

universe, in which no detail is too small to be considered, and all details are interrelated. Successful developers examine every detail of a project, from site location, to color and design schemes within the building, to the type and mix of tenants in the building. Every aspect of a building affects its marketability, so every aspect must be controlled to create the desired atmosphere.

Once a building has been constructed, owners and managers must consider the same criteria and more. Owners and managers need to know where their buildings stand in relation to other buildings in the local marketplace in terms of rental rates, types of tenants, amenities, appearance, and so on. Property managers must also know what their potential customers are looking for. Managers take that information into account in deciding how to position a building in the market and in deciding what additional investment may be required in a building. In short, developers, owners and managers expend large sums of money and enormous amounts of energy to create and maintain attractive places for people to live, work, and shop. They make rational, market-based decisions and have been extremely successful in developing the massive infrastructure that literally supports every business and residence in the country.<sup>14</sup>

As part of this process, building owners and managers are assisting a range of telecommunications providers to reach their specifically targeted customers. More than that, however, they are helping these providers to expand their potential markets by ensuring that they serve a broader range of their tenants on an expedited basis. As indicated by the Charlton

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<sup>14</sup> With the advent of the publicly-traded real estate investment trust, sound asset management has become even more important. The real estate industry is not about to ignore the importance of telecommunications services to its tenants: the fiduciary responsibilities of owners and managers to investors would not permit it. The industry also actively trains its employees to deal with new technologies, always with the goal of meeting tenant demand and protecting the value of its assets. The members of the Alliance have conducted numerous seminars for their members

Survey, building owners respond affirmatively to provider requests for building access two-thirds of the time. In doing so, they commit their own staff and other resources to helping the telecommunications providers build-out their networks. The current financial demands on building owners (including hiring additional personnel) to address telecommunications access-related issues is substantial, and significantly greater than under the old “monopoly model.” This includes increased costs for:

- Management of transactions including developing and negotiating access agreements
- Reviewing drawings and monitoring installation
- Maintaining adequate security
- Cleaning up telephone closets and riser spaces
- Managing provider access
- Electrical usage
- HVAC load

In almost all cases, the tenants and telecommunications carriers benefit from in-house or outside experts and other resources paid for by the building owners. These experts often play a role similar to brokers in other types of real estate transactions. They make potential buyers and sellers aware of their options. In that way, they add efficiencies to a market where many potential buyers and sellers are not aware of one another. This is particularly the case, of course, where any one or two tenants would not, by themselves, constitute a sufficient source of revenue to be of interest to any particular competitive provider.

Building owners increasingly realize that paying these costs is critical because failure to respond to tenant services will result in a diminished reputation, increased liability and eventually loss of tenants. By the same token, when building owners respond attentively to these

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on telecommunications issues over the last several years, and demand for more such training opportunities is growing.

issues — including aggressive wire management and backbone installation projects — the result is a win-win-win for the tenants, for the carriers and for the building owners.

Consequently, most building owners have begun taking a major role in managing their buildings' telecommunications infrastructure through direct agreements or partnerships between the owners and providers. In other instances, building owners have gone a step further and built-out their own carrier-neutral backbones to create a “plug-and-play” environment. In still other cases, however, owners have chosen to limit their role and have left tenants to make their own arrangements.

We will examine these three different scenarios in turn.

**Model 1: Direct Agreements Between Building Owners and Providers.**

In most instances, telecommunications providers will seek to persuade owners directly of the benefits of granting them building access. As is the case with other building vendors, these businesses may initially seek access free of charge. To achieve that objective, they may argue that tenant satisfaction — or potential future tenant satisfaction — is adequate compensation for the use (and physical occupation) of the owner's property, as well as the expenditure of time and money in facilitating access. In other cases, the providers may offer financial inducements to owners in order to persuade them to more rapidly facilitate access to a building's infrastructure. They do this, of course, in the hopes that this payment will give them an advantage over other competitors. Even if they do not seek an exclusive access agreement, they anticipate — in most cases quite correctly — that once they are in the building their competitors will be less interested in pursuing customers there. In the experience of some property owners, the “unreasonable” access fees referred to in pleadings before the Commission and legislative hearings are often no

greater than the financial inducements that telecommunications providers themselves have offered to building owners.

In no instance are providers more willing, indeed eager, to compensate building owners than when they can secure access rights to an entire portfolio of buildings. Each of the competing companies strongly desires to be the first — or among the first — to service a whole set of buildings. These portfolio-wide deals are almost always announced with great public fanfare.<sup>15</sup> These announcements assist in encouraging greater stock market investment in their companies, which in turn provides more capital for network build-out. The access rights granted via these large-scale transactions are highly valued by providers. This is because the providers make money from these deals, through the economies of scale and other efficiencies associated with gaining access to large numbers of buildings all at once.

