their central offices. Thus, a different takings analysis applies to the facts of this regulation.

B. When The Proper Standard Is Applied, It Is Evident That No "Taking" Is Created By The Application Of The Proposed Rule To Third-Party Property Owners

The Takings Clause issue is properly analyzed under the standard set forth in the Supreme Court's decision in *Penn Central Transp. Comp. v. City of New York.*[36] In that case, the Court conceded that it has "been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government..."[37] Whether a taking has occurred depends largely "upon the particular circumstances [in a] case," and the process of analysis is essentially an "ad hoc, factual" inquiry.[38] Nonetheless, the Court has identified the following factors which inform and guide the analysis:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[39]

As recognized by the Commission in its Order accompanying the *FNPR*, Congress has the power to change contractual relationships between private parties through the exercise of its constitutional powers. In *Connolly v. Pension Benefit Guaranty Corp.*[40], the Court stated:

> Contracts, however, express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions when the reach of dominant constitutional power by making contracts about them...[T]he fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[41]

Regulation of landlord-tenant relationships is an everyday fact of life. Federal, state and local governments place numerous requirements and regulations on landlords concerning the terms under which property may be rented. Many of these requirements (i.e., provision of heat, smoke detectors, utility hookups) require a landlord to do things or to permit tenants to do things which affect, in some way, the property owned by the landlord. These regulatory requirements are not "takings" in the constitutional sense because of the incidental nature of the intrusion on the owner's property interests in relation to the public interest goal sought to be achieved by the government.

The nature of the regulation required by Section 207 is analogous to conventional regulations governing the landlord-tenant relationship. Any intrusion into the owner's property is minimal. The right created by Section 207 is a right given to individuals and not, as did the state law struck down in *Loretto*, a right given to the video program provider. Instead, the regulation required by Section 207 will only give tenants and unit owners the right to install antennae to receive video services. For an owner of a unit in a condominium or townhouse, the ability to use such an antenna is likewise incident to the ownership interest possessed by the resident. It is important to note that the person for whose benefit the regulation is adopted would not be a "stranger"[42] to the owner. Instead, the regulation is for tenants who are in direct contractual relationship (i.e., privity) with the landlord/owner and with respect to property in which the citizen has a leasehold right or, in the case of condominiums and other common ownership forms, by one with an ownership stake in the property. Although persons residing in MDUs do not generally own common areas such as rooftops, they clearly do have interests in these areas to the extent provided in the rental agreement, other contractual declaration, or applicable state law.

The regulation is simply a minimal and temporary intrusion of the kind which has been allowed by the Supreme Court. *See Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879) (no taking where city constructed a temporary dam in river to permit construction of a tunnel, even though plaintiffs were thereby denied access

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[36] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh. den.* 99 S. Ct. 226, 58 L.Ed.2d 198 (1978).
[37] *Id.* at 124, 57 L.Ed.2d at 648 (quotations omitted).
[38] *Id.*
[39] *Id.*
[40] 475 U.S. 211 (1986).
[41] *Id.* at 223-24 (quotations and citations omitted).
[42] *Cf. Loretto* ("an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.")

to their premises, because the obstruction only impaired the use of plaintiffs' property). *In PruneYard Shopping Center v. Robins*, 447 U.S. (1980), the Court considered a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property to which they had already invited the general public. In concluding that this requirement did not involve and unconstitutional taking, the Court found determinative that the invasion was "temporary and limited in nature" and that the owner "had not exhibited an interest in excluding all persons from his property." The Court noted: "The fact that [the solicitors] may have physically invaded [the owners'] property cannot be viewed as determinative." *Id.* at 84. As was the case in *PruneYard*, the use allowed by the regulation required by Congress here is not inconsistent with uses allowed by the owner. MDU owners are under affirmative duties to allow the installation of and interconnection with utility services such as electricity and telephone. The addition of facilities to receive over-the-air television programming is no different in nature from these types of utility services.

What is really at issue with respect to the proposed regulation is the purported "right" of landlords to exercise control over the means by which tenants gain access to video programming. MDU owners would like to have the ability to control their tenants' access to video programming so that tenants will be channeled to "approved" video programming sources. Not surprisingly, landlords are using their leverage to extract additional revenues from their tenants while at the same time excluding competing video service providers from access to tenants in MDUs. In so doing, the owners of MDUs may frustrate the ability of citizens to access the video programming of their choice. If the Commission's commitment to competition and consumer choice is to have real substance, then tenants in MDUs must have the ability to choose the video services they desire. Landlords do not have a property right to inhibit competition in video program delivery. Simply put, neither Congress' elimination of this leverage from landlords, nor the Commission's rule to implement Section 207, implicate the Takings Clause. As the Court noted in *Andrus v. Allard*, regulations affecting an owner's future profits do not constitute a taking:

> [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.[43]

In sum, the rule required by Congress is a government regulation of the sort recognized by the Court as permissible in *Loretto*. Viewed in the context of the important governmental interests at stake and the very limited impact on the property rights of affected owners, the regulation simply does not implicate the Takings Clause of the United States Constitution.

Thank you for providing us with the opportunity to appear today.

Mr. TAUZIN. Let me disagree with you. The Chair recognizes himself and then I will recognize other members. I think it is more complicated than that. Let me kind of, maybe, set the stage. I want to ask Mr. Sugrue, first of all, how many inquiries of rulemakings are going on at the FCC right now, in this area?

Mr. SUGRUE. Well, we have a rulemaking addressing the utility rights of way under section 224. We have got unbundled network elements.

Mr. TAUZIN. Yes. That is two.

Mr. SUGRUE. That is two. Cable inside wiring.

Mr. TAUZIN. That is three.

Mr. SUGRUE. Section 207, over-the-air receptive devices.

Mr. TAUZIN. Four.

Mr. SUGRUE. I think that is it.

Mr. TAUZIN. I think you are making my case for FCC reform, to begin with but let me make the point.

We have got four proceedings going on, all in different areas of communications services to multi-dwelling or multi-commercial tenant buildings. Is that correct?

Mr. SUGRUE. We have four proceedings——

Mr. TAUZIN. Four proceedings.

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[43] 441 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210, 233 (1979)

Mr. SUGRUE. [continuing] implementing four different parts of the Communications Act. That is right. Yes.

Mr. TAUZIN. Right. Yes. And what is so complex is that communications are merging and converging into a single stream of ones and ohs. Someone told me at a meeting the other day, relax, it is just ones and ohs.

But all this stuff is going to be coming down to us from satellites, from over-the-air, wireless, from wires into the building. Master antennas might work for, you know, in some cases, cable service is fine but what if the tenant wants to get DBS service and receive a local broadcast over an antennae and the DBS cable programming from a direct broadcast satellite? What about that case? Where the tenant really wants that, but there is no provision for that in the bill.

It gets really complicated. Let me take where we have been to where we have to get and I think everybody will see the complexity. In a monopoly provision of communication services system, in the old telephone system where there was one telephone company, it was kind of easy to understand. The telephone company had an obligation to serve, therefore there was no real deal to be cut, no sharing of revenues with the building owner, the wires, technically, I guess, belonged to the telephone company who had a right to put them in and, in fact, an obligation to put them in when he was called upon to do so.

Cable companies, emerging in this country to help avoid the necessary of antennas or bad reception in some areas, now delivering the broadcast channels under compulsory license, very often under exclusive cable agreements with the franchising authority, sort of a monopoly de facto, if nothing else, was delivering video services through the wire end of the home. And so the cable company owned the wire, I guess, in many of these cases, at least to the building and perhaps even in the building.

And all of a sudden we have the explosion of new wireless services. As the computer merges with the wireless industry and cellular is born and wireless video is born, satellites go up. Now we get new satellite services. It is getting complex all of a sudden. And then we pass an Act that says, you know, we kind of like that. We kind of like the idea of a lot of different people serving the customers of America and consumers having a lot of different choices. So we passed an Act and we said we are going to get away from these monopoly driven services. We are going try to give cable some competition so that they are no longer exclusively providing the video services to people. We are going to give the telephone companies competition so they are no longer the telephone company, exclusively delivering the services.

And now we have got to think of a new system that works for the building owners, for the tenants, and for the providers. And it is complex. It is extremely complex right now. For example, Mr. Bitz makes the point, in this new world, is it fair to say that communications providers have a right to deliver their services into a building, but they don't have the obligation to do so when tenants want these services? Is it right for the building owners to decide which of those services are going to come in by which companies? And then is it up to the consumers to choose which building they

want to be in? Suppose you have got to be in that building for a lot of other good reasons but you don't have any choice except what your building owner wants to give you?

Is it right to pass forced entry? And where do you stop there? Do you say everybody has a right? Does everybody have a right to that wire? Or does everybody have to run their own wire, put up their own antennae? And how many are you going to have? It gets real complicated. And it gets real tough for government to end up making all of these decisions as we go from a monopoly driven system to a competitive system where literally everything is merging very quickly into a single stream of high-bandwidth that is going to deliver video, telephony, and data services all in the same package. And that is the picture. That is the picture.

And out of it I will let you I am going to have just a limited time, but I want you all to comment. As many of you as want to out of it comes a bunch of questions. Should the Federal Government make the rules? Should the States, individual States? You made a case, some of you, a compelling argument for a national rule. Some of you made the argument that these are things States ought to work out. We see States trying to work it out. Connecticut and Texas have passed laws. Florida has just tried and ran out of time on an agreement reached by the building owners, the property owners interest and the communications company.

Is it okay from where we sit, having been responsible for the 1996 Act, for us to leave it to people to agree or not agree on whether consumers in America are going to have competitive choices or do we have a responsibility to help make sure that happens? You know, I kind of think we can't just sit back and just hope it happens. You have got to maybe help make it happen. And, if we do, if we get engaged, do we write instructions to the FCC, as Mr. Sugrue has suggested? Guidance instructions, clear authority, perhaps in the reform of the FCC, putting all of this under a single place instead of in four different bureaus?

