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

In the Matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for Rulemaking to)
Amend Section 1.4000 of the Commission's Rules)
to Preempt Restrictions on Subscriber Premises)
Reception or Transmission Antennas Designed)
To Provide Fixed Wireless Services)
)
Cellular Telecommunications Industry)
Association Petition for Rule Making and)
Amendment of the Commission's Rules)
to Preempt State and Local Imposition of)
Discriminatory and/or Excessive Taxes)
and Assessments)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

WT Docket No. 99-217

CC Docket No. 96-98

COMMENTS OF SPRINT CORPORATION

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August 27, 1999

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Summary

In the instant NPRM, the Commission has sought comment on additional means of fostering competition in the local telecommunications market. Sprint recommends that the Commission adopt national rules requiring the following:

- Utilities, including LECs, must permit access to telecommunications carriers to rooftops, conduit, and risers on private property that the utilities own or control, to the extent that such rights-of-way are used as part of the utility's distribution network;
- ILECs must make access to riser cable and inside wiring they own or control within a multiple tenant environment (MTE) available to competitors as an unbundled network element, to the extent technically feasible;
- Any MTE building owner who allows a telecommunications carrier access to his facilities must make that access available to other carriers on a nondiscriminatory basis;
- Carriers should be barred from entering into exclusive arrangements with building owners; any agreement negotiated by a carrier with a building owner must allow competitors access to the facilities at non-discriminatory rates, terms and conditions, to the extent possible.

Sprint believes that the Commission has authority under Section 224 and 251(c)(3) to impose these obligations on carriers, and ancillary jurisdiction under Title I to impose non-discriminatory access requirements upon MTE owners, since MTE owners are providing facilities integral to communications.

Sprint does not believe there are significant technical limitations which would prevent shared access to external and in-building rights-of-way. Our comments also describe the engineering arrangements we anticipate deploying once access is made available, as well as logical demarcation points for the network interface device in MTEs.

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)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of Sprint's Long Distance Division, Sprint's Local Telephone Division and Sprint PCS, hereby respectfully submits its comments in the above-captioned proceeding in response to the Notice of Proposed Rulemaking and Notice of Inquiry released July 7, 1999.¹

¹ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking*, WT Docket No. 99-217, FCC 99-141 (released July 7, 1999) (*NPRM*). The Commission extended the pleading cycle for the *NPRM* opening comments to August 27, 1999 and

I. INTRODUCTION

In this proceeding, the Commission seeks comment on its “ongoing efforts to foster competition in local telecommunications markets.”² For robust local competition to flourish, new entrants must have access to consumers equivalent to that enjoyed by incumbents. This proceeding is intended to facilitate the development of competitive telecommunications networks that will provide consumers with alternatives to services provided by incumbents. In particular, the Commission seeks to level the playing field so that new entrants have reasonable and non-discriminatory access to rights-of-way (ROW), buildings, rooftops, and facilities in multiple tenant environments (MTE).³

Non-discriminatory access to MTEs is critical to the development of local competition. In order to encourage alternative technologies and sources of telecommunication services, the Commission should mandate reasonable and flexible access to the MTE ROW and facilities. Telecommunications service providers must be allowed access to connect to the building via the rooftop or main equipment room, as well as to the existing conduits and risers within MTEs, including carrier-owned or controlled ROW and facilities in the MTE. The concept of access

extended the pleading cycle for the Notice of Inquiry opening comments to October 12, 1999. *Order Extending Pleading Cycle*, WT Docket No. 99-217, DA 99-1563 (released Aug. 6, 1999). Sprint will file its comments on the Notice of Inquiry on October 12.

² *NPRM* at ¶ 1.

³ *Id.*

should be sufficiently flexible to promote different designs and technologies and should allow new entrants to install and maintain competitive systems.

II. ACCESS TO BUILDINGS AND ROOFTOPS

A. Overview

The Commission seeks comment generally on access to buildings and rooftops in the multiple tenant environment, and specifically asks three questions:

1. Can/should the Commission, pursuant to Section 224 of the Communications Act, require utilities to permit access to rooftops and similar rights-of-way in MTEs?
2. Can/should the Commission require incumbent LECs (“ILECs”) to provide unbundled access to riser cable and inside wiring the ILEC owns and controls within MTEs pursuant to Section 251(c)(3) of the Communications Act?
(Can/should the Commission treat ILEC-owned or controlled riser cable and inside wiring as a network element?)
3. Can/should the Commission require an MTE building owner who allows any telecommunications carrier access to facilities that the owner controls to make the same access available to other carriers on a nondiscriminatory basis?

