

**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 Communications	)	
	)	
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	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

**JOINT COMMENTS OF  
THE UNITED TELECOM COUNCIL  
AND  
EDISON ELECTRIC INSTITUTE**

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## SUMMARY

The Federal Communications Commission (“Commission”) has adopted the current *NPRM* to promote competition in local exchange markets by requiring utilities subject to Section 224 of the Communications Act, as amended, to provide competitive telecommunications providers access to multiple tenant environments. In their joint comments on behalf of the electric, gas, and water utilities, UTC and EEI oppose the proposal to expand the pole attachment rules to require mandatory access to building rooftops and riser conduit.

Building rooftops and risers are accessed by utilities under license, not pursuant to rights-of-way or private easements. These licenses confer no right to partition or convey the privileges granted thereunder, preventing utilities from providing rooftop and riser access to competitive telecommunications carriers. “Right-of-way,” as used in Section 224, must be determined according to state law, and the Commission cannot adopt a generic definition that includes building rooftops or riser conduits.

Nor may it expand the scope of the pole attachment rules to such a significant extent. Congress intended the Commission to construe the scope of the pole attachment obligations narrowly, specifically excluding the placement of antennas from coverage under the Pole Attachment Act. Instead, Congress intended to limit access to “poles, ducts, conduit or right-of-way” for wire communications. Mandating building access would create an identifiable class of applications that would effect a taking under the Fifth Amendment to the United States Constitution entitled to just compensation. As Congress did not expressly authorize mandatory building access, the Commission may not impose it, because building access is not necessary to promote telecommunications competition.

Consumers can choose from a variety of telecommunications providers or alternative apartments or office buildings if access to a wireless provider is denied at their current location.

Moreover, the issue of whether wireless attachments are pole attachments within the meaning of Section 224 is pending both before the Commission and the Eleventh Circuit Court of Appeals. It is both premature and procedurally improper to address building access before the larger issue of wireless attachments has been resolved by the Commission rendering a final decision on the pending petitions for reconsideration and by the Eleventh Circuit returning its decision on the appeal.

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**JOINT COMMENTS OF  
THE UNITED TELECOM COUNCIL  
AND  
EDISON ELECTRIC INSTITUTE**

Pursuant to Section 1.415 of the Federal Communications Commission (“FCC”) Rules, The United Telecom Council (“UTC”) and Edison Electric Institute (“EEI”) hereby submit their joint comments in response to the *Notice of Proposed Rulemaking* in the

above-referenced proceeding.<sup>1</sup> UTC and EEI oppose the proposals to obligate utilities to provide non-discriminatory access to telecommunications rights-of-way running over, between and through buildings. The FCC lacks statutory jurisdiction to mandate access to rooftops and riser conduit, which would necessarily preempt state and local property laws and effect a permanent physical occupation of the property rights of building owners in violation of the Fifth Amendment of the Constitution. As a practical matter, the rulemaking builds upon issues that are currently pending before the Eleventh Circuit Court of Appeals and the FCC. It would be premature to mandate building access before these issues are resolved. As a procedural matter, the Commission must first render a final decision on certain pending petitions for reconsideration that question the basis for the asserted right to building access. If the Commission nevertheless imposes building access obligations on utilities, it must ensure just compensation by adopting market rates for such access.

## **I. Introduction**

UTC (formerly known as UTC, the Telecommunications Association) is the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each.

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<sup>1</sup> *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 64 Fed. Reg. 41887 (Jul. 7, 1999)*(hereinafter “*NPRM*”).

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. EEI's U.S. members serve 99 percent of all customers served by the shareholder segment of the U.S. industry. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

Many of the electric, gas and water utility members of UTC and EEI, some of whom also provide commercial telecommunication service, are required to provide non-discriminatory access to poles, conduit and rights-of-way at rates, terms and conditions that are just and reasonable, in accordance with Section 224 of the Communications Act of 1934, as amended. The proposal to require non-discriminatory access to building rooftops and riser conduit would expand the pole attachment rules beyond the Commission's jurisdiction, would force utilities to become accomplices to trespass by competitive telecommunications providers, and would counterproductively drive up the cost of rooftop access or discourage building owners from negotiating for access altogether. Therefore, UTC and EEI are compelled to oppose the building access proposal, despite their general support for promoting local competition in other proceedings, and despite the fact that some of their members currently provide competitive telecommunications services.

