

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

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
In Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
Petition for Rulemaking to Amend	)	
Section 1.4000 of the Commission's Rules	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rulemaking	)	
and Amendment of the Commission's	)	
Rules to Preempt State and Local	)	
Imposition of Discriminatory or Excessive	)	
Taxes and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications	)	
Act of 1996	)	

**REPLY COMMENTS OF APEX  
SITE MANAGEMENT, INC.**

Apex Site Management, Inc. ("Apex") hereby replies to the comments of others in the Notice of Proposed Rulemaking ("NPRM"), FCC 99-141, released July 7, 1999 in the captioned proceeding. In opening Comments, Apex explained its view that the market for communications space is working satisfactorily in what the Notice calls multiple-tenant environments ("MTEs"). Apex reviewed past examples of FCC caution in extending its jurisdiction to private non-regulated entities and property, and concluded that nothing in recent legislation, including the Telecommunications Act of 1996 ("TA 96"), warranted enlargement of these historically narrow interpretations.

The prevailing themes of the comments thus far are aligned with the views of Apex. For the most part, incumbent local exchange carriers (“ILECs”), electric utilities, shared-tenant service (“STS”) providers, city and state governments and educational parties have joined the realty industry in warning against stretching Sections 207 of TA 96 or Sections 224 and 251 of the Communications Act beyond the bounds of Congressional intent.

Only the competitive carriers – notable among them Teligent, Winstar and their trade associations – argue at length for the broadest possible interpretations of specific statutory sections, with resort to the FCC’s general powers if all else fails. Apex suggests that it will set back, rather than advance, the cause of competitive entry to MTEs if the FCC is judicially reversed in stretching its express or ancillary powers. Should the FCC conclude that the market is an insufficient regulator of communications access to MTEs, it can turn to Congress as the agency did with respect to pole attachment legislation in 1976-78.

Building owners must remain free  
to bargain for the protection  
of their tenants and properties.

As demonstrated in Comments to the Notice, Apex has negotiated many access agreements between building owners and competitive LECs. Apex is fully cognizant of the issues and potential bottlenecks in the process. While the comments from many of the competitive LECs contain anecdotes of building owners establishing unreasonable barriers to entry, Apex maintains that these instances are far from the norm. The statistics that Apex provided in its comments support this position. More importantly, it has been Apex’s experience that these competitive LEC’s have often been at the center of serious installation and occupancy problems. Absent a fully-negotiated access agreement

enabling the owner to specify terms governing the occupancy of the property, the resolution of these issues would have been much more time-consuming and contentious.

The following are actual examples of problems that Apex and its clients encountered with respect to the activities of competitive LEC's at various buildings:

- A competitive LEC, requiring the installation of an equipment shelter on the roof of a property, contracted with a crane operator to hoist the shelter onto the building. The crane's weight exceeded the load capacity of the sidewalk surrounding the property and collapsed the ground underneath the crane, causing a water main rupture. The resulting damage was extensive. Moreover, the competitive LEC failed to pay the crane operator, who then filed a mechanic's lien against the property. Absent an agreement setting forth liability and responsibility, the resolution of this matter would have caused litigation and additional expense.
- A competitive LEC installed equipment on the roof of a building that blocked the signals from a transmit antenna installed by a PCS carrier in the market. The agreement permitting access contained clear and explicit rules regarding interference problems. This provision governed the resolution of this matter. Absent such an agreement, the issue would have required additional time and expense to mediate and resolve.
- A competitive LEC installed its equipment on the roof of a property without having received plan approval from the building owner. The installation was offensive to the owner from an aesthetic perspective. It significantly disturbed the design of the property and the owner wanted the antenna screened in order to preserve the appearance of the building. Absent the existence of an access agreement that protected the owner's reasonable property interest, the screening of this installation may have become a contentious and expensive issue to resolve.
- A competitive LEC was given permission by an owner to core-drill in a building in order to run conduit. The approved plans were specific as to the location of the core drilling. The owner was simultaneously undertaking an asbestos abatement program at the property and was careful to coordinate the core drilling in areas where the asbestos was not present. Despite this effort, the competitive LEC drilled in the wrong area. Fortunately, fire alarms were set off because the drilling also severed the cables for the alarms. Otherwise, the encapsulated asbestos would have become easily crumbled and released in the property, causing significant damage. The ultimate resolution of that matter would have been extremely costly and time-consuming without a fully negotiated access agreement containing the appropriate indemnities and insurance provisions.

