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Before the
Federal Communication Commission
Washington, D.C. 20554

In the Matter of

Promotion of Competitive Networks In Local Telecommunications Markets	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rule Making 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	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

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Comment of U.S. RealTel, Inc.

U.S. RealTel, Inc. (**"USRT"**) files this comment in response to the Federal Communications Commission's (the **"Commission"**) Notice of Proposed Rule Making dated July 7, 1999 (the **"NPRM"**) issued in response to Wireless Communications Association International, Inc.'s Petition for Rule Making 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 and Cellular Telecommunications Industry Association's 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 (collectively, the **"Petitions"**) and states:

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1. USRT leases rights to install and operate telecommunications equipment in multitenant environments (**"MTEs"/"Buildings"**) from Building owners (**"Owners"**). USRT then acts as a liaison between Owners and competitive communications providers (**"Providers"**) by subleasing those rights to Providers. USRT has subleased the right to install over 63 Building installations to Providers and has 333 proposed installations being prepared for deployment. USRT has established Building access relationships with 22 Providers, including WinStar, Teligent, Nextlink and Teleport Communications Group.

2. Passage of the Telecommunications Act of 1996 (the **"Telecommunications Act"**) presents Owners with Provider access issues that formerly did not exist or went unrecognized. In the pre-Telecommunications Act environment, access was usually requested by a single, well-capitalized, quasi-governmental, monopolistic, telecommunications service provider - the Regional Bell Operating Company (**"RBOC"**). The RBOCs primarily offered one service – voice transmission and reception. Owners granted Building access to the RBOCs as a matter of course; it was necessary to satisfy Building tenants' and occupants' (**"Occupants"**) demand for voice telecommunications service. A Building without voice service could not attract or retain Occupants. Additionally, RBOC access was relatively unobtrusive and benign because: (a) with little or no competition, there was minimal need to manage equipment space, accommodate other service providers' equipment and avoid interference; (b) the RBOCs' voice equipment consumed little electrical power; and (c) the RBOCs' years of experience, strong capitalization and stability mitigated quality of service, liability and insurance concerns.

3. The emerging competitive telecommunications market generated by enactment of the Telecommunications Act presents Owners with manifold concerns. These concerns are primarily generated by the presence of multiple Providers in Buildings offering multiple

services. Owners' expertise is primarily focused on traditional real estate business -- the leasing of space in their Buildings to office, retail and residential Occupants. Although providing telecommunications services to Buildings was critical to Occupant satisfaction before 1996, the former RBOC monopoly and limited array of services made it unnecessary for Owners to develop telecommunications expertise. Consequently, many Owners remain unfamiliar with Providers, the services they offer, and how their presence will affect Buildings. Owners face issues including: (a) managing each Building's limited equipment capacity in order to accommodate the maximum number of Providers; (b) attending to personnel access, insurance, indemnity, power and tax concerns; (c) radio frequency and structural engineering analyses; and (d) assuring Providers have proper FCC licensing and comply with radio frequency interference and emissions regulations. USRT allows Owners to remain focused on their primary business and confidently embrace telecommunications competition and technology. USRT's observations and discussions with Owners and Providers indicate that the largest obstacle to Provider access is an Owner's lack of familiarity with telecommunications. Naturally, unfamiliar Owners are hesitant to grant access rights, while conversely, well-informed Owners recognize the benefits Providers offer and are eager to grant them access. Greater telecommunications familiarity results in expedited Provider access while at the same time protecting Owners' vital interest in their Buildings.

