

or an executed license which, as discussed above in *Part II(A)(3)(a)* could effect the revocability of that license.

4. Interior, Nonservice Related. Wireless site agreements within or on buildings (e.g., rooftops) tend to be in the form of a lease, real property license or a combination of the two forms (e.g., lease of exclusive use areas in combination with real property license rights to nonexclusive areas). In some situations, the rooftop is master leased to a management company which then enters into licenses with the individual wireless telecommunications providers. Other nonservice uses by utilities within buildings (e.g., switching stations, offices) tend to be structured in the form of leases.

5. Apportioned Easements. Secondary users on apportioned easements typically obtain licenses from the easement holder for use of the easements.¹⁷⁰ The reason for this arrangement, in part, often is related to the easement holder's desire to maintain control over the easement so that it can protect its primary use of the easement and exert the necessary control over additional users necessary to ensure safety and permit the primary utility to coordinate the overall use of the apportioned easement. In addition, use of a license arrangement eliminates the issue of further apportionment and subdividing of an apportioned easement by the piggybacked user(s), assuring that any subsequent additional users will derive their use and access rights directly from the primary easement holder.

CONCLUSION

Despite the greatly increased role of the federal government in many areas of the economy, the creation and characterization of real property rights and interest remains the peculiar province of the states. By both legislative acts and common law development, the states have created a variety of rights, interests and estates which one person may hold in or over the land of another. While different states and even different judicial interpretations within a single jurisdiction may ascribe slightly different characteristics to a given class of interest, the pallet of choices, including easements, leases and licenses, is fairly consistent among the several states. It is not an overstatement to suggest that the creation and characterization of

¹⁷⁰ See, e.g., *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 106 (4th Cir. 1994); *Salvaty v. Falcon Cable Television*, 165 Cal.App. 3d 798, 800 (Cal. 1985).

interest in real property, including interests in the real property of another, is the most fully developed example of the diversity and experimentation encouraged by our federal system and common law tradition. Congress, the federal courts and federal executive agencies have been careful to severely limit federal intrusion into this traditional preserve of state and local law.

An observer of a utility's use of the land of another might not perceive the profound distinctions between use of that land pursuant to an easement, a license or a lease. But the distinctions are no less profound – in practice or in legal theory – by virtue of being opaque to the casual observer. Just as a person driving a car might be the owner or merely a casual renter – with vastly different legal implication – so, too, may a utility be anything from the holder of a fee estate to a mere temporary licensee. Federal rule making in areas driven by emerging communications technologies should be sensitive to and respectful of the categories or rights and interest in the land of another which have been created and honored by the several states. There is, after all, no other source of law defining such property interests.



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

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

**DECLARATION OF RICHARD STERN IN SUPPORT OF JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL;
INSTITUTE OF REAL ESTATE MANAGEMENT; INTERNATIONAL COUNCIL OF
SHOPPING CENTERS; MANUFACTURED HOUSING INSTITUTE; NATIONAL
APARTMENT ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS;
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES;
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS; NATIONAL
ASSOCIATION OF REALTORS; NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE**

I, Richard Stern declare as follows:

1. I submit this Declaration in support of the Joint Comments of the Building Owners and Managers Association International; the Institute of Real Estate Management; the International Council of Shopping Centers; the Manufactured Housing Institute; National Apartment Association; the National Association of Home Builders; the National Association of Industrial and Office Properties; the National Association of Real Estate Investment Trusts; the National Association of Realtors; the National Multi Housing Council; and the National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I am a 1983 graduate of University of Pennsylvania, a 1986 graduate of Boston University Law School. For three years I served as General Counsel to The Kamson Corporation, which is a real estate property manager and owner of over 10,000 residential apartment units in Mid-Atlantic and Eastern region of United States. For the following four years I served as Associate General Counsel to The Rubenstein Company, an owner and manager of over 10 Million square feet of commercial office properties in Pennsylvania, Delaware, Virginia and Georgia. And since 1998 I have served as the Vice President and General Counsel to Apex Site Management.
3. Apex Site Management is a full service real estate management and consulting company that specializes in negotiating telecommunication access agreements between property owners and telecommunications companies. Apex assembles clusters of high quality real estate in major metropolitan markets. Apex has delivered over 1,900 sites to the telecommunications industry and has amassed over 12,000 properties under exclusive management agreements in the United States and Canada. The site portfolio is comprised