Or do we write a national law right now that defines the rights of the consumers in America and the rights of building owners and the rights of telecom companies who want to get to those consumers? It gets real complicated, Mr. Prak. I have got a limited time, but I want you all, you sat through anything that I have had to say, any of you want to react? And then I will turn it over to Mr. Markey.

Mr. PRAK. Mr. Chairman, I would like to just react. I guess I was attempting to say, my piece of it doesn't have to be complicated.

I wouldn't begin to want to get into what you were describing because the truth is my focus is much more narrow than that. And I don't believe my piece has to be complicated, unless you make it so.

Mr. TAUZIN. I understand. And let me also clarify something. What I was telling Ms. Case was that I was just did a PSA with Kermit the Frog yesterday and I pointed out to Kermit that it must be pretty cool to have a girlfriend who likes to mud wrestle. And he said, I have got to use that. That is cool.

But this shouldn't be a mud wrestle. I mean, it really shouldn't be. We ought to be able to conceive of some framework in which this works. Is the framework just prohibiting exclusive agreements

in a competitive marketplace? Without necessarily defining who can come and saying you can't say nobody can come except the person I want. Is that the right remedy? Come back to me. Mr. Bitz wanted to go first. I guess you are next, Mr. Heatwole.

Mr. BITZ. Mr. Chairman, it seems to me that we are looking at a situation where I didn't bring any props, so if you will allow me to be a little impromptu the question is whether the cup is half empty or half full. In 1996, from a competition point of view, there was none. The cup was empty. But it seems to me that what has occurred over the last few years is that the cup has been filling up and maybe we are about here.

Mr. TAUZIN. But what if you are real thirsty and live at the top of the cup?

Ms. CASE. It has got some rocks in it though.

Mr. BITZ. That is right. But by no means has it made the progress that you, representing our country might like, but that the direction is clear, is that the companies that are sitting here with me are doing deals. It is getting into more and more buildings across the country every day. That the progress in your direction is quite correct and we don't need to have more regulation to tie us up when we are already heading where the Congress wanted us to go in 1996.

Mr. TAUZIN. Mr. Rouhana wants to respond to that, but I promised Mr. Heatwole first.

Mr. HEATWOLE. Here's my point, regarding——

Mr. TAUZIN. Grab the mike, Mr. Heatwole.

Mr. HEATWOLE. Excuse me. A couple of quick points.

Mr. TAUZIN. You have to have access to us. Shared access.

Mr. HEATWOLE. Regarding Mr. Prak, in 2 of the systems that we own where we own the entire cable TV distribution system and 1, which is a seniors property, a 205-unit property, we provide free, off-air access, costs them nothing. In a family property for off-air access, we charge I think $12 a month for that cable system.

Mr. TAUZIN. Let me quickly ask you, in the contract you were presented, you read to us, what was your quid pro quo? What would you get? Nothing?

Mr. HEATWOLE. Nothing. Zero.

Mr. TAUZIN. So there was no offer: We will pay you something——

Mr. HEATWOLE. Nothing.

Mr. TAUZIN. [continuing] to take over all this rights of entry and——

Mr. HEATWOLE. It was zero.

Mr. TAUZIN. Zero. How about was there an agreement to pay any damages?

Mr. HEATWOLE. Well, it theoretically. Yes.

Mr. TAUZIN. But there was no quid pro quo, no offer to share anything?

Mr. HEATWOLE. No. We have looked at those agreements.

Mr. TAUZIN. Yes.

Mr. HEATWOLE. But in that particular agreement, there was nothing that——

Mr. TAUZIN. Quickly, what is the difference between that agreement, a telecom provider, and the pizza delivery man? He drives

across your driveway. He parks in your parking lots and delivers pizzas to your customers. Can you say to the pizza delivery community in your town, only one of you can come? Do they all have a right to come? They are using shared facilities to provide services and sell products to your customers. What is the difference?

Mr. HEATWOLE. Well, No. 1, they leave.

Mr. TAUZIN. They leave. Very good.

They leave something good behind, too.

Mr. HEATWOLE. Hopefully. No. 2, theoretically, I assume that we could ban, you know, all pizza delivery drivers, you know, to the property. You have some areas where the pizza delivery people won't deliver, you know, because of——

Mr. TAUZIN. So there are some analogies there. We need to think about that. Mr. Rouhana. And then I will recognize my well, Mr. Sugrue and then Mr. Markey.

Mr. ROUHANA. I was going to try and address, actually, the first question you asked. As you were making your statement, Mr. Chairman, I was thinking, be careful what you wish for, because you may get it.

Mr. TAUZIN. That is right.

Mr. ROUHANA. In the Telecom Act, I believe what you wished for was competition.

Mr. TAUZIN. Yes.

Mr. ROUHANA. And people are trying to deliver it. And we have run into a road block and so we are back saying, there is a road block. You have asked whether this is a local or a national issue and I think I have tried to make the point that it really needs to be addressed on a national level because this is a national problem. This is not something that is happening just in one State; it is happening across the country and the fact is that the telecommunication infrastructure of this country is a national infrastructure and it just needs to be there and it needs to be upgraded.

I listened very carefully during all of the presentations by the folks representing the real estate community because I do believe a solution to all of these problems can be crafted and that it is possible for people to sit down, talk about these issues, and find the right balance for legislation that would protect both the real estate interests and ensure that an impediment to competition is removed.

I don't think there is any doubt that that can be done. It has been done in two States. It has certainly been done over and over again in other utility situations. We are not inventing something here, we are repeating a process that has happened again and again with regard to buildings. All we are trying to do is make sure that we deal with it rather than let it drift. We are sitting in a very difficult position where our infrastructure outstrips the ability of people to deliver it today because of this building access impediment issue, so——

Mr. TAUZIN. Mr. Sugrue, when are going to have it decided?

Mr. SUGRUE. Well, first I just want to endorse your vision of how complex this world is and that, for your job and mine, we were a lot easy in monopoly days. So competition is great except living through it until we get there.

I just wanted to note two things. One, the Bureau is recommending to the Commission that it shortly initiate a proceeding that pulls together threads of these different proceedings as they affect telecommunications service providers and addresses them in a more comprehensive manner. And the Wireless Bureau assuming the Commission adopts it, because I don't want to get ahead of them; we propose, they dispose but assuming it is adopted, we will be addressing issues as they affect telecom providers like Winstar and others in terms——

Mr. TAUZIN. So you have got to pull all of these proceedings together, if they agree to do that. Then you try to settle them. And how long does all that take?

Mr. SUGRUE. The notice initiating that proceeding should hopefully be out next month and then, by the end of year I would hope or early next year, have an order out resolving it. And I just wanted to note that, while there are four proceedings, you are really talking about two bureaus and you have them both here before you, so we will try to——

Mr. TAUZIN. There are four proceedings, but two bureaus involved.

Anyone else before I turn it over to Mr. Markey? Mr. Windhausen.

Mr. WINDHAUSEN. Mr. Chairman, you asked what your responsibility is now at this stage. And I think there is a responsibility for Congress to clarify this situation. Perhaps the best way I could the best language I have used or I have heard used is by an editor for the Baton Rouge Advocate that I met with just a couple of days ago.

Mr. TAUZIN. Careful now.

Mr. WINDHAUSEN. And his suggestion was: So what you guys are really looking for is to nudge the market along. And I think that is exactly right. With regard to this building access problem, the statutory language just doesn't clarify, doesn't go far enough to really deal with it for certain. And if we could just have legislative language that would establish the tenant's right to choose the provider that they want, then the CLECs will go and we will negotiate a deal with the landlord. We are not looking for free entry, forced access that was referred to earlier. We just want to be able to have the right to provide service and then we will work something out.

There has been discussion as well about the number about residential competition in Congress and why don't we have more residential competition. I think it is important to point out that 30 percent of residential consumers live in apartment buildings. If we don't take some action to deal with this problem that you could well be writing off those 30 percent of the public and saying, sorry, you don't get the choices that everybody else gets. That is why it is very critical for residential competition as well.

Mr. TAUZIN. I want to recognize Mr. Markey. You just put on the table the question: If we should provide legislative instructions that consumers have a right to multiple choices, does that abrogate existing contracts, exclusivity contracts? Do we have a right to do that? Is there a problem under whatever that Act Mr. Dingell always talks about where the government gets sued—Tucker. The Tucker Act. Are we going to get sued? Mr. Markey.

Mr. MARKEY. Okay. Thank you. Mr. Bitz, does your association believe that exclusive access deals are okay?

Mr. BITZ. No. We do not support exclusive access. Our industry association has repeatedly stated we believe in a competitive marketplace. That implies multiple providers in any circumstances, Mr. Markey.

Mr. MARKEY. Okay. Do you agree with that Mr. Heatwole?

Mr. HEATWOLE. I'll speak individually.

Mr. MARKEY. Yes. You are speaking for the whole association, is that correct, Mr. Bitz?

Mr. BITZ. Yes.

Mr. HEATWOLE. They don't know what I am going to say, so I will speak individually. If it is okay, then they will well done. In a perfect world, you would certainly want free and open access by anyone. From a very practical standpoint, as we pointed out, if you have a small local provider who may have the best of the Internet connection, the phone connection, and the cable TV connection, they may not be able to borrow the money to put in the system or the distribution system onsite required if the bank knows that they don't have 1-year, 2-year, 3-year, whatever the period is, contract. In that instance, what you have done is you have, de facto, opted to the large incumbent provider. Second——

Mr. MARKEY. Well, Andy, no. We have said to the smaller guy, find a way of being able to compete.

Mr. HEATWOLE. But he may be able to.

Mr. MARKEY. See we look at it, Mr. Heatwole, from the perspective of the tenant, okay. Our goal is to make sure that your tenants have the lowest possible Internet, cable, telephone long distance price. That is our objective. So if there is only one person in, then, obviously, that person is not going to be under the pressure to lower the price on all of those other services.