4. USRT and its Owners charge Providers rent in exchange for granting Building access. However, the rent charged is reasonable and does not place undue financial burdens on Providers nor unreasonably delay availability of their services to Occupants. Rent is usually charged on a recurring monthly basis, similar to other Building tenants. Thus, Providers avoid having to make large initial capital expenditures when deploying into a Building. USRT and its

Owners, primarily for reasons discussed below, eschew prohibitive rents like those related by WinStar in Paragraph 31 of the NPRM. Additionally, USRT recognizes that granting exclusive rights in a Building to a single Provider usually stifles competition and is inimical to the interests of its Owners, their Occupants and the objectives of the Telecommunications Act. USRT grant exclusive access rights only in very limited circumstances. For instance, where a shared tenant service provider requires exclusive rights to justify the capital expenditure of installing a communications platform that provides private branch exchange and/or internet switching services for two or more Occupants in a small Building. Before granting Building access, USRT requires that each Provider submit copies of FCC licenses, plans identifying the equipment to be installed, the equipment's proposed location, structural and radio frequency analyses, applicable zoning permits and certificates of insurance. Requiring submission of these items is necessary to protect each Building, its Occupants and other Providers from potential injury caused by improper equipment installation. Submission of these materials is usually no greater burden than that which is imposed on any other party accessing each Building, including Occupants. Additionally, these requirements help assure that Building capacity is allocated efficiently to maximize the number of Providers that may use available space and minimize potential inter-Provider interference. USRT brings Providers Building access on reasonable terms at reasonable rates.

5. The Petitions and NPRM propose that the Commission promulgate rules requiring Owners to grant Providers nondiscriminatory physical access to Buildings at reasonable rates. USRT believes that Building access on reasonable terms at reasonable rates is a legitimate and important means to the end of encouraging development of a competitive telecommunications service market offering the most advanced services; however, government action is not

necessary. Just as Occupant demand prompted Owners to grant Building access to RBOCs before passage of the Telecommunications Act, the same force assures that Owners will not unreasonably deny access nor charge unreasonable rents and access fees.

6. The key to Owner prosperity is Occupant satisfaction. The satisfied Occupant pays its rent and renews its lease. Occupant rent pays Owners' debt service, overhead and generates profit. A Building with high Occupant satisfaction has less vacancy and commands higher rents. American business' growing use on high bandwidth advanced telecommunications services means that Occupant satisfaction depends on a Building's ability to offer those services at competitive prices from multiple Providers. Each Owner is loath to lose an Occupant, or see a potential Occupant rent space elsewhere, because satisfactory telecommunications services are not available in their Building. The Commission should not underestimate Owner cost in losing Occupants and potential Occupants. These costs include lost rent on vacant space, lower rents, marketing and legal costs, brokerage commissions and tenant improvement/buildout expenses. These costs usually run into the hundreds of thousands of dollars. USRT's communications with its Owners and potential Owners indicate that assuring Occupant satisfaction is Owners' dominant concern.

7. Owners wish to charge Providers rent that will defray the costs associated with Provider presence in each Building, as well as earn a profit; however, Owners' interest in seeking remuneration from Providers is subordinate to Occupant satisfaction. The commercial real estate market is vigorously competitive. An Owner's opportunity cost in losing an Occupant and/or having to charge lower rents outweighs the advantage of demanding unreasonable rents from Providers or arbitrarily excluding them. Consequently, Owner pursuit of Occupant satisfaction is an efficient, privately generated, force encouraging multiple Provider access at reasonable rates.

The private access market is efficient - WinStar has successfully accessed over 4,800 Buildings already. A government substitute is not necessary. Although the Commission may be able to articulate a rational basis for allowing the private market to determine Building access is a more efficient and less burdensome means to the end of promoting a competitive telecommunications market offering the most advanced services within MTEs.

8. The Petitions and NPRM seek comment concerning nondiscriminatory Building access. USRT opposes any rule limiting Owners' ability to determine who will be granted access to their Buildings. Owners have significant security, safety, liability, legal compliance and Occupant satisfaction concerns regarding Building access. An inexperienced undercapitalized Provider may cause significant injury to a Building and its Occupants leaving the Owner with little recourse. Many Buildings have limited space available for installation of telecommunications infrastructure. Owners wish to assure that the Providers taking that limited space will render satisfactory service to their Occupants. The Owner who grants space to a poorly performing Provider reduces its Building's competitiveness. Although USRT and its Owners do not seek to "discriminate" against any particular Provider in favor of another, they respectively must insist on retaining discretion in selecting who will be granted access to their Buildings. Vague proposals of nondiscriminatory access threaten to divest Owners of necessary Building control.

