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

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
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	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	

COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

Howard J. Symons
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Cathleen A. Massey
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

Of Counsel

AUGUST 27, 1999

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. RESTRICTIONS ON ACCESS TO MULTIPLE TENANT ENVIRONMENTS BLUNT THE PRO-COMPETITIVE GOALS OF THE 1996 ACT 3

A. NEXTLINK IS OFTEN DENIED ACCESS TO MTEs OR ITS ACCESS IS UNREASONABLY DELAYED 4
B. SOME BUILDING OWNERS HAMPER NEXTLINK'S EFFORTS IN BAD FAITH 5
C. STATE LAWS DO NOT ADEQUATELY ENSURE NONDISCRIMINATORY ACCESS TO MTEs 6

III. THE COMMISSION HAS SUFFICIENT AUTHORITY TO REQUIRE NONDISCRIMINATORY ACCESS TO AREAS CONTROLLED BY ILECS 7

A. SECTION 224 PROVIDES THE COMMISSION WITH BROAD AUTHORITY TO REQUIRE NONDISCRIMINATORY ACCESS TO UTILITY-CONTROLLED AREAS OF MTEs 7
B. ALTERNATIVELY ACCESS TO UTILITY OWNED AND CONTROLLED AREAS SHOULD BE DEEMED UNBUNDLED NETWORK ELEMENTS 8

IV. THE COMMISSION HAS AUTHORITY TO PERMIT ACCESS TO AREAS CONTROLLED BY BUILDING OWNERS 9

A. THE COMMISSION HAS ANCILLARY POWER TO REQUIRE NONDISCRIMINATORY ACCESS TO A BUILDING OWNER FACILITIES 10
B. THE TAKINGS CLAUSE DOES NOT BAR NONDISCRIMINATORY ACCESS TO MTEs 12

V. CONCLUSION 15

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

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
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	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	

COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK"), through its attorneys, hereby files these comments in response to the Commission's Competitive Networks Initiative as outlined in the July 7, 1999 Notice of Proposed Rulemaking in the above-captioned docket.[1/]

I. INTRODUCTION AND SUMMARY

Over the past five years, NEXTLINK has made substantial investments in local markets throughout the country. These investments are demonstrated by the company's continually growing facilities-based, high capacity, fiber optic networks in markets across the United States. NEXTLINK currently operates 21 facilities-based networks providing switched local and long

---

[1/] In the Matter of Promotion at Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-17 (rel. July 7, 1999) ("Notice").

distance services in 41 markets in 14 states, including California, Illinois, Nevada, Utah, Ohio, Pennsylvania, New York, New Jersey, Tennessee, Georgia, Washington, Colorado, Texas and Florida. NEXTLINK is also the holder of the largest collection of broadband wireless licenses in the country. Its 82 local multipoint distribution services ("LMDS") licenses cover substantially all of the 30 largest markets in the United States. NEXTLINK has also acquired exclusive rights to a 16,000 mile high-speed, IP-centric fiber optic backbone network that will connect over 50 cities in the United States and Canada.[2/]

Although NEXTLINK has had success in expanding its network, it still faces one major competitive hurdle— gaining access to multiple tenant environments ("MTEs"). NEXTLINK's experience varies on a market-by-market basis, but it has seen the emergence of a number of practices by MTE owners that, if left unchecked, will undermine the development of facilities-based competition. These practices include:

- Denying NEXTLINK access regardless of the presence of a NEXTLINK customer in the MTE;
- Seeking unreasonable compensation far in excess of market rates;
- Requiring that CLECs make time consuming, expensive, and unnecessary showings in order to justify building access;
- Interfering directly with the business relationship between NEXTLINK and its customers;
- Threatening to disparage NEXTLINK's reputation among building owners in order to extract more favorable terms in negotiation; and
- Failing to engage in meaningful negotiations or creating unreasonable delay in negotiations.

In NEXTLINK's experience, state statutes have neither curbed such behavior nor adequately addressed the issue of nondiscriminatory building access. Without a binding national

[2/] The backbone network is being completed in segments and is expected to be completed by the end of 2001.

policy to open the MTE marketplace, NEXTLINK and other competitive carriers will not be able to fully implement their pro-competitive plans. This will profoundly effect local competition because approximately one-third of the U.S. housing market is located in the MTEs. The Commission must ensure that these consumers do not miss the full benefits of vibrant local competition delivered over a wide array of networks as contemplated in the 1996 Act.

