

tion mechanism should be to compensate the property owner for the space used (i.e., through a square foot rental rate as with market-based building lease rates), regardless of the number of customers served or the revenues generated by the telecommunications provider. To assure non-discriminatory treatment of multiple telecommunications providers, the PUC's policy requires that when a competitive carrier enters a multi-tenant building, the owner must modify the terms of its arrangement with the incumbent carrier to give it the same fees, terms, limits and conditions as the CLEC.

Congress and federal and state regulators have worked hard to assure that effective local service competition is not hindered by access to the local loop. But if the loop is the "last mile", building access is the "last yard" for many customers and CLECs. The National Association of Regulatory Utility Commissioners approved a resolution on this topic at its summer, 1998 meetings (Attachment C).

I hope this information is useful to the Subcommittee as it deliberates this important market opening issue. If I can provide any additional information, please let me know.

Best wishes,

PAT WOOD, III

cc: Representative Thomas Bliley

ATTACHMENT A

TEXAS UTILITIES CODE

PUBLIC UTILITY REGULATORY ACT OF TEXAS

Sec. 54.259. DISCRIMINATION BY PROPERTY OWNER PROHIBITED.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

- (1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;
- (2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;
- (3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;
- (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or
- (5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

- (1) an institution of higher education as defined by Section 61.003, Education Code; or
- (2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(c), (e), (g).)

Sec. 54.260. PROPERTY OWNERS CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

- (1) impose a condition on the utility that is reasonably necessary to protect:
 - (A) the safety, security, appearance, and condition of the property; and
 - (B) the safety and convenience of other persons;
- (2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;
- (3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;
- (4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;
- (5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(d), (e).)

ATTACHMENT B

PUBLIC UTILITY COMMISSION OF TEXAS

MEMORANDUM

TO: Chairman Pat Wood, III
Commissioner Judy Walsh
Commissioner Patricia Curran

FROM: Ann M. Coffin
Assistant Director
Office of Customer Protection
Bill Magness
Director
Office of Customer Protection

DATE: October 29, 1997

RE: On Agenda for November 4, 1997 Open Meeting
Project No. 18000: Informal Dispute Resolution

Office of Customer Protection Enforcement Policy regarding Rights of Telecommunications Utilities and Property Owners under PURA Building Access Provisions.

The Public Utility Commission of Texas (Commission) has recently been asked to address implementation and compliance issues concerning the "building access" provisions of the Public Utility Regulatory Act (PURA) §§ 54.259 and 54.260. The building access provisions of PURA were adopted during the 1995 legislative session in an effort to guarantee telecommunications utilities access to public and privately owned property for the provision of competitive telecommunications services. To date, the Commission has not addressed compliance issues associated with the building access provisions of PURA. As competition becomes a reality, telecommunications utilities have begun to raise concerns regarding their ability to access multi-tenant buildings in order to provide telecommunications services to the building's tenants. Specifically, the telecommunications utilities are concerned that property owners may be placing unreasonable terms and conditions on building access to the detriment of the developing competitive telecommunications market.

In order to quickly respond to these concerns and provide both telecommunications utilities and property owners the benefit of our interpretation of the provisions set forth in PURA §§ 54.259 and 54.260, the Office of Customer Protection (OCP) has developed the following enforcement policy. In no way is this policy intended to affect shared tenant service (STS) providers' right of entry contracts with property owners. Rather, OCP seeks to facilitate negotiated building access arrangements between incumbent local exchange carriers, new entrants, and building owners by providing parties with OCP's position on these complex issues. Although the policy paper is intended to reduce the need for formal enforcement actions, in the event that parties allege violations of PURA §§ 54.259 and 54.260, OCP intends to use this policy to guide its determination of whether enforcement actions against parties should be initiated.

OVERVIEW OF PURA, SECTIONS 54.259 AND 54.260

In 1995, the Texas Legislature passed legislation that introduced sweeping changes in the way in which telecommunications utilities may operate and the way they are regulated in Texas. Specifically, the legislation encouraged competitive entry into the Texas local exchange telecommunications market. Since that time, the Commission has actively undertaken its responsibility to introduce competition into the local telecommunications marketplace. Inevitably, the statutory mandate to "open up" the telecommunications marketplace has caused an increase in the number of telecommunications utilities seeking access to multi-tenant buildings in order to provide, install, maintain, and operate facilities necessary for the provision of service to the buildings' tenants. This demand for access has raised a fundamental question regarding a telecommunications utility's "right" to access commercial build-

ings in order to install facilities to serve tenants of the building. In adopting PURA § 54.259, the state legislature answered this question by creating a right of access by the telecommunications utility to public and private property. In exchange for allowing the telecommunications utility access to the building, the state legislature adopted PURA § 54.260, which allows the property owner to charge reasonable compensation for the access privilege.

The provisions of PURA § 54.259 govern the right of a telecommunications utility to access public and private property by mandating access, on a nondiscriminatory basis, to any telecommunications utility whose services are requested by a tenant. Sections 54.259(a)(4) and (5) prohibit discrimination against a tenant or in favor of another tenant based on their selection of a telecommunications utility and prohibit a demand for payment from a tenant for allowing their chosen provider access to the building. These provisions protect tenants who exercise their "right" to choose among service providers from being subjected to actions such as increased rental charges or surcharge assessments that may occur as a result of requiring the building to give access to multiple providers. Similarly, Sections 54.259(a)(1-4) protect the telecommunications utility, whose services are requested by a tenant, against discriminatory actions by the property owner. These provisions prohibit the property owner from preventing or interfering with a telecommunications utility's installation of a service requested by a building tenant; discriminating against the telecommunications utility in regard to installation, terms, or compensation issues; and requiring "unreasonable payments" in exchange for access to the property. The principle underlying these provisions is that a property owner may not treat similarly situated tenants or utilities on a different basis and that access and rental charges must be assessed on an equal basis among telecommunications service providers.

In recognition that property owners have the right to impose reasonable conditions and/or limitations on a telecommunications utility's ability to access the property owners property, the state legislature enacted PURA § 54.260. Specifically, PURA § 54.260(a) (1)-(2) authorizes the imposition of conditions or limitations that are "reasonably necessary" to protect the security, appearance, and condition of the property and the safety of the property and persons on it, as well as the imposition of "reasonable" limitations on times available for installation. In addition, PURA § 54.260(a)(3)-(5) permits the property owner to limit the number of telecommunications utilities that may access the owners property if space constraints dictate such a limitation; require indemnification for certain costs, and; require the tenant or utility to bear the entire cost of installing, operating, or removing any facilities. Most significant, however, is PURA § 54.260(a)(6), which allows the property owner to require the utility to pay compensation that is "reasonable and nondiscriminatory" among telecommunications companies.

PUC JURISDICTION

A number of parties that filed comments in this project raised the issue of whether the Commission has jurisdiction over matters involving building access. Specifically, parties challenge the constitutionality of the provisions, as well as the Commission's authority to enforce PURA §§ 54.259 and 54.260 against property owners.

Pursuant to PURA §§ 15.021, 15.023, and 54.260, the Commission is clearly vested with jurisdiction to enforce the building access provisions of PURA. Specifically, PURA § 54.260(b) states that "*notwithstanding any other law, the commission has jurisdiction to enforce this section.*" (emphasis added). Without question, the Commission has jurisdiction over the operations and services of telecommunications utilities operating in Texas. In light of the statutory language in PURA § 54.260(b) and the telecommunications expertise that the Commission brings to resolving building access issues, the Commission can reasonably conclude that it has primary jurisdiction over building access issues involving disputes between telecommunications utilities and property owners. Thus, any remedial relief or administrative penalty action ordered by the Commission would extend to property owners on issues which involve the rights of telecommunications utilities in building access situations.

ENFORCEMENT POLICY

In enacting PURA § 54.259, the Legislature sought to encourage competition in the local telecommunications market by facilitating competitive provider access to customers in privately owned multi-tenant buildings. It is with this in mind that OCP has crafted an enforcement policy on the building access issue that attempts to balance the rights of both service providers and property owners. OCP emphasizes that this enforcement policy does not constitute a rule or order of the Commission. Rather, the policy seeks to establish the parameters for interpreting PURA §§ 54.259 and 54.260 and guide compliance efforts in this area.