## **II. The Commission cannot mandate access to rooftops or riser conduit.**

### **A. Neither rooftops nor riser conduit is a "right-of-way," particularly as used in the Telecommunications Act of 1996.**

In the *NPRM*, the FCC tentatively concluded that, "all-rights-of-way that [a utility] owns or controls, whether publicly or privately granted, and regardless of the purpose for

which a particular right-of-way is used, are subject to section 224.”<sup>2</sup> It explained that “[a] right-of way over another party’s property has been understood in the case law as equivalent to an easement; that is, a right to use or pass over property of another,”<sup>3</sup> and that “the right to place an antenna on private property fits comfortably within this definition.” Therefore, the rulemaking proposes to obligate utilities to provide access to any right-of-way used for communications, including those used for wireless communications. The FCC cannot use its authority to regulate telecommunications under the Communications Act, and its authority to regulate “pole attachments” under the Telecommunications Act of 1996, to interfere with the private property rights of building owners to enter into voluntary agreements with utilities.<sup>4</sup>

1. Licenses are not easements or right-of-way.

Generally, rooftops and risers are accessed by utilities under *license*, not pursuant to rights-of-way or private easements. Thus, the FCC has no jurisdiction over them. Licenses are not rights-of-way or any other kind of easement under the law of property. Instead, a license with respect to real property is a privilege to go on the premises for a certain purpose, and does not convey any right to partition or convey the privileges granted thereunder. A license is ordinarily considered to be a mere personal or revocable

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<sup>2</sup>*NPRM* at ¶41.

<sup>3</sup> *NPRM* at ¶42 (citing *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 276-79 (1942); *Joy v. City of Saint Louis*, 138 U.S. 1, 44 (1890); and *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520, 527 (Fed. Cir.), *cert. denied*, 116 S.Ct. 61 (1995)).

<sup>4</sup> Moreover, relevant safety codes may not permit co-location of communication cable and electrical conductors not owned by the same entity.

privilege to perform an act or series of acts on the land of another and the owner of the property may exclude anyone and any use not covered by the license.<sup>5</sup>

2. Access pursuant to rights-of-way and private easements is strictly a matter of state law.

Utility “right-of-way” is a very specific concept, well-defined under long-developed state law. The concept refers to an easement obtained by or through eminent domain, and State law controls the ability of utilities to apportion or convey any right of control or access obtained thereunder.<sup>6</sup> The FCC proposal confuses private easements with “right-of-way.” In fact, private easements are not rights-of-way under state law, and the FCC has no jurisdiction over them. They are controlled by individual agreements with property owners pursuant to state law and, compared to right-of-way, can be more restrictive of a utility’s ability to apportion or convey any right of physical access obtained thereunder. In some cases, private easements do not permit the utility to make any collateral use of the easement.

**B. Congress did not preempt existing state law governing the interpretation of licenses, private easements and rights-of-way.**

The ability of utilities to apportion or convey licenses, private easements, and rights-of-way is a matter of state law. To require third-party access to all licenses and private easements, as well as rights-of-way, used by utilities would be an unauthorized

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<sup>5</sup> *Black’s Law Dictionary* (6<sup>th</sup> Ed.), at 920, “License - Real Property” citing *Hennebont Co. v. Kroger Co.*, 221 Pa.Super. 65, 289 A.2d 229, 231; *Timmons v. Cropper*, 40 Del.Ch. 29, 172 A.2d 757, 759.

<sup>6</sup> See *Black’s Law Dictionary*, at 1326, citing *Bouche v. Wagner*, 206 Or. 621, 293 P.2d 203, 209 (1956); *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 177 N.W.2d 786, 789 (1970).

and completely unnecessary usurpation of state authority to control the law of property and contracts. Congress did not intend such a far-reaching result.

1. There is no clear expression of Congressional intent to federalize the law of property and contracts to the extent proposed by the Commission in this proceeding.

Congress did not require telecommunications providers to be given access to private easements used by utilities, much less property accessed by utilities under license. Further, Congress did not require unrestricted access. Congress provided *only* that “*nondiscriminatory access*” be provided to “any pole, duct, conduit, or right-of-way *owned or controlled by*” a utility.<sup>7</sup>

Given that a utility license to access riser conduit or building rooftops does not reflect ownership or control, and that the rights-of-way which utilities do own or control through eminent domain are distinct from private easements, the Commission may not conclude that rooftops and risers are rights-of-way subject to Section 224. Moreover, the Commission has acknowledged that, “[t]he scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law.”<sup>8</sup> As Congress did not define what it meant by “right-of-way,” the Commission should defer to the determination of state law for the extent of utility control over rights-of-way or private easements.