of all types of real estate: high rise office and residential buildings, retail centers, office and industrial parks, raw land, existing telecommunications tower sites, smoke stacks and water tanks. As of July 1, 1999, the greater than 12,000 site portfolio includes over 1785 commercial office buildings, 1478 industrial or "flex" office space and 1416 hotel and hospitality properties. Apex includes as its clients many of the largest office and hotel REIT's based on market capitalization. Many of the largest office buildings in the major CBD's across the county are managed by Apex. Apex has executed over 1,900 leases for our property owners. Apex's team is comprised of real estate professionals with system operating experience in all aspects of telecommunications

4. In the last two years, APEX has negotiated well over 720 agreements on behalf of building owners with competitive local exchange carriers and PCS and cellular providers to allow the providers building access. Consequently, we are very familiar with the terms of these kinds of arrangements, and the negotiations that lead up to them.
5. Our clients willingly enter into agreements to allow CLEC's access to their buildings because they understand that their tenants need and want the services the CLEC's offer. Access to telecommunications services is vital to the success of building tenants, and the success of the tenants is vital to the success of the building owner. Therefore, our clients have a strong incentive to ensure that their tenants' needs for telecommunications service are met by permitting as many telecommunications providers as possible, within reason, access to their buildings.
6. At the same time, however, building owners must protect the value of their investment and consider the interests of all the tenants of a building, as well as all of the visitors and customers who come into a building. The owner is ultimately responsible for everything

that happens in a building and bears the ultimate risk if anything goes wrong. For example, buildings may have procedures to restrict access, by requiring visitors to sign in and limiting after hours access. Tenants are not typically permitted to make alterations to their premises without the owner's knowledge and consent, and alterations that might affect the structural integrity of the building are prohibited. Similarly, owners generally do not allow service providers unfettered access to their properties.

7. A typical office lease will deal with all of the various risks that a building owner faces. In addition to specifying the term and the base rent for the space being leased, a standard lease will require the tenant to pay a share of utilities, real estate taxes and insurance premiums that might otherwise be payable by the building owner, so that the owner is made whole. Tenants routinely pay a security deposit to compensate the owner for loss or damage caused by the tenant. Building services are normally available only during specified hours, so that if a tenant requires such services – such as air conditioning or engineering services – at different times, the tenant will be required to pay for them. While tenants will have access to their demised premises during specified hours, their access to rooftops and mechanical equipment will be limited, and if a tenant needs access to those areas after hours they may be required to reimburse the owner for the additional cost. Tenants are required to indemnify the property owner against any loss or damage arising from their presence on the premises, and may not engage in any activity that causes a lien to be placed against the building. When a tenant leaves a building at the end of the lease term, it must turn the premises over in good condition, excepting only ordinary wear and

tear. All of these provisions are negotiated by the building owner to protect itself, other tenants, and every person who enters the building.

8. In negotiating a lease with a PCS or cellular provider, or a CLEC, we must deal with exactly the same issues. In our experience at APEX, the amount of rent or compensation to be paid to the building owner for access to the building, which in our area ranges from \$300 to \$500 per month, is not the main point of contention in negotiations between CLEC's and building owners or managers. The most common difficulty we see in negotiating these deals is the refusal on the part of CLEC's to come to terms on the provisions that address the standard issues discussed above, which are intended to protect the owner from liability and ensure that the owner retains enough control over the building to effectively protect the rights of its other tenants.
9. We do not have this difficulty in dealing with PCS and cellular providers; they recognize that owners provide them a valuable service by making their buildings available as a platform to deliver their services. PCS providers recognize that the presence of telecommunications equipment on rooftops also poses special problems and they are willing to address those issues in their agreements with owners. For example, these providers are willing to address such unique issues as rooftop warranties and the limitations on which subcontractors may be used as well as issues regarding line of sight interference. The CLEC's on the other hand, do not seem to understand that the building owner has essentially created the market for their services by attracting tenants to the building. The CLEC's seem to focus only on their relationship with the potential subscriber in the building and ignore the fact that the building owner plays a critical role

