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

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In the Matter of	
Promotion of Competitive Networks in Local Telecommunications	WT Docket No. 99-217
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 Rulemaking 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	CC Docket No. 96-98

JOINT REPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
MANUFACTURED HOUSING INSTITUTE
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF HOME BUILDERS
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL ASSOCIATION OF REALTORS
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE/THE REAL ESTATE ROUNDTABLE

(THE "REAL ACCESS ALLIANCE")

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SUMMARY

The Real Access Alliance once again calls on the Commission to reject forced access in every form. Rarely has the Commission been presented with a record as unambiguous as the one in this proceeding. Forced access is nothing but a policy in search of a problem.

Even the competitive local exchange carriers ("CLECs") admit that they are not being harmed or restrained by market forces – they simply want the Commission to give them the edge in their dealings with property owners. As we stated in our opening comments, forced access amounts to a hidden subsidy, which would directly contradict the free market philosophy underlying the Telecommunications Act of 1996. Without an express directive from Congress, ordering the Commission to enact an industrial policy to promote the CLECs at the expense of the real estate industry, the Commission cannot proceed.

The comments submitted by the CLECs are a classic example of the old lawyers' saw, "when the facts and the law are against you, just pound on the table." The facts offered by the CLECs consist entirely of anonymous anecdotes, which neither the Commission nor other interested parties can adequately evaluate. The Commission must first establish the facts and then determine the policy, not the other way around. The Real Access Alliance has provided the Commission with verifiable and statistically valid evidence demonstrating that forced access is not needed, because building owners recognize the benefits of providing competitive telecommunications services and respond to the demands of their tenants. Based on the current record, any Commission order attempting to impose a forced access regime would be arbitrary, capricious, and an abuse of discretion.

The CLECs claim that Commission action is needed because some property owners do not see the merit of granting a particular CLEC access to a building. They admit, however, that they are only rarely denied access and that most building owners and managers will negotiate

with them. For example, WinStar states that "the vast majority of building owners have ultimately agreed to give WinStar access to their buildings...." Furthermore, two of the key CLEC commenters have taken positions in this proceeding that are inconsistent with their filings with the Securities and Exchange Commission. Although they claim here that forced access regulation is critical to their success, they have not identified lack of building access as a material risk factor in their securities filings. Under these circumstances, it is difficult to credit any of their arguments.

The CLECs object to the terms of access agreements, alleging that they are "unreasonable." Other than their anonymous anecdotes, however, they have no evidence and make no attempt to analyze or explain the basis for their claim. Since they admit that they are getting access, and have voluntarily agreed to the terms of access, this complaint is also hard to credit.

The assertion that building owners have "bottleneck control" over access to individual buildings and that tenants are locked in by their current leases collapses under the slightest scrutiny. It completely ignores the dynamic nature of the real estate business. The very reason that the real estate industry is competitive is that tenants can and do leave, and even in individual buildings, they do so on a continuing basis. In the time since passage of the Telecommunications Act of 1996, roughly 60% of leases have expired, and another 20% do so every year. Therefore, each building owner is constantly negotiating new leases and being forced – by the market, not the government – to meet new requirements. The CLECs have no factual or legal basis for their antitrust claims, and in any case the Commission has no general authority to enforce the antitrust laws.

The final CLEC complaint is that it takes too long for them to negotiate agreements, so that at current rates of growth it will take them many years to completely build out their

networks. This is incorrect. It takes less than five months to negotiate an access agreement, which is not much longer than the time needed for a standard lease negotiation. More important, the CLECs fail to answer the key question: if forced access rules were in effect today, what would be different? Would competition have arrived? The truth is that nothing would be any different because the CLECs are not capable of serving all the buildings to which they have access today.

The legal theories advanced by the CLECs are as unfounded as their factual claims.

The Commission cannot rely on Section 224 to grant CLECs the ability to place their facilities inside buildings. Section 224 was never intended to apply to in-building facilities. Ducts and conduits inside buildings belong to and are controlled by building owners, not ILECs or electric utilities. And there are no rights-of-way inside buildings, because the term "right-of-way" has never been understood to refer to a distribution network inside a building, and because building access rights typically take the form of licenses rather than easements. Even if the term "right-of-way" did include licenses inside buildings, licenses are not apportionable, so license holders have no rights that they can share with the CLECs.

