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BRINGING TELECOMMUNICATIONS COMPETITION TO TENANTS IN MULTI-TENANT ENVIRONMENTS

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EXECUTIVE SUMMARY

Nondiscriminatory telecommunications carrier access to commercial and residential consumers in multi-tenant buildings is critical to the development of facilities-based local exchange competition. Currently, some landlords can and do prohibit CLEC access to their building tenants. Still other landlords impose such unreasonable conditions and demand such high rates for access that competitive telecommunications service to their buildings is rendered uneconomic. The tenants in these buildings often are without recourse and cannot obtain access to competitive telecommunications options.

State laws do not help these tenants. Only two States -- Connecticut and Texas -- have statutes that require landlords to grant nondiscriminatory access to the telecommunications carriers from whom their tenants choose to take service. Moreover, market imperfections eliminate the possibility of relying on the marketplace to resolve the problem. A federal solution is warranted.

The FCC possesses ample authority under the Communications Act to eliminate this nationwide barrier to competition. Most importantly, Section 2(a) provides the Commission's subject matter and *in personam* jurisdiction over all interstate and foreign communications by wire and radio, and to all persons engaged within the United States in such communication. The sweeping definitions of radio and wire communication in the Communications Act include even items and services incidental to interstate wire communication. The Commission has successfully

exercised this expansive and flexible basis of authority in the past, and should do so again in the context of telecommunications carrier access to building tenants. To enable all tenants to receive the benefits of competition, the FCC should adopt federal nondiscriminatory building access rules and apply them in those States lacking nondiscriminatory building access statutes.

The FCC's rules should require that landlords grant telecommunications carriers reasonable, nondiscriminatory, and technologically neutral access to their buildings for the purpose of providing service to tenants within those buildings. Such access should expressly include access to rooftops, vertical and horizontal riser cables, utility closets/telephone equipment rooms (and the cross-connects therein) and to the intra-building wiring between the cross-connect and the customer's premises. The access should include both commercial and residential multi-tenant environments.

In addition, the Commission should prohibit exclusive access arrangements between a carrier and a landlord. The Commission should also prohibit the imposition by landlords of penalties or charges on tenants for exercising their choice in telecommunications carriers. Finally, landlords should not be permitted to condition access on the presence of actual customers within the building.

In exchange for access, landlords should be permitted to receive compensation that is reasonable, nondiscriminatory and technologically neutral. These rates should be related to costs. Moreover, landlords must not be permitted to impose revenue

sharing arrangements on carriers as a condition of access (although carriers and landlords should be permitted to enter into voluntary agreements of this sort insofar as they do not impair access by competing telecommunications carriers).

Carriers should be required to assume installation and damage costs. Moreover, although space constraints remain a largely theoretical issue, the Commission should be prepared to address legitimate and demonstrable space constraints (and the concomitant need to deny access) if and when they arise.

Given the established need for relief from this competitive barrier, and the immediate and manifest growth in competition that will result from requiring nondiscriminatory telecommunications carrier access to multi-tenant buildings, the Commission should adopt and implement federal access rules promptly.

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BRINGING TELECOMMUNICATIONS COMPETITION TO TENANTS IN MULTI-TENANT ENVIRONMENTS

I. NONDISCRIMINATORY ACCESS TO TENANTS IN MULTI-TENANT ENVIRONMENTS IS A CRITICAL COMPONENT OF A COMPETITIVE TELECOMMUNICATIONS MARKET.

Telecommunications competition brings choices in carriers, lower prices, and innovative services to consumers. Yet, a significant sector of the population is sometimes denied these benefits: those individuals and companies located in multi-tenant environments ("MTEs"). The Telecommunications Act of 1996 ("1996 Act") is largely invisible to many of these tenants and the Commission has taken no measures to remedy this situation.[1]

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[1] It is ironic that the Commission has taken no action domestically to provide for telecommunications carrier access to multi-tenant environments while the United States Government has officially recommended to the Government of Japan that it implement building access in order to promote telecommunications competition in that country. See *"Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Competition Policy, and Transparency and Other Government Practices in Japan,"* at 10 (dated Oct. 7, 1998)("Establish rules that facilitate access to privately owned buildings, particularly multi-dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier. For example, the GOJ should consider setting rules on demarcation points for telecommunications carriers to access buildings and prohibiting owners of multi-dwelling units from denying a tenant access to any telecommunications or cable TV service.").