The positions of the parties affected by this issue are diverse. The primary areas of conflict center around the parties' positions regarding the limits of the "discrimination" and "unreasonable payment" terms in PURA §§ 54.259 and 54.260, respectively. Specifically, the telecommunications utilities argue that absent some regulatory limits on the compensation issue, property owners have an incentive to extract monopoly rents for access. The utilities argue that competitive telecommunications options enhance the market value of the building and that any compensation to property owners must be minimal and take into consideration the building enhancement that results from the provision of competitive telecommunications services. Representatives of property owners, on the other hand, argue that the free market must be allowed to dictate terms, conditions, and compensation for access to a building's risers and conduits. These parties also argue that simply looking at the quantity of space to be used by the telecommunications utility does not take into account the value of the property, the nature of the improvements, its location, or the quality or size of the "market" created by the property owner for the telecommunications utility.

I. BASIS FOR DETERMINING REASONABLE COMPENSATION

Given the complexity of the issue, it is unlikely that a single compensation method can be found for each type of space requirement. The basic underlying principle, however, for any cost methodology related to building compensation issues is that property managers must impose the same costs, methodology, and rates on any telecommunications utility which gains access to the building. This approach ensures that competitive telecommunications services are available to tenants without the imposition of reasonable building restrictions by property owners. Granting building tenants access to competitive carriers is central to achieving PURA's goal of making competitive telecommunications service alternatives available for all Texans and their businesses, regardless of whether they live and work in a single family home or a multi-tenant building. Although the real estate industry, in general, is controlled by the free market, building access is a market segment that is not subject to free market forces. Rather, the property owner, by virtue of his ability to control access to the tenant acts as a gatekeeper through whom telecommunications utilities must gain passage. The exercise of this control enables the property owner to dictate terms and conditions of the building access arrangement that may grant access to one telecommunications utility, but deny access to another. In addition, the telecommunications utility cannot freely "walk away" from the terms and conditions placed by the building owner on the access arrangement, because the utility must have access to that particular building in order to provide service to its customer who is a tenant in that building. In order to address the absence of free market control over building access issues, the Legislature established compensation requirements for property owners. Specifically, the Legislature required that compensation for access be reasonable and nondiscriminatory.

The ability of the property owner to charge compensation which is reasonable and nondiscriminatory does not, however, imply that every telecommunications utility must be treated identically. Rather, it requires that a telecommunications utility be offered the same terms, conditions, and compensation arrangement as its similarly situated counterpart. This interpretation preserves not only the right of the parties to freely engage in commercial transactions wherein a service provider seeks access to private property, but also ensures that the property owner does not exert control over the building access arrangement in a manner that is unreasonable or discriminatory to the telecommunications utility.

In establishing the parameters applicable to the term "reasonable" compensation, it is important to distinguish between buildings in which the property owner has moved to a single minimum point of entry (MPOE), and thus owns all wiring inside the point of demarcation where the main line enters the building. In such instances, the telecommunications utilities must compensate the property owner for the use of cable distribution facilities. In multi-tenant buildings where telecommunications utilities maintain ownership of their wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), telecommunications utilities must compensate the property owner for use of building space.

A. Basis for determining reasonable compensation in a single demarcation point system.

In instances in which the property owner has assumed responsibility and ownership of wiring beyond the MPOE, the telecommunications utility may decide to utilize the building's existing cable distribution facilities. A property owner may charge for use of distribution facilities on the owners side of the demarcation point in a number of different ways. For instance, the property owner may base compensation

on a per pair, per circuit or per conduit or sheath basis. Without question, the charge for use of distribution facilities on the owner's side of the demarcation point may take into consideration the type of facilities used by the property owner in providing telecommunication services. In negotiating compensation terms for the use of the property owner's distribution facilities, parties may consider factors such as the amount of facilities investment, the useful life of the facilities, tax and a reasonable rate of return.

A property owner may also seek compensation for the physical space used by the utility in the building's equipment room and any actual costs associated with the utility's use of the building. The property owner, by controlling building access, manages an essential element in the delivery of telecommunications to the tenants in that building. As such, the price of equipment room space leased to utilities to provide service to tenants in that building should be based on the actual economic cost of the space and not on the number of tenants served or the revenues generated by the carrier for the provision of telecommunications services to the building's tenants. Compensation in this manner is reasonable because it ensures similar terms and conditions for all providers.

B. Basis for determining reasonable compensation in a multiple demarcation point system.

In multi-tenant buildings, where the telecommunications utility maintains ownership of the wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), the property owner may receive compensation for the telecommunications utility's use of the rental space in the equipment room, use of the building's conduit facilities, and any actual costs associated with the utility's use of the building. Compensation for rental floor space, as well as the use of the building conduit facilities should be based on the rental value in the marketplace of the property used by the provider, not on the type of facilities used, the revenues generated, or the number of customers served.

Compensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space.

The basis of any compensation mechanism should be to compensate the property owner for the space used, regardless of the number of end use customers served or the revenues generated by the telecommunications carrier. For this reason, use of the square foot rental rate for use of the basement and riser space is a reasonable basis of compensation in buildings with multiple demarcation systems. Lease rates for commercial property are an appropriate guide for determining compensation for access to the building because commercial leases not only reflect the variation in rental rates depending on the location and desirability of a particular building, but indicate what tenants are willing to pay for the amount of square footage being used by the tenant in the same marketplace and for the same type of space. This method of compensation ensures that the property owner is paid the fair market value for the use of the space and also recognizes that space in the basement of an office is not as valuable as retail space in a section of the building open to the public, or a corner office on the top floor of an office building.

II. APPLICABILITY OF THE DISCRIMINATION PROVISION IN PURA § 54.259 TO EXISTING SERVICE ARRANGEMENTS WITH INCUMBENT LOCAL EXCHANGE CARRIERS

PURA § 54.259 specifically prohibits a property owner from discriminating in favor of or against a tenant or telecommunications utility in any manner. This prohibition against discriminatory treatment is consistent with the overall terms of PURA which sought to advance the public welfare by promoting competition in the provision of telecommunications services in Texas. See PURA § 51.001 (a)-(c). While recognizing that many existing access arrangements were made prior to competitive entry, it is OCP's position that prior contractual agreements which provide for exclusivity or preferential terms for the incumbent telecommunications utility disserve the goals of PURA specifically and telecommunications competition generally. Accordingly, OCP interprets the PURA § 54.259 nondiscrimination provision to be applicable to pre-September 1, 1995 business arrangements between incumbent local exchange carriers and property owners.

Although the nondiscrimination provisions of PURA § 54.259 are applicable to pre-September 1, 1995 service arrangements, the non-discrimination provisions are triggered only at the time a competitive carrier seeks access to the building served by the incumbent telecommunications carrier. Therefore, service arrangements made prior to September 1, 1995, should be allowed to stay in place until a second carrier invokes the nondiscrimination requirement. Once a competitive carrier seeks access to the building, the nondiscrimination provisions are triggered, and the property owner must either treat all carriers the same as the incumbent "in relation to the installation, terms, conditions, and compensation of telecommunications services facilities to a tenant on the owners property"¹, or re-negotiate with the incumbent to treat it the same as all other carriers seeking access.

Because the legislative intent behind PURA §§ 54.259 and 54.260 is to foster competition, not provide protected status to the incumbent, compensation arrangements for building access that apply only to new entrant telecommunications utilities or new customers of an incumbent telecommunications utility are not reasonable. Every provider of telecommunications service must charge rates that recover its costs. At the same time, every provider's prices are nonstrained by the prices of its competitors. If the incumbent is paying no fee for building access, it certainly will have a cost advantage over its new entrant competitors that are paying such a fee. Exempting incumbents from paying for building access inevitably impacts competitors adversely because of the comparative cost advantage the incumbent gains as a result. Accordingly, when a new provider enters a commercial property, the treatment of the incumbent must be revised to match that accorded to the new provider. Thus, if private property owners require new providers to pay a fee, the incumbent should begin to pay a fee calculated in the same manner and on the same basis.