NEXTLINK therefore strongly supports the Commission's competitive networks initiative. As demonstrated below, the Commission has ample authority under 47 U.S.C. § 224 to require nondiscriminatory telecommunications access to all areas owned or controlled by a utility. In this regard, the Commission has already recognized the need for access to pole attachments and underground duct and conduit owned or controlled by utilities. A further extension to roofs, inside wiring and related riser conduits is wholly consistent with the goals of the 1996 Act. Alternatively, 47 U.S.C. § 251(c)(3) gives the Commission power to guarantee such access. The Commission also has authority to mandate nondiscrimination in areas owned or controlled by building owners. This authority emanates from the Commission's broad ancillary authority to take actions to fulfill its statutory mandate to promote local competition and does not trample the rights of building owners.

II. RESTRICTIONS ON ACCESS TO MULTIPLE TENANT ENVIRONMENTS BLUNT THE PRO-COMPETITIVE GOALS OF THE 1996 ACT.

The 1996 Act was designed break the monopoly grip of ILECs on local markets and ensure that more Americans benefit from competition. To date, local markets remain dominated by the ILECs and are not yet "fully and irreversibly" open to compensation.[3/] In NEXTLINK's

[3/] Despite the prize of interLATA entry, no ILEC has adequately opened the local market pursuant to the test set out in the "competitive checklist." See 47 U.S.C. § 271(c)(2)(B).

experience, MTE owners and managers have exacerbated this state of affairs by denying or delaying building access for CLECs or actively impeding CLECs altogether.

A. NEXTLINK is Often Denied Access to MTEs or Its Access is Unreasonably Delayed

As NEXTLINK attempts to bring additional competition to the MTE market it has had to endure MTE owners that prevent or stall competition in their buildings. For example, many MTE owners or managers will simply refuse to offer NEXTLINK access to their telecommunications facilities.[4/] Where negotiations are permitted, owners regularly negotiate on a protracted basis with NEXTLINK. It is not uncommon for NEXTLINK's staff to wait as long as four to six months to begin building access negotiations.[5/]

NEXTLINK's efforts are further delayed by owners that require a burdensome showing of "fitness" prior to granting access. Typically, NEXTLINK has had to provide not just detailed working drawings, but also financial statements, and marketing materials to appease owners and managers. NEXTLINK has also had to hire engineers, architects and other professionals before access was permitted. These unnecessary steps add significantly to the NEXTLINK's costs,[6/] impede competition, and reduce the value of NEXTLINK's offerings.[7/] Where an arrangement is

---

[4/] While many of these issues arise with a new NEXTLINK customer within an MTE, in at least one instance, NEXTLINK was prevented from gaining access to areas where it had already installed its own equipment after a change in the MTE's management. Essentially, NEXTLINK was forced to examine a judicial remedy. As explained below, such a remedy is not currently feasible.

[5/] In several major markets owners have refused to return NEXTLINK's calls or set up meetings for months at a time.

[6/] This is particularly true where NEXTLINK is required to use the owner's contractors. In one market, NEXTLINK constructed a collocation cage at its switch location for 30% less than it paid to construct a sixty percent smaller cage at an MTE where the MTE owner mandated use of the owner's contractors.

[7/] Not only must NEXTLINK pay for access that is provided to ILECs for free but it must also incur additional costs in order to "convince" owners to allow it to serve its customers.

finally reached, NEXTLINK is often forced to utilize insufficient space or must pay astronomical fees.[8/]

B. Some Building Owners Hamper NEXTLINK's Efforts in Bad Faith

On a fairly regular basis, NEXTLINK interacts with owners and managers that appear intent on impeding NEXTLINK's efforts. For instance, NEXTLINK has engaged in many negotiations where an owner behaves in an unreasonable manner. Unreasonableness is evidenced by demands for compensation that are wholly uneconomic, or by delay tactics such as opening up settled matters as if never discussed.[9/] Often these owners and managers tell NEXTLINK that they can either "take it or leave it" depending on how much NEXTLINK wants to serve its MTE customers.

