

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

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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

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

AT&T Corp. ("AT&T") submits these reply comments regarding actions that are necessary to ensure that competitive providers will have reasonable and non-discriminatory access to rights-of-way, buildings, rooftops, and facilities in multi-tenant environments ("MTEs").

Part I shows that the comments confirm that both incumbent local exchange carriers ("LECs") and some building owners are impeding efforts by competing carriers to serve customers in MTEs, but that incumbent LECs continue to bear responsibility for the most significant barriers to entry. Market forces have failed to produce sufficiently broad MTE access, and certainly have not done so on the rapid timetable envisioned by the 1996 Act.

As explained in Part II, the comments also confirm that the section 224 promise of nondiscriminatory access will be realized only if the Commission enforces the Act's broad application to *all* publicly or privately granted rights of ownership or control. Contrary to the suggestions of incumbent LECs and some building owners, section 224 applies to utility-owned or controlled ducts, conduits, and rights-of-way located within MTEs regardless of whether they are owned or merely controlled by the incumbent LEC and regardless of whether they currently are in use. Accordingly, the Commission should adopt federal rules broadly construing the scope of a utility's section 224 obligations, and neither state law nor the Fifth Amendment poses any obstacle to such rules.

In Part III, AT&T joins the majority of commenters that support the view that the demarcation point in all MTEs should be located at the minimum point of entry ("MPoE"). Placing the demarcation point at the MPoE has the effect of placing all of the riser cables and interior wiring under the exclusive control of the building owner, and

thus allows new entrants to avoid the discrimination and other costs that invariably occur when new entrants are dependent on the incumbent LEC. Establishing the demarcation point at the MPoE would be inappropriate, however, when the building owner has chosen to grant the incumbent LEC exclusive access to the riser cables and inside wiring in the MTE's common spaces. In this latter case, the demarcation point should be established in accordance with the existing rule for single unit installations – *i.e.*, at a point within 12 inches inside of where the telephone wire enters the individual customer's premises, or as close thereto as practicable.

AT&T demonstrates in Part IV that the comments confirm that incumbent LECs should be required to unbundle any MTE facilities that they own or control because new entrants will need unbundled access to these facilities if loop unbundling is to create the competitive environment envisioned by Congress. The Commission's September 15, 1999 News Release indicates that the Commission already has adopted rules requiring incumbent LECs to provide unbundled access to the loop (defined to include in-building wiring), and the comments filed in this and other Commission proceedings fully support the Commission's determinations. For the same reasons that the Commission determined that an incumbent LEC may not separate elements currently combined in its network, 47 C.F.R. § 51.315(b), the Commission should clarify that when a new entrant purchases loop facilities, an incumbent LEC may not impose wasteful costs on new entrants by separating loop facilities from inside wiring.

In Part V, AT&T explains further why the Commission should prohibit incumbent LECs from entering into or enforcing exclusive access agreements with building owners. No commenter seriously contends that the Commission lacks authority to do so, and even

the incumbent LECs do not argue that they should be permitted to enter into exclusive contracts. Instead, the incumbents argue that any restrictions must apply equally to all other carriers. The incumbents ignore the critical and defining feature that distinguishes them from new entrants and justifies differential treatment: the incumbent LECs' enduring monopoly power that places them in a position to lock up markets before new entrants are able to compete fully.

As explained in Part VI, the comments confirm that the Commission should adopt rules preempting restrictions on fixed wireless antennas. Although some commenters argue that the Commission has no authority to adopt rules prohibiting such restrictions, those arguments are ill-conceived. The Commission does not propose to use section 207 as the basis for new rules preempting restrictions on fixed wireless antennas, but instead proposes to use its general authority to effectuate the provisions and purposes of the Communications Act. And, because restrictions on the installation, maintenance, and use of fixed wireless antennas obstruct the federal objective of ensuring access to competitive, high-quality local telephone services, the Commission can and should preempt such restrictions.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") respectfully submits these reply comments in response to the Commission's *Notice*,¹ which addresses the actions that are necessary to help ensure that

¹ Notice Of Proposed Rulemaking And Notice Of Inquiry In WT Docket No. 99-217, And Third Further Notice Of Proposed Rulemaking In CC Docket No. 96-98, *Promotion* (continued . . .)

competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments ("MTEs").

INTRODUCTION

AT&T and other commenters overwhelmingly support the Commission's view that "it is important to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises," and that "the fullest benefits of competition, including the widespread availability of advanced and innovative services at reasonable prices, cannot be achieved unless the incumbent carriers are, to the extent feasible, subject to competition in all sectors of their markets." *Notice*, ¶ 6. Consistent with these principles, AT&T and the other new entrants fully support the Commission's tentative decision to require incumbent local exchange carriers ("LECs") to comply with their *existing* statutory obligations to provide nondiscriminatory access both to the MTE rights-of-way that they own or control, *see* 47 U.S.C. § 224(f)(1), and to the elements of their networks, *see* 47 U.S.C. § 251(c)(3).

Predictably, the incumbent LECs seek to evade their statutory obligations by claiming that section 224 is inapplicable to MTEs, questioning the Commission's authority to implement rules in this area, and raising the specter of constitutional "takings." As demonstrated below, there is no merit to these arguments, and they therefore should not deter the Commission from pursuing its objective of bringing local competition to the multi-tenant environment. Similarly, the comments refute the

(continued . . .)
of Competitive Networks in Local Telecommunications Market, FCC 99-141 (rel. July 7, 1999) ("*Notice*").

argument raised by some building owners that market forces alone will produce sufficiently broad MTE access on the rapid timetable envisioned by the 1996 Act. And, while AT&T does not presently advocate *direct* regulation of MTE building owners, the record is replete with evidence of obstructive and unreasonable behavior by many building owners, and the comments refute the building owners' claim that the Commission lacks authority to prohibit such conduct.

ARGUMENT

I. THE COMMENTS CONFIRM THAT INCUMBENT LECs AND SOME BUILDING OWNERS ARE INTERFERING WITH EFFORTS BY COMPETING CARRIERS TO SERVE CUSTOMERS IN MULTIPLE TENANT ENVIRONMENTS.