Tenants also stand to benefit enormously from these market transactions. Some may get service from competitive providers only because of the portfolio-wide deal. In other words, providers may not have sought access to these tenants for service but for the larger building access transaction and its associated strategic benefits. Others tenants ultimately may have qualified for service but at a much later date. When building owners negotiate these deals, they often insist that their tenants be offered service by a date certain. They can impose this requirement only because they offer the provider benefits that exceed those available from a deal with an individual consumer. In the absence of the building owner's negotiating role, many tenants would not receive timely installation. Instead, they would be at the mercy of the provider's own "optimal" build-out schedule.

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<sup>15</sup> See Exhibit N for copies of press releases.

While some service providers offer financial compensation for building access, others offer to make capital improvements to the building. One new breed of provider offers to build -- at the provider's expense -- a new fiber-optic telecom backbone in the building. They do so with the promise that they will share revenues from tenants or from other companies, generally internet companies, that seek to reach customers over the resulting "building-centric" system. These specialized providers build close relationships with individual building tenants and owners by offering them rapid, low cost access to the information superhighway and continuous on-site service. They do so on the assumption that their business relationships will ultimately pay off in terms of capturing business that might otherwise be overlooked by larger providers. They are quite satisfied to interconnect with other providers and are not looking to expend capital building out their own national networks. The success or failure of this "building-centric" model is still in the testing phase. One such company, Allied Riser Communications, is currently in 43 major office buildings in 16 markets. It expects to be fully operational in 25 markets by late 2000. *Dallas Business Journal*, March 29, 1999, attached at Exhibit M-1. If their business model is successful, they will offer competition to other providers of broadband services, thereby ensuring tenants have greater choice in terms of price and service.

**Model 2: Building Owners Take the Initiative To Improve the Building Infrastructure.**

Not all building owners choose to wait until they have struck deals or formed partnerships with specific providers to develop a telecommunications access strategy. In an increasing number of cases, building owners will take the initiative themselves. These owners seek to make their buildings "smart" by investing their own capital in carrier-neutral fiber and high-speed copper backbones and other building-specific technologies. In this way, they can

ensure their tenants have access to the broadest range of competitive providers as well as to other technologies. This approach is sometimes referred to as “plug-and-play.”

Nothing succeeds like success and developers throughout the country are watching closely as the owner-installed backbone model begins to get copied many times over. By way of examples of this “plug-and-play” model, consider these four projects.

- The Long Island Technology Center (Great River, New York)

The Long Island Technology Center ([www.Litechctr.com](http://www.Litechctr.com)) is a multi-tenanted environment under development by the Cogswell Realty Group and Rudin Management Company, Inc. in Great River, New York. The initial phase of the \$24 million dollar renovation project involves 150,000 square feet of office space with each office being equipped with optical fiber and high-speed copper wire to a main communications room. At full build-out, the project will comprise 1,100,000 square feet of space and will serve 70-100 tenants.

Telecommunications carriers that have already connected to the building’s system include MCI Worldcom, UUNET, Bell Atlantic, Cablevision Lightpath and North American Telecom. Many more carriers are expected to connect even before the building is occupied. Indeed, the tenants have signed up in large part because of the opportunity to benefit from the carrier neutral backbone, and the choice in providers that it offers. According to the *New York Times*, the tenants that have already signed up to lease space did so for three reasons: the “sophisticated communications system that would require a huge outlay of capital to install individually, the backups to safeguard systems from going down, the secure premises and an intangible — the ability to share ideas.” “Great River’s High Tech Center Begins to Hum,” *The New York Times Sunday* (June 20, 1999). Tenant interest in the building exceeded the developer’s expectations. According to Arthur Stern, chief executive of Cogswell, the “signing

of these [eight] charter tenants prior to our official grand opening shows that the demand for totally wired space is strong and growing.” “LI Tech Center signs up Tenants,” *Newsday* (May 28, 1999) attached at Exhibit M-2.

Other technology in the building will include a link (a 36 strand fiber-optic cable) from the building’s fiber-optic network into the network of Keyspan Communications (a subsidiary of Keyspan Energy). The link will allow high-speed transmission of data to domestic and global networks. Also part of the building specifications are:

- OC-48 Internet Protocol Backbone
  - Sonnet Ring
  - Satellite digital broadcast television
  - PBX/voice mail provisioning
  - Fiber from MDF to individual IDF
  - Redundant fiber paths into and within the facility
  - Video and teleconferencing common facility
  - Electronic whiteboards and remote learning facility
  - Centrally administered security system
  - All weather outdoor-indoor closed circuit television.
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- 55 Broad Street (New York, New York)

As indicated above, the Great Rivers building project is a joint venture between Cogswell Realty and one of New York’s most respected office and residential developers and managers, the Rudin Management Company, Inc. In 1996, the Rudins completed the now famous 55 Broad Street project. The 30 story, 400,000 square foot office building at 55 Broad Street ([www.55broad.com](http://www.55broad.com)) is now referred to as the New York Technology Center and was reportedly dubbed by Vice-President Al Gore, “the smartest building in the world.” (See “Visit by Vice President Al Gore, June 30<sup>th</sup>, 1999” [www.55broad.com/inthenews/gore/](http://www.55broad.com/inthenews/gore/).) The building has been hailed by new media companies in particular as a key hub for New York’s Silicon Alley.

