

But those who choose to dig in their heels should know that we will continue to monitor this situation. I am committed to opening the local loop, and building access is a key component to that effort.

Again, I thank the Chairman for holding this hearing, and I look forward to the testimony of the witnesses.

Mr. TAUZIN. So we will start today by welcoming the chief of the Wireless Telecommunications Bureau, Mr. Thomas Sugrue, who will give us some idea of what the FCC is doing in this area and give us an update on timing and what may be happening, what is going on. So you may all learn something about what is about to happen, all of you, from the FCC.

Mr. Sugrue.

STATEMENTS OF THOMAS J. SUGRUE, CHIEF, WIRELESS TELECOMMUNICATIONS BUREAU, FEDERAL COMMUNICATIONS COMMISSION; SCOTT BURNSIDE, SENIOR VICE PRESIDENT, REGULATORY AND GOVERNMENT AFFAIRS, RCN CORPORATION; JOHN D. WINDHAUSEN, JR., PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES; WILLIAM J. ROUHANA, JR., CHAIRMAN AND CEO, WINSTAR COMMUNICATIONS; BRENT W. BITZ, EXECUTIVE VICE PRESIDENT, CHARLES E. SMITH COMMERCIAL REALTY L.P.; ANDREW HEATWOLE, PARTNER, RIPLEY-HEATWOLE REALTORS; JODI CASE, MANAGER OF ANCILLARY SERVICES, AVALON BAY COMMUNICATIONS INCORPORATED; LARRY PESTANA, VICE PRESIDENT, ENGINEERING, TIME WARNER CABLE; AND MARK J. PRAK, PARTNER, BROOKS, PIERCE, MCLENDON, HUMPHREY, AND LEONARD

Mr. SUGRUE. Thank you, Mr. Chairman and Congressman Markey, members of the subcommittee. I am pleased to accept the invitation to testify today on these important issues.

Apart from my role as chief of the Wireless Bureau at the FCC, I have some personal experience with the benefits of enabling telecommunications providers to have competitive access to apartment buildings. Recently I sold my house and moved into an apartment while awaiting the construction of a new home. I was happy to discover that, when we signed our lease, we were asked which of two providers did we want to select for our local telephone service: Bell Atlantic or Jones Communication. Jones, the cable company in Alexandria, Virginia, is providing telephone service in that city. I felt empowered by the availability of choice and the service packages offered by Jones were attractively priced and included an array of options. I was able to compare the two offerings and pick between them. All Americans should have such a choice.

I should hasten to add that I selected Jones, not out of any unhappiness with my friends at Bell Atlantic, but simply out of professional curiosity.

How does this competition really work and so far the phone seems to work.

Tenants in multiple dwelling units or MDUs potentially play a critical role in the development of local competition. They have the opportunity to be among the very first customers to realize those benefits because of the economies of scale posed by the concentration of customers in these locations. As a result, MDUs could either be the beachhead in which facilities-based competition gets a foot-

hold or they could be the last place competition arises because competitive carriers lack the access to customers.

Competitive access to MDUs is also an important first step toward advancing local competition in non-MDU areas. The foothold Jones has in my apartment building and other MDUs and the customer base and operational experience that it is gaining could enable this carrier to take the next step, serving customers more broadly throughout all of Alexandria.

Now on the video side, I do admit some frustration with my situation. Since my apartment faces northeast, a DBS dish on my balcony won't work. There ain't so satellites up in that direction. So even though I can look out my window toward Boston, I can't receive the New England regional sports channels that cover my beloved Boston Red Sox and Boston College athletic teams a result that, while frustrating to me as a fan, is probably beneficial to my mental health. But, Congressman Markey, I am sure you feel my pain.

But, personal experience aside, the importance of promoting facilities-based local competition cannot be understated as a critical step in reaching the pro-competitive goals Congress established in the Telecom Act of 1996. In a competitive local telecommunications market, competitors will have the incentive to provide advanced features such as broad-band access and innovative service packages in order to attract customers to their offering. This pro-consumer result will be achieved in a timely and efficient manner only in the context of full facilities-based competition by service providers using all delivery technologies.

As my formal testimony more fully explains, the Commission has considered these issues in a number of proceedings aimed at promoting facilities-based competition in video and telecommunications. These proceedings have made inroads in this area, but issues do remain. Particularly in light of the emergence of new competitors in the form of wireless telecommunications providers, like Winstar, Telegent, and NextLink.

The Wireless Bureau has recently deployed Spectrum and will continue to do in the future, which makes the emergence of these new competitors a reality. The Bureau also intends to propose to the Commission soon that it initiate a proceeding that will attempt to address in a more comprehensive manner a number of the inter-related questions about building access issues involving these local telecommunications service providers.

I respectfully suggest that the subcommittee consider whether legislation appropriate to advance competitive access to MDUs. Legislation could clarify the Commission's authority to take action in the public interest to promote reasonable and nondiscriminatory access. Legislation could also provide guidance to the Commission and to reviewing courts on the proper scope of agency action, including the principles that should govern and the limitations that should apply. And it could help ensure that whatever decisions the Commission makes in this area do not get bogged down in protracted litigation initiated by one side or the other in this debate. The Commission staff would be pleased to offer their technical assistance to the subcommittee in this effort.

Again, I thank the subcommittee for this opportunity and I look forward to working with you on this matter.

[The prepared statement of Thomas J. Sugrue follows:]

PREPARED STATEMENT OF THOMAS J. SUGRUE, CHIEF, WIRELESS
TELECOMMUNICATIONS BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, Ranking Member, and Members of the Subcommittee: Good morning. I am Thomas Sugrue, Chief of the Wireless Telecommunications Bureau at the Federal Communications Commission. I welcome this opportunity to address the Subcommittee as it considers how best to ensure that residential and business customers located in multiple dwelling units ("MDUs"), such as apartment and office buildings, will have reasonable opportunities to obtain advanced and innovative local telecommunications services and video programming services from competitive service providers.¹

IMPORTANCE OF FACILITIES-BASED COMPETITION

The Commission has worked hard to implement a principal goal of the Telecommunications Act of 1996 ("1996 Act")—the promotion of competition in local telecommunications markets. As you well know, the 1996 Act contemplated three entry strategies for local competitors: use of their own physical facilities, use of unbundled elements of the incumbents' networks, and resale of the incumbents' services. All three of these entry strategies remain important as means of introducing competition, and the Commission continues to take actions to facilitate all three. In the long term, however, the most substantial benefits to consumers will be achieved through facilities-based competition. Only facilities-based competitors can avoid reliance on bottleneck local network facilities. Only facilities-based competition can fully unleash competing providers' abilities and incentives to pursue publicly beneficial innovation.

Facilities-based competition is important not only for the efficient and ubiquitous provision of basic telecommunications services, but also for the availability of advanced and innovative services. In a competitive local telecommunications market, competitors will have the incentive to provide advanced features, such as broadband access, and innovative service packages in order to attract customers to their offerings. This pro-consumer result will be achieved in a timely and efficient manner, however, only in the context of full facilities-based competition by service providers using all delivery technologies.

Moreover, the benefits of competition cannot be fully realized unless competitive local telecommunications services can be made available to all consumers, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. To the extent that certain classes of customers are unnecessarily disabled from choosing among competing telecommunications service providers, the Congressional goal of deploying services "to all Americans" is placed in jeopardy. Furthermore, the fullest benefits of competition cannot be achieved unless, to the extent feasible, competitive services become available in all sectors of the markets of incumbent local exchange carriers ("LECs"). Specifically, facilities-based competition has been especially important in the video area where competing multichannel video program distribution ("MVPD") providers have sought both access to inside wiring installed by cable companies and the ability to install their own antennas on MDU premises.

NATURE AND IMPACT OF THE MDU PROBLEM

I share the Subcommittee's concern in calling this hearing, which is focused on two groups of users and their ability to realize the benefits of facilities-based local telecommunications and video services competition: the millions of Americans who live in apartment buildings and other MDUs; and the many businesses, including small businesses, that are located in office buildings that they do not control. The special difficulty with offering competitive facilities-based services to these customers arises from the need to transport signals across the building owner's premises to the individual customer's unit. For a telecommunications reseller or a user of the incumbent LEC's unbundled local loops, this transport is typically accomplished by piggybacking on the incumbent LEC's existing facilities as part of the resale or unbundled access agreement. A carrier that uses its own wireline or wireless

¹ The comments and views expressed in this Statement are offered in my capacity as Chief of the Commission's Wireless Telecommunications Bureau and may not necessarily represent the views of individual FCC Commissioners.

facilities to reach the building owner's premises, however, must then either install its own equipment or obtain access to existing in-building facilities in order to reach individual customers.

Depending on State law and local practices, some or all of the locations and facilities to which competing carriers may require access may be controlled by the incumbent service provider, the building owner, or both. The rules governing ownership and control of existing facilities also differ depending on whether the facilities are used for telecommunications or video programming services. In order for facilities-based competition to be fully available to all customers, however, reasonable and nondiscriminatory access to competing providers must be provided by whomever controls these facilities.

This hearing is especially timely in light of the Commission's ongoing efforts to make spectrum available to provide fixed wireless telecommunications services. For example, service providers are now offering fixed voice telephony and high-speed Internet access services over spectrum in the 24 GHz and 39 GHz bands. The Commission also recently auctioned Local Multipoint Distribution Service spectrum in the bands around 28 GHz, which should result in a significant number of new licenses offering fixed wireless services over the next few years. It appears that all of these spectrum bands will likely be used primarily for broadband telecommunications applications, although licensees can provide video programming services over this spectrum as well. Because their technology enables them to avoid the installation of new wireline networks, wireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users. It is important that this potential not be threatened by obstacles to these providers' ability to deliver signals over the last 100 feet to their customers' locations.

COMMISSION ACTIONS AND PLANS

Significant Commission action over the past three years has been devoted to facilitating the rapid and efficient arrival of ubiquitous competition, including facilities-based competition, in local telecommunications markets. Beginning with the trilogy of local competition, access charge reform, and universal service rulemaking, and continuing through actions the Commission is taking in such areas as increasing the availability of spectrum, streamlining procedures, and forbearing from enforcing unnecessary statutory provisions and regulations, the Commission is moving to promote the ability of competitive local telecommunications carriers to compete. The Commission has similarly acted to promote competition in video programming distribution markets. With respect to MDU access in particular, the Commission has taken several actions and is considering several others. Specific proceedings that are relevant to access to MDUs include the following:

- In its August 1996 *Local Competition First Report and Order*, the Commission promulgated rules implementing amended Section 224 of the Communications Act. Section 224 requires public utilities, including LECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access under just and reasonable rates, terms, and conditions to poles, ducts, conduits, and rights-of-way that they own or control. Petitions for reconsideration of this portion of the *Local Competition First Report and Order* are pending. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Red 15499, 18058-16107 (1996).
- Section 251(c)(3) of the Communications Act requires incumbent LECs to provide other telecommunications carriers with nondiscriminatory access to network elements on an unbundled basis under just, reasonable, and nondiscriminatory rates, terms, and conditions. The United States Supreme Court recently vacated, and remanded for further consideration under the prescribed statutory standards, the Commission's rules identifying which network elements must be made available under this provision. In a Notice of Proposed Rulemaking (NPRM) implementing the Supreme Court's remand, the Commission specifically requested comments regarding whether incumbent LECs should be required to unbundle facilities located at end users' premises. Comments are due on May 28, and reply comments are due on June 10. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, 64 Fed. Reg. 20238 (April 26, 1999).
- In October 1997, the Commission adopted a Report and Order amending its cable inside wiring rules to enhance competition in the video distribution marketplace. At the same time, the Commission adopted an NPRM requesting comment on other issues affecting competitive video service providers' access to MDUs, including whether restrictions should be placed on exclusive contracts

between building owners and multichannel video programming distributors. *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997).

