is there are a million of them. But what he also illustrates is how good negotiators landlords are. Because when asked the question: Do you have any compromise at all? He says, no. And the truth is that is the process we have. And we will offer any number of compromises: Connecticut, Texas, Florida, a brand-new one. We are trying to reach a compromise. That is the whole point of this from our point of view. And there are ways to protect every single issue that has been raised here and we are more than willing to work through those. We do need a solution though. And it needs to be a national one.

And now just one last thing about the FCC. Two years ago at the FCC, these issues that we have been talking about today were raised in rulemaking proceedings and they haven't been answered. And the primary reason is the Commission, rightfully I believe, is unclear about its ability to act. They legitimately feel they don't have a clear mandate. We think they do have a clear mandate, but they believe they don't. So somebody needs to clarify it and I don't know who you go to when a regulatory authority doesn't believe they do, except to the legislative. So we are here and we are going to need either some kind of a clear direction or a law.

Mr. KLINK. Mr. Windhausen.

Mr. WINDHAUSEN. If I could just add in response to a couple of things that Mr. Bitz also said, we do have examples of consumers who sought the right to receive service from an individual CLEC and they were denied that right so we do know of many unhappy consumers, tenants. It is also that Mr. Bitz mentioned that we are looking for the right for 72 different companies to get into each building. That is not what we are looking for. For the most part, what happens is the economics work out that once you have two or three or perhaps four CLECs into a building, no other CLEC is going to seek access because it is just not economic for them.

We are only seeking access where there is space available. If the landlord can demonstrate that there is no space anymore to accommodate anyone else, that is fine. That is a legitimate reason for him to say, no, I am sorry. I can't take in any more CLECs. And that is a reason that we will understand and we are very happy if that would be written into the legislation.

Mr. KLINK. I thank you very much. Mr. Chairman, you have been very kind with the time. I just want to—and the hour is getting late. If nothing else comes out of my line of questioning, I just think it is important that we recognize that we have not come to the business community or those who are investing and putting up buildings and own and manage buildings and saying we want you to give and you haven't got any. We have actually—and I think you know this and the other members of the committee know it because they were here—we took their interests into consideration, very high consideration, when this legislation was written, when it was passed and we are just asking for them to come to the table.

And the intransigence that I hear. I hope that that is just for a day. Maybe you weren't prepared for the question. I hope that there is an ability, really, to be able to work together so we can get through this. We are not looking for a steamroller to come over the top of you, but, on the other hand, we want to get this technology out to the public. Thank you, Mr. Chairman, for your time.

Mr. TAUZIN. Thank you, Mr. Klink. I may point out to you, Mr. Rouhana, that generally when the FCC has trouble finding, you know, authority to do something, it is generally because they are reluctant to do something because when they want to do something they generally find authority to do something.

Mr. ROUHANA. Well said.

Mr. TAUZIN. But I understand the argument. The gentlelady from Missouri, the Show Me State. By the way, Karen, it is the common practice in Federal court when you go there to argue a case, the court will often ask you how are you here? I mean, what authority, what jurisdiction do we have over your case? A cajun lawyer once said, now, I came by the bus.

But the Commission is asking how are we are? What authority do they have? And it is a good question. Ms. McCarthy.

Ms. MCCARTHY. And I can appreciate, Mr. Chairman, that they would like us to address the answer and make it easier for them. But I come out of a background of State government feel pretty strongly if States like Connecticut and Ohio and Nebraska and Texas and even Florida are in the process or have addressed this issue, that probably the question for this committee today is, you know, if there were to be Federal legislation, what should be in it? How is it working out there in the States? Is there some model for us?

And in any of these States, have we got reciprocity going so that if a building owner is required to provide access on demand, are they also required to request service on demand? Is that in any of the State models? Mr. Rouhana, you made begin, but anyone who would like to weigh in. I would like to know your thoughts on what is out there and working. What would be ideal, if anything, for us to do.

Mr. ROUHANA. Well, I think that both Connecticut and Texas have a rather balanced approach to this and I think either one of them is particularly good. Personally, I think the Connecticut Act is the better of the two because it deals with the time problem that I have been talking about today more directly. Happily, in neither of those States has anything bad happened to the real estate market because of the passage of the Act. We haven't had, you know, assaults of thousands of telecom companies on people and there hasn't been a—I don't think there has been any diminution of the value of the real estate. And certainly wouldn't want to see that happen.

Mr. TAUZIN. Would the gentlelady yield? I think she has raised a good question. Do any of those statutes provide an obligation to serve?

Mr. ROUHANA. I don't know of any that does.

Mr. TAUZIN. Balanced with the right to be served?

I thank the gentlelady.

Ms. CASE. Communities that are entrenched within these forced access communities and there is no competition in these communities because of the forced access, because they have a legal and enforceable right to be there, being the local incumbent. So you are less likely to have choice and competition. We have zero choice and competition right now for two new development deals in Connecticut and in New Jersey. And the one community that I referenced

that was in New York was serviced, there were no customer service issues. They didn't even have an obligation to provide service within 90 days of a resident moving in.

Ms. MCCARTHY. Mr. Chairman, I apologize to the panel. Why I was late was I sit on the Energy Power Subcommittee and we are grappling with a similar principle there that we are talking about here in telecom—and the full committee and all these members will deal with eventually—of this reciprocity, as we deregulate how energy is delivered into the home and the wiring that is in place now to address these telecom issues will be critical to many of the issues that we are grappling with in another subcommittee.

So, Mr. Chairman, I would really like to hear more thought on this reciprocity idea and the rights that go both ways if you wouldn't mind a moment more of discussion by——

Mr. TAUZIN. Absolutely. The gentlelady controls the time. If any of you wants to discuss this with her. How does it work in a competitive—we understand a monopoly market. You have got a service. You have the right to put the wires in in service. But you also have the service if you want your service. How does that work in a competitive market? Ms. McCarthy has, I think, raised an excellent question.

Mr. PESTANA. In New York State, the cable operators, such as Time Warner, have to provide service to everybody. All residents that want cable get service, regardless of how much it costs us. The competition, RCN in New York, obviously they just pick the right buildings or the ones that have the right financial solutions for them. So they compete unit-by-unit in some locations and they compete on a bulk basis sometimes where we basically get excluded because we have the equipment there, but the landlord signs an agreement where everybody has to hook up to RCN. So we have those kinds of situations. But we are required to serve everybody.