55 Broad Street is relevant to this discussion because its highly successful owner-installed backbone was the central feature of the project. The building is wired with both a

multi- and single-mode fiber-optic backbone supporting the following capabilities: Gigabit – Ethernet, FDDI, ATM and SONET; LAN and WAN connectivity; low cost DS-3, 10 megabit, T-1, fractional T-1 and ISDN. It allows high-speed connectivity both between tenants’ systems and to a common resource such as the satellite system, with fiber distributed on every third floor. Enhanced high-speed Category 5 copper wire cable to desktops supports application speeds up to 155 Mbps over a distance of 100 meters.

There are currently 15 different telecom carriers available to tenants, with more being added. Those currently serving the building include:

- Teligent (local dial tone, long distance, internet)
- Winstar (local dial tone, long distance, internet)
- MFS Communications (local dial tone, long distance)
- Bell Atlantic (local dial tone)
- MCI World Com (local dial tone, long distance, internet)
- Teleport Communications (local dial tone, long distance, internet access)
- AT&T (long distance)
- Sprint (long distance, internet)
- US Cybercites (internet)
- Applied Theory (internet)
- Uunet Technologies (internet)
- Intercom Online (internet)
- Maestro Technologies (internet)
- Peak Access (internet)

The project reportedly included an initial owner-made investment of over \$15 million dollars to renovate the then-vacant property. This investment has by all measures proven a success. The building now houses over 75 tenants and is near 100% occupancy; there is a waiting list for future tenants. The testimonials from happy tenants at 55 Broad Street are almost too voluminous to fully document here. A few examples follow.

- According to Mr. J.J. Rosen, President of N2K, the building’s fiber-optic infrastructure, allowing his company to “plug and play” at high speeds on the Internet, provides savings to his company of at least \$700 a month on wiring alone. His internet designers routinely tap into the building’s wiring to run their modems at 1.5 millions bits per second (compared with the usual business or home speed

modem of 28,800 or 57,600 bits per second). "High Tech, High Rise." *Sky* (April. 1996) (attached as Exhibit M-3).

- "We were looking at space because we were in hyper-growth, and lots of places that we were looking at didn't have connectivity, they didn't have the piping or the bandwidth already built in." Said Brad Szollose, co-founder of K2 Design. "We had the chance [at 55 Broad] to have an entire area built exactly the way we wanted, and it already had the connectivity that we needed." "Wall Street's Other Boom," *New York* (Nov. 1996) (attached as Exhibit M-4).
- A branch of the Ericsson company that develops new technology chose 55 Broad Street because "we're 12 feet away from the vertical riser that holds all the connectivity we would ever need." "How Business Works: 55 Broad Street," *FORBES ASAP* (Aug. 1999) (attached as Exhibit M-5).
- An office of IBM that organizes corporate internet programs described its reason to choosing to lease space a 55 Broad Street: "Proximity to Silicon Alley, connectivity, building services, self contained team in a cool environment." *Id.*

#### Broadway Suite (Boulder, Colorado)

In 1998, Broadway Suites, a small brick office building located at the edge of Pearl Street in Boulder, Colorado, was losing tenants. It had a vacancy rate of 15%. Businesses were moving out of Boulder because of the perception that local growth controls were unfriendly to businesses. One year, later, however, the building is nearly back to full occupancy and the reason is connectivity. Paul Eklund, part owner of the building, took the initiative by offering his tenants everything from improved telephone services to T1 connections from their desktops. Recognizing that local businesses wanted alternatives to the local provider, U.S. West, he installed a switch in the building that now runs T1 lines directly from the building into Colorado Internet Coop, a member-owned nonprofit ISP that sells dedicated Internet service in Boulder.

- The JBG Companies (Arlington, Virginia)

The JBG Companies, a Washington, D.C.-based developer, recently received zoning approval for a new 20-story "plug-and-play" building to serve the high-tech market in Arlington,

Virginia. The Washington Times, p. D16 (Dec. 7, 1998) (attached as Exhibit M-6). The building will be pre-wired with fiber optic cable and will include a video-conferencing center.

**Model 3: Allowing Tenants To Make Their Own Arrangements.**

Some smaller property owners do not have the expertise or the resources to either make their own arrangements or manage the activities of providers in their buildings. These owners will therefore leave tenants to make their own arrangements with telecommunications providers. This approach exposes the owner to potential liability if such a provider causes damage to the building or other injury, and so it is rare in larger buildings.