- In November 1998, the Commission adopted rules under Section 207 of the 1996 Act restricting building owners' authority to impose restrictions on the placement of devices for the reception of over-the-air video programming in areas that are within a tenant's exclusive use. However, the Commission held that it could not adopt similar rules governing the placement of antennas in common or restricted access areas under Section 207 because Section 207 did not give it the express authority to do so. *Implementation of Section 207 of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 23874 (1998).
- In March 1996, the Commission amended its rule governing preemption of state and local regulation of satellite earth stations so as to make it consistent, to the extent appropriate, with the rules applicable to smaller receiver antennas. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996).

Looking forward, one of the pending petitions for reconsideration or clarification of the *Local Competition First Report and Order* asks the Commission to clarify the right of access under section 224 to rooftop rights-of-way and riser conduit (spaces inside the walls of a building through which cabling is run) that a LEC or other utility owns or controls. I anticipate that the Commission will act on this petition in the near future. In addition, once comments have been received on the recent NPRM regarding the identification of unbundled network elements following the Supreme Court's remand, the Commission will have a record on which to provide more guidance regarding incumbent LECs' obligations to provide reasonable and non-discriminatory access to facilities they may own or control within customers' buildings.

Let me assure you that there is a strong recognition within the Commission that a comprehensive and coordinated assessment of competitive providers' access to MDUs is essential. Staff from Bureaus and Offices across the Commission are working together to evaluate and present the various issues that affect building access. As one outgrowth of this process, the Wireless Telecommunications Bureau intends soon to propose to the Commission an item initiating a proceeding that will attempt to address in a more comprehensive manner a number of interrelated questions comprised within the building access problem for local telecommunications service providers.

POTENTIAL OBSTACLES TO EFFECTIVE ACTION

The upcoming Commission actions that I have just described will constitute important steps toward ensuring that customers in MDUs will have a full opportunity to obtain competitive facilities-based local telecommunications services. Some interested parties have argued, however, that the Takings Clause of the Fifth Amendment, as well as limits on the Commission's statutory authority, may limit the Commission's ability to act in this area. These arguments reflect legitimate concerns about ensuring reasonable compensation to building owners and ensuring against unreasonable burdens on their property, and they will be fully considered by the Commission in the course of any rulemaking proceeding. Even assuming, however, that the Commission ultimately determines it has authority to take action under existing law, the arguments in opposition may well form the basis for protracted litigation in the event the Commission decides to adopt any rules.

For this reason, I respectfully suggest that the Subcommittee consider whether legislation is appropriate to facilitate competitive telecommunications carriers' access to MDUs. Legislation could clarify the Commission's authority to take action in the public interest to promote reasonable and nondiscriminatory access to MDUs and to prevent the imposition of restrictions that discriminate or otherwise inhibit the ability of competitive providers to install the facilities necessary to offer their services in MDUs, including wireless equipment such as antennas on the roofs of apartments and office buildings. Legislation could also provide guidance to the Commission, and to reviewing courts, on the proper scope of agency action in this area and the principles that should apply, while still leaving implementation details to be determined in Commission rulemakings and other proceedings. Commission staff will be pleased to offer their technical assistance to the Subcommittee in this effort.

CONCLUSION

Once again, I would like to thank the Subcommittee for inviting me to testify at this important hearing to examine issues of competitive carrier access to customers located in MDUs.

Mr. SUGRUE. With me today is Bill Johnson, who is deputy chief of the Cable Services Bureau. I would like to ask the subcommittee's permission that he join me at the table to answer questions.

Mr. TAUZIN. Without objection, that will be the order of the day.

Mr. SUGRUE. Thank you, sir.

Mr. TAUZIN. We will get to questions in just a while, but we want to know what proceedings are ongoing, where they reside, and, at some point, what is the time line? And we will get to that in a second. I think we will all be very enlightened to learn those things.

Let me now introduce the guests we have here today who will get to the substance of this debate and, perhaps, help us resolve it. First, Mr. Scott Burnside, the senior VP of Regulatory and Government Affairs of RCN, Dallas, Pennsylvania. Dallas, Texas, is not the only Dallas, we find out, in America.

Mr. BURNSIDE. You bet it is not.

Mr. TAUZIN. This is America's hometown, Dallas, Pennsylvania. Mr. Scott Burnside.

STATEMENT OF SCOTT BURNSIDE

Mr. BURNSIDE. Thank you, Mr. Chairman, members of the subcommittee. I am the senior vice president for regulatory and government affairs at RCN corporation and I am appearing before you today to discuss the obstacles RCN faces accessing inside wiring in MDUs. The lack of such access is a serious impediment to the full roll out of competitive cable services and the implementation of both the spirit and intent of the Telecommunications Act. We believe that only congressional action can adequately cure the problems we are encountering. We believe that a legislative solution can be found which will advance competition in the delivery of cable services while, at the same time, preserving the property rights of MDU owners and incumbent cable operators.

My company, RCN, provides long distance and local telephony service, Internet, and cable television service to the residential marketplace. We currently offer service from Boston to Washington, DC, and will initiate service shortly in California. We have committed hundreds of millions of dollars to build our network and are making good progress doing so, despite a barrage of anti-competitive activities from existing cable operators.

Among the most serious problems we have is access to the so-called inside wire within multiple dwelling units. Problems arise in the connection of our network to the individual apartment units. Our preference is to install our own wire always. Do so, however, is frequently not possible because the building owners or managers are unwilling to permit the new construction which would be required to install a second set of wires. When incumbent cable operators refused to allow us to use the existing wire, the result is, in these buildings we have potential customers but no way to bring our signal to them.

FCC rules that govern inside wire are inadequate for two reasons. First, the rules are limited to instances in which the incum-

bent cable provider does not have a legal claim to retain its wiring in the MDU. In most cases, incumbent cable providers assert an ownership interest or claim to have an exclusive contractual arrangement with the MDU. Many States have enacted mandatory access laws granting cable operators the right to install their cable over any building ownership objections. Using these laws, cable operators claim ownership of all distribution wire. The FCC has declined to draft rules preempting these anti-competitive claims, expressing hesitation about its authority to do so.

In many cases, RCN has been denied access because of exclusive contracts between MDU owners and the incumbent. The FCC has declined to override these anti-competitive contracts, even though they are clearly not in the best interests of building residents.

The second reason the FCC rules are deficient focuses on the definition of the word "accessibility" in the current rules. New competitors are allowed to connect their wires at a demarcation point 12 inches outside of the apartment unit, unless that wire is physically inaccessible at that point. If it is, the rules go on to say that the demarcation point is moved to a point where the wires first become accessible outside of the apartment unit. Quite often, we find that building owners will not permit us to drill or cut holes in the wall to pull in our wire and connect to the 12-inch point. In such situations, the first point of access occurs at a junction box in a riser closet or a stairwell. Surprise. The incumbents do not agree and insist that the wire at the 12-point is accessible by FCC definition, even though RCN is not permitted to get at it.

We have attempted to address the interpretation of accessibility with the FCC by seeking a very narrow staff interpretation of the rule when building management will not allow access. That was 8 months ago and to date we have had no response. The interpretation sought by RCN would encourage competition by establishing that a second cable provider can, in such circumstances, access existing wire. Our request does not impair the incumbent's property rights. RCN does not seek to force a sale of the existing wire, but only to negotiate an arrangement so that each company can use it.

With respect to this matter, we ask that Congress persuade the FCC to address this narrow issue of interpretation as quickly as possible. A favorable ruling by the FCC, while a positive result and a good first step, is not the long-term solution. Ultimately, Congress must address the issue of State mandatory access laws and exclusive contracts which the incumbents use to thwart the FCC's inside wire rules. The FCC says it does not have sufficient jurisdiction to address these existing problems.

We have not asked for a rewrite of the Telecom Act. We only wish to have you finish what you started in 1996 by finetuning the Act, adjusting for unanticipated anti-competitive actions by the incumbents. The legislation should allow for the promulgation of FCC rules necessary to permit any cable provider to use, on a non-discriminatory basis, the existing home run wire. And, two, authorize the FCC or a Federal or State court to preempt, when necessary, conflicting State laws for prior and consistent contracts. We need a law which establishes that the competitors must have fair and reasonable access to existing wire which authorizes the FCC

or the courts to preempt conflicting State laws for inconsistent contract.

Thank you, Mr. Chairman.

[The prepared statement of Scott Burnside follows:]

PREPARED STATEMENT OF SCOTT BURNSIDE, SENIOR VICE PRESIDENT, REGULATORY AND GOVERNMENT AFFAIRS, RCN CORPORATION

Mr. Chairman and Members of the Subcommittee: My name is Scott Burnside. I am the Senior Vice President of Regulatory and Government Affairs of RCN Corporation ("RCN") and I am appearing before you today to discuss the obstacles RCN faces accessing "inside wiring" in multiple dwelling units ("MDUs"). The lack of such access is a serious impediment to the full rollout of competitive cable services and the implementation of both the spirit and intent of the Telecommunications Act of 1996 (the "Telecommunications Act"). We believe that only Congressional action can adequately cure the problems we are encountering and we urge this Subcommittee to consider the adoption of legislation addressing this competitive obstacle at the earliest practical moment. We believe that a legislative solution can be found which will advance competition in the delivery of cable services while at the same time preserving the property rights of MDU owners and incumbent cable operators.

First, let me briefly describe where RCN fits into the big picture. As a result of the pro-competitive policies of the Telecommunications Act, RCN was formed to provide residential telecommunications users with a competitive alternative for their telephony, Internet, and cable needs. As a telephony provider we initially supplied services by reselling incumbent services, but increasingly we are building out, and relying on, our own facilities-based, state-of-the-art, fiber optic cable. Through this facilities based network, we are also able to offer high speed Internet and cable services to our customers.

We operate in the Northeast corridor, from Boston to Washington, D.C., and are actively expanding our service in the San Francisco to San Diego corridor. We seek to provide value to our customers by providing superior service while underpricing the competition in each segment of our business and by offering discounts to customers who subscribe to each of our telephony, Internet and cable services. The focus of my testimony today will be on the cable aspect of our business and the competitive hurdles we face accessing inside wiring in MDUs.

RCN operates both as an open video service ("OVS") operator and as a traditional Title VI franchised cable company. As you well know, the OVS concept was developed by Congress and embodied in the Telecommunications Act.¹ You intended OVS to provide a new, and much needed, competitive alternative to the monopolistic incumbent cable companies.² We have tried to implement Congress' vision, and in fact, we like to refer to ourselves—perhaps somewhat boastfully—as the "poster child" of the Telecommunications Act in this regard. We operate OVS systems in Boston and its surrounding communities, in New York City, and here in the District of Columbia metropolitan area through our joint venture with PEPCO known as Star Power Communications. We are also developing traditional franchised cable operations in the Boston, New York and Washington metropolitan areas, and are beginning to plan for and build out OVS and franchised systems in the Philadelphia and San Francisco metropolitan regions. RCN is by far the largest investor in and operator of, OVS. Indeed, there are no other significant OVS operations up and running.

In each market we have entered we have made significant in-roads despite daunting barriers to entry. We believe that we have begun to fulfill the fundamental pro-competitive promise of the Telecommunications Act. We are aggressively pursuing our network build-out and have signed up a significant number of cable customers, especially in Boston and New York. Even so, we face competitive obstacles every step of the way. This Subcommittee, of course, does not need to be persuaded that competition in the cable marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.³ Yet it is interesting to see the theory at work. For instance, RCN's entrance into certain markets has caused cable operators to exercise dramatic restraint in some instances. For example, in late 1997, Time Warner an-

¹ 47 U.S.C. sec. 573.