- A building owner gave a competitive LEC limited permission to core-drill in a property. Despite this explicit limitation on permitted work, the competitive LEC brought a steel I-beam into the building to secure a floor for use as a platform to hold equipment. The I-beam was placed in a freight elevator in a slanted position rather than at a 90° vertical to the floor of the elevator. As a result, the top of the beam struck the counterweights to the elevator, causing significant damage to the elevator system and the interior cab. In addition, the floors around the elevator at the time the beam struck the counterweights were also damaged. Absent the existence of a fully negotiated access agreement establishing liability and responsibility, this issue would require time and expense to resolve.
- A competitive LEC was given permission to core-drill in a property. The approved plans required the competitive LEC to install conduit in the building and insulate the conduit with fireproof material. Contrary to these specific requirements, the competitive LEC ran wires without conduit in the risers and stuffed rags in the spaces in the core-drilled openings. The terms of the access agreement provided the mechanism for the owner to seek redress from the competitive LEC. Absent this agreement, the owner would be left to pursuing its remedies in a costly and inefficient manner.
- A competitive LEC was advised that its installation would require stamped, sealed construction drawings due to the extensive nature of the buildout and effect on the property. The carrier objected to the requirement and attempted to terminate the access agreement, as was its right under the document. Despite this, the carrier had contracted with the ILEC to run telephone service from one area of the property to the competitive LEC's space, requiring extensive trenching and damage to landscaping. Upon terminating the agreement, the competitive LEC abandoned the damaged areas and refused to repair the landscaping. The owner pursued its rights under the access agreement and ultimately the damage was repaired. Absent the agreement, however, the resolution of this matter would not have been accomplished quickly. Later, apparently coming to the realization that the owner had not been unreasonable, the competitive LEC returned to the property, provided the required documentation and installed its equipment.
- A competitive LEC presented plans for installation on the property that were ultimately rejected because the installation did not attempt to color match the building exterior and preserve the aesthetics of the property. Despite the rejection, the competitive LEC installed on the property by misrepresenting approval to the in building staff. The installation was objected to by the owner due the resulting aesthetics and only because of the access agreement and its clear language governing the situation, was the situation resolved.

- Competitive LEC's have repeatedly shown up at properties without approved plans to begin installation. Absent the agreements' clear and specific requirements regarding plan approval, the monitoring of these installations would be haphazard at best.

The point here is not to engage the FCC in a battle of anecdotes, but to suggest that the agency cannot possibly replicate in simple public rules the accumulated experience of private negotiations to meet a complex variety of problems and needs on behalf of carriers, incumbent utilities and owners alike. Sometimes the circumstances are even such that preferential agreements for a reasonable term are more likely to advance than inhibit competition.

Preferences typically are put to bid,  
and recognize that not every carrier  
can serve every building.

In its opening Comments (6-8), Apex noted its practice is to recommend against owners granting exclusive service rights to new carriers, although these often are requested. On the other hand, Apex believes that the award of preferences – its opening Comments (at 7) referred to “preferred providers” -- should not be treated as inherently unreasonable. The market is proving to establish a clear method for when these preferences are granted. Mostly, these are awarded after a competitive process has been established. Moreover, in some regards, the preferences are needed to permit competition and not to prohibit it. Realistically, not every carrier can enter every building. Market share constraints will not support this. If each carrier needs 15-25% penetration in order to meet a business plan and operate, and if each building had every carrier in it, then these carriers would die and competition would not be served. Only if

some carriers are given an opportunity to succeed by winning a competitive bid will there be enough healthy competitive LECs to actually compete with the ILECs.