10. Generally, if a competitive LEC is interested in accessing an Apex client's property, Apex will propose the business terms of the relationship and suggest the use of a license agreement or lease to govern the terms and conditions of such occupancy. The following sets forth the typical terms and conditions of the access agreements that Apex has negotiated on behalf of its clients. Generally speaking, for all clients that owns a large portfolio of properties (more than 10 buildings), Apex has recommended that the transactions be structured on a portfolio basis. Therefore, the competitive LEC will identify initial properties it desires to access, pursuant to an option agreement granting the competitive LEC the right to take down additional properties during the agreement's term. These access agreements typically provide for a fixed term of occupancy, generally three to five years, with a right to renew for additional one or two term periods. The agreements further provide for a fixed rental amount, typically \$300 to \$500 a month, but such amounts may be significantly increased depending upon the size of the installation, the number of antennas or electrical cabinets and other occupancy related factors. The agreements also contain typical terms and conditions associated with the occupancy of the owner's property. Issues such as insurance, access restrictions, repair and maintenance, indemnity, default, liability, subordination and regulatory compliance are all addressed. It is important to note that the terms and conditions of the occupancy agreements with the telecommunications carrier with respect to these issues are similar, if not exact, to the requirements that the building owner imposes on the other occupants of the property. The owner's fundamental interests of property ownership and asset value preservation are the basis underlying these provisions. The monetary compensation for the owner, on an

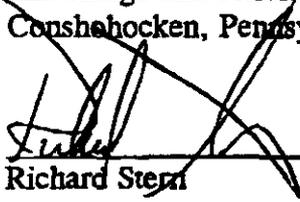
individual deal basis, is relatively minor. However, these amounts are derived from two factors, (i) the competitive forces in the market place, and (ii) the requisite compensation that the owner is entitled to for the use of the real estate, the oversight and administrative issues involved with the transaction and the inherent risk associated with third party occupancy.

11. While the economic issues associated with the transaction are important, they typically are not the basis for involved and lengthy negotiation. The issues associated with the competitive LEC's occupancy of the property are much more contentious. Building owners are very concerned whenever third parties occupy their property and require each occupant to agree to certain terms and conditions. Irrespective of whether competitive LEC's obtain free, non-discriminatory access to real estate, the owner will still require the carrier to adhere to certain rules and regulations regarding occupancy. The owner should not be expected to assume the risks associated with having equipment placed on the property, or the employees or agents of the competitive LEC accessing the property.
12. Finally, it has been our experience that some CLEC's, especially the fixed wireless providers, are entering into access agreements with building owners, but are not capable of delivering service to subscribers in those buildings for technical and financial reasons. As I stated above we generally negotiate access agreements on a portfolio basis rather than on an individual building basis. What we have discovered, however is that many carriers simply do not want access to all of the buildings in a portfolio, for whatever reason, and will take only a portion of those buildings offered to them. In fact, one carrier has completed over 500 access agreements with Apex clients, however they have currently

installed equipment in only 227 of those sites. Similarly, another carrier that has done significant business with Apex clients has executed over 220 agreements and installed in only 78 sites.

13. **Verification**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on August 25, 1999, in Conshohocken, Pennsylvania.