Ms. MCCARTHY. Mr. Rouhana, do you want to speak to this please?

Mr. TAUZIN. Yes, address the gentlelady. She controls the time.

Mr. ROUHANA. Yes, I think that there is a physical issue involved here which is literally the number of places that network infrastructure has to be created physically in order to deliver service to everyone. So what we have been talking about today is one of the impediments to actually going to as many places as possible which is building access. And I said a little bit earlier that we have got to get as many commercial places as we can so we can build the infrastructure, then start to go to the residential markets. And that you can't physically get there any faster than you can get there, but slowing us down is not going to get us there faster. So, by making it harder for us to get into buildings, we won't speed up the process of getting to everyone.

So I don't know quite how to answer the question except to say physically we have to create the network. That is a one building at a time thing. There are a million buildings to build it to. We have got to get access first to build to them. That is just commercial. Then there is is it 30 million homes some much bigger number of multiple dwelling units and then homes that have to be eventually reached. And it is going to take a combined effort of multiple carriers doing that to get an alternative infrastructure built across

the country. And it is going to be cable providers and competitive carriers, using a variety of technologies, that ultimately get us an alternative infrastructure in all of the facilities we want. But, clearly, that access, we don't have a shot at that.

Ms. McCarthy. Have you ever refused service when requested by a building owner?

Mr. Rouhana. By a building owner?

Ms. McCarthy. Yes.

Mr. Rouhana. Building owners don't ask us for service, tenants do. If we get an order from a tenant we try to serve them, if our network can get to them. It is a physical question. If we can get our network to a tenant, we want to serve them. We would like to serve everybody.

Ms. McCarthy. Mr. Bitz.

Mr. Bitz. With due respect to my colleague next to me, we have been turned down. We have contracts with the firm that Mr. Rouhana represents. We also have buildings where because I assume they are not attractive, they have elected not to sign up on those buildings. We have 102 in the Mid-Atlantic area.

So the issue of reciprocity is very important because right now we have many buildings where we would like to have service where we can't because maybe they are too small or the tenant mix is not desirable from a telecommunications service providers' perspective. So that is an issue of concern to our industry, because, I have mentioned before, the real point that we are looking to is to have happy tenants. The amount of revenue that we get out of this is really very small. I think it is .8 cents per square foot compared to $19 per square foot for rent. So it is infinitesimal relative to our overall business model.

Ms. McCarthy. Mr. Rouhana.

Mr. Rouhana. I just need to respond to that because if there is a place we haven't gone it is because we physically can't get there. I am back to my same issue. The process of constructing a network across the entire Nation takes a period of time. Time is the No. 1 impediment to having competition as quickly as possible. I mean, you want to have it as fast as you can have it. Building access is a key impediment to getting there. So we could get into a circular discussion about which came first, but the fact is, if we can't build the network to places, we can't get to the next place.

Ms. McCarthy. Well, my original question that I posed and directed to you was about the fact that if Federal legislation is needed or created what should be in it? And this question of reciprocity is one that I believe the subcommittee would entertain as a component of that, if we go down that path. And so that is why I was seeking thoughts on whether the question of reciprocity should be in it. Let me hear from—what is your name? I am sorry—Mr. Windhausen.

Mr. Windhausen. That's right. Thank you. Earlier there was reference made to Connecticut and Texas State statutes on these issues. They do not contain a reciprocity requirement, I imagine because they found it wasn't necessary. These companies are common carriers. They already have an obligation under the law to serve and to serve in a nondiscriminatory basis. I think the way the economics work out is once you are in a building and once you are

wired, your incentive then, as the CLEC, as the competitor, is to put as much traffic onto those facilities as possible. So it only makes sense for you to serve as many consumers in that building as want service. So there is no need for that kind of legislative requirement for reciprocity because it will happen anyway, once the access to the building is granted.

Mr. PRAK. If I might, Ms. McCarthy, on the question of obligation to serve, I represent the over-the-air television industry, KNBC, Kansas City, for example. We have been told by the Congress and by the FCC to build out digital television facilities to serve everyone. Our concern in this is that we don't want landlords standing in the way of folks who reside in their buildings being able to receive free, over-the-air television service, however they may receive it, whether they receive it with an over-the-air antennae or through cable or shortly, I guess, there will be the opportunity to receive it through DBS.

Ms. MCCARTHY. Mr. Chairman, I am not sure there is any other individual who wishes to speak. Mr. Sugrue?

Mr. TAUZIN. Any other want to respond?

Mr. BURNSIDE. Yes, Mr. Chairman, Ms. McCarthy, I would just like to return, for a moment, to direct your focus to the cable competition side, with respect to your core question. When you passed the 1996 Telecommunications Act, part of it was to create a concept called "OVS" or open video systems. And one of the things that the cable industry has hard time with since you passed that Act is the fact that, as an OVS operator, it is not required to adhere to the franchising licensing build out under the same terms and conditions that the existing cable operator is required to build out.

However, I think you recognized when you did that part of the Act, that it was absolutely impossible to expect a new competitor, a new entrant, coming into a marketplace, to overbuild an existing market which basically is a monopoly, even though 67 percent of the customers homes take it. You could not simply ask a new entrant to build out all of New York City at the same time and under the same conditions in which the new entrant 17 or 15 or 25 years ago did.

So I think it is a bit disingenuous for that industry to expect new entrants on the cable side to be held to the same standards as opposed to what I think you tried to achieve, and that was to give a new entrant competition and opportunity to get started and then extend its market, extend its network, as it was financially and physically possible.

Ms. MCCARTHY. Mr. Sugrue.

Mr. SUGRUE. If I could just respond. Because I don't want to leave the subcommittee confused about the Commission's attitude toward its own jurisdiction in this area. The Commission has never said aye or nay with respect to telecommunications services and Winstar, for example. Part of that is the focus has been on video because, in part, the law was sort of shaped a little bit with video in mind. Part because Winstar really wasn't doing much when the law passed and was being debated 4 years ago in 1995 and 1996.

Mr. TAUZIN. It is already an old law.

Mr. SUGRUE. In a way it is. We also have a Commission with four new commissioners since the law passed and a new Wireless

Bureau chief and we tend to take a fresh look, shall we say, at these issues.

