

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 In the Matter of )  
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 Promotion of Competitive Networks )  
 in Local Telecommunications Markets )  
 )  
 Wireless Communications Association )  
 International, Inc. Petition for Rulemaking )  
 to Amend Section 1.4000 of the )  
 Commission's Rules to Preempt )  
 Restrictions on Subscriber Premises )  
 Reception or Transmission Antennas )  
 Designed To Provide Fixed Wireless )  
 Services )  
 )  
 Cellular Telecommunications Industry )  
 Association Petition for Rule Making and )  
 Amendment of the Commission's Rules )  
 to Preempt State and Local Imposition of )  
 Discriminatory And/Or Excessive Taxes )  
 and Assessments )  
 )  
 Implementation of the Local Competition )  
 Provisions in the Telecommunications Act )  
 of 1996 )  
 \_\_\_\_\_ )

WT Docket No. 99-217

CC Docket No. 96-98

COMMENTS OF AT&T CORP.

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## TABLE OF CONTENTS

SUMMARY.....	III
INTRODUCTORY STATEMENT .....	2
ARGUMENT.....	4
I. INCUMBENT LECS AND SOME BUILDING OWNERS ARE IMPEDING EFFORTS BY COMPETING CARRIERS TO SERVE CUSTOMERS IN MULTIPLE TENANT ENVIRONMENTS .....	4
II. THE SECTION 224 PROMISE OF NONDISCRIMINATORY ACCESS CAN BE REALIZED ONLY IF THE COMMISSION CONFIRMS AND ENFORCES THE ACT'S BROAD COVERAGE OF ALL PUBLICLY OR PRIVATELY GRANTED RIGHTS OF OWNERSHIP OR CONTROL.....	9
A. Engineering Arrangements And Access Needs.....	10
B. Public vs. Private Rights-Of-Way.....	14
C. Access To Utility-Owned Property.....	17
D. Access To In-Building Conduit.....	18
E. "Owned Or Controlled".....	19
F. Ascertaining Utility Ownership Or Control.....	22
III. THE COMMISSION SHOULD DECLARE THAT ANY MULTIPLE TENANT ENVIRONMENT FACILITIES OWNED OR CONTROLLED BY AN INCUMBENT LEC ARE PART OF THE LOOP.....	23
IV. THE COMMISSION SHOULD PROHIBIT INCUMBENT LECS FROM ENTERING INTO OR ENFORCING EXCLUSIVE SERVICE AGREEMENTS WITH BUILDING OWNERS.....	25
V. THE COMMISSION SHOULD CLARIFY THAT UTILITIES MUST, WHERE NECESSARY, NEGOTIATE MODIFICATIONS TO THEIR RIGHTS-OF-WAY AGREEMENTS WITH BUILDING OWNERS SO AS TO ENABLE THE UTILITIES TO COMPLY WITH THEIR SECTION 224 ACCESS OBLIGATIONS.....	30
VI. THE COMMISSION SHOULD ADOPT A SINGLE DEMARCATION POINT FOR ALL MULTIPLE TENANT ENVIRONMENTS.....	36

VII. THE COMMISSION SHOULD ADOPT RULES PREEMPTING  
RESTRICTIONS ON FIXED WIRELESS ANTENNAS.....37

CONCLUSION.....45

## SUMMARY

AT&T Corp ("AT&T") submits these comments regarding actions necessary to ensure that competitive providers will have reasonable and non-discriminatory access to rights-of-way, buildings, rooftops and facilities in multi-tenant environments.

Part I of these comments addresses the barriers imposed by incumbent LECs and, unfortunately, some building owners that are impeding efforts by competing carriers to serve multiple tenant environments. Incumbent LECs have refused to deal, engaged in unwarranted delay, and have adopted overly cramped interpretations of their obligations under sections 251 and 224 of the 1996 Telecommunications Act in an effort to impede competing carriers' efforts to gain access to multiple tenant environments. Similarly, a minority of building owners have erected barriers to entry by refusing to permit access to new entrants or by demanding unreasonable payments for access. These obstacles seriously impair a new entrant's ability to provide service and warrant additional Commission action.

Part II demonstrates that a new entrant's right to nondiscriminatory access under Section 224 can only be meaningful if the Commission confirms and enforces the Act's broad coverage over all publicly or privately granted rights of ownership or control. In this regard, AT&T first describes the engineering arrangements that it seeks to employ within multiple-tenant environments -- (1) traditional telephone connectivity, (2) service through its 38 GHz wireless network, (3) service using hybrid fiber-coaxial ("HCF") networks, and (4) service using fixed wireless local loop technology -- and the access rights necessary to implement those arrangements. Second, AT&T agrees with the Commission that Section 224 requires utilities to provide access to both public and private rights-of-way, but believes that the Commission should confirm that a company

must comply with section 224 only to the extent that it is functioning as a "local exchange carrier or an electric, gas, water, steam or other public utility." Accordingly, to the extent that a company provides only cable or long distance service through a facility, it does not function as a utility and therefore the obligations of section 224 do not apply to that facility.

