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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

TO: The Commission

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Carol Ann Bischoff
Executive Vice President
and General Counsel
Robert M. McDowell
Vice President
and Assistant General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Steven A. Augustino
Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

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SUMMARY

CompTel strongly supports the NPRM's goal of ensuring that competitive local exchange carriers ("CLECs") have reasonable and non-discriminatory access to multiple tenant environments ("MTEs") for the provision of competitive local services. Increasingly, CLECs attempting to provide competitive services are facing obstacles to entry from a new source: unreasonable building access terms and conditions imposed by the MTE owner and/or management company, as well as the anticompetitive use of exclusive building access rights by ILECs. The types of practices CLECs face today in gaining access to MTEs include the following:

- MTE owners and/or management companies often insist upon receiving a portion of the CLEC's *gross* revenues – anywhere from 3-7% is commonplace – in exchange for MTE access; ILECs typically receive access to these MTEs without any of these additional payments.

- MTE owners and/or management companies often insist that the CLEC pay a fixed monthly rent (typically, square footage multiplied by a negotiated dollar amount) in lieu of or in addition to a percentage of revenues; ILECs typically receive access to these MTEs without paying any rent at all.

- MTE owners and/or management companies often require the CLEC to pay a substantial one-time non-refundable fee (*e.g.*, $50,000 per entrance), or an up-front deposit equal to up to several months' payments; no similar requirements are imposed on ILECs as a condition of MTE access.

- MTE owners and/or management companies have entered into exclusive arrangements with one local carrier and refuse to grant access to other local providers.

- MTE owners and/or management companies sometimes refuse to grant any CLEC access to an MTE on any terms or conditions.

- MTE owners and/or management companies will bundle separate MTEs into a single arrangement, effectively preventing a CLEC from gaining access to one MTE, at any price, unless the CLEC agrees to make similar payments for other MTEs regardless whether it can or wants to serve those MTEs.

- ILECs have not made their own entrance access, conduits, riser cable, inside wiring, and other rights-of-way for MTEs available to CLECs on reasonable and non-discriminatory terms, nor have they made their contracts with MTE owners and/or management companies routinely available so that CLECs can make informed decisions about the extent of access that can be obtained through existing ILEC agreements.

These types of practices are defeating the pro-competitive objectives of Congress in adopting, and the Commission in implementing, the 1996 Act by denying customers located in MTEs the freedom to select a provider of their choice. In order to alleviate these problems, CompTel urges the Commission to take several steps:

1. Broadly construe Section 224(f) to require ILECs to make any and all of their MTE access rights available to CLECs. This "piggyback" option should include any type of conduit or right of way, including house cables, riser cables, and access to rooftops and telecommunications closets, and should encompass any access right the ILEC possesses, regardless of whether it has yet exercised the right.

2. Mandate access to ILEC-owned inside wire (including intra-building circuits) as an unbundled network element available pursuant to Section 251(c)(3). Such facilities could be added to the definition of the network interface device (NID), so that the UNE encompasses all ILEC owned or controlled facilities between the loop and the customer-owned equipment.

3. Adopt non-discrimination rules to ensure that ILECs do not request or accept any preferences or artificial competitive advantages from MTE owners or management companies. The Commission should use its authority over ILECs as carriers to ensure that they do not enter into arrangements with MTE owners or management companies which are unjust, unreasonable or contrary to the public interest in open competition. Only in the unlikely event that such regulation proves ineffective should the FCC consider using its Title I authority to regulate building access rights directly as ancillary to the provision of interstate telecommunications services.

In addition, the Commission should adopt minimum procedural rules to ensure that these access rights are known and available to CLECs. Specifically, the Commission should require ILECs to reduce their arrangements with MTE owners and/or management companies to written contracts, to make those contracts available to CLECs upon request, and adopt expedited procedures for the resolution of access requests. The Commission should establish a three-year

transition period for converting all access arrangements to written contracts. Without written contracts, a CLEC cannot know what access rights the ILEC has that may be used by the CLEC to provide service to tenants. Further, those contracts will provide a necessary benchmark to CLECs who desire to be treated in a non-discriminatory fashion by the MTE owner or management company. The Commission should require ILECs to produce contracts for a particular MTE upon request within thirty days, and to provide a written denial to a CLEC's request for access within thirty days.

CompTel believes it is critical for the Commission to adopt rules giving teeth to its enforcement procedures. Accordingly, CompTel proposes that the Commission include MTE access complaints within the scope of the accelerated complaint proceedings (the so-called Rocket Docket). The Commission should also adopt a rule stating that an ILEC will be responsible for paying the attorneys' fees of a CLEC who proves that the ILEC has violated one or more of the FCC's MTE access rules. Lastly, the Commission should adopt rules establishing mandatory monetary payments by ILECs who have violated the Commission's MTE access rules.

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TO: The Commission

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the *Notice of Proposed Rulemaking* released by the Commission in the above-captioned proceedings.[1] CompTel commends the Commission for

[1] *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) (*NPRM*). By *Order* dated August 6, 1999, the Commission established a separate pleading cycle for the *Notice of Inquiry* portions of the item. *Promotion of Competitive Networks in Local Telecommunications Markets*, Order Extending Pleading Cycle in WT Docket No. 99-217 and CC Docket No. 96-98, DA 99-1563 (rel. Aug. 6, 1999).

initiating this proceeding, and strongly supports the rules and policies the Commission has proposed to ensure that competitive local exchange carriers ("CLECs") have reasonable and non-discriminatory access to multiple tenant environments ("MTEs") for the provision of competitive local services.