2. Federal preemption of this issue cannot be implied from the language of the Telecommunications Act of 1996.

Nor are state property laws implicitly preempted by Section 224. Preemption may only be implied when Congress “occupies the field” to such an extent that there is no

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<sup>7</sup> 47 U.S.C. §224(f)(1)(1998)(*emphasis added*).

<sup>8</sup> *Local Competition First Report and Order*, CC Docket 96-98, 11 FCC Rcd. 15499, 16082 (1996).

longer any room for state authority,<sup>9</sup> or when state law conflicts with a paramount federal law to such a degree that one cannot comply with both.<sup>10</sup> Each requires an examination of the language and purpose of the statute at issue, and its interaction with state law.

Federal regulation of telecommunications does not occupy the field of all property rights, all easements, rights-of-way, or licenses to use property. To the contrary, Section 332(c)(7) explicitly preserves local zoning authority “over the placement, construction, and modification of personal wireless service facilities,” to the extent they do not discriminate among providers of functionally equivalent services and do not actually or effectively prohibit the provision of personal wireless services.<sup>11</sup> To the extent private property rights must conform to local zoning authority, it is apparent that Federal regulation has not displaced state and local property laws.<sup>12</sup>

Moreover, state and local property laws do not so manifestly conflict with Federal regulation of telecommunications that they must be preempted. In other words, the Commission can reach its goals by means other than creating or exacerbating potential conflicts with state law regarding use of utility easements and rights-of-way. For instance,

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<sup>9</sup> See *Cipollene v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>10</sup> See *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

<sup>11</sup> 47 U.S.C. §332(c)(7)(1998).

<sup>12</sup> Federal law also should not be used to preempt legitimate state and local safety regulations. As the FCC has already noted, access to utility property may be denied for reasons of “safety, reliability and generally applicable engineering purposes.” *Local Competition First Report and Order*, 11 FCC Rcd. at 16078-79, ¶¶1169-70, citing 47 U.S.C. §224(f)(2). Uncontrolled construction of telecommunications facilities on public property can have devastating consequences. See Steven Gray, *The Water Flies, Then People Walk*, *The Washington Post*, August 19, 1999 at B3 (describing loss of water to a neighborhood when a telecommunications contractor laying fiber optic cable punctured a 24-inch water main).

the Commission can rely on and enhance the ability of customers to obtain wireless service, data transmission services, etc., by means of alternative technologies such as DSL and cable.<sup>13</sup> In addition, the existing vibrant, free and open market in real property (and even location<sup>14</sup>) will ensure that tenants have access to alternative suppliers of space who *will* allow them access to any desired service not available in their current building.

3. This NPRM, and the procedures therein, violate the spirit of Executive Order 13132 (Aug. 4, 1999), “Federalism.”

Even as an independent regulatory agency, the FCC is compelled to honor “[t]he constitutional relationship among sovereign governments, State and national, [that] is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution.”<sup>15</sup> However, the Commission has not consulted with the states to consider possible alternatives to its proposal. The Commission also has not indicated why it believes that Federal preemption is necessary in order to carry out its duties, or is otherwise justified under the Telecommunications Act of 1996.

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<sup>13</sup> See *CLEC Expenditures Set to Take Off*, Newsbytes, Aug. 18, 1999 (reporting that all respondents to survey of CLECs by Infonetics Research plan to offer DSL and a majority plan VPNs and VoDSL (Voice over DSL) services); *Lucent Technologies, Actel Integrated Communications Announce \$35 million Strategic Agreement to Expand Actel’s Voice/Data Network*, Newsbytes, Aug. 19, 1999 (reporting that Actel will be among the first companies to deploy Lucent’s cutting edge convergent technologies, including Voice Over Digital Subscriber Lines (DSL) and scaleable ATM); *Northpoint and Focal Enter Agreement to Develop Integrated Voice Over DSL Services – Leading CLECs Will Jointly Trial “Last Mile” Voice and Data Solutions*, Newsbytes, Aug. 19, 1999 (reporting that emerging voice over DSL technology avoids costly local loop fees of ILEC carriers, reducing business service rates).

<sup>14</sup> Cities, counties and states compete for new corporate citizens as much or more than building owners compete for new tenants.

