

VI. THE COMMISSION IS WITHOUT AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF SECTION 207 OF THE 1996 ACT

As acknowledged by the Commission in its order accompanying the *FNPR*,<sup>18</sup> Section 207 of the 1996 Act is mandatory. Section 207 provides that the Commission "shall" promulgate regulations to prohibit restrictions which the ability of citizens to use antennae to receive over-the-air signals. The language of the statute and the legislative intent indicate that Congress did not envision exceptions for specific classes of residents. Nothing in the legislative history suggests that Congress' concern extended only to those citizens who own their own single-family, detached dwelling. To the contrary, the Conference Report makes clear that the Commission is required to apply Section 207 to restrictions which "inhibit" reception of over-the-air television signals.<sup>19</sup> Private contracts, leases and homeowner's association rules which restrict the ability of a lessee or unit owner are impermissible under Section 207. Any attempt to draw a distinction between whether a citizen possesses a direct or indirect ownership in a residence as a basis for determining whether the citizen may use an antenna to receive over-the-air television service is without support in the statute or legislative history.

The Commission is without authority to declare the Congressional mandate to be unconstitutional.<sup>20</sup> To the extent that policy judgments must be made concerning the scope of the regulation, Congress has already made those judgments. Thus, the Commission must implement the will of Congress in such a way as to ensure that all citizens who choose to do so may avail themselves of access to the nation's free, over-the-air television system. It is hornbook law that one who leases real property from another possesses a non-freehold estate in the land itself.<sup>21</sup> This is true whether the lease runs for a term of years, from year to year, from month to month, or from day to day.<sup>22</sup> Thus, the Commission's focus on whether a citizen has a direct or indirect ownership in his residence as a basis for drawing a legal distinction in his right to use an antenna to receive over-the-air television signals is conceptually flawed. Section 207 requires the Commission to ensure that all citizens—whether they own or rent—are free to use an antenna to secure access to the over-the-air television service.

VII. THERE IS NO "TAKING" CREATED BY THE EXTENSION OF THE ANTENNA FREEMPTION RULES TO MULTIPLE DWELLING UNITS

The "Takings Clause" of the Fifth Amendment to the United States Constitution requires the government to compensate a property owner if it "takes" the owner's property. A taking may involve either the direct appropriation of property or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation. A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party or "denies all economically beneficial or productive use of land."<sup>23</sup> It is well settled that if a regulation does not result in a *per se* taking, courts will engage in an "ad hoc" inquiry to examine "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."<sup>24</sup> When properly analyzed, the regulation proposed here does not constitute a "taking" by the Commission.

A. *Loretto And Bell Atlantic Are Not Dispositive*

The Commission requested comment on the application of *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>25</sup> and *Bell Atlantic Telephone Companies v. FCC*<sup>26</sup> to Section 207.

As noted by the Court in *Loretto* as well as in subsequent Supreme Court decisions, that case was decided on narrow grounds and is limited to the specific facts

<sup>18</sup> See *FNPR* at 943 ("the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question...").

<sup>19</sup> *H.R. Rep. No. 486, 104th Cong. 2d Sess., p. 166 (1996)*.

<sup>20</sup> *FNPR*, at 943 (citing *GTE California, Inc. v. FCC*, 39 F.3d 940, 946 (9th Cir. 1944) and *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

<sup>21</sup> See Smith & Boyer, *Survey of the Law of Property*, 2d ed. 1971, West, p. 18.

<sup>22</sup> *Id.*

<sup>23</sup> *Penn Central Transp. Comp. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, reh. den., 99 S.Ct. 226, 58 L.Ed.2d 198 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992).

<sup>24</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

<sup>25</sup> 458 U.S. 419 (1982).

<sup>26</sup> 24 F.3d 1441 (D.C. Cir 1994) ("*Bell Atlantic*").

of the case.<sup>27</sup> In *Loretto*, a state law provided that a landlord could not "interfere" with the installation on his property of cable television facilities by a cable operator. Significantly, the state statute at issue in *Loretto* did not give the tenant any enforceable property rights with respect to the cable television installation; instead, the cable company, *not the tenant*, owned the installation.<sup>28</sup> This fact was deemed dispositive in *Loretto*; the Court expressly declined to opine concerning the respective property rights of landlords versus tenants, which, of course, is the precise issue here.<sup>29</sup> The Court in *Loretto* went on to note:

If [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation... The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.<sup>30</sup>

Moreover, the holding in *Loretto* was premised on the Court's finding that the state law at issue constituted a permanent physical occupation and deprivation of the owner's property by a third party with no legal interest in the property. In contrast, the regulation at issue here involves only a temporary physical occupation by one who has a property right in the real estate. As noted above, a lease is an estate in land.<sup>31</sup> The Court in *Loretto* affirmed the broad public power of states to regulate housing conditions in general and the landlord-tenant relationship in particular without necessarily being required to pay compensation for all economic effects that such regulation may entail. The Court concluded:

Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of the building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.<sup>32</sup>

The regulation proposed by NAB is, indeed, a permissible regulation of the landlord-tenant relationship. Moreover, if states have latitude to regulate property rented by landlords, then there can be no question but that Congress may, as it has done in enacting Section 207, impose such restrictions on the use of property as it deems appropriate to ensure the availability to all citizens of the nation's system of television broadcasting.<sup>33</sup>