III. PROSPECTIVE CUSTOMERS AS A CONDITION OF ACCESS

As more and more telecommunications utilities seek access to a building to provide service to the building's tenants, space limitations associated with access will inevitably arise. PURA § 54.260 authorizes a property owner to reasonably limit the number of utilities that have access to the property if the owner can demonstrate that space constraints justify such a situation. OCP is concerned however, that some carriers may attempt to preemptively "reserve" space in the building to the exclusion of subsequent carriers who may have the intention of serving the building on a more immediate basis. OCP will interpret such behavior on the part of the telecommunications utility to be anticompetitive. In addition, any restrictions on building access that impose unreasonable delays on a competitive carriers provision of telecommunications service to a customer will be considered discriminatory on the part of the property owner. OCP believes that the appropriate remedial course for either activity is enforcement action by the Commission.

IV. CARRIER OF LAST RESORT OBLIGATION AND BUILDING ACCESS

Several parties commented regarding a telecommunications utility's carrier of last resort (COLR) obligation in the context of the building access issue. Specifically, parties sought clarification on whether a telecommunications utility with COLR obligations may refuse to serve a building if a property owner seeks compensation for access. Because the implications associated with the COLR obligations extend beyond the building access, OCP declines to address the issue in this enforcement policy.

V. CONCLUSION

In enacting PURA §§ 54.259 and 54.260, the legislature sought to facilitate the development of local competition by ensuring that new entrants receive access to tenants on the property based on reasonable compensation and equal, non-discriminatory terms. Under these conditions, will residential and business customers in multi-tenant buildings experience the benefits of competition in the form of lower rates and expanded choices for products and services. OCP encourages telecommunications utilities and property owners to negotiate late building access arrangements that will enable utilities to compete for business on the basis of price and the provision of expeditious service. These types of access arrangements will benefit not only telecommunications utilities and property owners, but customers as well.

Although OCP's enforcement policy regarding building access issues is intended to facilitate building access arrangements between parties and reduce the necessity for formal enforcement actions, parties should be aware that the policy statements

¹ See PURA § 54.259(a)(3).

and proposals for resolving disputes developed in Project No. 18000 do not constitute commission rules and resolving disputes developed in Project No. 18000 do not constitute commission rules and orders, and do not deprive parties of rights under PURA or the Administrative Procedure Act. Project No. 18000 represents the Commission's effort to expedite settlement of business disputes in the increasingly competitive markets for telecommunications and electric services.

Please contact Ann Coffin (6-7144) or Bill Magness (6-7145) if you would like additional information on this matter.

Attachment

cc: Adib, Pwviz; Laakso, John; Bellon, Paul; Mueller, Paula; Bertin, Suzanne; Prior, Dianne; Davis, Stephen; Sapperstein, Scott; Dempsey, Roni; Silverstein, Alison; Featherston, David; Slocum, Bret; Hamilton, Kathy; Srinivasa, Nara; Jenkins, Brenda; Whittington, Pam; Kjellstrand, Leslie; Wilson, Martin; Kyle, Sandra; Vogel, Carole.

ATTACHMENT C

NARUC—SUMMER 1998

RESOLUTION REGARDING NONDISCRIMINATORY ACCESS TO BUILDINGS FOR TELECOMMUNICATIONS CARRIERS

WHEREAS, Historically, local telephone service was provided by only one carrier in any given region; and

WHEREAS, In the historic one-carrier environment, owners of multi-unit buildings typically needed the local telephone company to provide telephone service throughout their buildings; and

WHEREAS, Historically, owners of multi-unit buildings granted the one local telephone company access to their buildings for the purpose of installing and maintaining facilities for the provision of local telephone service; and

WHEREAS, Competitive facilities-based providers of telecommunications services offer substantial benefits for consumers; and

WHEREAS, In order to serve tenants in multi-unit buildings, competitive facilities-based providers of telecommunications services require access to internal building facilities such as inside wiring, riser cables, telephone closets, and rooftops; and

WHEREAS, Facilities-based competitive local exchange carriers, including wireline and fixed wireless providers, have reported concerns regarding their ability to obtain access to multi-unit buildings at nondiscriminatory terms, conditions, and rates that would enable consumers within those buildings to enjoy many of the benefits of telecommunications competition that would otherwise be available; and

WHEREAS, All States and Territories, as well as the Federal Government, have embraced competition in the provision of local exchange and other telecommunications services as the preferred communications policy; and

WHEREAS, Connecticut, Ohio, and Texas already utilize statutes and rules that prohibit building owners from denying tenants in multi-unit buildings access to their telecommunications carrier of choice; and

WHEREAS, The President of NARUC testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition that "(f)or competition to develop, competitors have to have equal access. They have to be able to reach their customers and building access is one of the things that state commissions are looking at all across the country."; and

WHEREAS, The attributes of incumbent carriers such as free and easy building access should not determine the relative competitive positions of telecommunications carriers; and

WHEREAS, The property rights of building owners must be honored without fostering discrimination and unequal access; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, urges State and Territory regulators to closely evaluate the building access issues in their states and territories, because successful resolution of these issues is important to the development of local telecommunications competition; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscrim-

inatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider.

Sponsored by the Committee on Communications

Adopted July 29, 1998

Mr. TAUZIN. The Chair is now pleased to recognize the gentleman from Pennsylvania, himself an experienced hand in the communications world. Mr. Klink.

Mr. KLINK. That is true. A recovering broadcaster.

Let me just, first of all, I was kind of stricken as we sit here at the hearing, at the position that many of us are in, including Chairman Tauzin. I think the chairman, if you will recall back, and one of the first issues that you and I talked about in depth was private property rights and we worked, all of us, so hard on coming up with competitiveness in the Telecom Act. So we find two things that we feel very passionately about clashing before us here today. And the answers are not easy.

I just wanted to go back. I have got the older version of the Telecom Act, but I think this is the section 207, although it was different. And I want to just read from it, "Directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewers' ability to receive video programming from over-the-air broadcast station or direct broadcast satellite service. The committee intends this section to preempt enforcement of State or local statutes or regulations or State or local legal requirements, restrictive covenants, or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or satellite receivers designed for reception of DBS service. Existing regulations including but not limited to zoning laws, ordinances, restrictive covenants, or homeowners associations' rules shall be unenforceable to the extent contrary to this section."

So what we have said to the building owners and to the realtors and to the people who manage property, we are going to give you an exemption so all those here comes the big Federal Government that is usually thought of as being a pain in everybody's posterior, we are going to give you an exemption to all these local problems that you could have and now you are sitting here before us today telling us you don't want to work with us to get that service the last couple of hundred of feet to the consumers out there that may desire this. And it gives me a little bit of a problem.

As I said, chairman, myself, others, we don't want to get into takings. We don't get into—private property means a lot to us. I own—I owned. I have sold it since I have been here to support my bad habits of being a Congressman. It costs you a lot to be down here—I mean, I was a property owner, a commercial property, rental properties. I know what you go through.

On the other hand, you know, we have got some exciting possibilities here and that bottleneck exists just maybe 100 or 200 feet away from the people that we wanted to serve, the people designed to benefit by this Act, that is the American people, being able to engage in purchasing as another option these competitive services. So I would ask for a reaction to that.

Mr. HEATWOLE. Well, I am going to speak to residential, multi-family. Your first comment and from what I understand of the section you read was dealing with off-air signals and, as I had spoken

earlier, in the properties where we actually own the cable TV system, we either give it away—the off-air signal or we sell it for \$12 a month. The chairman asked, you know, what do you tell residents what is available? Well, in our area, if we don't do it, build a system as a landlord, you have the incumbent provider. Those are the two things that are available as far as television is concerned.