At other times owners and managers will use the threat of "soiling" NEXTLINK's reputation in the building owners' community in order to gain more favorable contract terms. The threat of disparagement is a real concern because NEXTLINK and other CLECs do not have an adequate "stick" to encourage nondiscriminatory access and such disparagement would make competition all the more difficult.[10/] Therefore, many CLECs simply capitulate to unacceptable terms in order to get "some" access.

Although the relationship between landlord and tenant would appear to be a check on the owners' approach to CLEC access, that has not been the case. On one occasion, an MTE owner

---

[8/] In one key market, several owners seek payments that are as much as 10 times greater than the market value of the requested access. These owners seek much more than reimbursement of costs or some other form of "just compensation" and delve into the world of usury.

[9/] In one market many building owners have negotiated contracts with NEXTLINK and then on the eve of consummation of the agreement have written basic terms out of the contracts.

[10/] This fact only exacerbates the problem of unresponsive owners because CLECs are unwilling to strenuously object to inappropriate conduct by MTE owners because of concerns that the owner will disparage their reputation or otherwise retaliate.

denied access to NEXTLINK and then told NEXTLINK's customer that it "might as well switch [to a carrier of the owner's choice] because NEXTLINK could not provide service." In another incident, a building owner denied NEXTLINK access because the tenant paid below-market rental rates and the owner saw the denial as a potential means of forcing the tenant out of the building.

C. State Laws Do Not Adequately Ensure Nondiscriminatory Access to MTEs

Currently, NEXTLINK and other carriers do not have adequate protection from such acts by MTE owners and managers. A key reason for the lack of such protections is that the vast majority of states do not ensure nondiscriminatory access. In fact, only three states have enacted legislation or implemented regulations to prevent building owners from discriminating against telecommunications service providers.[11/] Even where such protections exist, CLECs do not readily seek their protections because those that do often face retaliation from other owners. Furthermore, such laws or regulations often do not have the necessary "teeth" to create incentives for different behavior.[12/] Even if NEXTLINK were to avail itself of the current state laws (in the three states where they are available), relief would not be sufficiently timely. The available regulatory and judicial remedies would likely grant NEXTLINK relief well after a customer has lost patience with NEXTLINK because it was unable to influence the MTE owner to allow it to provide the requested service.

[11/] See Conn. Gen. Stats. § 16-2471; Tex. Util. Code § 54.259; Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, Supplemental Finding and Order, 1994 Ohio PUC LEXIS 778 (Pub. Util. Comm. of Ohio Sep. 29, 1994).

[12/] Tex. Util. Code § 54.259 has been rarely, and never successfully, employed by CLECs in Texas. Although Section 54.259 outlines five actions that are prohibited for public and private property owners, the section lacks an enforcement mechanism.

The Commission has wisely opened this docket to address these critical competitive issues. As explained below, it has sufficient authority under several provisions of the Communications Act to take action that will ensure an open MTE market.

III. THE COMMISSION HAS SUFFICIENT AUTHORITY TO REQUIRE NONDISCRIMINATORY ACCESS TO AREAS CONTROLLED BY ILECS

A. Section 224 Provides the Commission with Broad Authority to Require Nondiscriminatory Access to Utility-Controlled Areas of MTEs

In its Notice, the Commission concludes that "the obligations of utilities under section 224 encompass access to rights-of-way, conduit, and risers on private property, including end user premises in multiple tenant environments, that utilities own or control."[13/] NEXTLINK enthusiastically supports this conclusion as the irreducible minimum for building access. The Commission correctly notes that "inclusion within section 224 of rights-of-way that a utility 'controls,' as well as 'owns,' suggests that rights-of-way over private property owned by a third party were intended to be included."[14/]

In the Local Competition First R&O, the Commission correctly recognized the breadth of Section 224(f)'s grant of nondiscriminatory access: "This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to

---

[13/] Notice ¶ 39.