The answer to all three questions should be yes. Without an affirmative answer, true facilities-based local competition will remain, largely, a pipe-dream.

B. National Rules

Before turning to the three specific questions, there are two issues that permeate the entire *NPRM* and all of the issues raised therein. The first is whether the Commission should adopt

national rules, or whether it should allow state and local governments to adopt (or refrain from adopting) rules. The second is whether the Commission has the authority to adopt such national rules. As above, the answer to both of these questions is in the affirmative.

In matters dealing with local competition and implementation of the Telecommunications Act of 1996 (the 1996 Act), the Commission determined in the *Local Competition Order* that national rules are advisable:

... The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets. National (as opposed to state) rules more directly address these competitive circumstances.

... Further, national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.⁴

The Commission's reasoning is equally applicable to the issues at hand. Just as the ILECs discussed in the *Local Competition Order* have bottleneck control, and thus more bargaining power than new entrants, over the network and facilities they own in MTEs, so too do MTE building owners have bottleneck control and thus unequal bargaining power regarding access to their buildings.

It is also clear that the Commission has the authority to adopt national rules. In the *NPRM*, the Commission lists numerous statutory references to support the Commission's adoption of national rules.⁵ Sprint agrees that these statutory provisions give the Commission the authority it needs. In particular, Sprint believes, as the Supreme Court did, that Section 201(b) of

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15528 (paragraphs 55 and 56) (1996) (*Local Competition Order*).

⁵ *NPRM* at ¶¶ 56 and 77.

the Communications Act provides the Commission with all the authority it needs to adopt national rules:

We think the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the “provisions of this Act,” which include §§ 251 and 252, added by the Telecommunications Act of 1996.⁶

National rules are both necessary and authorized.⁷

C. Experience with Access to MTEs

The Commission seeks general comment on the parties’ experience in gaining access to facilities and buildings in MTEs.⁸ Both Sprint ILEC and CLEC operations have experienced difficulties in obtaining access to MTEs. In the Sprint ILEC case, customer requests for service have gone unfulfilled because of exclusive arrangements between the MTE building owner and a CLEC. To an even greater degree, Sprint CLEC has encountered difficulties in obtaining access to MTEs, including refusals by building owners to discuss access to the building; demands for outrageously high, non-cost based compensation (generally, compensation that the ILEC did not have to pay for access); and contract negotiations that became so lengthy and complicated that customer requests for service could not be met in a timely manner. The first and second situations were often encountered where owners of single, often smaller, properties have neither the expertise nor resources to understand telecommunications issues and thereby choose to avoid the issues by refusing to deal in good faith. The third situation was often caused by building

⁶ *AT&T Corporation et al., v. Iowa Utilities Board, et al.*, ___ U.S. ___, 119 S. Ct. 721, 730 (1999) (*Iowa Utilities Board*).

⁷ Indeed, the Court not only upheld the FCC’s authority to adopt national rules, but also spoke to the necessity for such rules: “If there is any “presumption” applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.” *Iowa Utilities Board*, at fn. 6.

⁸ *NPRM* at ¶ 31.

managers of numerous complexes trying to negotiate “global” arrangements rather than focusing on the MTE in question.

D. Engineering Arrangements

1. Overview

The Commission seeks comment generally on the type of engineering arrangements competing providers prefer in MTEs and which arrangements can be feasibly employed.⁹ The Commission notes that typically, the LECs provide service to MTEs by connecting their network with a network interface device (NID) and then using riser cable to reach each floor and inside wire to then reach individual units within the MTE. The riser cable and inside wiring are owned or controlled by either the ILEC or the MTE owner.

In providing competitive local services to MTEs, Sprint will deploy numerous types of engineering arrangements depending on the particular circumstances. In some cases, Sprint may use the existing riser cable and inside wiring if access is made available. However, that is generally not the preferred method because, as the Commission notes,¹⁰ such arrangement leaves the competitive provider reliant upon the incumbent, undoubtedly their fiercest or one of their fiercest competitors, and limited to providing only those services the ILEC’s facilities are capable of handling.