Nor does the Communications Act give the Commission "in personam" jurisdiction over building owners or "subject matter" jurisdiction over wiring. The Commission has jurisdiction only over "persons engaged in communication" and "communication by wire or radio."

Building owners do not engage in communications or provide telecommunications services. They manage and charge for the use of property. Ownership and control of property on which wiring is or could be located does not constitute engaging in communication. Otherwise, every railroad and government entity that owns rights-of-way would be subject to the Act, and the Pole Attachment Act would not have been necessary to reach electric utilities.

Similarly, the Commission does not have "subject matter" jurisdiction over wiring as an instrumentality incident to transmission. The Commission has jurisdiction over "communication," which means the transmission of signals. The Commission can only regulate an "instrumentality" to the extent that it has the authority to regulate the person that owns or controls the instrumentality. For example, every time the Commission has addressed the regulation of inside wiring, it has relied on its Title II authority over common carriers. In any case, the property on which wiring is located is not an instrumentality under any reading of the statute.

The CLECs' Constitutional arguments are equally invalid, and rely on distorting and misinterpreting relevant precedent. For example, they assert that *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), protects only the right to exclude the *initial* occupant of property. This is a blatant misstatement of the holding in *Loretto* and the state of takings law.

In any case, the Eleventh Circuit's recent decision in *Gulf Power v. U.S.,* No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999), disposes of the CLECs' takings arguments. In its present form, Section 224 effects a taking of utility property. Since the NPRM proposes to either apply Section 224 itself, or a comparable nondiscrimination standard, any forced access proposal the Commission may adopt will also constitute a taking. The *Heart of Atlanta* case, *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964), relied on by some CLECs is fundamentally different, because it involved the specially protected constitutional interests that arise from immutable human characteristics, not the use of private property by a third party with purely commercial interests. The CLEC's goals are simply not comparable to the interests the Supreme Court was protecting in *Heart of Atlanta*, and we find it remarkable that the CLECs would draw such a comparison.

The CLECs also would have the Commission gloss over the likelihood that a forced access rule would cause a regulatory taking, even though they ultimately admit that, at the very least, buildings built after the advent of telecommunications competition do have investment-backed expectations.

As with *Loretto*, the CLECs attempt to distort the meaning of *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). First, they say that it does not apply because property owners have a choice not to allow telecommunications carriers on their property, while in *Bell Atlantic* the ILECs had no choice. This argument is absurd, and was essentially rejected by the Supreme Court in *Loretto*. The CLECs also claim that *Bell Atlantic* only applies if a taking "necessarily" would occur. The authority they cite to counter *Bell Atlantic*, however, says only that the courts will require something more than a mere "possibility" or a "specter" of a taking. In the face of *Gulf Power*, the forced access proposals more than meet this test.

Finally, the Commission must reject calls for expanding the scope of its OTARD rules. The existing rules are unconstitutional and exceed the Commission's authority. The Commission should not compound the error.

The Commission should ignore the pounding on the table and close this proceeding immediately, without further action.

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INTRODUCTION

The Real Access Alliance once again calls on the Commission to reject forced access in every form. Rarely has the Commission been presented with a record as unambiguous as the one in this proceeding. Even the foremost proponents of forced access have conceded that they usually are able to negotiate agreements with building owners. The competitive local exchange carriers (the "CLECs") admit that they are not being harmed or restrained by market forces – they simply want the Commission to give them the edge in their dealings with property owners. As we stated in our opening comments, forced access amounts to a hidden subsidy, which would directly contradict the free market philosophy underlying the Telecommunications Act of 1996. Furthermore, the legal theories advanced by the CLECs are novel and untested, precisely because they are utterly without foundation. This proceeding should be closed immediately, without further action.

I. BASED ON THE RECORD BEFORE THE COMMISSION, NO REASONABLE PERSON COULD CONCLUDE THAT THE FORCED ACCESS REGULATIONS PROPOSED BY THE NPRM ARE JUSTIFIED.