Third, AT&T agrees that section 224 may obligate a utility to provide non-discriminatory access to its own property and that such access must be provided when the utility engages in conduct on its property for which it generally would need to obtain a right-of-way if the utility attempted to engage in similar conduct on the property of another. Fourth, AT&T agrees with the Commission's tentative determination that section 224 provides a right of access to in-building conduit and therefore that the Commission's current rules defining "conduit" should be amended to reflect that conclusion. Fifth, AT&T recommends that the Commission clarify that the obligations of section 224 are triggered when a utility obtains the right (by whatever means) to use a duct, conduit or right-of-way to provide service, regardless of whether the utility actually chooses to exercise that right. Finally, AT&T submits that utilities must provide, in a timely manner, full information about their conduits and rights-of-way.

Part III demonstrates that the Commission should declare that any multiple tenant environment facilities owned or controlled by incumbent LECs are part of the loop and subject to the unbundling requirements of sections 251 and 252. Unbundled access to ILEC-controlled facilities is essential to address the competitive asymmetry that exists in multiple tenant environments today. Further, unbundled access often provides an important means for new entrants to gain a sufficient foothold in a building to justify

employing their own facilities and can provide competitive access where section 224 rights are inadequate.

Part IV explains that the Commission should prohibit incumbent LECS from entering into or enforcing exclusive service agreements with building owners and thereby prevent them from locking up multiple tenant buildings before competition has had an opportunity to develop. The Commission has authority under Section 201(b) of the Act to prohibit such arrangements between incumbent LECs and building owners that would frustrate Section 224's pro-competitive purposes. As the Commission has recognized in its decisions distinguishing dominant and non-dominant carriers, however, the same concerns are simply not present with respect to agreements between new entrants and building owners. Finally, the Commission should exercise its clear authority to prevent incumbent LECs from enforcing *existing* exclusive service arrangements they have entered into with building owners. The Commission, however, does not have similar authority or reasonable justification to abrogate exclusive contracts between MVPDs and building owners.

Part V recommends that the Commission clarify that utilities must, if necessary, negotiate modifications to their rights-of-way agreements with building owners to enable them to comply with their section 224 obligations. That conclusion flows directly from a utility's statutory duty to provide non-discriminatory access and reflects Congress' intent that new entrants be entitled to full use of a utility's rights-of-way under the same terms and conditions as the utility itself. Accordingly, if a utility has entered into an arrangement that precludes it from providing to a telecommunications carrier or cable provider the same quality of access to its right-of-way that the incumbent itself enjoys,

then it must, where reasonable space, safety and engineering considerations permit, either exercise its eminent domain powers or renegotiate its private arrangement to comply with its statutory obligations. To conclude otherwise would permit incumbent LECs or other utilities to contract away their federal obligations.

Part VI addresses demarcation and explains that the Commission should modify its existing demarcation point rules to adopt a single demarcation point for all multiple tenant buildings. The existing rules place far too much discretion in the hands of incumbent LECs in establishing demarcation points.

Finally, in Part VII, AT&T explains that the Commission should adopt rules preempting restrictions on the installation, maintenance or use of fixed wireless antennas similar to the standards it has adopted under section 207 for over-the-air reception devices (the "OTARD rules"). Specifically, the Commission should adopt rules explaining that a restriction (e.g., state or local law or regulation, private covenant, contract provision, lease provision, or homeowners' association rule) "impairs" the installation, maintenance or use of fixed wireless antennas if it imposes an unreasonable delay or unreasonable expense on the user of the antenna or precludes reception of an acceptable quality signal. The Commission has clear authority to enact such rules; indeed, subsection 332(c)(7)(b) expressly prohibits state and local governments from enacting laws or regulations that have the effect of prohibiting the provision of personal wireless services. Nor would such rules raise "takings" concerns, as the Commission has already ruled in the analogous OTARD context.

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In the Matter of	)	
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Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

**COMMENTS OF AT&T CORP.**

Pursuant to section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") respectfully submits these comments in response to the Commission's *Notice*<sup>1</sup> regarding actions to help ensure that competitive providers will have reasonable

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<sup>1</sup> Notice Of Proposed Rulemaking And Notice Of Inquiry In WT Docket No. 99-217, And Third Further Notice Of Proposed Rulemaking In CC Docket No. 96-98, *Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the* (continued . . .)

and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments (“MTEs”).

### **INTRODUCTORY STATEMENT**

AT&T shares the Commission’s view that “it is important to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises.” *Notice*, ¶ 6. And there can be no dispute that “the fullest benefits of competition, including the widespread availability of advanced and innovative services at reasonable prices, cannot be achieved unless the incumbent carriers are, to the extent feasible, subject to competition in all sectors of their markets.”

*Id.*

The reality today, however, is that incumbent local exchange carriers (“LECs”) are subject to effective competition in few, if *any*, sectors of their markets. Congress and this Commission have already taken many steps to change that, but much remains to be done. That is certainly true with respect to efforts to serve the already large and growing percentage of customers who reside in multiple tenant environments. *See id.* ¶ 29 (“approximately 28 percent of all housing units nationwide [are] located in multiple dwelling units”). To date, both the continuing anticompetitive efforts of incumbent LECs to preserve their monopolies, and, unfortunately, the practices of some building owners who attempt to use their bottleneck control over common area facilities to block entry or

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(continued . . .)

*Local Competition Provisions in the Telecommunications Act of 1996*, 1999 WL 459319 (FCC July 7, 1999) (“*Notice*”).

collect exorbitant fees, have impeded or foreclosed efforts by AT&T and other potential competitors to serve these customers.

