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Federal Communications Commission
Washington, D.C. 20554

February 18, 2000

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Arthur Lovell, Chairman
Leisure World Community Council
3701 Rossmoor Boulevard
Silver Spring, MD 20906

Dear Chairman Lovell:

Senator Mikulski has forwarded to the Commission your letter on behalf of the Leisure World Community Council (the "Council"). In your letter, you state that the Commission should not adopt rules in WT Docket No. 99-217 and CC Docket No. 96-98 to require building owners who allow any telecommunications carrier access to facilities that they control to make comparable access available to other carriers on a nondiscriminatory basis. In particular, you state that such rules may interfere with the ability of the Council to ensure a private and secure environment for the Leisure World community. Moreover, you believe that such rules are unnecessary where a residential community is owned and managed by its residents, as is the case with Leisure World, rather than by a non-resident landlord.

The Commission sought comment on this matter in FCC 99-141, released on July 7, 1999. This item represents another step in the Commission's ongoing efforts to foster competition in local telecommunications markets pursuant to Congress' directive in the Telecommunications Act of 1996. These efforts are intended to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. In particular, this item addresses issues that bear specifically on the availability of facilities-based telecommunications competition to customers in multiple tenant environments, including, for example, apartment buildings, office buildings, office parks, shopping centers, and manufactured housing communities. The item also explores the effect of State and local rights-of-way and taxation policies on telecommunications competition.

The purpose of this item is to explore broadly what actions the Commission can and should take to promote facilities-based competition to the incumbent local exchange carriers. Thus, the item seeks comment on a wide range of potential Commission actions, in most instances without reaching tentative conclusions. In particular, among other things, the item neutrally seeks comment on the legal and policy issues raised by a possible requirement that building owners, who allow any telecommunications carrier access to facilities that they control, make comparable access available to other carriers on a nondiscriminatory basis. These issues

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Arthur Lovell

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are addressed in Leisure World's comments.

Your letter has been placed in the record of this proceeding and will be given every consideration by the Commission. Thank you for your interest in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Steinberg". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jeffrey S. Steinberg
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

cc: The Honorable Barbara A. Mikulski

BARBARA A. MIKULSKI
MARYLAND

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United States Senate
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January 19, 2000

WTB
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Ms. Sheryl Wilkerson
Director
Communications Commission
Office of Legis. & Intergovernmental Affs.
445 12th Street, S.W.
Room 8-C453
Washington, D.C. 20554

Dear Ms. Wilkerson:

I am writing to request your consideration of the attached correspondence from the Leisure World of Maryland Corporation. Please respond directly to the Leisure World of Maryland Corporation and send a copy to Brian Tate of my staff. If you have any questions, please call Brian Tate at (202) 224-4654.

Thank you for your assistance.

Sincerely,



Barbara A. Mikulski
United States Senator

BAM:bct
Enclosure

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Leisure World of Maryland Corporation

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Senator Barbara A. Mikulski
709 Hart Senate Office Bldg.
Washington DC 20510

August 27, 1999

Dear Senator Mikulski:

We seek your support in our opposition to any action by the Federal Communication Commission which would require forced entry on our properties by telecommunications providers for the purpose of installing wiring and equipment at their option, even though such entry is against our desire. This proposal is now being considered by the FCC in a recent inquiry in its Docket No. 96-98, a copy of which is attached for your convenience.

As you can see from the comments we filed with the FCC, Leisure World is a gated, restricted access community created for individuals 55 years old or more. We have some 6800 residents, mostly retired, who are organized into some 22 condominium associations, and a cooperative housing association, composing a total of 4600 dwelling units, both high rise and low rise buildings. There organizations which are self-governing, also have beneficial ownership in common properties such as a medical center, golf course, restaurants, etc.

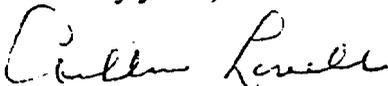
A principal objective of restricting access to our community is not only to protect our residents, all of whom have chosen to live in a secure environment, but also to insulate them from unwanted intrusion by persons not invited into the community, such as solicitors desiring to sell services and goods.

Insofar as concerns telecommunication, should a group desire to contract for service, there is no prohibition to doing so through their elected representatives. This has been our practice, and will continue to be so. However, we do not wish to have our community invaded by unwanted and uninvited concerns, in a manner not consistent with traditional competition. We stress that we are unlike other communities which are owned and managed by non residents, whose interest may diverge from those of the residents, and where forced access may possibly be beneficial to the residents.

In view of our concerns, we believe this matter is of such significant risk to the Leisure World Community that we consider it necessary to respectfully request the help of your office in opposing any rule which would mandate forced entry privileges as contemplated by the FCC inquiry. Since the Leisure World Community is self-governing and managed by the elected representatives of the owners we believe there should be no restrictions on our rights to contract for services in the manner we feel most beneficial to our residents, including contractual services on an exclusive basis if such is their determination.

If your office needs any additional information regarding this issue, please contact Robert Sullivan, General Manager (301)598-1000.

Sincerely yours,



Arthur Lovell, Chairman
Leisure World Community Council

Attachments: FCC Inquiry
Comments

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

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
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)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	

**NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY
in WT Docket No. 99-217, and THIRD FURTHER NOTICE
OF PROPOSED RULEMAKING in CC Docket No. 96-98**

Adopted: June 10, 1999

Released: July 7, 1999

Comment Date: August 13, 1999

Reply Comment Date: September 3, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell concurring and issuing a statement.

rights-of-way and taxation of telecommunications providers and services may be affecting competition. While focusing on these particular issues in this proceeding, we do not mean to imply that we view these issues as the principal impediments to facilities-based competition in local telecommunications markets. Rather, our consideration of these issues here is part of our ongoing effort to examine various possible impediments to such competition that come to our attention.

2. In the Telecommunications Act of 1996,¹ Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."² In particular, among other things, Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry.³ Competition in the local exchange market is desirable not only because of the benefits competition will bring to consumers of local services, but also because competition will eventually eliminate the incumbent LECs' control of bottleneck local facilities and thereby permit freer competition in other telecommunications services that must interconnect with the local exchange.⁴

3. Moreover, competition to the incumbent LECs will not be limited to traditional, voice-grade telephone service. To the contrary, consumers are increasingly demanding high-speed data services and other advanced features in order to enhance their ability to access the vast amounts of information, electronic commerce, and entertainment that are rapidly becoming available through the Internet and

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ seq. (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act").