The Commission cannot adopt rules on a whim, or merely because a handful of interested parties appears with a tale of woe and a gauzy, superficial theory alleging Commission jurisdiction. The Commission must first establish the facts and then determine the policy, not the other way around. The proponents of forced access have established neither that there is a problem, nor that regulation is warranted. Anonymous, unsubstantiated allegations are insufficient, especially in the face of verifiable data and statistical analysis directly to the contrary.

The CLECs have three general complaints that they wish the Commission to remedy: (1) in a small number of cases, property owners do not see the merit of granting a particular CLEC access to a building; (2) CLEC's must go to the trouble of actually negotiating access agreements with owners and managers and sometimes agree to terms they would rather not have to meet; and (3) it simply takes too long for them to get access. The record shows that these complaints are entirely invalid.

A. The Commission Must Demonstrate a Rational Connection Between Fact and Policy.

It is axiomatic that a properly supported factual background must be the foundation of any agency order.[1] This is so for two reasons. First, unsupported representations could lead an agency to regulate a non-existent problem or to regulate in the wrong way a problem that may exist.[2] Therefore, in any rulemaking, an agency order must demonstrate a "rational connection between the facts found and choices made."[3] Otherwise, a reviewing court might later determine

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[1] *See generally Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (discussing the requirements and purpose of the rulemaking process); *see also Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data . . . .).

[2] *See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd. 143, para. 105 n.245 (1987) (quoting *Home Box Office, Inc.*, 567 F.2d at 36, quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971) ("regulations perfectly reasonable and appropriate in light of a given problem may be highly capricious if that problem does not exist"). *See also Amendment of the Commission's Rules in Cellular Service*, Fourth Report and Order, 4 FCC Rcd. 2542, para. 14 (1988) ("This Commission is under an obligation not to impose regulations where there is no factual basis or need") (citing *Home Box Office*, 567 F.2d at 35-36).

[3] *Home Box Office*, 567 F.2d at 35 ("[O]ur review must be 'searching and careful' and we must ensure both that the Commission has adequately considered all relevant factors, and that it has demonstrated a 'rational connection between the facts found and choice made.'") (citations omitted).

that the agency rested its reasoning on dubious assertions and, therefore, that the administrative order was arbitrary and capricious.[4]

Second, the opportunity to comment, which goes to the very essence of the rulemaking process, becomes meaningless once anonymous and unverified facts are introduced into a Commission proceeding.[5] The fair treatment standard inherent in any rulemaking requires that all parties be afforded the opportunity to exchange views and information and to analyze arguments.[6] But when one party submits purported facts without sufficient detail to enable a responding party to critique or respond to them, then the rulemaking process no longer serves its purpose.[7]

For these reasons, it would be reversible error for the Commission, based on general unsupported rumors such as those proffered by ALTS and others, to conclude that there exists a problem in the market so pronounced and so troubling that the Commission must expand its jurisdiction to address it. Rather, the Commission should ignore any unsubstantiated assertions masquerading as facts. As the U.S. Court of Appeals for the District of Columbia has previously ruled, "comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response."[8]

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[4] *See id*; *Century Communications Corp. v. FCC*, 835 F.2d 292, 300-02 (D.C. Cir. 1987) (reversing a Commission action that rested on a NAB study because the study provided only "the spongiest of foundations for the FCC's asserted justification for its regulations").

[5] *See generally Home Box Office*, 567 F.2d at 35-36.

[6] *See id.*

[7] *See generally id.*

[8] *Id.* at 35-36 n.58 (reversing the Commission, finding that its action lacked proper evidentiary support and that the Commission lacked jurisdictional authority). *See also City of New York v. FCC*, 814 F.2d 720, 724 n.3 (D.C. Cir. 1987). In *City of New York*, intervenors contended that the Commission had arbitrarily and capriciously failed to address their accusation below that cable operators intentionally provided poor signals for government access and educational

B. The Evidence Proffered by the CLECs Does Not Meet the Standards Required by the Law.

The most notable feature of the comments submitted by the various CLECs is their dependence on a handful of anonymous, unverifiable anecdotes. The comments do not contain a single verifiable example or any objective data: other than their anecdotes, the CLECs rely entirely on broad policy statements and vague, general, and unsubstantiated claims.[9] This stands in stark contrast to the statistically valid survey attached to our opening comments. The CLECs attempt to justify their approach by claiming that they fear retaliation by property owners. While perhaps superficially appealing to one who desires to be convinced, both the CLECs' anecdotes and their defense prove unconvincing upon careful and objective examination.