This problem is not incidental; approximately one-third of U.S. residential units are located in MTEs.[2]

Traditionally, control over the "last mile" was held by the incumbent local exchange carrier ("ILEC"). The Commission implemented rules designed to provide competitive carriers with access to this last mile so that consumers could benefit from telecommunications competition.[3] When the consumer is located in a single tenant building or home, the decision to offer a competitive carrier access to the facility is a function of whether the individual or corporate tenant/owner wishes to avail itself of competitive alternatives.[4]

However, when a third party blocks the telecommunications consumer's access to its desired carrier, it thwarts the Commission's efforts to promote competition. When that third party is the ILEC, the Commission's unbundling and interconnection rules are designed to offer a remedy.[5] However,

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2 United States Census Bureau, Census of Housing, "Units in Structure" (1990 figures)(available at <www.census.gov/hhes/housing/census/units>). Indeed, MTEs are likely to be the first place that residential facilities-based local exchange competition occurs on a significant scale.

3 See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996)("Local Competition Order").

4 In a single tenant environment, the tenant would be expected to possess greater bargaining leverage vis-à-vis the landlord.

5 The Commission recently sought comment on "situations where the incumbent LEC owns facilities on the end user's side of the network demarcation point and whether those facilities should be unbundled under section 251(c)(3)." Implementation of Local Competition Provisions in the

when that third party is the owner or manager of an MTE, the remedy is less apparent and often non-existent in the absence of FCC action on this critical issue.

The competitive local exchange carrier ("CLEC") and the telecommunications consumer may be unable to reach each other because the MTE owner retains monopolistic control over the sole means of access to the consumer -- the "last hundred yards" of the network. Absent effective remedial access measures that apply to MTEs, control of even this small portion of the telecommunications network has the potential to eviscerate the pro-competitive goals of the Commission and the 1996 Act for many commercial and residential consumers.

In order to provide facilities-based service to a tenant in a multi-tenant building, a local telecommunications carrier must install its facilities within the building, sometimes to the individual tenant's premises. Regardless of where the demarcation point is located, building owners can and do exclude telecommunications carriers from the property (absent state laws or regulations to the contrary). The operation of state property laws generally requires that a telecommunications carrier obtain the permission of the building owner prior to installing the facilities within and on top of that owner's building (or otherwise on the building owner's property). In some cases, the

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Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Provider, CC Docket Nos. 96-98 and 95-185, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. April 16, 1999).

carrier's facilities may extend only from the property line to the building's minimum point of entry. Nevertheless, the land owner's consent is required for this extension. Consequently, absent a landlord-tenant lease provision to the contrary, the landlord can control the facilities-based local telecommunications carriers to which a tenant has access by refusing or granting a carrier access to install facilities within the building.

Building access is important to facilities-based competitors, and particularly to those carriers employing broadband wireless strategies since these carriers must place antennas on building rooftops to serve customers in the building and, hence, do not provide service using unbundled switch-to-NID loops. Increasingly, telecommunications companies are implementing strategies that bypass incumbent local loops through use of wireless technologies.[6] Teligent, WinStar and other traditional fixed wireless carriers have a history of pursuing this strategy.[7] AT&T's "Project Angel" envisions wireless local loop bypass of the incumbent bottleneck.[8] In addition, Sprint

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6 See, e.g., Lynnette Luna, *MMDS Next Frontier for Last-Mile Access*, RCR at 1 (April 19, 1999).

7 See, e.g., Peter Haynes, "Teligent's Test," Forbes Magazine (March 9, 1998)(noting the cost advantages and unique challenges of Teligent's wireless local loop strategy).