The comments show that both incumbent LECs and some building owners have impeded competing telecommunications carriers' efforts to obtain access to necessary facilities located within MTEs on reasonable and nondiscriminatory terms. Indeed, the record before the Commission in this and other proceedings is replete with examples of such obstructive behavior.²

As AT&T explained in its opening comments, the incumbent LECs continue to bear responsibility for the most significant barriers to entry. *See, e.g.*, RCN at 5 (incumbent LECs "appear to use any opportunity to block entry by new competitors"). Competitive carriers face incumbent LEC "lock-outs," in which the incumbent LEC claims, frequently with no proof whatsoever, that it owns the MTE wiring, and then denies the new entrant access – even if the new entrant offers to pay reasonable fees to

² *See, e.g.*, AT&T at 4-8 (and sources cited therein); Adelpia II at 4, 7; ALTS at 3-19; CAIS at 8-9; CTIA at 2-3; CoServe Broadband at 5, 10; Ensemble at 4; FWCC at 3, 5-6; GCI at 2; HighSpeed at 3-6; ICG at 4; Level 3 at ii, 3-5; McLeodUSA at 2-4 and Affidavit of Kent Van Metre; NEXTLINK at 2, 4-7; RCN at 5, 7-8; WCA at 3-4.

the incumbent LEC for the purchase or lease of the wiring. *See* RCN at 10-11. Incumbent LECs drag their feet in establishing the cross-connections that new entrants need to obtain MTE access, while forbidding new entrants from using their own technicians to establish such connections. *See id.* at 7-8. Incumbent LECs even go so far as to design their networks to frustrate MTE access by other carriers. Optel, for example, explains that “BellSouth designs MDU networks so that it can control the customer at the BellSouth switch, obviating the need to dispatch a service crew for most calls and also effectively foreclosing access by a competitor that does not wish to collocate at the BellSouth switch.” Optel at 3. And, “U S WEST . . . often uses several points of entry onto a single property with multiples structures, thus requiring new entrants to interconnect at numerous demarcation points.” *Id.* at 4 n.4.

Discriminatory pricing is yet another weapon in the incumbents’ anticompetitive arsenal. For example, incumbent LECs have required new entrants to pay the full unbundled local loop rate for use of only the incumbent LEC’s riser cable. *See* GCI at 2-3. These and the many other examples of anticompetitive conduct merely illustrate and confirm the general principle, long-recognized by the Commission, that “incumbent LECs have little incentive to facilitate the ability of new entrants . . . to compete against them,” and, to the contrary, “have [both] the incentive and the ability to engage in many kinds of discrimination.”³

With respect to building owners, ALTS provides 78 specific examples of unreasonable building owner conduct. ALTS at 6-18. This conduct includes outright

refusals to deal, unnecessarily protracted negotiations, and attempts to impose burdensome and discriminatory conditions on new entrants, including excessive charges for building access. *Id.* As a result, “denial of access to willing customers in . . . MTEs by landlords is one of the single biggest regulatory obstacles to competitive providers.” McLeodUSA at 1.⁴

The Real Access Alliance and other commenters respond that because the “real estate industry” is competitive, market forces alone will compel building owners to serve their tenants’ interests and regulation therefore is not necessary to ensure that new entrants obtain access to willing customers within MTEs. The reality, however, as numerous commenters demonstrate, is that market forces have failed to produce sufficiently broad MTE access, and certainly have not done so on the rapid timetable envisioned by the 1996 Act.⁵ Although the real estate industry may be comprised of numerous and independent building owners, each of these owners controls a bottleneck to existing tenants. To be sure, blatant disregard of tenants’ interests would decrease demand for space in a building, but the building owners’ documented conduct confirms

(continued . . .)

³ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 307 (1996) (“*Local Competition Order*”).

⁴ The Real Access Alliance contends that some building owners have experienced situations in which they are willing and able to provide new entrants with MTE access, but that the new entrants have not been able to take advantage of that opportunity. Real Access Alliance at 27-29. While it is true that the development of local competition will take time, and that new entrants therefore cannot always take immediate advantage of every opportunity available to them, it also is true, as McLeodUSA describes, that building owners have prevented new entrant access even when new entrants were ready, willing, and able, to provide service. McLeodUSA at 3-4.

⁵ See, e.g., AT&T at 6-8; ALTS at 3-19; Sprint at 5-6; MCI WorldCom at 1-2.

that these incentives are not strong enough to constrain building owners from placing their own interests ahead of their tenants' welfare in a host of areas relevant to this proceeding.

For example, some building owners deny new entrants access even though new entrants typically offer service that is broader, technically superior, and less expensive than the service provided by the incumbent LEC. RCN at 10-11. Building owners also have used their bottleneck control over MTEs to impose excessive access charges on new entrants, even though such charges can inflate the rates that their tenants must pay for service. In addition, building owners' efforts to impose such charges have led to protracted negotiations, and thus have significantly delayed tenants' ability to obtain service from competing providers.⁶

The building owners' own data, even if taken at face value, reveal the significant difficulties new entrants encounter in negotiating access arrangements with MTE building owners. For example, the Real Access Alliance data show that access negotiations between building owners and new entrants completely break down at least 35 percent of the time. Real Access Alliance at 10. Thus, not suprisingly, the most common reason for denying new entrant access is not space or security issues, but rather the breakdown of negotiations – *i.e.*, the refusal of building owners to charge reasonable rates for building access. *Id.* And, even when new entrants are able to secure building

⁶ Tenants generally have little recourse when MTE building owners deny access to new entrants. Tenants may be unwilling to incur the significant expense involved in identifying and moving to a new location for the sake of obtaining service from a competing provider. And, even if MTE tenants were willing to incur such expense, they may be locked into long-term leases that cannot be broken without significant financial
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access agreements, such agreements frequently contain onerous and discriminatory terms that impair new entrants' ability to provide service vis-a-vis incumbent LECs, which typically are immune from such requirements. *See, e.g.*, Level 3 at 5.

The Commission must take action to address these barriers to entry if it is to meet its stated goal of fostering rapid and effective competition. As explained below and in AT&T's opening comments, the simplest and most direct responsive action is to clarify and enforce the incumbent LECs' obligations under sections 224 and 251 to provide new entrants nondiscriminatory access to both the elements of the incumbent LECs' own networks and to the rights the incumbent LECs have to access building owner property.

II. THE COMMENTS CONFIRM THAT THE SECTION 224 PROMISE OF NONDISCRIMINATORY ACCESS CAN BE REALIZED ONLY IF THE COMMISSION CONFIRMS AND ENFORCES THE ACT'S BROAD COVERAGE OF ALL PUBLICLY AND PRIVATELY GRANTED RIGHTS OF OWNERSHIP OR CONTROL.

A. Section 224 Applies To Utility-Owned Or Controlled Ducts, Conduits, And Rights-Of-Way Located Within Multi-Tenant Environments.

Incumbent LECs and some building owners argue that section 224 does not apply to ducts, conduits, and rights-of-way located within MTEs because: (i) section 224 does not apply to facilities located on private property; (ii) section 224 does not apply to above-ground, in-building facilities; or (iii) ducts, conduits, and rights-of-way located inside MTEs are neither owned nor controlled by the utilities that have the right to occupy them. As demonstrated below, each of these contentions is incorrect.