For example, the ALTS Comments list 78 alleged instances that purportedly justify Commission regulation.[10] But ALTS also observes that there are 750,000 commercial office buildings in the country.[11] Because the anecdotes do not disclose the identities of the parties, we have no way of knowing that they are accurate. Taking them at face value, however, even if (1)

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channels in order to discourage viewers from watching those channels. In dismissing the intervenors' contention on appeal, the court reasoned, "[p]urely speculative comments, for example, require no agency response. The intervenor's concern evidently struck the Commission as so improbable and speculative, and so lacking any supporting evidence, that it did not merit consideration or acknowledgement. We are likewise unpersuaded that the intervenor's concern required the Commission's explicit consideration." (citation omitted).

[9] *See, e.g.,* Fixed Wireless Communications Coalition Comments at 3 ("Other MTE owners and managers impose such unreasonable conditions and/or demand such high rates for access that providing competitive telecommunications services in those MTEs becomes an uneconomic enterprise."). This amounts to a statement of opinion, not fact. Without analyzing the terms of agreements and especially comparing the rates for access in a particular building to the potential benefits of serving that building, it is impossible to test the veracity of this or similar statements. The CLEC comments are replete with this type of general statement, with no factual or analytical support.

[10] ALTS Comments at 6-18.

[11] *Id.* at 3.

we assume – purely for argument's sake -- that all of the anecdotes cited by ALTS truly represent unreasonable behavior by property owners; (2) we further assume that the anecdotes are just the tip of the iceberg; and (3) we therefore multiply the number of anecdotes by a factor of 100 to account for unreported incidents and cases in which multiple buildings are involved, then ALTS is demanding regulatory action for a problem that affects, at most, only *one percent of all office buildings.*[12]

Furthermore, upon closer examination, the ALTS anecdotes do not demonstrate that the terms of access are unreasonable. The largest number of anecdotes – 33 – involve cases in which the primary dispute seems to be about that most basic of business issues: money. It may be that some property owners have overvalued their property. It may also be that CLECs would rather get access for less than it is really worth.[13] In both cases, the market will ultimately decide who was right far more efficiently than the Commission ever could. In any case, the anecdotes themselves are worthless, because they say nothing about the size of the buildings or the CLEC's anticipated revenue stream. The typical fee complained of by ALTS seems to be in the range of

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[12] The number would be even smaller if we were to include residential buildings. We have not done so, however, because, despite their protestations, there is no evidence that CLECs have any real interest in serving residential subscribers. Note also that the anecdotes do not disclose how frequently alleged problems arise: what is the time frame covered by all the anecdotes? One year? Three years? The Commission cannot determine the true magnitude of the alleged problem without knowing this.

[13] For example, a fee based on a provider's gross revenues is directly related to the value of access to a building, yet ALTS objects to such fees. Gross revenues fees are common in the real estate industry, especially for retail space. Nothing in the Communications Act forbids such fees, and Section 624 expressly permits them in the context of cable franchises. The value of access to a building is likely to increase over time, especially if a CLEC does well and gains new customers in a building, so a gross revenues fee actually shares risks and rewards more equitably than a flat fee. In fact, there may be a market niche for providers who are willing to share revenues with building owners, or enter into various other types of creative arrangements. This is just one of the many ways in which Commission regulation would distort the market and hinder competition.

$1000 - $2000 a month. In the abstract, this does not appear excessive[14] – it is certainly not "astronomical" – and in any case, what is the CLEC getting? $2000 a month for the right to serve every subscriber in the World Trade Center would seem to be a bargain.[15] The amount of space in the building occupied by a CLEC is not the issue – the question is what the space is worth for the purpose to which the telecommunications provider will put it, and that ultimately turns on the revenue potential of each building over the course of the term of the access agreement. The Commission would need to know a great deal more about the cost structures and revenue projections of individual CLECs before it could even attempt to assess whether the access fees cited in the anecdotes are unreasonable.