9. As comprehensively analyzed in the Building Owners and Managers Association International's comment, a rule mandating physical Building access by Providers would constitute a taking under the Fifth Amendment to the United States Constitution. To survive constitutional scrutiny, each taking must be for a public purpose and each Owner must receive just compensation. Whether the Commission has sufficient statutory authority to authorize such

takings is questionable. Despite the Telecommunications Act's broad grant implementation authority to the Commission, *Bell Atlantic Telephone Cos. v. FCC*, 27 F.3d 1441 (D.C. Cir. 1994) suggests that specific statutory authorization is necessary before the Commission may effect takings via mandatory access and nondiscrimination rules. Because the Telecommunications Act does not specifically delegate authority to effect such takings, the Commission currently lacks sufficient statutory authority to do so. Moreover, USRT believes that Section 207 of the Telecommunications Act, and the rules promulgated thereunder, do not confer sufficient statutory authority on the Commission to effect takings of property within USRT's and Owner's exclusive possession.

10. Were Congress to grant statutory authority to support such takings, whether they are for a sufficient public purpose also remains questionable. Former takings by RBOCs and energy providers were made on behalf of publicly regulated monopolies. The Petitions request that the Commission compel Owners to grant Providers Building access ostensibly as a necessary means to supplying all Americans with competitively priced advanced telecommunications services. If Providers asseverations of devotion to public service are sincere, USRT suggests that Providers limit their fees as RBOCs did before enactment of the Telecommunications Act. Providers should not reap the benefits of being a public service without also bearing its burdens. Providers' public offering documents filed with the Securities and Exchange Commission indicate that Providers' pursuit of Building access is not solely for the purpose of assuring the availability of advanced telecommunications technology to all within the republic. In the former days of regulated telecommunications there may have been a sufficient public purpose to support takings of private property. In the competitive environment established by the Telecommunications Act, such takings would merely be an expression of

government partisanship in favor of one business interest at the expense of another. Providers tendentious claims that mandated Building access is necessary for the public good do not conceal the genuine purpose that is their own financial success. While their pursuit of prosperity may have a positive effect on the public, it is not sufficient to justify the taking of Owners' private property.

11. If sufficient statutory authority were granted and public purpose found to justify such takings, just compensation is required. Resulting uncertainty surrounding the inevitable disensus regarding what constitutes just compensation will delay deployment of Providers' equipment and service to Occupants. How will just compensation be determined and by whom? USRT would insist that condemned property be valued at its highest and best use determined by jury trial in accordance with the United States Constitution. The delay associated with resolving these and other collateral issues will only hinder achievement of the Telecommunications Act's goals while producing marginal, if any, benefit.

12. USRT and its Owners are also concerned about Providers' commitment to deliver competitively priced advanced telecommunications services to all of their Occupants. If Providers are granted Building access through the seizure of private property by claiming to do so for the public purpose of providing advanced telecommunications services at competitive prices, then, at the very least, the Commission should require that each Provider availing itself of such privilege offer its services to all Occupants in all Buildings, not solely to the most lucrative Buildings.

13. In conclusion, rules mandating Provider access to Building areas within Owners' and USRT's exclusive control is an overly burdensome means to the end of assuring all

Americans' access to competitively priced advanced telecommunications services. Moreover, it lacks statutory authority from Congress and is constitutionally suspect. USRT has established a private forum through which Providers may obtain Building access under reasonable terms at reasonable rates. USRT is eager to collaborate with Owners and Providers; however, USRT opposes adoption of rules that limit the ability to select which Providers will be granted access and under what conditions.

Respectfully submitted this thirteenth day of August, 1999.

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