You know, I don't know the answer to all these questions, but generally, as we have stated, competition in the marketplace of residential units and commercial units requires that you provide certain services. Theoretically, we wouldn't have to have telephone service in any of our units, but I doubt that we would have very many residents because most people want telephone service. Most people want television service, either off-air or cable TV. To be competitive in a marketplace, we simply cannot deny that service.

And, in Virginia, as far as residents are concerned and I will read from the Landlord Tenant Act "Access of tenant to cable, satellite, or other television facilities" and it goes on to any provider, it says "No landlord shall demand or accept payment of any fee, charge, or other thing of value from any provider of all these things in exchange for giving the tenants of such landlord access to such services and no landlord shall demand or accept any such payment from any tenants in exchange thereof unless landlord is itself the provider of the service."

Mr. KLINK. Mr. Heatwole, first of all, I am not here to defend what they have done in Virginia. We have got 49 other States and Commonwealths that we have to deal with.

Mr. HEATWOLE. Maybe it is the solution.

Mr. KLINK. Well, it may or may not be. But the point here is—and I think, as my distinguished colleague, Ms. Eshoo, said a few moments ago in her questioning—if we have thousands of people out there and perhaps tens of thousands of people who own buildings. And perhaps now if you are getting into residential, it is millions. I don't even know the number and I don't think anybody here knows the number.

If this industry, which is booming and which really could bring, I think, great competition—I think broad-band technology has great possibilities that probably none of us in this room has ever thought of—if we are going to bring that to the American people, which is one of the things that we—we didn't have broad-band in mind when we did the Telecom Law, but we want to see new technologies. We want to see things happen. We want to see industries develop. We are in a communications era, an informational era. I think we all agree with that.

If they have to go building-by-building and sometimes in these negotiations, I think we all know, can take a year or more to just kind of, you know, it is an attorneys relief act which there are probably some people in this room that would like that idea. There are probably a lot that wouldn't.

The point is that if we in this committee and in this Congress said to the building owners and the people, as we did as I read that section: We are willing to wave as much of a wand as we have here in the Federal Government to relieve you from all of the problems that you could have with zoning laws and other limiting laws by

the local governments in an effort to get the communications into your building, whether it is direct, off-the-air, I mean the intention is clear. We want to get the service, whatever it is, to the people.

And you remember, when we wrote this law in 1996, we were replacing a law that was written in 1934 before television was even invented. And so we realized as we were doing this that we are writing a law that deals with technologies that we haven't even dreamed of, haven't been invented yet, but we have to be able—and we had long, long discussions—how do we get these technologies that we don't even know about as we write this law—to the people?

Now we come here today and we take all of your objections very seriously, but how do we get that last few hundred feet? And we asking you to go with us and there doesn't seem to be a willingness because, again, Ms. Eshoo asked about could we use the Florida law, which we understand has not been enacted, that we understand, though, at least in Florida, there was agreement between the realtors and their building owners—I think Mr. Bitz said it was a disagreement within the family. How can we get to where we need to be? How can we give Mr. Sugrue the direction that the FCC needs to get somewhere that is not going to be onerous to you but, at the same time, allows us to see that this technology is out there as a viable option for the consumers across this Nation and the next technology that we have a year from now or 10 years from now.

Mr. Bitz.

Mr. BITZ. Earlier in my presentation, I stated that I was not aware in our company at least—and I can only speak for my own business experience—of any tenant in our commercial office buildings who is not satisfied with their telecommunications service. The voice that is missing at this table is you have competing industries at the moment, but you don't have anyone speaking for the consumer directly and I can only reflect the anecdotal experience that I have with over 2,000 tenants. I—in my experience. And I speak quite directly—is that I am not aware of any of our commercial tenants who are not well-served by the existing amount of telecommunications competition they already have. I can't speak for residential or the commercial industry. In my experience, that is certainly the case and while not every company can get into every building, that is not the issue. The question is are the tenants adequately served. And, in my perspective, they certainly do appear to be served.

On our end, think of the problems there would be if we were forced to have to deal with every single competitive provider. This gentleman indicated there are now 72 of them. Trying to deal with 72 companies to deal with the same service again and again and again in small-and medium-sized buildings would not serve the public interest, which, at that point, would already have been well taken care of by having 4 or 5 or 3 or 6 providers already in a building. So what we are saying is that we believe the competition is already there in the commercial business.

Mr. KLINK. Mr. Rouhana.

Mr. ROUHANA. What Brent says is true. He is one of the enlightened landlords that does allow people to have access. The problem

is there are a million of them. But what he also illustrates is how good negotiators landlords are. Because when asked the question: Do you have any compromise at all? He says, no. And the truth is that is the process we have. And we will offer any number of compromises: Connecticut, Texas, Florida, a brand-new one. We are trying to reach a compromise. That is the whole point of this from our point of view. And there are ways to protect every single issue that has been raised here and we are more than willing to work through those. We do need a solution though. And it needs to be a national one.

And now just one last thing about the FCC. Two years ago at the FCC, these issues that we have been talking about today were raised in rulemaking proceedings and they haven't been answered. And the primary reason is the Commission, rightfully I believe, is unclear about its ability to act. They legitimately feel they don't have a clear mandate. We think they do have a clear mandate, but they believe they don't. So somebody needs to clarify it and I don't know who you go to when a regulatory authority doesn't believe they do, except to the legislative. So we are here and we are going to need either some kind of a clear direction or a law.

Mr. KLINK. Mr. Windhausen.

Mr. WINDHAUSEN. If I could just add in response to a couple of things that Mr. Bitz also said, we do have examples of consumers who sought the right to receive service from an individual CLEC and they were denied that right so we do know of many unhappy consumers, tenants. It is also that Mr. Bitz mentioned that we are looking for the right for 72 different companies to get into each building. That is not what we are looking for. For the most part, what happens is the economics work out that once you have two or three or perhaps four CLECs into a building, no other CLEC is going to seek access because it is just not economic for them.

We are only seeking access where there is space available. If the landlord can demonstrate that there is no space anymore to accommodate anyone else, that is fine. That is a legitimate reason for him to say, no, I am sorry. I can't take in any more CLECs. And that is a reason that we will understand and we are very happy if that would be written into the legislation.

Mr. KLINK. I thank you very much. Mr. Chairman, you have been very kind with the time. I just want to—and the hour is getting late. If nothing else comes out of my line of questioning, I just think it is important that we recognize that we have not come to the business community or those who are investing and putting up buildings and own and manage buildings and saying we want you to give and you haven't got any. We have actually—and I think you know this and the other members of the committee know it because they were here—we took their interests into consideration, very high consideration, when this legislation was written, when it was passed and we are just asking for them to come to the table.

And the intransigence that I hear. I hope that that is just for a day. Maybe you weren't prepared for the question. I hope that there is an ability, really, to be able to work together so we can get through this. We are not looking for a steamroller to come over the top of you, but, on the other hand, we want to get this technology out to the public. Thank you, Mr. Chairman, for your time.

Mr. TAUZIN. Thank you, Mr. Klink. I may point out to you, Mr. Rouhana, that generally when the FCC has trouble finding, you know, authority to do something, it is generally because they are reluctant to do something because when they want to do something they generally find authority to do something.

Mr. ROUHANA. Well said.

Mr. TAUZIN. But I understand the argument. The gentlelady from Missouri, the Show Me State. By the way, Karen, it is the common practice in Federal court when you go there to argue a case, the court will often ask you how are you here? I mean, what authority, what jurisdiction do we have over your case? A cajun lawyer once said, now, I came by the bus.

But the Commission is asking how are we are? What authority do they have? And it is a good question. Ms. McCarthy.

Ms. MCCARTHY. And I can appreciate, Mr. Chairman, that they would like us to address the answer and make it easier for them. But I come out of a background of State government feel pretty strongly if States like Connecticut and Ohio and Nebraska and Texas and even Florida are in the process or have addressed this issue, that probably the question for this committee today is, you know, if there were to be Federal legislation, what should be in it? How is it working out there in the States? Is there some model for us?