Under all three models, building owners are permitting competitive providers access to their customers. The proposals in the NPRM, however, would essentially impose a fourth model on all property owners - providers must have access regardless of the preferences of the building owner or the tenants. Each telecommunications provider could come into a building *before* any tenant indicated an interest in receiving service. Forced access would especially harm those owners who have made substantial investments in their own infrastructure, since it would prevent them from recovering the value of that investment. Thus, forced access would immediately stifle creativity in the marketplace and discourage such approaches in the future.

Forced access would also harm the typical property owner by making it more difficult for the owner to protect its interest in the property as a whole. As noted at the beginning of this discussion, every element of the development and management processes is interrelated to the others, and ultimately affects the property's value. Commission regulation would lead to loss of control over a key aspect of the property and therefore impose additional costs (*see* Point VI, below, for discussion), at the same time as it would eliminate the revenue stream needed to recover those costs.

Rather than regulate when - as we have shown - there is no evidence of a problem, the Commission should restrain itself and let the market continue to adapt to changing circumstances.

**D. Forced Access Is Bad Policy Because It Would Distort the Free Market.**

Forcing building owners to provide access to all telecommunications providers is unjustifiable. Not only is it unnecessary, but, as the SPRI Study shows, it violates basic principles of economics. Regulation is not justified when a market is competitive, and all the evidence shows that the real estate market is competitive.<sup>16</sup>

The fundamental problem with a forced access policy is that it would shift costs away from service providers and users and onto building owners. The proponents of the proposed rules are asking the Commission to adopt an implicit subsidy for the benefit of the CLECs, at the expense of building owners and society as a whole. *See* SPRI Study at 23. One of the purposes of the 1996 Act was to eliminate implicit subsidies and ensure that entities that impose costs on the telecommunications network should bear those costs. Even Section 254 (“Universal Service”), which directed the Commission to provide a mechanism for subsidizing certain types of service, requires that the subsidies be explicit, rather than implicit. There is no legal or economic justification for imposing such a subsidy obligation on building owners.

In addition, as the SPRI Study discusses in more detail, forced access interferes with the market by displacing normal pricing mechanisms. SPRI Study at 18-19. Private businesses in competitive, unregulated industries offer discounted rates and preferential pricing every day. It

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<sup>16</sup> SPRI Study at 3-5. In addition, Congress has only authorized economic regulation of an industry when scale economies within a critical industry permitted the efficient operation of only one firm. Even then, competition has almost always continued to play an important role as a supplement to such regulation. *See, e.g., Otter Tail Power Company, supra; Phonetele, Inc. v. American Telephone and Telegraph Company*, 664 F.2d 716 (9<sup>th</sup> Cir. 1981).

is not unreasonable for building owners to strike different deals with different providers based on any number of factors. Forced access would replace the market's pricing judgment with the Commission's, and would preclude consideration of all the relevant factors, such as the location and size of a building, the amount of space available, the types and numbers of tenants and their needs, and the particular costs and risks posed by a particular provider.<sup>17</sup>

Forced access proposals also violate fundamental economic principles because they favor a few firms over others. The Commission is not responsible for ensuring the success of every competitor in the telecommunications industry, as the SPRI Study notes. In addition, technological differences may render one provider's service inferior to another's; forced access to rooftops, for example, might therefore favor a class of services that the market would disfavor. SPRI Study at 17-18. Forced access would also favor the first few companies to gain entry to a particular building. Space considerations dictate that only a limited number of providers can possibly coexist inside any particular building. The number of competitors a building can

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<sup>17</sup> See SPRI Study at 22. Allowing building owners to make their own pricing decisions is fully consistent with the consumer welfare objectives of a pro-competitive economic policy. Rivalry among rental property owners can be expected to limit prices to competitive levels while promoting a rational allocation of resources and increased consumer choice. Some landlords may seek to lower their rents by charging more for telecommunications access rights. Others might wish to offer their tenants access to state of the art telecommunication services. Some might wish to offer a choice of service providers. Still others might prefer to use their control over access rights to bargain for lower service rates for their tenants. Competition theory teaches that an open marketplace -- one in which sellers and buyers are free to make their own decisions with respect to how they will compete and what they will purchase -- will maximize consumer welfare. At the same time, interfering with that freedom needlessly, by means of forced access, will chill innovation and risk a loss of overall consumer choice. See, e.g., Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 *Antitrust L.J.* 749, 756-59 (1995); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust L.J.* 841 (1990); William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 *Antitrust L.J.* 855 (1990); David Reiffen & Andrew N. Keit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simply Horizontal Monopoly?*, 33 *J.L. & Econ.* 419 (1990); Note,

accommodate depends on the design of the building. In every building, there is a limit to the total number of providers that can be accommodated. In most buildings, that is not a large number. For example, a large Manhattan office building, with a relatively large amount of tenantable space in proportion to both the leasable rooftop space and space available for ground-level entry, cannot accommodate very many competing providers.<sup>18</sup> Forced access would allow existing CLECs to dominate the market forever. Once they gained entry to buildings they would presumably always have a right to remain, but their presence would preclude entry by late comers. Even if newer competitors offered better or cheaper services, the new entrants would not be able to compete. Thus, forced access actually stifles competition and innovation. SPRI Study at 7. We have already seen this in the field of cable television, in which state mandatory access statutes have restricted competition between incumbent cable operators and their competitors.