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penalties. *See, e.g.*, RCN at 6; Real Access Alliance at 7 (stating that the "average office lease term is approximately three to five years").

1. Section 224 Applies To Rights-Of-Way Located On Private Property.

Section 224 is fully applicable to poles, ducts, conduits, and rights-of-way located on private property. As described in AT&T's initial comments, and as confirmed by numerous other commenters, nothing in section 224 limits its application to "public" rights-of-way.⁷ To the contrary, section 224 requires a utility to provide nondiscriminatory access to "any pole, duct, conduit, or right-of-way owned or controlled by it," 47 U.S.C. § 224(f)(1) (emphasis added), and thus requires a utility to provide nondiscriminatory access regardless of whether the rights in question were publicly or privately granted. AT&T at 14-16.

BellSouth and other commenters nonetheless argue that the term "right-of-way" cannot be construed as "a privately granted right that is equivalent to an easement." BellSouth at 11; *see also, e.g.*, USTA at 9-10. As the Commission, the commenters, the case law, and dictionary definitions all make clear, however, the terms "right-of-way" and "easement" are used interchangeably to refer to similar or identical rights of property access, as well as to the actual physical space over which the right of passage is granted. *See Notice*, ¶¶ 42-43 & n.94 (citing case law); *see also, e.g.*, Teligent at 26-28 (citing case law showing that the term "right-of-way" encompasses a broad array of property interests, and frequently is interpreted as either an easement, license, or contract); Black's Law Dictionary 1326 (6th ed. 1990) ("[a]s used with reference to right to pass over another's land, [right-of-way] is only an easement"). Furthermore, the very statutory provision on which BellSouth purports to rely demonstrates that when Congress intended

⁷ AT&T at 14-16; *see also, e.g.*, ALTS at 35-36; CompTel at 9-10; MCI WorldCom at 8-9; Sprint at 10; Teligent at 34-35; Winstar at 54-56.

to distinguish between public and private rights-of-way in the Communications Act, it did so expressly. BellSouth at 11 (citing 47 U.S.C. § 621(a)(2) (“*public* rights-of-way”) (emphasis altered)); *see also* 47 U.S.C. § 253(c).

2. Section 224 Applies To Above-Ground, In-Building Rights-Of-Way.

Incumbent LECs and building owners contend that ducts, conduits, and rights-of-way located within an MTE are immune from the requirements of section 224 because that provision does not apply to above-ground, in-building facilities.⁸ BellSouth, for example, argues that “[e]xisting statutory and regulatory guidance clearly show that both Congress and this Commission intended the term [“conduit”] to apply only to outside, underground utility plant, and not to inside, above ground private property.” BellSouth at 12. In support of this claim, these commenters rely on a single piece of legislative history stating that “conduit” consists of “underground, reinforced passages.” *See, e.g., id.*

Section 224, however, requires a utility to provide nondiscriminatory access to “any” conduit owned or controlled by it, 47 U.S.C. § 224(f)(1), and thus, on its face, requires a utility to provide nondiscriminatory access to conduits even if they happen to be located above-ground and/or in an MTE. Further, as CompTel notes, there is no basis in the statutory language, Congress’ intent, or the legislative history to conclude that Congress meant in 1978 to freeze technology in place by limiting nondiscriminatory access requirements only to underground conduit for all time. CompTel at 8. Indeed, such a limited reading of the term “conduit” would be entirely inconsistent with Congress’s intent to broadly apply the obligation of nondiscriminatory access, *see, e.g.,*

⁸ *See, e.g.,* Bell Atlantic at 7; BellSouth at 12; Cincinnati Bell at 4; Real Access Alliance at 48-52; GTE at 24-25; Optel at 12; SBC at 4-5.

Local Competition Order, ¶ 1143-86, and would be at odds with “today’s marketplace of expanding telecommunications services, [where] conduit [is] found in a wider variety of locations than in 1978, and [where] MTE riser conduit serves the very same purpose as the underground conduits of 1978.” *Adelphia* at 5 n.7. In light of the plain language and clear congressional mandate, there is simply no cause for resort to snippets of legislative history. *See, e.g., Avco Corp. v. Dept. of Justice*, 884 F.2d 621, 625 (D. C. Cir. 1989) (“resort may be had to legislative history when a statute is ambiguous, or where the ordinary meaning would lead to absurd or futile result. But ‘the plainer the language, the more convincing contrary legislative history must be.’”) (quoting *Cole v. Harris*, 571 F.2d 590, 597 (D.C. Cir. 1977) (citations omitted)).

To the extent the Commission itself has in the past defined “conduit” as an underground facility, *see* 47 C.F.R. § 1.1402(i), the definition should be amended to reflect industry practice – which uses the term “conduit” to refer to above-ground facilities (*e.g.*, “riser conduit”). That understanding is the only one consistent with the procompetitive intent of section 224. *See, e.g., AT&T* at 18; *PCIA* at 25 (“If the congressional mandate and the Commission’s competition policies are to succeed, this [section 224] access right cannot exclude rights-of-way (including rooftop easements), conduits, [or] risers” in MTEs.); *Level 3* at 9 (“Although the Commission has, to date, narrowly construed these terms, it is clear that it must reconsider those determinations in light of the evidence that the last 100 feet is quickly becoming a bottleneck that threatens to derail the pro-competitive goals of the 1996 Act.”)

Finally, regardless of any historical limitations placed on the definition of the term “conduit,” section 224 also applies to “right[s]-of-way” and “duct[s],” and the

Commission can rely on these terms to ensure that new entrants obtain section 224 access to all of the necessary MTE facilities. *See, e.g.,* Winstar at 60 (“The Commission can accommodate access to [in-building] conduit under Section 224 by classifying riser conduit as a right-of-way through the MTE”); CompTel at 9; 47 C.F.R. § 1.1402(k) (defining “duct” as “a single enclosed raceway for conductors, cable and/or wire”).⁹

3. Utilities Own Or Control Ducts, Conduits, And Rights-Of-Way Located Within Multi-Tenant Environments.

AT&T’s initial comments demonstrated that a utility should be deemed to have ownership or control over a duct, conduit, or right-of-way when the utility has obtained (by whatever means) the right to use that duct, conduit, or right-of-way to provide service. AT&T at 19-22. A utility with the legal right (however obtained) to use a duct, conduit, or right-of-way has ownership of, or control over, that venue. *Id.*¹⁰

Some incumbent LECs and building owners, however, contend that the ducts, conduits, and rights-of-way located within an MTE are immune from the requirements of section 224 because such venues are neither owned nor controlled by the utilities, even though the utilities have the right to occupy them.¹¹ These commenters claim that

⁹ The Commission’s construction of any ambiguous terms in section 224 would, of course, be accorded substantial deference. *See, e.g.,* WCA at 17 n.33 (citing case law). Because section 224 is designed “to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers,” a broad construction of the terms “duct,” “conduit,” and “right-of-way” is not only consistent with the structure and purposes of the statute, it is compelled by them. *See* Report and Order, *Implementation Of Section 703(e) Of The Telecommunications Act Of 1996*, 13 FCC Rcd. 6777, ¶ 2 (1998) (“703 Order”).