² Indeed, Congress and the Commission intended OVS to be the primary source of facilities-based competition to cable operators. See, e.g., *Implementation of Section 303 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Red 18223, 18259 (1996). (Subsequent history omitted).

³ See, e.g., *Communications Daily*, July 15, 1996, p. 2, reporting CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate.

nounced that new rate increases in the range of 10% to 15% would take effect throughout the Boston area,⁴ except in Somerville, where RCN provides competitive cable service.⁵ Similarly, in the City of Boston, Cablevision raised its rates only 2.5%. In New York City, Time Warner has implemented an aggressive bulk discount program in many of the MDUs where RCN offers competitive cable programming.

Yet we have found the going very tough indeed. Economic theory recognizes that the cable incumbents, who have enjoyed a quiet but very prosperous life for decades, do not welcome new competition.⁶ Over the last two years we have been subjected to a barrage of anticompetitive activities by incumbent cable companies: we have been harassed by pleadings seeking the withdrawal of our OVS authority on various specious grounds—pleadings filed both by individual cable companies and by cable trade associations. We have been subjected to multiple administrative proceedings instigated by the cable incumbent in Boston—our first OVS market—as well as litigation in federal court brought by the incumbent cable operator which the presiding judge urged be withdrawn because it was so lacking in merit. We have been denied access to critical programming by our cable competitors both in Boston and New York. Of course, we anticipated resistance but to be candid the extent and intensity of that resistance—the prevalence of anticompetitive practices, has really surprised us. I hasten to add the important point that it has not deterred us but merely required allocating more time and resources to getting into various markets than we had initially anticipated.

One of the principal areas where we face substantial resistance concerns access to inside wiring in MDUs. MDUs account for about 27 percent of all U.S. households and in many cities such as Boston, the percentage is higher. Typically, MDUs have been wired by the local incumbent cable company which has no interest in sharing such wiring with a competitor. In MDUs, the cable signals are delivered to a junction box, usually in an electrical closet in a basement or ground floor of the building. From there the signals are carried by "risers" to junction boxes on each floor. From the junction boxes, the signals are carried to each unit; this segment of the wiring is known as the "home run wiring." This wiring is, in turn, connected to wiring inside each unit, which is known as "cable home wiring," and the subscriber's set is attached to a cable box which is fed by the cable home wiring. The home run wiring and the cable home wiring is usually buried behind walls or ceilings and occasionally embedded in structural elements. Riser cable is also generally inaccessible without opening walls, floors, ceilings, or structural elements. Occasionally, however, the wiring between junction boxes and cable boxes in individual units is carried inside molding which is attached to the outside of existing walls and similar structures.

For RCN, or for any non-incumbent cable provider, problems arise when we attempt to connect our outside distribution network to the individual customer units in MDUs. That is, after our signals have been brought to an MDU by underground or aerial cable, we must distribute it to individual subscribers. Our preference is to install our own wiring. Doing so, however, is frequently not an available option because, if construction or building alterations are required, the MDU owner or manager is unwilling, understandably, to permit the new construction which would be required to install a second set of wires. The incumbent cable company, of course, refuses to allow the overbuilder to use its existing wiring. We have encountered construction blockages in about 1/3 of the MDUs to which we have brought our signal in Boston, and in no case was the incumbent willing to allow us to use the existing wiring. As a result, we have subscribers who have requested our cable service but we have no way to bring our signal to them.

The inside wiring issue has been a problem for cable competitors for some time. Section 624(i) of the Cable Television Consumer Protection and Competition Act of 1992⁷ directed the FCC to adopt rules governing the disposition of wiring within the cable subscriber's home when such subscriber voluntarily terminates service. The FCC subsequently adopted rules, but they were too restrictive in their applica-

⁴ *Boston Globe*, December 21, 1997 (WL 6286769).

⁵ *Boston Globe*, November 28, 1997 (WL 6282146). In fact, a cable company executive stated that the company is "looking at a whole new competitive pricing system" and "facing how we deal in a competitive environment for the first time." See also FCC *En Banc* Presentation on the Status of Competition in the Multichannel Video Industry, December 18, 1997, at pp. 24-30.

⁶ See *Predation in Local Cable TV Markets*, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: "Cable television operators pursue a predictable set of reactions... to a potential CATV entrant... beginning with a vigorous lobbying campaign to deny entry rights... selective price cutting, preemptively remarketing the first submarkets to be competitively wired... tying up cable network programming... delaying access to... poles and/or underground conduits... and creating customer confusion..." *Id.* at 11.

⁷ 47 U.S.C. sec. 544(i).

tion as they applied only to wiring inside individual units and up to 12 inches beyond such units.⁸ In 1997, realizing the need to expand the scope of the rules, the FCC adopted further rules seeking to grant competitors access to the incumbent's inside wiring so that customers requesting a competitor's service could receive such service⁹ and requiring incumbents to cooperate with new entrants to facilitate implementation of the pro-competitive policies embedded in the rules.¹⁰

In formulating its inside wiring rules, the FCC anticipated that incumbent cable companies, especially in the case of service to MDUs, might not cooperate with new cable competitors and adopted rules specifically designed to address such situations. The Commission has gone to great lengths to resolve the many complex bottleneck issues related to inside wiring within MDUs, and has adopted regulations that attempt to successfully moderate the anticompetitive inclinations of incumbents.¹¹ In explaining these procedures, the Commission noted some of the exact problems currently faced by RCN:

[W]e believe that disagreement over ownership and control of the home run wire substantially tampers competition. The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been entered into in an era of an accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service... The result, regardless of the cable operators' motives, is to chill the competitive environment.¹²

Unfortunately, the FCC's inside wiring rules are grossly deficient. The rules are deficient for two principal reasons. First, the rules are limited to instances in which the incumbent cable provider does not have a legal claim to retain its wiring in the MDU. So, even though the FCC rules attempt to grant open access to inside wiring, the rules are inadequate because incumbent cable providers assert an ownership interest in the wires or claim to have an exclusive contractual arrangement to be the sole cable provider within the MDU. In many states, the incumbent cable companies have persuaded the legislature to adopt what are known as "mandatory access laws." These laws, with variations from state to state, grant cable companies a legal right to install their service in MDUs even over the objection of the building's owners or managers.¹³ Because the mandatory access laws were crafted in an era when cable service was invariably monopolistic, they may be used by incumbents to impede the introduction of competition. Relying on such laws, the incumbents claim that they own inside wiring, even when they cannot provide any proof of ownership. For its part, the Commission has declined to draft its rules so as to preempt these anticompetitive statutes, instead expressing hesitation about the scope of its authority to do so.¹⁴ In addition, incumbents often claim competitors cannot enter the MDU because they have an exclusive contractual arrangement with the MDU owner providing that the incumbent be the only cable provider. The FCC has declined to override these existing anticompetitive exclusive contractual arrangements between

⁸ See 47 C.F.R. secs. 76.801-2 and 76.8(mm).

⁹ See *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, 13 FCC Rcd 3659 (1997) ("Inside Wiring Order"), recon. pending and appeal pending, *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Cir.).

¹⁰ See 47 C.F.R. §§ 76.8 (mm) (2) and 76.804(a)(4) and (b)(5).

¹¹ *Id.*

¹² *Id.* at ¶38 (footnotes omitted).

¹³ There are about 18 such statutes. The Massachusetts Mandatory Access law is codified at M.G.L. Chapter 166A sec. 22. Cablevision, the incumbent cable operator in Boston, has contended that this statute grants it a "legally enforceable right to remain on the premises of the buildings... notwithstanding the owners' wishes." (Oppos. to —, p.7 filed in CSR —).

¹⁴ Report and Order and Second Further Notice of Proposed Rulemaking, in Docket No. 95-784, MM Docket No. 92-260, at page 81-101.

cable incumbents and MDU owners, but it is apparent that such contracts are an impediment to competition. Incumbents should not be permitted to rely on the scarcity of anticompetitive contracts, especially in light of new and changed regulatory circumstances, and the intent of the Telecommunications Act.

The second deficiency concerns the interpretation of the rules. The rules allow a new entrant to interconnect in an MDU with cable home wiring at the demarcation point. The demarcation point for cable home wiring is at or about 12" outside the unit unless it is physically inaccessible at that point. The Commission found that, where the cable demarcation point is "physically inaccessible to an alternative [cable provider], the demarcation point should be moved to the point at which it first becomes physically accessible that does not require access to the subscriber's unit."¹⁵ RCN believes that wiring behind the ceilings and walls and which MDU owners will not allow RCN to reach by boring holes, is inaccessible, and as a result, the demarcation point should be moved from 12" outside each unit to the point where it is first accessible or, in such cases, to the junction box. The incumbents, however, do not agree and argue that the demarcation point for the subscriber lines is located at or about 12" outside the subscriber's premises, notwithstanding the fact that the subscriber line is located behind a ceiling or wall and that the MDU owners will not allow RCN to bore through these structures nor install any new wiring.

Let me illustrate the deficiencies in the inside wiring rules for you by reference to one particular matter which is typical of the kinds of difficulties we are experiencing. Our Boston affiliate, RCN-BerCoCom, a joint venture with the Boston Edison Company, initiated OVS service in Boston last year and has been actively expanding its OVS system by providing service to MDUs in the city of Boston. The incumbent cable franchise has enjoyed a monopoly for some seventeen (17) years and currently serves approximately 320,000 subscribers. RCN has entered into agreements to serve numerous MDUs that the incumbent currently serves.

From its own junction boxes RCN can reach individual subscriber's units either by connecting with the existing wiring at the incumbent's junction boxes or by overbuilding its own subscriber line wiring and connecting to the individual units. In some of these buildings we were able to install our own wiring and have done so. In others, MDU owners and managers will not allow RCN to cut, open, plug, speak-le, tape, sand and paint the ceilings and walls in order to install new lines because it is disruptive and eventually could require the replacement of entire ceilings and walls. In these instances RCN has installed all of the facilities necessary to provide service in each of the buildings except the subscriber lines necessary to access the end users. Specifically, RCN's facilities consist of riser cables running vertically between floors and junction boxes in the same utility closets as the incumbent uses. In all but a very few cases, the existing wiring was installed behind structural elements including sheet rock walls, ceilings, or other immovable structures and is therefore inaccessible.

Notwithstanding the Commission's inside wiring rules, the incumbent cable operator recognizes that in those MDUs where RCN is not allowed to install its own wiring it can significantly delay RCN's penetration of its heretofore captive market by refusing to cooperate with RCN. The incumbent claims to own and to have contractual or statutory rights to maintain the wiring, although no evidence has been produced to support such a claim. Going to court to litigate each claim for each MDU is not a viable option.

RCN repeatedly has tried to develop a reasonable *modus operandi* with Cablevision, the incumbent, under which either company could quickly and efficiently transfer a subscriber's services to the other, without interruption or disruption to the subscriber. RCN has suggested using joint junction boxes, shared possession of keys and access to each other's junction box, coordinated appointments among the respective field staff, and other similar reasonable measures. However, the incumbent, insisting that the wiring behind sheet rock is accessible under the FCC's inside wiring rules, has refused all such suggestions, and instead simply insists that RCN must bore through the sheet rock to install its own wiring, regardless of the MDU owners' or managers' objections.

We have attempted to address the interpretation of "accessibility" with the FCC but, to date, we have not received a response. RCN sought a narrow staff interpretation of the rules to the effect that, when wiring is behind sheet rock and the building management will not allow access to it, the wiring should be considered inaccessible under the rules with the result that the competitor should have the right to interconnect at the junction box. To support this interpretation, RCN relied upon comparable language in the National Electrical Code. The incumbent and a host of other cable interests opposed RCN's request.