S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (1996 Conference Report). See implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1 (1996) (noting that the 1996 fundamentally change[d] telecommunications regulation" by replacing protection of monopolies with management of efficient competition) (*Local Competition First Report and Order*), *aff'd in part and reversed in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) (*Utilities Board*), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), appeals docketed, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr. 16, 1999) (*UNE Further NPRM*).

See *Local Competition First Report and Order*, 11 FCC Rcd. at 15505-06, ¶ 3. Thus, in section 270 of the Communications Act, Congress imposed special duties on LECs and incumbent LECs to take steps, including making their facilities and services available to competitors on reasonable terms that would promote competition. 47 U.S.C. § 251. In section 271, Congress required the former Bell operating companies to meet a competitive checklist, and to demonstrate either the existence of facilities-based competition in the local exchange or the absence of a request for access and connection to provide local exchange service, before they are allowed to provide in-region LATA service. 47 U.S.C. § 271.

Local Competition First Report and Order, 11 FCC Rcd. at 15506, ¶ 4.

packaging, and pricing."¹¹

5. Because of the unique benefits that facilities-based competition can confer upon the public, we seek to eliminate barriers to the development of competitive networks. Although facilities-based local competition in this country is still in its incipient stages, there is reason to believe that such competition on a broad basis is both technically and economically feasible. As discussed below, the prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent LECs' costly wireline networks, either by using wireless technology or by using existing facilities to customer locations.¹²

6. We also believe it is important to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. In the 1996 Act, Congress emphasized its intent to bring these benefits "to all Americans."¹³ To the extent that any class of consumers is unnecessarily disabled from choosing among competing telecommunications service providers, the achievement of this Congressional goal is placed in jeopardy. Moreover, the fullest benefits of competition, including the widespread availability of advanced and innovative services at reasonable prices, cannot be achieved unless the incumbent carriers are, to the extent feasible, subject to competition in all sectors of their markets.

7. We begin this item with a brief background section discussing the current status of facilities-based competition and reviewing certain actions we have taken or are taking to promote this form of competition. Following that, we address problems of access to multiple tenant environments, such as apartment and office buildings, office parks, shopping centers, and manufactured housing communities. Specifically, we initiate a notice of proposed rulemaking regarding: section 224 of the Communications Act¹⁴ and its application to riser conduit and privately granted rights-of-way in multiple tenant environments that utilities "own or control;" Section 251's¹⁵ unbundled access requirements in the context of riser cable or wiring that the incumbent LEC owns or controls in these environments; and certain other issues related to facilitating competitive access to these locations. Next, we initiate a notice of inquiry concerning: reasonable and nondiscriminatory State and local public rights-of-way and tax policies and their relationship to facilities-based competition; and other means of promoting the development of competitive facilities-based networks.

paras. 20-23, *infra*.

para. 19, *infra*.

1996 Act, § 706(a); 1996 Conference Report at 1.

U.S.C. § 224.

U.S.C. § 251.

10. Both before and since the 1996 Act, we have also taken several actions that specifically promote the ability of service providers using wireless technology to compete with the incumbent LECs. Thus, we have made spectrum in several frequency bands available in a form that is usable for offerings that can compete with wireline local service,¹⁹ we have permitted new partnering arrangements between Instructional Television Fixed Service (ITFS) and Multichannel Multipoint Distribution Service (MMDS) licensees to offer two-way services,²⁰ and we have increased CMRS licensees' flexibility to use spectrum for competitive purposes by allowing them to offer fixed services on a co-primary basis with mobile services.²¹ We have also made spectrum more usable, and promoted opportunities for additional competitors, by permitting licensees in many services to transfer portions of their spectrum authorizations to other parties, with Commission approval, by partitioning their service areas and disaggregating their spectrum.²² In addition, even before we were granted broadly applicable forbearance

Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-134, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134, ¶¶ 55-88 (rel. July 2, 1998) (*PCIA Forbearance Order*) (forbearing from applying to CMRS providers certain international tariffing requirements and certain provisions of the Telephone Operator Consumer Services Improvement Act), *recon. pending*; Hyperion Telecommunications, Inc., Petition Requesting Forbearance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 8596 (1997) (forbearing from applying tariffing requirements to providers of interstate exchange access services other than incumbent LECs).

, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Report and Order*, 8 FCC Rcd. 7700 (1993), *modified on recon.*, 9 FCC Rcd. 4957 (1994); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Notice of Proposed Rule Making*, 11 FCC Rcd. 1463 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd. 12545 (1997) (*800 MHz Second Report and Order*); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Regulate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Multipoint Distribution Service And for Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd. 19005 (1996); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Regulate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Multipoint Distribution Service And for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545 (1997) (*LMDS Second Report and Order*); Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd. 18600 (1997) (*39 GHz Report and Order and Second NPRM*).

Amendment of Parts 1, 21, and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Offer Two-Way Services in Fixed Two-Way Transmission, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd. 19112 (1998), *petitions for recon. pending*.

Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-106, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965 (1996).

, e.g., Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-106, *Report and Order*, 11 FCC Rcd. 8965 (1996).

public utilities within their utility service territories, wireline competitive LECs, and satellite-based service providers.³¹ We note that Congress apparently contemplated this variety when it included provisions in the 1996 Act to promote competition to the incumbent LECs from entities that have not traditionally offered telecommunications services.³²

13. While we are encouraged by certain progress that has been made toward local competition, however, we recognize that these initial steps have thus far had little practical impact in terms of providing most customers with choices of service providers or reducing the incumbent LECs' market power. We are also concerned that the growth of competition has been uneven and appears to be directly benefitting only certain classes of telecommunications service users, for example, business customers in more urbanized areas.³³ The substitution of CMRS for wireline local exchange service similarly appears at present to be only a limited phenomenon.³⁴ In the *Section 706 Report*, we emphasized that, despite our finding of reasonable and timely deployment of advanced telecommunications capability, we would continue to monitor closely the deployment of broadband capability by providers using all technologies.³⁵ We believe that a similar posture of vigilance, and of readiness to take action where necessary to remove barriers to competition, is appropriate with respect to the local telecommunications market generally.

