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MCI

MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006
202 887 2180
FAX 202 887 2204

Lawrence Fenster
Senior Economist
Federal Law and Public Policy

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 29, 1999

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW TW-A325
Washington, DC 20554

Re: Reply Comments of MCI WorldCom, Inc, in the matters of Promotion of Competitive Networks in Local Telecommunications Markets, 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 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, CC Docket No. 96-98

Dear Ms. Salas:

As the attached email documents, MCI WorldCom submitted its Reply Comments in the above-captioned proceeding in a timely fashion, but was unable to be processed by the Commission's Electronic Comment Filing System.

Please include this hard copy version in the record.

Thank you,

Larry Fenster

Larry Fenster

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Unfortunately, the second document which you sent electronically was corrupt. I would recommend sending a hard copy of your comments. If you have any further questions, please do not hesitate to contact us.

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T o Whom it May Concern:

Your organization filed submitted a filing (1999927108664) in docket # 99-217 on 9/27/99 that was found to be corrupt. This had caused a backlog in our conversion process and was unable to be processed. Please re-submit a clean filing via ECFS or as a paper copy. If you have any further questions, please do not hesitate to contact us.

Thank you

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	**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 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	)	**CC Docket No. 96-98**

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Reply Comments of MCI WorldCom, Inc

Larry Fenster
MCI WorldCom, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2180

September 27, 1999

Table of Contents

Executive Summary i

I. Introduction 4

II. The Market for MTE Access Exhibits Significant Market Power 5
- A. Properly Defining the Market for Telecommunications Building Access Will Help Settle Many Disputed Policy and Legal Issues 5
- B. The Relevant Market is Telecommunications Access to Each MTE 6
  - 1. Parties agree that the product market is telecommunications access to MTEs . . . 6
  - 2. The geographic market is defined at each MTE 7
  - 3. The market for building access does not become competitive by accounting for the availability of many buildings in a metropolitan area 8
- C. The Market for Telecommunications Building Access Has Changed from a Constrained Monopoly Where Building Access was Provided at Competitive Levels to an Unregulated Monopoly, Offering Discriminatory Prices above Competitive Levels 10
  - 1. Building owners' market power was effectively restrained by state grant of eminent domain authority to ILECs before the 1996 Act 10
  - 2. Market forces do not effectively discriminatory practices towards CLECs 11
  - 3. The welfare implications of discriminatory practices are decidedly negative 12
  - 4. Building owners' price discrimination is unreasonable 13
  - 5. Price discrimination distorts competition and innovation 14
- D. Exclusive Contracts Diminish Consumer Choice, Retard Innovative Service Offerings, and Protect Inefficient Technologies 15

III. A Nondiscriminatory Access Requirement for MTEs is Reasonable and Lawful . . 17
- A. Building Owners Show the Same Myopia About their Status as Communications Companies as Electric Utilities 17
- B. Recent decision to make subloop components available as a UNE indicate that building owners act as utilities when they offer subloop communications access 18
- C. Building owners are LECs when they provide communications access between the demarcation point and the customer premise 18

IV. Section 224 Provides the Commission Workable, Light-handed, Tools to Promote Equitable Access to MTEs 20
- A. Building Owners that Provide Communications Access for a Fee are Subject to Section 224 20
- B. Section 224 Applies to MTEs Even if Building Owners are not Utilities 21
  - 1. Risers in MTEs used for communications become rights-of-way 21
  - 2. Utility companies control rights-of-way in MTEs 23
  - 3. Utility companies may exercise eminent domain authority on behalf of a third party 24

V. Conclusion 25

Executive Summary

In these Reply Comments, MCI WorldCom responds to parties that seek to portray the discriminatory rate, and exclusive access, practices of building owners as the expression of economic efficiency and fully competitive behaviors. MCI WorldCom also responds to parties challenging the Commission's intended use of its ancillary and Section 224 authority to establish non-discriminatory terms and conditions for telecommunications building access.

Standard economic analysis shows the product market for access to MTEs is defined as access to a single point of entry into a MTE from which wire facilities carry signals to the customers premises; and the geographic market is defined at each and every MTE, since a single building owner is able to sustain a 5 percent increase the price of telecommunications access for more than one year. Based on this market definition, economic analysis shows that individual building owners can set a supracompetitive price for access that will not be disciplined by market choices available to tenants.

No party disputes the discriminatory price practices of building owners towards CLECs. Building owners simply raise a number of arguments in support of discriminatory pricing. MCI WorldCom's Reply Comments show that building owner's support of discrimination rests on a faulty comparison to an unregulated monopoly, rather than to a monopoly constrained to set a competitive price. Proper analysis of the welfare effects of price discrimination under these circumstances reveals a reduction in demand and innovation in the market for telecommunications services greater than any gains in welfare that might come from building owners realizing higher revenues. Building owners also argue that exclusive contracts between

themselves and inside wire local exchange companies permit them to fulfill the true telecommunications interests of their tenants. Our comments show that building owners cannot represent the telecommunications interests of their tenants since the market for communications exhibits economies of scale and scope. Our comments also show that exclusive contracts lock in inefficient technologies.

Recent decisions by the Commission regarding complex inside wire and sub loop access to ILEC network elements transform building owners into utility companies when they seek to set a rate for telecommunications building access. The implications of these two decisions are far reaching. First, they show that the Commission clearly does have jurisdiction to impose nondiscriminatory access requirements on utility building owners if they are utility companies providing a communications service. Second, once it is understood that building access is an offering of a communications service, building owners cannot claim that regulation of that service is a *per se* taking. Third, the investments building owners have made in their own inside wire systems were made possible only after the Commission conferred on them new property rights in its 1997 Inside Wire Report. Consequently, building owners do not have investment backed expectations includes the expectation they would not be subject to a federal nondiscrimination requirement. Fourth, building owners become directly subject to Sections 224 and 251 of the 1996 Act.

MCI WorldCom urges the Commission to clarify that building owners are utility companies, immediately subject to nondiscrimination, pole attachment, and unbundling requirements. Doing so avoids the possibility of any takings challenge, and will thereby hasten competitive entry into MTEs.

I. Introduction

MCI WorldCom Inc., *MCI WorldCom,* respectfully submits its Reply Comments in response to comments filed in the above-captioned docket.[1] In the Notice of Proposed Rulemaking, *NPRM,* the Commission considered taking actions that would help ensure that competitive providers will have reasonable and non-discriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments (MTEs). The Commission recognized that in spite of substantial investment in facilities throughout metropolitan areas, competitive local exchange companies (CLECs) have captured a disproportionately small share of business within MTEs due, in large measure, to the discriminatory fees CLECs must pay to gain access to these buildings. The Commission also recognized that building owners' exclusive arrangements with certain LECs have contributed to a reduction in consumer choice, contrary to the benefits expected to flow from the implementation of the 1996 Act.

In these Reply Comments, MCI WorldCom responds to parties that seek to portray the discriminatory rate, and exclusive access, practices of building owners as the expression of economic efficiency and fully competitive behaviors. Building owners and companies providing inside wire and local exchange access (Inside Wire LECs) and telecommunications services to

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[1]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, WT Docket No. 99-217; and Assessments Implementation of the Local Competition, Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *MDU Right-of-Way NPRM*, Released July 7, 1999.

building owners fall into this camp. MCI WorldCom also responds to parties challenging the Commission's intended use of its ancillary and Section 224 authority to establish non-discriminatory terms and conditions for telecommunications building access. Building owners, incumbent local exchange companies (ILECs), and electric companies (ELECs) fall into this camp.