Mr. TAUZIN. Don't use that term.

Mr. SUGRUE. I know. I was deliberately provocative. But so I don't want to mislead people. We want to look at this issue hard and my endorsement of some clarification is just to make our job easier, frankly, if we had some.

Ms. MCCARTHY. Mr. Chairman, thank you both for this hearing and for the time you have given me to explore this question. I really would be curious to have staff look into the States nd how it is working out there and appreciate the opportunity to be a part of this.

Mr. TAUZIN. Thank you very much and thank we have a lot of information that we will share with you on those State laws and at least as much background as we have gathered and, perhaps, the witnesses who are experiencing real world, as you said, in the mud operations can give us some insight as to their specific observations on how well those State laws are working.

The Chair will recognize the ranking minority member, Mr. Markey for as much time as you shall require.

Mr. MARKEY. Thank you, Mr. Chairman, very much. I just want to thank you for holding this hearing and for the excellent testimony that we received from the witnesses today. I think we pretty much had the issue framed for us today. We have voice and video and data industry that wants to provide competition, lower prices, better service to the one-third of Americans that live in apartment buildings and to businesses that operate in large structures across the country. And, on the other hand, we have legitimate concerns on the part of the real estate industry: the tenant safety, constitutional property right issues, compensation issues that all legitimately are being raised by the other side.

I think that our task is now very well framed for us. I think it is important for us to get it and get it resolved. And I would hope that this would be the kick-off of our effort to find some commonsense solution that legitimately deals with the issues raised by all parties, but toward the goal of ensuring that there is low-priced competition available for every tenant in America. And I thank you for holding the hearing.

Mr. TAUZIN. I thank my friend. The Chair recognizes himself. Let me, at this point, mention that PCIA has also submitted testimony for the record. Without objection, that testimony will be made as part of the record.

[The prepared statement of PCIA follows:]

May 12,1999

THE HONORABLE W.J. (BILLY) TAUZIN
United States House of Representatives
Chairman, Subcommittee on Telecommunications, Trade & Consumer Protection
2183 Rayburn HOB
Washington, DC 20515

DEAR CHAIRMAN TAUZIN: I want to commend you and the Telecommunications Subcommittee for conducting this week's hearing on the issue of access to multi-tenant buildings by competitive telecommunications providers. PCIA, on behalf of its Wireless Broadband Alliance members, looks forward to working with the Subcommittee as it explores means of promoting wireless broadband alternatives for the millions of small businesses and residential customers that live and work in multi-tenant buildings. As you move forward with your consideration of this issue, I hope

you will take into consideration the basic principles that I have outlined below. I respectfully request that you include this letter in the record of your hearing.

Consumers must have a choice of "last mile" broadband access providers if Congress' vision of a competitive telecommunications market is to be realized. Wireless broadband providers offer a real alternative to phone companies' DSL services and to cable modems. However, if these new wireless services are to achieve their potential, it is crucial for these wireless companies to have non-discriminatory access to buildings where incumbents now provide service.

Wireless broadband licensees are more than capable of offering the full array of broadband telecommunications services. The most established of these companies, WinStar and Teligent, are deploying service across the country today. Yet there are hundreds of companies recently licensed by the FCC who are prepared to offer highspeed voice, data, video-on-demand and Internet access to small businesses and residential consumers. These potential customers, who by and large have not had the opportunity to experience true broadband technologies, are often located in multi-tenant buildings under the control of a landlord or condominium association. For wireless broadband operators to offer these extraordinary services to these consumers, they must first have access to the buildings. This requires the consent of third parties (e.g., landlords or management agents) who often have made exclusive arrangements with the incumbent telephone company or cable company to serve the tenants in a building.

Some states have recognized the importance of mandating access for alternative telecommunications services in a multi-tenant environment. For example, Connecticut and Texas require, by statute, non-discriminatory access to buildings while the Ohio and Nebraska public utility commissions have mandated access. Last year, the National Association of State Regulatory Commissioners (NARUC) adopted a resolution supporting the rights of consumers in multi-tenant buildings to have a choice of telecommunications providers. Finally, this spring the State of Florida almost adopted legislation that would mandate access to buildings with reasonable compensation to building owners. Notably, this legislation garnered the support of the Building Owners and Managers Association (BOMA). Unfortunately, however, most states have yet to address this issue.

PCIA believes that the resolution of building access concerns demands a federal solution. Otherwise, wireless operators will face piece-meal and conflicting obstacles to their deployments across the country. Congress previously rejected the state-by-state approach to opening local markets to telecommunications competition through its adoption of the Telecommunications Act of 1996. It should do the same here through either express legislation or by directing the Federal Communications Commission to fashion access rules.

As you consider means of offering consumers a real choice in their broadband telecommunications providers, I urge you to keep several principles in mind. These principles will ensure that new telecommunications services are made available to all Americans while protecting the legitimate private property rights of building owners.

- *Non-discriminatory access to buildings:* The terms, conditions, and compensation for the installation of telecommunications facilities in multi-tenant buildings must not disadvantage one new entrant vis-a-vis another new entrant or new entrants vis-a-vis incumbent providers. Telecommunications carriers should compete to serve consumers on the basis of service quality and rates and should not succeed or fail in the market because of discrimination that tilts the playing field or prevents choice altogether.
- *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 buildings. Building owners and the tenants occupying their buildings should be assured that the cost of any repairs for damages caused by facility installation should be assumed by the installing carrier.
- *No exclusivity:* Building owners should be prohibited from granting exclusive access to telecommunications carriers. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications service.
- *No charges to tenants for exercising choice:* Under no circumstances should a building owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.
- *Both commercial and residential multi-tenant environments should be included within a nondiscriminatory building 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 customers difficult. Small and medium-sized business tenants are often denied a choice of communications providers and do not have the clout in a building to compel the landlord to honor their choice of provider.