CompTel is the principal industry association representing U.S., international and global competitive telecommunications companies and their suppliers. Its approximately 350 members include numerous facilities-based CLECs (both wireline and wireless) employing all types of technologies and entry strategies. It is critical for these CLECs to have non-discriminatory and cost-based access to the MTEs in which their customers live and do business in order to compete most aggressively against incumbent local exchange carriers ("ILECs"). Therefore, CompTel strongly supports the Commission's initiative in this proceeding, and we propose additional rules and policies that the Commission should adopt to ensure that the pro-competition mandate of the Telecommunications Act of 1996 ("1996 Act") is fully achieved.

I. THE CURRENT FEDERAL REGIME DOES NOT ASSURE THAT CLECS CAN OBTAIN REASONABLE AND NON-DISCRIMINATORY ACCESS TO MTES

The Commission addressed the issue of CLECs obtaining access to the ILECs' poles, ducts, conduits and rights-of-way in order to serve MTEs in its *Interconnection Order* in CC Docket Nos. 96-98 and 95-185. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996). Expressing the view that access disputes should be resolved on a case-by-case basis, the Commission declined to adopt a comprehensive regime of rules governing access to the rights owned or controlled by the ILECs. Instead, the Commission promulgated a few specific rules supplemented by certain guidelines and presumptions to facilitate the negotiation and implementation of pro-competitive access agreements. *Id.* at ¶ 1143. The Commission made clear that Section 224(f) requires ILECs to give CLECs access on non-discriminatory terms to poles, ducts, conduits, or rights-of-way that

they own or control, and prohibits ILECs from giving more favorable access to themselves than to other parties. *Id.* at ¶¶ 1156-57, 1170. Further, the Commission established that ILECs must take all reasonable steps to accommodate access requests, including expanding capacity. *Id.* at ¶¶ 1162-63. The Commission also established procedures governing an ILEC's response to a CLEC's request for access, as well as complaints against ILECs for refusing to provide access as required by the 1996 Act. *Id.* at ¶¶ 1222-31. The Commission made a commitment to monitor its approach and to propose additional rules if "reasonably necessary" to ensure access to MTEs by CLECs. *Id.* at ¶ 1143.

The rules and guidelines adopted by the Commission in the *Interconnection Order* were an important first step towards assuring that CLECs have sufficient access to MTEs. However, while CLECs have succeeded in gaining access to some MTEs, it has become clear in the last few years that CLECs are being blocked by ILECs, as well as by MTE owners and management companies, from obtaining reasonable and non-discriminatory access to a significant number of MTEs. CLECs' inability to gain access to MTEs is so severe that it is beginning to interfere with CLEC market entry, and it is denying the full benefits of local competition to many tens of thousands of residential and business subscribers throughout the country. Therefore, the time has come for the Commission to fulfill its commitment to adopt additional rules and policies that are necessary to ensure that CLECs have reasonable and non-discriminatory access to MTEs.

In response to the Commission's request (*NPRM* at ¶ 31), CompTel has informally surveyed its members to identify obstacles they are experiencing in obtaining access to MTEs today. CompTel's survey revealed that a significant barrier facing its members stems from the actions of MTE owners and/or their management companies. Although CompTel does not dispute the right of MTE owners to recover the cost associated with ingress and egress of

telecommunications from their buildings, CompTel believes that many MTE owners routinely attempt to use their market power to extract excessive and unreasonable concessions from CLECs (and typically only CLECs) attempting to serve tenants in the buildings. The following is a summary of the types of restrictions that CLECs face today in gaining access to MTEs:

- MTE owners and/or management companies often insist upon receiving a portion of the CLEC's *gross* revenues – anywhere from 3-7% is commonplace[2] – in exchange for MTE access; ILECs typically receive access to these MTEs without any of these additional payments.

- MTE owners and/or management companies often insist that the CLEC pay a fixed monthly rent (typically, square footage multiplied by a negotiated dollar amount) in lieu of or in addition to a percentage of revenues; ILECs typically receive access to these MTEs without paying any rent at all.

- MTE owners and/or management companies often require the CLEC to pay a substantial one-time non-refundable fee (*e.g.*, $50,000 per entrance), or an up-front deposit equal to up to several months' payments; no similar requirements are imposed on ILECs as a condition of MTE access.

- MTE owners and/or management companies have entered into exclusive arrangements with one local carrier and refuse to grant access to other local providers.

- MTE owners and/or management companies sometimes refuse to grant any CLEC access to an MTE on any terms or conditions.

- MTE owners and/or management companies will bundle separate MTEs into a single arrangement, effectively preventing a CLEC from gaining access to one MTE, at any price, unless the CLEC agrees to make similar payments for other MTEs regardless whether it can or wants to serve those MTEs.[3]

- ILECs have not made their own entrance access, conduits, riser cable, inside wiring, and other rights-of-way for MTEs available to CLECs on reasonable and non-discriminatory terms, nor have they made their contracts with MTE owners and/or management companies routinely

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[2] In some California markets, MTE owners and/or management companies demand up to 18% of gross revenues.

[3] This bundling also may substantially increase the length of time it takes a CLEC to negotiate access arrangements, thereby delaying services to individual tenant customers.

available so that CLECs can make informed decisions about the extent of access that can be obtained through existing ILEC agreements.