II. The Market for MTE Access Exhibits Significant Market Power

A. Properly Defining the Market for Telecommunications Building Access Will Help Settle Many Disputed Policy and Legal Issues

Antitrust market definition practice is crucial for evaluating the extent of competition because markets are defined in terms of the availability of alternate choices. Market definition therefore has immediate implications for the degree of competition one observes. It is commonly accepted that there are two dimensions to a market: the type of good or service supplied — known as the product market; and the geographic span of space buyers are willing to navigate in order to purchase a good or service — known as the geographic market.[2] In general, products or geographic regions that are ready substitutes for each other are probably in the same market. If they are good substitutes for each other, it would be difficult for any one product or region to elevate its price above existing levels for any significant period of time, for its customers would flee to substitute products and regions. Market definition starts with a narrow view of the

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[2]See, Philip Areeda and Donald F. Turner, *Antitrust Law*, 7 volumes, Little, Brown, 1978; F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, 1991; William G. Shepherd, *The Economics of Industrial Organization*; Second Edition, 1985.

products and region, and continually adds less similar products and less proximate regions. If common sense suggests the addition of another product or region would be able to prevent existing firms and regions from significantly raising their price above existing levels for a significant period of time, then the additional product or region is part of the market. Standard practice considers a 5 percent increase for one year to be the threshold for market definition.

B. The Relevant Market is Telecommunications Access to Each MTE

1. Parties agree that the product market is telecommunications access to MTEs

The NPRM is premised on the assumption that telecommunications access to MTEs is the product market, and the geographic market is defined at the individual MTE. All CLECs participating in this proceeding endorse these assumptions as evidenced by their documentation of discriminatory practices they experience from building owners as they attempt to gain telecommunications access to individual buildings.[3] Building owners and their inside wire allies also support defining the product market as telecommunications access to MTEs. A significant portion of their economic analysis is devoted to counter documenting good faith negotiations and reasonable outcomes for companies seeking telecommunications access to buildings.[4]

There are no meaningful alternatives to gaining ingress at a single point in each MTE. Both wireless and wireline companies indicate they require physical access to a MTE and rely on

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[3]Comments of: WinStar at 17; CompTel at 4; and especially ALTS at 6-17.

[4]See, e.g., Joint Comments of Building Owners and Managers Association International, *et. al.*, *Real Access Alliance*; Exhibit C — Charlton Survey; Exhibit D — Strategic Policy Research Analysis; Exhibit F — Declaration of Gerald Hagood; Exhibit G — Declaration of Allan Heaver; Exhibit I — Declaration of Richard Stern; Exhibit J — Declaration of Dennis Greene; Exhibit L — Declaration of Cathy Yovanov; Exhibit M — Declaration of Lawrence Perry.

wired connections from the entry point to the customer premise. The only access alternative would be an end-to-end wireless connection to each tenant. This is not a close substitute for a variety of reasons: it cannot provide the same array of data-intensive services offered over wire facilities; it suffers from signal reception problems; each customer in a MTE may not be able to locate an antenna in the proper location; and most importantly, there is a shortage of spectrum licences needed to support a conversion of wireline access to wireless within one year — the period of time the Department of Justice would use to evaluate the ability of building owners to sustain a price above competitive levels.[5]

2. The geographic market is defined at each MTE

CLECs define the geographic market at each MTE. Clearly every tenant requires telecommunications services. The question then becomes, can a building owner sustain a 5% increase in the price of telecommunications access for one year? If so, the geographic market is properly defined at the MTE. Framed in terms of standard economic analysis, the answer is clear that building owners can sustain a 5% increase in the price of access for one year. When CLECs pass the increase along to customers, the increase in their monthly telecommunications bill would be so small compared to their monthly rent that they would not be induced to seek other locations.[6] Moreover, no one contends that most tenants will move within one year of a price increase since, according to the building owners, the average MTE tenant lease is three to five

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[5]See, Department of Justice 1992 Merger Guidelines.

[6]Real Access Alliance at 8. The Real Access Alliance estimates the average telecommunications rental fee to be about .6% of a tenant's monthly rent. That amounts to $6 for every thousand dollars of rent. A 5% increase would add 30 cents, an increase in telecommunications access as a share of rent by .03%.

years, yielding an average maximum annual pool of tenants that would consider switching equal to about 25% of the market.[7]

3. The market for building access does not become competitive by accounting for the availability of many buildings in a metropolitan area

When building owners and inside wire LECs attempt to justify the competitive nature of telecommunications building access, they actually describe a different market — the market for tenancy. Building owners describe the service they offer to tenants as a bundle of location, space, telecommunications access, electricity access, heating and air conditioning services, security services, design, and other amenities.[8] Assuming this market is competitive, building owners then argue that the competitive nature of the market for tenancy forces landlords to provide the telecommunications capabilities they desire at competitive prices.[9] Economic analysis shows that the Commission cannot rely on unconstrained market incentives to achieve this goal.

Building owners first argue that they would not risk charging CLECs uncompetitive telecommunications building access rates since the revenues at risk if tenants were to leave swamp the revenues they could gain by setting a supracompetitive price.[10] Actually, there is plenty of room for a supracompetitive price to be sustained. The telecommunications building access fees that many CLECs currently object to account for only one-half of one percent of a tenants

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[7]*Id.*, at 7. Calculation assumes starting lease dates are randomly distributed.

[8]*Id.*, at 14.

[9]See Statement of Michael Whinston, Comments of the Independent Cable & Telecommunications Association, *ICTA*.

[10]*Id.*, at 8.

monthly rent. Landlords could double those fees and only add $5 to every $1,000 of rent faced by a tenant.[11] Assuming the tenant can even attribute the supracompetitive price increase to the owner, he or she is then faced with a choice of paying $5 more per month (or $60 per year) or incurring the cost of searching for a new location, negotiating a new lease, paying penalties for breaking the existing lease, and moving to a new location. The annualized costs of the latter are so much higher than $60 that landlords are under no risk of a tenant leaving if they raise telecommunications building access prices far above competitive levels.

Building owners also point to "high" lease termination rates as evidence tenants can easily and quickly move if their telecommunications rates rise as a result of the price owners charge CLECs for telecommunications building access.[12] In the unlikely event a tenant does choose to search for a new location, it is unlikely it will find a new building owner that has not already followed the example of the first owner. The market for telecommunications building access satisfies many of the conditions economists identify as necessary for firms to take coordinated action.[13] For the most part building access consists of supplying CLECs access to the NID, and access to horizontal and vertical riser space. The product is simple, homogeneous, and of similar cost across buildings. These conditions all facilitate coordinated action. In addition, BOMA, the building owner trade organization for building owners, has taken a very active social coordination role identifying and disseminating the revenue opportunities each building owner can achieve by

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[11]Assuming the CLEC passed the price increase through.

[12]*Id.*, at 7.

[13]See, Chapter 8, F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, 1991.

exploiting its locational monopoly.[14] Collusion is less likely when there are many firms in a market, if the firms that do not set supracompetitive prices can rapidly increase market share and revenues by keeping prices at competitive levels. The possibility the large number of firms could undermine the otherwise strong conditions supporting collusion in this market requires a few firms being able to quickly expand supply to accommodate a significant share of market demand. This condition does not exist in the MTE market, so consequently there will be a high degree of coordinated action in the market for telecommunications building access.