Where we can obtain the necessary access, Sprint may also deploy its own riser cable and inside wiring in the MTE. Additionally, Sprint has acquired several Multipoint Multichannel Distribution Service (MMDS) providers, and intends to use MMDS fixed wireless technology to

⁹ *Id.* at ¶ 34.

¹⁰ *Id.* at ¶¶ 4-6.

provide voice, video and data services to MTEs. Where Sprint has MMDS authority, Sprint will need access to rooftops in order to serve tenants within the MTE, as well as the ability for the tenants to place antennas on their leasehold to receive the wireless signals.

2. Multiple Dwelling Units

When the incumbent's existing facilities are not suitable to carry and effectively transmit the products and services that Sprint is seeking to provide in a multiple-dwelling unit, Sprint may explore the option of running its own facilities to the building from an existing fiber loop within the city. In an apartment or office building, the incoming fiber would be routed into the telecommunications room (or to the building exterior, depending on building design) where it connects to an installed service hub. The service hub is then connected to the customer via the existing riser cable and/or wiring inside the building.¹¹ This type of arrangement requires an easement granting the right to dig and run a fiber line from the existing fiber loop to the building. Rights to cross the property line, as well as permission from the building owner to penetrate the side of the building (where necessary) to run the fiber into the building are needed as well.

3. Multiple Tenant Communities

For multiple-tenant communities such as office parks, shopping centers, or manufactured housing communities, Sprint's preferred engineering arrangement would be to collocate a Digital Subscriber Line Access Multiplexer (DSLAM) in the incumbent's central office and lease a local

¹¹ See Diagram 1 for a graphical depiction of the provision of wireline services to a multiple tenant building using the competing provider's own facilities, run from a fiber loop within the city.

loop from the incumbent, cross-connecting at the Main Distribution Frame (MDF) when necessary.¹²

In areas where the ILEC provides service through a Digital Line Concentrator (DLC), the ILEC should provide the ability to collocate a mini-DSLAM near the DLC so that advanced xDSL services can be offered by competitors.¹³ The ILEC should also make xDSL equipped loops available to competitors when it has upgraded its DLC to provide this functionality. Either arrangement requires the incumbent to reserve some of the bandwidth in its fiber cable for Sprint's use and to provide sub-loop unbundling.

Another option for providing wireline service to a multiple tenant community is to collocate a mini-DSLAM near the incumbent's DLC, then run facilities to a Sprint terminal near the Community Distribution Block.¹⁴ When customers decide to switch to Sprint, a cross-connection can be made from the Sprint terminal to the Community Distribution Block. This type of engineering arrangement is not as cost-effective as the previous options because of the placement and easement rights associated with Sprint's laying cable from its mini-DSLAM to its terminal.

4. Engineering Arrangements (Wireless) - Multiple Tenant Environments

One solution to the problem of inadequate existing facilities is to bypass at least some of the existing wireline facilities. This can be done using wireless technologies such as Multipoint

¹² See Diagram 2 for a graphical depiction of the provision of wireline services to a multiple tenant community by leasing a local loop.

¹³ See Diagram 3 for a graphical depiction of the provision of wireline services to a multiple tenant community by collocating a mini-DSLAM.

¹⁴ See Diagram 4 for a graphical depiction of the provision of wireline services to a multiple tenant community by collocating a mini-DSLAM and building a terminal.

Distribution Service (MDS) and MMDS. These technologies allow voice, data, video and high speed Internet signals to be carried over specified radio frequencies rather than through buried fiber networks.

5. General Overview of MDS/MMDS Technologies and Sprint ION

Sprint ION and MMDS deployment require rooftop access to place an antenna and transceiver unit, as well as raceway access and rights to run additional conduit throughout the building. For wireless applications, Sprint ION requires cellular-type base station deployment. There must be a Base Station Controller (BSC) that has the ability to accept incoming signals from a number of sources, and transmit them in various directions via multiple antennas. A radio interface card must also be installed into the Sprint service hub. This card is essential to the success of the Sprint ION deployment, as it is the key element that converts intermediate radio frequency information into a digital data stream.

Sprint would note that the above discussion pertains only to today's options. As technology advances and changes, new options for reaching tenants in MTEs may be developed. It is therefore important that the Commission adopt flexible rules that will adapt over time to the ever-changing telecommunications landscape.