And in any of these States, have we got reciprocity going so that if a building owner is required to provide access on demand, are they also required to request service on demand? Is that in any of the State models? Mr. Rouhana, you made begin, but anyone who would like to weigh in. I would like to know your thoughts on what is out there and working. What would be ideal, if anything, for us to do.

Mr. ROUHANA. Well, I think that both Connecticut and Texas have a rather balanced approach to this and I think either one of them is particularly good. Personally, I think the Connecticut Act is the better of the two because it deals with the time problem that I have been talking about today more directly. Happily, in neither of those States has anything bad happened to the real estate market because of the passage of the Act. We haven't had, you know, assaults of thousands of telecom companies on people and there hasn't been a—I don't think there has been any diminution of the value of the real estate. And certainly wouldn't want to see that happen.

Mr. TAUZIN. Would the gentlelady yield? I think she has raised a good question. Do any of those statutes provide an obligation to serve?

Mr. ROUHANA. I don't know of any that does.

Mr. TAUZIN. Balanced with the right to be served?

I thank the gentlelady.

Ms. CASE. Communities that are entrenched within these forced access communities and there is no competition in these communities because of the forced access, because they have a legal and enforceable right to be there, being the local incumbent. So you are less likely to have choice and competition. We have zero choice and competition right now for two new development deals in Connecticut and in New Jersey. And the one community that I referenced

that was in New York was serviced, there were no customer service issues. They didn't even have an obligation to provide service within 90 days of a resident moving in.

Ms. MCCARTHY. Mr. Chairman, I apologize to the panel. Why I was late was I sit on the Energy Power Subcommittee and we are grappling with a similar principle there that we are talking about here in telecom—and the full committee and all these members will deal with eventually—of this reciprocity, as we deregulate how energy is delivered into the home and the wiring that is in place now to address these telecom issues will be critical to many of the issues that we are grappling with in another subcommittee.

So, Mr. Chairman, I would really like to hear more thought on this reciprocity idea and the rights that go both ways if you wouldn't mind a moment more of discussion by—

Mr. TAUZIN. Absolutely. The gentlelady controls the time. If any of you wants to discuss this with her. How does it work in a competitive—we understand a monopoly market. You have got a service. You have the right to put the wires in in service. But you also have the service if you want your service. How does that work in a competitive market? Ms. McCarthy has, I think, raised an excellent question.

Mr. PESTANA. In New York State, the cable operators, such as Time Warner, have to provide service to everybody. All residents that want cable get service, regardless of how much it costs us. The competition, RCN in New York, obviously they just pick the right buildings or the ones that have the right financial solutions for them. So they compete unit-by-unit in some locations and they compete on a bulk basis sometimes where we basically get excluded because we have the equipment there, but the landlord signs an agreement where everybody has to hook up to RCN. So we have those kinds of situations. But we are required to serve everybody.

Ms. MCCARTHY. Mr. Rouhana, do you want to speak to this please?

Mr. TAUZIN. Yes, address the gentlelady. She controls the time.

Mr. ROUHANA. Yes, I think that there is a physical issue involved here which is literally the number of places that network infrastructure has to be created physically in order to deliver service to everyone. So what we have been talking about today is one of the impediments to actually going to as many places as possible which is building access. And I said a little bit earlier that we have got to get as many commercial places as we can so we can build the infrastructure, then start to go to the residential markets. And that you can't physically get there any faster than you can get there, but slowing us down is not going to get us there faster. So, by making it harder for us to get into buildings, we won't speed up the process of getting to everyone.

So I don't know quite how to answer the question except to say physically we have to create the network. That is a one building at a time thing. There are a million buildings to build it to. We have got to get access first to build to them. That is just commercial. Then there is is it 30 million homes some much bigger number of multiple dwelling units and then homes that have to be eventually reached. And it is going to take a combined effort of multiple carriers doing that to get an alternative infrastructure built across

the country. And it is going to be cable providers and competitive carriers, using a variety of technologies, that ultimately get us an alternative infrastructure in all of the facilities we want. But, clearly, that access, we don't have a shot at that.

Ms. MCCARTHY. Have you ever refused service when requested by a building owner?

Mr. ROUHANA. By a building owner?

Ms. MCCARTHY. Yes.

Mr. ROUHANA. Building owners don't ask us for service, tenants do. If we get an order from a tenant we try to serve them, if our network can get to them. It is a physical question. If we can get our network to a tenant, we want to serve them. We would like to serve everybody.

Ms. MCCARTHY. Mr. Bitz.

Mr. BITZ. With due respect to my colleague next to me, we have been turned down. We have contracts with the firm that Mr. Rouhana represents. We also have buildings where because I assume they are not attractive, they have elected not to sign up on those buildings. We have 102 in the Mid-Atlantic area.

So the issue of reciprocity is very important because right now we have many buildings where we would like to have service where we can't because maybe they are too small or the tenant mix is not desirable from a telecommunications service providers' perspective. So that is an issue of concern to our industry, because, I have mentioned before, the real point that we are looking to is to have happy tenants. The amount of revenue that we get out of this is really very small. I think it is .8 cents per square foot compared to \$19 per square foot for rent. So it is infinitesimal relative to our overall business model.

Ms. MCCARTHY. Mr. Rouhana.

Mr. ROUHANA. I just need to respond to that because if there is a place we haven't gone it is because we physically can't get there. I am back to my same issue. The process of constructing a network across the entire Nation takes a period of time. Time is the No. 1 impediment to having competition as quickly as possible. I mean, you want to have it as fast as you can have it. Building access is a key impediment to getting there. So we could get into a circular discussion about which came first, but the fact is, if we can't build the network to places, we can't get to the next place.

Ms. MCCARTHY. Well, my original question that I posed and directed to you was about the fact that if Federal legislation is needed or created what should be in it? And this question of reciprocity is one that I believe the subcommittee would entertain as a component of that, if we go down that path. And so that is why I was seeking thoughts on whether the question of reciprocity should be in it. Let me hear from—what is your name? I am sorry—Mr. Windhausen.

Mr. WINDHAUSEN. That's right. Thank you. Earlier there was reference made to Connecticut and Texas State statutes on these issues. They do not contain a reciprocity requirement, I imagine because they found it wasn't necessary. These companies are common carriers. They already have an obligation under the law to serve and to serve in a nondiscriminatory basis. I think the way the economics work out is once you are in a building and once you are

wired, your incentive then, as the CLEC, as the competitor, is to put as much traffic onto those facilities as possible. So it only makes sense for you to serve as many consumers in that building as want service. So there is no need for that kind of legislative requirement for reciprocity because it will happen anyway, once the access to the building is granted.

Mr. PRAK. If I might, Ms. McCarthy, on the question of obligation to serve, I represent the over-the-air television industry, KNBC, Kansas City, for example. We have been told by the Congress and by the FCC to build out digital television facilities to serve everyone. Our concern in this is that we don't want landlords standing in the way of folks who reside in their buildings being able to receive free, over-the-air television service, however they may receive it, whether they receive it with an over-the-air antennae or through cable or shortly, I guess, there will be the opportunity to receive it through DBS.

Ms. MCCARTHY. Mr. Chairman, I am not sure there is any other individual who wishes to speak. Mr. Sugrue?

Mr. TAUZIN. Any other want to respond?

Mr. BURNSIDE. Yes, Mr. Chairman, Ms. McCarthy, I would just like to return, for a moment, to direct your focus to the cable competition side, with respect to your core question. When you passed the 1996 Telecommunications Act, part of it was to create a concept called "OVS" or open video systems. And one of the things that the cable industry has had time with since you passed that Act is the fact that, as an OVS operator, it is not required to adhere to the franchising licensing build out under the same terms and conditions that the existing cable operator is required to build out.

However, I think you recognized when you did that part of the Act, that it was absolutely impossible to expect a new competitor, a new entrant, coming into a marketplace, to overbuild an existing market which basically is a monopoly, even though 67 percent of the customers homes take it. You could not simply ask a new entrant to build out all of New York City at the same time and under the same conditions in which the new entrant 17 or 15 or 25 years ago did.