Additional Commission action in this area is thus unquestionably warranted. As explained below, the most expedient, and least controversial, solution is to take the additional steps necessary to encourage incumbent LECs to comply with their *existing* statutory obligations to provide nondiscriminatory access both to the elements of their networks, *see* 47 U.S.C. § 251(c)(3), and to the rights-of-way that they own or control, *see id.* § 224(f). The Commission should likewise recognize that it is anticompetitive for these dominant local telephone carriers to lock multi-unit building owners into exclusive contracts before widespread competition even has a chance to develop. In this regard, the Commission should prohibit, as an unreasonable practice, attempts by incumbent LECs to enter into or enforce such exclusivity arrangements. *See id.* § 201.

These measures are by no means a complete solution. Building owners also control bottleneck facilities, and some have not hesitated to abuse that control in myriad ways that impede efficient competition. These building owners claim that the Commission has neither statutory nor constitutional authority to remedy such barriers to entry. Whatever the Commission's ultimate view of those claims, there is one approach that the Commission has adopted in analogous circumstances which will mitigate – but not eliminate – problems associated with building owner abuses. As explained below, the Commission should confirm that neither an incumbent LEC nor any other utility may contract away its federal law duties. Thus, where a utility's existing arrangement with a building owner purports to prohibit the utility from providing third parties with access, the utility should be required to negotiate a modification of that arrangement – or, where

necessary, exercise its eminent domain power – to enable the incumbent to comply with its section 224 obligation to provide nondiscriminatory access.

As the Commission properly recognizes, “[a]ccess by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications markets.” *Notice*, ¶ 29. The failure to bring choice and competition to these customers would “seriously detract from local competition in general,” and would frustrate Congress’ intent to bring the benefits of local competition “to all Americans.” *Id.* ¶¶ 6, 29. It is thus critically important that the Commission, at a minimum, adopt the measures endorsed in these comments to address the significant barriers to entry that currently exist in the multiple tenant environment.

### ARGUMENT

#### **I. INCUMBENT LECs AND SOME BUILDING OWNERS ARE IMPEDING EFFORTS BY COMPETING CARRIERS TO SERVE CUSTOMERS IN MULTIPLE TENANT ENVIRONMENTS.**

The record before the Commission in this and other proceedings starkly confirms that “both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises.” *Notice*, ¶ 31.

That incumbent LECs have done so is no surprise. An incumbent LEC almost always has the *legal right*, under state and local law, to enter a building to provide telephone service to the building occupants. By contrast, a new entrant most often does *not* have that right. Accordingly, new entrants will often require access to incumbent LEC facilities and rights-of-way. But, as the Commission has repeatedly recognized, “incumbent LECs have little incentive to facilitate the ability of new entrants . . . to

compete against them” and “thus, have little incentive to [act] in a manner that would provide efficient competitors with a meaningful opportunity to compete.”<sup>2</sup> To the contrary, “incumbent LECs have the incentive and the ability to engage in many kinds of discrimination.”<sup>3</sup> These incentives and abilities have manifested themselves in the multiple tenant environment through outright refusals to deal, unwarranted delay, and overly cramped interpretations of the incumbent LECs’ section 251 and section 224 obligations. As WinStar describes, “[t]he configuration of MTE wiring and the location of the demarcation point have been used aggressively by [incumbent] LECs to frustrate a [new entrant’s] ability to gain access to an MTE.”<sup>4</sup> Indeed, the record in the *UNE Remand Proceeding*<sup>5</sup> is replete with suggested loop definitions that seek to account for the real-world difficulties that new entrants have encountered over the past three years in seeking to obtain building access through the use of incumbent LEC loop facilities.<sup>6</sup>

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<sup>2</sup> First Report & Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 307 (1996) (“*Local Competition Order*”).

<sup>3</sup> *See id.*

<sup>4</sup> Comments of WinStar Communications, Inc. at 10, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed May 26, 1999).

<sup>5</sup> The phrase “*UNE Remand Proceeding*” is used herein to refer to the Comments, Reply Comments, and other record evidence submitted in response to the Commission’s Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. April 16, 1999), which concerns the effect of the Supreme Court’s decision in *AT&T Corp. v. Iowa Utils. Board*, 119 S. Ct. 721, 734-736 (1999) on the Commission’s local competition rules. Comments and Reply Comments filed in the *UNE Remand Proceeding* will be cited herein as “*UNE Remand Comments*” and “*UNE Remand Reply Comments*,” respectively.

<sup>6</sup> *See, e.g.*, AT&T *UNE Remand Reply Comments* at 84-85 & nn.181-82.

Unfortunately, some building owners also have erected serious barriers to competitive entry. In the *UNE Remand Proceeding*, AT&T submitted an affidavit (which is attached and incorporated herein) which detailed some of the difficulties a new entrant encounters in providing service in multiple tenant environments.<sup>7</sup> As that affidavit explains, AT&T's experience confirms that "many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other charges that are not based on their costs and are not imposed on incumbent carriers." *Notice*, ¶ 31; *see* Lynch Aff. ¶¶ 5-11.

The obstacles a new entrant encounters in obtaining building access are varied and numerous. *First*, in some instances, building owners simply refuse to permit a new entrant to enter the building at all. This problem occurs even in the minority of states that have granted new entrants a legal right of entry, and even if the building's residents have expressly stated their desire to use the new entrant as their local service provider. *See* Lynch Aff. ¶ 5.