[14/] Notice ¶ 41. Section 224 requires utilities, including LECs, to provide telecommunications carriers with nondiscriminatory access to any pole, duct, conduit or right-of-way that they own or control. 47 U.S.C. § 224(f)(1). Access rights under Section 224 extend to all telecommunication carriers, including wireless carriers. Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, Report and Order, 13 FCC Rcd. 6777, 6798-99, ¶¶ 39-42 (1998) recon. pending; see also Local Competition First R&O, 11 FCC Rcd. at 16085, ¶ 1186.

compete in those fields."[15/] As a matter of sound policy and common sense, nondiscriminatory access must include all areas owned and controlled by a LEC. Otherwise, ILECs will continue to maintain the means to impede competition. Permitting access to all areas controlled by the LEC would clarify the Local Competition First R&O, and Section 224(f)(1) which mandates carriers' access to "any pole, duct, conduit or right of way."[16/]

Furthermore such action would ensure a level playing field among competitors because "it [is] unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities. . . ."[17/] The Commission has already addressed some of the competitive inequities enjoyed by ILECs by establishing fiber-based competitors' right to rights-of-way such as pole attachments and underground duct and conduit owned or controlled by utilities. In light of its prior determination, the Commission must act in a neutral manner towards alternative technologies by clarifying that wireless, and other carriers, have rights to bottleneck access such as roofs, inside wiring and related riser conduits.

B. Alternatively Access to Utility Owned and Controlled Areas Should be Deemed Unbundled Network Elements

As an alternative to access under Section 224, the Commission may determine that access to utility-owned or controlled facilities is required under Section 251 as an unbundled network element ("UNE"). NEXTLINK recognizes that the Commission's current rules do not indicate whether inside wire, including riser cable in buildings, are considered as part of the loop, or can otherwise be defined as a separate network element that the ILEC must provide. Nevertheless, such a definition is mandated under the Communications Act. Section 251(c)(3) requires ILECs

---

15/ Local Competition First R&O ¶ 1123.
16/ 47 U.S.C. § 224 (f)(1) (emphasis added).
17/ Local Competition First R&O ¶ 1157.

to make unbundled access to UNEs available to any and all requesting carriers. NEXTLINK has submitted comments in CC Docket 96-98 demonstrating that access to utility controlled areas constitutes an UNE because it is nearly impossible to do business in an MTE without access to existing rights of way.[18/] The Commission should, therefore, establish a definition for UNEs that contemplates the practical realities of competition in today's MTE marketplace.

IV. THE COMMISSION HAS AUTHORITY TO PERMIT ACCESS TO AREAS CONTROLLED BY BUILDING OWNERS

In the instant Notice and in the Inside Wiring Report and Order and NPRM, the Commission recognizes the importance that nondiscriminatory access to building owners' telecommunications facilities will play in enhancing local competition.[19/] Unlike the period when the Inside Wiring Report and Order and NPRM was released,[20/] the Commission now has before it a sufficient record to act on its concerns. On that basis, NEXTLINK urges the Commission to require that building owners that allow telecommunications access permit like access for competitors under the Commission's ancillary powers.[21/] Such a requirement can be implemented consistent with the Takings Clause of the U.S. Constitution. Mandating access under the Commission's ancillary jurisdictin provisions will help ensure that the local market remains open

---

[18/] NEXTLINK's prior comments on this subject are incorporated herein by reference. Comments of NEXTLINK Communications, Inc., CC Docket 96-98, filed May 26, 1998.

[19/] Notice ¶ 52; Telecommunications Services Inside Wiring: Customer Premises Equipment, and Implementation of the Cable Television Consumer Protection and Competition Act of 1992*:* Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Notice of Proposed Rulemaking, 13 FCC Rcd 3659 3742 ¶ 178 (1997) ("Inside Wiring Report & Order and NPRM").

[20/] Id. (arguing that the Commission's record was not sufficiently developed).

[21/] In addition to the bases of jurisdiction addressed herein, NEXTLINK urges the Commission to consider other theories of jurisdiction which are outlined in a White Paper entitled, "Bringing Telecommunications Competition to Tenants in Multi-Tenant Environments" which was submitted to Commission staff on behalf of ALTS, NEXTLINK, PCIA, Teligent and Winstar before WT Docket 99-217 was created.

in the "last bastion of monopolitic control" and allow customers to enjoy choice as contemplated in the 1996 Act.