¹⁵ Inside Wiring Order, supra at ¶150.

The interpretation sought by RCN would encourage competition by establishing that a second cable provider can, in such circumstances, access existing wiring. Nor would RCN's request have impaired in any way the incumbent's property rights. RCN did not, nor does it now seek the opportunity to force a sale of the existing wiring to RCN, but only to negotiate an arm's length arrangement for either company to use the wiring. RCN sought to meet the incumbent at the bargaining table with both parties under a Cable Services Bureau mandate to bargain in good faith to resolve this matter. RCN noted that it has previously offered to consider leasing the wiring from the incumbent, and that it would be willing to discuss any reasonable payment arrangements for use of the wiring. Almost eight-months later we have had no indication from the Commission staff how it views the matter. With respect to this matter, we ask that Congress persuade the FCC to address this narrow issue of interpretation immediately.

However, a favorable ruling by the FCC, while a positive result and a good first step, is not the long term solution to ensure competitive access to inside wiring. Ultimately, Congress must address the issue of the incumbents' interpretation of state mandatory access laws and long term exclusive contracts which the incumbents continue to use successfully to thwart the FCC's inside wiring rules. For that reason, we have concluded that, although the Commission is to be commended for committing a great deal of time and energy to its inside wiring rules, the FCC simply does not have sufficient jurisdiction to address the problems which exist. State law with respect to the property rights of cable operators in inside wiring or related facilities is not at all uniform.¹⁶ Service contracts entered into years ago between monopoly cable providers and MDU owners frequently prohibit competitive entry. We have concluded that we must ask for federal legislation.

The purpose of the legislation would be to increase competition and diversity in the cable video market through the elimination of barriers to the distribution of cable programming within MDUs. The legislation should (i) allow for the promulgation of FCC rules necessary to permit any cable provider granted access to an MDU the right to use, on a nondiscriminatory and competitively neutral basis, the existing home run wiring in the MDU in order to provide competitive services to customers requesting such service; (ii) provide for any cable provider with a property interest in home run wiring to be fairly compensated for such use; (iii) provide that any contract, arrangement or agreement between an incumbent cable provider and an owner of an MDU, which is inconsistent with the FCC's rules is unlawful with respect to such inconsistency; and (iv) if the FCC determines that a State or local government has adopted a law, regulation or ruling which discriminates against any cable provider or that is inconsistent with the FCC's rules or open competition, the FCC shall preempt the enforcement of such law, regulation or ruling to the extent necessary to correct such violation or inconsistency.

RCN does not suggest that access to MDU inside wiring requires a massive legislative or regulatory effort; it does suggest, however, that Congress should act to overcome the refusal of the incumbents to make existing facilities available to new competitors on reasonable and equitable grounds. Simply put, to bring competitive cable services to subscribers in MDUs, we need a federal statute which establishes as an overriding principle that competitors must have fair and reasonable access to existing wiring and which authorizes the FCC, or a federal or state court to preempt, where necessary, conflicting state law or prior inconsistent contracts. Such access should be accompanied by a financial obligation which is fair both to the incumbent and to the entrant.

Let me emphasize what we neither need nor want:

We do not seek authority to force incumbents to sell us their wiring. We do not wish to impair property rights or to force incumbents to divest the inside wiring they have been using. All we need is an enforceable right to use that wiring.

We do not seek authority to run roughshod over the preferences of MDU owners or managers. We do ask for an opportunity to sell our services to MDU residents if the residents or the owners do not want such services, we can accept that. Provided that the process of soliciting customers is fair, we are content to have the market decide such questions.

We do not seek a federal right to force an incumbent out of an existing building—only the right to use existing wiring on fair and reasonable terms including cost allocations based on an economically rational approach to costing. We do seek a process, compelled by the legislation, in which the parties are required to negotiate terms and conditions in good faith which are mutually satisfactory. In the event such private negotiations are not adequate, we think it is critical that the legislation

¹⁶ See Telecommunications Regulation (New York, 1998), sec. 21.11(2).

provide the entrant with a variety of remedies, including the filing of a formal administrative complaint, or taking the matter to a U.S. district or state court, as the entrant deems most advantageous.

We will persevere with our efforts to bring competitive services to residents of MDUs because that is our vision and our business. Undoubtedly we will continue to make progress. However, it would significantly accelerate the roll-out of competitive cable services if federal legislation were passed which established a broad policy encouraging competitive entry into the MDU market.

Thank you very much.

Mr. TAUZIN. Thank you very much, Mr. Burnside. We are now pleased to welcome the president of the Association of Local Telecommunication Services, or ALTS, Mr. John Windhausen, Jr.

By the way, does that qualify as a weapon? How did you get in here?

Mr. ROUHANA. It is mine.

Mr. TAUZIN. Oh, it is yours. Okay.

Mr. ROUHANA. It is my weapon.

Mr. TAUZIN. Sure. Mr. Windhausen.

Mr. WINDHAUSEN. It is very small.

STATEMENT OF JOHN D. WINDHAUSEN, JR.

Mr. WINDHAUSEN. Thank you, Mr. Chairman. As you noted, my name is John Windhausen. I am president of the Association for Location Telecommunications Services or ALTS. By the way of background, I had the pleasure of working on the staff of the Senate Commerce Committee for 9 years, leading up to passage of the Telecom Act and I had the distinct honor of standing next to you, Mr. Chairman, during an historic signing ceremony in the Library of Congress. But I also will have to admit, I share the misfortune of Mr. Sugrue in also being a Red Sox fan.

As I mentioned, ALTS is the leading association representing facilities-based competitors to the local telephone companies. We currently have 72 members, CLEC members, competitive local exchange companies, and that is up substantially from the time the Act passed. When the act passed, ALTS had 13 members. We are now up to 72. So we are growing quite rapidly.

Our companies are meeting the provision of data services in this country. We have installed over 660 switches around the country and we are very quickly deploying DSL and other high-speed Internet access services. Our members include wireless companies, such as Winstar, Telegent, and Nextlink, that are seeking to install antennas on rooftops. We are represent wire-line companies who are seeking to run fiber optic cables into the basements of buildings and other DSL companies that I mentioned that are simply looking to attach electronics to the wires provided by the phone companies.

Now, in crafting the Telecom Act, Congress identified three barriers to the development of local competition: interconnection with the local telephone company network, State and local laws that prohibited competition, and building owners. All three of these sectors must be handled, must be dealt with for telecommunications competition to become a reality. Congress, in my view, dealt very clearly and dealt well with the first two of those issues. Unfortunately, Congress did not do as good a job in crafting the language to deal with the building owner problem.

Landlords right now are the final hurdle, the last bottleneck, the last checkpoint. All of the benefits that competition was supposed to provide lower prices, greater technologies, new services all the wonderful things that CLECs can provide in the market may never reach the consumer unless the owner of the building allows the CLECs into that building. The building owner literally is the gatekeeper. Not just figuratively, but literally has the keys to the vaults and the basement or to the rooftop to decide whether a CLEC gets into that building and can deliver the services to the tenants or not.

Fortunately, some landlords, and quite many landlords and I believe we are about to hear from Mr. Bitz, who is one of those progressive landlords who has worked out arrangements with CLECs. And, in a lot of cases, these landlords realize the benefits that our telecom companies can provide to consumers. And so we are very happy to be able to make that progress.

Unfortunately, there are many other landlords that are not so farsighted. Many other landlords simply refuse to open their doors to CLECs whatsoever. They just refuse to. They say, we have got provision from the telephone company. Why do we need anybody else in our building?

Mr. TAUZIN. By the way, we invited the company. They refused to come. They just wouldn't be here.

Mr. WINDHAUSEN. Many landlords insist upon a percentage of the revenues as a condition of opening their doors or they assess very large rental fees that are a significant cost to our business, just to get in the door. And that is before we have the cost of actually providing the service, so it is a significant impediment.

Or, in some cases, landlords grant exclusive access to one company and put a contract out for bid and award an exclusive arrangement. No other CLEC can then get in that building. It is a very specific and identifiable harm to competition that results.

In fact, my written testimony identifies many examples of landlords that have charged tens of thousands of dollars just for the right to get into the door and put an antenna on the roof or put a fiber optic cable in the basement. So this situation is particularly harmful because in most cases the ILEC, the incumbent local exchange company, is in for free. They have no had to pay these fees that the CLEC has to pay. So, in this case, the CLEC is the one that is handicapped. It simply can't afford to serve all of the consumers, all of the tenants in those buildings.

So, for this reason, ALTS earlier this year initiated a new campaign called the smart building policy project. The purpose of this initiative is to educate building owners and policymakers and consumers about the benefits of opening buildings up to competition. Our objective is to demonstrate that allowing competitive telephone companies to provide advanced services to buildings will enable tenants to become smart and sophisticated users of telecom services in a way that will increase their productivity and speed up their access to the Internet.

While we believe this project will help to convince building owners to open their doors voluntarily, again, it is also clear that many are simply not interested in doing so. So, unfortunately, we need a legislative solution. And this is why we are here today. As we

heard earlier from Tom Sugrue, the FCC right now has a lot of items on its plate. It is just not certain of what the legal authority is that it has. If Congress could step in and clarify the existing law, that would be of great benefit to tenants and consumers and CLECs alike.

We are willing to work, as an association and as an industry, we are willing to work with the building owners to make sure that they are compensated, as long as that compensation is reasonable. And so we hope to work with them and with the members of this committee in crafting a solution that we all can find and achieve success with the Telecom Act. Thank you.

[The prepared statement of John D. Windhausen, Jr. follows:]

PREPARED STATEMENT OF JOHN D. WINDHAUSEN, JR., PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Good morning Mr. Chairman and members of Congress. My name is John Windhausen, Jr. I am the President of the Association for Local Telecommunications Services ("ALTS"). ALTS is the leading national industry association devoted to the promotion of facilities-based local telecommunications competition and it represents companies that build, own, and operate competitive local networks. Thank you for the opportunity to discuss an issue that is critical to the development of facilities-based local exchange competition as envisioned by the Telecommunications Act of 1996.

Telecommunications carrier access to tenants in multi-tenant buildings is essential to the development of local competition. In order to provide facilities-based service to a tenant in a multi-tenant building, a local telecommunications carrier must install its facilities on or within the building, sometimes to the individual tenant's premises (such as their office or apartment). In some cases, the carrier's facilities extend only from the building owner's property line to the basement telephone equipment room. For example, the carrier's line extends from the curb, across the parking lot to the building. Although this distance may be very short, it is impenetrable without the building owner's consent—the operation of state property laws generally requires that a telecommunications carrier obtain the permission of the building owner prior to installing facilities within and on top of that owner's building.

However, building owners can and do exclude telecommunications carriers from buildings in many different ways. For example, absent a landlord-tenant lease to the contrary—which is very uncommon—the landlord can eliminate a tenant's choice in telecommunications carriers simply by refusing carrier access to the building. Other landlords impose such unreasonable conditions and demand such high rates for access that competitive telecommunications service in those buildings becomes an uneconomic enterprise. Consequently, landlords can perpetuate the monopoly local telephone environment—the bottleneck—that the 1996 Telecommunications Act sought to dismantle.

To give you an idea of the problems that ALTS members confront, I offer you a sampling of examples. This is by no means an exhaustive list of the problems that competitive carriers face, but it does provide some concrete understanding of the unreasonable barriers to competition that some landlords are erecting.