14. Consistent with this view, we are considering issues relevant to the development of local competition in several ongoing proceedings. One major set of issues centers around ensuring that Federal and State universal service support is provided in a manner that does not impede the ability of competitive telecommunications carriers to seek customers, especially in rural areas. For example, the provision of implicit universal service support through geographically averaged incumbent LEC rates artificially lowers the revenues available to competitors who might seek to serve rural areas, and thereby discourages them from serving these areas. We are currently in the process of transitioning from implicit to explicit high cost universal service support.³⁶ We have also sought comment on the types of services

Section 706 Report, 14 FCC Rcd. at 2426-30, ¶¶ 54-61.

e.g., 47 U.S.C. § 621(b)(3) (limiting authority of local franchising authorities to reach or limit the provision of telecommunications services by cable operators or their affiliates); 15 U.S.C. § 79z-5c (authorizing Commission to exempt providers of telecommunications and information services from certain requirements of the Public Utility Holding Company Act of 1935).

See CCB Local Competition Report at 2, 5, 6.

See Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, *Memorandum Opinion and Order*, 13 FCC Rcd. 6245, ¶ 73 (1998); Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, *Memorandum Opinion and Order*, FCC 98-271, ¶ 2 (Oct. 13, 1998) (holding that BellSouth had not shown that "broadband PCS service currently competes with the wireline telephone voice service offered by BellSouth in Louisiana").

Section 706 Report, 14 FCC Rcd. at 2402, ¶ 8.

See Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 8801 (1997), as corrected by *Errata*, CC

access to unbundled network elements.⁴⁴ We also determined that a carrier may provide telephone service entirely through the use of leased elements of an incumbent's network.⁴⁵ We believe that these decisions promote competition by increasing a competitor's options for obtaining the facilities that it needs to provide service under reasonable and nondiscriminatory rates, terms, and conditions. At the same time, however, these rules in combination arguably reduce the incentives for competitors to make the investments and take the other business risks necessary to provide service using their own facilities. Although we do not address this issue here, it is one that we must continue to consider in our ongoing review of how our rules impact the development of competition.

17. In this proceeding, we seek comment and make inquiry in several specific areas relating to the development of competitive networks. Specifically, in a notice of proposed rulemaking, we make proposals and seek comment on issues relating to competitive providers' access to multiple tenant environments, and in a notice of inquiry we explore issues related to access to public rights-of-way and State and local taxation. This effort is complementary to our past actions and other ongoing proceedings described above.

III. DISCUSSION

A. The Competitive Networks of the Future.

18. The most immediate beneficial effect of the introduction of competition into local telecommunications markets, even on a small scale, is to make competitive alternatives available to individual subscribers. As noted above, this goal can be achieved in a number of ways: through resale, leasing of unbundled network elements, or use of a new entrant's own facilities. To date, our efforts to facilitate local competition have generally encompassed all three of these means of entry, both separately and in combination.⁴⁶ These efforts have helped eliminate many of the economic inefficiencies that previously characterized local telecommunications markets and have contributed to the early growth of competition in those markets, and we intend to continue enforcing our rules and taking other necessary actions to ensure that all three means of entry are available on economically efficient terms.⁴⁷ Nonetheless, as discussed above, our broadly directed efforts to date have resulted in only relatively

⁴⁴ *Local Competition First Report and Order*, 11 FCC Rcd. at 15816, ¶¶ 628-629; see also *Iowa Utilities Board*, 119 S.Ct. at 729-33 (affirming Commission's authority to prescribe a pricing methodology).

⁴⁵ *Local Competition First Report and Order*, 11 FCC Rcd. at 15666-71, ¶¶ 328-340; see also *Iowa Utilities Board*, 119 S.Ct. at 736 (affirming this decision).

⁴⁶ *Local Competition First Report and Order*, 11 FCC Rcd. 15499; see also, e.g., "Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition," CCBPol 97-9, *Public Notice*, 12 FCC Rcd. 10343 (1997) (seeking comment generally on actions the Commission should take to promote rapid and efficient entry into local exchange markets).

⁴⁷ See, e.g., *UNE Further NPRM*, FCC 99-70.

the connection of every call through the incumbent LECs. Some industry observers believe that competitive LECs today serve less than 3 percent of nationwide switched access lines, and that only about a quarter of these are served through the competitive LEC's own facilities.³⁴ Because incumbent LECs still serve the vast majority of customers and originate or terminate the vast majority of telephone calls, most competing carriers obtain interconnection to the public switched telephone network through the incumbent LECs. Moreover, when two competitive carriers need to transmit calls between each other, they frequently do so by interconnecting indirectly through the incumbent LECs. Thus, as a practical matter, the incumbent LECs exert bottleneck control over interconnection, an essential input to the carriage of telecommunications.

22. In order for competitive networks to develop, the incumbent LECs' bottleneck control over interconnection must dissipate. As the market matures and the carriers providing services in competition with the incumbent LECs' local exchange offerings grow, we believe these carriers may establish direct routing arrangements with one another, forming a network of networks around the current system. In time, it is likely that the incumbent LECs will cease to be viewed as the presumptive primary providers of interconnection, and indeed they will begin to seek interconnection and other arrangements with their challengers. These circumstances would strengthen the case for substantial deregulation of the incumbent LECs.³⁵

23. The current dependence of most carriers on the incumbent LECs for interconnection, and in many instances for other inputs as well, may also be limiting the extent of publicly beneficial innovation for two reasons. First, the incumbent LECs' networks may be technically unable to support certain innovative and advanced service offerings. Competitive networks may have the potential to bring these benefits to American homes and businesses more quickly and more efficiently than can the existing arrangements built around the incumbent LECs.³⁶ More fundamentally, however, in the absence of facilities-based competition the incumbents may lack incentives to rapidly develop and introduce innovative products. Thus, the growth of competitive networks will not only lead to innovation by the new competitors, but should also spur the incumbent providers to upgrade their systems and offer a broader array of desired service options to meet customers' demands. For example, many observers believe that the introduction of fiber rings by CAPs in the 1980s was a central factor in causing the incumbent LECs to adopt this network architecture.