Mr. HEATWOLE. My point is that the one person with the lowest price may be the small provider who, without an exclusive contract, does not have the capital that many of these other larger companies have and, consequently, he is excluded from providing the lower price and you have, de facto——

Mr. MARKEY. I understand that, Mr. Heatwole.

Mr. HEATWOLE. And, second——

Mr. MARKEY. I have just got to move on. I apologize, Mr. Heatwole. The big point that we are trying to make here is that we want the marketplace to determine what the lowest price is, not a predetermined exclusive contract to determine that. Because we are not sure that that deal, over a period of time, winds up with the lowest price because of the innovation and the change. And that is why we like your association's perspective on this, okay. And so we will just stick with this because it seems to be something that we can work with. And it is only that I have limited time that I have to move on and I apologize to you, sir.

In Massachusetts, Mr. Burnside, what has happened where you are able to compete, to cable rights, to other rights?

Mr. BURNSIDE. Well, a couple of interesting things, Mr. Markey, have happened. One example in Massachusetts, in 1998, when Time Warner announced a 12 to 15 percent price increase across the board, they exempted one community, the first community that

RCN had actually established service in, and said that that community would not have a price increase because Time Warner faced a competitive situation. So it is pretty clear. And we could look to other examples in New York where we have seen bulk discounts, perfectly acceptable from the market standpoint, bulk discounts offered in MDUs where RCN has been able to build its service. So, clearly, prices do come down.

And I might add that it has been our experience that, in addition to prices coming down, the pie tends to get larger. We heard that 67 percent of the homes passed take cable service. We have experience in markets where in fact, there is one in particular in eastern Pennsylvania where we own a cable system that is completely overbuilt by a competitor. And there the penetration rates exceed 90 percent. So the pie gets bigger, keeping the local licensing authorities whole.

Mr. MARKEY. Okay. So when we in Congress preempted all of the exclusive contracts that municipalities had granted to the incumbents, it made it possible for RCN to come in, then, and begin to match or lower the price that was being offered by the incumbent cable company for the benefit of consumers across the company.

Mr. BURNSIDE. That is it exactly. Exactly.

Mr. MARKEY. So, Mr. Sugrue, do we have to legislate it all? Are there any changes you think we have to make in order to give you the authority you need in order to, you know, get to the point where you can have the power that these companies can offer the integrated telecommunications services that are scattered now throughout the Telecommunications Act?

Mr. SUGRUE. I think on the question of building access, the issue we have been principally debating today, legislation would be helpful. The Commission hasn't ruled really one way or the other with respect to telecom services whether it has the jurisdiction under the present law. But it is at least, as you can tell from the debate—and I have gotten white papers and constitutional scholars coming in on each side of this—that it is open for debate right now.

Mr. MARKEY. And, finally, has a tenant ever been denied, Mr. Bitz, service from the telecom or cable provider of their choice, to your experience?

Mr. BITZ. Well, I can only speak for the company that I work for, sir. We have never had a situation that I am aware of where, as a result of the landlord's business decisions, the tenant has been denied their choice of telecommunications provider. In many cases, the tenants actually go direct to telecommunication service provider, independent of us. And I can't speak as to whether or not they have been turned down, although I would suspect that is the case because we have many small tenants who would not be necessarily attractive business targets for the telecommunications industry and smaller buildings that I know where we have tried to encourage the telecommunications industry to actually provide service and we have been turned down by various companies.

Mr. MARKEY. Finally, Mr. Rouhana, have you ever been denied access to customers in MDUs that would want access to your service?

Mr. ROUHANA. Rarely, but it happens. It does happen.

Mr. MARKEY. And what is the reason why you are denied?

Mr. ROUHANA. I have never really been able to tell. I mean, the fact is that when you are dealing with a landlord, you are dealing with an absolute authority. So they don't have to tell you. They have no responsibility to respond even. So, in the cases where we have not gotten into the buildings, it has been because we have gotten little or no response from the people in charge.

The problem is there are so many landlords. If they were all like the people at this table, we wouldn't have a problem. They would all already have us in there. So that is really the issue. There are so many of them.

Mr. MARKEY. Let me ask Mr. Windhausen to finish up on the question.

Mr. WINDHAUSEN. Thank you, Mr. Markey. Yes we do have several examples where customers sought to receive service from a particular CLEC and were told by the building owner, no, I am sorry. The building owner said I have an exclusive deal with one provider. That is your only choice. And we have those examples from wireless companies and wire-line companies who tried to provide service and the building owner has said no.

Mr. MARKEY. Okay. Thank you, Mr. Windhausen.

Mr. TAUZIN. Thank you, Mr. Markey. I wanted to welcome the vice chairman of the committee, Mr. Oxley, to the hearings and recognize for a round of questions the gentlelady Ms. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. I am from Wyoming and recently held a community hearing on placing towers for cellular telephones and the biggest thing, the biggest issue was private property rights. And I want to tell you that private property rights in Wyoming means something different than they do in Washington, DC. And when you are talking about placing a tower somewhere, it is a lot more personal when you are talking about requiring someone on the place where they live, the landlord, it seems like it is much more of a violation to the private property rights of someone in Wyoming.

And I would like to ask you, Mr. Rouhana, on the issue of private property rights, you suggest that the issue of access should be addressed at the national level. Now is that exclusively to provide some companies with—well, companies like yours—with a seamless business plan?

Mr. ROUHANA. Well, I think I will just have to go back to the very beginning. It seems to me that what we are trying to do is to create competition and the issue that is preventing us from getting to the buildings, which is where the customers are, is this access issue. Now this is in a multiple dwelling environment, not in a single family home, so certainly we are not advocating that.

Mrs. CUBIN. We have those.

Mr. ROUHANA. I know you do. And we are certainly not advocating that. And private property rights—I mean, what is there that is more important, frankly, than that? But this is, as I said, I think over and over again, not the first time this has happened. What we are talking about is a situation where people have congregated. They are in buildings that are owned by others. And those others are standing between the people in the buildings and those who they want service from and they are preventing that from happening. So, clearly, there has got to be a balance of these interests.

Our proposal, I think, tries to take that account and, in particular, has all kinds of safeguards built even in that case to make sure that this is not an abusive process. We don't want to take anything. We want to give something. We want to give the services that these tenants have been asking for, that they need. I don't want their buildings. I just want to give the tenants the service. And we are even willing to pay for it, so it is not even a question of asking for access for free. We are more than willing to pay a commercially reasonable rate.

Mrs. CUBIN. Well, what this reminds me of, if you will forgive me, is the Endangered Species Act, you know, where you lose the ability to use your land because there is potentially an endangered species on there. They are not taking your land away, but you can't use it. So, you know, there are certain rights that go along with owning property.

I wanted to ask you, too, you are talking about the person that stands in between, the landlord, getting the residents what they want and the providers providing it. Are any of you aware of any circumstance where a building owner or a building manager actually has been paid to prevent someone else from coming in? Because I can see that that would be a problem. Anyone who wants to answer that.

Mr. WINDHAUSEN. There are many examples of landlords and building owners granting exclusive contracts to one single provider.

Mrs. CUBIN. Right.

Mr. WINDHAUSEN. And, as a part of that agreement, the landlord agrees to be paid by that exclusive provider and the agreement is that the landlord will then prevent any other competitor from serving that building. I mean that is part of an exclusive contract.

Mrs. CUBIN. Right. But what I mean is that if someone else wanted to negotiate the same kind of contract with that landowner or that landlord, are there instances that anyone of you know of that that wasn't allowed or they just weren't interested or—any?

Mr. WINDHAUSEN. That is exactly what happens with an exclusive contract. Another CLEC will come in and say I just want the same deal that the other guy is getting and the landlord has said no.

Mrs. CUBIN. Mr. Rouhana—or anyone who wants to answer this I really think, as a general rule, that situations that have problems are better addressed at the State level. And I am sure you have reasons to think that they should be addressed at the national level rather than the State level. Could you tell me what they are?

When I came in here, I was—you know, I just thought we have to protect private property rights. Well, now I am confused. Now I honestly know that there is something in between here. I am just trying to find what it is and I am not going to find it out here today. It will take a lot of time and work.

Mr. ROUHANA. Well, I would say there are really two big reasons that I think it is appropriate to try to do this nationally. First of all is just the Telecom Act itself, you know, is a national Act and the entire imperative behind it is to try and create for the country an infrastructure that will be equally distributed across the country and will be available across the country. So I think solving the problem nationally will at least ensure that, to the maximum ex-

tent possible for money and dollars will flow evenly across the country to the extent it can.

Second, our experience has been that where State Acts exist and we attempt to use and we are dealing with a national landlord, they can sometime take it out on us in another State without similar kinds of rights. So we can find that is a way to sort of freeze the effectiveness of the State law by, you know, making it clear that if you try to use the State law in this State, we will make it hard for you in another place where they don't have this law. And so it is a little more complicated than just a State-by-State analysis.

Obviously, we will continue to work with the States have we have. And, frankly, we will continue to do this one building at a time because we have to. But I think it would be better in terms of the attempt to get a complete infrastructure out there that is competitive, if we had a national solution. I think it would happen more quickly for everyone that way.

Mrs. CUBIN. Thank you, Mr. Rouhana.

Mr. TAUZIN. Thank you. Go ahead, Ms. Case.

Ms. CASE. I see absolutely no——

Mr. TAUZIN. Pull the microphone to you.

Ms. CASE. I have never needed a microphone. Exclusivity—as a property owner, there is nothing wrong with exclusivity. I am providing—you already know so I can—I am providing you with your home. If I engage into a contract that provides that provider an exclusive right, then I am taking the risk, if I get paid or if I don't get paid. I can tell you that we don't have, currently, any contracts that are exclusive for service. But I will allow our managers to exclusively market a provider. Now if a resident is dissatisfied with that provider, I lose. My contract needs to have customer service obligations in there.