These types of practices are defeating the pro-competitive objectives of Congress in adopting, and the Commission in implementing, the 1996 Act. *First*, these practices effectively deny tens of thousands of residents and businesses the freedom to choose their local telephone service providers. Instead, these consumers are forced to use the ILEC, or the single CLEC selected by the MTE owner or management company. Other carriers either are denied entry entirely, or receive access on terms which materially limit their ability to serve customers in the MTE. *Second*, a related problem is that these practices often deprive building tenants of access to advanced and other innovative services that are offered by CLECs whom the MTE owners and management companies have effectively excluded from the premises. *Third*, by coercing CLECs into paying significant sums for MTE access – which are completely unrelated to any costs incurred by the MTE owners and management companies – these practices artificially increase the rates that MTE tenants must pay for non-incumbent local telephone services. *Fourth*, these practices undermine the development of local competition everywhere, by removing tens of thousands of buildings, and hundreds of thousands of residential and business customers, from the competitive marketplace. By effectively shrinking the addressable market available to new entrants, MTE owners and management companies are forcing CLECs to enter markets more slowly, or in some cases to narrow the geographic scope of their entry strategy. The result is that even consumers who do not live or work in MTEs have fewer competitive alternatives available to them due to these practices.

The Commission cannot rely upon market forces to ensure that CLECs have reasonable and non-discriminatory access to MTEs. That approach already has been tried, and it has failed. For the last three years, CLECs have waited for market forces to give them adequate

access to MTEs, but the problem has merely worsened as MTE owners and management companies become more aggressive in negotiating extortionate access arrangements. The reasons why market forces have not cured this growing problem are readily apparent. For CLECs, access to MTEs is absolutely essential in order to serve customers located there. But the MTE owner does not have the same need to provide CLECs with reasonable access. Although the MTE owner often ensures that tenants can reach the dominant local telecommunications provider (*i.e.*, the ILEC), CLECs do not have the customer base or market power that requires the MTE owner to permit access. Instead, MTE owners often attempt to maximize their revenues by conducting an "auction" to see which CLEC will pay the most for access to the building. It is this incentive which leads to the types of problems that CompTel members are experiencing.

In other proceedings, some MTE owners have argued that they have an incentive to satisfy all of their tenants' needs, including the need for telecommunications services, and therefore are constrained in their ability to impose unreasonable conditions on competitive telecommunications providers. However, tenants cannot effectively police MTE owner excesses. Many tenants have long-term leases, and they cannot break them without incurring substantial penalties. As a result, they have limited leverage to force the MTE owner to grant them access to their preferred local carrier. Even where tenants are not captive to long-term leases, the cost of moving out of their MTE can deter them from doing so in order to obtain the CLEC of their choice.[4] The problem can be particularly acute for residential consumers, who

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[4] As the Commission frequently has noted with respect to number portability issues, the collateral cost of changing letterhead, notifying customers, etc. can inhibit a subscriber's decision to change carriers. *See, e.g., Telephone Number Portability*, Fourth Memorandum Opinion And Order On Reconsideration, 1999 FCC LEXIS 3358, ¶ 35 (July 16, 1999); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion And Order On Reconsideration, 7 FCC Rcd 2677 (1992); *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (September 16, 1991).

often may not even be aware of the choices they are losing through the practices of MTE owners and management companies. Those tenants cannot impose pressure on MTE owners and management companies because they are in the dark about the extent to which CLECs are being excluded from their buildings. Therefore, the Commission must conclude that the current regime is not assuring CLECs reasonable and non-discriminatory access to MTEs, and that the only solution is for the Commission to adopt stronger, more detailed rules to achieve that pro-competitive objective.

II. THE COMMISSION SHOULD ADOPT RIGOROUS RULES TO MAKE CERTAIN THAT CLECS CAN MAKE FULL AND EFFECTIVE USE OF THE ILEC'S MTE ACCESS RIGHTS

It is critical for local competition that the Commission adopt rules to maximize the ability of CLECs to "piggyback" onto the MTE access rights of ILECs. By relying upon the ILECs' access rights, the Commission can reduce the adverse impact of the unreasonable practices of some MTE owners and management companies. ILECs frequently already have long term (and sometimes perpetual) agreements with MTEs, many of which were negotiated before MTE owners began demanding unreasonable concessions for building access. As a result, ILEC building access agreements generally do not contain the types of conditions that are precluding effective CLEC access to MTEs. While "piggybacking" may not be a panacea – the ILECs' existing access rights are limited in many cases, and do not always provide the types of access that CLECs require – it will significantly improve competitive access to MTEs if the Commission takes the steps necessary to guarantee CLECs full and fair access to the ILECs' existing access rights.

There can be no doubt that the Commission has ample authority to adopt rules implementing those provisions in the Communications Act that enable CLECs to use the ILECs' MTE access rights – chiefly, Sections 224(f)(1) and 251(c)(3). As the Supreme Court recently

confirmed in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), Section 201(b) gives the Commission broad authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 154(i).

A. A Broad Interpretation of Section 224(f)(1) Serves the Public Interest

Section 224(f)(1) of the Communications Act requires the ILECs to provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). CompTel strongly supports the Commission's proposal to interpret the terms of Section 224(f)(1) broadly to promote the pro-competition purposes of the 1996 Act.

First, the Commission should construe Section 224(f)(1) to require ILECs to make any and all of their MTE access rights available to CLECs, including but not limited to ILEC rights to the network interconnection device, ducts and conduit, riser cable, rooftop facilities and access, and inside wiring. The statutory reference to "any pole, duct, conduit, or right-of-way owned or controlled" by the ILEC is broad enough to support an expansive interpretation. Although there is some legislative history in the Pole Attachments Act of 1978 indicating that the provision would apply to "underground" conduit, *NPRM* at ¶ 44, there is no basis in the statutory language, Congress' intent, or the legislative history to conclude that Congress meant to freeze technology in place by applying this provision *only* to underground conduit. Therefore, the Commission should revise its current definition of "conduit" to delete reference to pipe that is "placed in the ground." *NPRM* at ¶ 44; *see* 47 C.F.R. § 1.1402(i). Instead, conduit should be defined to include any pipe or similar structure (whether placed in the ground or located in or on another structure) in which cables and/or wires may be installed. Alternatively, the Commission can rely upon its existing definition of a "duct" to each ILEC

access arrangements within MTEs. *See* 47 C.F.R. § 1.1402(k) (defining a "duct" as "a single enclosed raceway for conductors, cable and/or wire").