<sup>15</sup> Exec. Order. No. 13132, §2(c).

**III. The FCC must resolve pending petitions for reconsideration and issues on appeal that question the basis for imposing building access rights under Section 224.**

**A. Pending matters need to be addressed.**

Before opening a new proceeding to address building access, the FCC must first resolve the fundamental question whether wireless attachments are “pole attachments” within the meaning of Section 224 of the Telecommunications Act. This question is currently pending before the Eleventh Circuit Court of Appeals.<sup>16</sup> It is premature for the Commission to mandate access to building rooftops and riser conduit under Section 224 for wireless carriers before the Eleventh Circuit has returned its decision. Resolving the issue of wireless attachments is a necessary precondition to expanding that right to include building access. Nor could the FCC simply defy an adverse appellate decision.<sup>17</sup>

It is also procedurally improper for the FCC to adopt a new rulemaking to address building access when petitions for reconsideration addressing it and related issues have been fully briefed and have remained pending for as much as three years. WinStar filed its *Petition for Reconsideration* in CC Docket No. 96-98 on September 30, 1996.

Comments and reply comments were timely filed by American Electric Power Service Corporation *et al.* (“AEPSC *et. al.*”), Ameritech, Duquesne Light Company (“Duquesne”), Edison Electric Institute and UTC, Sprint Corporation and the United

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<sup>16</sup> *Gulf Power Company v. FCC*, 998 F.Supp. 1386 (N.D. Fl. 1998), No. 98-6222, (11<sup>th</sup> Cir. argued Feb. 25, 1999).

<sup>17</sup> *See e.g. Iowa Utils. Bd. v. FCC, Writ of Mandamus*, No. 96-3321 (8<sup>th</sup> Cir. Jan. 22, 1998) (ordering the FCC to confine its pricing role under section 271(d)(3)(A) to determining whether applicant Bell Operating Companies (“BOCs”) have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services), *rev’d. AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

States Telephone Association. Moreover, AEPSC *et al.*, Duquesne and Florida Power & Light (“Utility Petitioners”) all filed Petitions for Reconsideration opposing the broader issue of wireless attachments, as a general principle.

Given the unanimous opposition to building access, it is a mystery how the Commission can now tentatively conclude that, “the record compiled in response to [WinStar’s] Petition [indicates] 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.”<sup>18</sup> Yet, the Commission has chosen to resuscitate WinStar’s petition, leaving other pending petitions filed by AEPSC *et al.*, Duquesne and Florida Power & Light twisting in the wind. The arbitrary and capricious manner in which the Commission has ignored the existing record to advance the interests of a single petitioner to the exclusion of others clearly raises the “combination of danger signals that the [FCC] has not really taken a ‘hard look’ at the salient problems and has not genuinely engaged in reasoned decision-making.”<sup>19</sup>

**B. Wireless attachments are not mandated by Section 224.**

If the Commission plows ahead undaunted by the pending appeal at the Eleventh Circuit and ignoring the full record developed in still open proceedings, it should nevertheless first render a final decision on the larger issue of wireless attachments raised by the Utility Petitioners. Utility Petitioners maintain that wireless attachments are not

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<sup>18</sup> *NPRM* at ¶39.

<sup>19</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

pole attachments under Section 224, because wireless attachments are neither necessary, nor did Congress affirmatively grant access to them.<sup>20</sup>

In 1978, Congress reluctantly intervened on behalf of cable television companies in the “least intrusive manner,” in order to counter “utilities’ superior bargaining position” that it perceived resulting from the “local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities.”<sup>21</sup> Moreover, pole attachments were originally limited to “any attachment *for wire communications*.”<sup>22</sup> Congress only revised the definition of pole attachments in order to narrow the application of the Act to a “cable television system” rather than the broader class of wire communications services.<sup>23</sup> Finally, Congress clarified that the Pole Attachment Act would not require the Commission “to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire or even access and rents for antenna sites,” adding that, “any problems pertaining to restrictive easements of utility poles and wires over private property, exercise

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<sup>20</sup> See AEPSC *et al.*, *Petition for Reconsideration*, CC Docket 96-98 at 1-18, 26-29 (Sept. 30, 1996); Duquesne, *Petition for Reconsideration*, CC Docket 96-98 at 17-18 (Sept. 30, 1996); and Florida Power & Light, *Petition for Reconsideration*, CC Docket 96-98 at 24-26 (Sept. 30, 1996) and the pole attachment dockets (CS Docket 97-98 and CS Docket 97-151).