Richard Stern

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

In the Matter of)	
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Promotion of Competitive Networks)	WT Docket No. 99-217
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And Assessments)	
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Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	

**DECLARATION OF DENNIS GREENE IN SUPPORT OF JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL;
INSTITUTE OF REAL ESTATE MANAGEMENT; INTERNATIONAL COUNCIL OF
SHOPPING CENTERS; MANUFACTURED HOUSING INSTITUTE; NATIONAL
APARTMENT ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS;
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES;
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS; NATIONAL
ASSOCIATION OF REALTORS; NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE**

I, Dennis Greene declare as follows:

1. I submit this Declaration in support of the Joint Comments of the Building Owners and Managers Association International; Institute of Real Estate Management; International Council of Shopping Centers; Manufactured Housing Institute; National Apartment Association; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Real Estate Investment Trusts; National Association of Realtors; National Multi Housing Council; and National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

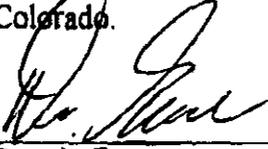
2. I have an M.B.A. from the University of Colorado, am a Real Property Administrator, certified by the Building Owners and Managers Institute International (“BOMI”). I have eleven years experience as a property manager including ten years as general manager of a 557,047 rentable square feet mixed use complex. I am the Vice President, Operations of a portfolio that contained 10 buildings and 2.1 million rentable square feet in Colorado and New Mexico. I have been involved in the due diligence process in the sale or purchase of some 15 buildings. I also serve as the local president of Denver Metro BOMA.

3. Vector Property Services is a small property management and leasing company which leases and manages commercial office space. Vector Property Services currently manages over 500,000 square feet in three buildings located in Denver and Dallas, with a fourth under construction in Denver. Vector Property Services supports approximately 60 tenants.

4. As far as I am aware, Vector Property Services has never denied a telecommunications carrier access to one of our buildings; on the contrary, we recognize the importance of providing our tenants with a wide variety of choices as to telecommunications carriers and services and are *seeking* telecommunications providers who wish to provide service to our tenants.
5. Not only are we seeking telecommunications providers, but in some cases we have even offered incentives to carriers as a means of getting them to come into our buildings. For example, we offered a telecommunications provider that already had facilities in the street some 75 feet away from our building access to our building rent-free until such time as the provider obtained a paying customer in the building. In fact, we made that offer over a year ago and the provider has yet to run a line to our building.
6. The access refusal claims made by telecommunications providers are not consistent with my experience. Not only are building owners and managers not refusing to offer access to their buildings, but they are encouraging such access. In just one week in July, 1999 I signed four license agreements for three different buildings.
7. In fact, I have been approached by the following telecommunications providers: Teligent; Winstar and ICG. We have concluded access agreements for several of our buildings with Teligent, Winstar and Shared Technologies Fairchild Telecom. We have also requested proposals from Electro-tel and Intelisys.

8. Verification

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 8/11/99, in Englewood, Colorado.



Dennis Greene

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

In the Matter of)	
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Implementation of the Local Competition)	CC Docket No. 96-98
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Act of 1996)	

**DECLARATION OF BRENT W. BITZ IN SUPPORT OF JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL;
INSTITUTE OF REAL ESTATE MANAGEMENT; INTERNATIONAL COUNCIL OF
SHOPPING CENTERS; MANUFACTURED HOUSING INSTITUTE; NATIONAL
APARTMENT ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS;
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES;
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS; NATIONAL
ASSOCIATION OF REALTORS; NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE**

I, Brent W. Bitz declare as follows:

1. I submit this Declaration in support of the Joint Comments of the Building Owners and Managers Association International; Institute of Real Estate Management; International Council of Shopping Centers; Manufactured Housing Institute; National Apartment Association; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Real Estate Investment Trusts; National Association of Realtors; National Multi Housing Council; and National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I am an Executive Vice President at Charles E. Smith Commercial Realty LP. I have been in the Commercial Real Estate business for twenty-four years, and have been involved in office and retail properties throughout the United States and Canada. My education includes a Masters of Business Administration and the designation of Real Property Administrator from BOMI. My duties at Charles E. Smith Commercial Realty include oversight for our company's twenty-five million square foot portfolio of commercial properties. This portfolio consists of both owned and fee managed properties and is located throughout the mid-Atlantic area between Richmond and Philadelphia, with a strong concentration in the Washington metropolitan area. In this context, I am responsible for all matters pertaining to the occupancy needs and services of our tenants. In addition to the above, I currently serve as a member of the Building Owners and Managers Association National Advisory Counsel.
3. Charles E. Smith Commercial Realty, LP, is a private master limited partnership that owns and manages a portfolio of commercial properties located in the metropolitan Washington area. Our company provides management, leasing and financial advisory services to third-