So I think it is a bit disingenuous for that industry to expect new entrants on the cable side to be held to the same standards as opposed to what I think you tried to achieve, and that was to give a new entrant competition and opportunity to get started and then extend its market, extend its network, as it was financially and physically possible.

Ms. MCCARTHY. Mr. Sugrue.

Mr. SUGRUE. If I could just respond. Because I don't want to leave the subcommittee confused about the Commission's attitude toward its own jurisdiction in this area. The Commission has never said aye or nay with respect to telecommunications services and Winstar, for example. Part of that is the focus has been on video because, in part, the law was sort of shaped a little bit with video in mind. Part because Winstar really wasn't doing much when the law passed and was being debated 4 years ago in 1995 and 1996.

Mr. TAUZIN. It is already an old law.

Mr. SUGRUE. In a way it is. We also have a Commission with four new commissioners since the law passed and a new Wireless

Bureau chief and we tend to take a fresh look, shall we say, at these issues.

Mr. TAUZIN. Don't use that term.

Mr. SUGRUE. I know. I was deliberately provocative. But so I don't want to mislead people. We want to look at this issue hard and my endorsement of some clarification is just to make our job easier, frankly, if we had some.

Ms. MCCARTHY. Mr. Chairman, thank you both for this hearing and for the time you have given me to explore this question. I really would be curious to have staff look into the States and how it is working out there and appreciate the opportunity to be a part of this.

Mr. TAUZIN. Thank you very much and thank we have a lot of information that we will share with you on those State laws and at least as much background as we have gathered and, perhaps, the witnesses who are experiencing real world, as you said, in the mud operations can give us some insight as to their specific observations on how well those State laws are working.

The Chair will recognize the ranking minority member, Mr. Markey for as much time as you shall require.

Mr. MARKEY. Thank you, Mr. Chairman, very much. I just want to thank you for holding this hearing and for the excellent testimony that we received from the witnesses today. I think we pretty much had the issue framed for us today. We have voice and video and data industry that wants to provide competition, lower prices, better service to the one-third of Americans that live in apartment buildings and to businesses that operate in large structures across the country. And, on the other hand, we have legitimate concerns on the part of the real estate industry: the tenant safety, constitutional property right issues, compensation issues that all legitimately are being raised by the other side.

I think that our task is now very well framed for us. I think it is important for us to get it and get it resolved. And I would hope that this would be the kick-off of our effort to find some common-sense solution that legitimately deals with the issues raised by all parties, but toward the goal of ensuring that there is low-priced competition available for every tenant in America. And I thank you for holding the hearing.

Mr. TAUZIN. I thank my friend. The Chair recognizes himself. Let me, at this point, mention that PCIA has also submitted testimony for the record. Without objection, that testimony will be made as part of the record.

[The prepared statement of PCIA follows:]

May 12, 1999

THE HONORABLE W.J. (BILLY) TAUZIN
 United States House of Representatives
 Chairman, Subcommittee on Telecommunications, Trade & Consumer Protection
 2183 Rayburn HOB
 Washington, DC 20515

DEAR CHAIRMAN TAUZIN: I want to commend you and the Telecommunications Subcommittee for conducting this week's hearing on the issue of access to multi-tenant buildings by competitive telecommunications providers. PCIA, on behalf of its Wireless Broadband Alliance members, looks forward to working with the Subcommittee as it explores means of promoting wireless broadband alternatives for the millions of small businesses and residential customers that live and work in multi-tenant buildings. As you move forward with your consideration of this issue, I hope

you will take into consideration the basic principles that I have outlined below. I respectfully request that you include this letter in the record of your hearing.

Consumers must have a choice of "last mile" broadband access providers if Congress' vision of a competitive telecommunications market is to be realized. Wireless broadband providers offer a real alternative to phone companies' DSL services and to cable modems. However, if these new wireless services are to achieve their potential, it is crucial for these wireless companies to have non-discriminatory access to buildings where incumbents now provide service.

Wireless broadband licensees are more than capable of offering the full array of broadband telecommunications services. The most established of these companies, WinStar and Teligent, are deploying service across the country today. Yet there are hundreds of companies recently licensed by the FCC who are prepared to offer high-speed voice, data, video-on-demand and Internet access to small businesses and residential consumers. These potential customers, who by and large have not had the opportunity to experience true broadband technologies, are often located in multi-tenant buildings under the control of a landlord or condominium association. For wireless broadband operators to offer these extraordinary services to these consumers, they must first have access to the buildings. This requires the consent of third parties (e.g., landlords or management agents) who often have made exclusive arrangements with the incumbent telephone company or cable company to serve the tenants in a building.

Some states have recognized the importance of mandating access for alternative telecommunications services in a multi-tenant environment. For example, Connecticut and Texas require, by statute, non-discriminatory access to buildings while the Ohio and Nebraska public utility commissions have mandated access. Last year, the National Association of State Regulatory Commissioners (NARUC) adopted a resolution supporting the rights of consumers in multi-tenant buildings to have a choice of telecommunications providers. Finally, this spring the State of Florida almost adopted legislation that would mandate access to buildings with reasonable compensation to building owners. Notably, this legislation garnered the support of the Building Owners and Managers Association (BOMA). Unfortunately, however, most states have yet to address this issue.

PCIA believes that the resolution of building access concerns demands a federal solution. Otherwise, wireless operators will face piece-meal and conflicting obstacles to their deployments across the country. Congress previously rejected the state-by-state approach to opening local markets to telecommunications competition through its adoption of the Telecommunications Act of 1996. It should do the same here through either express legislation or by directing the Federal Communications Commission to fashion access rules.

As you consider means of offering consumers a real choice in their broadband telecommunications providers, I urge you to keep several principles in mind. These principles will ensure that new telecommunications services are made available to all Americans while protecting the legitimate private property rights of building owners.

- *Non-discriminatory access to buildings:* The terms, conditions, and compensation for the installation of telecommunications facilities in multi-tenant buildings must not disadvantage one new entrant vis-a-vis another new entrant or new entrants vis-a-vis incumbent providers. Telecommunications carriers should compete to serve consumers on the basis of service quality and rates and should not succeed or fail in the market because of discrimination that tilts the playing field or prevents choice altogether.
- *Carrier assumption of installation and damage costs:* Installing carriers must assume the costs of installation as well as the responsibility for repairs and payments for damages to buildings. Building owners and the tenants occupying their buildings should be assured that the cost of any repairs for damages caused by facility installation should be assumed by the installing carrier.
- *No exclusivity:* Building owners should be prohibited from granting exclusive access to telecommunications carriers. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications service.
- *No charges to tenants for exercising choice:* Under no circumstances should a building owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.
- *Both commercial and residential multi-tenant environments should be included within a nondiscriminatory building access requirement.* As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As

a practical matter, in many urban areas it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of customers difficult. Small and medium-sized business tenants are often denied a choice of communications providers and do not have the clout in a building to compel the landlord to honor their choice of provider.

- *Reasonable accommodation of space limitations:* Space limitations in buildings most likely will not be an issue in practice. In the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building without serving commercial customers and requirements that carriers share certain facilities.
- *Building owners should receive reasonable compensation for building access:* Congress need not establish specific rates or rate formulas for access. Instead, Congress can establish a set of presumptions for the FCC or other government bodies to use to evaluate the reasonableness of a charge. This method allows parties to negotiate specific rates within the parameters defined by Congress. These parameters might include the following:
 - *Rates should not be based on revenues.* Congress should presume that a building owner's imposition of revenue sharing on a telecommunications carrier is *per se* unreasonable because it does not approximate cost-based pricing and suggests the extraction of monopoly rents.
 - *Rates must be nondiscriminatory.* Congress should require that rates for access to buildings be assessed on a nondiscriminatory basis. For example, if the ILEC does not pay for access to a multi-tenant building, neither should other telecommunications carriers. This would not bar the landlord from recovering reasonable out-of-pocket costs.
 - *Rates must be related to costs.* Building access rates must be related to the cost of access and must not be inflated by the building owner so as to render competitive telecommunications service within the building an uneconomic enterprise for more than one carrier.