¹⁰ *See also* CompTel at 9; MCI at 10; Sprint at 13; Teligent at 35; Winstar at 55-56.

¹¹ *See, e.g.,* Real Access Alliance at 49; Cincinnati Bell at 5-7; Optel at 13; USTA at 8-9.

utilities generally do not control “access” to MTE ducts and conduits, that their agreements with building owners do not permit third-party access, and that building owners’ consent must be obtained before such access can be granted and before a right-of-way can be modified or expanded.

These claims do nothing to undermine the conclusion that the incumbent LECs’ relationships with building owners, however characterized, trigger section 224. The incumbent LECs and building owners confuse the concepts of ownership and control. Although a building owner might “own” building conduit, in the sense that the building owner can grant new entrants access to that conduit if he or she so desires, a utility that has the legal right to use that conduit has been given “control” over the space that it is entitled to occupy. Further, for purposes of section 224, it is irrelevant whether each utility’s right to place and maintain facilities on MTE property is construed as owning or controlling the conduit or as owning or controlling a right-of-way through the conduit. In either case, the utility must, under section 224, provide nondiscriminatory access to the space that it controls. 47 U.S.C. § 224(f)(1).¹²

Indeed, even if, as some commenters contend, an exclusive “license” were the only source from which the utility derived its right to occupy space within an MTE, the utility still would have sufficient “control” of that space to trigger section 224. A license that gives the utility the right to use or pass its facilities through the property of an MTE building owner is a classic “right-of-way.” See Black’s Law Dictionary at 1326 (defining

¹² Of course, if the utility’s right-of-way is too limited to allow the utility to meet its section 224 obligation to provide nondiscriminatory access, the utility must take reasonable steps to obtain modifications to its agreement with the building owner to ensure that it can meet that obligation. AT&T at 30-36; see also *infra* part V.

right-of-way, in part, as the right to pass over the property of another); *see also* Teligent at 26-28 (citing case law showing that the term “right-of-way” encompasses a broad array of property interests, and frequently is interpreted as either an easement, license, or contract).

In all events, the incumbent LECs generally overstate the nature of the restrictions placed on their ownership of, or control over, MTE ducts, conduits, and rights-of-way. For example, although the incumbent LECs now claim that agreements between utilities and building owners preclude utilities from providing third-party access, BellSouth, in its Section 271 Application in South Carolina, indicated that it would provide new entrants with precisely the type of MTE access that new entrants seek in this proceeding. *See* Teligent at 31-32 (citing Brief In Support Of Application By BellSouth For Provision Of In-Region, InterLATA Services In South Carolina, Affidavit Of W. Keith Milner, Appendix A, Exh. WKM-9, at 3, *Application By BellSouth For Provision Of In-Region, InterLATA Services In South Carolina*, CC Docket No. 97-208 (Sept. 30, 1997) (BellSouth “will offer to CLEC through a license or other attachment the right to use any available space owned or controlled by BellSouth in the building or building complex to install CLEC equipment and facilities as well as ingress and egress to such space”)). Furthermore, numerous commenters have cited case law showing that utilities may grant third-parties access to rights-of-way without obtaining the consent of, or compensating, the owner of the servient property. *See, e.g.*, Teligent at 29-32.¹³

¹³ As described in AT&T’s initial comments (at 15-16), the Commission should reaffirm that a “utility” is required to comply with section 224 only to the extent that it is functioning as a local exchange carrier or other utility, not as a cable or long distance service providers.

B. Section 224 Applies To Utility-Owned Property Used In A Manner For Which The Utility Would Need To Obtain A Right-Of-Way From A Private Landowner.

GTE contends that the “traditional definition of ‘right-of-way . . . require[s] that property owned by a utility in fee simple absolute not be subject to section 224.” GTE at 25. In GTE’s view, the term “right-of-way” must exclusively be understood as the right “to pass or cross the lands of *another*.” *Id.* (emphasis in original). The term “right-of-way” is not limited to a right to use property that belongs to another, but instead also denotes the actual physical space over which a utility’s facilities traverse. *See* Black’s Law Dictionary at 1326. Consistent with that meaning, the Michigan Public Service Commission already has held that land used for distribution facilities is a “right-of-way” even if it is held by a utility in fee simple absolute. *Notice*, ¶ 43. And, in all events, section 224, by its terms requires a utility to provide access to “any” right-of-way that it “own[s]” as well as “control[s].” 47 U.S.C. § 224(f)(1).¹⁴

¹⁴ GTE also asserts that the “underlying purposes of the statute also support limiting Section 224 to actual rights-of-way” because “there is no evidence that the property that GTE owns is the product of any such historical or incumbent advantage.” GTE at 25-26. To the contrary, GTE’s ubiquitous network, developed during an extended period of monopoly control, has far more distribution facilities than do the networks of new entrants, including more facilities on GTE’s own property. The purpose of section 224 is not to ensure that GTE retains exclusive control of those facilities, but rather that it provide competing carriers with nondiscriminatory access to those facilities. 47 U.S.C. § 224(f).

C. The Scope Of A Utility's Ownership And Control Should Be Broadly Construed As a Matter of Federal Law.

The comments confirm that the issue of the scope of a utility's obligations to provide nondiscriminatory access under section 224 presents a question of federal law for which additional Commission guidance is necessary.¹⁵

1. Section 224 Applies To Unused Rights-Of-Way.

GTE contends that even if a utility has a right to use a pole, duct, conduit, or right-of-way, it should not be deemed to have ownership or control of that venue until the utility makes an "affirmative occupation." GTE at 26-27. GTE never explains why such an affirmative occupation is necessary to establish ownership or control, nor could it. The "authority" or "power" to use a right-of-way, standing alone, is sufficient to constitute ownership or control. *See* AT&T at 21. Regardless of whether requiring a utility to provide nondiscriminatory access to unused rights-of-way puts it in an "awkward and burdensome" position with respect to property owners, GTE at 26, federal law requires the utility to comply with its section 224 obligations, and creates no exception for existing, but currently unused, rights-of-way. *See* 47 U.S.C. § 224(f)(1). Furthermore, to the extent the "burdensome" tasks GTE identifies are necessary at all, they are equally necessary with respect to a venue currently used by the utility, and there is thus no basis for applying section 224 differently to "used" and "unused" venues.