C. The Market for Telecommunications Building Access Has Changed from a Constrained Monopoly Where Building Access was Provided at Competitive Levels to an Unregulated Monopoly, Offering Discriminatory Prices above Competitive Levels

1. Building owners' market power was effectively restrained by state grant of eminent domain authority to ILECs before the 1996 Act

Prior to the 1996 Act, building owners did not have unconditional control over utility entry to their buildings and installation of intrabuilding wire. Eminent domain authority contained in their franchises, conferred on ILECs the ability to establish whatever property rights they needed to enter buildings, place conduit in risers, pull cable through conduit, maintain and repair their cables and connections, and expand their facilities in response to customer demand and technical innovation. These property rights have taken a variety of forms, including: easements,

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[14]"Your building's telecommunications pathways, wires and rooftops have taken on an enhanced value and are competitive commodities to be leased in the marketplace. *Wired for Profit* guides you through this process. The book provides checklists and model license agreements to govern every imaginable telecommunication use," from *Wired for Profit: The Property Management Professional's Guide to Capturing Opportunities in the Telecommunications Market.*

leaseholds, licenses, etc. Building owners never had an unconditioned right to exclude utility companies from their buildings. Consequently, the arguments that building owner will be denied fulfillment of investment backed expectations that were based on their ability to exclude utility companies from their premises are unfounded.[15]

Because building owners have not had an unconditioned right to exclude utility companies, pricing for ILEC access has been at competitive levels. The building owner has been responsible for creating riser and common space, and has recovered these investments solely from tenants through rental charges. ILECs were responsible for costs associated with entering the building, pulling conduit through risers, pulling cable through conduit, stringing cable horizontally to the customer, and maintaining cable and connections. The price of this component of access has been the cost of self-supply by the ILEC.

2. Market forces do not effectively discriminatory practices towards CLECs

The increase in CLEC demand for access to MTEs resulting from the 1996 Act, coupled with the lack of CLEC eminent domain authority, has created both incentive and opportunity for building owners to exert their, now unrestrained, market power. As a result, we are witnessing a variety of discriminatory practices, such as revenue sharing demands, exorbitant access rates, denial of access where the building owner has an exclusive contract with an inside wire LECs, and other practices many parties have documented in their comments.[16] Only regulatory action by the Commission can level the playing field, promote competition, and eliminate the socially harmful

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[15]Real Access Alliance at 40.

[16]See in particular, ALTS at 6-17.

effects of price discrimination in this market.

3. The welfare implications of discriminatory practices are decidedly negative

No party disputes the discriminatory price practices of building owners towards CLECs.[17] Building owners simply raise a number of arguments in support of discriminatory pricing. The most general argument, made in the language of economic welfare theory, is that price discrimination practiced by a monopolist can actually improve welfare compared to uniform price setting by an unconstrained monopolist.[18] The reason this can occur is because a discriminating monopolist can segregate demand, offer a lower price to those unwilling to buy at the higher price than would occur if a monopolist set a uniform price. This in turn increases output, reduces dead-weight losses and improves allocative efficiency.[19]

However, in order to evaluate the welfare effects of price discrimination practiced by an unrestrained monopolist such as building owners in the market for telecommunications access to MTEs, the proper comparison is not to an unrestrained monopolist practicing uniform price setting, but to a monopolist restrained to offer access at the competitive price of self-supply by the ILEC, i.e. the market situation *ex ante*. In this instance, the monopolist is raising, not lowering, price. This higher price for building access does not differ from a pure rental payment extracted from the CLEC, since the building owner has already shown it is profitable to permit ILEC entry

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[17]Building owners do deny responsibility for denying access, placing the blame on CLECs unrealistic demands. See, Real Access Alliance at 27.

[18]Real Access Alliance, Declaration of Shooshan et al, at 6)

[19]See, F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, 1991, page 495.

without payment. The welfare effect of this rental payment is properly analyzed as a tax on telecommunications services, which standard economic theory shows reduces both consumers surplus and producers surplus more than the additional revenues the building owner gains through discrimination (i.e. the tax). The result is a net loss to society.[20] In short, economic theory shows that in current market conditions, the discriminatory access prices set by building owners reduces demand and innovation in the market for telecommunications services greater than any gains in welfare that might come from building owners realizing higher revenues.

4. Building owners' price discrimination is unreasonable

Another argument offered in defense of price discrimination is that it is not unreasonable -- there are differences among LECs that justify different access prices.[21] CLECs would gladly pay different prices based on actual cost differences. If CLECs were given the same access rights as ILECs, they too would be able to obtain access at the cost of investing in the needed cables, conduits, and the labor costs of gaining ingress and installing conduits in risers, etc. Building owners would only need to be compensated for the space each CLEC requires to place its electronic equipment, a rate that should be no higher than the average square footage rental rate in the building. The access rates documented in this proceeding are unreasonable by comparison.

One can show that access prices for CLECs are unreasonable through more theoretical arguments as well. The price differences economic theory would predict do not occur in the current market. A discriminating monopolist should be able to extract a higher price for

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[20], MicroEconomic Theory, Layard and Walters, 1978, p. 89.

[21]Real Access Alliance, Declaration of Harry Shooshan *et. al.*., Economic Analysis of the FCC's Proposed Policy of 'Forced Access' for CLECS to Private Buildings," at 19.

telecommunications companies that have lower demand elasticities for access. In the market for building access, ILECs have the lowest demand elasticity since they are already in the building and are the carrier of last resort. Economic theory would predict they would be subject to the highest price. However, the opposite is true. ILECs face the lowest price for building access.[22] The reversal of relative prices faced by ILECs and CLECs compared to prices predicted by a functioning competitive market undermines arguments made by building owners that the different prices for building access we see is a natural outcome of market process, and does not amount to unreasonable discrimination.

5. Price discrimination distorts competition and innovation

Finally, the Commission should be concerned about the way in which the price discrimination exerted by building owners will distort innovation and competition. By singling out CLECs for significantly higher access rates, building owners will be able to maximize their revenues at the expense of even greater reductions in both producer and consumer surplus. CLECs will pass along the discriminatory access charges in telecommunications prices above least cost levels, thereby creating an opportunity for ILECs to lock tenants into long term contracts for more services, even though they may not be offered at least cost.

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[22]The fact that they face the lowest price is attributable to its control over rights-of-way within buildings it has obtained by asserting or referring to its eminent domain authority in its relations with building owners.

D. Exclusive Contracts Diminish Consumer Choice, Retard Innovative Service Offerings, and Protect Inefficient Technologies

Building owners, and especially inside wire LECs, seek to defend exclusive arrangements on the grounds that they permit inside wire LECs to undertake investments in advanced inside wire facilities that would not be profitable if they had to compete against other LECs.[23] Independent Cable & Telecommunications Association (ICTA) devotes considerable attention to the economic justification of exclusive contracts. It argues that exclusive contracts do not hinder, and may help local competition.[24] if certain conditions are met:

1. All parties affected by the exclusive contract are present during contract negotiations. This gives affected parties the opportunity to mitigate, the negative impacts they fear would result from specific contract features being negotiated.

2. Tenant interests are perfectly represented by landlords. ICTA argues that owners are forced by the marketplace to perfectly represent their tenants. The ability and willingness of tenants to go to buildings that provide better value for their money, forces owners to "increase the value of being a tenant."

3. The service(s) used by the tenant do not exhibit economies of scale. If the market for communications services has no economies of scale, the balkanization of service to MTEs that results from exclusive contracts will not prevent providers excluded from the contract (building) from achieving efficient scale.[25]

Cursory examination of communications markets quickly reveals these conditions are not

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[23]Real Access Alliance at 69; Independent Cable & Telecommunications Association at 6.