8 See Rebecca Blumenstein, "AT&T Plans to Enter Some Areas Using 'Fixed Wireless' Technology," The Wall St. J. at B6 (March 19, 1999)(noting AT&T's strategy to used fixed wireless technology to provide local service where it is unable to use cable television lines).

recently announced its acquisition of several fixed wireless operators that will enable it to bypass BOC local loops to deliver broadband services to consumers.[9] Similarly, MCI WorldCom recently reached an agreement to acquire CAI Wireless which will give it access to spectrum so as to offer services to consumers without reliance on incumbent networks.[10] Given the importance of building access to wireless local loop strategies, and the trend towards such strategies, the growth of local exchange competition increasingly will correlate with the level of telecommunications carrier access available to tenants in multi-tenant environments.

The telecommunications facilities that will be installed within and on top of MTEs typically do not occupy much space. To provide facilities-based service to a tenant in a multi-tenant environment, a fixed wireless carrier must first obtain rooftop access for the placement of its small antenna.[11] The antenna

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9 See Nicole Harris, "Sprint to Acquire People's Choice TV In Broadband Bid," The Wall St. J. at B6 (April 13, 1999)(reporting Sprint's purchase of an MMDS provider so that it can offer high-speed Internet access and video conferencing over wireless technology instead of purchasing BOC loops); Comm Daily Notebook, Communications Daily (May 4, 1999) (reporting Sprint's proposed acquisition of Videotron USA and Transworld Telecom which would give Sprint an additional 6.4 million potential homes to reach through wireless facilities, rather than landlines).

10 See "Comm. Daily Notebook," Communications Daily (April 28, 1999).

11 The antenna allows the carrier to receive and transmit radio signals which are converted to or from wireline frequencies for customer communication. The antennas used by fixed wireless carriers range from 1-2 feet in diameter and are typically 12 inches in depth.

must be located on the building being served because a coaxial cable typically runs from the rooftop antenna through a modulator (often smaller than the racks used by most ILECs) and to the building's cross-connect where connection with the customer's telephone system is accomplished. Access to riser cables or other conduit within the building is necessary to carry the signal over wires from the rooftop antenna to the modulator and through the building to the customer's connect point, often located in the basement of the building in a telephone closet or equipment room.[12] Finally, a fixed wireless carrier, like a wireline CLEC, requires access to the telephone inside wire from the cross-connect to the tenant's premises.[13]

Although the Communications Act of 1934, as amended, provides ample authority to eliminate restrictions on a tenant's access to telecommunications carriers as discussed in detail below, the Commission's rules do not expressly prohibit building access restrictions, unreasonable conditions for access, or

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12 The riser space within a building frequently has excess capacity or contains unused cables. Use of this excess capacity or removal of the unused cables would allow sharing of risers by competitive carriers without the need for costly construction of additional through-ways from the roof to the basement.

13 Often a building's equipment room contains a wall board which connects the ILEC's network to the inside wire of the building. A fixed wireless carrier must have the ability to remove the ILEC's wires from that portion of the cross-connect pertaining to a customer who chooses the CLEC over the ILEC (a technically simple and routine procedure), and connect directly into and use the building's wires that connect the telephone network cross-connect with the individual tenants' premises.

exclusive building access arrangements between telecommunications carriers and building landlords.

The experiences of CLECs demonstrate the need for prompt Commission action.

- The manager of one large Florida property has demanded from a CLEC a rooftop access fee of $1,000 per month and a $100 per month fee for each hook up in the building. The company estimates that this fee structure would cost it about $300,000 per year -- just to service <u>one</u> building.

- The management company for another Florida building demands that a telecommunications carrier pay the management company $700 per customer for access to the building, in addition to a sizable deposit, a separate monthly rooftop fee, and a substantial monthly riser fee that, when taken together, precludes the company from providing tenants in that building a choice of telecommunications carriers.

- One CLEC sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of $2,500 per building in addition to space rental of approximately $800 to $1,500 per month per building (or $6,000 per month per building for nodal sites). Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that the CLEC agree to refrain from making any regulatory filings concerning the building access issue.