Such a broad interpretation not only would promote Congress' market-opening objectives, it would help ensure that such objectives are achieved in ways that are technology neutral. Toward this end, whenever possible, the Commission should interpret access agreements to permit access via wireless facilities. For example, a general right to obtain access necessary to provide local services to MTE tenants should be interpreted to permit rooftop access as well as access to the basement of the building.[5] Similarly, if the ILEC's access agreement does not limit its entry point, the Commission should interpret the agreement to permit access at any entry point, including the rooftop.

Second, CompTel supports the Commission's proposal to construe Section 224(f)(1) broadly to apply to private as well as public rights-of-way, including rights-of-way held by ILECs in fee simple absolute. *NPRM* at ¶¶ 41-43. Such a broad interpretation is fully consistent with the statutory language and legislative intent, and it would go far to promote Congress' and the Commission's pro-competition objectives. It is particularly important that the Commission construe Section 224(f)(1) to include access rights that the ILECs own or control, even if they do not currently use them. *NPRM* at ¶ 45. The relevant question for purposes of Section 224(f)(1) is whether an ILEC has obtained the right to use a particular pole, duct, etc.; whether it is actually exercising that right at the time is not dispositive. Thus, a utility should be considered to "own" or "control" a pole, duct, conduit or right of way whenever it obtains rights to the facility, not when it exercises that right. Section 224(f)(1) has transformed the ILECs' MTE access agreements into a mechanism for competitive access. Giving CLECs the ability to

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[5] In addition, as explained *infra* at pages 13-22, the Commission should *require* ILECs to negotiate competitively-neutral access arrangements, including an explicit right to access the rooftop as a building entry point.

fully exercise the ILECs' rights – even if the ILEC has chosen not to – furthers the goals of Section 224.

B. ILEC Access Rights Should Be Defined as UNEs

The Commission asks parties to comment on whether it should require ILECs to make in-building wiring or cable available as unbundled network elements ("UNEs") pursuant to Section 251(c)(3). *NPRM* at ¶ 51. CompTel supports requiring ILECs to provide in-building access through UNEs. The statutory definition of the term network element applies broadly to any "facility or equipment used in the provision of a telecommunications service," and includes all "features, functions, and capabilities" that are provided by means of the facility or equipment. 47 U.S.C. § 251(c)(3). In-building wire or cable owned by the ILEC clearly falls within the scope of this section.

In its Comments in CC Docket 96-98 in response to the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, CompTel has proposed that the Commission provide access to in-building wire by expanding its definition of the Network Interface Device ("NID"). Specifically, CompTel proposes defining the NID not only to include the cross-connect device used to connect loop facilities to inside wire (the current definition) *but also* to include ILEC-owned or controlled inside wiring on the customer-side of the cross-connect.[6] In other words, the NID network element should encompass all ILEC-owned or controlled facilities between the loop and customer premise equipment.

[6] Comments of the Competitive Telecommunications Association, at 36, CC Docket No. 96-98 (filed May 26, 1999).

In adopting rules requiring ILECs to offer in-building cable and wiring as mandatory UNEs, the Commission should make clear that such rules do not mitigate or lessen in any respect the rules and policies that the Commission adopts to implement Section 224(f)(1). The public interest would be best served by rules that give CLECs a choice of provisions – Section 224(f)(1) or Section 251(c)(3) – for gaining access to individual MTEs. Some CLECs may desire to include these UNEs in their interconnection agreements with ILECs, even though the provisions would be subject to delays and could vary on a state-by-state basis. Other CLECs may desire to proceed under Section 224(f)(1) to obtain faster access to a broader range of ILEC access rights without state-by-state variations. Some CLECs may even choose one mechanism for certain MTEs, while using the other mechanism for other MTEs, or they may see a need to use both mechanisms for the same MTE. Rather than choosing one approach over the other as the method by which CLECs must obtain MTE access, the Commission should adopt rules that give CLECs the broadest possible latitude within the statute to obtain the type of access to MTEs that is consistent with their business needs.

C. The Proposed Rules Do Not Raise a Takings Issue

The Commission asks parties to comment on whether any interpretation of ownership or control might result in the taking of a building owner's property without just compensation within the meaning of the Fifth Amendment to the United States Constitution.[7] No interpretation of "ownership" or "control" that is consistent with Section 224(f) could result in a "taking" of a building owner's property.

Section 224(f) governs the use by a utility of the property rights that *it* possesses. Persons granted rights under Section 224(f) are given access only to those rights already possessed by the utility. By contrast, nothing in Section 224 imposes a duty on the building

[7] *NPRM* at 47.

owner to provide access to a utility, and nothing in Section 224 affects the building owner's use of the property rights its possesses. Thus, rules that are consistent with Section 224(f) cannot result in a taking, because they affect only those property rights that a building owner has voluntarily granted to a utility.[8]

The cases cited in the *NPRM* at ¶ 47 are not implicated by the access rules CompTel proposes.[9] Those cases dealt with an argument that Section 541(a)(2) of the Communications Act permitted an *expansion* of rights granted by a property owner.[10] None of the cases addressed whether cable providers could "piggyback" on the existing rights granted, which is the only issue implicated by Section 224. Moreover, since the courts based their decisions on an interpretation of the statutory provision, none of the cases found that a taking had actually occurred.[11]

In summary, the Commission's proposed rules are entirely consistent with Section 224(f). Nothing proposed in the *NPRM* affects rights still possessed by building owners, and therefore nothing proposed in the *NPRM* would result in a taking. CompTel strongly supports the Commission's proposed interpretations to effectuate these rights.