[24]Exclusive contracts, at least in the case of private cable operators (PCOs) is "an efficient choice for the parties in the sense that it maximizes their joint payoff." ICTA Comments, Declaration of Michael Whinston at 3.

[25]See Comments, Declaration of Michael Whinston at 4-8.

met. Consequently, the economic justification for exclusive contracts fails. First, it is clear that all parties are not represented during the negotiations of an exclusive contract between a building owner and a communications service provider. Tenants are not present, nor are competitors. It is all the more important then, that the second condition, the ability of building owners to perfectly represent the telecommunications interests of their tenants, be shown to be true.

When tenants have different needs for communications services, there may be no single provider that is capable of providing all services at the minimum price. That would only be so if the economies of scope were so large that every single service would be offered most cheaply by a single firm, the case of a natural monopoly. That is certainly not the case in today's telecommunications markets. Unless every tenant has identical telecommunications needs, building owners are incapable of acting in the interests of each and every tenant.

Finally, it is not the case that no providers of communications services exhibit economies of scale. If one does, the exclusive contracts engaged in by all other providers will close out a more efficient technology from being provided. ICTA may be correct that the inside wire LECs that offer local exchange and internet access for a few buildings do not exhibit economies of scale, but other LECs who have invested substantial sums of money to place facilities throughout a metropolitan certainly do have economies of scale.[26]

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[26]ICTA recognizes that an alternate provider might have scale economies and be able to offer services at a lower price than the PCO provider, but asserts that abrogating the exclusive contract to permit overbuilding within a MTE would nevertheless be inefficient. A close examination of ICTA's argument reveals it to be nothing more than a plea to shelter an inefficient firm from the forces of competition. ICTA constructs an example where the overbuilder has greater economies of scale than the PCO, and unlike the PCO who must capture all tenants within a building to be profitable, only needs to capture a fraction of building tenants. ICTA asserts that permitting a second firm access to the building will not yield any consumer benefits in the form of

III. A Nondiscriminatory Access Requirement for MTEs is Reasonable and Lawful

A. Building Owners Show the Same Myopia About their Status as Communications Companies as Electric Utilities

The arguments made by the building owners against the Commission's authority to impose a nondiscriminatory access requirement rest on the contention that the Commission has no power over building owners unless they are also engaged in communications by wire or radio.[27] Building owners take it for granted that they are not providing communications services. However, the recent actions of the building owners show that they are vigorously engaged in communications by wire.[28] The arguments of the building owners in this proceeding mirror those of the electric utilities in the recent Section 224 proceedings, where the electric companies portrayed themselves as companies that would never offer telecommunications service in competition with the entities they were seeking to deny attachment, even as they sought approval from the Commission as telecommunications companies exempt from the requirements of the Public Utility Holding

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lower prices, presumably because once the PCO is driven out of business, the remaining firm will raise prices above competitive levels. That would be possible only if the remaining firm had significant market power. ICTA's point may have had some validity in the context of cable services, but cannot serve as a justification for exclusive contracts in the telecommunications markets under consideration in this proceeding. See, ICTA Comments, Declaration of Michael Whinston at 13.

[27]"In the current proceeding, the Commission has no jurisdiction because building owners do not engage in communications by wire or radio. It therefore follows that none of the authority conferred by the Act can be applied to building owners as building owners - it does not matter whether that authority is express, or based on ancillary 'jurisdiction,' because building owners are entirely outside the Commission's reach." Real Access Alliance at 34-35.

[28]See, e.g, Real Access Alliance at 19.

Companies Act.[29]

B. Recent decision to make subloop components available as a UNE indicate that building owners act as utilities when they offer subloop communications access

Indeed, now that the Commission has determined that subcomponents of the loop in MTEs constitute a market for unbundled network elements that may be purchased from an ILEC, an entity that holds out access to that market to others for a fee becomes a utility company.[30] Until recently building owners have not offered communications building access for a fee and have not been considered utility companies. It is significant that Congress expanded the definition of utility when it passed the 1996 Act to include entities that provide access service even though they may not do so at regulated rates.[31] Building owners clearly fall within the definition of a utility company providing exchange access.

C. Building owners are LECs when they provide communications access between the demarcation point and the customer premise

An earlier action by the Commission has strengthened the utility status of building owners. In its 1997 *Inside Wiring Report and Order and Second Further NPRM* the Commission clarified the implications of moving the demarcation point moved to the minimum point of entry in a

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[29]See , e.g, Comments of American Electric Power, Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies governing Pole Attachments, CS Docket 97-151, September 26, 1997.

[30]News Release, FCC Promotes Local Telecommunications Competition, Adopts Rules on Unbundling of Network Elements, September 15, 1997

[31]47 U.S.C. § 224(a)(1)..

MTE.[32] The Commission clarified that in buildings built after August 1990, building owners could request ILECs to move the demarcation point to the minimum point of entry and, that while the ILEC would continue to own intrabuilding wire, building owners could install their own cabling between the customer's premise and the NID.[33] The Commission addressed this possibility in the belief that the building owner would install this wiring only after removing the inside wire of the existing ILEC. In this case, the building owner would become the sole provider of exchange access between the customer's premise and the NID and would clearly be acting as an (incumbent) local exchange carrier according to Section(3)(26), and would become subject to the relevant provisions of Section 251(c), and Section 224. In the event the building owner does not remove the cabling of the existing ILEC, it would become a competing provider of access between the customer's premise and the NID.[34] In this case, the building owner is simply a LEC, and becomes subject to Section 251(b) and Section 224.

The implications of these two decisions are far reaching. First, the Commission clearly does have jurisdiction to impose nondiscriminatory access requirements on utility building owners if they are utility companies providing a communications service. Second, once it is understood that building access is an offering of a communications service, building owners cannot claim that

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[32]Review of Sections 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to The Telephone Network and Petition For Modification of Section 68.213 of The Commission's Rules Filed by The Electronic Industries Association, *Inside Wiring Report and Order and Second Further NPRM,* CC Docket No. 88-57; RM-5643; 12 FCC Rcd 11897 (1997); FCC 97-209, Released June 17, 1997.

[33]*Id.* at ¶32.

[34]Again, assuming the Commission applies Section 251(c) to LEC facilities between the NID and the customer's premise within a MTE.

regulation of that service is a *per se* taking. Consequently, the Commission need not limit its authority to a narrow reading in order to comply with the precedents established in *Bell Atlantic Telephone Companies v. FCC*.[35] Third, the investments building owners have made in their own inside wire systems were made possible only after the Commission conferred on them new property rights in its 1997 Inside Wire Report. As discussed immediately above, when building owners exercise these new property rights, they do so as LECs competing with other LECs for inside wire transport between the customer premise and the demarcation point. Consequently, building owners may not logically claim their investment backed expectations includes the expectation they would not be subject to a federal nondiscrimination requirement, since their ability to offer this communications service was itself conferred by the Commission to promote competition for telecommunications services within MTEs.

IV. Section 224 Provides the Commission Workable, Light-handed, Tools to Promote Equitable Access to MTEs

A. Building Owners that Provide Communications Access for a Fee are Subject to Section 224

As discussed above, the combination of new market definition and new property rights resulting from the Commission's recent UNE decision and its 1997 Inside Wire Report indicate that building owners are acting as LECs when they provide building communications access for a fee. This also makes them utility companies, subject to Section 224. The Commission should clarify the utility status of building owners. Treating building owners as utility companies disarms building owner and ELEC arguments that Section 224 mandates on utility companies is limited by

[35] 24 F.3d 1441 (D.C. Cir. 1994).

state-defined property relations between ILECs and building owners, since building owners have become utility companies.