The complexity of today's business tenancy agreements and the occasional usefulness of preferences in promoting competition are among the practical reasons why the FCC should regulate only with a light hand, if at all. For example, a regime of "nondiscriminatory access" should accommodate "reasonable discrimination" of the kind discussed here and in the initial comments of Apex and others. These practical reasons are congruent with legal realities: The agency's authority to regulate building owners or their premises is severely constrained.

Section 224 is limited to utility pole attachments or the narrow alternative of underground ducts.

The FCC tentatively concludes that "so long as a utility uses any pole, duct, conduit, or right-of-way for wire communications,"

all rights of way that [the utility] owns or controls, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used, are subject to Section 224.

(Notice, ¶41, emphasis added) To reinforce its conclusion, the agency refers to a portion of the *Local Competition First Report and Order* rejecting an electric power company's argument that only those poles with existing communications attachments should be accessible under the mandate of Section 224(f)(1), 11 FCC Rcd 15499, 16080, ¶1173 (1996).

But that discussion three years ago was not conducted "regardless of the purpose for which a particular right-of-way is used." To the contrary, the First Report and Order's analysis of "Access to Rights of Way" (¶¶1119-1240) is wholly devoted to the

purpose of pole attachments or their underground counterparts in localized communications distribution – cables housed in ducts or conduits. One searches in vain for any reference to rooftops or in-building risers. Indeed, in the same order a separate discussion of “unbundled access” pursuant to Section 251(c)(3) offers the following caveat:

We emphasize that access to inside wiring through the incumbent LEC’s NID [network interface device] does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC’s NID does not entitle the competitor to the riser and lateral cables between the NID and the individual units within the building, which may be owned or controlled, for example, by the premises owner. (¶393, n. 853)

The FCC would hardly have needed this warning if it believed that Section 224 granted the competitive access to private buildings which Section 251(c)(3) disallows. In short, the agency could not have meant for any analysis of Section 224 in the *Local Competition First Report and Order* – confined as it was to conventional outdoor pole attachments – to foreordain the resolution of issues involving attachment to rooftops and in-building distribution facilities.

Instead, the FCC seems to have changed its mind based on the unresolved petition of Winstar for reconsideration of the 1996 local competition initial order. (Notice, ¶39) The agency is impressed, as a matter of legal interpretation, by the fact that the term “rights-of-way” in Section 224(f)(1) is not qualified by the adjective “public” and thus must be read to include private ways as well:

Indeed, the inclusion within section 224 of rights-of-way that a utility “controls” as well as “owns,” suggests that rights-of-way over private property owned by a third party were intended to be included.

(Notice, ¶41)

Given the addition of Section 224(f) in TA 96, and the cross-reference to Section 224 in new Section 251(b)(4), it is easy to forget that the term “rights-of-way” and the phrase “right-of-way owned or controlled by a utility” have existed in the statute from its inception in 1978.<sup>1</sup> It is well settled that terms and phrases appearing in separate parts of a statute should be construed in the same way, if possible.<sup>2</sup> Thus we may look to see what Congress intended by its use of the rights-of-way language in 1978 and assume the same intent in 1996 – absent legislative evidence to the contrary.

“This expansion of FCC regulatory authority,” Congress said in 1977, reporting on S.1547 which included a new Section 224

is strictly circumscribed and extends only so far  
as is necessary to permit the Commission to  
involve itself in arrangements affecting the

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<sup>1</sup> Subsections 224(a)(1) and (a)(4), respectively defining “utility” and “pole attachment.” P.L. 95-234, 92 Stat. 33, 35, 1 U.S. Code Congressional and Administrative News (“USCCAN”), 1978. The 1996 amendment to the pole attachment definition added “or provider of telecommunications service” as an eligible attacher, but did not revise the meaning of “right-of-way.”

<sup>2</sup> *Barnson v. U.S.*, 816 F.2d 549, 554 (10<sup>th</sup> Cir. 1987), citing *United States v. Morton*, 467 U.S. 822, 828 (1984).

provision of utility pole communications space to CATV systems.<sup>3</sup>

In further explanation, the Senate report continued:

Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws.

S.Rept. 95-580 at 124 (emphasis added).