- *Reasonable accommodation of space limitations:* Space limitations in buildings most likely will not be an issue in practice. 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 without serving commercial customers and requirements that carriers share certain facilities.
- Building owners should receive reasonable compensation for building access: Congress need not establish specific rates or rate formulae for access. Instead, Congress can establish a set of presumptions for the FCC or other government bodies to use to evaluate the reasonableness of a charge. This method allows parties to negotiate specific rates within the parameters defined by Congress. These parameters might include the following:
  - *Rates should not be based on revenues.* Congress should presume that a building owner's 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.
  - *Rates must be nondiscriminatory.* Congress should require that rates for access to buildings be assessed on a nondiscriminatory basis. For example, if the ILEC does not pay for access to a multi-tenant building, neither should other telecommunications carriers. This would not bar the landlord from recovering reasonable out-of-pocket costs.
  - *Rates must be related to costs.* Building access rates must be related to the cost of access and must not be inflated by the building owner so as to render competitive telecommunications service within the building an uneconomic enterprise for more than one carrier.

The Telecommunications Act of 1996 clearly voices Congress's desire to promote facilities-based local exchange competition. Today, a new breed of facilities-based providers using wireless broadband technologies are ready to meet that goal. These companies will offer small businesses and residential customers the highspeed Internet access and other advanced services that are unavailable to them today. Customers deserve the right to choose the wireless alternative for receiving broadband access. Yet millions of potential customers will not have the opportunity to choose unless Congress adopts a building access regime that insures non-discriminatory access for all telecommunications providers.

Again, I thank you and the Committee for opening a dialogue on this important matter.

Best regards,

JAY KITCHEN
President,
Personal Communications Industry Association

cc: Chairman Bliley
Ranking Member Dingell
Members of Telecommunications Subcommittee

Mr. TAUZIN. Let me make a couple of comments. First of all, on section 207, I think it is interesting to note that one of the reasons why section 207 is there was to protect the right of the viewer to put up an antennae and receive the signal. The concern there was principally focused in on direct broadcast television—you are right—it was a video kind of concept.

But it was designed to make sure that, in fact, there wouldn't be a denial in State law, local laws, or property owners agreements that would restrict one of the property owners from, in fact, installing a DBS dish and, therefore, offering a competitive choice for the local incumbent cable. That was sort of the genesis, perhaps, of the section but it speaks of viewers, not owners, which is rather interesting. And I know the Commission is wrestling with that. What is the meaning of that term?

The Congress could well have said owners are not, you know, no restrictions shall be allowed to prevent owners, State laws, local laws, agreements among common owners, would prevent a single owner from putting up an antennae and receiving some of these services. But the law said viewers, not owners. Does that mean, then, that the owner of the property can't stand between the viewer, a tenant, and his right to have an antennae, whatever it takes to receive these signals.

While we were thinking video and while the Internet is mentioned twice in the 1996 Act, that is all the browser wasn't even invented until 1995. It was being invented at the same time we were trying to write a law about switch networks and we weren't even thinking about, you know, packet networks like the Internet. While all that is true, how does that law then, which was written with a video concept in mind, apply now to all sorts of wireless services and wired services, that will contain a lot more than video? That, indeed, could be integrated services and by all accounts will be integrated services. And those are interesting thoughts that I think we are going to take with us from this hearing.

In this testimony by PCIA, PCIA calls for a whole list of things they think would help. I would touch on them real quickly and just to give you an idea of how complex we view this task. They ask for nondiscriminatory access to buildings. Well, how many? How many people should have nondiscriminatory access to a single building? You mentioned how many members now in your association and that is growing. CLECs are growing. Companies are I mean, we have churned out all kinds of spectrums for all kinds of new users and providers out there. And they all want to get to our homes or our businesses.

How many would have nondiscriminatory access to the same building? Would they have it over a common wire? Common antennae? Or does everyone get to put their own system in? At what cost to the landowner, the property rights concerns? That is not easy to deal with.

PCIA mentions the carrier should assume the cost of insulation and damage cost. Well, did the monopoly incumbent telephone company have to pay for those costs? Did the owner have to pay for them? Is the new entrant going to be treated differently than the incumbent when it comes to cost and installation of those systems? How do you get parity there? Is everybody free or is everybody charged? And if you go everybody charged, who is going to set the charges? Is government going to be setting prices here? Determining whether it should be $500 maximum and whether or not when I am in a hotel I should be charged that extra buck for a .10 call? You know, Mr. Markey raises that issue. Do we get into that? Do we dare go there?

No exclusivity. I notice the Florida statute, for example, touches that, but it says no exclusivity forward. So that there is no abrogating existing contracts. But what is a contract has a 25-year term? Take it or leave it. You want cable services, you can only have ours for the next 25 years. When cable was a monopoly and de facto legally then. And now all of a sudden we have got new competitors

who want to come in. Well, we have got an exclusive contract for 25 years and nobody should abrogate it. Not an easy little problem.

No charges to tenants for existing choice. Well, if the landowner has a lot of charges or the provider has additional charges to reach that tenant, you mean you can't pass that on the tenant? And who can? Under what circumstances? And how much? How much of an add-on can you make? Do we get into that? In a competitive marketplace where we are trying to deregulate, downsize the FCC's role, how much do you really want the FCC involved in all that, guys and gals?

And it goes on. I mean, they have got a whole list. For example, the reasonable compensation for the building owners' access, rates to be based on revenue. Well, again, are we going to get into all the criteria upon which rates are going to be based to compensate for the use of buildings or access to buildings to reach those viewers who now become not just viewers, but information service customers of the future?

The plate is full. I say it again. Thank you very much. You have enlightened us but you have also made our lives much more complex and for that we thank you because that means our jobs will continue.

The hearing stands adjourned.

[Whereupon, at 1 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:

STATEMENT OF THE COMMUNITY ASSOCIATIONS INSTITUTE

The Community Associations Institute (CAI)[1] appreciates the opportunity to address the Subcommittee on Telecommunications, Trade and Consumer Protection on behalf of the nation's condominium associations, cooperatives and planned communities to provide the following comments on the issue of access to buildings and facilities by telecommunications providers.

Community associations fully support a competitive telecommunications marketplace and are working diligently and effectively to secure the telecommunications services requested by residents while ensuring that the delivery of such services does not damage the substantial investment that homeowners have made in association property. Increasingly, community association residents are seeking newer, faster, and more sophisticated telecommunications capabilities. In response to such demands, resident boards of directors are looking to viable competition among telecommunications companies—and the advancements that such competition will produce—as means to provide more enhanced and affordable services to their communities. If certain telecommunications providers have not gained access to community associations, it is due to a lack of demand for their services, concern over potential damage to property, the scarcity or absence of available space, or other such legitimate concerns. It is not due to association intransigence.