Applying Section 224 directly to building owners would require a minimum of regulatory oversight. Since horizontal and vertical riser space has been recovered from MTE tenants, the costs building owners would be entitled to recover would pertain primarily to the costs associated with the initial entry by the CLEC, establishing conduit sleeves, pulling conduit and cable, making connections, etc. These costs are non-recurring and have been considered "make-ready" costs under the Commission's Pole Attachment Rules. The Commission has declined to prescribe reasonable charges for make ready costs, and has trusted the negotiations between utilities and attaching parties. The Commission's Pole Attachment Complaint Rules have resolved differences regarding reasonable make-ready charges on a case-by-case basis.

B. Section 224 Applies to MTEs Even if Building Owners are not Utilities

The application of Section 224 to the MTE environment is based on the following logic: 1) Section 224 applies to any right-of-way controlled by a utility to place wires used as part of its communications network; 2) the use ILECs make of horizontal and vertical risers within a MTE amounts to "control"; and 3) a utility may expand capacity on behalf of a cable or telecommunications company, even if the property relation the utility formally negotiated to place its wires does not explicitly permit capacity expansion, since its use ultimately flows from state-granted eminent domain authority. This authority is broader than the specific form of property (lease, license, easement, etc.), and the various uses associated with each property right a utility may have actually negotiated in order to place its communication wire within a MTE.

1. Risers in MTEs used for communications become rights-of-way

Building owners and ELECs challenge each step of this logic. Some building owners argue that there are no rights-of-way within MTEs. The Real Access Alliance argues that a right-of-way is a right to pass over property, but such passage does not involve use of property.[36] Since a utility uses risers in a MTE, it must be the case that risers are not rights-of-way. But other parties, including electric companies, contradict this view stating that right-of-way "...refers to the use to which the land is put as well as to the land itself."[37] If the "use" is for an essential public purpose such as completing a communications distribution network, the property becomes a right-of-way. According to the logic of the Real Access Alliance, a telecommunications company could not attach to a utility's facilities located on public land, since the utility's facilities merely pass over the land and do not use the land. However, even the Real Access Alliance does not dispute the right of a telecommunications company to attach to a utility's facilities located on public land if it does so to complete its communications distribution network.

The building owners recognize that the term right-of-way is not a legal category of use and access rights.[38] Consequently, it would be wrong to rely on the legal categories of use and access rights negotiated with private property owners to define right-of-way. Rather, right-of-way in the utility context is indeed a state-granted right to access and condemn private property for the purpose of providing an essential service.[39] Therefore, when ILECs occupy risers to

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[36]Real Access Alliance at 49.

[37]Florida Power and Light at 17, WinStar at 56.

[38]Real Access Alliance at 49.

[39]See, WinStar at 52.

provide an essential service, they are using rights-of-way.

2. Utility companies control rights-of-way in MTEs

Utility companies next argue that while they may use riser space within a MTE, and may even own the riser, they must obtain permission from the building owner to enter the building and perform work installing cable in the risers, adding risers, connecting to customer premises, etc.[40] Clearly utility companies exert a significant degree of control; and although they may require permission from building owners to perform certain tasks, permission is not required in every case. The Commission has already determined that so long as actions by utility companies: do not increase the burden or endanger property of the owner; and conform to generally accepted engineering practices, the utility may provide attachment to third parties, even though the third party needs to have some understanding with the property owner.[41] In short, an attachment by a telecommunications company to another's property confers enough control over its own attachment and the space on the property used by that attachment to permit the utility company to modify its attachment and permit third party attachment, which is no different than apportioning its attachment.

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[40]USTA at 8.

[41]Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order Released February 6, 1998, at ¶¶64,69.

3. Utility companies may exercise eminent domain authority on behalf of a third party

Finally, building owners, ELECs and ILECs argue that their control over MTE property is limited by the specific rights utilities have negotiated with the building owner. If the Commission were to require utilities to expand that right on behalf of another it would constitute a per se taking since there would be an additional occupation of the owner's property and since the Commission is not in a position to determine the reasonable amount of compensation to which the property owner would be entitled.[42]

The Commission has already addressed this issue in its First Local Competition Order. In that Order it concluded that utility companies were required to exercise their state-granted eminent domain authority to expand capacity over private property to create new rights-of-way on behalf of a third party.[43] This requirement is not in conflict with the Commission's deference to state property law cited in the same Order.[44] The Commission recognizes that the extent of the utility's ability to expand capacity on behalf of a third party is limited by the specific grant of eminent domain authority to each utility. Similarly, the compensation property owners would be

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[42]Real Access Alliance at 56.

[43]See, First order at 1181. "Finally, we disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties. We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over *private property* (emphasis added) in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."

[44]See ¶1179.

entitled to would be set according to state-determined condemnation procedures. The Commission is only requiring utilities to exercise their broadest authority. Since the eminent domain authority and the compensation are determined by state authority, the Commission's requirement is not a per se taking.

V. Conclusion

MCI WorldCom submits that the Commission should adopt the rules and regulations presented in these reply comments.

Respectfully submitted,

Lawrence Fenster

Lawrence Fenster
Senior Economist

September 27, 1999

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on September 27, 1999

Lawrence Fenster

Lawrence Fenster
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2180

Certificate of Service

I, Barbara Nowlin, do hereby certify that copies of the foregoing Comments of MCI WorldCom, Inc. were sent via first class mail, postage paid, to the following on this 27th day of September, 1999.

Metricom, Inc.
Henry M. Rivera
Shook, Hardy & Bacon, LLP
600 14th Street, N.W.
Washington, D.C. 20005-0004

Louise H. Renne
Office of the City Attorney
City Hall, Room 234
San Francisco, CA 94102

Robert N. Kittel
Department of the Army
United States Army Legal Services Agency
901 North Stuart Street
Arlington, VA 22203-1837

Cais, Inc.
Charles A. Rohe
Swidler Berlin Sheref Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Fixed Wireless Communications Coalition
1300 North 17th Street
11th Floor
Arlington, VA 22209

Level 3 Communications, LLC
Andrew D. Lipman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Leon M. Kestenbaum
Sprint Corporation
1850 M Street, N.W. Suite 1100
Washington, D.C. 20036

Cathleen A. Massey
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

Terry Lewis, Esq., Coordinator
Cooperative Housing Coalition
1401 Eye Street, N.W., Suite 700
Washington, D.C. 20005

Mary McDermott
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Matthew C. Ames
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, Suite 1000
Washington, D.C. 20036-4306

Michael R. Carper
Allied Riser Communications Corporation
1700 Pacific Avenue, Suite 400
Dallas, TX 75201

Apex Site Management, Inc.
James R. Hobson
Donelan Cleary Wood & Maser. P.C.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3934

Glenn B. Manishin
Blumenfeld & Cohen
1625 Massachusetts Avenue, N.W.
Suite 300
Washington, D.C. 20036

Cincinnati Bell Telephone Company
Jack B. Harrison
Frost & Jacobs, LLP
201 East Fifth Street
Cincinnati, OH 45202

Cinergy Corporation
Paul A. Colbert
139 East Fourth Street
P.O. Box 960
Cincinnati, OH 45201

Ameritech
Gerald A. Friederichs
30 S. Wacker Drive
39th Floor
Chicago, IL 60606

Entergy Services, Inc.
J. Wayne Anderson
639 Loyola Avenue
New Orleans, LA 70113

Kansas City Power & Light Company
Michael A. Rump
1201 Walnut, P. O. Box 418679
Kansas City, MO 64141-9679