I am the one who loses the resident. If I get paid money up front, if I get paid on an ongoing basis, I will lose. There is no amount of money that could bring our company to higher levels than rent. And that is what we are in the business to do.

Mrs. CUBIN. Well, while I generally agree with that, in Wyoming it is not just so simple as okay I am going to move out of your building into somebody else's.

Mr. TAUZIN. Unless you get a tent.

Mrs. CUBIN. Yes.

So, you know, in theory I agree, but——

Mr. TAUZIN. Thank you, Ms. Cubin. I think Mr. Prak—you have got a few who want to comment before I move on.

Mr. PRAK. I was just going to respond from the perspective of over-the-air, free, over-the-air television, that there is a national interest and that I would think that you could harmonize your views with respect to privately owned property, as I have, and in the same way that the Supreme Court has, by looking at some of these regulations as akin to local laws and Federal laws that require access to utility connections, mail boxes, smoke detectors, fire extinguishers, all of these things that are required. A mail box is required by Federal law.

At one level, one could look at them as some kind of infringement upon private property rights. Our Supreme Court has interpreted the Constitution otherwise.

Mrs. CUBIN. I just want to make one more statement now. You know, I am really torn here because we were talking about local-to-local TV with some industry broadcasters and they said, well, they will only be serving in the next few years the top 70 markets. Well, the largest market in Wyoming is 196 and the next one is 199. So I am thinking, well, okay, if we are going to across-the-country, nationally provide or make provisions that everyone can have access, then maybe every single citizen in the country deserves the right to have everything that everybody else has, so maybe we shouldn't be looking at Wyoming at 196 and 199. Maybe we should just say, okay, industry, build it.

Everybody is entitled to mail a letter for the same price. Everybody is entitled to telephone service. Everybody is entitled to electricity. Get them the telecommunications services, too.

Mr. PRAK. I guess what I would say in response, Congresswoman, is that the folks I represent are in the process of trying to do that right now. We are in Wyoming and, by golly, we are going to cover it all with a digital signal.

Mr. TAUZIN. Don't mess with Wyoming, any of you. I am telling you.

Mr. PRAK. That is right.

Mr. TAUZIN. Thank you. If you have other responses I will have to move on—maybe you can get your points in with other members. Let me recognize the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, for holding this hearing. It is fascinating. As I have listened to not only everyone at the table offering their testimony, but members asking questions I leaned over to my distinguished colleague from Pennsylvania and said, I think that we are national referees sometimes. So we have got to come up with a solution on this. But first I want to start with Mr. Burnside. I just can't resist this. Do people tell you that you look like Robin Williams?

Especially when you smile. Look at that. And he does wear glasses sometimes.

Mr. BURNSIDE. You are not the first.

Ms. ESHOO. Okay. Okay. Great. Well, I had to get that in. A little levity. For those that haven't seen his face, if you can turn around now.

Mr. TAUZIN. You ought to hear the number of people who ask Robin Williams if he looks like Mr. Burnside. It is amazing.

Ms. ESHOO. Right. Yes. Let me start out with Mr. Bitz. In your testimony, you pointed out that your residencies are providing competitive options for tenants and it has been mentioned before that BOMA supported a bill that nearly passed in the Florida legislature. Do you consider that a model? And, if so, would you support a federally modeled bill from that piece of legislation that is pending in the Florida legislature?

Mr. BITZ. Well, perhaps, like many families, we don't always agree within our family and, at a national level, BOMA disagreed with what the local chapter entered into.

Ms. ESHOO. And what was your disagreement?

Mr. BITZ. Our position is that we are not in favor of any mandated access, even on a negotiated basis.

Ms. ESHOO. But once you get beyond that. I mean, that is like the developer going in and saying 1,000 homes and then when they have to sit down and negotiate with the planning department, then the powers to be they will say, okay, we will do 720 units. So, you know, what is your next position?

Mr. BITZ. You heard my next position, which was this goes to the heart of, in our opinion, of owning real estate because private property rights are very important to us and we believe we are meeting the Nation's telecommunications objective as an industry. I, in a somewhat humorous fashion, used my glass of water to point out that progress has been made, dramatic progress has been made, about the number of service providers. We believe that that will continue. It is a very positive trend. We support that.

But we don't want the government forcing us to have to deal with people that we may or may not otherwise deal with in a free-market environment. We support the free-market environment and we support the competitive environment that we are in. We believe that works for our tenants.

Ms. ESHOO. Do you charge people to have access to the services?

Mr. BITZ. Yes.

Ms. ESHOO. And, if so, do you have——

Mr. BITZ. The agreements we have, including with my colleague next to me——

Ms. ESHOO. Do you have fixed rates? Or does the association help set them?

Mr. BITZ. No, these are individually negotiated between individual companies and telecommunications service providers.

Ms. ESHOO. What is the range? What is the range that you charge?

Mr. BITZ. Well, I would say it would vary from like $100 to $500 a month for a site. It depends on the size of the building. I mean, a small building, obviously, is worth less than a much larger one. We do not, in my company, have really huge buildings. We are here in Washington. They are of medium size. So I can't speak for, you know, major buildings in New York. But that is our company's experience.

Ms. ESHOO. So it is anywhere from $500 a month on up.

Mr. BITZ. On down.

Ms. ESHOO. Oh.

Mr. BITZ. It is not a lot of money from our perspective, Ma'am.

Ms. ESHOO. So a provider would pay anywhere from $500 on up or down for——

Mr. BITZ. Down.

Ms. ESHOO. Down. The high is $500 a month?

Mr. BITZ. That is correct. That is right.

Ms. ESHOO. And what is your cost for charging that $500 a month?

Mr. BITZ. It is impossible to identify a separate cost. It is like, when we build a building——

Ms. ESHOO. It is just the cost of——

Mr. BITZ. It is just we are you know, these things are multi-billion-dollar properties.

Ms. ESHOO. [continuing] providing a space.

Mr. BITZ. That is correct, Ma'am.

Ms. ESHOO. In your association, how many players are there? I am just trying to get a handle on how much is involved here. I have a sense that it is a lot.

Mr. BITZ. Well, the commercial office building industry, we have 17,000 members who are in our association. I don't know——

Ms. ESHOO. So of the 17,000 how many people would be——

Mr. BITZ. There would be hundreds of companies.

Ms. ESHOO. There would be hundreds.

Mr. BITZ. Hundreds of companies.

Ms. ESHOO. And are the 17,000 buildings? 17,000 members.

Mr. BITZ. 17,000 members.

Ms. ESHOO. How many buildings do you think there are?

Mr. BITZ. If there is not pushing 1 million office buildings in the United States of every description, I would be surprised.

Ms. ESHOO. So 1 million and how many do you think are in the $500 range a month?

Mr. BITZ. I couldn't answer that question, Ma'am. I have never seen any statistics.

Ms. ESHOO. Anyone have any idea? Yes, Mr. Windhausen.

Mr. WINDHAUSEN. Well, I am sorry, I don't have the answer to that specific question, but I would like to say that, in my testimony, that we have a number of examples of building owners charging thousands of dollars per month, up to and exceeding $10,000 per month. So not all the companies are as farsighted as Mr. Bitz in only charging $500. It is really a much bigger problem.

Ms. ESHOO. Mr. Chairman, I think there is something in my background legislatively where we developed—you know, we worked together on this and you were key in the passage of it of uniform standards across the country in another area. There is no question in my mind that there are private property rights that come in and around this, that we bump up against our magnificent Constitution.

But it seems to me that it is an area that does cry out for some kind of fair—of course, that is in the eyes of the beholder—something reasonable that—because this is all over the map. I mean, it is catch-as-catch-can. I think that people that live in the buildings, use the buildings, I know people in my district are still acting where is the competition of the Telecom Act that you touted in working on that. So I do think that this is an area that we are going to have to look at some kind of legislative solution. Obviously, we are not going to come up with it today, but in listening to people, this is—I think that we are going to be faced with it.

It is complex, obviously. But unless the parties come together and say we have a solution—and I would encourage that. It doesn't sound like there is. But if there isn't. If you don't get together, I think that the Congress may very well step in and I have said to people before do you really want the Congress in this? Well, we will see. But if you can't come up with—I think that you can even though you didn't want to state what a solution might be, I think that is good for openers.

I would urge you to try and come together to draw up something voluntarily. But, if not, then I guess we will jump into it.

Mr. MARKEY. Will the gentlelady yield?

Ms. ESHOO. Sure. I would be glad to.

Mr. MARKEY. I thank the gentlelady for yielding. You know, most of the telecommunications legislation that has moved through Congress is driven by the personal experiences of members as well. And, you know, the gentleman from North Carolina here, Mr. Prak, he is right. Which apartment owner was saying in the 1950's and 1960's and 1970's and 1980's, I am not going to have an antennae on the top of my apartment building and I am not charging my tenants anything, so it wasn't any big deal to have an antennae on top of the roof, obviously.

And then a new phenomenon occurred, as we know, and there is nothing that frosts me more than to be in a hotel room of a hotel that never—that you used to make phone calls from that used to cost, if you made a local call, .30, .50. And all of a sudden to find out that the ten local calls you make now cost you $1 just to access the phone and then still only .30 to the phone company, right?

Ms. ESHOO. The tax is cheaper than that, than the local call.

Mr. MARKEY. No, it is not just the tax——

Ms. ESHOO. No, the bed tax.

Mr. MARKEY. It is the hotel break up, okay. It is the sharing of this profit that, you know, they now get .75 or .50 for every phone call, Ookay? Now that is fine, okay? You are a captive, you know. But now you have got one-third of all Americans in apartment buildings. So the higher this fee is that an apartment owner can charge is the higher the rates have to be that the competitor has to charge in order to provide these services. So there is a balance that has to be struck here because, obviously, everyone is in an apartment building as a captive.