- Another large property owner and management company demanded $10,000 per month per building just for access rights to building risers.

- One CLEC has encountered a building owner that demanded a $50,000 fee at signing of a contract and a lease payment of $1200 per month.

- A large number of building owners and managers do not want a second telecommunications carrier in the building because of revenue sharing arrangements with the first carrier and many have entered into exclusive access contracts with a single carrier; indeed, one building management company told a CLEC not to solicit its tenants.

- Management companies for many other buildings demand revenue sharing arrangements in exchange for access.

II. TELECOMMUNICATIONS CARRIER ACCESS TO TENANTS IN MTEs MAY BE ACCOMPLISHED THROUGH THE ESTABLISHMENT OF PARAMETERS THAT DEFINE REASONABLE CONDITIONS AND PRICING.

In order to secure the option of competitive telecommunications services for tenants within MTEs, nondiscriminatory MTE access must encompass: (1) rooftop access (for fixed wireless antennas); (2) inside wiring; (3) riser cables (both horizontal and vertical); and, (4) telephone closets and Network Interface Devices ("NIDs"). Access to these facilities will ensure a technology-neutral capability for carriers to provide telecommunications services to tenants in MTEs.

In furtherance of a competitive market -- and in the related interests of maximizing tenant choice -- MTE access rules must adhere to the principle of nondiscrimination. Telecommunications carriers should compete to serve consumers on the basis of service quality and rates and should not succeed or fail in the market because of discrimination that tilts the playing field or prevents choice altogether.[14] The terms, conditions, and

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[14] See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 2 (1998)("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶¶ 3-4 (noting that "Section 224 was designed to ensure that utilities' control over poles and rights-of-way

compensation for the installation of telecommunications facilities in MTEs must not disadvantage one new entrant vis-à-vis another new entrant. Discriminatory rules or recommendations that would disadvantage a particular carrier or type of carrier will, by necessity, reduce the choices available to MTE tenants. Therefore, for purposes of telecommunications competition and maximum tenant choice, the Commission should design rules or recommendations that adhere to and promote the principle of nondiscrimination.[15]

As a function of nondiscrimination, any tenant access rules, recommendations, or conditions should be technologically neutral. Services are and will continue to be offered using a variety of technologies. The spectrum of transmission technologies should be accommodated and encouraged in providing for access to MTEs. For example, fixed wireless carriers transmit microwave signals that ultimately enter an MTE through the rooftop. For such carriers, MTE access must contemplate rooftop access as well as the provision of easily accessible interfaces with MTE wiring (i.e., on an MTE's top floor).

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

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did not create a bottleneck that would stifle the growth of cable television" and that the protections of Section 224 were extended to telecommunications carriers in 1996).

15 Governance by these principles would be consistent with the goal behind the 1996 Act to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)(emphasis added).

- *Carrier assumption of installation and damage costs*: Installing carriers must assume the costs of installation as well as the responsibility for repairs and payments for damages to MTEs. Although indemnity provisions are also warranted, they can entail the expense and delay of seeking judicial resolution. MTE owners and the tenants occupying their MTEs would be better served by a presumption that the cost of any repairs for damages caused by facility installation should be assumed by the installing carrier.

- *No customer prerequisite for access*: MTE owners should not be permitted to require the presence of customers within the MTE as a condition of telecommunications carrier access. Carriers must be permitted to wire a structure prior to seeking customers within it. Otherwise, the delays involved in providing service caused by the need to wire an MTE will operate as a strong disincentive to choosing a competitive provider of telecommunications service and will cause needless delay in the time that a customer can expect to receive service.

- *No exclusivity*: MTE owners should be prohibited from granting exclusive telecommunications carrier access to a building. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications service. The Commission should require the reformation of long-term contracts to eliminate exclusivity provisions when requested by the MTE owner, a telecommunications carrier, or a tenant within the MTE.[16]

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16 See Western Union Tel. Co. v. F.C.C., 815 F.2d 1495, 1501 (D.C. Cir. 1987)("[T]he Commission has the power to . . . modify other provisions of private contracts when necessary to serve the public interest."); see also Expanded Interconnection With Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket Nos. 91-141; 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369 at ¶ 201 (1992)("The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements should be permitted to take a 'fresh look' to determine if they want to avail themselves of a competitive alternative."), *vacated on other grounds and remanded for*

- *No charges to tenants for exercising choice*: Under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.