Twenty-four of the anecdotes involve an apparent refusal to negotiate by property owners or managers. Again, we have no way of determining whether there are other factors at play in any of these cases – for example, perhaps a particular provider has a reputation for failing to meet its obligations. In any case, even if every instance represents an utterly unreasonable decision by the owner or manager, regulation is not justified. First of all, as we stated earlier, the anecdotes represent an infinitesimal number of buildings. They are even a tiny number when compared to the thousands of buildings in which access has been granted. But more important, property owners are allowed to make bad decisions because they operate in a competitive market

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[14] Office and retail tenants pay much more than this, in absolute terms; even some apartment residents pay rents in this range. In addition, we understand that Teligent just held a "special end of summer promotion" in which it paid bonuses of $1000 to buildings that signed agreements on or before September 24, 1999.

[15] What the CLECs would have the Commission ignore is that they are paying for the ability to use the building owner's facilities (in which the building owner has invested a great deal), to piggyback off of the owner's expertise in attracting and retaining tenants, and to exploit the owner's efforts in collating these tenants to make it easier for the CLEC to serve. $2000 a month could be a bargain in many buildings, because tenants could provide the CLEC with many more thousands of dollars a month in revenues due to the efforts and infrastructure of the building owner. In any case, our figures show that access fees are generally lower.

and they will be punished by the market. The Commission should not substitute its judgment for that of every property owner merely because it disapproves of the actions of a tiny handful. In any case, without knowing to which owners and properties the anecdotes refer, it is impossible to determine whether the anecdotes are entirely accurate. We suspect that in many cases the truth is rather more complicated than ALTS would have the Commission believe. The overwhelming weight of the evidence is that property owners do behave reasonably and grant access to competitive providers, and the CLECs have admitted as much.[16]

The remaining ALTS anecdotes deal with exclusive contracts (eight); various reasons for delays in negotiations (six); complaints related to incumbent local exchange carrier ("ILEC") control over facilities (two); and complaints related to owner control over facilities (five). None of these categories justifies regulation.[17]

The CLECs justify their use of anonymous accusations by claiming that they fear "retaliation" by property owners. Every business can understand that concern; an angry customer may take its business elsewhere, and an angry supplier may cut off needed goods and services. Indeed, it is the very fear of alienating tenants that motivates property owners to ensure that tenants get the telecommunications services they want. But in this case, the fear of

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[16] *See generally* Real Access Alliance Comments.

[17] WinStar includes its own short list of allegedly unreasonable demands. WinStar Comments at 16-18. These suffer the same deficiencies as the ALTS anecdotes. Other CLECs merely make generalized statements without recounting even specific anecdotes. None of the commenters provides enough information for their claims to be evaluated. We understand the utility of anecdotal evidence and have used it ourselves to illustrate certain points, but the CLECs have offered the Commission nothing but anecdotes. What is particularly disturbing is that the CLECs would have the Commission regulate an entirely new industry without statutory authority and violate the Constitutional rights of property owners based on such flimsy evidence. In a proceeding of this importance, involving such a fundamental change in government policy and business practices, the Commission must set a high standard. The burden of proof must be on the CLECs to show that a problem exists. As the record stands, no reasonable person could conclude that they have even remotely made their case.

retaliation is unwarranted because even large property owners do not have market power. As we stated in our opening comments, the largest property owner/manager in the country controls only 5.5% of the market nationwide.[18] The same is true in individual markets: real estate ownership is diffuse and decentralized. There is simply no likelihood of widespread "retaliation" by property owners. Property owners have a much more powerful incentive to keep their tenants happy than they do to punish CLECs. If a tenant wants service from WinStar or any other particular provider, the needs of that tenant will be more important than the fact that WinStar complained about its treatment in pleadings before the Commission. After all, there are more tenants than buildings, and more building owners than CLECs: tenants have more choices in building owners than they do in providers.[19]

But in reality the likelihood or effects of retaliation are irrelevant, because the CLECs' retaliation argument is nothing more than a convenient excuse. The CLECs did not have to rely solely on anonymous accusations; they had other ways of making their arguments. For example, we have addressed the same issues as the CLECs did through the use of a statistically valid survey. The truth is that the CLECs are happy to rely on unverifiable anecdotes because they do not have any solid evidence to support their position.