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8 *See, e.g., FCC v. Florida Power Co.*, 480 U.S. 245, 250-253 (1987) (holding that the "element of required acquiescence is at the heart of the concept of occupation" that results in a taking of property).

9 *See Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992), *cert. denied*, 506 U.S. 862 (1992); *TCI of North Dakota v. Schriock Holding Company*, 11 F.3d 812, 814-15 (8th Cir. 1993); *Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1174 (4th Cir. 1993); *Cable Investments Inc. v. Woolley*, 867 F.2d 151, 159-60 (3rd Cir. 1989).

10 Specifically, these cases involved the statutory interpretation of Section 541(a)(2), which provides, in relevant part, as follows: "Any franchise shall be construed to authorize the construction of a cable system . . . through easements, which is within the area to be served by the cable system and which *have been dedicated for compatible uses* . . . ." (emphasis added). 47 U.S.C. § 541(a)(2). Interpretation of the terms "dedicated" and "compatible" raised the issue of whether Section 541(a)(2) could be used to effectuate a taking from a property owner.

11 Faced with two possible interpretations of Section 541(a)(2), one which raised takings issues and one which did not raise any takings issues, the courts adopted the interpretation that did not raise any takings issues. Consequently, these courts did not reach the question of whether a taking had actually occurred.

III. THE COMMISSION SHOULD ADOPT STRONG NON-DISCRIMINATION RULES TO ENSURE THAT CLECS HAVE NECESSARY MTE ACCESS

Adopting strong rules to ensure that CLECs obtain maximum use of the ILECs' MTE access rights is an important step, but it does not go far enough to ensure that CLECs have reasonable and non-discriminatory access to MTEs. In some cases, the ILECs' access rights may not be sufficient to enable multiple CLECs to provide competitive local services, including new and innovative advanced services, to consumers in an MTE. For example, ILECs frequently have not negotiated the type of access necessary for wireless local exchange carriers to provide service to customers. Moreover, due to its dominant position, an ILEC may be able to accept certain terms in an agreement with an MTE owner which have a discriminatory impact on CLECs. As a result, CompTel submits that the Commission should not stop at ensuring "piggyback" rights to whatever the ILECs negotiate, but should also adopt rules to ensure that the agreements negotiated by the ILECs are just, reasonable and in the public interest. This requires the FCC to look at minimum terms and conditions that ILECs must include in their arrangements in order to make a "piggyback" right meaningful.

As explained below, CompTel proposes that the Commission prohibit the ILEC from entering into agreements that directly or indirectly discriminate against competing providers or that have the effect, directly or indirectly, of impairing the right of tenants in MTEs to use or receive service from the telecommunications provider of their choice. The ILECs also should affirmatively be required to include technology-neutral access rights in their agreements with MTE owners. The ILECs should be required to include provisions incorporating these rules into their building access arrangements and to reform or terminate any non-conforming agreements. In addition, no carrier – ILEC or CLEC – should be permitted at this time to enter into an exclusive access arrangement with an MTE owner. Strong non-discrimination rules

channel the advantages of the ILECs' historical monopoly position to the benefit of all customers receiving local services, regardless of which service provider the customer chooses.

The non-discrimination obligations CompTel proposes will address the types of arrangements that hinder the public interest in competition. They do so by regulating the practices of the ILEC – not (at this time) of the MTE owner. As a result, they avoid questions of the Commission's jurisdiction over MTE owners (which CompTel believes the Commission clearly has) and the additional complication of administering a new scheme of rules on a new class of persons.

A. The Commission has Legal Authority to Adopt Non-Discrimination Rules

In the *NPRM* (at ¶ 56), the Commission asked parties to comment on whether it has authority under the Communications Act to impose non-discrimination rules directly upon MTE owners. CompTel believes that the Commission has broad authority under Title I of the Communications Act to adopt rules governing entities which do not qualify as common carriers when such rules are "reasonably ancillary" to the performance of its statutory responsibilities. *United States v. Southwestern Cable*, 392 U.S. 157, 178 (1968); 47 U.S.C. § 154(i). In this case, the FCC has Title I authority to impose non-discrimination rules on MTE owners because such rules are "reasonably ancillary" to the Commission's Title II duties to ensure that rates and practices among common carriers are just, reasonable, and non-discriminatory. Further, such rules are "reasonably ancillary" to the Commission's responsibility to implement the critical market-opening provisions in Section 251(c). Without strong non-discrimination rules, local competition will be stunted, consumers will have a reduced list of services and service providers to choose from, and prices will be higher.

Although the Commission has Title I authority to impose strong non-discrimination rules on MTE owners, CompTel recognizes that implementing and enforcing such

rules against tens or hundreds of thousands of MTE owners might impose a significant burden on both the Commission and the industry. Moreover, there is a realistic possibility that the Commission's goals can be substantially achieved by implementing and enforcing a strong non-discrimination policy applicable to ILEC access agreements. By adopting a rule forbidding ILECs from entering into agreements which discriminate against competitors or which impair a tenant's ability to receive service from others, the Commission will establish a regulatory mechanism that may be able to achieve most of the objectives of direct regulation while also avoiding many of the difficulties associated with that approach. Therefore, without relinquishing its authority to impose a non-discrimination policy directly upon MTE owners in the future, the Commission should first seek to achieve its objectives by imposing a non-discrimination policy on the ILECs.