<sup>21</sup> Communications Act Amendments – Penalties and Forfeitures Authority and Regulation of Cable Television Pole Attachments by the Federal Communications Commission, S. REP. NO. 95-580 at 13, 15 (1978).

<sup>22</sup> H.R. REP. NO. 94-1630 at 30-31; and H.R. REP. NO. 95-721 at 10.

<sup>23</sup> See H.R. REP. NO. 94-1630 at 30-31 (1976). See also *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 930 (D.C. Cir. 1993)(explaining that the substitution of the words “wire communications” for “cable television system” were made at the behest of the FCC, and were inserted to limit the application to cable television systems as a subset of the broader class of attachments for wire communications).

of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction.”<sup>24</sup>

The scant legislative history from the 1996 amendments to Section 224 adds nothing to alter the conclusion that Congress only intended to open access to bottleneck facilities necessary to route *wire* communications. The Commission itself reached a similar conclusion when it explained that:

The intent of Congress in Section 224(f) was to permit cable operators and telecommunications carriers to “piggyback” along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.<sup>25</sup>

Unlike wireline communications that must “piggyback” over poles and through conduit, wireless communications are able to leapfrog across such perceived bottlenecks, undercutting the need for wireless attachments to these facilities, let alone building rooftops and riser conduit.<sup>26</sup>

Given Congress’s intent to limit access to perceived bottleneck facilities, it becomes clear that it meant to strictly limit access to “poles, ducts, conduits or rights-of-way used, in whole or in part, for any *wire communications*,”<sup>27</sup> when it defined the extent of the Commission’s jurisdiction over utilities. Had Congress intended to grant access for wireless attachments, it would have done so expressly, which it did not. Nor may the Commission imply such intent, given the Fifth Amendment Taking implications for the

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<sup>24</sup> S. REP. NO. 95-580 at 16.

<sup>25</sup> *Local Competition Order*, 11 FCC Rcd 15499, 16085(1996).

<sup>26</sup> See *Opposition of Sprint Communications*, CC Docket 96-98 at 22-23 (Oct. 31, 1996).

<sup>27</sup> 47 U.S.C. § 224(a)(1)(1998).

general proposition of mandating wireless attachments or extending that proposition to mandate building access.<sup>28</sup>

Absent express authority from Congress, wireless providers may not claim access simply because they claim to fit within the definition of “telecommunications carriers” entitled to pole attachments. In extending pole attachment access to “telecommunications carriers,” Congress did not revise the definition of pole attachments to include wireless attachments, nor did it even consider the issue. If nothing else, had it meant to include wireless attachments, Congress would have conformed Section 224(a)(1) to confer jurisdiction over utilities that own or control poles, ducts, conduits or rights-of-way used for any wire *or wireless* communications. Instead, by retaining wire communications as the sole “nexus” triggering jurisdiction over utilities, Congress conveyed that access was neither required for wireless attachments nor to facilities used for wireless communications.

Moreover, such an interpretation comports with the axiom that legislative intent is determined not “by a single sentence or member of a sentence, but [through] the provisions of the whole law, and its object or policy.”<sup>29</sup> As the legislative history suggests that Congress intended to narrowly construe the scope of the right to pole attachments, taking aim solely at facilities over which utilities were perceived to exercise bottleneck control in specific relation to wire communications, the FCC must conclude that wireless

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<sup>28</sup> See *Delaware, L. & W. R.R. Co. v. Morristown*, 276 U.S. 182 (1928). See also, *Petition for Reconsideration of AEPSC et al.*, CC Docket 96-98 at 29, n.52 (Sept. 30, 1996).

<sup>29</sup> *United States Nat’l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

attachments, such as building access, are beyond the scope and the purpose of Section 224.

#### **IV. Building access implicates the Takings Clause of the Fifth Amendment.**

##### **A. Mandating nondiscriminatory access to building rooftops and riser conduit would effect an unconstitutional Fifth Amendment Taking.**

Absent express authority from Congress, establishing a rule to impose the permanent physical occupation of building rooftops and riser conduit falls within an “‘identifiable class’ of applications that would seem to constitute a taking.”<sup>30</sup> In *Bell Atlantic*, the court denied similar FCC assertions of implied authority to require collocation for competitive access providers, stating that, “such an implication may be made only as a matter of necessity, where ‘the grant [of authority] itself would be defeated unless [takings] power were implied.’”<sup>31</sup>