³⁴ CCB Competition Report at 19.

³⁵ We do not here decide specifically what market conditions, or other factors, would establish grounds for any degree of deregulation. For example, even in a competitive market for interconnection, the incumbent LECs might exercise market power over termination that necessitate some form of regulation. We simply observe that the case for substantial deregulation is stronger to the extent that the market for interconnection becomes competitive.

³⁶ For example, under some conditions wireless systems in the upper frequency bands, including 24 GHz, 39 GHz, and LMDS systems, can be relatively easily used to provide high-speed data services at low cost and to bundle a variety of services into one system. See *Third CMRS Competition Report*, Appendix F at F-11 to F-12.

may in some circumstances require us to take proactive measures to relieve barriers to competition created by third parties. In this item, we make proposals and seek comment on several possible actions, and initiate an inquiry into other issues, all of which are related to achieving our procompetitive goals.

B. Access to Buildings and Rooftops.

28. In this section, we address issues that bear specifically on the availability of facilities-based telecommunications competition to customers in multiple tenant environments, including, for example, apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. We begin with an overview of the problem of access to multiple tenant environments generally. We then propose that, under section 224 of the Communications Act, utilities must permit access to rooftop and similar rights-of-way and riser conduit that they "own or control" in multiple tenant environments, and we request comment on issues relating to the implementation of this requirement, including the circumstances under which utility ownership or control might be found to exist. We also ask whether we should require incumbent LECs to make available unbundled access to riser cable and wiring that they control within multiple tenant environments pursuant to section 251(c)(3) of the Act. Finally, we request comment on other building access issues, including the legal and policy issues raised by a possible requirement that building owners who allow any telecommunications carrier access to facilities that they control make comparable access available to other carriers on a nondiscriminatory basis.

1. Overview.

29. Access by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications markets. As of 1990, approximately 28 percent of all housing units nationwide were located in multiple dwelling units, and that percentage is likely growing.³⁴ In addition, many businesses, especially small businesses, are located in multiple tenant environments. If a significant portion of these housing units and businesses is not accessible to competing providers, that fact could seriously detract from local competition in general and from the availability of competitive services to "all Americans."³⁵

30. In order to serve customers in multiple tenant environments, telecommunications carriers typically require a means of transporting signals across facilities located within the building or on the landowner's premises to individual units. In the case of a reseller, these signals are typically transported across the underlying carrier's facilities as part of the resale arrangement. Similarly, a carrier that utilizes the incumbent LEC's local loop and network interface device (NID) as unbundled network elements will

telecommunications Services Inside Wiring, CS Docket No. 95-184, Implementation of The Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 3659 at 3679, ¶ 36, 3778-82, ¶¶ 258-271 (1997) (*Inside Wiring Report and Order and Second Further Notice of Proposed Rulemaking*, appeal docketed sub nom. Charter Communications, Inc. v. FCC, No. 97-4120 (8th Cir. 1997)).

³⁴ See *Section 706 Report*, 14 FCC Rcd. at 2450-51, ¶ 104.

incumbent LEC in Houston and Dallas, Texas, to establish demarcation points.⁶⁴ At the same time, we are aware that competitive telecommunications carriers have successfully negotiated building access agreements in many instances,⁶⁵ and we recognize that building owners may have an incentive to offer high quality telecommunications services and choices of providers in order to attract tenants. On the other hand, long-term tenant leases and high relocation costs may prevent the market from effectively conveying tenants' preferences to building owners.⁶⁶ We request parties, including competing carriers, building owners, incumbent LECs, and customers, to provide additional evidence of their experiences regarding the provision of telecommunications services in multiple tenant environments.⁶⁷

32. The Commission has a long history of concern that all customers have access to their choice of communications service providers in competitive markets. For example, in the 1980s we imposed equal access obligations on LECs, including presubscription and dial-around requirements, in order to ensure consumer choice of interexchange service providers.⁶⁸ Congress subsequently extended the principle of equal access to operator services, requiring that every aggregator of operator services allow consumers to access the operator services provider of their choice at no additional charge.⁶⁹ In areas other than telecommunications, we have established rules for the disposition of cable inside wiring that enhance subscribers' ability to choose alternative providers of video service.⁷⁰ In addition, we have

Testimony of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc. at 2-3 (Rouhana Telecommunications Subcommittee Hearing Testimony (\$50,000 charge upon signing of access contract plus \$1200 per month)

tion 706 Inquiry, Comments of OpTel, Inc. at 3 (filed Sept. 14, 1998) (OpTel Section 706 Inquiry Comments); *see also id.* at 4 (noting that demarcation point practices of other incumbent LECs unnecessarily complicate access); Section 706 Inquiry, Comments of KMC Telecom, Inc. at 8 (filed Sept. 14, 1998) (discussing formal and informal exclusive access arrangements); Section 706 Inquiry, Comments of KMC Telecom, Inc. at 4-5 (filed Oct. 8, 1998) (similar).

, e.g., Rouhana House Telecommunications Subcommittee Hearing Testimony at 2 (noting that WinStar has negotiated access to 4800 buildings nationwide).

Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 474-76 (1992) (recognizing "lock-in" effect created when users encounter high costs to switch suppliers).

We note our previous conclusion that the record in the *Inside Wiring* proceeding did not provide a sufficient basis to address issues regarding requirements for either video or telephony service providers. *Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3742-43, ¶ 178. We believe, based on the comments discussed above, that it is now appropriate to initiate a proceeding to establish a more complete factual record regarding the current building access situation in the telecommunications marketplace and to provide a basis for us to take appropriate action, if any is shown to be necessary.

See *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, *Report and Order*, 100 FCC2d 860, 865-80, ¶¶ 14-65.

U.S.C. § 226(c)(1)(B),(C); *see also* 47 C.F.R. §§ 64.703(b), 64.705(b). We have since forbore from enforcing these requirements on aggregators of CMRS operator services. *See PCIA Forbearance Order*, ¶¶ 76-80.