Furthermore, the Commission is not a Star Chamber, and the concept of basing policy on anonymous accusations ought to be repugnant. The CLECs chose an inadequate method to make

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[18] Real Access Alliance Comments at 6. In addition we note that the company referred to, Jones Lang Lasalle, is both an owner and a manager. Management contracts run for relatively short terms -- often only six months -- so if a building owner learns that the management firm is not satisfying tenant needs, the building owner can remedy the situation very quickly. This means that even a larger firm like Jones Lang Lasalle has a strong incentive to do what tenants want and relatively little leverage in the market.

[19] The CLECs also claim that they have been reluctant to exercise their rights under state fraud access laws for fear of retaliation. We think the more likely reason is fear of a successful challenge on Fifth Amendment grounds.

their case, and must now face the consequences. The Commission cannot accept the anecdotal evidence at face value. Before giving the CLEC anecdotes any credence, the Commission would have to obtain sufficient information to permit an objective analysis of each claim, and conduct both a rigorous, detailed study of what actually is happening in the marketplace and an economic analysis of what would happen if forced access rules were adopted. Of course, this is unnecessary because the Alliance has already conducted both a statistical survey and an economic analysis and demonstrated that lack of access to buildings is not a problem. Therefore, the Commission should simply close both the record and the proceeding without further action.

Finally, several key commenters have made statements in filings submitted to another federal agency that indicate that access to buildings is not nearly as important an issue as they would have the Commission believe. The securities laws and related regulations require issuers of registered securities to disclose certain material facts and risks regarding their business, their financial data, their securities, and the market in periodic reports. [20] These reports are filed with the U.S. Securities and Exchange Commission (SEC) and are made available to the public through the SEC's Electronic Document Gathering and Retrieval System (EDGAR).[21] Mandatory periodic reports include annual reports, known as "10-K" reports, and quarterly reports, known as "10-Q" reports. If it is as important as alleged by the CLECs, lack of building access would appear to be a "material" item that must be disclosed in periodic reports.

For example, lack of building access has been claimed to be the "chief impediment" to

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[20] Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1994, Supplemented 1996); Securities Exchange Act of 1934 Rules 13a-13(d), 17 CFR 240.13a-13(d), and Rules 15d-1 to 15g-100, 17 CFR 240.15d-15g-100 (April 1998). *See also* Regulation S-K, 17 CFR 229.10-915 (April 1998).

[21] The EDGAR system is available via the World Wide Web at www.sec.gov.

building fixed wireless networks.[22] Commenters further allege that they are stymied in reaching the nation's approximately "750,000 office buildings"[23] by the "unreasonable"[24] demands of property owners for "exorbitant"[25] rates that "effectively preclude entry by competitive carriers."[26] They imply that these impediments and costs are excluding them from "literally scores more multiple dwelling units." [27] And they say that "it will take decades to obtain access rights to all the buildings and customers that our networks are designed to reach."[28] Surely such alleged costly barriers to entry—and alleged high costs of staying in the market—should be noted in SEC filings.

None of these statements is reflected in either WinStar or Teligent's SEC filings, however. In Winstar's 10-Q for the three months ended March 31, 1999, the company states that "we are pursuing a rapid expansion of our telecommunications services to 60 U.S. markets by the end of 2000 and up to 50 foreign markets by the end of 2004."[29] What could slow the speed of its rapid expansion? According to Winstar, "We may elect to slow the speed or narrow

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[22] Access to Buildings and Facilities by Telecommunications Providers, Hearing before the House Subcommittee on Telecommunications, Trade and Consumer Protection, Serial No. 106-22 (May 13, 1999) (hereinafter, House Hearing Report) statements by William J. Rouhana, Jr., Winstar, pages 24 and 26.

[23] Teligent Comments at 3; House Hearing Report, statement of William J. Rouhana, Jr., Winstar, page 24.

[24] Teligent Comments at 9; House Hearing Report, statement of William J. Rouhana, Jr., Winstar, page 27.

[25] Teligent Comments at 9.

[26] House Hearing Report, statements by William J. Rouhana, Jr., Winstar, page 27.

[27] House Hearing Report, statements by William J. Rouhana, Jr., Winstar, page 27.

[28] House Hearing Report, statements by William J. Rouhana, Jr., Winstar, pages 24, 26, and 27.