- The manager of one large Florida property has demanded from a CLEC a rooftop access fee of \$1,000 per month and a \$100 per month fee for each hook up in the building. The company estimates that this fee structure would cost it about \$300,000 per year—just to service one building.
- The management company for another Florida building demands that a telecommunications carrier pay the management company \$700 per customer for access to the building, in addition to a sizable deposit, a separate monthly rooftop fee, and a substantial monthly fee for access to the building's risers which are the dedicated, horizontal and vertical spaces within a building that contain utility facilities. Taken together, these fees preclude the company from providing tenants in that building a choice of telecommunications carriers.
- In one Arizona building, a CLEC had pulled its fiber cable into the building, had access to the telephone closet and building risers, and had begun providing service to customers in the building with the landlord's permission. However, one of the CLEC's customers in that building recently requested expanded service from the CLEC, requiring an expansion of facilities. The building owner in-

found the CLEC that it could no longer have access to the telephone closet—that it was the property of the incumbent LEC. Moreover, the building owner informed the CLEC that the building was now under exclusive contract to another carrier and that the CLEC would have to obtain permission from that carrier to service the equipment that the CLEC had already installed in the building. As a result, the customer in the building is experiencing delays in receiving expanded services while the CLEC negotiates with the building owner and the "exclusive" telecommunications carrier for access. Moreover, the CLEC's relationship with the customer is at risk and the CLEC's facilities that were installed in the building several years ago are in jeopardy of becoming stranded assets.

- One CLEC sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of \$2,500 per building in addition to space rental of approximately \$800 to \$1,500 per month per building. Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that the CLEC agree to refrain from making any regulatory filings concerning the building access issue.
 - Another large property owner and management company demanded \$10,000 per month per building just for access rights to building risers.
 - In an Arizona property, the incumbent and one competitive provider had installed facilities. Four additional CLECs requested access. The property owner demanded that the four new CLECs provide conduit, fiber conductivity between buildings, and dark fiber to the property owner free of charge—approximately \$200,000 of in-kind contributed facilities. The property owner also seeks to charge a \$750 per month access fee for access to the property even though the access will not deprive the property owner of leasable space to tenants. This situation places the four new CLECs at a competitive disadvantage to the two providers already inside the building.
 - A large number of building owners and managers do not want a second telecommunications carrier in the building because of revenue sharing arrangements with the first carrier and many have entered into exclusive access contracts with a single carrier. Indeed, one building management company told a CLEC not to solicit its tenants.
 - In Washington state, the owner of a new building put the provision of telecommunications services to the tenants out to bid. The winning bidder would gain exclusive access to provide telecommunications services to the tenants in the building. The incumbent provider was able to outbid all other providers, offering to pay \$10,000 every year to the building owner. The incumbent was thereby able to shut its competitors out of the building entirely.
 - Management companies for many other buildings demand revenue sharing arrangements in exchange for access.
 - Some owners of newly constructed buildings are installing "central distribution systems" ("CDS") in their buildings—an intra-building telecommunications network. Rather than allowing carriers to install their own facilities all the way to the customer, the building owner requires the carriers to utilize the CDS. However, some of these facilities are not advanced enough to carry adequately the traffic of more advanced carriers. Moreover, the building owners will not guarantee the reliability of these CDS intra-building networks. In addition, building owners often seek to charge excessive rates for use of a CDS that many carriers would rather not use. Finally, some building owners are requiring telecommunications carriers to sign agreements that once a CDS system is installed, it must be used—forcing CLECs to promise to strand their installed investments within buildings. This creates a tremendous disincentive to serving customers in these buildings.
- The tenants in these buildings often are without recourse and cannot obtain access to telecommunications options. Building owner interests sometimes say that the market will take care of the problem—that landlords have the incentive to keep their tenants happy and to allow them access to the telecommunications carriers of their choice. They say that tenants will move out of the building if they are unhappy with their telecommunications options. These arguments are simply wrong.
- The building access problem exists, suggesting that these "market incentives" are not working. Of course, in some instances, the market may provide competitive choices, but not until tenants are legally and financially able and willing to move their residence or business for the sake of competitive telecommunications choices. Tenants would be required to incur the substantial expense and inconvenience of breaking their leases and moving locations. Moreover, they may often confront higher leases, given the strength of the real estate markets and the economy generally.

This is an unreasonable pre-condition to the enjoyment of the competition envisioned by the 1996 Telecommunications Act. In fact, many of these tenants—particularly individuals and small and medium-sized businesses (those who have the least power when dealing with landlords)—have never had the opportunity to experience the benefits of telecommunications competition. This is largely a theoretical phenomenon to them. The notion that these tenants would break a lease and incur all of the other identified expenses for this unknown benefit is unrealistic.

The 1996 Telecommunications Act represents a laudable effort to open local telephone markets to competition. A good deal of work went into the construction of the statute to eliminate barriers to competitive entry. However, to a large degree, the 1996 Telecommunications Act assumes that once the incumbent LEC-imposed barriers are removed, competition will be able to flourish. It does not contemplate that even after incumbent LEC barriers are dismantled, telecommunications carriers may still be prevented from reaching and serving consumers. In short, the 1996 Telecommunications Act assumes that building access is available. Unfortunately, that assumption has proven incorrect. Building access remains a formidable barrier to the accomplishment of local competition.

The building access problem is particularly acute given the nascent stage of local competition. The geographic concentration of a large number of consumers within a building allows economies of scale that enhance the economic attractiveness of providing competitive service. For this reason, multi-tenant buildings are likely to be the first place that residential and commercial facilities-based local exchange competition occurs on a significant scale. Building access restrictions stifle competition precisely in those locations where it is most likely to arise.

This is a problem that warrants a federal solution. The vast majority of States have taken no action to ensure that tenants in multi-tenant buildings are not excluded from a competitive telecommunications environment. Connecticut and Texas both have statutes requiring landlords to permit telecommunications carriers to install their facilities to provide service to tenants therein.⁹ The Ohio Public Utilities Commission held, in an order, that landlords could not forbid or unreasonably restrict any tenant from receiving telecommunications services from any provider of the tenant's choice.¹⁰ Nebraska, too, has mandated building access in residential buildings.¹¹ But that leaves 46 States without building access remedies.

A State-by-State approach to this problem is slow and it fails to guarantee that tenants nationwide will have access to competitive telecommunications choices. Moreover, a State-by-State approach may also be ineffective because of the strategic behavior of property management companies. ALTS members inform me that if they demand compliance with the building access laws in those few States that have them, nationwide property management companies will retaliate. These management companies will penalize the carrier in those other States without building access laws. Therefore, carriers with nationwide operations are sometimes required to waive operation of building access laws thereby undermining the effect of these laws in those few States that have them.

I strongly urge Congress to enact legislation that ensures that tenants in multi-tenant buildings across America can enjoy the benefits of competition arising out of the 1996 Telecommunications Act that other U.S. telecommunications consumers are beginning to enjoy. Access should be nondiscriminatory, reasonable, and technologically-neutral. It should permit landlords to receive compensation in exchange for access—but that compensation must remain at reasonable levels and must be assessed on a nondiscriminatory basis. The Texas and Connecticut statutes offer compromise models for federal legislation that incorporate these principles and I refer you to them. I encourage Congress to act quickly on this issue and emphasize that once building access is assured, Americans will enjoy a marked and rapid increase in competitive options for local telecommunications services. Thank you.

Mr. TAUZIN. Thank you very much, John. The subcommittee is pleased to welcome a colleague from our full committee from New York, Vito Fossella, who will introduce the next witness. Vito. Oh,

⁹ See Connecticut General Statutes, Section 16-2471. See also Texas Public Utility Regulatory Act §§ 54.259 and 54.260, implemented by Texas Public Utility Commission Project No. 18000.

¹⁰ Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 88-927-TP-COL, Supplemental Finding and Order, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sept. 29, 1994).

¹¹ In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/P1-23, Order Establishing Statewide Policy for MDU Access, slip op. at 4 (Neb. PSC, March 2, 1999).

Mr. Lazio is going to do it. Mr. Lazio, from New York, is going to introduce the next witness. Mr. Lazio.

Mr. LAZIO. Thank you very much, Mr. Chairman. I appreciate your extending this courtesy to me. I want to take this opportunity to thank you personally for your interest in this issue—you are really the point person in the House on telecommunications—and for convening this hearing.

We have somebody from my neck of the woods who I think is one of the true visionaries of the field—Bill Rouhana. I am very pleased to see. He has been a director since the inception of Winstar Communications, its chairman of the board since February 1991, and CEO since May 1994. I am not going to read his entire bio except to say that I have had the pleasure of working with Bill Rouhana for the last several months in particular and not just discussing telecommunications issues, but talking about the future: its impact on children, the need for multiple platforms of providing a level playing field to give maximum consumer choice, and to provide for an open and competitive field. In short, to spur the kind of creativity and innovation that is necessary to continue the explosion of technology and to provide the maximum amount of information to our homes and to our businesses.

He is a creator, an innovator, a leader, and I think he has expressed some very legitimate concerns which I hope we can address in a balanced way—together with the rights of building owners—to achieve the end purpose of enhancing the quality of life for Americans. So it is a great pleasure that I see him here today and it is with great pleasure that I thank you for extending the invitation to somebody of his calibre.

Mr. TAUZIN. Thank you, Mr. Lazio. With that kind of buildup, Mr. Rouhana, you better have something very important to say today.

STATEMENT OF WILLIAM J. ROUHANA, JR.

Mr. ROUHANA. Well, I do have something important to say: Good morning, Mr. Chairman, and to the members of the committee and thank you, Congressman Lazio. I am Bill Rouhana. I am the chairman and chief executive officer of Winstar. In the interest of full disclosure, I would like to say I am not a Red Sox fan, so and I am sorry Congressman Markey.

Mr. MARKEY. How about your wife?

Mr. ROUHANA. Well, we can work on that. And I am also the man who is packing the weapon that you discussed a minute ago. In fact, that weapon is right here. And this is an antennae. This is the antennae that we seek to put on building rooftops.

Mr. TAUZIN. Hold it up there. Let us see what it looks like. This is the Winstar antennae.

Mr. ROUHANA. And this is the antennae that would be used by companies like Telegent or Nextlink also. Any wireless fiber type provider would use an antennae like this and, by installing this very small antennae on a rooftop, would be able to provide competitive local, long distance services as well as high-speed Internet access, broad-band data services of all kinds, and really bring the future of communications to tenants in many, many buildings.

Now, we call this wireless fiber service and it really does bring customers onto the information superhighway in a way that allows them to really experience the benefits of this new world we are seeing with the Internet and other things. And this can be installed at a fraction of the cost of a fiber optic cable. It is just as efficient. In fact, it is just as effective and some people might say more effective and more reliable.

We install these radios on rooftops and then we connect them to risers and conduits inside buildings and telephone closets and these are the crucial steps to building and expanding our network. In fact, there are some charts that I brought here today. Since I knew I wasn't going to be as funny as Tom Sugrue was, I wanted to have some show and tell items to help break the monotony. And I have brought a couple of charts for you to see, just so you could understand what we are talking about here.

There are a bunch of people who want to get on the rooftop and they all have a legitimate interest in that, but they are, when you add them all together, a relatively limited number of people who have a lot to offer the tenants in the buildings. Once we are on the rooftop, we need access to the inside wiring, which is already there. And then, using that wiring, we get to the customers in the building. So there is a minimal amount of space required for what we are doing, both outside and inside the building. And it is relatively easy for us to get tenants connected to what is really the first mile. It is their connection to the Internet; it is their connection to the outside world. And so a relatively simple, elegant, and easy solution to extending the broad-band network to people who live and work inside of multiple tenant environments.