¹⁵ *See, e.g.*, AT&T at 19-22; MCI WorldCom at 7; Teligent at 28; Winstar at 62.

2. Section 224 Applies To The Expanded Right-Of-Way A Utility Could Obtain Through The Exercise Of Its Eminent Domain Power.

Bell Atlantic argues that the “Commission cannot and should not adopt [its] proposal” to require utilities to exercise their powers of eminent domain to expand existing rights-of-way for the benefit of third parties. Bell Atlantic at 8. The Commission *already* has rejected that argument, and has specifically held that a utility is required to exercise its authority of eminent domain where necessary to expand an existing right-of-way in order to accommodate a request for access. *Local Competition Order*, ¶ 1181.

Bell Atlantic provides no reasonable basis for the Commission to revisit its holding. Contrary to Bell Atlantic’s claim, the Commission has ample authority to implement and construe the section 224 obligation of nondiscriminatory access.¹⁶ Bell Atlantic also claims that “any eminent domain authority granted to a utility is generally restricted [and does not allow] . . . a utility to condemn private property on behalf of other companies.” Bell Atlantic at 8-9. To the extent this claim is true, it does not present a problem under the Commission’s current rule, which only requires a utility to exercise its power of eminent domain where that power exists. *Local Competition Order*, ¶ 1181. Finally, Bell Atlantic claims that the Commission’s rule is unreasonable because, for practical reasons, Bell Atlantic prefers to negotiate mutually agreeable access arrangements with building owners rather than become embroiled in “contentious judicial proceeding[s]” that “often” accompany the exercise of eminent domain authority. Bell Atlantic at 9. Nothing in the Commission’s rule prevents a utility from engaging in such

¹⁶ See, e.g., CompTel at 14-16.

negotiations to the extent they are, in fact, more expedient than exercising the power of eminent domain.

3. State Law Is Not A Barrier To Commission-Provided Guidance On The Meaning Of “Owned Or Controlled.”

Some commenters have alleged that the Commission’s ability to provide guidance on “owned or controlled” is constrained by state law.¹⁷ As AT&T explained in its opening comments, although the scope of a utility’s ownership or control vis-à-vis a property owner is a matter of state law, the issue of whether a utility’s property rights under state-law (whatever they may be) *trigger* the federal obligations of section 224 presents a federal question. AT&T at 19-20. The comments confirm the need for further Commission clarification in this area. *See, e.g.*, CPI at 4-5 (arguing that the Commission should adopt definite criteria for determining whether a utility should be “deemed to ‘control’ a facility”).

D. CMRS Providers Have Attachment Rights Under Section 224.

Contrary to the claims of several utilities, *see* Electric Utilities at 21-23; Electric Utilities Coalition at 6-7; UTC/EEI at 10-14, section 224 clearly gives providers of commercial mobile radio services (“CMRS”) a right of attachment. Section 224 requires the Commission to regulate pole attachment rates as they apply to *any* attachment by *any* telecommunications carrier, and CMRS providers unquestionably are telecommunications carriers.¹⁸ Thus, as the Commission expressly found in its order

¹⁷ *See, e.g.*, Ameritech at 2; GTE at 22; Optel at 12-13.

¹⁸ *See* 47 U.S.C. § 153(46) (“telecommunications service” means “the offering of telecommunications for a fee directly to the public . . . , *regardless of the facilities used*”) (emphasis added); *id.* § 153(44) (A “telecommunications carrier” is “*any* provider of (continued . . .)

adopting rates for pole attachments, wireless carriers are entitled to the benefits and protection of section 224. *See 703 Order*, ¶ 39.

The Electric Utilities Coalition argues that if the Commission expands the mandatory attachment requirements, it should also make them reciprocal. Electric Utilities Coalition at 13. There is no statutory basis, however, for such reciprocity. Congress required only “utilities” to provide access to their poles, ducts, conduits, or rights-of-way and did not impose reciprocal obligations on telecommunications carriers that are not “utilities.” A “utility” is “a local exchange carrier or an electric, gas, water, steam, or other public utility [that] owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” 47 U.S.C. § 224(a)(1). Unless and until CMRS providers are deemed local exchange carriers, they have no obligations under section 224.¹⁹

Certain incumbent LEC and utility commenters argue that rooftops and riser space do not fit within the statutory phrase “pole, duct, conduit, or right-of-way” used in

(continued . . .)

telecommunications services”); *see also Local Competition Order*, ¶ 993 (CMRS providers are telecommunications carriers).

¹⁹ GTE argues that section 224 does not extend to exclusively wireless facilities. GTE at 27-28. To the extent that GTE is arguing that other telecommunications carriers and cable operators do not have a right of attachment to facilities exclusively used to provide CMRS service, AT&T agrees. If, however, GTE is arguing that certain poles, ducts, conduits, and rights-of-way used to provide local exchange service are not subject to section 224, then such a reading is inconsistent with the definition of a utility as an entity whose facilities are used, “in whole or in part,” for wire communications. *See AT&T* at 16 n.19 (“section 224 obligations apply to all rights-of-way associated with all *utility* operations of a utility providing wire communications, but *not* to the non-utility operations of that company.”) (emphasis in original).

section 224.²⁰ There is no basis for the narrow reading of section 224 that these commenters urge. The Commission is not limited to regulating “distribution” rights-of-way. Rather, as AT&T explained in its comments, the Commission has consistently and appropriately recognized that the obligation of nondiscriminatory access must be read broadly in order to serve its purpose of allowing telecommunications carriers and cable systems to reach the customers who want their services. *See Notice*, ¶ 41 n.45 (citing *Local Competition Order*, ¶ 1173). Where a rooftop constitutes a right-of-way owned or controlled by a utility, competing telecommunications service providers are entitled to non-discriminatory access to that rooftop.

E. Ordering Building Access Under Section 224 Will Not Result In An Unconstitutional Taking.

Some commenters argue that requiring incumbent LECs and other utilities to meet their section 224 obligations could cause a “taking” of building owner property.²¹ The short answer is that the section 224 interpretations advanced by AT&T require a utility only to: (i) provide third parties whatever access the utility has authority to provide, or (ii) where existing arrangements with the property owner are inadequate to provide nondiscriminatory access, to take reasonable steps to obtain the necessary authority either through exercising eminent domain powers or negotiating additional contractual arrangements with the property owner. Neither scenario “takes” any building

²⁰ *See, e.g.*, SBC at 4; Electric Utilities at 16-21; Cinergy at 8-10; Minnesota Power at 1-2; UTC/EEI at 3-5.

