA's definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.²⁷⁸

d. Multichannel Video Program Distributors (SIC 4841)

27. Our inquiry in this Notice of Proposed Rulemaking regarding whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services would affect operators of cable and other pay television services, if such inquiry leads to the adoption of rules. The SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.²⁷⁹ This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.²⁸⁰

e. Neighborhood Associations

28. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207 would affect neighborhood associations, if such inquiry leads to the adoption of rules. Section 601(4) of the Regulatory Flexibility Act, 5 U.S.C. § 601(4), defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 such associations in 1993.²⁸¹

f. Municipalities

29. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt

²⁷⁷ 1987 SIC Manual.

²⁷⁸ 13 C.F.R. § 121.201.

²⁷⁹ 13 C.F.R. § 121.201 (SIC 4841).

²⁸⁰ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841.

²⁸¹ See Community Associations Institute Comments in Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276, 19337 (1996).

rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207 may affect municipalities, if such inquiry leads to the adoption of rules. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."²⁸² As of 1992, there were approximately 85,006 governmental entities in the United States.²⁸³ This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566, or 96%, have populations of fewer than 50,000.²⁸⁴ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,606 (96%) are small entities.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

30. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking proposes no additional reporting, recordkeeping or other compliance measures.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

31. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking seeks comment on how the proposals and inquiries set forth could impact regulated entities, including small entities. For example, with respect to our Section 224 proposal, we seek comment on whether an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners, including small building owners, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties.²⁸⁵ In addition, with respect to our inquiry into building owner obligations, we seek comment on whether we should limit the scope of any building owner obligation in order to avoid imposing unreasonable regulatory burdens on building owners, and we suggest that a potential rule could exempt buildings that house fewer than a certain number of tenants or are under a certain size.²⁸⁶ Commenters are invited to address the economic impact of all of our proposals on small entities and offer any alternatives.

²⁸² 5 U.S.C. § 601(5).

²⁸³ U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

²⁸⁴ *Id.*

²⁸⁵ *See* Section III.B.2 *supra*.

²⁸⁶ *See* Section III.D *supra*.

VI. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

32. None.

**Separate Statement
of
Commissioner Susan Ness**

Re: Promotion of Competitive Networks in Local Telecommunications Markets; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Wireless Communications Association International, Inc. Petition For Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission antennas Designed to Provide Fixed Wireless Services

This Notice grapples with a critical component of the competitive landscape -- the ability of wireless carriers to gain access to essential communications facilities to serve tenants in multi-dwelling buildings. Multi-dwelling customers represent a substantial portion of the residential and business population. Access to these customers, therefore, is a pivotal part of the business plan of many competitive carriers.

The proposals in this Notice are aggressive, but reflect the pro-competitive spirit imbued in the Telecommunications Act of 1996, and I am pleased to support this initiative. I write separately, however, to voice my concern over one proposal: imposing a nondiscrimination building access requirement on building owners. Under this proposal, once a building owner allows a telecommunications provider access to its premises, the building owner must make comparable access available to all other telecommunications carriers under nondiscriminatory rates, terms and conditions.

While well intended, the concept would impose a new regulation on building owners - a class of persons not otherwise regulated by the Commission. Less than a year ago, the Commission considered a similar issue. In the *OTARD Second Report & Order*, the Commission declined to impose an affirmative obligation on building owners to allow a tenant access to building common and rooftop areas for the placement of over the air video reception devices. In that proceeding, the Commission expressed its reluctance to use its *express* authority under Section 207 of the Telecommunications Act of 1996, which was limited to prohibiting regulations that impair a viewer's ability to receive video programming through devices designed for over the air reception as a basis for imposing obligations on how building owners should use their private property. I have difficulty distinguishing that precedent from the instant case.

Moreover, where constitutional rights are at stake, judicial precedent informs us that the courts do not favor the imposition of obligations by a federal administrative agency which relies on ancillary jurisdiction. Rather, this may be one area that is

better served by a legislative solution. Notwithstanding these reservations, I enthusiastically support this Notice, and look forward to a spirited debate on the issue of the Commission's authority to impose nondiscrimination obligations on building owners.

**Statement of Commissioner Harold Furchtgott-Roth,
Concurring in Part and Dissenting in Part**

**In the Matter of Promotion of Competitive Networks in Local
Telecommunications Markets (WT Docket No. 99-217); Implementation of the
Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket
No. 96-98); Wireless Communications Association International, Inc. Petition for
Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt
Restrictions on Subscriber Premises Reception or Transmission Antennas
Designed To Provide Fixed Wireless Services; Cellular Telecommunications
Industry Association Petition for Rule Making and Amendment of the
Commission's Rules to Preempt State and Local Imposition of Discriminatory
And/Or Excessive Taxes and Assessments**

Today's decision initiating a proceeding to promote the establishment of competitive networks in local telecommunications networks has a number of laudable aspects. In particular, I applaud our efforts to develop a record to assist us in determining the precise contours of Section 224 of the Act, 47 U.S.C. § 224, which requires that utilities owning or controlling poles, ducts, conduits and rights of way provide access on reasonable and non-discriminatory terms to cable television systems and telecommunications carriers (other than incumbent local exchange carriers). I urge this Commission to take prompt action on this issue so that fixed wireless and other providers attempting to enter the local market have certainty as to the boundaries of that provision.