So, yes, we have moved from this old Mr. Prak area where people said, yes, we are going to provide it or the old Bell system, the old era to this new era where now it is a profit center, you know? And we are also trying at the same time to drive telecommunications revolution into every room that people in our country live in as well. So it is a balance and we just have to strike it but it is our own personal experience that helps to animate the debate.

Ms. ESHOO. Can I reclaim my time now?

Mr. TAUZIN. The gentlelady—now let me explain how this works. The gentlelady controls the time. I have been generous with time because I was pretty generous with myself. And the gentlelady controls it. If you want to address these comments, the gentlelady recognizes you and you can address them. The gentlelady has the time.

Ms. ESHOO. Thank you very much, Mr. Chairman. And I thank our ranking member for making the points that he made too. I love to tease him, but he is a brilliant and witty mind here and we can't do without him.

Mr. TAUZIN. Well, don't go too far.

Ms. ESHOO. And you too, Mr. Chairman. You, too, absolutely. There has been testimony, and legitimately so, relating to businesses and what they receive, what they should receive, how they receive it, the competition, all of that. What about the residential buildings? I mean, if Congress were to provide access, what assur-

ances are you prepared to give us that the residential customers will be served as well?

Mr. HEATWOLE. In Virginia, you are barred by the Virginia Residential Landlord Tenant Act from charging an access fee simply to get on the property. You cannot charge $500 or $1,000 or $10,000. You can, if there is a quid pro quo. I have paid to put the lines inside the building. What will you pay me to rent the lines? I am providing space and a building for a distribution system. My staff is providing advertising and actually signing up your customers. For providing those services, we can negotiate a reasonable fee for those services. But as far as simple access, give me $1,000 or you can't come on my property, in Virginia, on residential properties, we cannot do that and we don't do that.

Ms. ESHOO. Thank you very much. Mr. Rouhana and Mr. Burnside, maybe.

Mr. BURNSIDE. Well, obviously, our business, our marketplace is the residential communities and I would just make the point that throughout the 1996 Act, you consistently use the word "competitively neutral," "nondiscriminatory." And I cannot see anything in exclusive contracts or mandatory access laws when used to claim exclusive ownership of wire otherwise inaccessible in that last mile that could be possibly described as competitively neutral in any way, shape, or form.

So I think you certainly have——

Ms. ESHOO. You are saying the words of the Act support the question or the answer to the question I just posed?

Mr. BURNSIDE. Words of the Act in sections of the Act where those words are used reflect the spirit of the Act.

Ms. ESHOO. So is the spirit catching, though? I mean, do you think this would——

Mr. BURNSIDE. I would agree that it is catching on.

Ms. ESHOO. Okay.

Mr. BURNSIDE. But we still have some "T"s to dot and some "T"s to cross in some corrective legislation, I believe.

Ms. ESHOO. You really do look like him.

When you smile, it really gets——

Mr. Rouhana.

Mr. ROUHANA. How do you follow Robin Williams? That is my question.

Ms. ESHOO. I know. We are going to find someone that you look like.

Mr. ROUHANA. All right, well, let us not go there.

I may not like what you do. The answer to your question is we are primarily focused on the business community, but as we build out our network, we are going to end up with line-of-sight from our hub sites to literally thousands of multiple dwelling units. The easier it is for us to get into the commercial marketplace, the faster we are getting to the local marketplace. It is that simple. It is a simple equation. If it is harder for us to go and it takes us decades to get to the commercial marketplace, we can't go to the residential marketplace until we get there because the economics don't allow us to do it. RCN is primarily focused on residential.

But what I am saying about Winstar is true about all competitive carriers. The faster we get established and have the critical mass

to be able to service customers, the faster we are bringing this service to people. We didn't go into business to be small. We went into business to be big, to serve as many people as we possibly can.

The impediment to getting there fast is this building access issue. I have said it over and over again. And you were quite right when you said there is something big going on here. We have a million negotiations to do to get into the commercial buildings. How can we do this in less than a decade or two without some kind of framework? It won't happen any other way.

Ms. ESHOO. I think you have made excellent points. Thank you to you all. I just wonder when several industries are going to have more women at the top. This is really interesting. Well, I guess it is great that there are women on this side of the table.

Mr. TAUZIN. Absolutely. It is a good balance, I think over here you have got going. Let me thank the gentlelady.

Ms. ESHOO. Thank you.

Mr. TAUZIN. One of the things that—as I go to Mr. Pickering—I will probably want to submit in the form of written questions: How much disclosure occurs where there are—you know, to tenants? How much disclosure occurs to the tenant that you only have these services, you don't have a right to choose other services? And what is being charged for access? And whether disclosure—you don't have to answer that now. I just want to put it on the table because it is a question that other members have whispered to me.

The gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman. And I want to commend you for having this hearing. This is a very important hearing. As someone who worked on the other side on Senate staff then, as I have said before, lost my influence when I became a member, but did work for too many days and too many years and too many hours on the Telecom Act, knowing the various debates.

Mr. TAUZIN. Mr. Pickering, you might tell them who you worked for on the Senate side.

Mr. PICKERING. I worked for Senator Lott on the Senate side.

Mr. TAUZIN. Imagine what a come-down that was.

Mr. PICKERING. But I have worked with Mr. Windhausen very closely as he worked with Senator Hollings at that time. And it is clear that our intent and the spirit of the Act was to have a competitive policy and competitive access. This is a classic case where we have to balance the property rights, the constitutional property rights, with individual rights of access to information and technology.

We are going from a one-wire world and model to a multiple network, multiple technology, from wireless to other wire lines, whether it is electric utilities or cable companies or traditional telephone company.

The access question, especially when you put it in the context of one-third of the U.S. population is in a multi-tenant building, this is something that we have to address and hopefully we can resolve. I was hoping that maybe Florida came up with an appropriate balance. I understand your position today, but I think, Mr. Chairman, that is something that we may want to look at.

Let me go quickly, though, to FCC authority, Mr. Sugrue. Because some would argue that you have existing authority to ad-

dress this question and I just want to we gave you broad authority under the Act to eliminate all barriers to competition. If you look in section 224, access to utilities right of way for the provision of telecommunications services; section 706, to promote the deployment of advanced services; section 207, prohibits restrictions on devices designed for over-the-air reception of video programming, which—any restrictions that could appear under that section.

Do you believe that you have additional authority or the general authority to address this issue? If so, what are your plans for addressing it? And does the Wireless Bureau have a proposal or are they in the process of putting a proposal forward on this issue?

Mr. SUGRUE. To start with the last question first, and I am just going to work back, the Bureau is, as I indicated earlier, proposing that the Commission initiate a proceeding to address these issues: building access, both building access with respect to conduit and wire control by the utility and those issues that are the focus of today's discussion, which is principally access to those parts that building and wiring controlled by the building owner.

Again, assuming that the Commission adopts the Bureau's proposal, we would launch that probably in June. We are targeting the June meeting on that.

Mr. PICKERING. Since you are doing a proposal, is the correct interpretation in your view that the FCC has the authority to address building access?

Mr. SUGRUE. Not necessarily. One of the principal issues to be discussed is just the scope and extent of the Commission's authority. The Communications Act does not, even with the amendments in the 1996 Act, does not explicitly address this. There is longstanding Supreme Court law of supporting the Commission's exercise of what the court has called ancillary jurisdiction, jurisdiction that derives from the purposes of the Act and——

Mr. PICKERING. The intent.

Mr. SUGRUE. We sort of put it together from different parts. The parts that you cited, undoubtedly, would be the parts we would cite were we to proceed on that. As to whether we need legislation, it would save a lot of time, effort, and sleepless nights for us if the Congress were so inclined to tell us: FCC, go this far. Don't go any further than this. And just what the standards would be. Because, from the debate here today, what you heard today is really almost a microcosm of what we have heard and are going to hear, I am sure, in the next few months.

Mr. PICKERING. Mr. Sugrue, I would appreciate it if, as you move forward within the FCC, that you would also provide recommendations to Congress of what we need to do that would be helpful in bringing about the objectives of the Act.

Mr. SUGRUE. Thank you.

Mr. PRAK. Yes, Mr. Pickering, if I may, I just wanted to respond by saying, at some point, Congress may need to provide encouragement to the Commission to exercise the authority it already has. I don't know if you were here for my testimony on the 207 issue regarding over-the-air broadcasters, but it strikes me that when Congress passed the Telecommunications Act which contained section 207, it made a judgment about that Act's provisions' constitutionality and its harmony with the Fifth Amendment. And now

when we go before the agency in a rulemaking proceeding and we are revisiting Fifth Amendment issues that had been addressed by the Congress or we would contend had been addressed by the Congress, that, at some point, before it is litigated, somebody has got to go ahead, belly up to the bar, and move on.

Mr. PICKERING. Let me just add, Mr. Sugrue. In the structure of the bill, the Telecommunications Act, we tried to provide you with the flexibility to achieve the objectives of the Act. And we gave you pretty broad authority. Sometimes we wish we could take that back.

Mr. TAUZIN. Oh, yes.

Mr. PICKERING. But I do think that we gave you the broad authority and the flexibility to address these issues.

Mr. SUGRUE. Thank you. I appreciate that.

Mr. TAUZIN. Thank you, Mr. Pickering. At this point in the record, I want to note that we have received testimony from the Public Utility Commission of the State of Texas, which is State that has passed legislation. And, without objection, they have asked that we make it part of our record. It is so ordered.

[The prepared statement of the Public Utility Commission of Texas follows:]

PUBLIC UTILITY COMMISSION OF TEXAS
AUSTIN, TEXAS 78711-3326
May 11, 1999

THE HONORABLE W.J. "BILLY" TAUZIN
Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection
Committee on Commerce
U.S. House of Representatives
Room 2125, Rayburn House Office Building
Washington DC 20515-6115

DEAR REPRESENTATIVE TAUZIN: I am sorry that I am unable to join you for the May 13 hearing on building access issues for facilities-based local telecommunications service providers. I hope you will allow me to share a few brief thoughts on how these issues have been handled here in Texas.