If the 1996 Act is truly "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,"¹⁵ the FCC must adopt national rules that allow access to MTEs and ROW and facilities within MTEs in a technology-agnostic, flexible and non-discriminatory manner.

¹⁵ *S. Conf. Rep. No. 104-230*, 104th Cong. 2d Sess. at 1 (1996) (1996 Conference Report.)

III. ACCESS TO RIGHTS-OF-WAY AND UNBUNDLED NETWORK ELEMENTS

In the instant *NPRM*, the Commission has requested comment on the degree to which Section 224 of the Act requires utilities, including LECs, to provide access to telecommunications carriers to ROW, conduit, and risers on private property that the utilities own or control. The Commission has tentatively concluded that Section 224 does encompass access to rights-of-way on private property¹⁶ and to in-building conduit owned or controlled by the utility.¹⁷

Sprint supports the Commission's conclusions here. In order for facilities-based local competition to develop, the Commission must interpret Section 224 in a manner sufficiently expansive to afford competitive local exchange carriers the opportunity to access both public¹⁸ and private ROW on terms comparable to those available to the incumbent local exchange carrier. Without equivalent access to ROW, new entrants are at a severe competitive disadvantage vis-à-vis the incumbents. In some cases, the new entrant is unable to obtain the right to place its distribution equipment at sites available to the incumbent; where the new entrant does have such access, it is generally achieved only after protracted and expensive negotiations with the property owner. Thus, the Commission should find that "equivalent" access to ROW encompasses not only access to the physical location, but also access at the same rates, terms and conditions as are applicable to the incumbent.

¹⁶ *NPRM* at ¶ 35.

¹⁷ *Id.* at ¶ 44.

¹⁸ There would seem to be no debate that non-discriminatory access to public rights-of-way is required under Section 224. Indeed, Section 253(a) explicitly requires that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

There is nothing in Section 224 that limits access to ROW to public property. To the contrary, the fact that Section 224 applies to LECs and other public utilities which "...control[]" ROW "suggests that rights-of-way over private property owned by a third party were intended to be" subject to Section 224.¹⁹ Private property owners are of course entitled to just and reasonable compensation for use of their ROW under Section 224(b)(1).

Section 224 also extends to ROW owned by utilities, although as the Commission has previously concluded, this section "does not confer a general right of access to utility property,"²⁰ new entrants are not allowed to demand access to private property merely because it is convenient to have such access. Sprint therefore recommends that Section 224 be applied to any property that a utility uses as part of its distribution network. Such an application balances the new entrant's need to obtain access to facilities that cannot reasonably be duplicated (because duplication would be prohibitively expensive, physically infeasible, or excessively disruptive for surrounding communities), with the utility's interest in avoiding excessive demands for access to its property.

There is nothing in Section 224 that limits access to external ROW. Therefore, Sprint also supports the Commission's tentative conclusion that Section 224 covers "in-building conduit, such as riser conduit, that may be owned or controlled by a utility."²¹ Allowing new entrants access to in-building conduit will help to ensure that consumers in multi-tenant

¹⁹ *NPRM* at ¶ 41.

²⁰ *Id.* at ¶ 40.

²¹ *Id.* at ¶ 44.

environments are able to obtain local and network access services from the carrier of their choice. For purposes of Section 224, Sprint recommends that a utility be considered to exert “control” over conduit in any situation in which it has placed a distribution facility on a piece of property with the agreement of the owner. Capacity concerns should be handled under the guidelines adopted in the *Local Competition Order*.²²

The Commission asks whether “an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners.”²³ Sprint acknowledges that building owners, especially small building owners, cannot reasonably be expected to be fully conversant with Commission regulations regarding ROW. However, such problem can be minimized by focusing on the access obligations of the incumbent carrier. It makes far more sense from a practical and jurisdictional standpoint to apply ROW obligations under Section 224 to the utility that has ownership or control of the facility. Under this approach, the utility would be forbidden from entering into any exclusive arrangements with a building owner. Any agreement negotiated by the utility with the building owner would have to allow new entrants access to the facilities under the same rates, terms and conditions as are available to the utility, to the extent such access is physically possible without compromising safety, reliability and generally applicable engineering purposes. Moreover, existing exclusive contracts between the incumbent and building owners should be declared invalid relative to provisions which make access to the building available only to the incumbent carrier.