With the addition of Section 224(f) in TA 96, Congress decided to require what the cable industry 18 years earlier had said was not needed – a guarantee of access to utility poles, ducts, conduits and rights-of-way. *Id.* But was this new guaranteed access meant to run beyond the outdoor utility poles with aerial attachments or the outdoor ducts and conduits underground, or the rights-of-way associated with these poles, ducts or conduits? To answer this question affirmatively, we need evidence that Congress – when it guaranteed access – was also rewriting the 1978 phrase “pole, duct, conduit, or right-of-way owned or controlled by a utility” it had used to define “pole attachment.”

There is no such evidence. Congress had three principal purposes in mind in the 1996 amendments to Section 224. The first was the access guarantee of subsection (f). The second was extending to “providers of telecommunications service” the protected attachment rights already granted cable operators. The third was the adjustment of the rates formula, and associated notice obligations, to account more fairly for multiple

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<sup>3</sup> S.Rept 95-580, 2 USCCAN 109, 123 (1978), emphasis added.

attachers.<sup>4</sup> Nowhere in the legislative record of TA 96 does Congress indicate an intent to change the meaning of right-of-way as originally enacted.

The closest Congress came to the subject between 1978 and 1996 was the adoption of Section 621(a)(2) of the Communications Act in 1984, reading in part:

Any [cable] franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . .<sup>5</sup>

There, the rights-of-way were plainly limited to public ways and the “dedicated” easements have been held to refer only to those involving “appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted by or on behalf of the public.”<sup>6</sup>

On the basis of the foregoing, there is every reason to believe that the phrase “right-of-way owned or controlled by a utility” retains today the meaning intended by Congress in 1978. As we have seen from the report on S.1547, that intent was “strictly circumscribed” to “arrangements affecting the provision of utility pole communications

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<sup>4</sup> Interestingly, neither the House nor the Conference report on TA 96 chose to discuss the new access guarantee of Section 224(f). P.L. 104-104, 4 USCCAN 58-59, 220-221 (1996). This relative indifference may arise from the recognition, as the FCC has observed, that the access guarantee is not absolute. A utility remains justified in refusing access for communications purposes if none of its facilities has permitted that use. *Local Competition Report and Order*, 11 FCC Rcd 16079-80, ¶1172. *But see, Gulf Power Co. v. United States*, No. 98-2403, 1999 U.S. App. LEXIS 21574, at \*20 (11<sup>th</sup> Cir. 1999) (Utility’s right to use its property for wire communications “may not be conditioned on being forced to submit to a permanent physical occupation of its property without payment of just compensation.”)

<sup>5</sup> Cable Communications Policy Act, P.L. 98-549, codified at 47 U.S.C. §541(a)(2). It is worth noting that Congress distinguished easements from rights-of-way, contrary to the Notice’s tendency (¶42) to equate the two terms.

<sup>6</sup> *Media General Cable v. Sequoyah Condominium Council*, 991 F.2d 1169, 1173 (4<sup>th</sup> Cir. 1993), citing Black’s Law Dictionary, 6<sup>th</sup> edition.

space” and to passage of “utility poles and wires” over private property. Thus, Congress had in mind the conventional local cable TV distribution facilities of the time, attached overhead to poles or buried underground in ducts or conduits. Only the rights-of-way associated with those aerial or underground traverses are included in Section 224.<sup>7</sup>

The FCC does not possess  
other authority to regulate  
telecommunications access  
to private buildings.

The Notice concedes (¶52) that Section 224 and the reference to it in Section 251(b)(4) “do not provide access to areas or facilities controlled by the premises owner.” The FCC asks, however, whether its general and ancillary powers at Sections 1, 2(a), 3 and 4(i) of the Communications Act would suffice for subject matter jurisdiction. (Notice, ¶56) Apex respectfully suggests that it would be better to ask Congress for new authority, if it is needed, than to stretch existing powers beyond their intended limits.