The decision of the D.C. Circuit Court of Appeals in *Bell Atlantic* is also irrelevant to the takings issue. In *Bell Atlantic*, the court struck down two Commission orders requiring Local Exchange Companies ("LECs") to set aside a certain portion of their central offices for occupation and use ("co-location") by competitive access providers ("CAPs"). The sole question before the court was whether the Commission's order compelling LECs to provide co-location orders for CAPs was authorized by statute.<sup>34</sup> Of course, no such question arises here because Congress, in Section 207 of the 1996 Act, has explicitly directed the Commission to promulgate the regulation in question. Because the FCC had no such authorization in *Bell Atlantic*, the court construed the FCC's power narrowly.<sup>35</sup> Such construction was necessary, the court concluded, because the co-location orders raised "substantial" constitutional questions under the Takings Clause in light of the Supreme Court's holding in *Loretto*. Again, the regulation under consideration in this proceeding is distinguishable from the *Bell Atlantic* and *Loretto* facts because (1) no "stranger" to the owner is granted rights with respect to an owner's property, and (2) the regulation does not authorize a permanent interference with the owner's property interests. In *Bell Atlantic*, the CAPs had no ownership or contractual interest in the land used by the LECs for

<sup>27</sup> See 458 U.S. at 441, 73 L.Ed.2d at 886 ("Our holding today is very narrow."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 94 L.Ed.2d 282, 289 (1987) (Acknowledging, "We characterized our holding in *Loretto* as "very narrow.").

<sup>28</sup> *Id.* At 339.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* At 440 n. 19.

<sup>31</sup> *Smith & Boyer, supra*

<sup>32</sup> *Id.* At 440 (emphasis added).

<sup>33</sup> 47 U.S.C. § 151.

<sup>34</sup> *Id.* at 1444 n.1 ("The only question we consider is whether the order under review are indeed duly authorized by law.")

<sup>35</sup> The *Bell Atlantic* did not rest its decision on a Takings Clause analysis. *Id.* at 1444, n.1 ("The only question we consider is whether the orders under review were indeed duly authorized by law.")

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

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

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

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

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

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

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

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

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

<sup>36</sup> 439 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, reh. den. 99 S. Ct. 226, 58 L.Ed.2d 196 (1978).

<sup>37</sup> *Id.* at 124, 57 L.Ed.2d at 648 (quotations omitted).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 475 U.S. 211 (1986).

<sup>41</sup> *Id.* at 223-24 (quotations and citations omitted).

<sup>42</sup> *Cf. Loretto* ("an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property.")

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

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

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

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

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

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

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

Mr. TAUZIN. Yes. That is two.

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

Mr. TAUZIN. That is three.

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

Mr. TAUZIN. Four.

Mr. SUGRUE. I think that is it.

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

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

Mr. SUGRUE. We have four proceedings—

Mr. TAUZIN. Four proceedings.

<sup>43</sup> 441 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210, 233 (1979)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HEATWOLE. Nothing. Zero.

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

Mr. HEATWOLE. Nothing.

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

Mr. HEATWOLE. It was zero.

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

Mr. HEATWOLE. Well, it theoretically. Yes.

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

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

Mr. TAUZIN. Yes.

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

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

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

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

Mr. TAUZIN. They leave. Very good.

They leave something good behind, too.

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

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

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

Mr. TAUZIN. That is right.

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

Mr. TAUZIN. Yes.

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

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

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

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

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

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

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

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

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

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

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

Mr. TAUZIN. Careful now.

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

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

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

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

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

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

Mr. HEATWOLE. I'll speak individually.

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

Mr. BITZ. Yes.

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

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

Mr. HEATWOLE. But he may be able to.

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

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

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

Mr. HEATWOLE. And, second—

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

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

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

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

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

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

Mr. BURNSIDE. That is it exactly. Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mrs. CUBIN. We have those.

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

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

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

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

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

Mrs. CUBIN. Right.

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

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

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

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

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

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

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

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

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

Mrs. CUBIN. Thank you, Mr. Rouhana.

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

Ms. CASE. I see absolutely no—

Mr. TAUZIN. Pull the microphone to you.

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

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

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

Mr. TAUZIN. Unless you get a tent.

Mrs. CUBIN. Yes.

So, you know, in theory I agree, but—

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

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

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

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

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

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

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

Mr. PRAK. That is right.

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

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

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

Mr. BURNSIDE. You are not the first.

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

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

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

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

Ms. ESHOO. And what was your disagreement?

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

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

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

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

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

Mr. BITZ. Yes.

Ms. ESHOO. And, if so, do you have—

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

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

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

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

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

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

Mr. BITZ. On down.

Ms. ESHOO. Oh.

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

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

Mr. BITZ. Down.

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

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

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

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

Ms. ESHOO. It is just the cost of—

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

Ms. ESHOO. [continuing] providing a space.

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

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

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

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

Mr. BITZ. There would be hundreds of companies.

Ms. ESHOO. There would be hundreds.

Mr. BITZ. Hundreds of companies.

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

Mr. BITZ. 17,000 members.

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

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

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

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

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

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

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

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

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

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

Mr. MARKEY. Will the gentlelady yield?

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

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

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

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

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

Ms. ESHOO. No, the bed tax.

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

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

Ms. ESHOO. Can I reclaim my time now?

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

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

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

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

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

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

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

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

So I think you certainly have——

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

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

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

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

Ms. ESHOO. Okay.

Mr. BURNSIDE. But we still have some "T's to dot and some "T's to cross in some corrective legislation, I believe.

Ms. ESHOO. You really do look like him.

When you smile, it really gets——

Mr. Rouhana.

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

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

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

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

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

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

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

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

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

Ms. ESHOO. Thank you.

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

The gentleman from Mississippi, Mr. Pickering.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. PICKERING. The intent.

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

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

Mr. SUGRUE. Thank you.

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

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

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

Mr. TAUZIN. Oh, yes.

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

Mr. SUGRUE. Thank you. I appreciate that.

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

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

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

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

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

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

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

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

These statutory provisions are attached (Attachment A).

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