Nevertheless, CompTel can foresee the possibility that even a non-discrimination policy, however strongly worded and broadly enforced, may not eradicate some of the more unreasonable access arrangements being foisted on CLECs by MTE owners and management companies. If the only change wrought by the policy is that ILECs are made to enter into the same unreasonable agreements as CLECs, then the policy will not have achieved the objective of ensuring that all carriers have adequate access to MTEs. However, CompTel believes that once the current practice of discriminating in favor of ILECs is prohibited, the negotiation or reform of access arrangements could remove or at least mitigate the most objectionable practices of the MTE owners and management companies. Therefore, in order to give the non-discrimination policy a meaningful opportunity to work effectively, CompTel is not at this time calling for the Commission to adopt rules governing the substance of the access arrangements negotiated by ILECs and CLECs. However, should the non-discrimination policy not work effectively, the

Commission should consider adopting rules that govern the nature and content of such access arrangements.

B. The Non-Discrimination Policy.

CompTel proposes that the Commission determine that certain provisions contained in an ILEC's access agreement would be unjust and unreasonable practices within the meaning of Section 201(b) of the Communications Act. The Commission should identify these practices and prohibit the ILECs from entering into agreements with MTE owners that contain unreasonable conditions. Specifically, the Commission should declare that it would be an unreasonable practice for an ILEC to:

- Enter into an agreement with MTE owners and/or management companies that has the effect, directly or indirectly, of discriminating against competing telecommunications carriers. This policy should affect all material aspects of the access arrangements, including the type, nature and scope of access, duration, effective date, payments from one party to another party, ownership of in-building equipment and plant, and other factors.

- Enter into an agreement with MTE owners and/or management companies that, directly or indirectly, impairs the ability of tenants in an MTE to use or receive service from the telecommunications provider of their choice.

- Solicit or accept any preferential access to buildings from MTE owners and/or management companies.

The Commission also should require ILECs to enter into agreements which are technology-neutral. Thus, an ILEC should be prohibited from entering into an agreement which denies wireless CLECs the ability to access an MTE. An ILEC should affirmatively be required to include a provision in all new contracts which establishes a right to install a rooftop antenna as well as related facilities necessary to provide services to all tenants in the MTE. Particularly given the documented difficulty that wireless CLECs have experienced in persuading MTE owners to grant them non-discriminatory access to install rooftop antennas and related

facilities,[12] a requirement that the ILECs include such a provision in their agreements would promote the public interest in local competition and the offering of advanced telecommunications services.[13]

ILECs should be required to include in their agreements with MTE owners and/or management companies provisions which implement these determinations, including:

- A provision that nothing in the agreement will be construed to limit or deny access by other telecommunications carriers to the building.
- A provision that the building owner will not offer, and the ILEC will not accept, any right or provision which discriminates against any other telecommunications carrier with regard to the rates, terms or conditions of access to buildings.
- A provision which makes violations of these provisions a material breach of the agreement and grounds for termination.
- A provision that allows competitive carriers to enforce these provisions.[14]

These rules would preclude ILECs from entering into or otherwise accepting access arrangements for an MTE that are more favorable to them than the access arrangements which are offered or available to CLECs for the MTE. It should be *per se* unreasonable for an ILEC to accept any MTE access arrangements if another CLEC is being denied access to that

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12 *See, e.g.,* Comments of WinStar Communications, Inc., CC Docket No. 98-146, at 11-18 (filed Sept. 14, 1998); Statement of William J. Rouhana, Jr., Chairman and CEO, WinStar Communications, Inc., U.S. House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade & Consumer Protection, Oversight Hearing Regarding: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1999).

13 Because the MTE owner is not required to enter into a contract with an ILEC, but rather does so voluntarily, such a requirement does not constitute a taking under the Fifth Amendment and, therefore, there is no question as to the Commission's statutory authority to adopt the requirement. *See, e.g., FCC v. Florida Power Co.*, 480 U.S. 245, 250-253 (1987) (distinguishing between interlopers with a government license and commercial lessees in determining whether a taking has occurred).

14 Such a provision will grant the widest possible enforcement opportunities to ensure compliance with the non-discrimination policy.

MTE altogether. The Commission should make clear that this rule applies not only to new access arrangements established after the adoption of the rule, but to all existing arrangements.

Lastly, CompTel emphasizes the importance of a blanket prohibition of exclusive access arrangements negotiated by any carrier – either an ILEC or a CLEC – with an MTE owner or management company. *See NPRM* at ¶¶ 61, 64. At this critical juncture in the development of local competition, any exclusive access arrangement causes harm to consumers that far outweighs any theoretical benefits. The goal of the Commission's policies should be to ensure that as many carriers as possible are able to compete against each other in offering local services to building tenants. CompTel agrees that certain carriers may need to recoup their investments to serve particular MTEs (*see NPRM* at ¶ 53), but the appropriate way to do that in competitive markets is through rates to subscribers. Permitting one carrier to have exclusive access to an MTE only ensures that the tenants in that building are held captive and forced to pay above-market rates for some period of time. In effect, the MTE owner and the carrier together create a captive customer environment in which they are able to share monopoly rents. The Commission's goal should be to break down barriers that prevent multiple carriers from serving an MTE, and therefore it should prohibit all exclusive access arrangements.[15]

C. Enforcement Procedures

When negotiating new access arrangements, the ILEC should be required to advise the MTE owner or management company in writing of the Commission's non-discrimination rules and policies as early as possible in the negotiations, and to incorporate the

[15] Some carriers may seek to negotiate a "preferred carrier" arrangement with an MTE owner or management company. If such an arrangement does not discriminate in the access arrangements made available to competing carriers, then CompTel does not have any objection to it at this time. For example, an MTE owner might give its endorsement to a particular carrier in marketing services to building tenants. So long as such an endorsement does not affect access or provisioning arrangements, or the ability of other carriers to market their own services to building tenants in competition with the carrier preferred by the MTE owner or management company, such a "preferred carrier" approach is not objectionable.

policy in the agreement through the provisions described above. Should the ILEC learn that one or more CLECs are seeking access arrangements while it is negotiating with the MTE owner or management company, the Commission should require the ILEC, upon request, to regularly inform the CLECs of the terms it is negotiating. Should the ILEC learn that the MTE owner is seeking to impose discriminatory terms and conditions upon one or more CLECs, or is otherwise refusing to provide non-discriminatory access to other carriers, the ILEC should be required to ensure that any such problems are rectified before concluding its own negotiations for MTE access.