You know, since 1994, we have successfully negotiated over 4,800 building access rights across the Nation. That is quite a large number. And we are the country's largest holder of these rights. So this, obviously, is something we know how to do and we know the process. In fact, my colleague next to me is one of our landlords, one of the landlords with whom we have successfully negotiated such rights, Charles Smith. And we find that it is possible to reach agreement over and over with landlords in how we do what we do.

But the chief impediment to extending this network even more rapidly to many more buildings is really the difficulty of obtaining access rights to the vast number of buildings that are out there. There are 750,000 commercial office buildings alone in the United States of America. There are literally scores more multiple dwelling units. In order to get to each and every one of those buildings, one negotiation at a time, taking 9 to 24 months to do it, means we will wait decades for the extension of the broad-band network to people who happen to be unfortunate enough to be in multiple tenant environments. And I don't think that is what any of us want to see happen.

So I would say that the key problem that we have today is an enormous job which, if we must do it one negotiation at a time, will be impossible to do in a reasonable timeframe for our country. And so, as a result, this is the single most important impediment to actually realizing the promise of the Telecom Act. This is the unfulfilled promise of the Act.

Now the building owners and managers really, I think, see it very much our way when you try to get to the bottom line of this. In fact, they have Ten Commandments brochure, which we have attached to our testimony, which talks about how to deal with Telecom providers.

And the No. 2 commandment, which certainly I wouldn't disagree with, is "Don't discriminate among telecom providers." This is not a bad idea. Obviously, it is a good idea. The problem is in the marketplace, discrimination does exist. Landlords do not understand this issue. When they are forced, they take an awful long time to make up their minds about this. As John has correctly said, there are even examples where they can be attempting to use their rather special position as the intermediary between us and the tenants in a way that is really not right. It just doesn't work to the tenants' benefit. They try to extract excess compensation or special benefits.

Now I will say that that is really the exception rather than the rule. The bigger problem is the time. The bigger problem is the time. It takes a long time and there are so many buildings that must be connected, that it will take us decades to do what should be done and could be done in years if we have a framework to operate under that is understood in advance and which is agreed to between us and the building owners in advance. And we would ask you to help us create that framework because we have been unsuccessful in doing it ourselves.

In fact, it is kind of ironic that the U.S. Government has asked another country to do what we are asking the U.S. Government to do. I don't know if you are aware of this, but in the World Trade Organization negotiations, the U.S. Government, through the U.S. trade representative urged the Japanese government to: "Establish rules that facilitate access to privately owned buildings, particularly multiple dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier." So we are just asking the U.S. Government to do, for its citizens, what it is asking the government of another country to do for their citizens. Not an outrageous request, it seems to me, especially given the importance of what we are talking about to the future of our country. Now over the course of a century, clearly gas, electric, telephone, water, cable, virtually all kinds of utilities have been allowed into multiple tenant buildings. This is not some paradigm shift, some outrageous concept that is being invented here today for the first time.

Without competitors, there is no competition. So, unless we are given access to these buildings, we are clearly not going to be able to compete with the incumbents. At this point, without clear national guidelines, what we are going to find is, even as the States move forward on this and, as you know, two States, Connecticut and Texas, have very good access in this regard what we find is that national building owners treat you one way in one State and then, sometimes, if they are not happy that you have used the legislation of one State, they take it out on you in another State.

And this is not necessary because it is quite clear to me that we can reach agreement. In fact, we do. We reach agreement every day. And we did reach agreement in Florida recently on a com-

promise bill with BOMA which I think is clearly an indication that an agreement can be reached again.

Mr. TAUZIN. But that bill did not pass last year.

Mr. ROUHANA. It didn't. Time ran out. But I think, with a little more time, it would have. And hopefully it will next session if we don't have action here. You know, to ensure the competition that we all want, we absolutely have to get to multiple dwelling units. Too many individuals live in multiple dwelling units, too many businesses are in multiple tenant environments. We are going to have two classes in our society in terms of access to the communications infrastructure unless there is a way to remove this impediment. And I don't think we want that. I don't think we need that. And I certainly don't think that that is useful or the things that were envisioned in the Telecom Act just passed.

So, with all that having been said, we need a framework. We think it needs to come from you. And we will work as hard as we can to reach yet another agreement with building owners that we can all live with. Because I think that is quite doable and I thank you for the opportunity to speak.

[The prepared statement of William J. Rouhana, Jr. follows:]

PREPARED STATEMENT OF WILLIAM J. ROUHANA, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, WINSTAR COMMUNICATIONS, INC.

Good morning Mr. Chairman and members of Congress. My name is Bill Rouhana. I am Chairman and Chief Executive Officer of WinStar Communications, Inc. ("WinStar"). Thank you for the opportunity to discuss with you today building access issues that are critical to providing facilities-based competition to the incumbent local exchange carriers ("ILECs") and fulfilling the goals of the Telecommunications Act of 1996.

I. Description of WinStar Communications, Inc.

WinStar is a nationwide competitive carrier with broadband FCC licenses in the electromagnetic spectrum at the 28 and 38 GHz bands. WinStar uses this spectrum to provide facilities-based fixed wireless broadband communications services, including local and long distance, data, voice and video services, as well as high speed Internet and information services. WinStar currently operates in 31 markets, including Baltimore, Boston, Cleveland, Columbus, Detroit, Houston, Los Angeles, Minneapolis, New York City, San Francisco, and Washington, D.C. WinStar plans to expand into 29 additional domestic markets by the end of 2000 and 50 international markets by the end of 2004.

A key part of WinStar's local broadband networks is our *Wireless Fiber™* service, which is transmitted over microwave radio spectrum, using small antennas approximately 12-24 inches. Our *Wireless Fiber™* service establishes connections between our customer buildings and other buildings on our network. The quality and capacity of our *Wireless Fiber™* service meets or exceeds that of typical fiber optic cable, and can be installed at a fraction of the cost. Securing building access rights to install our antennas on the roof, plus access to risers and conduits, telephone closets and pre-existing inside wires, are crucial steps in the construction and expansion of our local broadband networks. Charts outlining these elements are attached.

II. Nondiscriminatory Access To Tenants In Multi-Tenant Environments Is A Critical Component Of A Competitive Telecommunications Market.

WinStar and the other competitive carriers owe their existence to the 1996 Act. We actively use provisions in the 1996 Act, such as Section 251, for interconnection with ILECs to successfully provide competitive local exchange services to consumers. But interconnection with ILECs, important as it is, is only one aspect of providing service. Our ability to serve customers situated in multi-tenant environments ("MTEs") also depends upon our ability to reach them.

Since 1994, WinStar has successfully negotiated access rights to 4,900 buildings nationwide, making us the industry leader. However, the chief impediment to extending our networks rapidly and bringing a second communications pathway to millions of end users is the difficulty of obtaining access rights to every building where we have a potential customer. In the majority of cases, on average, it takes

nine months, but it can take as long as two years to negotiate access rights with building owners. At this rate, it will take decades to obtain access rights to all the buildings and customers that our networks are designed to reach.

WinStar has experienced and is continuing to experience difficulties in obtaining access rights to every building where it has a potential customer. In reality, many building owners do not view access by competitive carriers as a priority for their tenants; some completely prohibit access to their tenants; many others impose unreasonable conditions or rates that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested \$50,000 upon signing of an access contract with WinStar in addition to \$1,200 per month. By contrast, the incumbent provider rarely pays anything to the building owner for access to customers in the building. For tenants, the 1996 Act thus far has failed to provide the choices envisioned by Congress. This problem is not incidental; approximately one-third of U.S. residential units are located in MTEs.¹

The Building Owners Management Association in its publication *Wired for Profit*, provides Ten Commandments for its members to follow when dealing with telecommunications service providers. The commandments are attached to my testimony. You will note that BOMA's Second Commandment states that building owners shall not discriminate among telecommunications service providers. Nevertheless, in the marketplace, a great many building owners do not and have never followed this "commandment." Rather, they discriminate against competitive carriers every day by not allowing us access to their tenants, or by allowing such access on economically unreasonable terms - terms that are not applied to any other utility that traditionally has enjoyed building access privileges.

In Florida last month, as part of a larger telecommunications bill, the competitive carrier community, along with BOMA and others in the real estate community, agreed to legislative language ensuring non-discriminatory building access. Although the overall bill ultimately was not passed, building owners and competitive carriers did reach agreement, as a group, on legislative language.² Thus, no one should tell you today that a legislative solution cannot be reached and agreed to throughout the industry. In fact, the Florida experience is evidence that the interests of competitive carriers and real estate holders are complementary and that a win-win solution to the building access issue can be reached.

Indeed, the United States Government recently encouraged adoption of such a solution in another country. In October 1998, the U.S. Government stated that the Government of Japan should "establish rules that facilitate access to privately owned buildings, particularly multi-dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier."³ We simply ask the U.S. Government to give the same instruction and care to the citizens of this country as it has advocated for Japanese citizens.

III. A Federal Solution For MTE Access Is Necessary And Appropriate.

A federal solution to building access issues is necessary to promote facilities-based competition in the United States. This is especially true because only two States—Connecticut and Texas—have statutes that require landlords to grant nondiscriminatory access to competitive carriers. Because some MTE owners and management companies hold properties across various jurisdictions, no single State has the capacity to address their unreasonable behavior in a comprehensive fashion. Indeed, in some cases, if a carrier exercises its rights under the building access laws of a particular State (e.g., in Texas), nationwide property management companies will penalize the carrier in other States without building access laws, thereby undermining the effect of State-by-State resolution of the building access problem.

Moreover, the market often cannot be relied upon to secure timely competitive telecommunications options for tenants in MTEs. Tenants often lack the unilateral power to secure access to telecommunications options. The argument that all a tenant need do is move to another location misrepresents the economic realities of commercial tenancy. The effect of long-term leases—typically found in commercial

¹ United States Census Bureau, *Census of Housing, "Units in Structures" (1990 figures) available at www.census.gov/hhes/housing/units). Indeed, MTEs are likely to be the first place that residential facilities-based local exchange competition occurs.*

² These parties included BOMA of Florida, the International Council of Shopping Centers, the Florida Apartment Association, AT&T, the Florida Coalition for Competition, the Association for Local Telecommunications Services, *et al.* Telecommunications, Inc., NEXTELINK Communications, Inc., Tollnet, Inc., Time Warner Telecom, and WinStar.

³ See "Submissions by the Government of the United States to the Government of Japan Regarding Derogation, Competition Policy, and Transparency and Other Government Practices in Japan," at 10 (dated Oct. 7, 1998).

environments—tenants without recourse to market influences.⁴ Tenants should not be required to incur the substantial costs of breaking a lease and moving to have competitive choice. This is an unreasonable pre-condition to the enjoyment of the competition envisioned by the 1996 Act.

For these reasons, federal government intervention is necessary and appropriate to ensure competitive carrier nondiscriminatory access to MTEs. Such intervention will promote competition and the public interest.

Intervention will not implicate the Takings Clause of the Fifth Amendment. A nondiscriminatory access requirement is similar to the Pole Attachment Act of 1978. The Supreme Court concluded that the Pole Attachment Act of 1978 did not effect a taking because there was no "required acquiescence."⁵ That Act gave the FCC authority to regulate rates; it did not force pole owners to enter into contracts where there were none. Similarly, a nondiscriminatory access requirement would not permit access to telecommunications providers in the first instance, but would merely provide access to all telecommunications providers once an MTE owner permits one telecommunications provider to enter.

This is comparable to the regulation at issue in *Yee v. City of Escondido, California*.⁶ There, the Court found that a statute may regulate the use of land by regulating the relationship between landlord and tenant. A nondiscriminatory access requirement merely regulates an already existing contractual relationship and does not "permit an initial invasion;" thus, a nondiscriminatory requirement is not a "taking."