*Second*, even when a building owner does not forbid new entrant access, a new entrant must routinely engage in arduous negotiations to obtain the necessary right of entry and to lease the necessary space. Building owners have enormous leverage in these negotiations (because, as noted above, a new entrant typically does not have a legal right of entry), and some use that leverage to impose burdensome restrictions and substantial fees on new entrant access. For example, building owners frequently seek fees of thousands of dollars per month to lease common space that amounts to little more than a

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<sup>7</sup> AT&T UNE Remand Reply Comments at Exhibit C (Affidavit of Kevin Lynch on Behalf of AT&T Corp.) ("Lynch Aff.").

closet. In addition, many building owners require payment of a separate fee, of similar amount, for the use of riser space. The national average real estate rental rate is approximately \$24 per rentable square foot. Some building owners, however, seek more than \$100 per square foot for space that is less costly to maintain than most rentable space and for which the building owner has *already* been compensated (through the loss factor used to set rentable space rates). These charges are plainly excessive, but their anticompetitive and discriminatory impact is even greater because incumbent LECs typically are exempt from paying such charges. See Lynch Aff. ¶ 6.<sup>8</sup>

*Third*, building owners often have little incentive to conduct or conclude building access negotiations on a timely basis, and allow them to drag on for months (or even longer) to increase their bargaining leverage over new entrants. In one case, AT&T has been involved in negotiations with a building owner for over three years because the building owner has demanded the right to share in AT&T's revenues. Negotiations can become even more complicated and time-consuming if the building owner has contracted with a third party to maintain common and riser spaces for telecommunications facilities – a situation which is becoming increasingly common. These delays obviously impair a new entrant's ability to provide service to customers on a timely basis, and thus impair its ability to compete against the incumbent LEC, which typically does not have to engage in such negotiations and thus can promise a customer that it will begin to provide service

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<sup>8</sup> Similar problems arise when new entrants attempt to locate facilities on publicly owned property, such as airports, and the government authority attempts to impose fees based on revenue sharing or minutes of use. For example, a state university has refused to allow AT&T to activate on-campus residents requesting AT&T service, and even has disconnected AT&T's feeder lines and denied access to AT&T's technicians, on the  
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almost immediately. For example, AT&T often has found that while it is attempting to negotiate access terms with a building owner, the incumbent LEC will attempt to lock-up the building's residents by offering them an upgraded, competing service which can begin immediately – pursuant to a multi-year exclusive contract. *See id.* ¶ 7-8.<sup>9</sup>

These obstacles seriously impair a new entrant's ability to provide service and, as a result, AT&T, for one, does not have its own loop facilities in a large number of buildings even though it has fiber in close proximity to those buildings. For example, it is so difficult to obtain building access in Los Angeles, AT&T has deployed its own loop facilities in only 123 commercial buildings in that city. Moreover, AT&T has facilities in the common space – which allows AT&T to serve any customer in the building – in only 26 of those 123 buildings. In the remainder, AT&T has only “fiber to the floor,” which allows AT&T to serve only the residents on a particular floor, not the whole building. *See id.* ¶ 10. Plainly, additional Commission action to clarify and enforce multiple tenant environment access obligations is required if widespread and effective competition is to develop.

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grounds that there is no “license agreement” in place that would require AT&T to pay fees for such access.

<sup>9</sup> In addition, it often is difficult for new entrants even to identify the proper party with whom they must negotiate. The on-site property manager typically fields all calls, and often will not reveal the identity of the building owner. Similarly, the management companies of homeowners associations typically will not release the identities of the associations which they manage – even though the associations generally must consent to provide new entrants with building access – and have told AT&T that it must obtain such authorization directly from individual residents.

**II. THE SECTION 224 PROMISE OF NONDISCRIMINATORY ACCESS CAN BE REALIZED ONLY IF THE COMMISSION CONFIRMS AND ENFORCES THE ACT'S BROAD COVERAGE OF ALL PUBLICLY OR PRIVATELY GRANTED RIGHTS OF OWNERSHIP OR CONTROL.**

Section 224 of the Communications Act states that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to *any* pole, duct, conduit, or right-of-way *owned or controlled* by it.” 47 U.S.C. § 224(f)(1) (emphasis added). A “utility” is “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” 47 U.S.C. § 224(a)(1).<sup>10</sup> The Commission has had numerous opportunities to construe, apply, and enforce section 224, and it has consistently – and appropriately – recognized that Congress intended the obligation of nondiscriminatory access to apply broadly and did not intend semantic loopholes that would allow utilities effectively to evade that obligation.<sup>11</sup> The *Notice* proposes a number of important clarifications to foreclose attempts by utilities to create such loopholes, and, as explained below, AT&T supports these and other measures designed to ensure that section 224 serves its purpose of allowing telecommunications carriers and cable systems to reach the customers who want their services.

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<sup>10</sup> See also 47 U.S.C. § 224(a)(5) (“For purposes of this section, the term ‘telecommunications carrier’ (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.”) Accordingly, section 224 does not afford incumbent LECs the right to obtain nondiscriminatory access to a utility’s poles, ducts, conduits, or rights-of-way.