47 C.F.R. §§ 76.800-76.806.

is typically located in the basement or on the ground floor. Signals are transported from the NID to locations on each story of the building by means of riser cable, and to individual units by inside wire. In order to reach individual units, competing carriers typically need access either to the existing riser cable and inside wiring, or to riser conduit and other building space in which to place their own facilities, or both. Although use of existing cable and inside wiring is typically less expensive and less disruptive, the existing facilities in many buildings may be technically inadequate to support some providers' services. In addition, providers using wireless technology may need access to rooftops on which to place their antennas, and to conduit for laying cable to carry signals from the antenna either to the NID or directly to individual units.⁷⁶ We seek comment generally both on competing providers' preferred engineering arrangements within multiple tenant environments and on the types of arrangements that they can feasibly employ, as well as on the access requirements attendant upon each form of engineering arrangement. We further seek comment on whether different engineering issues are implicated in accessing multiple tenant environments that are not contained within a single structure, such as campuses and manufactured housing communities.

35. In order best to accommodate the varying access needs of different competing telecommunications service providers, we address herein several potential requirements to ensure that incumbent LECs and property owners do not unreasonably obstruct the availability of facilities-based competitive telecommunications services to customers located in multiple tenant environments. We ask commenters to address specifically how each potential requirement meets or fails to meet the access needs of different competing providers.

2. Access Under Section 224.

36. Pursuant to section 224 of the Communications Act, utilities, including LECs, must provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control.⁷⁷ In addition, section 224 requires the Commission to regulate the rates, terms, and conditions for attachments to poles, ducts, conduits, or rights-of-way to ensure that such rates, terms, and conditions are just and reasonable, except where such matters are regulated by a State.⁷⁸ The right of access granted under section 224 includes access for

According to at least one provider of fixed wireless services, existing inside wire in the top floors of a building is typically too thin to carry high capacity traffic to be carried directly from a rooftop antenna to facilities located on the upper floors through that wiring. See *Inside Wiring Comments* at 7.

U.S.C. § 224(f)(1). A "utility" is defined as any person who is a LEC or an electric, gas, water, steam, or other public utility, and owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications, except that the term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State. U.S.C. § 224(a)(1). An electric utility is permitted to deny access to its facilities on a nondiscriminatory basis for reasons of insufficient capacity, safety, reliability, and general engineering purposes. 47 U.S.C. § 224(f)(2). See also 47 U.S.C. § 251(b)(4) (requiring LECs to comply with section 224); 47 U.S.C. § 271(c)(2)(B)(iii) (requiring Bell Operating Companies to comply with section 224 as a condition for obtaining authorization to provide interLATA services).

U.S.C. § 224(b),(c). The principles governing the Commission's rate regulation of pole attachments utilized to provide

discriminatory fashion.⁶⁵ Six parties filed oppositions or comments addressing the WinStar Petition, and three parties filed replies.⁶⁶

39. Based on the WinStar Petition and the record compiled in response to that Petition, it appears that the obligations of utilities under section 224 encompass access to rights-of-way, conduit, and risers on private property, including end user premises in multiple tenant environments, that utilities own or control. Similarly, section 224 appears to include locations on a utility's own property that are used by the utility in the manner of a right-of-way in connection with the utility's distribution network. Depending on the definition of "ownership" or "control," however, these interpretations may raise practical and constitutional concerns that are not fully addressed in the record. We therefore seek further comment on the issues raised in the WinStar Petition.

40. Much of the opposition to the WinStar petition is directed at refuting the proposition that section 224 encompasses a right of access to all real property owned or controlled by a utility. These commenters argue that the simple fact that a provider may find it convenient to utilize a piece of utility property in constructing its network does not justify broadening the scope of section 224 to include that property.⁶⁷ By its terms, section 224 governs attachments to "pole[s], duct[s], conduit[s], or right[s]-of-way."⁶⁸ Unless utility property falls within this definition, therefore, it is not within the plain language of section 224. Thus, we held in the *Local Competition First Report and Order* that section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a transmission tower.⁶⁹ Nothing in the present record persuades us to reexamine this holding.⁷⁰ Thus, we tentatively conclude that we should not reconsider our prior determination that section 224 does not confer a general right of access to utility property, and we seek comment on this tentative conclusion.

41. At the same time, it appears that where a rooftop or other location does constitute a right-of-

at 8.

relevant oppositions and comments were filed by American Electric Power Service Corporation *et al.* (AEPSC *et al.*), Ameritech, Duquesne Light Company (Duquesne), Edison Electric Institute and UTC (EEI/UTC), Sprint Corporation (Sprint), and United States Telecommunications Association (USTA). Replies were filed by AEPSC *et al.*, Duquesne, and WinStar. *See also* WinStar Communications, Inc. Petition to Petitions for Reconsideration at 5-10 (filed Oct. 31, 1996) (WinStar Opposition) (replying to Duquesne Opposition).

e.g., Duquesne Opposition at 3-6; EEI/UTC Comments at 2-3; Sprint Opposition at 22-23; USTA Opposition at 42-44; *see also* AEPSC *et al.* Reply at 19 (contending that WinStar's argument, if taken to its logical conclusion, "would permit a telecommunications company to site its facilities in the lobby of a utility's headquarters").

47 U.S.C. § 224(a)(4).

Local Competition First Report and Order, 11 FCC Rcd. at 16084-85, ¶ 1185.

WinStar expressly disclaims that it is seeking "access to every piece of equipment or real property owned or controlled by a utility." WinStar Opposition at 9.

holding is consistent with the common use of the term "right-of-way" to denote land that is used for a right-of-way.⁹⁸ Although a "right-of-way" can be understood in some contexts as limited to a right to use property belonging to another,⁹⁹ we tentatively conclude that the broader definition, which is equally consistent with common usage, better effectuates the procompetitive intent of this provision. We further tentatively conclude that this definition is more consistent with the language of section 224, which encompasses rights-of-way that a utility "owns" as well as "controls." Thus, where a utility uses its own property in a manner equivalent to that for which it might obtain a right-of-way from a private landowner, we tentatively conclude that it should be considered to own or control a right-of-way within the meaning of section 224. We seek comment on this tentative conclusion, as well as on the test for determining when a utility is using its own property in a manner equivalent to a right-of-way.