Finally, forced access would distort the current market for rooftop antenna leases. The real estate industry has leased thousands of rooftop sites to cellular, PCS and other wireless service providers without Commission intervention, and there is a well-established market for those sites. *See* SPRI Study at 17. Forced access regulations, however, would create an incentive for providers to declare themselves to be CLECs and then claim rights, under whatever rules the Commission might adopt. This would conceivably result in the attempted abrogation of thousands of freely-negotiated contracts, for no good reason.

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*Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities,"* 74 Va. L. Rev. 1069 (1988).

<sup>18</sup> For a general discussion of problems associated with multiple providers on rooftops, *see* Declaration of James Sylvester, attached as Exhibit K ("Sylvester Decl.").

## **II. THE NPRM FALSELY ASSUMES THAT BUILDING OWNERS ARE RESPONSIBLE FOR EVERY DIFFICULTY IN RELATIONSHIPS BETWEEN PROPERTY OWNERS AND COMPETITIVE PROVIDERS.**

We understand the Commission's desire to promote local competition. The Commission must not, however, base its decisions on false premises. On the one hand, the NPRM seems to assume that the CLECs are so disadvantaged that only the Commission can save them, while on the other it assumes that they are full-fledged competitors, able to meet all their customers' demands for service now, but for the demands of property owners. In truth, many CLECs, especially the fixed wireless providers, are not able to keep up with current demands for their services. Furthermore, as their plea for Commission assistance shows, they seem to believe they should be exempt from dealing with the reasonable business needs of other market players merely because they and the Commission are in a hurry to develop competition. Finally, the NPRM assumes that differences between current ILEC service and proposed CLEC entry are due to unreasonable behavior by building owners. This fails to consider the legal issues raised by existing ILEC access rights that were acquired from building owners in the past monopoly environment.

### **A. Competitive Providers Are Not Always Prepared To Compete Effectively.**

The Commission must always bear in mind that the CLEC industry is in its infancy in every respect. Not only must CLECs build a customer base and gain access to buildings, but they must develop the capacity to serve those tenants and those buildings. We note, for example, that the WinStar press releases cited earlier refer to the number of buildings in which WinStar has access rights – not the number of buildings or tenants actually served by WinStar. The truth is that if WinStar had access to every building in the country today, it could not provide adequate service to all of its customers. We believe that many CLECs are still suffering growing pains

and in a significant number of instances cannot provide the full range of services they are marketing, even when they have access to buildings. Consequently, forced access would merely make it easier for providers to selectively target buildings and force owners to agree to terms they might not otherwise accept -- it would not guarantee expansion of their networks.

For example, Apex Site Management has found that one carrier, which has completed over 500 access agreements with Apex clients, has only installed equipment in 227 of the buildings. Another carrier has executed over 220 agreements and installed in only 78 sites. Stern Decl. at ¶ 12; *see also* Greene Decl.

Similarly, 18% of respondents to the Charlton Survey stated that at least one CLEC they had dealt with had failed to meet its contractual or tenant service obligations. The most common causes were slow or untimely installation, poor service/technology, and failure to install or provide service. *See also* Lansdale Statement.

As a group, CLECs are particularly unprepared to serve the residential market on any wide-scale basis. The industry's marketing is overwhelmingly aimed at office building tenants, and CLECs are remarkably selective even in that market. *See* Stern Decl. at ¶ 12 (noting that when offered access to all the buildings in a portfolio, some providers will take only a portion of the buildings offered to them); *see also* Greene Decl. There are sound business reasons for these decisions, and we believe that as the CLEC industry grows the prospects for residential competition and broader office competition should increase, but building owners must not be made the scapegoats for economic forces entirely outside their control.

Given the lack of maturity of the CLEC industry, imposing obligations on building owners will not advance the Commission's goals. Before the Commission proceeds any further, it should demand that the CLECs provide accurate and comprehensive information about their

overall deployment costs, numbers of buildings and customers served, actual costs associated with access rights, customer service problems, and other relevant information. We have provided solid data refuting the incorrect assumptions in the NPRM and the telecommunications industry should be required to do the same.