<sup>11</sup> See, e.g., *Local Competition Order*, ¶ 1143-86.

**A. Engineering Arrangements And Access Needs.**

The Commission “seek[s] comment generally both on competing providers’ preferred engineering arrangements within multiple tenant environments and on the types of arrangements that they can feasibly employ, as well as on the access requirements attendant upon each form of engineering arrangement.” *Notice*, ¶ 34. Technologies, services, and service providers are evolving rapidly. For example, “[i]ncipient and potential challenges to the incumbent LECs may come from several sources,” including wireless and cable providers. *Id.* ¶ 12. For this reason, it is becoming increasingly important that utilities comply with their section 224 obligations in a manner that gives all telecommunications and cable providers nondiscriminatory access.

As the *Notice* properly recognizes, a new entrant seeking to provide telecommunications services through its own facilities may need extensive and varied forms of access to utilities’ poles, ducts, conduits, and rights-of-way depending on the design of the new entrant’s network, the technology it employs, and the types of services it seeks to offer. *Id.* Depending on individual circumstances, AT&T and other potential competitors hope to rely on wireline, wireless, and cable strategies to provide competing services.

AT&T anticipates using four primary network architectures to provide service to its customers. The first involves traditional telephone connectivity between AT&T’s network and the customer’s premises. Such connectivity generally requires AT&T to connect its network to a centralized network interface device (“NID”) located in the building’s common space, and then to deploy conduit, cable, and wiring between the NID

and the customer's premises. *Notice*, ¶ 34.<sup>12</sup> Second, to provide service through its 38 GHz wireless network, AT&T must place antennas on building rooftops, and then deploy conduit, cable, and wiring from the terminating radio equipment to the NID, and then from the NID to the customer's premises. *See id.* Third, AT&T intends to provide service through a hybrid fiber-coaxial ("HFC") network. As the Commission has recognized, this "architecture takes fiber from the headend all the way to feeder lines," and then runs coaxial cable or twisted pair cable to the NID, and from the NID to the customer's premises. OPP Working Paper No. 30, *Internet Over Cable: Defining The Future In Terms Of The Past*, 1998 WL 567433 (F.C.C. Aug. 1998). In so doing, it "offer[s] improved reliability, increased capacity, and clearer signal transmission." *Id.*

Finally, AT&T plans to provide competitive local services using fixed wireless local loop technology. AT&T currently is conducting a trial of this service in Dallas, Texas using only single family homes, but plans to provide services to MDUs in the near future. The architecture for providing fixed wireless local loop service to MDUs under development by AT&T requires a small antenna to be placed outside the dwelling unit.

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<sup>12</sup> As discussed in AT&T's Comments and Reply Comments in the *UNE Remand Proceeding*, the "NID" must be broadly defined to include the functionality that provides the physical termination (including electrical protection such as grounding) and cross-connection, at the appropriate signal throughput (or bandwidth), of the incumbent LEC facilities and the privately owned wiring. AT&T UNE Remand Comments at 83-84; AT&T UNE Remand Reply Comments at 85-87 & n.184. Where the point of connection between the incumbent LEC's outside loop facility and the inside wire is not a clearly identifiable physical device, new entrants must be allowed to access any space or facility accessible by the incumbent LEC for purposes of accessing and re-terminating the inside wire. This access will allow new entrants to connect the inside wire to their own loop facilities by removing the inside wire from the incumbent LEC's NID and attaching it to the new entrant's own device (which will neither involve the new entrant's use of the incumbent LEC's NID, nor the connection of new entrant wiring at the NID).

A small cable will be deployed from the antenna to a box in the dwelling unit. It may be necessary to access the LEC wiring at the NID or wiring closet.

In order to make efficient use of these network designs, AT&T needs, at a minimum, access to: (i) existing conduit from the public right-of-way to the point of demarcation, including access to the RJ-11 jack<sup>13</sup>; (ii) sufficient common space within the multiple tenant environment to place three cabinets or racks of equipment<sup>14</sup>; (iii) a sufficient electrical source; (iv) existing riser conduit, including conduit from the antenna to the terminating radio equipment and to the NID; (v) existing horizontal distribution<sup>15</sup>; (vi) interior wall and ceiling space (or "plenum") to provide access from riser conduit or horizontal distribution to individual units; (vii) roof space for the placement of antennas; (viii) exterior wall space for global positioning system ("GPS") receivers<sup>16</sup> and/or small

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<sup>13</sup> As explained below, the Commission should specify that new entrants may obtain access to the ducts, conduits, and rights-of-way owned or controlled by a utility regardless of whether those facilities are underground or above-ground or inside or outside of the relevant multiple tenant environment structure(s). The Commission also should specify that access to "conduit" includes access to the conduit's innerducts.

<sup>14</sup> Space for a third cabinet or rack is necessary for auxiliary battery power.

<sup>15</sup> Horizontal distribution provides, *inter alia*, inter-building connectivity in multi-structure multiple tenant environments. Because it performs essentially the same function in a "low rise" environment as riser cable performs in a "high rise" environment, it is critical that cable television systems and telecommunications carriers have access to horizontal distribution.