- *Both commercial and residential multi-tenant environments should be included within a nondiscriminatory MTE access requirement.* As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As a practical matter, in many urban areas, it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of structures difficult. Small and medium-sized business tenants often have not experienced choice and often do not have the clout in a building to get what they want but have never had.

- *Reasonable accommodation of space limitations*: As an economic matter, space limitations most likely will not be an issue in practice. The costs attending the installation of telecommunications facilities within an MTE dictate that the endeavor will not be undertaken if consumer demand within the MTE is insufficient to recoup those costs. Logically, the number of carriers seeking to install facilities within an MTE will be limited by the number of services to which potential tenant customers will subscribe. Nevertheless, in the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building without serving commercial customers and requirements that carriers share certain facilities.

The Commission need not establish rates or rate formulae for access. However, the Commission can describe rate structures that are presumed reasonable or unreasonable by adopting a set of presumptions. In this manner, the Commission eliminates a market

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further proceedings sub nom, Bell Atlantic Tel. Cos. v. F.C.C., 24 F.3d 1441 (1994); see also Competition in the Interstate Marketplace, CC Docket No. 90-132, *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 2677, 2681-

failure -- the inequality of bargaining positions -- the market power -- derived from the MTE owner's/manager's monopoly status.[17] This method allows parties to negotiate specific rates within the reasonable parameters defined by the Commission. Of course, parties should be free to negotiate mutually acceptable terms that vary from the model.

Examples of reasonable parameters include the following:

- *Rates should not be based on revenues*. The Commission should presume that an MTE owner's imposition of revenue sharing on a telecommunications carrier is per se unreasonable because it does not approximate cost-based pricing and suggests the extraction of monopoly rents.[18]

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82 (1992)(fresh look for 800 bundling and interexchange offerings).

17 This approach would resemble that adopted by the 1996 Act in that the MTE owner's bargaining power over access to tenants parallels that of the ILEC's power with regard to access to other parts of the network. The Commission recognized this in its Local Competition Order when it noted the ILECs' "superior bargaining power" and the attempt of the statute to address this problem by allowing the new entrant to assert certain rights in negotiations with the ILEC. See Local Competition Order at ¶ 15. A similar bargaining relationship applies in the context of MTEs and a similar remedy would be appropriate.

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

The surplus benefits of telecommunications competition are more appropriately directed to consumers.

- *Rates must be nondiscriminatory*. The Commission should require that rates for access to MTEs be assessed on a nondiscriminatory basis. For example, if the ILEC does not pay for access to an MTE, neither should other telecommunications carriers. This would not bar the landlord from recovering reasonable out-of-pocket costs.

- *Rates must be related to costs*. MTE access rates must be related to the cost of access and must not be inflated by the MTE owner so as to render competitive telecommunications service within an MTE an uneconomic enterprise for more than one carrier.

III. MARKET IMPERFECTIONS NECESSITATE REGULATORY ACTION.

In many instances, the market resolves the issue: the MTE owner is responsive to tenant requests and recognizes that the building's value is enhanced by the presence of alternative telecommunications carriers. Of course, CLECs typically prefer to obtain access to tenants in MTEs through voluntarily negotiated agreements with MTE owners and managers.

However, the market often cannot be relied upon to secure timely competitive telecommunications options for tenants in MTEs. In such instances, Commission intervention is a public interest obligation. In this manner, the Commission assumes a role analogous to that assumed by the Department of Justice and the Federal Trade Commission in antitrust and consumer protection matters.[19]

Office of Customer Protection, to Chairman Wood and Commissioners Walsh and Curran at 6 (Oct. 29, 1997).