Likewise, Section 224 does not expressly authorize the Commission to impose building access, nor is it such a necessary policy that the authority may be implied. As discussed, *supra*, Congress did not intend to include wireless attachments as “pole attachments,” under Section 224. As discussed, *infra*, mandatory building access is not

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<sup>30</sup> *Bell Atlantic v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994). See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)(holding that ordering landlords to allow cable companies to access rooftops is a permanent physical occupation and a taking entitled to just compensation). See also *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. 825 (1987) (holding that requiring an easement as a condition for a building permit is a taking); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)(noting that the landowner’s right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

<sup>31</sup> *Bell Atlantic v. FCC*, 24 F.3d at 1446, quoting *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F.362, 373 (C.C.W.D. Pa), *aff’d*, 123 F.33 (3d Cir. 1903), *aff’d*, 195 U.S. 540 (1904).

necessary to promote local competition. Therefore, mandatory building access is an unconstitutional taking that the Commission may not impose.

**B. To require rates at less than full market value would be an unconstitutional taking of private property by the government.**

Utilities have paid fair market value for their rights-of-way and private easements. It would be an unconstitutional taking for the FCC to mandate access at less than the full market value as of the time of the use of those property rights.<sup>32</sup> Setting below-market rates would entitle property owners, such as utilities, to a Tucker Act claim against the government for the difference between the allowed rates and the market rate.<sup>33</sup> In addition, market rates are not in any way unconscionable or anticompetitive. There is a vibrant market for wireless attachment space. Even the federal government demands to be paid full market rates for wireless attachments.<sup>34</sup>

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<sup>32</sup> See *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441.

<sup>33</sup> See *Bell Atlantic v. FCC*, 24 F.3d at 1445, n.2. However, in order to avoid creating a broad class of takings claims, compensable in the Court of Claims, courts would not owe *Chevron* deference to the FCC's building access rule and would likely strike it in the absence of express authority from Congress to impose it. *Id.* Beyond the issue of rates, the Commission has not explained how it would enforce such a requirement, and how evidentiary burdens would be assigned when reviewing complaints over access.

<sup>34</sup> See, e.g., GSA Bulletin FPMR D-242, 62 Fed.Reg. 32,611 (June 16, 1997) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); GSA Bulletin FPMR D-246, 63 Fed.Reg. 10,631 (Mar. 4, 1998) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); see also, Budget of the United States Government, Fiscal Year 2000, Appendix, page 181, ID. Code 12-9921-4-999 (1999) (proposal for utilities to pay full market value for use of right-of-way on federal land); and see Statement of Mike Dombeck, Chief USDA Forest Service, Before the House Committee on Resources, Forest Health Subcommittee, Forest Service Fiscal Year 2000 Budget (Feb. 23, 1999).

**V. The Commission should not require building access as a policy matter.**

**A. The Commission does not need to require such access.**

The regulations proposed in this proceeding are unnecessary, as the Commission has alternative means by which to promote facilities-based competition for wireless and data transmission services. Several competing technologies (such as DSL and cable) offer the same or superior broadband capacity. Moreover, other wireless carriers are capable of providing telecommunications service to tenants without the need for rooftop access.<sup>35</sup> Therefore, proposed regulations are simply unnecessarily invasive and prescriptive.

In addition, the advanced telecommunications and video services market is vibrant and fast-growing.<sup>36</sup> It does not need heavy-handed regulation of access. As Chairman Kennard himself noted in the context of broadband development, in his June 15 address to the National Cable Television Association in Chicago, “let the marketplace do it. ... [W]e can’t predict where this market is going. ... The competitive fires are burning. ... [A] deregulatory approach ... will let this nascent industry flourish.”<sup>37</sup>

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<sup>35</sup> For example, a satellite-based, high-speed Internet service called DirecPC is available through Hughes Network Systems. Upstream transmissions are sent via a dial-up connection over the PSTN. Downstream transmissions from the satellite are sent at rates of up to 400 kbps. Services start at US \$ 9.99 per month (plus US\$ 0.60 per megabyte downloaded) to US\$ 129.95 per month. The industry is working on a viable wireless upstream path, and DirectTV, the largest DBS provider and sister company to Hughes Network Systems, has announced an agreement with Microsoft to develop software and hardware to deliver interactive broadcast services to personal computers. *See* [www.direcpc.com](http://www.direcpc.com) (visited Aug. 27, 1999).