²² *Local Competition Order* at ¶¶ 1162-1164.

²³ *NPRM* at ¶ 47.

The Commission also has sought comment “on the potential treatment of in-building cable and wiring owned or controlled by an incumbent LEC as an unbundled network element under Section 251(c)(3),” and whether “unbundled access to riser cable and wiring within multiple tenant environments is technically feasible.”²⁴ Sprint believes that access to in-building riser cables and inside wiring owned or controlled by the ILEC should be available as a UNE pursuant to Section 251(c)(3).

In virtually all buildings, the ILEC has a legal right, undisputed by property owners, to enter a building to provide telephone service to its occupants; other carriers do not. Indeed, the record in CC Docket No. 96-98 contains ample evidence that building owners routinely refuse to provide access to other carriers, either at all, or at exorbitant prices and after lengthy delays.²⁵ Even where the property owner may be willing to allow other carriers into the building, the building often does not have enough space to accommodate multiple risers. Under these circumstances, there can be no dispute that ILEC-controlled or owned riser facilities constitute a bottleneck facility. Unless the Commission mandates the right of a competitive carrier to obtain nondiscriminatory access to ILEC-controlled facilities up to the customer’s privately owned inside wiring, the competitive carrier will be unable to provide local or exchange access to end users in a multiple tenant environment. Access to the in-building riser cable owned or controlled by the ILEC should be considered part of an unbundled local loop UNE, since without such access, a carrier’s wireline access to the end user in MTEs is severely limited or economically

²⁴ *Id.* at ¶ 51.

²⁵ *See, e.g.*, Reply Comments in UNE Remand proceeding filed by AT&T on June 10, 1999, Affidavit of Kevin Lynch; *see also*, Section II.C *supra*.

infeasible.²⁶ Furthermore, requesting carriers should be allowed to obtain the riser cable UNE in whatever configuration is technically feasible. For example, a CLEC should be able to request that the NID be placed either inside or outside the building, and the ILEC should accommodate such request as long as it is technically feasible.²⁷ Such a requirement is consistent with Section 251(c)(3).

The Commission has also asked whether unbundled access to riser cable and wiring within MTEs is technically feasible, and whether sharing of wire may lead to problems due to insufficient power or electromagnetic incompatibility.²⁸ Sprint is not aware of any problems with technical feasibility or insufficient power. However, wire sharing may raise spectrum management issues. For example, if a carrier provides ADSL services using a cable binder adjacent to a T-1 circuit, the T-1 circuit could cause near end cross-talk on the ADSL line. However, these interference problems can be prevented by careful record keeping (not using adjacent wire cable binders in the first instance) or by using additional cables. If Sprint is allowed to deploy fiber facilities into the building, we could eliminate most of the cross-talk by installing an optical controller and DSLAM in the telecommunications room, and cross-connect from the DSLAM to the main distribution frame.

²⁶ The carrier presumably can obtain dedicated access from the ILEC through its interstate or intrastate access tariffs to serve a particular end user in the MTE; however, this form of access is likely to be far more expensive than UNE access.

²⁷ The CLEC would, of course, be required to provide its own grounding in compliance with national electrical safety code standards.

²⁸ *NPRM* at ¶51.

IV. BUILDING ACCESS ISSUES

A. Non-discriminatory Access to Buildings

The Commission should require building owners who allow access to their premises to any carrier of telecommunications services to make comparable access available to all telecommunications carriers under nondiscriminatory rates, terms, and conditions. Absent such a requirement, local competition cannot fully develop, thus thwarting the cornerstone to the 1996 Act. Additionally, the lack of such a requirement will allow building owners to become a bottleneck with regard to telecommunications services, holding the tenants hostage to the building owner's provider of choice. As the Commission recognizes, this is clearly incompatible with the desires of Congress as expressed in the 1996 Act:

We also believe it is important to bring the benefits of competition, choice, and advanced service to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. In the 1996 Act, Congress emphasized its intent to bring these benefits "to all Americans." To the extent that any class of consumers is unnecessarily disabled from choosing among competing telecommunications service providers, the achievement of this Congressional goal is placed in jeopardy....²⁹

It will not be enough if the Commission only extends Section 224 and 251(c) obligations to ILEC-owned and controlled facilities because, Sprint believes, in many if not the vast majority of instances, it is the MTE owner, not the ILEC, that owns or controls the in-building facilities. Likewise, while a prohibition on exclusive arrangements, as discussed *infra*, is necessary, it too will be insufficient on its own, to implement and enforce the market opening provisions of the

²⁹ *Id.* at ¶ 6, footnote omitted.