South Central Wireless, Inc.
Gregory W. Whiteaker
Bennet & Bennet, PLLC
1000 Vermont Avenue, 10th Fl.
Washington, D.C. 20005

Spectrapoint Wireless, LLC
Scott Marin
1125 E. Collins
Richardson, TX 75081

Avista Corporation
Robert E. Neate
Paine, Hamblen, Coffin, Brooke & Miller LLP
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201-3505

Texas Office of Public Utility Counsel
Alberto Levy
1701 N. Congress Avenue, Suite 9-180
Austin, TX 78701

Central Texas Communications, Inc.
Gregory W. Whiteaker
Bennet & Bennet, PLLC
1000 Vermont Avenue, 10th Fl.
Washington, D.C. 20005

The Competition Policy Institute
Harry L. Pliskin
Ireland, Stapleton, Pryor & Pascoe, P.C.
1675 Broadway, Suite 2600
Denver, CO 80202

Competitive Telecommunications Association
Robert J. Aamoth
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Dallas Wireless Broadband, L.P., dba Coserv Broadband
Robert J. Miller
Gardere & Wynne, L.L.P.
3000 Thanksgiving Tower, 1601 Elm St.
Dallas, TX 75201-4761

Ensemble Communications, Inc.
Bill S. Simpson
6256 Greenwich Drive
Suite 400
San Diego, CA 92122

Wireless Communications Association International, Inc.
Andrew Kreig
1140 Connecticut Avenue, N.W.
Suite 810
Washington, D.C. 20036-4001

Adelphia Business Solutions
Dana Frix
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

State of New York Department of Public Service
Lawrence G. Malone
Three Empire State Plaza
Albany, NY 12223-1350

HighSpeed.Com, L.L.C.
Kristian E. Hedine
1520 Kelly Place, Suite 202
Walla Walla, WA 99362

Global Crossing LTD.
Martin L. Stern
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006

Cellular Telecommunications Industry Association
Andrea D. Williams
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

ICG Telecom Group, Inc.
Cindy Z. Schonhaut
161 Inverness Drive West
Englewood, CO 80112

Metromedia Fiber Network Svcs., Inc.
Karen Nations
One Meadowlands Plaza
East Rutherford, NJ 07073

General Communication, Inc.
Kathy L. Shobert
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005

McLeodUSA
Richard S. Lipman
McLeodUSA Technology Park
6400 C Street SW
Cedar Rapids, IA 52406-3177

Minnesota Power, Inc.
Ingrid Kane-Johnson
30 West Superior Street
Duluth, MN 55802

Lincoln Springs Apartment Homes
Lincoln Springs Management
1170 South Chelton Road
Colorado Springs, CO 80910

Windsor at McAlpine Place
Marcie Williams
6800 Fisher's Farm Lane
Charlotte, NC 28277

Gryboski Rental Properties
Catherine D. Gryboski
P.O. Box 13535
Green Bay, WI 54307-3535

Toonen Rental Properties
Tricia Glodowski
830 Liebman Court
Green Bay, WI 54302

Drucker & Falk, LLC
John A. Munick, Jr.
9286 Warwick Boulevard
Newport News, VA 23607-1500

Jamestown Homes, Inc.
Robyn Bolle
1700 Hobson Road
Fort Wayne, IN 46805

Cornerstone Properties Inc.
Rodney C. Dimock
126 East 56th Street
New York, NY 10022

Manchester Village, Inc.
Robyn Bolle
4233 Holly Hill Drive
Indianapolis, IN 46241

Orchard Glen Cooperative, Inc.
Robyn Bolle
1001 Sugar Maple Circle
Bloomington, IN 47403

Tara Cooperative, Inc.
Robyn Bolle
346 East Essex Lane
Fort Wayne, IN 46825

Harbert Realty Services of Florida, Inc.
Betsy L. Owens
601 South Lake Destiny Road
Suite 180
Maitland, FL 32751

ESSEX Property Trust, Inc.
Keith R. Guericke
925 East Meadow Drive
Palo Alto, CA 94303

Central Management, Inc.
Victor E. Vacek, Jr.
5444 Westheimer
Suite 1925
Houston, TX 77056

Irem Institute of Real Estate Management
Edward J. McKeegan
World Trade Center
350 S. Figueroa Street, Suite 292
Los Angeles, CA 90071

Gross Builders
Gary L. Gross
14300 Ridge Road, Suite 100
North Royalton, OH 44133

Lincolnwood Cooperative, Inc.
Garrett W. Floyd
2101 Mark Lane
Kokomo, IN 46902

Mark III
Charles A. Pechette
7321 Shadeland Station
Suite 220
Indianapolis, IN 46256

CarrAmerica Realty Corporation
Richard W. Greninger
1850 K Street, N.W.
Washington, D.C. 20006

Polen Mortgage Realty, Co
Robert M. Blick
P.O. Box 103, G-8308 Office Park Drive
Grand Blanc, MI 48439-0103

Linda D. Horne
Horne Companies, Inc.
7301 Warfield Road
Gaithersburg, MD 20879**

Eugene J. Burger
Eugene Burger Management Corporation
481 Via Hidalgo
Greenbrae, CA 94904

Daniel J. Lipnick
Transworld Properties, Inc.
Bank One Centre
910 Travis Street, Suite 800
Houston, TX 77002

James L. Poehlman
T & C Management Service, Inc.
579 D'Onofrio Drive, Suite 10
Madison, WI 53719

Kevin P. Kelly
Leon N. Weiner & Associates, Inc.
One Fox Point Centre
4 Denny Road
Wilmington, DE 19809

Penny Nichols
Property Manager
Windsor at Quiet Waters
11 NW 45th Avenue
Deerfield Beach, FL 33442

Michele Dooling
Property Manager
Windsor At Shirlington Village
300 S. Randolph Street
Arlington, VA 22206

Michael D. LaRouque
Portfolio Director
CAMCO
1201 North Clark Street, Suite 400
Chicago, IL 60610

Carla Kennedy, President
CAMCO
1201 North Clark Street, Suite 400
Chicago, IL 60610

Roland L. Turpin
Executive Director
Dayton Metropolitan Housing Authority
400 Wayne Avenue
Dayton, OH 45410

Debra L. Benoit
Regional Housing Manager
White Birch Apartments
9239 North 75th Street
Milwaukee, WI 53223

Richard J. Bighinatti
Property Manager
6507 Sugar Maple Drive
Richmond, VA 23225

Mike Smith
Thompson Thrift Development
1100 Spruce Street
Terre Haute, IN 47807

Virginia A. Panico
Executive Vice President
Key West Chamber of Commerce
402 Wall Street
Key West, FL 33040

Ralph Paul
Colony North
319 East Lea Boulevard
Wilmington, DE 19802

Nancy Campbell
Hillcrest Apartments
P.O. Box 43
Greendale, WI 53129

William D. Gohl, General Manager
Liberty Heights at Northgate
12105 Ambassador Drive
Colorado Springs, CO 80921

Anna Swann
Regional Vice President
Lincoln Property Company
3150 Royal Drive, Suite 300
Alpharetta, GA 30022

Beverly Lanham
Manager, Berkshire Springs Apartments
5704 Spring Valley Road
Dallas, TX 75240

Susan Young
General Manager
Indigo on Forest Apartments
9669 Forest Lake
Dallas, TX 75243

Shiree Spencer
Manager, Gulf Side Apartments
5613 Coventry Park
Maltom City, TX 76117