<sup>36</sup> *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, CC Docket 98-146 at ¶6 (Feb. 2, 1999).

<sup>37</sup> This Week’s Big Thinker, Excerpts from Speech by William Kennard before the National Cable Television Association on June 15, 1999,

And further, in an interview broadcast August 6 on Ziff-Davis Television's "Big Thinkers,"<sup>38</sup> Chairman Kennard reiterated that "the best way to get [the broadband infrastructure] built is with a minimum amount of regulation. ... The question is how do you get [openness]. Do you regulate your way there? Or are there other means? I would like to explore other means of getting there. ... In fact, we are releasing a paper that explains why restraint, government restraint, has been good for the Internet space." EEI and UTC believe that the same approach should be used in building out the infrastructure at issue in this proceeding.

Even more telling, Chairman Kennard also noted that, just as is the situation in this proceeding, "[p]eople are coming to Washington ... and they're saying 'Regulate, regulate. Intervene in the marketplace.' We don't know exactly what this marketplace is going to look like yet. ... [L]et's not put a pall of regulation over this whole marketplace until we know how it's going to take shape."<sup>39</sup> If that is true for the private property involved in the issue of whether to mandate access to cable systems, it is just as – if not more – true for the private property at issue in this proceeding.

Further, the technologies for providing alternative voice, data, and video service are not only available, they are rapidly evolving. As the Chairman noted on August 6, "we have to have a sense of humility about our jobs. That we don't know exactly where it's

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<http://www.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/jump/0,6918,2294365,00.html> (visited Aug. 25, 1999).

<sup>38</sup> This Week's Big Thinker, Transcript from August 6, 1999 interview with William Kennard, <http://www.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/story/0,6917,2294299,00.html> (visited Aug. 25, 1999).

<sup>39</sup> *Id.*

going and what new paradigm-shifting technology is going to come along.”<sup>40</sup> Given that atmosphere, it is completely unnecessary to require building owners and users of right-of-way and private easements to provide access in order to assist certain current technologies at the expense of other current technologies, market participants, and all property owners.

Nor has WinStar demonstrated that negotiating building access has significantly impeded its ability to compete. Although its petition scolds the Commission for failing to address in the *Local Competition First Report and Order*, “*the particularized concern of absolutely critical importance to WinStar*” (i.e. building access), WinStar offers no evidence to substantiate its need for building access.<sup>41</sup> In fact, WinStar is no small competitor fighting against overwhelming odds. Rather, WinStar is a strong and canny competitor, larger and more powerful than many utilities.

WinStar’s business success since 1996 shows that mandatory building access is not necessary. Without Commission intervention, WinStar has negotiated access to 4,200 building rooftops, and its market capitalization has risen over 457 percent in only two years, from approximately \$336.6 million in 1997 to over \$1.5 *billion* at present.<sup>42</sup> Whereas historically it has negotiated rooftop access on a building-by-building basis, more

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<sup>40</sup> *Id.*

<sup>41</sup> WinStar Communications, Inc., *Petition for Reconsideration*, CC Docket 96-98 at 5 (filed Sept. 30, 1996).

<sup>42</sup> 1999 10-K Annual Report of WinStar Communications, Inc. filed with the Securities and Exchange Commission, at 1-3 (Mar. 30, 1999); and 1997 10-K Annual Report, at 1 (Mar. 30, 1997).

recently, WinStar has begun to negotiate for rooftop rights with portfolios of buildings, resulting in the following contracts:

- In December 1998, [WinStar] acquired roof rights to a portfolio of more than 600 buildings owned or controlled by Spieker Properties, one of the largest publicly traded real estate investment trusts in the United States.
- In October 1998, [WinStar] acquired roof rights to a portfolio of more than 400 buildings through an agreement with DEVNET, LLC., a firm which manages the telecommunications needs for commercial buildings throughout the United States.
- In May 1998, [WinStar] acquired roof rights to a portfolio of 96 commercial buildings owned or managed by CIGNA Investments, Inc., an investment subsidiary of CIGNA Corporation, a major insurance company.<sup>43</sup>

If any conclusion may be drawn from the market, it is that negotiating building access is easier now than before, and that WinStar is effectively competing and handsomely profiting without the Commission mandating nondiscriminatory access to private property.