[1] Founded in 1973, CAI is the national voice for 42 million people who live in more than 205,000 community associations of all sizes arid architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence though a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 57 local Chapters and 26 state Legislative Action Committees.

Understanding Community Associations

In order to understand the concerns of community association residents and their collective opposition to any proposal that would grant telecommunications providers a privilege to access and use common or private property without permission, it is important to grasp the legal basis and governance structure of community associations.

All community associations are comprised of property that is owned separately by an individual homeowner and property owned in common either by all *owners jointly* or the association.[2] There are three legal forms of community associations: condominiums, cooperatives, and planned communities, which differ as to the amount of property that is individually owned. In condominium associations, an individual owns a particular unit; the rest of the property is owned jointly by all unit owners. In cooperatives, the individual owns stock in a corporation that owns all property; the stock ownership gives the individual the right to a proprietary lease of a unit. In planned communities, an *individual* owns a lot; the association owns the rest of the property. Generally, an individual owns less property in a condominium than a planned community, while there is no individual property ownership in a cooperative. Therefore, while individuals do own or use property in community associations, they do not exclusively own all property in the association. Community associations either own or control association common property, using and maintaining this property for the benefit of all association residents.

By virtue of their property interest, association owners are members of the association's voting body. As such, they are responsible for electing a board of *directors* to govern the association. In this respect, residents govern themselves since community associations are operated *by* residents on *behalf of* residents. Owners in a community association who are not on the board may participate in governing sessions by attending board meetings and joining various committees. Directly or indirectly, owners have control over the activities that occur in their association and board members must regularly seek the votes of their neighbors to remain in office. As a result, community associations are particularly accustomed to considering the needs and desires of their residents when determining budgetary expenditures, the use of common property and the *selection* of association services and service providers.

Individuals choose to purchase homes in community associations subject to the covenants, rules and regulations that enable all residents to participate in the governance of the community and establish high levels of services and standards for all. Congress should recognize this self-determinate process and the role community associations lay in maintaining, protecting and preserving the common areas, the value of the community or building and all individually owned property within the development. To fulfill these duties, community associations must be able to control, manage and otherwise protect their common property.

In the context of telecommunications, this may mean that the association enables all residents to choose one or more of Services A, B and C but that Service D is not available to Resident X because the delivery of Service D would mean substantial cost to the association or would damage association property. Service D may also be unavailable because the provider sought to deliver the service in a manner that did not adequately protect the association or its property. The bottom line is that community associations have the appropriate right and responsibility to manage common property, and those that seek to use such property, for the maximum benefit and enjoyment of all residents. An association's charge to preserve, protect and manage common property will always dictate that any provider wishing to physically enter association property or use wiring on association property must satisfy association concerns about such things as security, liability and space limitations. This is absolutely appropriate and vital if the association is to fulfill its duty to the individuals who have purchased homes in the community.

Forced Entry Is Unnecessary, Inappropriate & Unfair

While proponents of forced entry proposals attempt to justify their arguments by irresponsibly portraying community associations and others as barriers to competition, the substantial growth of competitive telecommunications providers in recent years demonstrates nothing if not the effectiveness of the marketplace in meeting the growing demand for advanced and dependable services. The successful relation-

[2] In each type of community association, different terms apply to residents who have an ownership interest in the association: unit owner in a condominium, resident or apartment owner in a cooperative, and homeowner in a planned community. For convenience, all three types will be referred to as "owners." The term "resident" applies to owners and tenants collectively.

ship between competitive telecommunications providers and community associations across the country merits celebration—not legislative action.

It appears Congressional action is being solicited, however, because providers either fear the competition of an open marketplace or have simply concluded that they do not wish to address the legitimate concerns that community associations and others have in relation to effectively and professionally managing an environment where multiple telecommunications providers may be operating within a property.

CAI believes that it would be absolutely inappropriate for Congress or any other governmental entity to disregard the positive evolution of the competitive marketplace by granting any special legislative privilege for telecommunications providers to advance their business strategies and profit margins at the expense of the rights of others.

Forced Entry Dismisses Importance of Provider Knowledge, Expertise & Reputation

The telecommunications industry is growing rapidly and provider quality varies tremendously. To ensure that community association residents receive dependable services, association boards of directors must be able to weigh factors such as a provider's reputation when allocating limited space to telecommunications companies. This is essential if residents are to have a variety of dependable telecommunications options and confidence that the providers are committed to the community's long-term interests.

Community associations choose telecommunications services from alternative service providers that provide high quality, reasonably priced, flexible services that are demanded by association residents. Forced entry policies would deter the growth of the competitive marketplace, and instead, would create artificial markets by granting privileges to low quality telecommunications service providers that would otherwise be unable to compete based on the quality of and demand for their services. With any provider able to force installation of telecommunications equipment on association property, providers would not have to demonstrate service quality and competitive pricing or address any other legitimate concerns for the valuable and limited space they would require. Therefore, forced entry policies would impede the growth of quality competition and possibly prevent association residents from receiving better services from more professional providers.

Forced Entry Undermines Community Security, Safety & Association's Responsibility to Manage Common Property

Removing an association's prerogative to regulate the access of providers to building or community systems, as proponents of mandatory access/forced entry are requesting, would limit the association's ability to protect residents and their telecommunications service, the equipment of all providers, and the property itself. In such an environment, resident safety and security would be compromised and association risks and liabilities would escalate.

Forced entry proposals undermine every responsibility associations have to properly serve their owners and the properties. Equipment and wiring installation usually involves removing or drilling through roofs, walls, floors, and ceilings. This activity often causes damage, requiring additional expense to restore the property. With its authority to permit or deny access to its common property and to require that all providers negotiate a written agreement governing their conduct, an association can choose telecommunications providers that will not damage common and private property during equipment installation and maintenance, and insure that any damage is properly repaired and paid for by the provider causing the damage.

In a forced entry environment, all telecommunications providers could access an association regardless of how they treat the property and providers would have less of an incentive to prevent damage to common property because their lack of care could not be a basis for exclusion. The association and its owners, the telecommunications consumers, would be required to bear the financial burden of repairs.

With multiple service providers having the unrestricted right to enter an association, the potential for damage to common property and telecommunications equipment, or injury to association residents and personnel, would increase exponentially. Since multiple providers would often be using the same portions of common property, it is conceivable that such areas would be damaged, restored to some extent, then damaged again by another provider. It is also conceivable that a new provider would damage a previous provider's telecommunications equipment during installation.