A. The Commission has Ancillary Power to Require Nondiscriminatory Access to a Building Owner Facilities.

As an initial matter, a nondiscriminatory MTE access requirement, for owners' property, is consistent with the Commission's subject matter jurisdiction as outlined in Sections 1 and 2(a) of the Communications Act. Sections 1 and 2(a) give the Commission jurisdiction to enforce the Act with respect to "all interstate and foreign communication by wire or radio …"[22/] The Act goes on to define radio communication and wire communication to include "all instrumentalities, facilities, apparatus, and services … incidental to" such communication."[23/] This broad mandate is backed by court decisions that emphasize that Congress grants the Commission significant discretion to regulate within the scope of its expertise.[24/] Thus, the Commission has substantial authority to address novel issues or problems concerning interstate radio and wire communication. The scope of this authority is broader than matters explicitly referred to in the Communications Act.[25/] Congress "define[d] broad areas for regulation and . . . establishe[d]

[22/] 47 U.S.C. §§ 1, 2(a) (emphasis added).

[23/] 47 U.S.C. §§ 3(33), 3(51).

[24/] See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("Rapidly fluctuating factors [mandates that] the administrative process possess sufficient flexibility to adjust itself."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943) (arguing that regardless of explicit grant, the Act gives "the Commission … expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966) (indicating that the FCC as an "expert agency [is] entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

[25/] See, e.g., National Broadcasting Co. v. U.S., 319 U.S. at 219 ("Congress . . . did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency").

standards for judgment adequately related to their application to the problems to be solved."[26/] This reasoning was recently validated by the United States Supreme Court when it held that the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities…."[27/] In Iowa Utilities Bd, the Court rejected arguments seeking an overly limited reading of the Commission's ancillary authority noting that while "Commission jurisdiction always follows where the act applies" ancillary jurisdiction "could exist even where the Act does not appl[y]."[28/]

Reflecting this broad delegation of authority, there are numerous provisions of the Communications Act which permit the FCC to require nondiscriminatory access to building owners' property. First, Section 4(i) of the Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such order, not inconsistent with this Act, as may be necessary in the execution of its functions."[29/] This provision ensures that the Commission enjoys broad flexibility to promulgate regulations that are not within any particularly enumerated statutory power if it is necessary to carry out the purposes and provisions of the Act. Second, Section 303(r) of the Act authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act …."[30/] As such, Section 303(r) acts as a backstop to ensure that the Commission has adequate authority to issue regulations necessary to forward the goals of the Communications Act. Third, 47 U.S.C. § 201(b) authorizes the Commission to "prescribe such

---

[26/] Id.
[27/] AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct 721, 730 (1999).
[28/] Id.
[29/] Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Rcd. 1190, 1192-93, ¶¶ 13-18 (1986).
[30/] 47 U.S.C. § 303(r).

rules and regulation as may be necessary in the public interest to carry out the provisions of this Act.[31/] The Supreme Court has determined that Section 201(b) "explicitly gives the FCC jurisdiction governing matters to which the 1996 Act applies."[32/] The Commission, therefore, may act under any of the afore-mentioned provisions, or a combination thereof, to ensure nondiscriminatory access to an owner's building.

B. The Takings Clause Does Not Bar Nondiscriminatory Access To MTEs

An MTE access requirement does not constitute a constitutional taking if it is tailored to apply only if the property owner has already permitted another carrier to physically occupy its property. In the OTARD Second Report and Order, the Commission examined the Takings Clause in its review of its authority under Section 207 and concluded that Section 207 authorizes the Commission to prohibit restrictions on the devices for the reception of over-the-air video signals in areas within a tenant's exclusive use and control.[33/] The Commission also determined that such a prohibition does not constitute a per se taking of private property within the meaning of the Fifth Amendment because it does not result in a new physical occupation of the landowner's property. Rather, it only affects the use of areas that the landlord has voluntarily

---

[31/] See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (Southwestern Cable) (upholding the Commission's authority to regulate cable television); National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); United Video, Inc. v. FCC, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting).

[32/] AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct 721, 730 (1999).