[29] Winstar Quarterly Report, filed May 19, 1999, at 13. The Winstar Quarterly Report is publicly available at www.sec.gov.

the focus of this expansion in the event that we are unable to raise sufficient amounts of capital on acceptable terms."[30] There is no mention of the "chief impediment" of building access.

Similarly, in its discussion of the market and competition in its annual report, Teligent mentions competition from the ILECs, several other fixed wireless companies, electric utilities, ILECs operating outside their current local service areas, and other providers, but never expresses concern about gaining access to buildings.[31] It would seem logical that the SEC and investors need to know not only about Teligent's growth, but also that federal intervention is "necessary" for further growth. Conversely, when a company tells the SEC and investors that, in the first quarter of the year, it "was able to triple revenue over the fourth quarter of 1998 while keeping our operating expenses in line,"[32] that information would also seem to be material to the Commission's analysis of whether the costs of building access are prohibiting growth.

The proposition that a publicly traded and federally regulated company would consider such a fundamental matter "material" for one agency and not "material" for another is puzzling. Either building access is an important problem, in which case it should be reflected in SEC filings, or it is not, in which case this proceeding is a waste of time. We incline to the latter view.

C. Competitive Providers Acknowledge that They Are Generally Able to Negotiate Agreements for Building Access.

None of the commenters claims that denial of access to buildings is actually a significant problem. In fact, they say exactly the opposite:

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[30] Winstar Quarterly Report, filed May 19, 1999, at 13.

[31] Teligent Annual report, filed March 29, 1999, at 8-9. The Teligent Annual Report is publicly available at www.sec.gov.

[32] Teligent Quarterly Report, filed May 17, 1999, Exhibit 99.1. The Teligent Quarterly Report is publicly available at www.sec.gov.

- "The vast majority of building owners have ultimately agreed to give WinStar access to their buildings on commercially reasonable terms after lengthy negotiations."[33]
- "[A] minority of building owners have erected barriers to entry by refusing to permit access."[34] AT&T's comments express far greater concern with the degree of ILEC control over facilities inside buildings.
- Teligent acknowledges that many owners "willingly enter into negotiations with Teligent," and that only "some" owners deny access entirely. Teligent's chief complaint is the speed of negotiations.[35]
- Other CLECs complain of the pace and terms of negotiations, but they do not claim that they are being kept out of buildings with any frequency.

In our opening comments, citing the findings of the Charlton Survey, we stated that building access is successfully negotiated about 65% of the time, and only 37% of building owners have ever denied access to a provider, even on a single occasion.[36] Survey respondents stated that 78% of providers that had contacted them had been given access to their buildings. There is nothing in the record to contradict these facts. All the evidence suggests that the market is working. Consequently, imposing a right of forced access makes absolutely no sense.

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[33] WinStar Comments at 16.

[34] AT&T Comments at iii.

[35] Teligent Comments at 9.

[36] Note that the 37% figure refers to providers, not buildings. Although the survey did not address this question, we suspect that CLECs with proven track records are even more successful.

D. There Is No Evidence that the Terms of Building Access Are Unreasonable.

Since it is an established fact that property owners typically grant CLECs access it is a little difficult to credit any claims that the terms of access are unreasonable. If they were truly unreasonable, the CLECs would not have agreed to them. Property owners do not have market power and are not in a position to dictate terms.[37] And in any case, as we discussed in our opening comments, the terms property owners seek are necessary to protect the present and future value of their buildings.[38]

The CLECs have not shown that the terms requested by owners are unreasonable. In fact, they have made no serious attempt to describe and analyze the kinds of terms that they think are unreasonable. Their only clear complaint is that they believe that some property owners charge too much. Other than that, the most they can say is that in a few isolated instances owners have made demands that, at least in isolation and without the benefit of knowing all the facts, may appear unreasonable. Indeed, many CLECs state they are willing to address such issues as insurance, indemnification, liability for damage to buildings and the like. They also say that they are willing to compensate owners for access.