Richard B. Smagala
General Manager
The Chateau Apartments Co.
Philadelphia Pike & Shipley Road
Wilmington, DE 19809

Ann Niehaus
Property Manager
Windsor at Union Station
8197 Meeting Street
West Chester, OH 45069

Jenny Donellon
Property Manager
Windsor at Britton Woods
5489 Crescent Ridge Drive
Dublin, OH 43016

Karen Chasteen
Dave Lewis
Weigand-Omega Management, Inc.
333 S. Broadway, Suite 105
Wichita, KS 67202

Kathy Pauly
Weigand-Omega Management, Inc.
333 S. Broadway, Suite 105
Wichita, KS 67202

Fred Lightner
Jefferson West Apartments
810 Wildwood Drive, R-2
Jefferson City, MO 65109

Jennifer Blackstone
Property Manager
Windsor Courts at Beverly
201 Broughton Drive
Beverly, MA 01915

Dawn Eastman
Property Manager
Windsor at Gaslight Square
6516 University
Peoria, IL 61614

Kristine M. Dingley
Property Manager
Windsor Ridge at Westborough
Windsor Ridge Drive
Westborough, MA 01581

Steven G. Rogers
President & Chief Executive Officer
Parkway Properties
One Jackson Place
188 East Capitol Street, Suite 1000
Jackson, MS 39201

John P. McCann, Chairman
John S. Schneider, Preident
United Dominion Realty Trust Inc.
10 South Sixth Street
Richmond, VA 23219

Shannon Schmitt
Manager, Huntington Brook Apartments
12516 Audelia Road
Dallas, TX 75243

Kathy Fletcher
Manager, Providence Apartments
11700 Audelia Road
Dallas, TX 75243

Joshua Glazov
Corporate Counsel
US RealTel, Inc.
100 South Wacker Drive, Suite 850
Chicago, IL 60606

Dennis L. Funkhouser
Regional Director
The Mid-America Management Corp.
1100 Eaton Center
1111 Superior Avenue
Cleveland, OH 44114

Steve T. Lamberti
Vice President
Archon Group
600 E. Las Colinas Blvd, Suite 1900
Irving, TX 75039

Laura Arnett
Property Manager
8406 East Harry
Wichita, KS 67207

Patrick M. Kelly, President
FDC Management, Inc.
2600 E. Nutwood Avenue
Penthouse Suite
Fullerton, CA 92831

Joan Hill
Property Manager
Windsor at Rockborough
202 N. Rock Road
Wichita, KS 67206

Pamela Adams
Manager, Hunter's Glen Apartments
6100 Independence Pkwy
Plano, TX 75023

Jerry Kellen
Acting Property Manager
Flagstone
2002 Flagstone
Madison, AL 35758

Haydon Stanley
Atlanta Apartment Association
Post Properties
One Riverside 1
4401 Northside Pkway, Suite 800
Atlanta, GA 30327

John W. Connor
General Manager
C&G Investment Associates
1690 Bob-O-Link Bend
Columbus, OH 43229

Sonia J. Patano
Senior Property Manager
Windsor Village at Waltham
976 Lexington Street
Waltham, MA 02451

Susan Genovese
Property Manager
Windsor Heights at MarlBorough
39-5 Briarwood Lane
Marlborough, MA 01752

Donna Williams
Manager, Huntington Lakes Apartments
7324 Stillman
Dallas, TX 75231

Carl Kidd
General Manager, Prescott Place Apartments
2701 Franklin Drive
Mesquite, TX 75150

Ronda Wenger
Property Manager
Windsor at Asbury Square
2000 Ashbury Square
Dunwoody, GA 30346

Brian Bergersen
Spectrum Properties LG
10448 Stone Canyon, Suite 105 North
Dallas, TX 75230

Kara Moran
Property Manager
Windsor Meadows at Marlborough
141A-8 Broad Meadow Road
Marlborough, MA 01752

Carleen Hilmes
Manager, Pleasant Woods Apartments
Pleasant Woods Apartment Homes
9236 Church Road
Dallas, TX 75231

Matt Scarborough
Property Manager
Windsor at Arbors
5250 Duke Street
Alexandria, VA 22304

Theodore M. Seldin
Chairman and CEO
Seldin Company
13057 West Center Road
Omaha, NE 68144

Patrick K. Orender
Property Manager
Windsor at Woodgate
5400 East 21st Street
Wichita, KS 67208

Denise Silva
Property Manager
Windsor at Brentwood
630 Smithfield Road
North Providence, RI 02904

Grace Salazar
Manager, Benchmark Apartments
3424 W. Country Club Drive
Irving, TX 75038

Brian Cox
Vice President
Maxim Property Management
350 Bridge Parkway
Redwood City, CA 94065

Richard E. Steiner
Vice President
Berkshire Industrial Corporation
2 Parklawn Drive
Bethel, CT 06801

George J. Kontogiannis
Chairman and CEO
The Kontogiannis Companies
400 South Fifth Street
Columbus, OH 43215

Anthony G. Franda
V.K. Development Corporation
19275 West Capitol Drive
Brookfield, WI 53045

Heather Mulcaby
Property Manager
The Village At McLean Gardens
3401 38th Street, NW
Washington, DC 20016

Heidi Hulme
Property Manager
Windsor at Chateau Knoll
2900 Chateau Knoll
Bettendorf, IA 52722

Betina Severn
Property Manager
Windsor at Ashton Woods
8401 Oakton Lane
Ellicott City, MD 21043

Patty Streeter
Acting Property Manager
Windsor at Park Terrace
500 South Park Road
Hollywood, FL 33021

Wayne A Garland, Jr.
President
Buckeye Real Estate
P.O. Box 8310
Columbus, OH 43201

Kent J. Kolanko
American Shelter Management Co, Inc.
4031 South Webster Street
Kokomo, IN 46902

Roberta Cerabone
Property Manager
Windsor at Stonington Farm
150 Commons Way
Doylestown, PA 18901

Jon Arnold
Given & Spindler Companies
1001 Plaza East Boulevard, Suite 303
Evansville, IN 47715

Carol Guttrowski
Todd R. Fred/Karen Grummer
Trust Property Management
12000 Ford Road, Suite 245
Dallas, TX 75234

Paul J. Walter
Executive Director
Housing Authority
Park View Manor
535 Third Avenue
Antigo, WI 54409

Connie Simmons
Property Manager
Windsor at Pine Ridge
7100 Ducketts Lane
Elkridge, MD 21075

Carter A. Howard
The Carter Company, Inc.
607 Due West Avenue, Suite 116
Madison, TN 37115

Ken Reed
Vice President
Washington Real Estate Investment Trust
6110 Executive Boulevard, Suite 800
Rockville, MD 20852

Tammie Vaughan
Windsor at Old Buckingham Station
1701 Buckingham Station Drive
Midlothian, VA 23113

Nancy Ahlswede
Executive Director
Apartment Association
4120 Atlantic Avenue
Long Beach, CA 90807

Carolyn Staubs
Property Manager
Windsor at Fieldstone
703 Clark Court
Leesburg, VA 20175

Angela Springer
Property Manager
Windsor at Kingsborough
2720 S. Seneca
Wichita, KS 67217

Allen House Apartments
3601 Allen Parkway
Houston, TX 77019

Carol T. Miller
Property Manager
Thompson Partners
746 Horton Road
Bonita, CA 91902

Donald E. Schafer, Jr.
Regional Property Manager
Apartment Investment Company
9200 Keystone Crossing, Suite 500
Indianapolis, IN 46240