While incumbent local exchange companies have had access to multi-tenant buildings for years, facilities-based competitive local exchange companies (CLECs) trying to compete for those customers do not always had the same level of access. Without building access on the same terms and conditions as the incumbent local telephone company, new competitors face a significant competitive disadvantage to serve building tenants and the goal of a competitive market is stalled.

To further competition in the local telecommunications market, the Texas Legislature amended the Public Utility Regulatory Act of Texas ("PURA") in 1995 to add two sections on building access:

- Section 54.259 prohibits a property owner from preventing or interfering with a telecommunications utility's installation of a service requested by a building tenant, discriminating against a telecommunications utility with respect to installation, terms or compensation issues, and requiring unreasonable payments in exchange for access to the property. These provisions assure that building access and rental charges are assessed equally on all telecommunications service providers.
- Section 54.260 allows a property owner to charge reasonable compensation, limits and impose necessary conditions on a utility seeking access, to protect the property and its owner.

These statutory provisions are attached (Attachment A).

After addressing several examples of discriminatory building access, the Texas Commission staff developed an enforcement policy to implement PURA's building access provisions and facilitate negotiated building access arrangements between building owners and telecommunications utilities. This policy (see Attachment B, Public Utility Commission of Texas memo of October 29, 1997) attempts to balance the rights of service providers and building owners and reduce the need for formal enforcement actions by the PUC. The policy specifies that the basis for a compensa-

tion mechanism should be to compensate the property owner for the space used (i.e., through a square foot rental rate as with market-based building lease rates), regardless of the number of customers served or the revenues generated by the telecommunications provider. To assure non-discriminatory treatment of multiple telecommunications providers, the PUC's policy requires that when a competitive carrier enters a multi-tenant building, the owner must modify the terms of its arrangement with the incumbent carrier to give it the same fees, terms, limits and conditions as the CLEC.

Congress and federal and state regulators have worked hard to assure that effective local service competition is not hindered by access to the local loop. But if the loop is the "last mile", building access is the "last yard" for many customers and CLECs. The National Association of Regulatory Utility Commissioners approved a resolution on this topic at its summer, 1998 meetings (Attachment C).

I hope this information is useful to the Subcommittee as it deliberates this important market opening issue. If I can provide any additional information, please let me know.

Best wishes,

PAT WOOD, III

cc: Representative Thomas Bliley

ATTACHMENT A

TEXAS UTILITIES CODE

PUBLIC UTILITY REGULATORY ACT OF TEXAS

Sec. 54.259. DISCRIMINATION BY PROPERTY OWNER PROHIBITED.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

(1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;

(2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;

(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;

(4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or

(5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

(1) an institution of higher education as defined by Section 61.003, Education Code; or

(2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(c), (e), (g).)

Sec. 54.260. PROPERTY OWNERS CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

(1) impose a condition on the utility that is reasonably necessary to protect:

(A) the safety, security, appearance, and condition of the property; and

(B) the safety and convenience of other persons;

(2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;

(3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;

(4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;

(5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(d), (e).)

ATTACHMENT B

PUBLIC UTILITY COMMISSION OF TEXAS

MEMORANDUM

TO: Chairman Pat Wood, III
Commissioner Judy Walsh
Commissioner Patricia Curran

FROM: Ann M. Coffin
Assistant Director
Office of Customer Protection

Bill Magness
Director
Office of Customer Protection

DATE: October 29, 1997

RE: On Agenda for November 4, 1997 Open Meeting
Project No. 18000: Informal Dispute Resolution
Office of Customer Protection Enforcement Policy regarding Rights of Telecommunications Utilities and Property Owners under PURA Building Access Provisions.

The Public Utility Commission of Texas (Commission) has recently been asked to address implementation and compliance issues concerning the "building access" provisions of the Public Utility Regulatory Act (PURA) §§ 54.259 and 54.260. The building access provisions of PURA were adopted during the 1995 legislative session in an effort to guarantee telecommunications utilities access to public and privately owned property for the provision of competitive telecommunications services. To date, the Commission has not addressed compliance issues associated with the building access provisions of PURA. As competition becomes a reality, telecommunications utilities have begun to raise concerns regarding their ability to access multi-tenant buildings in order to provide telecommunications services to the building's tenants. Specifically, the telecommunications utilities are concerned that property owners may be placing unreasonable terms and conditions on building access to the detriment of the developing competitive telecommunications market.

In order to quickly respond to these concerns and provide both telecommunications utilities and property owners the benefit of our interpretation of the provisions set forth in PURA §§ 54.259 and 54.260, the Office of Customer Protection (OCP) has developed the following enforcement policy. In no way is this policy intended to affect shared tenant service (STS) providers' right of entry contracts with property owners. Rather, OCP seeks to facilitate negotiated building access arrangements between incumbent local exchange carriers, new entrants, and building owners by providing parties with OCP's position on these complex issues. Although the policy paper is intended to reduce the need for formal enforcement actions, in the event that parties allege violations of PURA §§ 54.259 and 54.260, OCP intends to use this policy to guide its determination of whether enforcement actions against parties should be initiated.

Overview of PURA, Sections 54.259 and 54.260

In 1995, the Texas Legislature passed legislation that introduced sweeping changes in the way in which telecommunications utilities may operate and the way they are regulated in Texas. Specifically, the legislation encouraged competitive entry into the Texas local exchange telecommunications market. Since that time, the Commission has actively undertaken its responsibility to introduce competition into the local telecommunications marketplace. Inevitably, the statutory mandate to "open up" the telecommunications marketplace has caused an increase in the number of telecommunications utilities seeking access to multi-tenant buildings in order to provide, install, maintain, and operate facilities necessary for the provision of service to the buildings' tenants. This demand for access has raised a fundamental question regarding a telecommunications utility's "right" to access commercial build-

ings in order to install facilities to serve tenants of the building. In adopting PURA § 54.259, the state legislature answered this question by creating a right of access by the telecommunications utility to public and private property. In exchange for allowing the telecommunications utility access to the building, the state legislature adopted PURA § 54.260, which allows the property owner to charge reasonable compensation for the access privilege.

The provisions of PURA § 54.259 govern the right of a telecommunications utility to access public and private property by mandating access, on a nondiscriminatory basis, to any telecommunications utility whose services are requested by a tenant. Sections 54.259(a)(4) and (5) prohibit discrimination against a tenant or in favor of another tenant based on their selection of a telecommunications utility and prohibit a demand for payment from a tenant for allowing their chosen provider access to the building. These provisions protect tenants who exercise their "right" to choose among service providers from being subjected to actions such as increased rental charges or surcharge assessments that may occur as a result of requiring the building to give access to multiple providers. Similarly, Sections 54.259(a)(1-4) protect the telecommunications utility, whose services are requested by a tenant, against discriminatory actions by the property owner. These provisions prohibit the property owner from preventing or interfering with a telecommunications utility's installation of a service requested by a building tenant; discriminating against the telecommunications utility in regard to installation, terms, or compensation issues; and requiring "unreasonable payments" in exchange for access to the property. The principle underlying these provisions is that a property owner may not treat similarly situated tenants or utilities on a different basis and that access and rental charges must be assessed on an equal basis among telecommunications service providers.

In recognition that property owners have the right to impose reasonable conditions and/or limitations on a telecommunications utility's ability to access the property owners property, the state legislature enacted PURA § 54.260. Specifically, PURA § 54.260(a) (1)-(2) authorizes the imposition of conditions or limitations that are "reasonably necessary" to protect the security, appearance, and condition of the property and the safety of the property and persons on it, as well as the imposition of "reasonable" limitations on times available for installation. In addition, PURA § 54.260(a)(3)-(5) permits the property owner to limit the number of telecommunications utilities that may access the owners property if space constraints dictate such a limitation; require indemnification for certain costs, and; require the tenant or utility to bear the entire cost of installing, operating, or removing any facilities. Most significant, however, is PURA § 54.260(a)(6), which allows the property owner to require the utility to pay compensation that is "reasonable and nondiscriminatory" among telecommunications companies.

PUC Jurisdiction

A number of parties that filed comments in this project raised the issue of whether the Commission has jurisdiction over matters involving building access. Specifically, parties challenge the constitutionality of the provisions, as well as the Commission's authority to enforce PURA §§ 54.259 and 54.260 against property owners.

Pursuant to PURA §§ 15.021, 15.023, and 54.260, the Commission is clearly vested with jurisdiction to enforce the building access provisions of PURA. Specifically, PURA § 54.260(b) states that "*[n]otwithstanding any other law*, the commission has jurisdiction to enforce this section." (emphasis added). Without question, the Commission has jurisdiction over the operations and services of telecommunications utilities operating in Texas. In light of the statutory language in PURA § 54.260(b) and the telecommunications expertise that the Commission brings to resolving building access issues, the Commission can reasonably conclude that it has primary jurisdiction over building access issues involving disputes between telecommunications utilities and property owners. Thus, any remedial relief or administrative penalty action ordered by the Commission would extend to property owners on issues which involve the rights of telecommunications utilities in building access situations.

Enforcement Policy

In enacting PURA § 54.259, the Legislature sought to encourage competition in the local telecommunications market by facilitating competitive provider access to customers in privately owned multi-tenant buildings. It is with this in mind that OCP has crafted an enforcement policy on the building access issue that attempts to balance the rights of both service providers and property owners. OCP emphasizes that this enforcement policy does not constitute a rule or order of the Commission. Rather, the policy seeks to establish the parameters for interpreting PURA §§ 54.259 and 54.260 and guide compliance efforts in this area.