With respect to existing access arrangements, the Commission should require the ILECs to use their best efforts to reform such arrangements consistent with the anti-discrimination policy once they have been provided with information in writing by a CLEC showing that the ILEC is receiving preferential terms and conditions from the MTE owner or management company. In seeking to reform such arrangements, the ILECs should be required to inform the MTE owner or management company that the FCC's rules require reformation of the arrangements to comply with the non-discrimination policies. If the ILEC is unable within six months to reform the arrangements to comply with the FCC's rules and policies, the ILEC shall so advise the Commission in writing, with copies to interested CLECs and the MTE owner and/or management company. The Commission should then send a letter to all interested parties asking them to show cause pursuant to an accelerated comment schedule why it should not order termination of the access arrangements between the ILEC and the MTE owner. If the Commission concludes on the basis of the comments that the ILEC's access arrangements violate the Commission's policies, the Commission shall order the arrangements terminated as of

a date certain.[16] At that point, the ILEC and interested CLECs would be able to negotiate new access arrangements with the MTE owner and/or management company as specified in the previous paragraph.

If the ILEC believes that its access arrangements are not discriminatory, or if it believes that it has succeeded in modifying those arrangements so that they comply with the non-discrimination rules and policies, the ILEC shall so advise interested CLECs in writing. That writing should be sent within 30 days of either (i) the CLEC's notification that the ILEC is benefiting from a discriminatory access arrangement, or (ii) the date upon which the ILEC concludes modifications to the access arrangements that it believes comply fully with the FCC's rules and policies. If a CLEC is not satisfied with the ILEC's response, the CLEC may request the FCC to issue a show-cause letter such as that specified in the prior paragraph.

Although detailed, these procedures nevertheless are necessary to ensure that the FCC's non-discrimination policy will have a beneficial effect on current and future MTE access arrangements. It is CompTel's expectation that relatively few cases will go all the way to an order by the Commission terminating the ILEC's access arrangements. Rather, all parties will have an incentive to comply with the FCC's rules and policies. Both the ILEC and the MTE owner will have a strong incentive to reach an acceptable compromise to avoid any possible risk of a disruption of service to the building tenants. Without these types of vigorous rules and enforcement procedures, the Commission's non-discrimination policies might have little to no impact on the conduct of ILECs and MTE owners and management companies in the marketplace.

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[16] A termination order would not necessarily result in a disruption of service to building tenants. Rather, it would be a matter for negotiation between the ILEC and the MTE owner or management company, subject to state laws, whether and how services should be provided over the ILEC's in-building plant pending the negotiation of new access arrangements.

D. Analogous Commission Precedents.

There are several other situations where the Commission has sought to accomplish its goals by regulating indirectly rather than directly. For example, the Commission has adopted several policies to restrain foreign carriers from exercising market power to the detriment of U.S. consumers. Because the Commission lacks jurisdiction over foreign carriers, the Commission has sought to achieve its objectives by regulating the types of arrangements which U.S. carriers can, and cannot, enter into with foreign carriers. For example, the Commission currently prohibits U.S. international carriers from accepting so-called "special concessions" from dominant foreign carriers in certain circumstances.[17] As another example, for many years the FCC has sought to prevent foreign carriers from discriminating unreasonably among their U.S. correspondents by requiring U.S. carriers to accept only their proportionate share of international return traffic.[18] Indeed, that policy is part of the Commission's broader International Settlements Policy, which generally prevents U.S. carriers from accepting discriminatory arrangements with foreign carriers unless they first obtain Commission approval.[19] Most recently, the FCC sought to determine that settlement rates that foreign carriers charge to terminate U.S.-billed international calls by regulating the amounts that U.S.

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[17] 47 C.F.R. § 63.14. See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, at P 140 (rel. Apr. 18, 1997) (Classification of LEC Long Distance Service Report and Order), recon. FCC 97-229 (rel. June 27, 1997) (describing application of the No Special Concessions rule).

[18] 47 C.F.R. § 43.51(e). Sprint Communications Company, L.P.; Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico, 14 CR 417, 1998 FCC LEXIS 6022 (1998) (denying request for modification in part due to inconsistency with proportionate return rule).

[19] *See, e.g.,* AT&T Corp. MCI WorldCom, Inc. Sprint Communications Co. L.P.; Petition for Enforcement of International Settlements Benchmark Rates for Service with Cyprus, 1999 FCC LEXIS 2545 (rel. June 3, 1999) (discussing International Settlements Policy).

international carriers are permitted to pay.[20] These international policies show that it is realistic for the Commission to achieve its goals by regulating the types of arrangements which U.S. carriers can, and cannot, enter into with entities that are otherwise unregulated.