²¹ *See, e.g.*, Ameritech at 3-4; GTE at 21-23; Optel at 10-12, 17; Bell Atlantic at 7; BellSouth at 13-14; Cincinnati Bell at 8; Real Access Alliance at 37-40; SBC at 3; USTA at 10-11.

owner property without just compensation in violation of the Fifth Amendment, and these section 224 requirements therefore raise no plausible takings concerns.²²

III. THE COMMISSION SHOULD SPECIFY THAT THE DEMARCATION POINT IN ALL MULTIPLE TENANT ENVIRONMENTS IS AT THE MINIMUM POINT OF ENTRY, UNLESS THE MTE PREMISES OWNER HAS GRANTED EXCLUSIVE ACCESS TO RISER CABLES AND OTHER WIRING IN THE MTE'S COMMON SPACES TO THE INCUMBENT LEC.

In its opening comments, AT&T established that the “current Commission rule governing multi-tenant demarcation places far too much discretion in the hands of incumbent LECs,” and that the Commission should therefore “establish a single telephony demarcation point for multi-tenant environments.” AT&T at 36-37. A broad array of commenters, both new entrants and incumbent LECs, support this position.²³ In particular, these commenters request that the Commission establish a mandatory demarcation point for MTEs at the Minimum Point of Entry (“MPoE”).²⁴ AT&T

²² Of course, the Commission has express authority to “take” incumbent LEC property in connection with enforcing section 224 obligations. *See Gulf Power Co. v. United States*, No. 98-2403 (11th Cir. Sept. 9, 1999).

²³ *See, e.g.*, ALTS at 22-23; CAIS at 9-10; FWCC at 13-14; GTE at 4-8; Optel at 5-7; PCIA at 32-33; Teligent at 76-84; Winstar at 65-68; *see also* Cincinnati Bell at 3 (alleging that “most ILECs have adopted a MPOE policy” for MTE riser cable, and that Cincinnati Bell’s default position is to “revert[] to the MPOE policy for the installation”).

²⁴ The Commission’s rules define the MPoE as “either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The telephone company’s reasonable and nondiscriminatory standard operating practices shall determine which shall apply.” 47 C.F.R. § 68.3. AT&T believes that the MPoE generally should be defined to mean the point at which the service provider’s network facilities switch over to twisted copper “home-run” wiring. This interpretation is consistent with the current definition because the “closest practicable point” generally is located at the Main Distribution Frame (“MDF”) or the Intermediate Distribution Frame (“IDF”) – the locations where the service provider’s network facilities switch over to the twisted copper pair “home-run” wiring. In mid- and high-rise buildings where the service provider has deployed fiber to
(continued . . .)

concur, and urges the Commission to specify that, except where the building owner has effectively ceded control over riser cables and inside wire in the MTE's common spaces to the incumbent LEC,²⁵ the demarcation point in all MTEs should be at the MPoE. As demonstrated below and in the numerous comments that advocate this change, establishing a single point of demarcation in MTEs at the MPoE is essential if subscribers in MTEs are to obtain the benefits of facilities based competition.

Placing the demarcation point at the initial entry into the multiple tenant environment (or at the property line) has the effect of placing all of the riser cables and interior wiring under the exclusive control of the building owner, allowing new entrants to bypass the incumbent LEC entirely by deploying fiber to the outside of the building, and allowing them to utilize the building's existing inside wiring. This enables new entrants to provide their own facilities-based service free from discrimination and other costs that invariably occur when new entrants are dependent on the incumbent LEC, and make it possible for building owners and their tenants to obtain service from competing providers without facing the undesirable consequence of having their premises re-wired with multiple sets of redundant wiring.

(continued . . .)

individual floors, the MPoE will be the frame at each floor where the fiber switches over to twisted copper pair wiring. In addition, in a campus setting, where the service provider's network facilities switch over to twisted copper "home-run" wiring at the IDF in the telephone room in each building on the campus, and not at the main clubhouse, the MPoE should be located at the IDF.

²⁵ MTE building owners can cede such control to incumbent LECs through exclusive access contracts. As described herein and in AT&T's initial comments (at 25-30), incumbent LECs should be prohibited from entering into or enforcing such contracts. Furthermore, even in the absence of such contracts, building owners may effectively cede control to incumbent LECs by, for example, refusing to deal with new entrants or by failing to permit new entrants access on reasonable and nondiscriminatory terms.

By contrast, placing the demarcation point in a multiple tenant environment closer to the individual customer than the MPoE creates significant barriers to facilities based entry – which is precisely why some incumbent LECs (such as BellSouth) have already chosen to designate the demarcation point at the customer’s individual unit. BellSouth at 7. Placing the demarcation point at some distance from the MPoE has the effect of placing all of the wiring between the MPoE and the demarcation point under the ownership and control of the incumbent LEC. In that situation, a new entrant wishing to provide service to a customer or customers within an multiple tenant environment has two alternatives. First, the new entrant could undertake the wasteful and costly task of deploying redundant riser cables and other interior wiring between the MPoE and the customer’s premises. Needless to say, this prospect will often be sufficient to deter a building owner or customer from obtaining service from the new entrant, because property owners will often be reluctant to have additional wiring running through their property. Second, the new entrant could choose to lease the incumbent LEC’s loops (defined to include riser cable and inside wiring). That prospect is equally unattractive because the new entrant must depend on the incumbent’s goodwill and is limited by the technology that the incumbent LEC has chosen to deploy. That is why even GTE is compelled to admit that establishing “the point of access at the MPoE is the most effective means of allowing competitive access to inside wiring in MTUs . . . and guarantees that individual customers in MTUs are served by their provider of choice.” GTE at 7-8.