**B. In Their Haste To Enter the Market, Competitive Providers Sometimes Fail to Understand or Address the Business Needs of Building Owners.**

We noted earlier that during a hearing before the House Subcommittee on Telecommunications, Trade and Consumer Protection a representative of the CLEC industry acknowledged that building owners only “rarely” deny access to buildings. In response to the next question, the witness stated that “The problem is that there are so many landlords.” *House Hearing Transcript* at 75. In other words, the fundamental issue is that certain companies want to get into the market faster than they currently do. These companies want the Commission to subsidize their market entry by short-circuiting the normal rules that control access to private property in this society. They also seek to reduce their transaction costs by convincing the government to limit the real estate industry’s ability to negotiate. If private property is made available by government fiat, without the obligation to negotiate terms and conditions of access, the telecommunications industry will surely enjoy reduced costs of market penetration. But those cost reductions will be subsidies at the expense of real estate building owners and developers, not true cost savings through increased efficiencies. Rather than spending time and money on traditional market processes like arms’ length negotiations, these providers want the Commission to give them a leg up.

There is no justification for such a policy. Property owners have legitimate interests to protect – not to mention many other things to do – so it is only natural that negotiations sometimes take some time to complete. The fact is that negotiations for CLEC access do not

take substantially longer than other types of routine negotiations conducted by property owners. For example, 70% of respondents to the Charlton Survey stated that on average it takes six months or less to negotiate an agreement with a CLEC. That compares favorably with other types of rooftop leases: 62% of respondents said it took six months or less on average to negotiate such leases. In addition, although traditional tenant leases typically only take about three months, it is not unusual for such negotiations to take up to six months.

In addition, CLECs are often unwilling to agree to the kinds of basic occupancy terms that property owners require of all of their tenants. They often reject lease terms dealing with such issues as insurance, indemnification, reimbursement for costs not covered by rent, and the like. *See Stern Decl.* at ¶¶ 8-10. Competitive providers also sometimes show little concern for the building owner's obligations to other tenants. One property owner reports that telecommunications providers have refused to cooperate with such matters as requests that installation work requiring loud drilling through sixteen floors of a building be done after hours to avoid disruption to other tenants. Declaration of Cathy L. Yovanov, attached as Exhibit J, ("Yovanov. Decl.") at ¶ 6. Another company refused to remove its wiring, even though they had no subscribers in the building and the building risers were so full that there was no room for any additional wiring. *Id.* at ¶ 9.

The CLEC complaints are reminiscent of the general complaints about the slow development of competition since the 1996 Act was enacted. In fact, however, those complaints are unreasonable. The Council of Economic Advisers said as much in a recent report:

Because of the long institutional history of local monopoly and the economic complexity of entry into the local residential market, the uneven development of competition does not itself show that the 1996 Act's market-opening provisions are a failure or should be changed. Indeed, the developments in the business market suggest otherwise. To ensure that the potential for residential benefits is realized, continued application of

the proven, competitive principles of the Act is the course better supported by the economic evidence.

Council of Economic Advisers, *Progress Report: Growth and Competition in U. S. Telecommunications 1993-1998* (Feb. 8, 1999) at p. 10.

For the Commission to create a regime that discriminates against property owners by forcing them to subsidize competitive providers and to accept bad business terms merely because a few firms are in a hurry to impress Wall Street would be arbitrary and capricious, especially when there is no evidence of a problem with competitive entry.

**C. The NPRM Does Not Adequately Consider the Legal Effects of Existing ILEC Access Rights.**

In the traditional monopoly environment of the past, neither property owners nor their customers had any choice in who provided them with telecommunications services. Owners willingly gave the ILECs access to their properties because telephone service was simply essential. In other words, in the traditional environment, the ILEC had just as much monopoly power over the property owner as it did over the telephone subscriber: The property owner needed its tenants to have service as much as the tenants needed the service.

In the new competitive world, the relationship between telecommunications providers and property owners is completely different. The NPRM, however, does not seek to examine this relationship at all. Instead, the NPRM assumes that building owners are entirely responsible for any differences in the terms of access between ILECs and CLECs. Rather than relying on unwarranted assumptions, the Commission must examine all the facts and legal circumstances. The NPRM presents a one-sided view of the issues and is not a reliable guide to resolving them.

The NPRM also fails to make important distinctions among different types of access and use rights. Such terms as "easement," "right-of-way," "lease," and the like, are often misused.

The Commission must understand both the nature of the historical ILEC access rights and the legal distinctions among the key real property concepts of it is to deal properly with the issues in the NPRM. To this end, the appended Property Rights Study examines the relevant law and concepts.

One consequence of the historical ILEC monopoly was that building owners did not always guard their property rights as carefully as they might otherwise. Because entry by the ILEC was a necessity and a foregone conclusion, owners did not pay strict attention to the nature of the ILEC's rights to occupy the property and did not negotiate detailed agreements defining the ILEC's rights and duties. In this environment, for example, it would have been inconceivable for a property owner to charge the ILEC for the right to place its facilities in a building. Such issues as insurance and indemnification also did not arise because the property owner had no negotiating leverage. Furthermore, since there was only one provider, questions regarding coordination between providers and the allocation of the costs to the owner of management of activities in the building simply did not arise.