44. In addition, we tentatively conclude that the obligations of utilities under section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility. First, we believe that riser conduit used by a utility could reasonably be interpreted as a right-of-way. In addition, section 224 on its face provides broadly for a right of access to "conduit," without any limitation on the term. Although legislative history dating from 1978, when the Pole Attachments Act was originally enacted, suggests that conduit consists of "underground reinforced passages,"¹⁰⁰ we are not currently persuaded that this legislative history legally limits the plain language of the statute.¹⁰¹ Moreover, even if, as has been argued, electric utilities rarely own or control riser,¹⁰² this fact does not necessarily limit the application of section 224 to any situations where a utility does exercise such ownership or control. We request comment on this analysis. In addition, we note that section 1.1402(i) of our rules currently defines conduit as consisting of pipe "placed in the ground."¹⁰³ We seek comment regarding whether this definition should be amended.

45. At the same time, we are aware that an interpretation of section 224 as including rights-of-way and conduits on end user premises may raise difficult issues of implementation. In particular, although section 224 on its face imposes obligations only on utilities, we believe it is important to consider whether application of that provision would have an impact on underlying property owners. We therefore seek comment on several issues relating to the implementation of our interpretation of section 224. First, we seek comment regarding the circumstances under which a utility may be considered to own or control a right-of-way or conduit within the meaning of section 224. For example, a utility might

⁹⁸ *Joy*, 138 U.S. at 44; Black's Law Dictionary at 1326 (6th ed. 1990).

⁹⁹ *Ameritech Opposition* at 42-43; *AEPSC et al. Reply* at 18.

¹⁰⁰ *AEPSC et al. Opposition* at 7, *citing* S.Rep. No. 580, 95th Cong., 1st Sess. at 26.

¹⁰¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984).

¹⁰² *see* EEI/UTC Comments at 3.

¹⁰³ 47 C.F.R. § 1.1402(i).

broad construction of utility ownership or control would impose unreasonable burdens on building owners, including small building owners, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties. In addition, commenters should consider whether any construction would effectively limit the ability of property owners to enter into exclusive service contracts with telecommunications service providers or multichannel video programming distributors (MVPDs), and, if so, whether this result is appropriate.¹⁰⁷ We also note that our rules governing the disposition of cable home run wiring apply only where the incumbent MVPD no longer has a legally enforceable right to remain on the premises.¹⁰⁸ We seek comment on whether and how our proposed interpretation of section 224, under any definition of "own" or "control", might affect the application of the rules governing home run wiring by expanding a cable television system's ability to remain on multiple unit premises, and on what action we should take to account for any such effects.

48. Finally, section 224(c) of the Act provides that the Commission shall not have jurisdiction with respect to rates, terms, and conditions of access to pole attachments if a State regulates such matters and certifies to the Commission that it does so and that it meets certain conditions.¹⁰⁹ We request comment as to whether any additional certification or other Commission action is necessary to ascertain whether a State is regulating the rates, terms, and conditions of access to facilities and rights-of-way on multiple unit premises within the meaning of this provision.¹¹⁰

14-15 (8th Cir. 1993) (similar); *Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1104 (4th Cir. 1993) (similar); *Cable Investments Inc. v. Woolley*, 867 F.2d 151, 159-60 (3rd Cir. 1989) (similar). We note that in analogous situations, we have held that the Fifth Amendment did not prevent us from requiring a building owner to allow a tenant to place antennae on property that the tenant controls. See *OTARD Second Report and Order*, 13 FCC Rcd. at 23882-85, ¶¶ 19-23.

See para.61, *infra*.

See 47 C.F.R. § 76.804.

Specifically, a State must certify that in regulating pole attachments it "has the authority to consider and does consider the interests of subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services." 47 U.S.C. (c)(2)(B). We have determined that under section 224(c), a State need not make any certification to the Commission in order to exercise exclusive jurisdiction over access to pole attachments, as opposed to the rates, terms, and conditions of such access. See *Local Exchange Carriers First Report and Order*, 11 FCC Rcd. at 16107, ¶ 1240.

In addition to requiring nondiscriminatory access and directing the Commission to ensure by regulation that the rates, terms, and conditions for pole attachments are just and reasonable, section 224 directs the Commission to prescribe regulations to govern the rates for pole attachments used by telecommunications carriers when the parties fail to resolve a dispute over such charges. 47 U.S.C. (e). In the *Telecommunications Pole Attachment Pricing Report and Order*, we determined that the record did not permit us to establish detailed standards for the pricing of access to rights-of-way, and accordingly that we would consider allegations of unjust, unreasonable, or discriminatory rates, terms, and conditions or denials of access on a case-by-case basis. *Telecommunications Pole Attachment Pricing Report and Order*, 13 FCC Rcd. at 6832, ¶¶ 120-121. Teligent has petitioned for reconsideration of this decision, requesting that specific guidelines be developed. Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket 97-151, *Petition for Reconsideration and Clarification of Teligent, Inc.* (filed Apr. 13, 1998). We do not request comments on this issue here. Similarly, we do not here request comment regarding any formula for determining the pricing of access to riser conduit. See

loop unbundling at the remote terminal or at other points within the incumbent LEC's network.¹¹⁸