party owners. We have a portfolio of seventy-three office buildings, which also include some retail tenancies. Our buildings are occupied by approximately two-thousand tenants whose business activities vary widely. We have major governmental agencies, high profile professional legal and accounting firms, and high technology companies, as well as a wide range of general business activities. The size of our tenants range from 1.8 million square feet for one large government tenant, to tenants of approximately one thousand square feet. Part of our business responsibility is to ensure that the telecommunication needs of our tenants, as they relate to their occupancy in our building, are well taken care of. To that end, we have regular interaction with our tenants to ensure that their needs are properly supported by our building operating staff.

4. A competitive telecommunications marketplace is important to our tenants and is, therefore, vital to building owners and managers, like Charles E. Smith. For an office building to remain competitive in today's marketplace, it must offer tenants, not only a wide array of telecommunications services, but also an array of choices in telecommunications service providers. In fact, building owners and managers aggressively market the characteristics of their properties, including telecommunications services.
5. Our policy at Charles E. Smith Commercial Realty, LP, is to accommodate tenant requests for telecommunications services. We have eight local exchange carriers providing service to our portfolio of seventy-three buildings and are in the process of adding one additional carrier. Forty-three properties have at least one provider in addition to Bell Atlantic, ten properties have three providers in addition to Bell Atlantic, four properties have two providers, excluding Bell Atlantic; and pending the execution of a new deal with Starpower, we will have nine properties with four providers, excluding Bell Atlantic. These local

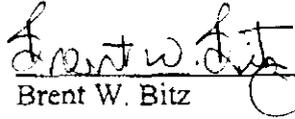
exchange carriers include Winstar, Teligent, Nextlink and Intermedia Communications. I am not aware of a single incident where a tenant was unable to meet its telecommunications needs because of issues relating to its occupancy in one of our buildings.

6. I am completely satisfied that the existing telecommunications service environment adequately meets my tenants' needs. In every case, if we were not able to meet a tenant's requirements through existing telecommunications service arrangements, they were able to deal with a competitive service provider on a direct basis. At no time would we ever interfere with a tenant's desire to obtain improved service in this vital business area. For example, at 2101 L Street, Washington, DC, a major law firm (Dickstein, Shapiro and Moran), requested the services of Teleport Communications in 1998, and we subsequently entered into a license agreement that was mutually satisfactory to all concerned. Another example is 1666 K Street, Washington, DC, where another law firm (O'Connor and Hannan), is in the process of moving into an entire floor. They requested the services of Starpower, and we are now in the process of finalizing a license agreement. In addition to the above, we regularly work with major Federal Government agencies and the private contracting firms that work with them, to ensure that their specialized telecommunication needs are taken care of. Many of these agencies have security concerns which require us to deal with specialized local exchange carrier services.
7. One area where we do have concern is where the telecommunications service providers have elected not to do business with us because, in the deregulated environment, they have no obligations to provide service except in those certain situations where they see a profitable business opportunity. We currently have twenty-six properties that have been repeatedly offered to Winstar, Teligent, Nextlink, Starpower and other telecommunications services

providers, and yet they have elected not to provide service for these properties. It would be our desire to have multiple service providers in these properties and yet these major players in the telecommunications industry have rejected our requests and are not providing the service we would like. At Charles E. Smith Commercial Realty, it appears to us completely unfair that the telecommunications industry wishes to have unfettered right to access all of our properties, and yet not be willing to accept the obligations to provide service to all of our tenants. Their current approach has been to cherry pick the best business opportunities, and leave some of our tenants without alternatives beyond the primary local carrier, Bell Atlantic.

8. Verification

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on AUG. 24, 1999, in Arlington, Virginia.



Brent W. Bitz

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