*Section 207 Does Not Provide a Jurisdictional Basis to Regulate Building Owners on Behalf of Non-Video Programming Services.*

Some commenters assert that the Commission should expand the reach of Section 207 of TA 96 beyond video programming services.<sup>8</sup> Teligent admits that Congress there granted the Commission authority only in relation to video programming services, but argues that Section 207 “may be extended to give effect to...competitive

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<sup>7</sup> This is borne out by the comments and conclusions reached in the proceeding to implement the new rate provisions of Section 224, Report and Order, CS Docket 97-151, 13 FCC Rcd 6777, 6831-32 (1978). (“[T]here have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.”)

<sup>8</sup> See, e.g., Teligent Comments at 43-46; WCA Comments at 7-14.

telecommunications services where those facilities have the capacity to be used to provide video programming services.”<sup>9</sup> Others contend that mandating nondiscriminatory access to any form of telecommunications service by building owners would be analogous to the requirements imposed by the Commission in construing its Section 207 directive.<sup>10</sup>

These comments ignore several important facts. First, Section 207 was a specific Congressional mandate, pursuant to Section 303, for the Commission to promulgate regulations pertaining to reception of video programming services. In response to that mandate, the Commission has adopted rules implementing Section 207 which cover over-the-air reception devices used to receive television broadcast services, direct broadcast satellite services, and all types of multipoint distribution services.<sup>11</sup> There is no such mandate for non-video programming services. Congress has not directed the Commission to remove governmental or private restrictions for other types of services.<sup>12</sup> As the Commission noted in the OTARD proceeding:

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<sup>9</sup> Teligent Comments at 44.

<sup>10</sup> Sprint Comments at 18; WinStar Comments at 42-45 (referring to *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 (hereafter “OTARD Second Report and Order”).

<sup>11</sup> *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 96-328, released August 6, 1996, at paras. 28-30.

<sup>12</sup> Sections 224 and 251 do not require the FCC affirmatively to remove restrictions on the provision of telecommunications services, but even if those provisions were so interpreted, neither of them applies to building owners.

If Congress has directly spoken to the precise question at issue “that is the end of the matter” and we must give effect to the “unambiguously expressed intent of Congress.” If, however, Congress has not spoken to the precise question at hand- i.e., if “the statute is silent or ambiguous with respect to the specific issue- the Commission may exercise its reasonable discretion in construing the statute.”<sup>13</sup>

The latter maxim is applicable in situations where Congress has not expressed itself unequivocally. The meaning of statutory language must be considered in the context of the whole statute.<sup>14</sup> Thus, the Commission may exercise discretion to assert authority over persons or entities not specifically delineated only when a particular statute is ambiguous, and the discretion must be exercised in light of the entire statute.

In the 1996 Act, Congress contemplated all types of communications services, including well-established, nascent, and even those services which have yet to be developed. Despite having considered all communications services, Congress chose not to extend the reach of Section 207 to voice, data or any other non-video service. Thus, the Commission properly limited its Section 207 rules to only those services used for video programming.

Second, even though it was given specific statutory authority for video programming services, the Commission recognized the limits on its own authority and expressly declined to impose affirmative obligations on MTE property owners to enable tenants to use common or restricted areas in connection with a Section 207 device. The Commission noted that granting viewers a right of access to common or restricted areas would “impose on the landlord or community association a duty to relinquish possession of property.” The Commission also found allowing viewers to place video reception

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<sup>13</sup> OTARD Second Report and Order, para. 12, citing *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).

<sup>14</sup> *Bell Atlantic Tel. Co. v. F.C.C.*, 131 F.3d 1044, 1047 (1997).

devices in common and restricted areas would constitute a permanent physical occupation. Thus, under *Loretto*, the Commission held that this type of mandated access would have been a *per se* taking requiring just compensation.<sup>15</sup>

In sum, the statute was clear in its reference only to video programming services, and the Commission issued regulations pertaining only to these services earmarked by Congress. There is simply no legal justification for expanding the scope of Section 207 to include voice or data telecommunications, Internet access or any other types of non-video programming services.

*There Is No Ancillary Authority Over Building Owners.*

Some commenters argue that the Commission should exercise “ancillary jurisdiction” over building owners pursuant to Sections 1 and 2 of the Communications Act.<sup>16</sup> But this argument overlooks the fact that ancillary jurisdiction can only be asserted

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<sup>15</sup> *Id.* at 20.