If telecommunications providers damage property or injure association residents, it is likely that the association would be held liable since it has the responsibility to decide what companies and providers operate within the community. Yet, forced entry policies would negate the rights of associations to limit the risk of damage or

injury while minimizing the disruption to common property, telecommunications equipment, and association residents. Instead, it would labor associations with the expensive and burdensome task of trying to hold telecommunications providers liable for problems after the fact.

Forced Entry Ignores Space Limitations & Is Anti-Competitive

Real estate is a finite resource and common area space is always limited. It is simply not possible for community associations to accommodate an unlimited number of providers. It is this reality that seems to make forced entry so appealing to providers already in the marketplace. Not only do they see a prospect of advancing their immediate business plan, they also understand that a forced entry environment would enable them to preclude future competitors by installing equipment and wiring in as many buildings as possible so there would be no remaining space when new providers come to call.

Not only would such a rush to occupy space likely result in poor quality installations and increased damage to common property, the end consumer would also suffer in such a forced entry environment because competition would be limited. A new provider could be just what the residents desire but the association would be precluded from adding the services or substituting the new provider for an incumbent because providers and not the association controlled the space allocations. Community associations must maintain their rights and flexibility to select a balance of providers in order to respond to resident requirements and ensure a wide diversity of services within the property.

Forced Entry Raises Serious Property Rights Issues

CAI urges Congress to recognize that any requirement forcing a community association to permit access to property for the installation of telecommunications equipment or wiring, in the absence of just compensation, would violate the Fifth Amendment to the United States Constitution and would be the same as that invalidated by the United States Supreme Court in *Loretto v. Manhattan Teleprompter*.[3] In *Loretto*, the New York statute required building owners to make their properties available for cable installation, providing only nominal compensation for the space occupied. The Supreme Court ruled that that installation amounted to a permanent physical occupation of the landlord's property and that even the slightest physical occupation of property, in the absence of compensation, is a taking.[4] The Court further reasoned that permanent occupancy of space is still a taking of private property, regardless of whether it is done by the state or a third party authorized by the state.[5]

Conclusion

CAI eagerly anticipates the growth of additional competition among telecommunications providers and believes that such competition is best fostered through a free and open marketplace that operates with minimal governmental intrusion.

Increasingly, community associations, responding to the desires of their residents, are entering into contracts with multiple telecommunications providers to offer a variety of competitive services to residents. As more providers enter the marketplace to offer high quality, reasonably priced services, such competition will only increase.

Any forced entry policy would unnecessarily limit the rights of community associations and their residents simply to advance the business plans of various telecommunications providers and would be inappropriate for a free market grounded on competition and the respect for private property. Such a policy would hamper the development of a more competitive telecommunications environment and expose the nation's community association residents to undue risks, costs and chaos.

Community associations must retain control over common property, which they maintain and protect. Just as all dry cleaners or sandwich shops may not force their way onto common property to sell their services simply because an association has contracted with other such entities, neither should a telecommunications provider be allowed to take over property it does not own simply because other providers are already there.

A telecommunications providers access to community associations is now and should continue to be based on the quality of services it provides and the demand for those services. A reputable provider with a quality service will be competitive in this environment. Congress should encourage such competition rather than create artificial markets for providers seeking to avoid it.

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[3] 458 U.S. 419,102 S. Ct. 3164, 73 L. Ed. 868 (1982).
[4] *Loretto* at 427.
[5] *Loretto* 458 U.S. at 432, n.9.

Finally, Congress should be aware that this issue has been previously considered and rejected by this body, by the Federal Communications Commission and by numerous states legislatures and regulatory bodies. It is time to put a stop to this endless trek of providers who travel from one governmental entity to another in search of someone to ignore the marketplace realities and public policy shortcomings that should always merit the demise of forced entry proposals. To do otherwise would be a disservice to the nation's 42 million community association homeowners.

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	**CS Docket No. 96-83**
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services	)	

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Pursuant to Sections 1.106 and 1.429 of the Commission's rules,[1] WinStar Communications, Inc. ("WinStar"), Teligent, Inc. ("Teligent"), NEXTLINK Communications, Inc. ("NEXTLINK"), Association for Local Telecommunications Services ("ALTS"), and the Personal Communications Industry Association ("PCIA") hereby petition the Commission for reconsideration of the Second Report and Order in the above-captioned docket, released November 20, 1998 (the "Order").[2]

I. INTRODUCTION AND SUMMARY.

This proceeding concerns implementation of Section 207 of the Telecommunications Act of 1996 ("1996 Act"). In Section 207, Congress required the Commission to promulgate rules that prohibit restrictions on viewers' installation of devices that

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1 47 C.F.R. § 1.106 & § 1.429.

2 In re Implementation of Section 207 of the Telecommunications Act of 1996, Second Report and Order, CS Dock. No. 96-83 (rel. Nov. 20, 1998) ("Order").

receive over-the-air video programming. In its Order, the Commission extended its over-the-air reception devices rule to prohibit restrictions that hamper consumer use of television antennas, small satellite dishes, and wireless cable antennas to include viewers who rent or occupy multi-tenant buildings and wish to install and use such devices in areas where they have exclusive use, such as balconies or patios. The Commission declined to extend Section 207's protection to renters or tenants of multi-tenant buildings that do not have property under their exclusive use suitable for the installation of Section 207 devices. The Commission found that it did not have the statutory authority to prohibit restrictions on installation of Section 207 devices in or on common or restricted use areas, such as rooftops of multi-tenant buildings.

Thus, the Commission's new rules would prohibit certain restrictions of highly limited scope, but in practice effectively will deny the benefits of Section 207 to the overwhelming majority of consumers that do not have access to a patio or balcony and line-of-sight to a Section 207 video programming provider. For these consumers, under the FCC's extraordinarily narrow rendering, their building owners, landlords, or condominium associations effectively mandate their choice of video programming service. That result is directly contrary to the 1996 Act.