On the surface, therefore, there would seem to be no issue for the Commission to address, but the CLECs are being disingenuous. The CLECs are not interested in meeting owners half-

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[37] What the CLECs really want is access on the same terms as the ILECs; as we discuss in our opening comments, in most cases, there is little a building owner can do about the terms of ILEC presence in a building. The Commission should not attempt to enforce an outdated monopoly provider model on access agreements. It is unreasonable to attempt to regulate building owners to fix a problem they did not create and cannot control.

[38] MCI asserts that the presence of CLECs does not present a space concern for building owners because there is enough space in buildings to accommodate many CLECs. MCI Comments at 3. This may be true in newer buildings served by MCI, but it is not true as a general rule. For example, BOMA's Oakland chapter reports that many buildings have only half the riser space claimed by MCI – or less – and are already essentially full.

way or making good faith efforts to accommodate building owners' concerns. What they really want is one or both of two things: the same terms as the ILECs, and terms set by the Commission. This has nothing to do with the reasonableness of agreements that have already been signed, or the terms being sought by owners in pending and future negotiations. It is just a plea for special treatment and the CLECs know that their case will appear stronger if they can claim that property owners are mistreating them.[39] The trouble is that they have no proof of mistreatment.

E. Access Agreements Are Negotiated in a Timely Manner, and Artificially Accelerating the Rate of Negotiations Would Yield No Benefits.

The CLECs' third complaint is as tenuous as the first two. In essence, the CLECs say that it takes too long to negotiate access (Winstar says nine months to two years) and that at present growth rates it is taking too long for them to expand their networks. We dealt with these issues in our opening comments.[40]

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[39] Perhaps the most outrageous of the CLEC arguments is the attempt to smear BOMA, other members of the Alliance, specific property owners and state legislators for their role in blocking state legislation and regulatory efforts. If the CLECs have even the slightest evidence of unethical or illegal action by any person, they should take those claims to the proper authorities instead of insinuating that the rejection of their policy preferences is the result of underhanded tactics. What makes this claim particularly outrageous is that the rejected proposals did not arise spontaneously out of the legislatures or in response to public outcry – the telecommunications industry is known to be a powerful lobby in every state legislature and before every regulatory commission in the country, and every one of the legislative and regulatory forced access proposals was initiated at the behest of telecommunications industry lobbyists. The May 13 hearing before the House Telecommunications Subcommittee was held at the request of the CLEC industry, forced access legislation has been introduced in Congress at their urging, and the NPRM itself was issued after intensive lobbying by the fixed wireless CLECs. At the May 13 hearing, WinStar's representative claimed that the Florida legislation failed for lack of time, implying that it would have passed; yet now WinStar accuses a key legislator of a conflict of interest. If the CLECs' case had a sound factual and legal basis, they would not need to resort to such tactics. The Commission must not let itself be swayed by anything other than the merits.

[40] Real Access Alliance Comments at 4-13.

As to the time it takes to negotiate, the Charlton Survey found that on average it takes less than five months to negotiate an access agreement.[41] The Charlton Survey also found that this figure compares favorably to negotiations for similar types of agreements.

As to the rate of growth, we made several relevant points in our opening comments. First, that the CLEC industry is growing fast and is expected to grow even faster, even without forced access. Second, we noted – relying both on the Charlton Survey and anecdotal evidence -- that many property owners have experienced difficulties with CLECs that indicate that in a substantial number of cases they might not be able to adequately serve existing customers, much less large numbers of new customers.[42] The fundamental question is, if forced access were in effect today, what would be different? Would the CLECs really have that many more customers? Would they really be serving significantly more buildings? Would the Nirvana of perfect competition have arrived?

WinStar's comments raise the point in a way that illustrates how hollow their argument is. They claim that at the present rate of 2500 buildings a year, it will take them 20 years to get access to all of the 50,000 buildings their network will "cover" in the year 2000; therefore, the Commission must adopt a mechanism so they can get into buildings faster. Taking this claim at face value for the moment, one can only say "So what?" WinStar's argument is nonsensical, for several reasons.

First of all, it has taken the ILECs a century to build their current networks. If we assume a useful life of 75 years for an office building and use WinStar's figure of 750,000 office

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[41] Individual property owners support this. For example, Charles E. Smith Commercial Realty, LP ("Charles E. Smith"), states that it takes about one to three months to negotiate an access agreement.

[42] *See also* Apex Site Management Comments at 5.