Even if a federal nondiscriminatory requirement qualifies as a Fifth Amendment taking, the government can avoid constitutional challenge by providing for reasonable compensation. *Loretto* stands for the proposition that even if a government regulation is a taking, it can still survive constitutional scrutiny. There, the Supreme Court did not invalidate the statute that it found to be a taking since a finding of unconstitutionality required the absence of just compensation. Indeed, the Court did not expressly rule upon the compensation provided for in that particular case.⁷ A State court, on remand, stated that \$1.00 would most likely be adequate compensation in most cases. For building access, the government can overcome any claims of unconstitutionality through a requirement for reasonable compensation. Certainly, as discussed below, the provision of reasonable compensation for access is a condition competitive carriers are willing to stipulate.

IV. The Government Must Mandate Nondiscriminatory Access to MTEs.

Clear guidelines governing building access will promote competitive carriers' abilities to reach more consumers with less expensive, superior, faster broadband services. This will, in turn, accomplish the goals of the 1996 Act by promoting local competition. In Connecticut and Texas, building access legislation has existed since 1994 and 1995 without significant legal challenge or a hue and cry that this approach is unworkable. For the majority of this century, gas, electric, telephone, and water lines have co-existed in virtually all of the nation's multi-tenant buildings. Cable is now present. Buildings are not being harmed in any way because of this access by utilities, and they will not be harmed by competitive carriers' access.

In order to secure competitive telecommunications service options for tenants within MTEs, nondiscriminatory MTE access must encompass: (1) rooftop access (for fixed wireless antennas); (2) inside wiring; (3) riser cables (both horizontal and vertical); and, (4) telephone closets and Network Interface Devices ("NIDs"). Access to

⁴ *Cf. United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974) (explaining that the ability of market participants to wield competitive influence in the marketplace is reduced or eliminated by their participation in long-term requirements contracts).

⁵ *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 246 (1987).

⁶ 503 U.S. 519 (1992).

⁷ *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁸ *Id.* at 441. ("Our holding today is very narrow....") (Our conclusion that § 808 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand."). Although there was no subsequent judicial finding on the adequacy of the compensation (partly because landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision), a State court did characterize it as "unquestionably impermissible [that it would have] eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 808 compensatory scheme (in most cases \$1.00) does not amount to just compensation...." *Loretto v. Crown TV Cable, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987)*. As Justice Blumstein noted in his dissent, the practical effect of *Loretto*'s case amounted to "a large expenditure of judicial resources on a constitutional claim of little moment." *Loretto*, 458 U.S. at 466, n.12.

these facilities will ensure a technology-neutral capability for carriers to provide telecommunications services to tenants in MTEs.

In furtherance of a competitive market—and in the related interests of maximizing tenant choice—MTE access rules must adhere to the principle of nondiscrimination. Telecommunications carriers should compete on the basis of service quality and rates and should not succeed or fail in the market because of discrimination. The terms, conditions, and compensation for the installation of telecommunications facilities in MTEs must not disadvantage one new entrant vis-à-vis another, nor extract, as a function of nondiscrimination, any tenant access rules, recommendations, or conditions should be technologically neutral. Services are and will continue to be offered using a variety of technologies. Discriminatory rules or recommendations that would disadvantage a particular carrier or type of carrier will, by necessity, reduce the choices available to MTE tenants. Therefore, for purposes of telecommunications competition and maximum tenant choice, Congress should work with the FCC to ensure nondiscriminatory access to MTEs among telecommunications carriers.

Additional conditions governing telecommunications carrier access to MTEs should include the following:

- **Carrier assumption of installation and damage costs:** Installing carriers must assume the costs of installation as well as the responsibility for repairs and payments for damages to MTEs. Although indemnity provisions are also warranted, they can entail the expense and delay of seeking judicial resolution. MTE owners and the tenants occupying their MTEs would be better served by a presumption that the cost of any repairs for damages caused by faulty installations should be assumed by the installing carrier.
 - **No customer prerequisite for access:** MTE owners should not be permitted to require the presence of customers within the MTE as a condition of telecommunications carrier access. Carriers must be permitted to wire a structure prior to seeking customers within it. Otherwise, the delays involved in providing service caused by the need to wire an MTE will operate as a strong disincentive to choosing a competitive provider of telecommunications service and will cause needless delay in the time that a customer can expect to receive service.
 - **No exclusivity:** MTE owners should be prohibited from granting exclusive telecommunications carrier access to a building. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications services. The reformation of long-term contracts to eliminate exclusivity provisions when requested by the MTE owner, a telecommunications carrier, or a tenant within the MTE, must be permitted.
 - **No charges to tenants for exercising choice:** Under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the services of that tenant's telecommunications carrier of choice.
 - **Both commercial and residential MTEs should be included within a nondiscriminatory MTE access requirement.** As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As a practical matter, in many urban areas, it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of structures difficult.
 - **Reasonable accommodation of space limitations:** As an economic matter, space limitations most likely will not be an issue in practice. The costs attendant the installation of telecommunications facilities within an MTE dictate that the endeavor will not be undertaken if consumer demand within the MTE is insufficient to recoup those costs. Logically, the number of carriers seeking to install facilities within an MTE will be limited by the number of services to which potential tenant customers will subscribe. Nevertheless, in the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building and requirements that carriers share certain facilities.
- Congress need not establish rates or rate formulas for access. However, it can describe rate structures that are presumed reasonable or unreasonable by adopting a set of presumptions. In this manner, it will eliminate a market failure—the inequality of bargaining positions—derived from the MTE owner/manager's monopoly status. This method allows parties to negotiate specific rates within parameters already deemed reasonable. Of course, parties should be free to negotiate mutually acceptable terms that vary from the model.

Examples of reasonable parameters include the following:

- *Rates should not be based on revenues.* MTE owners' imposition of revenue sharing on a telecommunications carrier is *per se* unreasonable because it does not approximate cost-based pricing and suggests the extraction of monopoly rents.⁹ The surplus benefits of telecommunications competition are more appropriately directed to consumers. Revenue sharing should be permitted as a voluntary arrangement to which carriers and landlords can mutually agree (i.e., in exchange for the landlord marketing the carrier's services within the building as a "preferred provider," but not in such a manner so as to preclude other carriers from entering into or serving the building).
- *Rates must be nondiscriminatory.* Rates for access to MTEs should be assessed on a nondiscriminatory basis. For example, if the incumbent LEC does not pay for access to an MTE, neither should other telecommunications carriers.
- *Rates must be related to costs.* MTE access rates must be related to the cost of access and must not be inflated by the MTE owner so as to render competitive telecommunications service within an MTE an uneconomic enterprise for more than one carrier.

WinStar is not seeking access to MTEs that is not already provided to ILECs. Nor is it seeking access without providing just and reasonable compensation to building owners for access where compensation is appropriate. WinStar is willing to assume responsibility for any repairs due to damages caused to a building during installation or operation. The use of fixed wireless technology can be, and is being, safely managed. Therefore, it is not a disadvantage for building owners to provide non-discriminatory access to competitors, such as WinStar.

Mr. TAUZIN. And now Mr. Brent Bitz, Executive VP, Charles E. Smith Commercial Realty L.P. from Washington, DC, New York Avenue here in the city. Mr. Bitz, you have been complimented as a building owner who cooperates. Let us hear your story.

STATEMENT OF BRENT W. BITZ

Good morning, Chairman Tausin, Mr. Markey. My name is Brent Bitz. I am executive vice president with Charles E. Smith Commercial Realty. Charles E. Smith Commercial Realty owns and manages over 24 million square feet of commercial office space, primarily located in the Mid-Atlantic region and we have some over 2,000 tenants in our portfolio. Today I have the privilege of speaking on behalf of the Building Owners and Managers Association, which represents some 17,000 owners and property management professionals throughout this country and other nations.

Mr. Chairman, BOMA International and its members need and I believe the record will properly document that we have supported a competitive telecommunications marketplace. Such a marketplace is important not only to ourselves but, more importantly, important to our tenant which, of course, is the lifeblood of our industry. Mr. Chairman, I hope to impart two simple but important messages here today. Firstly, that telecommunications competition is alive and thriving in office buildings and, second, that the marketplace is currently working extremely well; that government action will only hurt competition, but not advance it.

⁹The Texas Public Utility Commission's building access Enforcement Policy Paper notes that "(c)ompensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space." *Informal Dispute Resolution: Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions*, Project No. 18000, Enforcement Policy Memorandum from Ann M. Coffin and Bill Magness, Office of Customer Protection, to Chairman Wood and Commissioners Walsh and Curran at 6 (Oct. 29, 1987).

And if any of you were reading the Wall Street Journal over the last day or two, you may have noticed that some of the companies represented in this room had announced extremely ambulant revenue growth, extremely attractive numbers, numbers that anyone in my industry would die to have. And I think that should be taken into account, how rapidly this industry has grown, in cooperation with our industry.

Studies have documented that, for an office building to remain competitive in today's marketplace, it must offer tenants not only a wide variety of telecommunication services, but also a wide variety of service providers. Such a marketplace does not need government-mandated access. Telecommunications competition is very alive and very thriving. As my colleagues have already pointed out, hundreds of license agreements, indeed, thousands of license agreements are being signed every year between our industry and the telecommunications industry. These are negotiated in a free, competitive environment at arm's length. We don't need the government to assist us in that process.

While our tenants, we believe, can adequately rely on the marketplace to ensure that their interests are well protected, building owners, if it need be, will look to the U.S. Constitution for our defence. But that is not what I wish to speak about today, because that is adequately documented in our written submission which you have in front of you.

We at the Charles E. Smith Commercial Realty Company are a testament to the competitive marketplace. We ensure that office consumers have not only the widest array of services, but also a wide array of service providers. And my colleagues here have already complimented our company on our ability to do that. We did that of our own competitive interest, as you would expect a company to do. We have eight local exchange carriers in our 102 buildings and this is only our company in the Mid-Atlantic region. We have over 2,000 tenants and I am not aware of 1 single instance where any tenant has had a problem in its telecommunications services as a result of its occupancy in our buildings.

We have every conceivable type of tenant from small entrepreneurs through major professional services firms and very large government agencies. And I am very satisfied that our company has been able to meet their existing telecommunications needs by cooperative effort between ourselves, them, and the telecommunications industry. In any case where we were not able to meet a telecommunications need from a tenant, we certainly were very happy to allow them and, indeed, encouraged them to deal directly with the telecommunications industry. Because the amount of revenues that our industry sees out of this issue is very small relative to the rental issue which is the lifeblood of our business.

I was hearing thousands of dollars mentioned just a moment ago. I must be a very poor negotiator because I am only getting hundreds. I will have to take some tips.

Any government action or mandate in this area, in our opinion, would interrupt the free negotiation and flow between companies. Moreover, the FCC, we believe, in its most recent broad-band deployment docket, found there was no lack of broad-band distribution, no lack of competitive choice being offered in office buildings.

We are at a loss to understand how the proponents of forced building entry could ask this committee or indeed this Congress to inject a static regulatory regime at the intersection of the business and telecommunications revolution.

If there is an issue that has arisen with the tenants in the Charles E. Smith buildings between ourselves and the telecommunications issue, it is where the telecommunications industry has indeed turned us down because not all of our buildings nor all of our tenants are viewed by the industry as being a desirable business investment from their perspective. Now as a businessman, I can understand it and, indeed, I can accept it even if I am not happy. But what I can't accept, Mr. Chairman, is their desire to have a one-sided request for access. Such a benefit for them with no balancing obligation for service, in our opinion, would be unacceptable.