51. We seek comment on the potential treatment of in-building cable and wiring owned or controlled by an incumbent LEC as an unbundled network element under section 251(c)(3). We will establish criteria for applying the "impair" and "necessary" standards of section 251(d)(2), and apply those criteria to the previously identified minimum set of network elements, including the NID, based on the record compiled in response to our recent Further Notice of Proposed Rulemaking. We request comment on whether unbundled access to riser cable and wiring within multiple tenant environments is technically feasible.¹¹⁹ We note that facilities-based competitive LECs have advanced arguments that, in many instances, it is difficult for them to provide service without access to these facilities,¹²⁰ and that at least one State commission has required incumbent LECs to unbundle house and riser cable within multiple tenant environments.¹²¹ We seek comment, in particular, from a technical standpoint, on whether sharing of wire may lead to problems due to insufficient power or electromagnetic incompatibility. Commenters should address whether any obligation to allow unbundled access to cable and wiring should be limited, or whether any additional rules should be adopted, to avoid these problems.¹²² We also seek comment regarding how this network element should be defined, whether any other facilities controlled by incumbent LECs within multiple tenant environments should be included, whether and to what extent these facilities must be unbundled from each other, and any other issues relating to the implementation of this potential requirement. For example, commenters may wish to address whether, in addition to or instead of the network unbundling obligation discussed above, we should require incumbent LECs to permit unbundled access to a remote terminal or other point outside the walls of a multiple tenant building. Commenters should consider to what extent alternative proposals would satisfy the needs of all classes of competing providers.¹²³

We note that prior to the Supreme Court's decision, we requested comment on whether incumbent LECs should be required section 251(c) to provide sub-loop unbundling and permit collocation at the remote terminal, and we tentatively concluded that requirements should be imposed. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012, 24086-88, ¶¶ 173-176

Inside Wiring Report and Order and Second Further NPRM, 13 FCC Rcd. at 3781-82, ¶¶ 270-271 (seeking comment on technical feasibility of sharing wire between two video service providers).

e.g., Teligent CCB Inquiry Comments at 22-24; Section 706 Inquiry, Reply Comments of WinStar Communications, Inc. at 9 and Oct. 8, 1998) (WinStar Section 706 Inquiry Reply Comments).

e Joint Complaint of AT&T Communications of New York, Case 95-C-0657, *Opinion and Order in Phase 2*, Opinion No. 97-16, N.Y. PUC LEXIS 709 at *107-26 (N.Y.P.S.C. Dec. 22, 1997).

radiofrequency signals are applied to the wiring, the systems must comply with the standards contained in Part 15 of the Commission's rules. See 47 C.F.R. Part 15, esp. §§ 15.107 and 15.109(e).

e note that the issue of whether to unbundle facilities owned by the incumbent LEC on the end user's side of the network at the collocation point under section 251(c)(3) is pending in the *UNE Further NPRM*, FCC 99-70. To the extent commenters have previous

54. We note that several States have enacted legislation or taken regulatory action to prevent building owners from discriminating or demanding unreasonable payments or conditions with respect to access by telecommunications service providers.¹²⁹ Furthermore, the National Association of Regulatory Utility Commissioners (NARUC) has resolved that it "supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications providers in multi-tenant buildings," and that it "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider."¹³⁰ We seek comment on the effectiveness of existing State statutes and regulations governing building access. Furthermore, we note that the Building Owners and Managers Association, International (BOMA) has stated that it offers its members model license agreements that do not discriminate between incumbent and competitive providers.¹³¹

55. In addition to continuing to work with State and local governments, industry, and building owners, we seek comment here on the necessity and prospects for adopting a national nondiscriminatory access requirement. If we were to consider such a national requirement, we seek comment on how it could be tailored to ensure that consumers in all parts of the country will in fact have a choice of competitive service providers without infringing on the rights of property owners and the authority of other regulating jurisdictions.

56. Specifically, we seek comment on whether the imposition of a nondiscrimination requirement on building owners would be within our statutory authority. First, we seek comment on whether the use of in-building facilities to provide interstate and foreign communication is within our subject matter jurisdiction to regulate under Title I of the Communications Act. Sections 1 and 2(a) of the Act, read together, give the Commission jurisdiction to enforce the Act with respect to "all interstate and foreign communication by wire or radio. . . ."¹³² Pursuant to section 3, "radio communication" and "wire communication" are defined to include "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication.¹³³ We seek comment on whether or not the use of inside wire for

¹²⁹ Conn. Gen. Stats. § 16-2471; Tex. Util. Code § 54.259; Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 100 (Ohio Pub. Util. Comm. of Ohio Sept. 29, 1994). A number of other States have similar rules for providers of video services. See *Inside Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3744, ¶ 182.

¹³⁰ Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers" (adopted July 29, 1998).

¹³¹ May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Brent W. Bitz, Executive Vice President, Charles H. Commercial Realty L.P. at 10.

¹³² U.S.C. §§ 1, 2(a).

¹³³ U.S.C. § 3(33), 3(51).

is "reasonably ancillary to the effective performance of the Commission's various responsibilities. . . ." ¹⁴⁰ As discussed above, several provisions of the Communications Act, as amended by the 1996 Act, are designed to promote consumers' ability to choose from among competing providers of communications services. ¹⁴¹ We seek comment on whether the addition of a nondiscrimination requirement with respect to access to facilities used to provide interstate and foreign telecommunications services owned or controlled by premises owners is sufficiently closely related to the regulation of those services under Title II as to confer jurisdiction. Would such an exercise of Commission authority be sufficiently necessary to carry out the provisions and intent of the 1996 Act to promote competition and consumer choice? ¹⁴² In addition, we seek comment on any other potential sources of or conflicts with Commission jurisdiction.

58. We also ask for comment on whether there would be any constitutional impediment to our adoption and enforcement of a nondiscrimination requirement. Under the Fifth Amendment to the United States Constitution, government may not effect a taking of private property without just compensation. ¹⁴³ In the *Loretto* case, the United States Supreme Court considered a challenge to a New York statute that required building owners to permit cable television service providers to install facilities on their premises in exchange for compensation determined by a State regulatory commission to be reasonable. ¹⁴⁴ The Court held that because the installation of these facilities constituted a permanent physical occupation of the landlord's property, it amounted to a *per se* taking for which just compensation is constitutionally required, regardless of the minimal extent of the occupation or the importance of the public interest served. ¹⁴⁵ The Court therefore remanded the matter to State court to determine whether the nominal compensation prescribed by regulation was just. ¹⁴⁶ In *Bell Atlantic*, the United States Court of Appeals for the D.C. Circuit narrowly construed the Commission's pre-1996 statutory authority to overturn a requirement that LECs offer physical collocation to competing telecommunications carriers. ¹⁴⁷ The Court held that because the Commission's order created an identifiable class of cases in which application of the regulation would necessarily constitute a taking, it

outhwestern Cable, 392 U.S. at 178; see also *Iowa Utilities Board*, 119 S.Ct. at 731 (noting that "'ancillary' jurisdiction . . . could even where the Act does not 'apply'").

ee, e.g., 47 U.S.C. §§ 224, 251, 332(c)(7); 1996 Act, §§ 207, 706.

ee 1996 Conference Report at 1 (purpose of the 1996 Act is to accelerate the competitive deployment of services to all American

I.S. Const., Amendment V.

oretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982) (*Loretto*).

d. at 426, 436-37.

d. at 441.

bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*).