<sup>16</sup> Fixed wireless networks generally require the placement of GPS receivers on the outside of building walls when the vertical distance from the downstairs rack to the receiver exceeds 100 feet.

fixed wireless antennas; and (ix) sufficient space to deploy equipment within utility vaults.<sup>17</sup>

This list simply mirrors the design of existing distribution networks as they wend their way from public-rights-of way to customer premises, and thus represents the minimum amount of access that new entrants need to provide service on a competitive and nondiscriminatory basis with incumbent LECs. Providing new entrants with access to at least the items on this list will allow new entrants to optimize the efficiency of their network designs by selecting among wireline, wireless, and cable/HFC network configurations. *See Notice*, ¶ 25 (“competitive providers must be free to provide services in the manner that will enable them most efficiently to offer the services, or combinations of services, that consumers desire”).

The Commission also seeks comment on “whether different engineering issues are implicated in accessing multiple tenant environments that are not contained within a single structure, such as campuses and manufactured housing communities.” *Id.*, ¶ 34. Although many of the basic access needs are the same or similar, different engineering issues do arise in multi-structure, multiple tenant environments. First, such environments typically do not contain common space for telecommunications equipment, and it is therefore often necessary to install direct fiber to, and place equipment in, the customers’ premises. Second, access to horizontal distribution (both above ground and underground) is critical to ensure that new entrants can obtain connectivity between buildings in multi-

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<sup>17</sup> “Vaults” are underground or above-ground structures which house wires, cables, optical conductors, hardware, and other equipment, and may contain major splice points in a utility’s distribution network. They may be separate structures (*e.g.*, controlled  
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structure environments. Third, in the multi-structure context, utilities often deploy centralized vaults that contain the major splice points in the utility's distribution network. Each of these access needs is addressed by the list set forth above.

In addition to the foregoing, AT&T personnel need direct access to ducts, conduits, and rights-of-way for purposes of installation, maintenance, repair, and service termination, including the ability to disconnect incumbent LEC dial tone service from the NID. In emergency situations, incumbent LECs generally are able to access their facilities on a twenty-four-hours-a-day, seven-days-a-week basis, and new entrants therefore are entitled to the same level of access. For non-emergency situations, incumbent LECs generally notify the building owner and, if necessary, the individual unit owner to determine a reasonable and mutually agreeable time for the incumbent LEC to make the necessary entry. Accordingly, new entrants should be required to follow similar procedures and should enjoy equivalent levels of non-emergency access.

**B. Public vs. Private Rights-Of-Way.**

The Commission has tentatively concluded that, under section 224, "so long as a utility uses any pole, duct, conduit, or right-of-way for wire communications, . . . all rights-of-way that it owns or controls, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used, are subject to section 224." *Notice*, ¶ 41. The Commission's tentative conclusion is technically correct, but needs additional clarification.

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environment vaults ("CEVs")) or huts, or they may be located within a larger structure or building (*e.g.*, central office vaults).

As an initial matter, the Commission's conclusion is correct to the extent that it requires utilities to provide access to private rights-of-way. Nothing in section 224 limits its application to "public" rights-of-way. To the contrary, section 224 requires a utility to provide nondiscriminatory access to "any pole, duct, conduit, or right-of-way owned or controlled by it," 47 U.S.C. § 224(f) (emphasis added), and thus plainly requires a utility to provide nondiscriminatory access to *all* poles, ducts, conduits, and rights-of-way owned or controlled by it, regardless of whether such venues are publicly or privately granted. In this regard, when Congress intended to distinguish between public and private rights-of-way in the Communications Act, it did so expressly. *See, e.g.*, 47 U.S.C. § 253(c) ("[n]othing in this section affects the authority of a State or local government to manage the *public* rights-of-way") (emphasis added). In such circumstances, courts properly presume that "where Congress includes particular language in one section of a statute but omits it in another . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (Congress' use of a term elsewhere in the same statute "underscores [the courts'] duty to refrain from reading [the] phrase into the statute when Congress has left it out.").<sup>18</sup>

The Commission should reaffirm, however, that a "utility" is required to comply with section 224 only to the extent that it is functioning as a local exchange carrier or

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<sup>18</sup> AT&T also agrees that "the definition of 'right-of-way' as including a publicly or privately granted right to place a transmit or receive antenna on public or private premises is consistent with the common usage of the term." *Notice*, ¶ 42. This  
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other utility. As the Commission previously has held, the term “utility” in section 224 pertains to local exchange carriers and other utilities, not to cable or long distance service providers. Memorandum Opinion and Order, *Applications For Consent To The Transfer Of Control Of Licenses And Section 214 Authorizations From Tele-Communications, Inc., Transferor To AT&T Corp., Transferee*, 14 FCC Rcd. 3160, ¶ 30 (1999) (“*TCI Approval Order*”). Accordingly, a company should be “required to comply with section 224 [only to the extent] the company acts as a local exchange carrier and, therefore, a ‘utility’ within the statutory definition.” *Id.* To the extent that a company only provides cable or long distance service in a certain area or through a certain facility, it does not function as a utility within the meaning of section 224, and thus should not be required to provide access to those facilities under this statutory provision. *See id.* (“To the extent Ameritech seeks imposition of section 224 obligations on AT&T-TCI in areas where the company only provides cable service, we decline to impose section 224 obligations because we conclude the company is not acting as a ‘utility’ within the meaning of section 224 when it provides only cable service.”)<sup>19</sup>

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conclusion is fully consistent with, and mandated by, the case law cited by the Commission. *Id.* ¶ 42 & n.94 (citing case law).