[19] See, e.g., Neil W. Averitt and Robert H. Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713, Spring 1997 (explaining that "antitrust law can best be understood as a

Some MTE owners and management companies are quite large, holding or controlling MTEs nationwide in different jurisdictions. Unilaterally, these companies can deny access to competitive telecommunications carriers for large numbers of tenants at once or can exert undue market power in negotiations with carriers. Moreover, because these companies' holdings extend across various jurisdictions, no single State has the capacity to address the unreasonable behavior in a comprehensive fashion.[20] The Commission has that capability.

The Commission should exercise this capability because tenants often lack the unilateral power to secure access to telecommunications options. The argument that all a tenant need do is move to another location belies the economic realities of commercial tenancy. The effect of long-term leases -- typically found in commercial environments -- renders tenants without recourse to market influences.[21] To obtain choice in

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way of protecting the variety of consumer options in the marketplace" and that "consumer protection cases are explicable as a means of safeguarding the ability of consumers to choose among the options that the market provides").

20 In some cases, if a carrier exercises its rights under the building access laws of a particular State (e.g., in Texas), nationwide property management companies will penalize the carrier in other States without building access laws (thereby undermining the effect of State-by-State resolution of the building access problem).

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

telecommunications carriers and services, they must break their leases and move -- often incurring substantial expenses in doing so. This is an unreasonable pre-condition to the enjoyment of the competition envisioned by the 1996 Act. Not only are there moving expenses, but often a higher rent on a new lease given the strength of the real estate and general economy. Moreover, small and medium-sized tenants, for the most part have never experienced these services, so the idea that they would, in significant numbers, break a lease and incur all of the other identified costs, is unreasonable.

There is another market imperfection here. The Commission has recognized contentions by real estate interests that "a dynamic market for access to buildings is evolving and that building owners have good reason to afford their tenants the services they want."[22] In some instances, the market may provide competitive choices, but not until tenants are legally able and willing to move their residence or business for the sake of competitive choices. This is unrealistic and often would require a breach of contract and, in any event, is an unacceptably high price to pay for competitive sources of telecommunications services.

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22 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Report*, FCC 99-5 at ¶ 103 (rel. Feb. 2, 1999)("Advanced Services Report").

Indeed, the 1996 Act's number portability requirement is premised on an analogous proposition. Prior to enactment of the number portability requirement, customers could switch local exchange providers so long as they were willing to switch their telephone numbers too -- an expensive and inconvenient undertaking, but certainly one much less inconvenient than a physical relocation. Congress believed that the inability to retain one's telephone number when switching carriers presented an extraordinary, often insurmountable impediment to local competition and that customers should not have to choose between their telephone number and competition.[23] The same philosophy requires that customers should not have to choose between the benefits of local competition and maintaining their present physical location.[24]

So too, the more general proposition that market forces demand landlords to cater to tenant wishes is flawed. Landlords, who may have little or no economic incentive to comply with the telecommunications choices of an individual or small business tenant in their buildings, should not have the ability to

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[23] See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 (1995)("The ability to change service providers is only meaningful if a customer can retain his or her local telephone number.").

[24] Choice in telecommunications carriers remains a relatively new phenomenon for most consumers. Given that many consumers do not yet fully comprehend the benefits that competition can bring them, it is unlikely that they will possess the zeal for competitive choices sufficient to warrant consideration of moving locations.

interpose their choice of telecommunications provider by denying would-be competitive providers access to their buildings.

Finally, the costs of breaking a lease and the inconvenience and disruption of moving may simply be too high for many individuals and small to medium sized businesses. The economic description of this phenomenon is the "lock-in" effect and it impairs natural market adjustments. In fact, it was noted by the Building Owners and Managers Association ("BOMA") in its effort to argue that building owners should not have to bear the maintenance costs of riser cable in multi-unit buildings. As a Commission Order notes, BOMA has asserted that "many tenants have long term leases that will prevent building owners from passing on [the] additional costs [of riser maintenance] to their tenants."[25]

The lock-in effect, a concept well-grounded in legal and economic precedent, was addressed by the Supreme Court in its 1992 Kodak decision.[26] Kodak was charged with seeking to impose high service costs on purchasers of its copier equipment who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated that "even if consumers were capable of acquiring and processing

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25 Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-209 at ¶ 25 (rel. June 17, 1997)(emphasis added).