I am deeply troubled, however, by two aspects of this proceeding. First, the Commission decides today to seek comment on whether building owners permitting access to any telecommunications provider must make comparable access available to all such providers under nondiscriminatory terms and conditions. As authority for such action, today's decision posits that most slender of reeds: the Commission's ancillary jurisdiction under Sections 4(i) and Sections 303(r) of the Act, 47 U.S.C. §§ 154(i), 303(r). But as *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) instructs, this Commission must be vigilant in overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority -- regardless of whether such regulation constitutes commendable public policy. I fear that today's proposal, if ultimately adopted by the Commission, may stray outside this agency's jurisdictional boundaries.

The second area which causes me great concern is the Commission's apparent inclination to deal piecemeal with the Supreme Court's recent remand of our rules implementing Section 251 of the Act, 47 U.S.C. § 251. The Commission recently issued a further notice of proposed rulemaking to deal with the issues raised by the remand. Yet, in

this proceeding, the Commission requests comment on whether unbundled access to riser cable and wiring within multiple tenant environments meets the requirements of Section 251. Although we do state that we will apply our decisions in the remand proceeding to the issue of riser cable and wiring in multiple tenant environments presented here, the better course of action in my judgment would be to consider all issues pertaining to unbundled network elements in one proceeding.

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
CONCURRING**

Re: *Promotion of Competitive Networks in Local Telecommunications Markets; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; and Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments (CC Docket No. 96-98)*

I whole-heartedly support taking all appropriate steps to promote local competition. And, I commend the Wireless Bureau staff for their initiative in identifying the specific issues in this item and commencing this proceeding to examine them further. I do, however, have grave concerns about a couple components in this item.

First, under judicial precedent, this agency should not move toward rules that would effectuate a *per se* taking without specific authority to do so. *See Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Here, it seems that we propose to do just that. We have no specific statutory provision that directs, or “empowers,” us to assert regulatory authority over owners of private property. Instead, this item proposes to rely solely on “ancillary” jurisdiction. Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf.

Moreover, this proposed rulemaking stands in stark contrast to our recent consideration of the limits of our authority when the rights of property owners are involved. Specifically, we refused to go beyond the language of Section 207 of the Telecommunications Act of 1996 regarding the placement of over-the-air reception devices on common and restricted access property because of constitutional and statutory authority concerns. *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874, 23894-97, ¶¶ 39-45 (1998) (OTARD proceeding) (“because there is a strong argument that modifying our Section 207 rules to cover common and prohibited access property would create an identifiable class of *per se* takings, and there is no compensation mechanism authorized by the statute, we conclude that Section 207 does not authorize us to make such a modification” (relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982))). Yet here, we lack a provision analogous to Section 207, but nevertheless contemplate requiring “nondiscriminatory access” to privately owned rooftops and other areas—a seemingly greater intrusion into the rights of property owners than we could stomach in the OTARD proceeding. In the context of a likely takings under the Fifth Amendment, this is not an area where we should be pushing the envelope of our “ancillary” statutory authority without, at least, being certain we have exhausted other alternatives.

Even though my mind remains open to what commenters present, the door is open only a sliver. We may eventually win an “ancillary jurisdiction” argument in court against the building owners and landlords, but it does not seem like good policy to propose a new

regulatory dictate on these entities before other measures to evaluate the problem or pursue other non-regulatory initiatives prove inadequate. Nevertheless, I will concur with asking the questions we do in this item, anticipating an end result – based on the record – that is consistent with the law.

My second area of concern is the proposal to consider requiring incumbent LECs to make available “unbundled access” to riser cable and wiring they control within multiple tenant environments pursuant to section 251(c)(3) of the 1996 Act. I feel strongly about our duty to faithfully and quickly implement the Supreme Court's remand of the Commission's unbundled network element rule (the so-called Rule 319). I am therefore concerned about adding yet another possible “network element” to a list that the Supreme Court struck down without the thorough and thoughtful interpretation and application of the “necessary” and “impair” standards of section 251(d)(2).

I will not object to the inclusion of this issue in this item since it basically defers to the UNE remand proceeding, but I am troubled by the growing list of UNEs that we put out for comment before we implement the limiting principle as Congress and the Court required.