The purpose of the 1996 Act was to open telecommunications markets for all Americans so that consumers would have the largest possible range of choices for telecommunications

services. It was not Congress' intent to effectively discriminate against and exclude a whole class of consumers, constituting millions of tenants of multi-tenant buildings, from the protections of Section 207, thereby as a practical matter potentially ensuring the creation of a technology-deprived class of consumers. Thus, the Commission should reconsider the Order and revise its rules so as to honor the clear intent of Congress and complete the implementation of Section 207 and protect these consumers. The Commission should prohibit any restriction (other than those clearly justified by safety concerns) that would prevent tenants of a multi-tenant building from having access to common areas and restricted use areas for the installation of Section 207 devices.

Such a prohibition would not be a per se taking of property within the meaning of the Fifth Amendment. Rather, the Commission would be regulating a preexisting contractual arrangement between the building owner, landlord, or condominium association and the tenant. The Supreme Court has held that such regulation does not give rise to a Fifth Amendment "taking" for which compensation would be required, a clear legal red herring raised by certain real estate interests unsupported by the relevant caselaw. Indeed, the public interest compels the full implementation of Section 207 consistent with this petition. Through such implementation, competition in the video programming business will be enhanced and current concentration in the market will be reduced, and Congress' overall policy in the 1996 Act to enhance consumer choice will be promoted.

II. Interest of Petitioners

A. WinStar.

WinStar is a pioneer in offering local telecommunications services using fixed wireless technology, including both 38 GHz facilities and LMDS facilities. Fixed wireless technology has the potential to bring a variety of voice, data, and video services to users and viewers more rapidly and efficiently than competing technologies. However, the competitive potential of fixed wireless services depends heavily on users' and viewers' ability to receive such services, which require installation of antennas with line-of-sight access to other antennas.

WinStar accordingly is directly impacted by any decision bearing on the opportunities for customers of wireless services to obtain access to their service providers, particularly where such access involves use of antennas on the rooftops of multi-tenant buildings. On September 20, 1996, WinStar filed a Petition for Reconsideration of CC Docket 96-98 on the issue of nondiscriminatory access to buildings and rooftop access pursuant to Section 224, a Petition that remains pending more than two and one-half years later. WinStar participated actively in CS Docket 97-151 and CS Docket 95-184, in which the Commission considered issues of building access for providers of wireless services. In May 1998, WinStar supported Teligent's still-pending petition for reconsideration of the Commission's February 1998 Report and Order in that docket, urging the Commission to rule that Section 224(f) of the Communications Act requires access for all carriers to building rooftops where the incumbent telecommunications

utility has access to the rooftop via easement or otherwise. WinStar continues to stand by its outstanding petitions regarding other Sections of the 1996 Act. WinStar, at present, is also deeply concerned about the Commission's decision to so narrowly interpret Section 207 as to virtually render it meaningless in terms of the practical realities of fixed wireless deployment and engineering.

B. Teligent.

Teligent, a leading communications provider using fixed wireless technology, is licensed by the Commission to transmit signals in the 24 GHz band. Teligent provides voice, data and video telecommunications services, including local telephone service, primarily by deploying fixed wireless point-to-multipoint broadband networks in numerous locations throughout the United States. Unlike copper- and fiber-based systems, Teligent's fixed wireless system does not have any physical wires to install and maintain between the customer's antenna and Teligent's base station antenna. Rather, the network equipment necessary to transmit a signal from a customer antenna to Teligent's base station antenna is placed on private property -- most often on rooftops of buildings.

C. NEXTLINK.

NEXTLINK was founded in 1994 to provide local facilities-based telecommunications services to its targeted customer base of small- and medium-sized businesses. Today, NEXTLINK is a rapidly-growing telecommunications company focused on providing high-quality local, long distance, and enhanced

telecommunications services at competitive prices. NEXTLINK operates 21 facilities-based networks providing local and long-distance services in 36 metropolitan areas throughout the country. NEXTLINK provides competitive access provider ("CAP") services in many locations as well. NEXTLINK also offers small- and medium-sized businesses an integrated package of enhanced telecommunications services. In short, NEXTLINK focuses on services that it believes are at the core of the local exchange market -- standard dial tone, multi-trunk services and advanced telecommunications services.

In addition to its fiber network, NEXTLINK owns a 50 percent share of a joint venture with Nextel Spectrum Acquisition Corp. ("Nextel"), called NEXTBAND Communications, L.L.C. ("NEXTBAND"). NEXTBAND obtained 42 LMDS licenses at the Commission's auction in March 1998. LMDS has been designated by the FCC for use in the provision of fixed wireless voice, data and video services. LMDS technology provides the capability for integrated, two-way digital distribution of multimedia services via large, high-quality bandwidth similar to fiber optic cable, but delivered through rooftop antennas without a wire. LMDS spectrum can, therefore, be used to provide a broad range of telecommunications products, including video programming. NEXTLINK announced on January 14, 1999 that it has reached an agreement in principle to acquire Nextel's 50 percent share in NEXTBAND for approximately $137.7 million. If the transaction takes place, the 42 NEXTBAND licenses will be under NEXTLINK's sole control. Also on January 14, 1999 NEXTLINK announced its agreement to acquire WNP

Communications, Inc. ("WNP") for approximately $695 million. Upon FCC approval and consummation of the merger, NEXTLINK will acquire WNP's 40 LMDS licenses. If both transactions are approved by the FCC and closed, NEXTLINK will hold 82 LMDS licenses that cover most of the major U.S. cities.

NEXTLINK believes that the acquisition of the LMDS licenses will provide NEXTLINK new access and transport capabilities to complement its existing local and developing inter-city fiber networks. By reducing NEXTLINK's dependence on incumbent local exchange carrier facilities, NEXTLINK will gain increased efficiencies and control over its costs. Additionally, NEXTLINK will have the ability to offer innovative services that are not possible using ILEC networks. Consumers accordingly will benefit from NEXTLINK's ability to design flexible and cost-effective transmission solutions to suit their needs. Additionally, NEXTLINK will be able to expand its footprint, enter new markets and reach new customers where there is currently little competition for the ILECs. NEXTLINK is therefore directly effected by any decision bearing on the opportunities for customers to obtain access to wireless services.

D. ALTS.

ALTS is the leading national industry association whose mission is to promote facilities-based local telecommunications competition. Located in Washington, D.C., the organization was created in 1987 and represents companies that build, own, and operate competitive local networks. Three of ALTS members are WinStar, Teligent, and NEXTLINK.