<sup>19</sup> The Commission states that “so long as a utility uses any pole, duct, conduit, or right-of-way for wire communications, . . . all rights-of-way that it owns or controls, . . . regardless of the purpose for which a particular right-of-way is used, are subject to section 224.” *Notice*, ¶ 41. This statement is technically correct because it limits the section 224 obligation to utilities (which, as described above, means LECs, not cable or long distance providers) that provide wire communications. The statement is potentially misleading, however, because the phrase “regardless of the purpose for which a particular right-of-way is used” could be misunderstood to require companies to provide section 224 access to rights-of-way used only for cable, long distance, and non-wire communications, *i.e.*, when the company is not acting as a LEC or other utility and thus has no section 224 obligations. Accordingly, the Commission should reaffirm that  
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### C. Access To Utility-Owned Property.

The Commission also has correctly concluded that section 224 “encompasses a utility’s obligation to provide cable television systems and telecommunications service providers with access to property that it owns” when the utility “uses its own property in a manner equivalent to that for which it might obtain a right-of-way from a private landowner.” *Notice*, ¶ 43. The term “right-of-way” is not limited to a right to use property that belongs to another. *Id.* Instead, the term also is used to denote the actual physical space over which a utility’s facilities traverse. *See, e.g.,* Black’s Law Dictionary at 1326 (6th ed. 1990) (“right of way” can be used to denote “the land itself, not the right of passage over it”). Moreover, the latter interpretation is mandated by the expansive scope of section 224, which requires a utility to provide access to “any” right-of-way that it “own[s]” as well as “control[s].” 47 U.S.C. § 224(f)(1).

To implement this conclusion, the Commission “seek[s] comment on . . . the test for determining when a utility is using its own property in a manner equivalent to a right-of-way.” *Notice*, ¶ 43. As a general matter, the Commission should adopt a test that is broad enough to encompass the wide range of activities that constitute use of property “in a manner equivalent to a right-of-way.” Accordingly, the Commission’s test should indicate that a utility is using its own property “in a manner equivalent to a right-of-way” whenever the utility has engaged in conduct on its own property for which it generally would need to obtain a right-of-way if the utility were to attempt to engage in similar

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section 224 obligations apply to all rights-of-way associated with all *utility* operations of a utility providing wire communications, but *not* to the non-utility operations of that company.

conduct on the property of another (either a public or private landowner). *See id.*, ¶ 43 (proposing similar language). Then, to reduce the potential for disputes concerning this issue, the Commission should provide a non-exhaustive list of the types of conduct that would be covered by the Commission's rule. For example, a utility acting on the property of another most likely would need a right-of-way to deploy conduit from the public right-of-way to a customer's premise; to place equipment in a building's common space; to make use of a building's electrical source; to deploy riser conduit or cable or horizontal distribution; to run conduit and wiring through interior wall and ceiling space; to obtain access to RJ-11 jacks; to place antennas on rooftops; to place GPS receivers or fixed wireless antennas on exterior wall space; to obtain vault space; and to obtain access for service installation, maintenance, and termination. Accordingly, when a utility engages in any of these activities on its own premises, it should be deemed to have used its property "in a manner equivalent to a right-of-way."

**D. Access To In-Building Conduit.**

AT&T supports the Commission's tentative conclusion "that the obligations of utilities under section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility." *Notice*, ¶ 44. By its terms, section 224 requires a utility to provide access to "*any . . . conduit . . . owned or controlled by it,*" 47 U.S.C. § 224 (emphasis added), and thus encompasses all forms of conduit within the utility's ownership or control. Any attempt to limit this provision to underground conduit therefore would be inconsistent with the plain terms of the statute. Further, such a limited reading would be inconsistent with industry practice, which uses the term "conduit" to refer to enclosed tubes, pathways, core drilled holes, manholes, hand-holes, and protected troughs that are used to house or provide access to communication or

electrical cables, regardless of whether these structures are found underground or aboveground. Indeed, the term “riser conduit” itself demonstrates that conduit is not limited to underground facilities. Accordingly, section 1.1402(i) of the Commission’s rules – which narrowly defines “conduit” as “pipe ‘placed in the ground’” – should be amended to reflect industry usage of the term and to realize fully the procompetitive intent of section 224. *See Notice*, ¶ 44 (citation omitted).

**E. “Owned Or Controlled”**

The Commission seeks comment regarding the interplay between section 224 and principles of state law that inform whether the federal obligations of section 224 are triggered. *Notice*, ¶ 47. Specifically, the Commission asks whether “it is useful or appropriate for [the Commission] to offer any guidance regarding the existence and scope of ownership or control under particular circumstances, or whether [the Commission] should defer entirely to state law.” *Id.*, ¶ 47.

Commission guidance is both necessary and appropriate. While AT&T agrees that “[t]he scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law,” *id.*, the scope of a utility’s obligations to provide nondiscriminatory access *under section 224*, based on those state-law rights, presents a question of federal law for which additional Commission guidance is necessary. *See* 47 U.S.C. § 224. For example, in the *Local Competition Order*, the Commission provided significant guidance in this area by explaining that where state law provided utilities with the right to exercise eminent domain authority, then the “owned or controlled” requirement of section 224 was satisfied, and the utility therefore had an obligation under federal law to “exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access.” *Local Competition Order*, ¶ 1181.