**B. Requiring such access would harm the development of facilities-based competition.**

FCC should be promoting competition in the relevant markets, not any particular type of technology. “Government interventions [in markets] must aim to provide fair competitive opportunities, not to protect competitors from efficient competition. Any attempt to deny [property owners] the benefit of or handicap them in exploiting genuine ... advantages threatens to suppress competition and denies consumers its full benefits.”<sup>44</sup>

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<sup>43</sup> *Id.* at 4.

<sup>44</sup> Alfred E. Kahn, *Deregulation: Micromanaging the Entry and Survival of Competitors* at 7, February 1998.

Again, Chairman Kennard noted in his August 6 interview, “to get competition going, ... we [must] create the conditions for expediting investment in that marketplace. And that means that we in government have to be restrained about imposing regulation ... [to] promote competition and try to liberate everybody to compete in a more competitive marketplace. ... [T]hat’s best for American consumers.”<sup>45</sup>

The FCC’s proposal in this proceeding will actually thwart the development of facilities-based competition. Property owners will be reluctant to provide access to any one provider of communications service if this will require them to offer access to all providers, particularly if at below-market, and even below-cost, rates. Building owners are also likely to seek legal redress of the economic harm and other concerns stemming from any FCC-mandated changes in their existing agreements for building access, in addition to harm resulting from mandated terms for future agreements.<sup>46</sup>

As Chairman Kennard noted in his August 6 interview, “we ought to have an essentially hands-off approach ... . [W]hat we don’t want to do is depress investment. ... [Y]ou don’t want to have ... regulatory uncertainty and difficulty when you’re trying to get this infrastructure built out.”<sup>47</sup>

## Conclusion

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<sup>45</sup> This Week’s Big Thinker, Transcript from August 6, 1999 interview with William Kennard, <http://www.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/story/0,6917,2294299,00.html> (visited Aug. 25, 1999).

<sup>46</sup> See *Bell Atlantic v. FCC*, 24 F.3d at 1445, n.2 (noting that the Communications Act permits Tucker Act remedies to Fifth Amendment claimants).

<sup>47</sup> This Week’s Big Thinker, Transcript from August 6, 1999 interview with William Kennard, <http://www.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/story/0,6917,2294299,00.html> (visited Aug. 25, 1999).

UTC and EEI support the Commission’s efforts to promote competition in telecommunications, but believe that mandatory building access premised on Section 224, runs counter to the “pro-competitive deregulatory national policy framework” that Congress sought to achieve. More specifically, Congress defined the outer limits of the scope of Section 224 when it required utilities to provide access to “poles, ducts, conduit or rights-of-way,” and did not intend to expand that list to include building rooftops or riser conduit. Nor did it even intend to provide for wireless attachments, generally.

Instead, Congress made clear that matters affecting “right-of-way” are to be determined under state law. Nor did it imply that state jurisdiction over property rights should be preempted. To the contrary, by permitting states to preempt federal regulation of pole attachments, Congress evinced the opposite intent.<sup>48</sup> Therefore, imposing mandatory building access through Section 224 would violate fundamental principles of federalism by usurping state jurisdiction over rights in real property.

Nor is building access so imperative that the Commission can rely on implied authority within the Communications Act to impose it. There is a variety of competing telecommunications providers, using a variety of delivery technologies all vying for the lucrative multi-tenant dwelling unit market. Even if they were unable to negotiate access for entry to one building, nothing prevents them from negotiating access to others. Nor is there evidence that building access is a widespread problem that would allow the Commission to rely on implied authority to intervene on behalf of fixed wireless providers. The Commission should not allow itself to be coaxed out onto that ledge.

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<sup>48</sup> See 47 U.S.C. §224(c).

Moreover, the Commission should not use Section 224 as a backdoor for asserting jurisdiction over building owners. If the Commission determines that building owners are to blame for impeding competition, utilities should not be made scapegoats for their anticompetitive practices. The Commission must find other, preferably legislative, solutions for jurisdiction over building owners.

In any event, addressing building access without first resolving the merits of wireless attachments is putting the procedural cart before the horse. The Commission must first render a final decision on petitions for reconsideration opposing wireless attachments that have remained pending for almost three years. Even then, it should await the outcome of the appeal pending at the Eleventh Circuit before proceeding to consider the merits of building access.

**WHEREFORE, THE PREMISES CONSIDERED,** UTC urges the Commission to act in conformity with the views expressed herein, denying the petition of WinStar and refusing to require mandatory access to rooftops and risers, as well as utility poles, ducts, conduits or rights-of-way, for wireless telecommunications providers.

Respectfully submitted,

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