<sup>16</sup> *E.g.*, Teligent Comments at 48-52; ALTS Comments, 21; Competition Policy Institute Comments, 7-8; Fixed Wireless Communications Coalition, 11-12.

to regulate within the purview of existing jurisdiction.<sup>17</sup>

Sections 1 and 2 are general statements of the Commission's jurisdiction which include only persons "engaged in communications by wire or radio." MTE owners are not "engaged in communications by wire or radio" through any stretch of the imagination. Simply owning private property which contains wires or other apparatus used for communications does not equate to engaging in communications by wire or radio. Obviously, if it did, the Commission would not be concerned about the possibility over exerting jurisdiction over private owners.<sup>18</sup>

Where building owners have fallen within the purview of the Commission's rules, it has been in an extremely limited context and for a particular purpose unrelated to the building owner's property. There are only two areas in which the rules could be construed to affect building owners indirectly. The Part 68 rules do not allow building owners or subscribers to remove or rearrange inside wiring *on the carrier's side of the demarcation point*. These rules were promulgated to protect carrier's networks. There is no such restriction on the subscriber's side of the demarcation point, even if the wiring was installed by the carrier.<sup>19</sup> Further, these rules restrict building owners and subscribers from doing something; they do not mandate that the building owner take some type of affirmative action. The Section 207 rules are similarly permissive. They do not mandate

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<sup>17</sup> *American Telephone and Telegraph Company v. F.C.C.*, 487 F.2d 865, 872 (2d Cir. 1973) (Rather than purporting to transfer its legislative power to the unbounded discretion of the regulatory body, Congress "intended a specific statutory basis for the Commission's authority.")

<sup>18</sup> See Notice, Separate Statement of Commissioner Ness, and discussion of OTARD Second Report and Order, *supra*.

<sup>19</sup> 47 C.F.R. § 68.213(b).

action on the part of building owners; they simply allow tenants to place antennas on their premises (but only on the property covered by their leases).

In addition, sections 4(i) and 303(r) do not confer ancillary authority. Section 4(i) is a “necessary and proper clause” empowering the Commission to deal with the unforeseen “to the extent necessary to regulate effectively those matters *already within the boundaries.*”<sup>20</sup> Sections 4(i), 201(b) and 303(r) are intended to fill in regulatory gaps, not confer jurisdiction. In each of the “ancillary authority” cases for which these provisions are cited by the commenters in favor of mandatory access, the Commission was simply filling in the blanks and exercising authority over entities it was already empowered to regulate.<sup>21</sup>

Even if the Commission were to determine that it constitutionally can exercise ancillary authority over building owners, which Apex does not believe it can, there are limits on the extent of that authority. In the oft-cited *Southwestern Cable* decision, the Supreme Court was careful to limit regulation of the new medium of cable television to “that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting,” and to find that such

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<sup>20</sup> *North American Telecommunications Ass’n v. FCC*, 772 F.2d 1282, 1292 (7<sup>th</sup> Cir. 1985). (emphasis added)

<sup>21</sup> *E.g.*, *GTE Corp. v. F.C.C.*, 474 F.2d 724 (2d Cir. 1973) (Authority over common carriers sufficient to reach their data-processing activities); *National Broadcasting Company v. U.S.*, 319 U.S. 190 (1943); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

limited regulation was “imperative for the achievement of [the] agency’s ultimate purposes.”<sup>22</sup> On this record, the proponents have not come close to demonstrating that mandatory access to MTEs is imperative for the achievement of the FCC’s purposes.

When the question was extension of FCC jurisdiction over the carrier-like operations of a cable system, a federal appellate court answered in the negative because the regulation appeared to have nothing to do with protection of TV broadcasting.<sup>23</sup> Nor does the Commission’s power to regulate communications extend to real property issues, including contractual issues between owners and carriers.<sup>24</sup> It does not matter if the property is used in a regulated activity—the authority extends to only the activity itself, not the property where the activity is taking place.<sup>25</sup>

Given the Commission’s prior reluctance to expand its Section 207 authority over common areas under the control of building owners, it would be arbitrary for the Commission to suddenly reverse itself, despite the absence of any statutory authority, and find that it has jurisdiction over building owners and over the common or restricted areas of their buildings.