The positions of the parties affected by this issue are diverse. The primary areas of conflict center around the parties' positions regarding the limits of the "discrimination" and "unreasonable payment" terms in PURA §§54.259 and 54.260, respectively. Specifically, the telecommunications utilities argue that absent some regulatory limits on the compensation issue, property owners have an incentive to extract monopoly rents for access. The utilities argue that competitive telecommunications options enhance the market value of the building and that any compensation to property owners must be minimal and take into consideration the building enhancement that results from the provision of competitive telecommunications services. Representatives of property owners, on the other hand, argue that the free market must be allowed to dictate terms, conditions, and compensation for access to a building's risers and conduits. These parties also argue that simply looking at the quantity of space to be used by the telecommunications utility does not take into account the value of the property, the nature of the improvements, its location, or the quality or size of the "market" created by the property owner for the telecommunications utility.

I. BASIS FOR DETERMINING REASONABLE COMPENSATION

Given the complexity of the issue, it is unlikely that a single compensation method can be found for each type of space requirement. The basic underlying principle, however, for any cost methodology related to building compensation issues is that property managers must impose the same costs, methodology, and rates on any telecommunications utility which gains access to the building. This approach ensures that competitive telecommunications services are available to tenants without the imposition of reasonable building restrictions by property owners. Granting building tenants access to competitive carriers is central to achieving PURA's goal of making competitive telecommunications service alternatives available for all Texans and their businesses, regardless of whether they live and work in a single family home or a multi-tenant building. Although the real estate industry, in general, is controlled by the free market, building access is a market segment that is not subject to free market forces. Rather, the property owner, by virtue of his ability to control access to the tenant acts as a gatekeeper through whom telecommunications utilities must gain passage. The exercise of this control enables the property owner to dictate terms and conditions of the building access arrangement that may grant access to one telecommunications utility, but deny access to another. In addition, the telecommunications utility cannot freely "walk away" from the terms and conditions placed by the building owner on the access arrangement, because the utility must have access to that particular building in order to provide service to its customer who is a tenant in that building. In order to address the absence of free market control over building access issues, the Legislature established compensation requirements for property owners. Specifically, the Legislature required that compensation for access be reasonable and nondiscriminatory.

The ability of the property owner to charge compensation which is reasonable and nondiscriminatory does not, however, imply that every telecommunications utility must be treated identically. Rather, it requires that a telecommunications utility be offered the same terms, conditions, and compensation arrangement as its similarly situated counterpart. This interpretation preserves not only the right of the parties to freely engage in commercial transactions wherein a service provider seeks access to private property, but also ensures that the property owner does not exert control over the building access arrangement in a manner that is unreasonable or discriminatory to the telecommunications utility.

In establishing the parameters applicable to the term "reasonable" compensation, it is important to distinguish between buildings in which the property owner has moved to a single minimum point of entry (MPOE), and thus owns all wiring inside the point of demarcation where the main line enters the building. In such instances, the telecommunications utilities must compensate the property owner for the use of cable distribution facilities. In multi-tenant buildings where telecommunications utilities maintain ownership of their wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), telecommunications utilities must compensate the property owner for use of building space.

A. Basis for determining reasonable compensation in a single demarcation point system.

In instances in which the property owner has assumed responsibility and ownership of wiring beyond the MPOE, the telecommunications utility may decide to utilize the building's existing cable distribution facilities. A property owner may charge for use of distribution facilities on the owners side of the demarcation point in a number of different ways. For instance, the property owner may base compensation

on a per pair, per circuit or per conduit or sheath basis. Without question, the charge for use of distribution facilities on the owner's side of the demarcation point may take into consideration the type of facilities used by the property owner in providing telecommunication services. In negotiating compensation terms for the use of the property owner's distribution facilities, parties may consider factors such as the amount of facilities investment, the useful life of the facilities, tax and a reasonable rate of return.

A property owner may also seek compensation for the physical space used by the utility in the building's equipment room and any actual costs associated with the utility's use of the building. The property owner, by controlling building access, manages an essential element in the delivery of telecommunications to the tenants in that building. As such, the price of equipment room space leased to utilities to provide service to tenants in that building should be based on the actual economic cost of the space and not on the number of tenants served or the revenues generated by the carrier for the provision of telecommunications services to the building's tenants. Compensation in this manner is reasonable because it ensures similar terms and conditions for all providers.

B. Basis for determining reasonable compensation in a multiple demarcation point system.

In multi-tenant buildings, where the telecommunications utility maintains ownership of the wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), the property owner may receive compensation for the telecommunications utility's use of the rental space in the equipment room, use of the building's conduit facilities, and any actual costs associated with the utility's use of the building. Compensation for rental floor space, as well as the use of the building conduit facilities should be based on the rental value in the marketplace of the property used by the provider, not on the type of facilities used, the revenues generated, or the number of customers served.

Compensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space.

The basis of any compensation mechanism should be to compensate the property owner for the space used, regardless of the number of end use customers served or the revenues generated by the telecommunications carrier. For this reason, use of the square foot rental rate for use of the basement and riser space is a reasonable basis of compensation in buildings with multiple demarcation systems. Lease rates for commercial property are an appropriate guide for determining compensation for access to the building because commercial leases not only reflect the variation in rental rates depending on the location and desirability of a particular building, but indicate what tenants are willing to pay for the amount of square footage being used by the tenant in the same marketplace and for the same type of space. This method of compensation ensures that the property owner is paid the fair market value for the use of the space and also recognizes that space in the basement of an office is not as valuable as retail space in a section of the building open to the public, or a corner office on the top floor of an office building.

II. Applicability of the Discrimination Provision in PURA § 54.259 to Existing Service Arrangements with Incumbent Local Exchange Carriers

PURA § 54.259 specifically prohibits a property owner from discriminating in favor of or against a tenant or telecommunications utility in any manner. This prohibition against discriminatory treatment is consistent with the overall terms of PURA which sought to advance the public welfare by promoting competition in the provision of telecommunications services in Texas. *See* PURA § 51.001 (a)-(c). While recognizing that many existing access arrangements were made prior to competitive entry, it is OCP's position that prior contractual agreements which provide for exclusivity or preferential terms for the incumbent telecommunications utility disserve the goals of PURA specifically and telecommunications competition generally. Accordingly, OCP interprets the PURA § 54.259 nondiscrimination provision to be applicable to pre-September 1, 1995 business arrangements between incumbent local exchange carriers and property owners.

Although the nondiscrimination provisions of PURA § 54.259 are applicable to pre-September 1, 1995 service arrangements, the non-discrimination provisions are triggered only at the time a competitive carrier seeks access to the building served by the incumbent telecommunications carrier. Therefore, service arrangements made prior to September 1, 1995, should be allowed to stay in place until a second carrier invokes the nondiscrimination requirement. Once a competitive carrier seeks access to the building, the nondiscrimination provisions are triggered, and the property owner must either treat all carriers the same as the incumbent "in relation to the installation, terms, conditions, and compensation of telecommunications services facilities to a tenant on the owners property"[1], or re-negotiate with the incumbent to treat it the same as all other carriers seeking access.

Because the legislative intent behind PURA §§ 54.259 and 54.260 is to foster competition, not provide protected status to the incumbent, compensation arrangements for building access that apply only to new entrant telecommunications utilities or new customers of an incumbent telecommunications utility are not reasonable. Every provider of telecommunications service must charge rates that recover its costs. At the same time, every provider's prices are nonstrained by the prices of its competitors. If the incumbent is paying no fee for building access, it certainly will have a cost advantage over its new entrant competitors that are paying such a fee. Exempting incumbents from paying for building access inevitably impacts competitors adversely because of the comparative cost advantage the incumbent gains as a result. Accordingly, when a new provider enters a commercial property, the treatment of the incumbent must be revised to match that accorded to the new provider. Thus, if private property owners require new providers to pay a fee, the incumbent should begin to pay a fee calculated in the same manner and on the same basis.

III. Prospective Customers as a Condition of Access

As more and more telecommunications utilities seek access to a building to provide service to the building's tenants, space limitations associated with access will inevitably arise. PURA § 54.260 authorizes a property owner to reasonably limit the number of utilities that have access to the property if the owner can demonstrate that space constraints justify such a situation. OCP is concerned however, that some carriers may attempt to preemptively "reserve" space in the building to the exclusion of subsequent carriers who may have the intention of serving the building on a more immediate basis. OCP will interpret such behavior on the part of the telecommunications utility to be anticompetitive. In addition, any restrictions on building access that impose unreasonable delays on a competitive carriers provision of telecommunications service to a customer will be considered discriminatory on the part of the property owner. OCP believes that the appropriate remedial course for either activity is enforcement action by the Commission.

IV. Carrier of Last Resort Obligation and Building Access

Several parties commented regarding a telecommunications utility's carrier of last resort (COLR) obligation in the context of the building access issue. Specifically, parties sought clarification on whether a telecommunications utility with COLR obligations may refuse to serve a building if a property owner seeks compensation for access. Because the implications associated with the COLR obligations extend beyond the building access, OCP declines to address the issue in this enforcement policy.

V. Conclusion

In enacting PURA §§ 54.259 and 54.260, the legislature sought to facilitate the development of local competition by ensuring that new entrants receive access to tenants on the property based on reasonable compensation and equal, non-discriminatory terms. Under these conditions, will residential and business customers in multi-tenant buildings experience the benefits of competition in the form of lower rates and expanded choices for products and services. OCP encourages telecommunications utilities and property owners to negotiate late building access arrangements that will enable utilities to compete for business on the basis of price and the provision of expeditious service. These types of access arrangements will benefit not only telecommunications utilities and property owners, but customers as well.

Although OCP's enforcement policy regarding building access issues is intended to facilitate building access arrangements between parties and reduce the necessity for formal enforcement actions, parties should be aware that the policy statements

[1] *See* PURA § 54.259(a)(3).

and proposals for resolving disputes developed in Project No. 18000 do not constitute commission rules and resolving disputes developed in Project No. 18000 do not constitute commission rules and orders, and do not deprive parties of rights under PURA or the *Administrative Procedure Act*. Project No. 18000 represents the Commission's effort to expedite settlement of business disputes in the increasingly competitive markets for telecommunications and electric services.