IV. THE COMMISSION ALSO SHOULD ADOPT PROCEDURAL RULES TO ENSURE THAT CLECS MAY EXERCISE THEIR ACCESS RIGHTS.

In addition to the rules and policies proposed in the *NPRM*, CompTel submits that the Commission should adopt the following rules and policies to maximize the entry opportunities afforded to CLECs by the ILECs' MTE access rights.[21]

First, the Commission should require an ILEC upon request to provide a requesting carrier with any contracts in the ILEC's possession that establish or affect the ILEC's access rights to all or part of an MTE. Without those contracts, a CLEC cannot know what access rights the ILEC has that may be used by the CLEC to provide service to tenants. Further, those contracts will provide a necessary benchmark to CLECs who desire to be treated in a non-discriminatory fashion by the MTE owner or management company. Moreover, because those contracts could be very useful to a CLEC as it begins to market services to an MTE, the CLEC should be able to obtain such contracts even if it does not yet have a customer in the MTE. The FCC should establish the shortest reasonable time period (*i.e.*, thirty days) as the deadline for an ILEC to produce contracts for a particular MTE upon request.

Second, in situations where an ILEC already has access to an MTE other than through a written contract, the Commission should require the ILEC to convert its access rights

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20 *See, e.g.*, International Settlement Rates, 1999 FCC LEXIS 2757 (rel. June 11, 1999) (denying the petitions for reconsideration of the *Benchmark Order*, International Settlement Rates, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997), *aff'd sub. nom.*, Cable & Wireless et al. v. FCC, No. 97-1612 (D.C. Cir., Jan. 12, 1999).

21 CompTel recognizes that its proposed rules and policies will impose certain burdens on ILECs. To the extent the Commission is concerned that the smallest ILECs would be materially harmed by such burdens, CompTel would be willing, on an interim basis, to impose these rules and policies only on Tier 1 ILECs. 47 C.F.R. §§ 32.11(a)(1), 32.9000.

into written agreements with the MTE owner or other appropriate party. Such written contracts will then provide an objective basis for CLECs to identify and take full advantage of the MTE access rights of ILECs. Given the possibility that the negotiation of such contracts may take time, CompTel proposes that the Commission establish a three-year transition period for converting all access arrangements to written contracts. On a going-forward basis, the Commission should require ILECs to negotiate comprehensive written contracts whenever they establish access rights with all or part of an MTE for the first time.

Third, the Commission's current policies require an ILEC who denies a CLEC's request for access to provide a written denial within 45 days of the request. *Interconnection Order* at ¶ 1224. CompTel proposes that the Commission reduce that period to 30 days in order to speed up the process by which CLECs gain access to MTEs or, in the event the ILECs deny access, the filing of a complaint or the initiation of other enforcement actions. There is no reason that an ILEC should need more than 30 days from receipt of a request to determine whether it will grant or deny the request.

Fourth, the complaint procedures established by the Commission (*see Interconnection Order* at ¶¶ 1222-23) have not significantly facilitated the ability of CLECs to gain reasonable and non-discriminatory access to MTEs. There are hundreds of thousands of MTEs in the United States, and the cost and time of engaging in conventional litigation to vindicate access rights on an MTE-by-MTE basis are simply prohibitive. Without a cost-effective and expeditious enforcement mechanism, the rules adopted by the Commission will not be fully effective because ILECs will know that they can flout them with virtual impunity. Therefore, CompTel believes it is critical for the Commission to adopt rules giving teeth to its enforcement procedures for MTE access.

CompTel proposes that the Commission include MTE access complaints within the scope of the accelerated complaint proceedings (the so-called Rocket Docket).[22] This will give CLECs adequate assurances that their access complaints will be addressed expeditiously. Further, the Commission should adopt a rule stating that an ILEC will be responsible for paying the attorneys' fees of a CLEC who proves that the ILEC has violated one or more of the FCC's MTE access rules. This will reduce the deterrent effect that litigation costs have on the willingness of CLECs to vindicate their access rights, and it will encourage ILECs to grant access wherever possible in order to avoid paying these fees. Lastly, the Commission should adopt rules establishing mandatory monetary payments by ILECs who have violated the Commission's MTE access rules. Such payments would be made directly to CLECs who can show that their access to an MTE was impeded by such a violation. The amount of the payment would be intended as compensation for the wasted costs incurred by the CLEC in an effort to gain access to an MTE, and would not reflect (or prevent the recovery of) any damages suffered by the CLEC due to lost business opportunities and revenues. CompTel proposes a mandatory monetary penalty -- $5,000 per MTE up to a maximum of $50,000 for multiple MTEs under common ownership -- as reasonable compensation for the costs that CLECs typically incur to gain access to an MTE. These mandatory payments would not only compensate CLECs for the lost out-of-pocket expenses they suffer when they are illegally denied access to an MTE, they would provide another incentive for ILECs to comply with the Commission's access rules.

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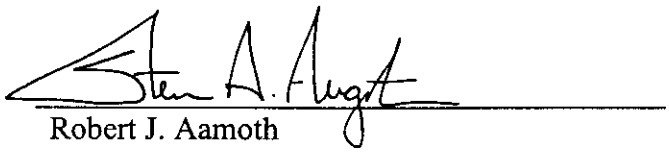
[22] Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Second Report & Order, CC Docket No. 96-238, FCC 98-154 (rel. July 14, 1998) (creating rocket docket).

CONCLUSION

CompTel respectfully submits that the Commission should adopt the rules and policies as specified herein.

Respectfully submitted,



Robert J. Aamoth
Steven A. Augustino
Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Carol Ann Bischoff
Executive Vice President
and General Counsel
Robert M. McDowell
Vice President
and Assistant General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

DATED: August 26, 1999

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **"Comments of the Competitive Telecommunications Association"** were served via courier this 26th day of August, 1999 to each individual on the attached service list.

Patricia A. Bell

Patricia A. Bell

Service List in CC Docket 96-98

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Jake E. Jennings
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Robert Atkinson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Dorothy Attwood
Office of Commissioner Kennard
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Linda Kinney
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. William Bailey
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Kyle Dixon
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Sarah Whitesell
Office of Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554