[33/] In the Matter of Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite, 13 FCC Rcd. 23874, 23880-81, ¶¶ 12-15. ("OTARD Second Report and Order").

allowed the tenant to occupy.[34/] In the OTARD proceeding, however, the Commission concluded that access to common and restricted access areas constitutes a per se taking because it would authorize a permanent physical occupation of the landlord's property.[35/]

The Commission's concerns related to a permanent physical occupation can be alleviated if the agency adopts an MTE access requirement that is limited to areas that are already occupied by other telecommunications carriers. In such cases, as with areas under a tenant's use and control, there would be no compelled physical invasion. Instead, the FCC would simply be regulating the contract rights and duties that already exist between MTE owners and tenants. Thus, the Commission need not perform a "required acquiescence" test[36/] because the MTE owner retains a meaningful choice to exclude all telecommunications carriers. Such a regulatory modification of an existing contract between landlords and tenants is not a per se taking.[37/]

A nondiscriminatory building access requirement is analogous to the rent control ordinance in Yee v. City of Escondido.[38/] Like the rent control ordinance in Yee, a

---

[34/] OTARD Second Report and Order at 23882-85, ¶¶ 19-23, distinguishing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and FCC v. Florida Power Corp., 480 U.S. 245 (1987). Similarly, the Commission determined that its interference with such regulation does not effect a regulatory taking. OTARD Second Report and Order at 23894-96, ¶¶ 24-28.

[35/] OTARD Second Report and Order at 23894-96, ¶¶ 39-43.

[36/] See Loretto, 458 U.S. at 441; Federal Communication Commission v. Florida Power Corp., 480 U.S. 245 (1987). The concept of "required acquiescence" involves a situation where an owner is commanded to endure physical occupation without any invitation. Under a limited MTE access requirement, there is no required acquiescence because the Commission would simply regulate the relationships that already exist pursuant to an earlier invitation allowing access by other carriers.

[37/] See Loretto, 458 U.S. at 441 (noting that the Commission does not question "the authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.").

[38/] 503 U.S. 519 (1992). In Yee, the Court considered a rent control ordinance that restricted the termination of mobile home park tenancies. The Court found that the ordinance did not constitute a compelled physical occupation of land. The Court noted that the statute "merely

nondiscriminatory MTE access requirement alters the relative rights existing under a rental contract and would not constitute a per se taking. Even under the "required acquiescence" analysis, a nondiscriminatory MTE access requirement does not amount to a taking because it lacks the necessary element of "required acquiescence."[39/] This is evidenced by the fact that MTE owners subject to a nondiscriminatory MTE access requirement retain the prerogative of ownership to restrict the access of all telecommunications carriers. However, once these owners have "open[ed] their property to occupation by others" the government retains a constitutionally sound regulatory interest in such arrangements.

---

regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant." Id. at 528 (emphasis in original).

[39/] See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987) (limiting Loretto to find a permanent physical occupation only where the element of "required acquiescence" is present).

V. CONCLUSION

For the reasons state above, NEXTLINK requests that the Commission take action consistent with these Comments to open the local market to additional competition.

Respectfully submitted

/s/ _____

Cathleen A. Massey
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

Howard J. Symons
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Of Counsel

AUGUST 27, 1999

CERTIFICATE OF SERVICE

I, D. Ellen Love, hereby certify that, on this 27th day of August, 1999, I served a copy of the attached Reply Comments of NEXTLINK via hand-delivery on the following:

Chairman William Kennard
Federal Communications Commission
The Portals - 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

Thomas Sugrue, Bureau Chief
Commercial Wireless Division
FCC
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Jeffrey Steinberg, Deputy Chief
Commercial Wireless Division
FCC
The Portals - 5-C450
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
FCC
The Portals - 8 - A302
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael Powell
FCC
The Portals - 8 - A204
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Peter Tenhula, Office of
Commissioner Michael Powell
FCC
The Portals - 8 - A204
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Helgi Walker, Office of
Commissioner Harold Furchtgott-Roth
FCC
The Portals - 8 - A302
445 12th Street, S.W.
Washington, D.C. 20554

James Schlichting, Deputy Chief
Commercial Wireless Division
FCC
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Joel Taubenblatt, Deputy Chief
Commercial Wireless Division
FCC
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Susan Ness
FCC
The Portals - 8 - B115
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Gloria Tristani
FCC
The Portals - A - C302
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Janice Wise, Office of
Commissioner Susan Ness
FCC
The Portals - 8 - B115
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Adam Krinsky, Office of
Commissioner Gloria Tristani
FCC
The Portals - A - C302
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Service (ITS)
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554

/s/
D. Ellen Love

DCDOCS: 155942.2 (3cbq02!.doc)