Please contact Ann Coffin (6-7144) or Bill Magness (6-7145) if you would like additional information on this matter.

Attachment

cc: Adib, Pwviz; Laakso, John; Bellon, Paul; Mueller, Paula; Bertin, Suzanne; Prior, Dianne; Davis, Stephen; Sapperstein, Scott; Dempsey, Roni; Silverstein, Alison; Featherston, David; Slocum, Bret; Hamilton, Kathy; Srinivasa, Nara; Jenkins, Brenda; Whittington, Pam; Kjellstrand, Leslie; Wilson, Martin; Kyle, Sandra; Vogel, Carole.

ATTACHMENT C

NARUC—SUMMER 1998

RESOLUTION REGARDING NONDISCRIMINATORY ACCESS TO BUILDINGS FOR TELECOMMUNICATIONS CARRIERS

WHEREAS, Historically, local telephone service was provided by only one carrier in any given region; and

WHEREAS, In the historic one-carrier environment, owners of multi-unit buildings typically needed the local telephone company to provide telephone service throughout their buildings; and

WHEREAS, Historically, owners of multi-unit buildings granted the one local telephone company access to their buildings for the purpose of installing and maintaining facilities for the provision of local telephone service; and

WHEREAS, Competitive facilities-based providers of telecommunications services offer substantial benefits for consumers; and

WHEREAS, In order to serve tenants in multi-unit buildings, competitive facilities-based providers of telecommunications services require access to internal building facilities such as inside wiring, riser cables, telephone closets, and rooftops; and

WHEREAS, Facilities-based competitive local exchange carriers, including wireline and fixed wireless providers, have reported concerns regarding their ability to obtain access to multi-unit buildings at nondiscriminatory terms, conditions, and rates that would enable consumers within those buildings to enjoy many of the benefits of telecommunications competition that would otherwise be available; and

WHEREAS, All States and Territories, as well as the Federal Government, have embraced competition in the provision of local exchange and other telecommunications services as the preferred communications policy; and

WHEREAS, Connecticut, Ohio, and Texas already utilize statutes and rules that prohibit building owners from denying tenants in multi-unit buildings access to their telecommunications carrier of choice; and

WHEREAS, The President of NARUC testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition that "[f]or competition to develop, competitors have to have equal access. They have to be able to reach their customers and building access is one of the things that state commissions are looking at all across the country."; and

WHEREAS, The attributes of incumbent carriers such as free and easy building access should not determine the relative competitive positions of telecommunications carriers; and

WHEREAS, The property rights of building owners must be honored without fostering discrimination and unequal access; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, urges State and Territory regulators to closely evaluate the building access issues in their states and territories, because successful resolution of these issues is important to the development of local telecommunications competition; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscrim-

inatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider.

Sponsored by the Committee on Communications

Adopted July 29, 1998

Mr. TAUZIN. The Chair is now pleased to recognize the gentleman from Pennsylvania, himself an experienced hand in the communications world. Mr. Klink.

Mr. KLINK. That is true. A recovering broadcaster.

Let me just, first of all, I was kind of stricken as we sit here at the hearing, at the position that many of us are in, including Chairman Tauzin. I think the chairman, if you will recall back, and one of the first issues that you and I talked about in depth was private property rights and we worked, all of us, so hard on coming up with competitiveness in the Telecom Act. So we find two things that we feel very passionately about clashing before us here today. And the answers are not easy.

I just wanted to go back. I have got the older version of the Telecom Act, but I think this is the section 207, although it was different. And I want to just read from it, "Directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewers' ability to receive video programming from over-the-air broadcast station or direct broadcast satellite service. The committee intends this section to preempt enforcement of State or local statutes or regulations or State or local legal requirements, restrictive covenants, or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or satellite receivers designed for reception of DBS service. Existing regulations including but not limited to zoning laws, ordinances, restrictive covenants, or homeowners associations' rules shall be unenforceable to the extent contrary to this section."

So what we have said to the building owners and to the realtors and to the people who manage property, we are going to give you an exemption so all those here comes the big Federal Government that is usually thought of as being a pain in everybody's posterior, we are going to give you an exemption to all these local problems that you could have and now you are sitting here before us today telling us you don't want to work with us to get that service the last couple of hundred of feet to the consumers out there that may desire this. And it gives me a little bit of a problem.

As I said, chairman, myself, others, we don't want to get into takings. We don't get into—private property means a lot to us. I own—I owned. I have sold it since I have been here to support my bad habits of being a Congressman. It costs you a lot to be down here—I mean, I was a property owner, a commercial property, rental properties. I know what you go through.

On the other hand, you know, we have got some exciting possibilities here and that bottleneck exists just maybe 100 or 200 feet away from the people that we wanted to serve, the people designed to benefit by this Act, that is the American people, being able to engage in purchasing as another option these competitive services. So I would ask for a reaction to that.

Mr. HEATWOLE. Well, I am going to speak to residential, multifamily. Your first comment and from what I understand of the section you read was dealing with off-air signals and, as I had spoken

earlier, in the properties where we actually own the cable TV system, we either give it away—the off-air signal or we sell it for $12 a month. The chairman asked, you know, what do you tell residents what is available? Well, in our area, if we don't do it, build a system as a landlord, you have the incumbent provider. Those are the two things that are available as far as television is concerned.

You know, I don't know the answer to all these questions, but generally, as we have stated, competition in the marketplace of residential units and commercial units requires that you provide certain services. Theoretically, we wouldn't have to have telephone service in any of our units, but I doubt that we would have very many residents because most people want telephone service. Most people want television service, either off-air or cable TV. To be competitive in a marketplace, we simply cannot deny that service.

And, in Virginia, as far as residents are concerned and I will read from the Landlord Tenant Act "Access of tenant to cable, satellite, or other television facilities" and it goes on to any provider, it says "No landlord shall demand or accept payment of any fee, charge, or other thing of value from any provider of all these things in exchange for giving the tenants of such landlord access to such services and no landlord shall demand or accept any such payment from any tenants in exchange thereof unless landlord is itself the provider of the service."

Mr. KLINK. Mr. Heatwole, first of all, I am not here to defend what they have done in Virginia. We have got 49 other States and Commonwealths that we have to deal with.

Mr. HEATWOLE. Maybe it is the solution.

Mr. KLINK. Well, it may or may not be. But the point here is—and I think, as my distinguished colleague, Ms. Eshoo, said a few moments ago in her questioning—if we have thousands of people out there and perhaps tens of thousands of people who own buildings. And perhaps now if you are getting into residential, it is millions. I don't even know the number and I don't think anybody here knows the number.

If this industry, which is booming and which really could bring, I think, great competition—I think broad-band technology has great possibilities that probably none of us in this room has ever thought of—if we are going to bring that to the American people, which is one of the things that we—we didn't have broad-band in mind when we did the Telecom Law, but we want to see new technologies. We want to see things happen. We want to see industries develop. We are in a communications era, an informational era. I think we all agree with that.

If they have to go building-by-building and sometimes in these negotiations, I think we all know, can take a year or more to just kind of, you know, it is an attorneys relief act which there are probably some people in this room that would like that idea. There are probably a lot that wouldn't.

The point is that if we in this committee and in this Congress said to the building owners and the people, as we did as I read that section: We are willing to wave as much of a wand as we have here in the Federal Government to relieve you from all of the problems that you could have with zoning laws and other limiting laws by

the local governments in an effort to get the communications into your building, whether it is direct, off-the-air, I mean the intention is clear. We want to get the service, whatever it is, to the people.

And you remember, when we wrote this law in 1996, we were replacing a law that was written in 1934 before television was even invented. And so we realized as we were doing this that we are writing a law that deals with technologies that we haven't even dreamed of, haven't been invented yet, but we have to be able—and we had long, long discussions—how do we get these technologies that we don't even know about as we write this law—to the people?

Now we come here today and we take all of your objections very seriously, but how do we get that last few hundred feet? And we asking you to go with us and there doesn't seem to be a willingness because, again, Ms. Eshoo asked about could we use the Florida law, which we understand has not been enacted, that we understand, though, at least in Florida, there was agreement between the realtors and their building owners—I think Mr. Bitz said it was a disagreement within the family. How can we get to where we need to be? How can we give Mr. Sugrue the direction that the FCC needs to get somewhere that is not going to be onerous to you but, at the same time, allows us to see that this technology is out there as a viable option for the consumers across this Nation and the next technology that we have a year from now or 10 years from now.

Mr. Bitz.

Mr. BITZ. Earlier in my presentation, I stated that I was not aware in our company at least—and I can only speak for my own business experience—of any tenant in our commercial office buildings who is not satisfied with their telecommunications service. The voice that is missing at this table is you have competing industries at the moment, but you don't have anyone speaking for the consumer directly and I can only reflect the anecdotal experience that I have with over 2,000 tenants. I—in my experience. And I speak quite directly—is that I am not aware of any of our commercial tenants who are not well-served by the existing amount of telecommunications competition they already have. I can't speak for residential or the commercial industry. In my experience, that is certainly the case and while not every company can get into every building, that is not the issue. The question is are the tenants adequately served. And, in my perspective, they certainly do appear to be served.

On our end, think of the problems there would be if we were forced to have to deal with every single competitive provider. This gentleman indicated there are now 72 of them. Trying to deal with 72 companies to deal with the same service again and again and again in small-and medium-sized buildings would not serve the public interest, which, at that point, would already have been well taken care of by having 4 or 5 or 3 or 6 providers already in a building. So what we are saying is that we believe the competition is already there in the commercial business.

Mr. KLINK. Mr. Rouhana.

Mr. ROUHANA. What Brent says is true. He is one of the enlightened landlords that does allow people to have access. The problem