26 Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

the complex body of information, they may choose not to do so. Acquiring the information is expensive."[27] Although some sophisticated customers may be able and willing to assume the costs of the requisite information gathering and processing, the Court noted that

> [t]here are reasons . . . to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . . [I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.[28]

Even those customers with sufficient information may suffer uneconomic exploitation from the lock-in effects. As the Court observed,

> [i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands.[29]

The economic concept of "lock-in" effects also was part of the explanation for the Department of Justice's insistence on a phase-out period for the 1956 IBM consent decree; the Department sought, among other things, to ensure that any mainframe users who wanted to switch computer platforms due to termination of the decree could do so over time since their enormous software investment would leave them "locked-in" for years to IBM.

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[27] Id. at 474.

[28] Id. at 475.

[29] Id. at 476.

The situation described by the Supreme Court in Kodak is closely analogous to that of small and mid-size commercial tenants in long-term leases who wish to take local telephone service from a competitor. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option and had no way of knowing that these choices would become available. Therefore, such tenants could not and would not have negotiated for the competitive carrier access in their leases necessary to allow them competitive local exchange service.

Although it is possible that a few sophisticated customers may have negotiated or renegotiated lease terms to provide for competitive telecommunications choice, most smaller businesses and individuals certainly have not realized the benefits of the renegotiated leases of a few sophisticated customers, particularly due to an MTE owner's ability to discriminate among tenants with respect to lease terms and conditions. Therefore, many tenants find themselves locked-in to arrangements that preclude affordable access to competitive options in local exchange service. In light of this market failure, Commission intervention is warranted to ensure that tenants in MTEs are given the freedom to choose their telecommunications carrier.

In other contexts, market incentives have proven inadequate to achieve socially beneficial goals on the necessary scale. Commission intervention represents a warranted response when consumers are ill-served. A recent example involves telecommunications carrier billing practices. Carriers have

market incentives to satisfy their customers and many carriers operate in the expected fashion. However, some carriers engage in billing practices that lead to customer confusion and surprise at the payments that they are required to make for telecommunications service. Some entities use the confusing nature of bills to engage in fraud.[30] These practices disserve consumers and led the Commission to adopt truth-in-billing practices.[31] The Commission's rules are designed to ensure that consumers are able to easily understand their telephone bills and are well-served by their carriers in that regard.[32] Adoption of nondiscriminatory MTE access rules to protect consumers in multi-tenant environments would operate in a similar fashion.

IV. SOME STATES HAVE ASSUMED A LEADERSHIP ROLE IN SECURING ACCESS TO COMPETITIVE TELECOMMUNICATIONS CARRIERS AT REASONABLE TERMS FOR TENANTS IN MULTI-TENANT ENVIRONMENTS.

Prior to the 1996 Act, several States took the lead in opening up local telephone markets to competition. Again, in a similar manner, some States are to be commended for recognizing early that telecommunications carrier access to tenants in MTEs is an important component of telecommunications competition.

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30 See Truth-in-Billing and Billing Format, CC Docket No. 98-170, *Notice of Proposed Rulemaking*, FCC 98-232 at ¶ 3 (rel. Sept. 17, 1998).

31 See "FCC Adopts Truth-in-Billing Principles and Guidelines to Help Consumers Understand Their Phone Bills and to Deter Slamming and Cramming," Report No. CC 99-12 (rel. April 15, 1999). The *First Report and Order and Further Notice of Proposed Rulemaking* in that docket, although adopted by the Commission, has not yet been released.