Although in many states the ILECs have the power of eminent domain, in practice that authority was rarely used to gain entry to a building in a monopoly environment. In general, a utility's right to use property depends on practical factors such as the nature of the use, the physical location of the use, the relationship between the parties, the availability of eminent domain and the cost of obtaining access and use rights. For example, a utility generally needs to be assured of long-term control over its main distribution facilities, and so the utility will probably seek an easement to locate those facilities. Similarly, safety concerns may dictate that underground facilities be located on easements to ensure that all parties are aware of their location. Property Law Study at 29.

Facilities located inside buildings, however, typically do not raise such concerns. Consequently, in most cases, access rights within a building take the form of licenses. *Id.* at 33-34. Such licenses may or may not be in writing, and they may or may not be revocable at will by the property owners. Very often, the presence of a utility's facilities on the premises will mean that the utility's access rights will not be an ordinary license, revocable at will, but a "license coupled with an interest." If a license coupled with an interest has been created, the property owner's ability to revoke the license is limited, in order to protect the licensee's interest in its facilities. Payment of consideration by the licensee for the license may also affect revocability. *Id.* at 13-15.

In any event, the nature of the access rights of an ILEC or other utility will depend on the exact facts and circumstances of the grant, as well as on state law. *See* the Property Law Study generally for a complete discussion of access and use rights.

Two fundamental points arise out of this discussion: first, the terms of ILEC access to buildings are by no means uniform, in many cases are unclear, and were often not reduced to writing; and second, the Commission cannot reasonably act in this area without giving full deference and careful attention to state property law.

### **III. IMPOSING A NONDISCRIMINATORY ACCESS REQUIREMENT ON BUILDING OWNERS WOULD BE UNLAWFUL, UNCONSTITUTIONAL AND UNREASONABLE.**

As one possible solution to the nonexistent problem of lack of access, the NPRM proposes the far-reaching, intrusive and entirely unlawful solution of imposing a nondiscriminatory access requirement on building owners. A majority of the Commission has already expressed strong doubts about the Commission's ability to adopt such an approach. We urge the entire Commission to recognize that this approach must fail because the

Communications Act confers neither jurisdiction nor authority to regulate building owners or take their property.

**A. The Communications Act Gives the Commission no Jurisdiction Over Building Owners or their Property.**

Section 2(a) of the Communications Act states that the Act applies “to all interstate and foreign communications by wire or radio . . . and to all persons engaged within the United States in such communication . . . .” Building owners are not engaged in such communications, and so are not within the reach of the Commission’s jurisdiction.<sup>19</sup> Furthermore, the Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity. See *Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Nor does the Commission have jurisdiction over real property that might have an incidental effect on a regulated activity. *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7<sup>th</sup> Cir. 1972) (FCC had no jurisdiction over construction of Sears Tower despite possible effect on broadcast signals). Consequently, the Commission has no power to direct a building owner to do anything, unless that building owner happens also to be a person “engaged in communications by wire or radio.” The mere ownership of real property on which facilities may be located does not constitute engaging in communications by wire or radio.

**B. The Commission’s Ancillary Jurisdiction Extends Only to Entities that Are Engaged in Activities Subject to the Communications Act.**

The Supreme Court has held that the Commission may exercise authority that is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”

*U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The term “ancillary jurisdiction” ultimately derives from this portion of the Court’s opinion, but the phrase is actually a misnomer; it should be more accurately referred to as “ancillary authority.” The Commission’s *jurisdiction* is limited by Section 2 of the Communications Act. The Commission has *authority* to engage in the specific activities set forth in the remainder of the Act; where its authority is not express, it may rely on its ancillary jurisdiction. Note, for example, that the Commission’s authority over cable television in *Southwestern Cable* derived from its jurisdiction over broadcasting. In other words, Sections 4(i), 201(b), and 303(b) confer authority but not jurisdiction.

Consequently, the Commission’s ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. For this reason, the Commission may not regulate an activity that is unrelated to the communications industry. *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (FCC cannot regulate data processing services provided by regulated entities). Similarly, even in the case of a matter that does affect the communications industry, the Commission’s ancillary jurisdiction does not extend to building owners. *Illinois Citizens Committee*, 467 F.2d at 1400 (noting restrictions on scope of *Southwestern Cable*).

In the current proceeding, the Commission has no jurisdiction because building owners do not engage in communications by wire or radio. It therefore follows that none of the authority conferred by the Act can be applied to building owners as building owners - it does not matter whether that authority is express, or based on ancillary “jurisdiction,” because building owners are entirely outside the Commission’s reach.

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<sup>19</sup> Just as the federal courts must find jurisdiction before adjudication, so must administrative agencies establish their jurisdiction before acting. There are no federal agencies of general jurisdiction any more than there are federal courts of general jurisdiction.