Since neither tenants nor building owners have the right to demand service from a provider, we do not think that the provider should be given the right of forced access. The telecommunications industry cannot have it both ways. They cannot cherry pick the best business opportunities in major buildings and desirable tenants throughout this country and then have no obligation to serve the other thousands upon thousands of smaller buildings that are located throughout this country of ours. Even with the difficulties that I have told you about, it is our opinion that commercial tenants can well rely upon the existing competitive environment to ensure that their telecommunications service needs are being taken care of.

And, in closing, Mr. Chairman, we can understand the CLEC's industry desire for a guaranteed marketplace. In fact, some of my colleagues were hoping that I would be able to arrange with you today a bill for a 100 percent occupancy requirement. But that is not a reasonable request.

Mr. TAUZIN. What the heck.

Mr. BITZ. But as this committee and the Congress has stated before, guaranteeing business success is not the role of government. BOMA would like to suggest that the CLEC industry, very much like Mr. Windhausen has mentioned, that instead of spending our time fending off forced building entry legislation, both at the Federal and the State level, that we join together in a mutual education effort to bring those perhaps less progressive members of our industry forward to understand the benefits to both their companies and their tenants of the competitive environment that we also agree is so important to our national interests.

Thank you very much, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Brent W. Bitz follows:]

PREPARED STATEMENT OF BRENT W. BITZ, EXECUTIVE VICE PRESIDENT, CHARLES E. SMITH COMMERCIAL REALTY L.P.

INTRODUCTION

Chairman Tauzin, Mr. Markey and members of the Subcommittee, good morning, I am Brent Bitz, Executive Vice President of Charles E. Smith Commercial Realty L.P. The Charles E. Smith Company owns and manages over 25 million square feet of property. We serve in excess of 2,000 tenants and we employ more than 1,150 individuals, either directly or through contracts at our properties.

BACKGROUND

Today I have the privilege of testifying on behalf of the over 17,000 property management professionals that comprise the Building Owners and Managers Association International.¹ At BOMA, I currently serve as a senior member of the association's National Advisory Council and was appointed to serve as lead representative in meetings earlier this spring that we had with the C-LEC industry represented by Teligent.

The record will document BOMA International and its members need—and have supported—a competitive telecommunications marketplace. Such a marketplace is important to our tenants and is, therefore, vital to us.

The BOMA membership, however, has consistently identified opposition to any governmental effort to mandate access to our properties as a leading advocacy issue. BOMA feels forced building access is unnecessary, unmanageable and unconstitutional.

OFFICE BUILDINGS NEED ROBUST TELECOMMUNICATIONS OFFERINGS

Just as the telecommunications industry has been revolutionized, and ultimately improved, by competition, our industry has recognized the challenges posed by an increase in customer sophistication and customer demands for new telecommunications services. Indeed, these demands will be (and already are) providing opportunities for our businesses to compete, one against the other, for market share. Our members aggressively market the characteristics of their properties, including telecommunications services.²

BOMA, in cooperation with the Urban Land Institute, just released a study entitled, "What Office Tenant's Want." One portion of the study asked tenants to rank their top three intelligent building features and to indicate whether they would be willing to pay additional rent to have such a missing amenity.

From the array of 13 intelligent building features, survey respondents designated "Built in Wiring for Internet Access" as the number one required feature and placed in an almost statistical tie for positions two through five:

- Wiring for high speed networks,
- Conduits for cabling,
- Fiber optics capability,
- HVAC systems.

¹ Founded in 1907, the Building Owners and Managers Association (BOMA) International is a dynamic federation of 94 local associations whose members own or manage over 8.5 billion square feet of downtown and suburban commercial properties and facilities in North America. The membership—composed of building owners, managers, developers, leasing professionals, facility managers, asset managers and the providers of goods and services—collectively represents all facets of the commercial real estate industry.

² Building owners and managers of America's real estate increasingly are focused on improving wire management within buildings and targeting investments in what is sometimes called "smart building" technology. The highly competitive office market demands no less of owners, who by nature are inclined to satisfy their tenants by providing ample access to the expansive array of telecommunications products and services needed to facilitate information flows.

In acknowledgment of this investment prerequisite, a number of real estate owners have even devised systems on a building-specific basis that provide cabling (copper or fiber optic) that is accessible to any and all telecommunications providers; this approach is one of the most cost-effective means of ensuring that tenants have the widest possible access to the ever-proliferating number of service providers.

For example, the 31-story, 400,000-square-foot office building located 55 Broad Street in lower Manhattan used to be a "hollow headstone for the Eighties." It was vacant for more than five years following the bankruptcy of its anchor tenant in the late 1990s. New York City's moribund downtown real estate market left little hope that the building could ever return to life again. That was before it was retrofitted by its owner (at a cost of more than 15 million dollars) with fiber optic and high-speed copper wire as well as ISDN, T-1, and fractional T-1 lines to enable Internet, LAN and WAN connectivity; voice, video and data transmissions; and satellite accessibility. The building owner suggests that prospective tenants need only "plug in," and this message has been getting the attention of potential tenants as far away as the West Coast.

Of course, many other building owners prefer not to get into the business of owning or operating telecommunications facilities. But this does not mean they ignore the occupants' needs. The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and that no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms to the owner's business plan for the property. Even during the lease term, it is important for building owners and managers to keep their customers satisfied. Happy tenants are more likely to renew their leases and less likely to break them—and building operators have a strong incentive to reduce the administrative costs and disruption that accompany high turnover rates.

Seven out of ten survey respondents answered "yes" when asked if they would be willing to pay additional rent to have one of these intelligent building features added to their building.

NUMBER OF PROVIDERS ALMOST AS IMPORTANT AS NUMBERS OF SERVICES

In addition to the BOMA/ULI study, numerous other studies have documented that for an office building to remain competitive in today's marketplace, it must offer tenants not only a wide array of telecommunications services, but also an array of choices in telecommunications service providers. Because the commercial real estate business is fiercely competitive, we must provide our tenants with access to the latest telecommunications services or they will go elsewhere, and our buildings' operations will cease.

MARKETPLACE IS WORKING.

In short, the marketplace does not need government-mandated access; telecommunications competition is alive and thriving in office buildings. Hundreds of license agreements are being signed by office building owners and telecommunications service providers every day. These transactions are negotiated at arm's length and in a *free market environment*.

CHARLES E. SMITH EXPERIENCE

We at the Charles E. Smith Commercial Realty L.P. are a testament to the competitive marketplace. We ensure that office consumers have access not only to the widest array of telecommunications services, but also have access to numerous service providers. At the Charles E. Smith Company today, we have eight alternative local exchange carriers providing service to our portfolio of 102 buildings. As I mentioned earlier, we have approximately 2,000 tenants in the buildings, which we either own or manage. I am not aware of a single incident where a tenant was unable to meet its telecommunications needs because of issues relating to its occupancy in one of our buildings. We have every conceivable type of tenant in our portfolio. Our tenants range from small entrepreneurs through sophisticated professional service firms and major government agencies. I am completely satisfied that the existing telecommunications service environment adequately meets my tenants' needs. In every case, if we were not able to meet a tenant's requirements through existing telecommunications service arrangements, they were able to deal with these service providers on a direct basis. At no time would we ever interfere with a tenant's desire to obtain improved service in this vital business area.

Mr. Chairman, every one of those license agreements were executed because they made business sense to all parties involved. Any government action or mandate would disrupt that environment. Moreover, the FCC, in its most recent broadband deployment docket, found no lack of broadband distribution nor competitive choice being offered in office buildings. As an industry, we are; therefore, at a loss to understand how the proponents of forced building entry could ask this Committee and this Congress to interject a static regulatory regime at the intersection of the business and the telecommunications revolution.

RECIPROCAL REQUIREMENTS

As a provider of commercial office space, one of the greatest challenges we have faced are instances where telecommunications service providers have elected not to do business with us or with the tenants in our buildings. In each case, the reason the C-LEC elected to pass on our business was that we did not represent an attractive-enough investment opportunity. As a businessman, while I am not happy with their decision I can accept it.

What I can not accept is the telecommunications industry's one-sided request for forced access, which benefits them with no balancing obligations for service. Since neither tenants nor building owners have the right to demand service from a provider, we do not think that the providers ought to be given the right to forced access. The telecommunications industry cannot have it both ways. They can not cherry pick the best opportunities for business and then unilaterally ignore the rest of our industry's tenants across this nation.

UNREGULATED ENVIRONMENT WORKS BEST

We believe that an unregulated environment works best. Commercial tenants may rely upon market forces to ensure their access to not only a wide array of telecommunications services, but also a wide array of telecommunication service providers.

CONSTITUTIONAL RIGHTS

And while tenants may rely upon the marketplace to ensure their rights are protected, building owners will look to the U.S. Constitution for our defense. But rather than going on at length about the constitutional protections we enjoy³ and a discussion of how a one-size-fits-all regulatory scheme for access is unmanageable, I have reduced those comments to paper as Appendix One and Two, respectively. I would like to conclude my testimony with a call for a cooperative relationship with the competitive local exchange industry.

COOPERATION & EDUCATION

Mr. Chairman, we can understand the C-LEC industry's desire of a guaranteed marketplace. Some of my colleagues were hoping that perhaps we could have a 100 percent occupancy law passed. But as this Committee and this Congress have stated before: guaranteeing business success is not the role of government.

The C-LEC industry claims that it is being treated unfairly or differently from the incumbent local exchange carriers. If that is true, it is a transition issue. One that will work itself out as more and more building owners learn they may demand the same of incumbent providers that which they are demanding of competitive providers.

BOMA would suggest the C-LEC industry, rather than force us to spend our time fending off forced building entry legislation, join us in an educational effort—an education effort to inform building owners of their right to require incumbent providers to:

- Obtain their permission for access, and
- Comply with the same rules and regulations for gaining access to any given property that we are today asking of C-LECs.

BOMA is currently engaged in this education program. We have produced "Word for Profit" which, in layman's language explains the world of competitive telecommunications services and then offers model license agreements to govern access to buildings. These license agreements do not discriminate between incumbent and competitive providers. We look forward to the day when *all* access to our buildings by any telecommunications service provider is governed by such a license. Thank you for the opportunity to testify, and I welcome your questions.

APPENDIX ONE

"FORCED BUILDING ENTRY IS UNCONSTITUTIONAL"

Any attempt by Congress to directly, or indirectly by means of Federal Communications Commission actions, mandate access to multiple-unit buildings by telecommunications providers—whether under the guise of defining demarcation points or otherwise—would lead to a taking of private property under the Fifth Amendment.

The U.S. Supreme Court has held in *Loretto v. TelePrompTer Manhattan*, 488 U.S. 420 (1982), that any regulation allowing a telecommunications provider to employ its cables in, on, or over a private multi-tenant building is a governmental taking and would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of wires would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.⁴

For the Congress or the Federal Communications Commission to mandate access for telecommunications providers' cables in and on private buildings would be just as unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompTer to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See *Loretto v. TelePrompTer Manhattan CATV Corp.*, 488 U.S. 419 (1982).

³ Attached to my testimony as Appendix One, is a restatement of the constitutional history on telecommunications wire and the leading case, *Loretto v. TelePrompTer Manhattan*, 488 U.S. 420 (1982) and a restatement of BOMA's filing with the FCC on why a regulatory response with compensation is unmanageable.

⁴ As the Court said in *Rendell-Baker v. Los Angeles*, 200 U.S. App. D.C. 308, 307 n.96, 746 F.2d 1500, 1524 n.95 (1984) (en banc) recited on other grounds, 471 U.S. 1115 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering just compensation."