E. PCIA.

PCIA is an international trade association that represents the interests of the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance. As the FCC-appointed frequency coordinator for the Industrial/Business Pool frequencies below 512 MHz, the 800 MHz and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees. PCIA's Wireless Broadband Alliance membership includes LMDS licensees, operators, and equipment manufacturers, each of whom have a vested interest in the ability of video service providers to access multi-tenant buildings.

F. Section 1.106(2)(b)(1) Showing.

The Commission released the further notice on which the Order in this proceeding is based in August 1996, with comments and reply comments due in September and October 1996, respectively. At that time, WinStar was a new participant in the telecommunications industry, focused primarily on launching a business devoted to the provision of voice and data telecommunications over fixed point-to-point 38 GHz wireless

facilities, and in fact had yet to launch facilities-based switched local services in even its first market. In 1997, the Commission enabled 38 GHz licensees to provide point-to-multipoint services, and WinStar also acquired LMDS authorizations in 1998. In 1998, WinStar's business plans grew to encompass potential video offerings, primarily using its LMDS facilities. At that time, the issues in this proceeding regarding viewer access to LMDS services via antennas in shared and restricted areas of multi-tenant buildings first became directly relevant to WinStar's business plans. By then, the comment period in this proceeding was long over. WinStar therefore has the "good reason" required by Section 1.106(2)(b)(1) of the Commission's rules for seeking reconsideration of the Order without having formerly participated in this proceeding.

As for Teligent, the further notice requested by the Commission was issued prior to the development of Teligent and its business plan as it is known today. Indeed, Alex Mandl, the Chairman and CEO of Teligent, did not join the company until after the release of the further notice. For this "good reason," Teligent's concerns regarding the Commission's Order should be heard.

Due to NEXTLINK's recent LMDS acquisitions and evolving business plan for wireless services, NEXTLINK could not have been aware that the Commission's proceeding would be relevant to its business at the time the Commission released the further notice.

Thus, NEXTLINK's concerns in this proceeding should be considered fully by the Commission.

As an association whose largest members include WinStar, Teligent and NEXTLINK, ALTS was not in the position to participate in the comment period of the Commission's Order. Due to the serious issues the Order raises regarding these members' interests, ALTS has a "good reason" to join its members in this Petition.

Similarly, PCIA has a "good reason" to seek reconsideration of this Order. PCIA's members include LMDS licensees which did not even have their licenses when the Further Notice was released. In fact, the Commission recently issued a substantial number of new LMDS licenses last year. Thus, it was only at this recent date that these LMDS licensees began expending resources toward the implementation of their service. While LMDS licensees are still planning their systems and services to be offered, it is reasonable and in the public interest for the FCC to hear their concerns regarding the provision of video services to tenants in multi-tenant buildings as it is likely that LMDS licensees may choose to offer video programming services. Thus, in the interest of fairness and towards the promotion of real competition in the video programming business, the Commission should hear the concerns of LMDS licensees as described in this Petition.

III. CONGRESS INTENDED FOR SECTION 207 TO PROMOTE COMPETITION AND PROTECT ALL AMERICAN CONSUMERS FROM RESTRICTIONS THAT IMPAIR THEIR ABILITY TO USE SECTION 207 DEVICES.

The Commission should reconsider and revise its decision to recognize explicitly that it has -- and should exercise -- the statutory authority to prohibit restrictions imposed by building owners, landlords, or condominium associations on installation of Section 207 devices in common areas and restricted use areas. Section 207 provides that the Commission shall:

> promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designated for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.[3]

The statute requires the Commission to promulgate regulations that prohibit restrictions on receipt of video programming from over-the-air-reception devices. Such prohibited restrictions include the refusal of a building owner, landlord, or condominium association to permit a viewer to receive video programming from a device in common areas or restricted use areas.

While the Commission has promulgated rules of relatively limited practical impact that, for example, prohibit civic associations from restricting landowners' use of Section 207 devices, and protect renters from landlords' restrictions on installation of Section 207 devices on property under renters' exclusive use, the overwhelming majority of the public entitled to the protection of Section 207 was left absolutely unprotected

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[3] Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 114 (1996).

by the Commission's rules. These are the consumers that cannot receive over-the-air signals using Section 207 reception devices on property under their exclusive use due to lack of line-of-sight or lack of a balcony or patio, or due to other physical restrictions. It is critical to note that the FCC's reliance on the installation of reception devices on a tenant's patio or balcony appears predicated virtually entirely on the ex parte presentations of Cellularvision in late 1996,[4] a failed company now in bankruptcy. The real life deployment experience of WinStar and Teligent, among others, collectively in more than 30 major markets over the past three years has proven conclusively that, as a practical engineering matter, the realities associated with a line-of-sight technology cannot be supported -- given the necessities of widespread deployment -- by anything other than rooftop access. Under the subject ruling, these consumers in practice are now limited to purchasing video programming sanctioned by their building owners, landlords, or condominium associations.

In its Order, the Commission states that Section 207 "applies on its face to all viewers," and that it "should not create different classes of 'viewers' depending upon their status as property owners."[5] However, the Order does not apply Section 207 to all viewers, and it creates classes of viewers by disparately treating consumers that occupy multi-tenant

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4 See Order, at ¶ 2, note 6.

5 Order, at ¶ 13.

buildings. Under the rules adopted in the Order, those viewers in multi-tenant buildings that have a balcony or patio within their exclusive use and can achieve line-of-sight to their provider receive the protection of Section 207; however, those viewers in multi-tenant buildings who do not have a balcony or patio or do not have line-of-sight do not receive Section 207 protection.[6]

The Commission's finding that Section 207 by its very terms applies to all viewers is correct. It naturally follows that Section 207 protections via implementing regulation of necessity must be extended to all viewers -- including the millions in multi-tenant buildings that do not have the ability to use a Section 207 device from within their private space. This is consistent with and effectively mandated by the procompetitive purposes of the 1996 Act. Congress specifically intended that the 1996 Act would provide for:

> a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .[7]

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6 In paragraph 2 of the Order, the Commission relies upon the fact that LMDS devices will be capable of receiving signals inside buildings. Indeed, it cites to a representation made by a party that it already had such a device. Pursuant to the knowledge of the parties to this Petition, such a device does not exist, and it is very uncertain whether such a device is technically feasible. Order, at ¶ 2, note 6.

7 S. Rep. No. 230, 104th Cong., 2d Sess 1 (1996).