The Commission can, and should, address these problems by modifying its existing demarcation point rule for multi-unit installations by specifying that the

demarcation point in all multi-unit installations, regardless of age, must be at the MPoE – unless the building owner effectively cedes control over the wiring to the incumbent LEC. At the same time, the Commission should clarify that because – under its rules – the incumbent LEC retains legal ownership of incumbent LEC-installed riser cables and other inside wiring on the customer’s side of the demarcation point, and because utilities must provide access to rights-of-way that they own or control, the incumbent LEC’s duty to provide nondiscriminatory access to riser conduit and other rights of way within a multiple tenant environment is unaffected by the change in the demarcation point.²⁶

Although the Commission should therefore specify that the demarcation point must generally be established at the MPoE, establishing the demarcation point at the MPoE would be inappropriate where the building owner has chosen, either as a result of a contractual agreement with the incumbent LEC or otherwise, to effectively grant the incumbent LEC exclusive access to the riser cables and inside wiring in the MTE’s common spaces. As the Commission’s rules make clear, the purpose of the demarcation point is to specify “[t]he point of demarcation . . . between telephone company

²⁶ “The Commission has held that moving the demarcation point does not transfer ownership and that carriers may retain ownership over carrier-installed inside wiring. Premises owners or customers, however, have a right of access to wiring on the customer’s side of the demarcation point, and a responsibility to maintain such wiring.”

Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, *Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 12 FCC Rcd 11897, ¶ 32 (1997); see also Memorandum Opinion & Order, *Detariffing the Installation and Maintenance of Inside Wire*, 1 FCC Rcd 1190, ¶ 34 (1986) (“Our objectives can accordingly be satisfied by precluding [conduct that interferes with deregulation of the installation and maintenance of inside wiring] in lieu of requiring telephone companies to relinquish claims of ownership”).

communications facilities and terminal equipment, protective apparatus or wiring at a *subscriber's* premises." 47 C.F.R. § 68.3 (emphasis added). The demarcation point, in other words, specifies where the incumbent LEC's control over wiring ceases, and where the subscriber's control over the wiring begins.

Where the building owner, however, has decided to grant the incumbent LEC effective control over the wiring between the subscriber's premises and the point of entry into the MTE, the demarcation point could not be established at the MPoE. In that situation, it is clear that the incumbent LEC has retained effective control over all wiring outside the subscriber's individual unit, and the demarcation point in that situation must be established in accordance with the existing rule for single unit installations. In other words, the Commission should specify that in that situation the demarcation point in multi-unit premises shall be a point within 12 inches inside of where the telephone wire enters the individual customer's premises, or as close thereto as practicable, and that new entrants may obtain access under section 251(c)(3) to all of the wiring on the telephone company's side of the demarcation point. Any other result would defeat any possibility of competitive entry into the MTE, because new entrants most likely would not have a legal basis for obtaining use of the existing riser cables or other inside wiring, or the right to use such wiring on reasonable and nondiscriminatory terms.

Consistent with the Commission's Public Notice in the recent *UNE Remand Proceeding*, and as AT&T established in its opening comments (at 19-22), the Commission should therefore make clear that where the incumbent LEC has obtained exclusive access over riser cables and other MTE wiring, the incumbent LEC must provide new entrants with access to those facilities at cost-based rates. Because the

incumbent LEC in that circumstance has retained both ownership *and* control over those MTE facilities, the Commission should clarify that those facilities are part of the loop, and thus are subject to the unbundling requirements of section 252(c)(3).

In short, the point of demarcation in multiple tenant environments should generally be established at the MPoE. However, where the MTE premises owner has effectively granted the incumbent LEC exclusive access, the demarcation point should be established within 12 inches inside of where the wiring enters the individual subscriber's unit, and all wiring outside the subscriber's unit should be defined as part of the incumbent's loop.

IV. THE COMMENTS CONFIRM THAT INCUMBENT LECS SHOULD BE REQUIRED TO UNBUNDLE ANY MULTI-TENANT ENVIRONMENT FACILITIES THAT THEY OWN OR CONTROL.

AT&T's initial comments demonstrated that a new entrant will need unbundled access to all of the MTE facilities owned and controlled by the incumbent LEC if loop unbundling is to create the competitive environment envisioned by Congress. AT&T at 23-25. These facilities may include, *inter alia*, the NID,²⁷ riser cable and other wiring, horizontal distribution, multiplexing equipment, junction and utility boxes, and

²⁷ As demonstrated in AT&T initial comments, the "NID" should be broadly defined to include the functionality that provides the physical termination (including electrical protection such as grounding) and cross-connection, at the appropriate signal throughput (or bandwidth), of the incumbent LEC facilities and the privately owned wiring. AT&T at 11 n.12. The Commission appears to have adopted such a broad definition. FCC News Release, Rpt. No. CC 99-41, at 3 (rel. Sept. 15, 1999) ("*FCC News Release*").

terminating equipment (e.g., terminal blocks, smart jacks, and channel banks). The majority of commenters overwhelmingly support AT&T's position.²⁸

Some incumbent LECs, however, argue that incumbent LEC owned and controlled MTE facilities should not be unbundled because "no case has yet been made that these facilities" pass the "necessary" and "impair" test of section 251(d)(2).²⁹ The Commission, however, already (and properly) has rejected this argument, and has adopted rules requiring incumbent LECs to provide unbundled access to the loop (defined to include "inside wire owned by the incumbent LEC"³⁰), subloops (at any accessible point, including the NID, MPoE, and feeder interface device), and the NID (defined as the "device used to connect loop facilities to inside wiring"). *FCC News Release* at 3. AT&T supports those determinations (as described in the *FCC News Release*), which are well-supported by the record in this and other Commission proceedings.

The Commission also should clarify that incumbent LECs may not separate the loop facilities from the customer's inside wiring when the new entrant purchases loop facilities from the incumbent LEC. The Commission already has determined that an incumbent LEC may not separate elements currently combined in its network, 47 C.F.R. § 51.315(b), and the Supreme Court expressly upheld that determination, finding that the

²⁸ See, e.g., CoServe Broadband at 6; Global Crossing at 7-9; ICTA at 5; MCI WorldCom at 16-20; NEXTLINK at 8-9; Optel at 8; PCIA at 32-33; Sprint at 13-14; Teligent at 52; Winstar at 68-70.

²⁹ See, e.g., Ameritech at 4; Cincinnati Bell at 9; USTA at 13.

³⁰ The *FCC News Release* refers to "inside wire owned by the incumbent LEC." Strictly speaking, however, the incumbent LECs generally retain ownership of all "inside wire" they install. Thus, the *FCC News Release's* reference to "inside wire owned by the incumbent LEC" appears to refer to all MTE wiring outside an individual subscriber's unit that is both owned and effectively controlled by the incumbent LEC.

Commission properly precluded incumbent LECs from engaging in such an “anticompetitive practice.” *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 737-38 (1999). The Commission similarly should clarify that incumbent LECs cannot impose wasteful costs on new entrants by separating loop facilities from inside wiring.

V. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD PROHIBIT INCUMBENT LECs FROM ENTERING INTO OR ENFORCING EXCLUSIVE SERVICE AGREEMENTS WITH BUILDING OWNERS.