Here, the Commission should provide similar guidance in the parallel situation where a utility has secured access rights through a *private agreement* with a property owner. Specifically, the Commission should clarify that when a utility has a private agreement allowing the utility access to a “pole, duct, conduit, or right-of-way,” the “owned or controlled” requirement of section 224 is satisfied. This clarification is necessary because the relevant issue under section 224 is the *existence* of ownership or control, and not the method by which the ownership or control was obtained. Accordingly, the Commission should not distinguish between legal rights derived from a private agreement (via contract or otherwise) and rights obtained through the exercise of eminent domain power. *See Notice*, ¶ 46.<sup>20</sup>

Specifically, in response to the Commission’s request for comment “regarding the circumstances under which a utility may be considered to own or control a right-of-way or conduit within the meaning of section 224,” *id.*, ¶ 45, AT&T recommends that the Commission adopt a broad interpretation of “owned or controlled” that encompasses all the means by which a utility can come to have dominion over a duct, conduit, or right-of-way. A utility should be deemed to have ownership or control over a duct, conduit, or right-of-way when the utility has obtained (by whatever means) the right to use that duct, conduit, or right-of-way to provide service. This proposed interpretation effectuates the language and intent of section 224 because a utility with the legal right (however obtained) to use a duct, conduit, or right-of-way plainly has ownership of, or control over, that venue. *See Black’s Law Dictionary* at 1105 (defining “own” as “to have a legal or

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<sup>20</sup> In addition, as described below, utilities should not be permitted to circumvent their statutory obligations under section 224 by structuring their private arrangements to  
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rightful title to; to have; to possess”); *id.* at 329 (defining “control” as “[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee”).<sup>21</sup>

Furthermore, a utility with a right to use a pole, duct, conduit, or right-of-way has sufficient ownership or control over that venue regardless of whether the utility actually chooses to exercise that right. Just as a private homeowner does not lose ownership of, or control over, his or her home merely because he or she chooses not to live there, the scope of a utility’s ownership or control should not be affected by whether it elects to exercise its right to make use of a certain right-of-way. The “authority” or “power” to use a right-of-way, standing alone, is sufficient to constitute ownership or control. *See Black’s Law Dictionary* at 329.

The Commission also seeks comment on the related issue of “how to measure the extent of the right-of-way that a utility might be considered to own or control under specific circumstances,” and notes that “a utility is required to exercise its authority of eminent domain where necessary to expand an existing right-of-way in order to accommodate a request for access.” *Notice*, ¶ 46 (citing *Local Competition Order*, ¶ 1181).<sup>22</sup> As the Commission has held, *Local Competition Order*, ¶ 1181, the scope of a

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permit only “exclusive access” to “pole[s], duct[s], conduit[s], or right[s]-of-way.”

<sup>21</sup> This same criterion should be used to “establish utility ownership or control of riser conduit for purposes of section 224.” *Notice*, ¶ 45.

<sup>22</sup> The Commission also has held that a utility is required to expand its capacity to the limits of the underlying right-of-way. *Local Competition Order*, ¶ 1162. Under this rule, a utility should be required to make pole, duct, conduit, and right-of-way space available, where practicable (*e.g.*, by removing retired, inactive, or abandoned cable, and by providing access to spare inner ducts).

utility's ownership or control of a right-of-way under section 224 is commensurate with the scope of the ownership or control that a utility could be required to obtain over an expanded right-of-way.<sup>23</sup>

**F. Ascertaining Utility Ownership Or Control.**

The Commission seeks comment on "how such ownership or control may be ascertained by a competitive service provider." *Notice*, ¶ 45. In general, AT&T believes that a utility cannot meet its obligation to provide nondiscriminatory access under section 224 unless it provides, in a timely manner, full information, upon request, concerning conduit and right-of-way ownership, control, location, condition, and availability. This information requirement would include allowing the competitive provider to review any franchise, license, contract, lease, or other agreement the utility has entered into with a municipality, property owner, utility, or other right-of-way interest holder. It also would include the provision of route maps of existing poles, ducts, conduits, and rights-of-way,

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<sup>23</sup> As to the request for comment on the nature of State certification under section 224(c)(2), States that purport to regulate in the area of pole attachments should be required to re-certify that fact in light of the Amendments to Section 224 in the 1996 Telecommunications Act. Currently, the Commission requires that States certify that "the state has the authority to consider and does consider the interests of the subscribers of *cable television services* as well as the interests of the consumers of the utility services." 47 C.F.R. § 1.1414(a)(2) (emphasis added). This regulation should be amended to track the broader language of 47 U.S.C. § 224(c)(2)(B), by replacing "cable television services" with "the services offered via such attachments," *id.* Moreover, the Commission has made clear that State regulation "in this area is subject to the provisions of section 253," *Local Competition Order*, ¶ 1239, and that "the discretion of state and local authorities to regulate in the area of pole attachments is tempered by section 253, which invalidates all state or local legal requirements that 'prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,'" *id.* ¶ 1155 & n.2827 (quoting 47 U.S.C. § 253(a)). Accordingly, section 1.1414 should be modified to require that certifying States confirm that their regulation of pole attachments neither "prohibit[s]" nor has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *Local Competition Order*, ¶ 1155.