Shari Rosen
Executive Director
Apartment Association
14550 Archwood Street
Van Nuys, CA 91405

Edward L. Davidson, Jr.
President
Mid-Atlantic Reality Co., Inc.
248-C Presidential Drive
Greenville, DE 19807

Douglas J. Groppenbacher
ReMAX Commercial Investment
7110 E. McDonald Drive, Suite A-1
Scottsdale, AZ 85253

Vernice Waddic
Owner/Management
Castlebrook Apartments
4944 S. Sherwood Forest Blvd.
Baton Rouge, LA 70816

Harold N. Cohn
Hudson River Management
322 Eighth Avenue, Suite 1402
New York, NY 10001

Eileen Bruskewitz
Pinckney Dayton Apartments
211 W. Gilman Street
Madison, WI 53703

D. Scott Litton
Janesville Housing Partners Limited
Partnership, Meridan Group Inc.

Brenda Brooks
Property Manager
P.O. Box 620800
Middleton, WI 53562

Parkview Mobile Home Court
1331 Bellevue Street
Green Bay, WI 54302

H. Benjamin Duckworth, Jr.
The Duckworth Comany, Inc.
4800 I 55 North Frontage Road, #31B
Suite 200
Jackson, MS 39211

The Town and Country Management
Company
Cathy A. Milder
100 South Charles Street, Suite 1700
Baltimore, MD 21201

Gayle A. Smolinski, President
Village of Roselle
31 South Prospect Street
Roselle, IL 60172-2097

Lori DeLuca
Mayor
2121 Cross Timbers Road
Flower Mound, TX 75028

Rick Stephenson
General Manager
Total Service Development, LLC
P.O. Box 12206
Green Bay, WI 54307-2206

Edward J. McKeegan
President
Institute of Real Estate Management
World Trade Center
350 S. Figueroa St., Suite 292
Los Angeles, CA 90071

Richard E. Steiner
Vice President
Berkshire Industrial Corporation
2 Parklawn Drive
Bethel, CT 06801

Jason Simon
Property Manager
Windsor at Eastborough
7024 E. Kellogg
Wichita, KS 67207

Jack Tennyson
Vice President
Central Management, Inc.
5444 Westheimer, Suite 1925
Houston, TX 77056

Draper and Kramer, Inc.
Greg L. Martin
Vice President
33 West Monroe Street
Chicago, IL 60603-5401

Roy E. Hearrean
President
State Wide Investors, Inc.
4401 Atlantic Avenue
Suite 300
Long Beach, CA 90807-2246

Ed Yaker
President
Amalgamated Housing Corporation
98 Van Cortlandt Park South
Bronx, NY 10463

Mary Jo Schneider
Property Manager
Windor at Polo Run
100 Polo Run Drive
Yardley, PA 19067

Barbara A. Woodworth
Director
Sterling House
5050 Hawthorne Drive
West Des Moines, IA 50265

Allen L. Thurgood
Executive Director
Coordinating Council of Cooperatives
465 Grand Street
New York, NY 10002

Minor L. Best
General Manager
Shaker Square
2375 Shaker Lane
Labanon, IN 46052

Leland R. Speed
Chairman
EastGroup Properties
P.O. Box 22728
Jackson, MS 39225-2728

Floyd Lee
Resident Manager
Radwyn Garden Apartments
275 Bryn Mawr Avenue
Bryn Mawr, PA 19010

Thomas L. Hefner
Chairman and CEO
Duke-Weeks Realty Corporation
8888 Keystone Crossing, Suite 1200
Indianapolis, IN 46240

Dawn Williams-Deare
Property Manager
Diamond Lakes Apartment Homes
2700 Ambassador Caffery Parkway
Lafayete, LA 70506

Pamela W. Monroe
Senior Vice President
Sizeler Real Estate Management Co., Inc.
900 Downtowner Blvd., Suite A
Mobile, AL 36609

John H. Sullivan
Deputy Executive Director
American Water Works Association
1401 New York Avenue, NW
Suite 640
Washington, D.C. 20005

Sharron A. Beck
Property Manager and Agent
411 CO., LTD.
411 West 7th Street
Suite 1015
Fort Worth, TX 76102

Carter M. Comaford
Green Store Partners LLC
P.O. Box 2936
Palo Verdes, CA 90274

Bruce Wechsler
President
Wexenthaller Realty Management, Inc.
3170 N. Sheridan Road
Chicago, IL 60657

Angela Robinson
Director of Marketing
Key Management
125 North Market
Suite 1510
Wichita, KS 67202

E. Scott Dupree
SVP/General Counsel
CONAM Real Estate Mgmt. & Investment Svcs.
1764 San Diego Avenue
San Diego, CA 92110-1906

Lee Anne Powell
Property Manager
Windsor at Fairlane Meadow
4900 Heather Drive
Dearborn, MI 48126

Annelin B. Knight
Property Manager
Nottingham
228 Sanders Ferry Road
Hendersonville, TN 37075

The United States Telephone Association
Lawrence E. Sarjeant
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005

Independent Cable & Telecommunications Association
Deborah C. Costlow
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

The Wireless Communications Association International, Inc.
Andrew Kreig, President
1140 Connecticut Avenue, N.W.
Suite 810
Washington, D.C. 20036-4001

BellSouth Corporation
M. Robert Sutherland
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30306-3610

Edison Electric Institute
Laurence Brown
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

United Telecom Council
Jeffrey L. Sheldon
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

AT&T Corporation
Mark C. Rosenblum
295 North Maple Avenue
Basking Ridge, NJ 07920

SBC Communications Inc.
Alfred G. Richter, Jr.
One Bell Plaza, Room 3024
Dallas, TX 75202

The Association for Local
Telecommunications Services
Philip L. Verveer
Willkie Farr & Gallagher
Suite 600
1155 21st Street, N.W.
Washington, D.C. 20036

Cellular Telecommunications Industry
Association
Andrea D. Williams
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

RCN Corporation
william L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-5116

Bluestar Communications, Inc.
Andrew D. Lipman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Teligent, Inc.
Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Florida Power & Light Company
Jean G. Howard
9250 West Flagler Street
Miami, FL 33174

Winstar Communications, Inc.
Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384

GTE
Andre J. Lachance
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Bell Atlantic
Lawrence W. Katz
1320 North Courthouse Road
8th Fl.
Arlington, VA 22201

c/o Riser Management Systems
200 Church Street
P.O. Box 1264
Burlington, VT 05401

Optel, Inc.
W. Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036

The Electric Utilities Coalition
Walter Steimel, Jr.
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006

American Electric Power Service Corp.
CommonWealth Edison Company
Duke Energy Corp. & Southern Co.
Shirley S. Fujimoto
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096

Dana Frix
Kathleen L. Greenan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Lara E. Howley, Issues Manager
Government & Public Affairs
Community Association Institute
1630 Duke Street
Alexandria, VA 22314

Michael Steele
Sean Burns
Equity Office Properties Trust
Two North Riverside Plaza, Suite 2200
Chicago, IL 60606

Douglas M. Kleine
National Association of Housing
Cooperatives
1401 New York Avenue, NW
Washington, DC 20005

Frederick E. Ellrod III
Marci L. Frischkorn
Traci Bone
Jayne Lee
Christine Ferrari
Office of the City Attorney
City Hall, Room 234
San Francisco, CA 94102

Anthony Mordosky, President
ACUTA, Inc.
152 West Zandale Drive, Suite 200
Lexington, KY 40503

Donald N. David
Fischbein Badillo Wagner Harding
909 Third Avenue
New York, NY 10022

Barbara Nowlin