The Telecommunications Act of 1996 clearly voices Congress's desire to promote facilities-based local exchange competition. Today, a new breed of facilities-based providers using wireless broadband technologies are ready to meet that goal. These companies will offer small businesses and residential customers the high-speed Internet access and other advanced services that are unavailable to them today. Customers deserve the right to choose the wireless alternative for receiving broadband access. Yet millions of potential customers will not have the opportunity to choose unless Congress adopts a building access regime that insures non-discriminatory access for all telecommunications providers.

Again, I thank you and the Committee for opening a dialogue on this important matter.

Best regards,

JAY KITCHEN
President,

Personal Communications Industry Association

cc: Chairman Bliley
Ranking Member Dingell
Members of Telecommunications Subcommittee

Mr. TAUZIN. Let me make a couple of comments. First of all, on section 207, I think it is interesting to note that one of the reasons why section 207 is there was to protect the right of the viewer to put up an antennae and receive the signal. The concern there was principally focused in on direct broadcast television—you are right—it was a video kind of concept.

But it was designed to make sure that, in fact, there wouldn't be a denial in State law, local laws, or property owners agreements that would restrict one of the property owners from, in fact, installing a DBS dish and, therefore, offering a competitive choice for the local incumbent cable. That was sort of the genesis, perhaps, of the section but it speaks of viewers, not owners, which is rather interesting. And I know the Commission is wrestling with that. What is the meaning of that term?

The Congress could well have said owners are not, you know, no restrictions shall be allowed to prevent owners, State laws, local laws, agreements among common owners, would prevent a single owner from putting up an antennae and receiving some of these services. But the law said viewers, not owners. Does that mean, then, that the owner of the property can't stand between the viewer, a tenant, and his right to have an antennae, whatever it takes to receive these signals.

While we were thinking video and while the Internet is mentioned twice in the 1996 Act, that is all the browser wasn't even invented until 1995. It was being invented at the same time we were trying to write a law about switch networks and we weren't even thinking about, you know, packet networks like the Internet. While all that is true, how does that law then, which was written with a video concept in mind, apply now to all sorts of wireless services and wired services, that will contain a lot more than video? That, indeed, could be integrated services and by all accounts will be integrated services. And those are interesting thoughts that I think we are going to take with us from this hearing.

In this testimony by PCIA, PCIA calls for a whole list of things they think would help. I would touch on them real quickly and just to give you an idea of how complex we view this task. They ask for nondiscriminatory access to buildings. Well, how many? How many people should have nondiscriminatory access to a single building? You mentioned how many members now in your association and that is growing. CLECs are growing. Companies are I mean, we have churned out all kinds of spectrums for all kinds of new users and providers out there. And they all want to get to our homes or our businesses.

How many would have nondiscriminatory access to the same building? Would they have it over a common wire? Common antennae? Or does everyone get to put their own system in? At what cost to the landowner, the property rights concerns? That is not easy to deal with.

PCIA mentions the carrier should assume the cost of insulation and damage cost. Well, did the monopoly incumbent telephone company have to pay for those costs? Did the owner have to pay for them? Is the new entrant going to be treated differently than the incumbent when it comes to cost and installation of those systems? How do you get parity there? Is everybody free or is everybody charged? And if you go everybody charged, who is going to set the charges? Is government going to be setting prices here? Determining whether it should be \$500 maximum and whether or not when I am in a hotel I should be charged that extra buck for a .10 call? You know, Mr. Markey raises that issue. Do we get into that? Do we dare go there?

No exclusivity. I notice the Florida statute, for example, touches that, but it says no exclusivity forward. So that there is no abrogating existing contracts. But what is a contract has a 25-year term? Take it or leave it. You want cable services, you can only have ours for the next 25 years. When cable was a monopoly and de facto legally then. And now all of a sudden we have got new competitors

who want to come in. Well, we have got an exclusive contract for 25 years and nobody should abrogate it. Not an easy little problem.

No charges to tenants for existing choice. Well, if the landowner has a lot of charges or the provider has additional charges to reach that tenant, you mean you can't pass that on the tenant? And who can? Under what circumstances? And how much? How much of an add-on can you make? Do we get into that? In a competitive marketplace where we are trying to deregulate, downsize the FCC's role, how much do you really want the FCC involved in all that, guys and gals?

And it goes on. I mean, they have got a whole list. For example, the reasonable compensation for the building owners' access, rates to be based on revenue. Well, again, are we going to get into all the criteria upon which rates are going to be based to compensate for the use of buildings or access to buildings to reach those viewers who now become not just viewers, but information service customers of the future?

The plate is full. I say it again. Thank you very much. You have enlightened us but you have also made our lives much more complex and for that we thank you because that means our jobs will continue.

The hearing stands adjourned.

[Whereupon, at 1 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:

STATEMENT OF THE COMMUNITY ASSOCIATIONS INSTITUTE

The Community Associations Institute (CAI)¹ appreciates the opportunity to address the Subcommittee on Telecommunications, Trade and Consumer Protection on behalf of the nation's condominium associations, cooperatives and planned communities to provide the following comments on the issue of access to buildings and facilities by telecommunications providers.

Community associations fully support a competitive telecommunications marketplace and are working diligently and effectively to secure the telecommunications services requested by residents while ensuring that the delivery of such services does not damage the substantial investment that homeowners have made in association property. Increasingly, community association residents are seeking newer, faster, and more sophisticated telecommunications capabilities. In response to such demands, resident boards of directors are looking to viable competition among telecommunications companies—and the advancements that such competition will produce—as means to provide more enhanced and affordable services to their communities. If certain telecommunications providers have not gained access to community associations, it is due to a lack of demand for their services, concern over potential damage to property, the scarcity or absence of available space, or other such legitimate concerns. It is not due to association intransigence.

¹Founded in 1973, CAI is the national voice for 42 million people who live in more than 205,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence through a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 57 local Chapters and 26 state Legislative Action Committees.

Understanding Community Associations -

In order to understand the concerns of community association residents and their collective opposition to any proposal that would grant telecommunications providers a privilege to access and use common or private property without permission, it is important to grasp the legal basis and governance structure of community associations.

All community associations are comprised of property that is owned separately by an individual homeowner and property owned in common either by all owners jointly or the association.² There are three legal forms of community associations: condominiums, cooperatives, and planned communities, which differ as to the amount of property that is individually owned. In condominium associations, an individual owns a particular unit; the rest of the property is owned jointly by all unit owners. In cooperatives, the individual owns stock in a corporation that owns all property; the stock ownership gives the individual the right to a proprietary lease of a unit. In planned communities, an individual owns a lot; the association owns the rest of the property. Generally, an individual owns less property in a condominium than a planned community, while there is no individual property ownership in a cooperative. Therefore, while individuals do own or use property in community associations, they do not exclusively own all property in the association. Community associations either own or control association common property, using and maintaining this property for the benefit of all association residents.

By virtue of their property interest, association owners are members of the association's voting body. As such, they are responsible for electing a board of directors to govern the association. In this respect, residents govern themselves since community associations are operated by residents on behalf of residents. Owners in a community association who are not on the board may participate in governing sessions by attending board meetings and joining various committees. Directly or indirectly, owners have control over the activities that occur in their association and board members must regularly seek the votes of their neighbors to remain in office. As a result, community associations are particularly accustomed to considering the needs and desires of their residents when determining budgetary expenditures, the use of common property and the selection of association services and service providers.

Individuals choose to purchase homes in community associations subject to the covenants, rules and regulations that enable all residents to participate in the governance of the community and establish high levels of services and standards for all. Congress should recognize this self-determinate process and the role community associations lay in maintaining, protecting and preserving the common areas, the value of the community or building and all individually owned property within the development. To fulfill these duties, community associations must be able to control, manage and otherwise protect their common property.