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<sup>22</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968). *See also*, *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“Without reference to the provisions of the Act governing broadcasting, the Commission’s jurisdiction under §2(a) would be unbounded.”)

<sup>23</sup> *National Assn. of Reg. Util. Com’rs v. F.C.C.*, 533 F.2d 601, 615-17 (D.C. Cir. 1976).

<sup>24</sup> *See, Regents v. Carroll*, 338 U.S. 586 (1950).

<sup>25</sup> *Regents, supra*; *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Illinois Citizens Committee for Broadcasting v. F.C.C.*, 467 F.2d 1397 (7<sup>th</sup> Cir. 1972); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

The policy balance weighs  
against mandatory access.

If the Commission, having found jurisdiction notwithstanding the above, were to balance the interests of building owners versus tenants in determining whether to mandate access, it would conclude that the harm to building owners substantially outweighs the benefits to tenants. In the OTARD proceeding, the Commission recognized that tenants usually have no alternative but to place an antenna on or near their property if they wish to receive video programming services. Even that right was limited, however. When the building owner has installed a centrally available antenna, the tenants have the ability to receive video programming signals and the owner may restrict them from placing an antenna on their property.

With respect to the services at issue in this proceeding, tenants clearly possess alternatives. As has been pointed out by numerous commenters, competitive telecommunications providers are already providing services in MTE buildings, or are in the process of negotiating contracts, at a rapid rate. This is not a case in which the tenant has no alternative but to place equipment on his property to receive a service.

Further, as the Commission recognized in the OTARD proceeding and Apex has demonstrated above, building owners have valid concerns about damage to their property. The Commission noted that building owners would have the right to prohibit tenants from drilling holes through exterior walls or piercing the roof, for example.<sup>26</sup> The damage caused by the removal of inside wiring would be even more substantial.

Antennas can be easily removed, wires can't.

Any mandated access to private  
or utility property will constitute

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<sup>26</sup> OTARD Second Report and Order, para. 32.

“taking” requiring just compensation.

As discussed more fully in the Reply Comments of Arden Realty, Inc. (“ARI”), which Apex endorses, a U.S. Court of Appeals recently has found that Section 224(f) of the Communications Act mandates the physical occupation of poles, ducts, conduits and rights-of-way owned or controlled by utilities in a manner that effects a “taking” of property under the Fifth Amendment to the Constitution.<sup>27</sup> While the Court found that the rates mechanism in the statute saved it from facial unconstitutionality, it did not reach the question of whether applying the statutory range of avoidable-cost to fully allocated-cost recovery would meet the constitutional standard of “just compensation” to utility owners.

It is clear, however, that if the FCC mandates access under any color of authority – Section 207 of TA 96, Sections 224 or 251 of the Communications Act, or some other grant of power – it must provide for just compensation to the utility or building owner, as required. Notably left open was the pregnant question of whether a forced invasion is due higher compensation than rates previously established for permissive occupancy.

#### CONCLUSION

For the reasons discussed above, the Commission should find that it lacks authority to compel access to MTEs. Even if the FCC concludes that it possesses the

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<sup>27</sup> *Gulf Power Co. v. United States*, No. 98-2403, 1999 U.S. App. LEXIS 21574, at \*11 (11<sup>th</sup> Cir. 1999).

necessary power, it should decline to exercise the authority until something better than the current anonymous record demonstrates that the exercise is imperative to the achievement of the agency's ultimate purposes.

If the agency believes that nondiscriminatory access may be lawfully imposed and must be ordered, it should leave owners and incumbent utilities free to negotiate the kinds of detailed safeguards for tenants and property that have been shown necessary by Apex's anecdotes. The access, in short, should be reasonably nondiscriminatory. The Commission should acknowledge, as a legal consequence of mandated access, that property owners are entitled to just compensation which cannot be wholly measured in terms of mere recovery of cost – notwithstanding the cost-based formulations in Sections 224 and 251.

Respectfully submitted,

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