In the 1996 Act, “Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry” and to “eliminate the incumbent LECs’ control of bottleneck local facilities.” *Notice*, ¶ 2. In furtherance of those goals, the Commission sought comment regarding whether it should prohibit as unjust and unreasonable practices prohibited by section 201(b) some or all “exclusive contracts” between common carriers and building owners to ensure “that customers located in multiple tenant environments have access to their choice of telecommunications service providers.” *Id.* ¶ 64. The Commission should prohibit incumbent LECs from entering into or enforcing such arrangements.

No commenter seriously contends that the Commission lacks authority under section 201(b) to prohibit incumbent LECs from entering into or enforcing exclusive service arrangements.³¹ As AT&T demonstrated in its opening comments, Section 201(b) provides the Commission with undoubted power to regulate these contractual arrangements. AT&T at 25-26. Thus, the relevant inquiry is not whether the Commission has the necessary authority to act, but whether the Commission *should*

³¹ See, e.g., Bell Atlantic at 6 (“The Commission has sufficient authority to prohibit service providers from entering into . . . exclusive contracts”).

exercise that authority to preclude incumbent LECs from perpetuating their bottleneck control through exclusive access arrangements.

It clearly should do so. Indeed, even the incumbent LECs do not argue that they should be permitted to enter into exclusive contracts.³² Some building owners do claim generally that “exclusive contracts . . . work to the benefit of our residents [by] . . . giv[ing] competitors a chance to establish a foothold in our area.”³³ But that rationale plainly does not support allowing incumbent LECs to enter or enforce exclusive arrangements. Incumbent LECs have no need to establish a “foothold” – they already have “direct, and in many cases, exclusive access to almost every customer in their operating territory.” CPI at 17; *see also* Global Crossing at 4 (“it is the incumbents who generally take advantage of exclusive arrangements due to their historic relationship with building owners, and not the competitive entrants seeking to provide consumer choice”).

For their part, the incumbent LECs argue only that any restrictions that apply to them must apply equally to all other carriers.³⁴ But that ignores the critical and defining feature of incumbent LECs that distinguishes them from other carriers and justifies

³² *See, e.g.*, SBC at 7; *accord* Bell Atlantic at 5-6 (“the Commission should preclude any single provider from foreclosing access to competitors by entering into an exclusive contract to serve all tenants in a multi-tenant building”); GTE at 16 (“GTE supports a policy that permits individual telecommunications customers in MTUs to select the carrier of their choice”).

³³ *See, e.g.*, Trust Property Management at 2; Colonial Properties Trust; Windsor at Polo Run Comments; Wexenthaller Realty Management; Diamond Lakes Apartment Homes; Windsor at Asbury Square; Windsor at Hunter Woods; Windsor at Fairlane Meadow; Nottingham Apartments; White Birch; Weigand-Omega Management, Inc.; CMI Central Management, Inc.; Draper & Kramer Inc.; Jamestown Homes, Inc.; Ridgedale Apartments; Berkshire Realty Co.; Sterling House of West Des Moines; Barton Farms; Bexley Village; Shaker Square.

³⁴ *See, e.g.*, Ameritech at 10; Bell Atlantic at 5.

different treatment: their enduring monopoly power that places them “in a position to lock up markets before the CLEC industry is ready to compete fully.” CPI at 17-18; *see also Notice*, ¶¶ 8, 19. Ameritech’s argument that it would be unlawful for the Commission to recognize this distinction ignores that the Commission, the courts, and Congress have consistently, and properly, done precisely that. *See AT&T* at 26-28.

VI. THE COMMISSION SHOULD ADOPT RULES PREEMPTING RESTRICTIONS ON FIXED WIRELESS ANTENNAS.

The Real Access Alliance argues that the Commission had no authority to adopt the current rules prohibiting restrictions that impair the maintenance, installation or use of OTARD devices, much less expand the scope of these rules. *Real Access Alliance* at 73. The Real Access Alliance bases its argument on section 207, which it claims is too narrow to permit the Commission to expand its rules to apply to new services and new providers. *Id.* These arguments are misdirected because the Commission does not propose to use section 207 as the basis for new rules preempting restrictions on fixed wireless antennas. Rather, the Commission proposes to use its general authority to effectuate the provisions and purposes of the Communications Act. *See Notice*, ¶ 69.

As AT&T demonstrated in its comments, a clear objective of the 1996 amendments to the Communications Act was to promote competition in the local exchange telecommunications market and break the incumbent LEC monopoly over the provision of local telecommunications services. *AT&T* at 38-39 & n.45 (citing H.R. Rep. 104-204, at 48 (1995), S. Rep. No. 104-23, at 5 (1995)). Because restrictions on the installation, maintenance, and use of fixed wireless antennas obstruct the federal objective of ensuring access to competitive, high-quality local telephone services, the Commission can and should preempt such restrictions.

The City and County of San Francisco argue that the Commission cannot preempt state and local police powers over telecommunications antennas absent express Congressional authority. San Francisco at 14-18. San Francisco claims that any proposed rule that incorporated such a preemption would completely eradicate traditional health, safety, zoning and aesthetic considerations as bases for local decisions about telecommunications antennas. *Id.* at 14. The current OTARD rules, however, preserve the ability of local authorities to impose restrictions necessitated by safety or historic preservation concerns, if such a restriction is as narrowly tailored as possible, imposes as little burden as possible, and applies in a non-discriminatory manner throughout the regulated area. *See* 47 C.F.R. § 1.4000(b). Including a similar exception in any new rules preempting restrictions on fixed wireless antennas would preserve the right of states and localities to protect the public health and safety.

San Francisco and the National Association of Counties also argue that the Commission may not extend its rules for video antennas to encompass telecommunications antennas. *See* San Francisco at 17-18; National Association of Counties II at 20. These commenters argue that section 704(a) of the Telecommunications Act of 1996 expressly preserves local governments' authority over telecommunications antennas and prevents the Commission from adopting rules for telecommunications antennas similar to those it adopted for video receive antennas. San Francisco at 17; National Association of Counties II at 20-21. As AT&T explained in its comments (at 39-41), however, section 704(a) is not an obstacle to the Commission's preemption of state and local regulations that impair the installation, maintenance, or use of a fixed wireless antenna. State and local governments will continue to have the

authority to adopt legitimate regulations governing the placement, construction, and modification of fixed wireless antennas, as long as such regulations do not “impair” their installation, maintenance, or use. *Id.*

CONCLUSION

For the foregoing reasons, the Commission should adopt the vast majority of tentative conclusions in the *Notice* and should modify others in accordance with AT&T's comments and reply comments.

Respectfully submitted,

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