In the context of telecommunications, this may mean that the association enables all residents to choose one or more of Services A, B and C but that Service D is not available to Resident X because the delivery of Service D would mean substantial cost to the association or would damage association property. Service D may also be unavailable because the provider sought to deliver the service in a manner that did not adequately protect the association or its property. The bottom line is that community associations have the appropriate right and responsibility to manage common property, and those that seek to use such property, for the maximum benefit and enjoyment of all residents. An association's charge to preserve, protect and manage common property will always dictate that any provider wishing to physically enter association property or use wiring on association property must satisfy association concerns about such things as security, liability and space limitations. This is absolutely appropriate and vital if the association is to fulfill its duty to the individuals who have purchased homes in the community.

Forced Entry Is Unnecessary, Inappropriate & Unfair

While proponents of forced entry proposals attempt to justify their arguments by irresponsibly portraying community associations and others as barriers to competition, the substantial growth of competitive telecommunications providers in recent years demonstrates nothing if not the effectiveness of the marketplace in meeting the growing demand for advanced and dependable services. The successful relation-

² In each type of community association, different terms apply to residents who have an ownership interest in the association: unit owner in a condominium, resident or apartment owner in a cooperative, and homeowner in a planned community. For convenience, all three types will be referred to as "owners." The term "resident" applies to owners and tenants collectively.

ship between competitive telecommunications providers and community associations across the country merit's celebration—not legislative action.

It appears Congressional action is being solicited, however, because providers either fear the competition of an open marketplace or have simply concluded that they do not wish to address the legitimate concerns that community associations and others have in relation to effectively and professionally managing an environment where multiple telecommunication providers may be operating within a property.

CAI believes that it would be absolutely inappropriate for Congress or any other governmental entity to disregard the positive evolution of the competitive marketplace by granting any special legislative privilege for telecommunications providers to advance their business strategies and profit margins at the expense of the rights of others.

Forced Entry Dismissed: Importance of Provider Knowledge, Expertise & Reputation

The telecommunications industry is growing rapidly and provider quality varies tremendously. To ensure that community association residents receive dependable services, association boards of directors must be able to weigh factors such as a provider's reputation when allocating limited space to telecommunications companies. This is essential if residents are to have a variety of dependable telecommunications options and confidence that the providers are committed to the community's long-term interests.

Community associations choose telecommunications services from alternative service providers that provide high quality, reasonably priced, flexible services that are demanded by association residents. Forced entry policies would deter the growth of the competitive marketplace, and instead, would create artificial markets by granting privileges to low quality telecommunications service providers that would otherwise be unable to compete based on the quality of and demand for their services. With any provider able to force installation of telecommunications equipment on association property, providers would not have to demonstrate service quality and competitive pricing or address any other legitimate concerns for the valuable and limited space they would require. Therefore, forced entry policies would impede the growth of quality competition and possibly prevent association residents from receiving better services from more professional providers.

Forced Entry Undermines Community Security, Safety & Association's Responsibility to Manage Common Property

Removing an association's prerogative to regulate the access of providers to building or community systems, as proponents of mandatory access/forced entry are requesting, would limit the association's ability to protect residents and their telecommunications services, the equipment of all providers, and the property itself. In such an environment, resident safety and security would be compromised and association risks and liabilities would escalate.

Forced entry proposals undermine every responsibility associations have to properly serve their owners and the properties. Equipment and wiring installation usually involves removing or drilling through roofs, walls, floors, and ceilings. This activity often causes damage, requiring additional expense to restore the property. With its authority to permit or deny access to its common property and to require that all providers negotiate a written agreement governing their conduct, an association can choose telecommunications providers that will not damage common and private property during equipment installation and maintenance, and insure that any damage is properly repaired and paid for by the provider causing the damage.

In a forced entry environment, all telecommunications providers could access an association regardless of how they treat the property and providers would have less of an incentive to prevent damage to common property because their lack of care could not be a basis for exclusion. The association and its owners, the telecommunications consumers, would be required to bear the financial burden of repairs.

With multiple service providers having the unrestricted right to enter an association, the potential for damage to common property and telecommunications equipment, or injury to association residents and personnel, would increase exponentially. Since multiple providers would often be using the same portions of common property, it is conceivable that such areas would be damaged, restored to some extent, then damaged again by another provider. It is also conceivable that a new provider would damage a previous provider's telecommunications equipment during installation.

If telecommunications providers damage property or injure association residents, it is likely that the association would be held liable since it has the responsibility to decide what companies and providers operate within the community. Yet, forced entry policies would negate the rights of associations to limit the risk of damage or

injury while minimizing the disruption to common property, telecommunications equipment, and association residents. Instead, it would labor associations with the expensive and burdensome task of trying to hold telecommunications providers liable for problems after the fact.

Forced Entry Ignores Space Limitations & Is Anti-Competitive

Real estate is a finite resource and common area space is always limited. It is simply not possible for community associations to accommodate an unlimited number of providers. It is this reality that seems to make forced entry so appealing to providers already in the marketplace. Not only do they see a prospect of advancing their immediate business plan, they also understand that a forced entry environment would enable them to preclude future competitors by installing equipment and wiring in as many buildings as possible so there would be no remaining space when new providers come to call.

Not only would such a rush to occupy space likely result in poor quality installations and increased damage to common property, the end consumer would also suffer in such a forced entry environment because competition would be limited. A new provider could be just what the residents desire but the association would be precluded from adding the services or substituting the new provider for an incumbent because providers and not the association controlled the space allocations. Community associations must maintain their rights and flexibility to select a balance of providers in order to respond to resident requirements and ensure a wide diversity of services within the property.

Forced Entry Raises Serious Property Rights Issues

CAI urges Congress to recognize that any requirement forcing a community association to permit access to property for the installation of telecommunications equipment or wiring, in the absence of just compensation, would violate the Fifth Amendment to the United States Constitution and would be the same as that invalidated by the United States Supreme Court in *Loretto v. Manhattan Teleprompter*.³ In *Loretto*, the New York statute required building owners to make their properties available for cable installation, providing only nominal compensation for the space occupied. The Supreme Court ruled that that installation amounted to a permanent physical occupation of the landlord's property and that even the slightest physical occupation of property, in the absence of compensation, is a taking.⁴ The Court further reasoned that permanent occupancy of space is still a taking of private property, regardless of whether it is done by the state or a third party authorized by the state.⁵

Conclusion

CAI eagerly anticipates the growth of additional competition among telecommunications providers and believes that such competition is best fostered through a free and open marketplace that operates with minimal governmental intrusion.

Increasingly, community associations, responding to the desires of their residents, are entering into contracts with multiple telecommunications providers to offer a variety of competitive services to residents. As more providers enter the marketplace to offer high quality, reasonably priced services, such competition will only increase.

Any forced entry policy would unnecessarily limit the rights of community associations and their residents simply to advance the business plans of various telecommunications providers and would be inappropriate for a free market grounded on competition and the respect for private property. Such a policy would hamper the development of a more competitive telecommunications environment and expose the nation's community association residents to undue risks, costs and chaos.

Community associations must retain control over common property, which they maintain and protect. Just as all dry cleaners or sandwich shops may not force their way onto common property to sell their services simply because an association has contracted with other such entities, neither should a telecommunications provider be allowed to take over property it does not own simply because other providers are already there.

A telecommunications providers access to community associations is now and should continue to be based on the quality of services it provides and the demand for those services. A reputable provider with a quality service will be competitive in this environment. Congress should encourage such competition rather than create artificial markets for providers seeking to avoid it.

³ 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).

⁴ *Loretto* at 427.

⁵ *Loretto* 458 U.S. at 432, n.9.

Finally, Congress should be aware that this issue has been previously considered and rejected by this body, by the Federal Communications Commission and by numerous states legislatures and regulatory bodies. It is time to put a stop to this endless trek of providers who travel from one governmental entity to another in search of someone to ignore the marketplace realities and public policy shortcomings that should always merit the demise of forced entry proposals. To do otherwise would be a disservice to the nation's 42 million community association homeowners.

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