32 Id.

These States provide a model for the Commission in developing rules for tenant access to competitive telecommunications options. For example, the Public Utilities Commission of Ohio mandated MTE access unilaterally -- without legislation specific to the matter. It held in an order that "no person owning, leasing, controlling, or managing a multi-tenant building shall forbid or unreasonably restrict any occupant, tenant, lessee, or such building from receiving telecommunications services from any provider of its choice, which is duly certified by this Commission."[33] The former President of the National Association of Regulated Utility Commissioners ("NARUC") and former Ohio Public Utility Commissioner Jolynn Butler 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."[34] NARUC and Ohio are correct.

Texas also prohibits property owners from interfering with or preventing a telecommunications provider from installing

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33 Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sep. 29, 1994).

34 The Telecommunications Act of 1996; Moving Toward Competition Under Section 271: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary, *Testimony of Ms. Jolynn Butler* (March 4, 1998).

telecommunications service facilities on the owner's property at the request of a tenant.[35] The Texas law contains a nondiscrimination provision which requires the property owner to treat all CLECs in the same way it treats the ILEC, or re-negotiate with the ILEC to treat it in the same way that it treats the CLECs. Moreover, Texas prohibits building owners from demanding compensation on the basis of the type of facilities used, the number of tenants served, or the revenues generated by the telecommunications carrier. Finally, Texas considers any access restrictions that impose delays to be discriminatory and subject to enforcement by the PUC.

Connecticut also has a statute requiring building owners to allow a telecommunications provider to wire the building and provide service so long as: (1) a tenant requests services from the provider; (2) the costs are assumed by the telecommunications provider; (3) the provider indemnifies the building owner for any damages caused by the wiring; and, (4) the provider complies with State inside wire regulations.[36]

Recently, the Nebraska Public Service Commission explained:

> [t]he intent behind the Telecommunications Act of 1996 was to open up the telecommunications market for competition. However, residents of MDUs have generally been unable to reap the benefits of this industry transformation.[37]

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35 Texas Public Utility Regulatory Act §§ 54.259 and 54.260, implemented by Texas Public Utility Commission Project No. 18000.

36 Connecticut General Statutes, Section 16-2471.

37 <u>In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents</u>

The Nebraska PSC recognized that tenants in some other states were guaranteed the ability to choose their telecommunications carrier through building access obligations and expressed its belief that "residents of Nebraska MDUs should have the same choice."[38] Consequently, the Nebraska PSC ordered statewide telecommunications carrier access to residential MDUs.

Finally, the National Association of Regulatory Utility Commissioners ("NARUC") passed a resolution supporting "legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings."[39] The NARUC Resolution also "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider."[40]

Telecommunications consumers in Ohio, Texas, Connecticut, and Nebraska as well as in those States that intend to implement the recommendation of NARUC, benefit from the foresight of their

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of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 4 (Neb. PSC, March 2, 1999).

38 Id.

39 Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers, NARUC 1998 Summer Meeting, Seattle, Washington.

40 Id.

regulators and lawmakers. Unfortunately, though, the vast majority of States have not addressed the issue. The need for Commission intervention in these circumstances is a function of the Commission's duty to protect and promote the public interest under the Communications Act.

V. THE COMMISSION RETAINS JURISDICTION TO SECURE TENANT ACCESS TO COMPETITIVE TELECOMMUNICATIONS OPTIONS.

The 1996 Act represents Congress' and the Administration's efforts to establish the principle of competition as a governing goal of communications regulation, a remarkable shift in an industry historically dominated by local monopolies. The enormity of the changes to the communications regulatory environment effected by the 1996 Act legitimately demands significant attention to its provisions. Nonetheless, the 1996 Act does not exist in a vacuum; it constitutes a part of a more comprehensive legislative scheme for communications regulation: the Communications Act of 1934. It is critical that the authority of the Commission to secure competitive options for tenants in MTEs, to implement the terms of the 1996 Act and, more generally, to continue its regulation of communications in the public interest, be viewed in its historic context so as not to unnecessarily limit the Commission's ability to accomplish the goals of Congress. This is precisely the message conveyed by the Supreme Court's decision in AT&T v. Iowa Utilities Board.[41] As the Court explained,

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[41] AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721, 142 L.Ed.2d. 834 (1999).