In every case in which the Supreme Court has found that the Commission properly exercised ancillary jurisdiction, the Court has also found that the Commission already had jurisdiction over the activity or over the party pursuant to the Communications Act. The farthest afield the courts have allowed the Commission to go has been the regulation of cable television as an extension of the Commission's authority over television broadcasting, *see Southwestern Cable*, and the regulation of telephone holding companies to prevent cross-subsidization, *see North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7<sup>th</sup> Cir. 1985). The courts have never found that the Commission has ancillary jurisdiction based solely upon Section 4(i) or Section 303(r), or both. The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g., Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon *telecommunications carriers* interim billing method for interconnection charges); *New England Tel. and Tel. Co., et al. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (finding ancillary jurisdiction to order *telecommunications carriers* to reduce telephone rates), not to expand that authority to include otherwise unregulated entities or activities.

The Commission may have jurisdiction over wiring used by a regulated entity to provide regulated services, but there is a distinction between such wiring and the property on which the wiring is located. And there is a further distinction between the wiring and the owner of the underlying property. The Commission does not have jurisdiction over an unregulated entity merely because that entity owns real estate used or occupied by a regulated entity. Such a claim would be a novel extension of the scope of ancillary jurisdiction, and would surely be found outside the scope of what would be "reasonably ancillary to the effective performance" of the Commission's duties. *See Southwestern Cable*, 392 U.S. at 178. If the Commission does not

have jurisdiction over carrier-owned central office buildings, as in *Bell Atlantic*, then it cannot possibly have jurisdiction over non-carrier property of any kind.

**C. Any Attempt To Require Property Owners to Grant Physical Access to their Properties Is a Taking Under the Fifth Amendment.**

**1. A Nondiscriminatory Access Rule Would Constitute a *per se* Taking.**

Requiring a property owner to allow a third party to occupy space in a building and to attach wires to the building plainly crosses the clear, bright line between permissible regulation and impermissible takings. Where the “character of the governmental action,” the Supreme Court has said, “is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.” *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The nondiscriminatory access requirement contemplated by the NPRM is legally indistinguishable from *Loretto*. The Cooper, Carvin Analysis demonstrates that any forced access proposal, including a nondiscriminatory access agreement, would “fall squarely within the *per se* takings rule as articulated by the Supreme Court in *Loretto*.” Cooper, Carvin Analysis at 8. The Cooper, Carvin Analysis notes that in the most recent decision in this area, *Gulf Power Co. v U.S.*, 998 F. Supp. 1386 (N.D. Fla. 1998), the court ruled that the nondiscriminatory access provision of Section 224 of the Communications Act constitutes a taking. Cooper, Carvin Analysis at 21-23. The *Gulf Power* court relied directly on *Loretto* in reaching this conclusion. The statute survived scrutiny only because, according to the court, the statute also provided a mechanism for establishing compensation by directing the Commission to adopt rules regulating pole attachment rates. In this instance, however, Congress has not given the Commission any

authority to compensate building owners or regulate the terms of access to buildings.

Consequently, a court following *Gulf Power* would undoubtedly reach a different result.<sup>20</sup>

Based on the Commission's decision in *Implementation of Section 207 of the Telecommunications Act of 1996 -- Restrictions Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, CS Docket No. 96-83 Second Report and Order 13 FCC Rcd. 23874 (1998) ("*OTARD Second Order*"), some parties may argue that an owner's consent to the physical presence of an ILEC or a tenant on a property changes this analysis, but this is incorrect. The *OTARD Second Order* assumes that once a property owner leases its property, the owner has surrendered any right to claim that FCC regulation constitutes a *per se* taking. The *OTARD Second Order* seems to say that by acquiescing in the tenant's occupancy for a specified set of purposes, the property owner has surrendered the "right to exclude" for all purposes. There is absolutely no authority for this position. If a lease expressly denies a tenant the right to install a certain type of equipment, the property owner has expressly reserved the right to exclude with respect to that equipment, and a government action abrogating the lease provision to permit a physical occupation therefore effects a taking under *Loretto*. See Cooper, Carvin Analysis at 16, 28-30.

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<sup>20</sup> Other than *Loretto* and *Gulf Power*, the case most analogous to the proposed nondiscriminatory access requirement is *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979). In that case, Kaiser Aetna made certain improvements to a lagoon, including deepening an existing channel between the lagoon and the ocean. Under Hawaii law, the lagoon was private property and owned by Kaiser Aetna, which leased lots along the waterfront and restricted access to the lagoon to its lessees. After the channel had been deepened, however, the Corps of Engineers informed Kaiser Aetna that the lagoon had become part of the navigable waters of the United States and Kaiser Aetna was now required to allow free public access to the lagoon. The Supreme Court found that imposing that obligation on the property owner constituted an actual physical invasion of private property, and was thus a taking. *Kaiser Aetna* is directly analogous to the nondiscriminatory access proposal: Kaiser Aetna corresponds to the building owner, Kaiser Aetna's lessees correspond to the ILEC and other entities allowed on the property by the