1996 Act because it would still leave MTE owners free to treat competing carriers disparately and thus indirectly keep other carriers out, preventing end user choice.

In paragraph 57 of the NPRM, the Commission suggests that it may have ancillary jurisdiction under Section 4(i) of the Act to impose a nondiscriminatory access requirement on building owners. Sprint agrees, and believes that exercise of that authority would not constitute a taking under the Fifth Amendment. A close review of Title I of the Communications Act of 1934 (the “Act”) reveals the Commission’s jurisdiction to act. Section 2(a) (part of Title I) provides that “The provisions of this act shall apply to all interstate and foreign **communications by wire or radio** ... and to all **persons** engaged within the United States in such communications” (emphasis added). The focus is on “communications by wire” and “persons.” This focus is in stark contrast with Title II of the Act, which focuses on “common carriers” (*e.g.*, Section 201(a) - “It shall be the duty of every common carrier....”; Section 202(a) - “It shall be unlawful for any common carrier....”; Section 203(a) - “Every common carrier....”, etc.).

In this respect Title I is broader than Title II because Title I is not limited in its application to common carriers, but encompasses all **persons** engaged in communications by wire or radio, which is defined in Section 3(51) as:

The term “wire communication” or “communications by wire” means the transmission of writing, signs, signals pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, **including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.** (emphasis added)

Once a building owner has provided space in the MTE to a carrier for the location of equipment and/or wiring to be used for communication by wire, it is clear that this space is a “facility” or “apparatus” that goes beyond being incidental to the communication, but is an integral part of the

transmission, and thus subject to the Commission's Title I jurisdiction pursuant to Sections 1 and 2.

Additional jurisdictional authority is found in the terms of the 1996 Act. Title I, Section 1 of the Act created the Federal Communications Commission to "execute and enforce the provisions of this [Communications] Act [of 1934]." The 1996 Act was, by Congressional direction, "inserted into the Communications Act of 1934."³⁰ As noted by the Commission, in the 1996 Act, "Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry"³¹ and to bring these benefits "to all Americans."³²

Thus, this Commission has Title I authority over persons engaged in communications by wire, and has Title I authority to enforce the 1996 Act. The Commission should exercise this authority by requiring building owners who allow access to their premises to any carrier of telecommunications services to make comparable access available to all telecommunications carriers under nondiscriminatory rates, terms, and conditions. Such access must also be technology neutral. If access is granted to a wireline provider, comparable access, suitable to the technology, must be granted for other providers, including wireless providers, and vice-versa.

Such a nondiscrimination requirement, imposed where the building owners have already provided access to one carrier, would not constitute an impermissible taking under the Fifth

³⁰ *Iowa Utilities Board* at page 729.

³¹ NPRM at ¶ 2.

³² *Id* at ¶ 6.

Amendment. Such a requirement is similar to that imposed by the Commission in the *OTARD*³³ proceeding. There, the Commission prohibited restrictions on viewers who wish to install, maintain or use a reception device within their leasehold. No taking took place in the MTE situation, because the landlord has already relinquished the leasehold to the tenant. Thus, the Commission determined that the prohibition was a regulation of use, not a permanent physical occupation or taking of property. Accordingly, the Commission utilized the *Penn Central*³⁴ analysis to determine whether the regulation constituted a regulatory taking and evaluated the following: (1) the character of the government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.

Sprint's recommended non-discrimination requirement is also similar to one approved in *PruneYard Shopping Center v. Robins*³⁵ (cited with approval in *Loretto*³⁶), where the Supreme Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property. The Supreme Court agreed that the right to exclude others is an important property right that should be protected by the Fifth Amendment takings clause. However, the Supreme Court noted that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense"³⁷ and examined the taking issue on the basis of the character of the governmental action,

³³ *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions of Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Satellite Services*, CS Docket 96-83, FCC 98-273, released November 20, 1998.

³⁴ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

³⁵ *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

³⁶ *Loretto v. Teleprompter Manhattan CATV Corp. et al*, 458 U.S. 419 (1982).

³⁷ *PruneYard* at p. 82.