60. We seek comment on the extent to which a nondiscrimination requirement on private property owners can be sustained consistent with *Loretto* and *Bell Atlantic*, and with the application of those decisions in the *OTARD Second Report and Order*. For example, would constitutional problems be mitigated if a requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property, if it enabled a property owner to obtain from a new entrant the same compensation that it has voluntarily agreed to accept from an incumbent LEC, or if a property owner could satisfy a nondiscrimination obligation in many instances simply by allowing transport of a competing carrier's signals over existing wire that the building owner owns and controls? Under the last of these circumstances, the competing carrier would not physically occupy the building owner's property. We therefore seek comment on whether either a *per se* or regulatory taking would be involved under any of these situations, or any combination of these situations. We further request comment regarding whether such arrangements will be sufficient to allow competing providers to offer telecommunications service, and on whether providers utilizing such arrangements will also require additional access to premises facilities, such as physical connection to the existing wire.

61. If we decide to adopt any nondiscrimination requirement, we seek additional comment on how that requirement should be structured to achieve our procompetitive objectives. In particular, commenters should consider whether it is sound policy, and would promote competition, to permit exclusive contracts between property owners and service providers under some circumstances. On the one hand, an exclusive contract prevents carriers from competing to serve customers on the covered premises during the period that the contract is in effect. On the other hand, it has been argued that new entrants often need exclusive contracts for a limited period of time in order to recoup their investment, and that if exclusive contracts are not permitted incumbents might face no competition at all.¹⁵⁶ We seek comment on the extent to which, and under what circumstances, the ability to enter into exclusive contracts materially advances the ability of competitive carriers to serve customers in multiple tenant environments. We also seek comment on whether end users may benefit from a property owner's ability to enter into an exclusive contract, for example by negotiating a discount with the carrier. Commenters that favor permitting exclusive contracts should address the circumstances under which such contracts should be allowed. For example, a rule might permit only exclusive contracts that are limited to some defined period of time, or contracts between building owners and carriers that do not exercise market power. Commenters should also consider whether any rule should be applied in a manner that abrogates existing contracts, and whether doing so would raise constitutional concerns. For example, commenters should consider whether any unfairness might arise, and whether the effectiveness of any rule might be compromised, if the compensation provided for in a contract that contemplated exclusivity were to become the nondiscriminatory standard for non-exclusive contracts.

62. In addition, we invite commenters to address whether we should establish any special mechanism for enforcing any nondiscrimination obligation on private premises owners. We also invite comment on whether, and under what circumstances, we should preempt any State regulation of access that may be inconsistent with any regulations that we may adopt, or whether our regulations should apply

¹⁵⁶ *e.g.*, May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Jodi Case, Manager of Ancillary Services, AvalonBay Communities, Inc. at 5.

contracts or contracts involving carriers with market power.¹⁶¹ We also request comment on the legal and policy issues and practical implications of either abrogating existing exclusive contracts or allowing them to remain in force, including any constitutional issues.¹⁶²

65. Second, we request comment on how our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the property owner on multiple unit premises under Part 68 of our rules impact competitive provider access, and whether any modification or clarification of those rules is appropriate to promote access.¹⁶³ In 1984 and 1986, in order to foster competition in the market for telecommunications inside wiring, the Commission acted to detariff the provision of inside wiring by the LECs and permit subscribers and premises owners to install and connect their own inside wiring.¹⁶⁴ The "demarcation point" establishes the division, for purposes of these rules, between wiring and other equipment that is under the control and responsibility of the carrier and that which is under the control and responsibility of the subscriber or premises owner. Under our current rules, the demarcation point in multiple unit premises may be established at any number of places depending on the date the inside wiring was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Specifically, in multiple unit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and nondiscriminatory standard operating practices as of August 13, 1990.¹⁶⁵ In multiple unit premises in which wiring is installed, or major additions or rearrangements of wiring are

see para. 61, *supra*.

L We note that the Nebraska Public Service Commission has prohibited exclusive contracts and marketing agreements between communications companies and property owners, except for contracts and agreements involving condominiums, cooperatives, and owners' associations. Commission Motion to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling (MDUs) in Nebraska by Competitive Local Exchange Telecommunications Providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access* at 6 (March 2, 1999) (*Nebraska MDU Order*).

We note that the definition of the demarcation point for telephone company communications facilities is not identical to the demarcation point definition for cable television facilities for purposes of the cable inside wiring rules. 47 C.F.R. § 76.6(mm); *see* para. 61. In 1997, we declined to establish the same rules to govern the demarcation point for cable and telephone service providers. *See Wire Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3719-30, ¶¶ 129-151.

Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems, and Terminal Apparatus to the Telephone Network, CC Docket No. 81-216, *Report and Order*, 97 F.C.C.2d 527 (1984), *stay denied*, FCC 84 (rel. Nov. 20, 1984), *recon. granted in part*, 50 Fed. Reg. 29384 (1985); *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, *Second Report and Order*, 51 Fed. Reg. 8498 (1986), *recon. granted in part*, 1 FCC Rcd. 1190 (1986); C.F.R. §§ 68.213, 68.215.

47 C.F.R. § 68.3 (definition of "demarcation point" at (b)(1)); *see also* *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, *Order on Reconsideration, First Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 11897, 11914-15, ¶ 26 (1997) (*1997 Telephone Inside Wiring Order*).

must necessarily be the same person who exercises control for purposes of competitive access, and, if not, whether we should apply different standards for each of these purposes. Commenters may also consider whether, as suggested in the comments described above, they believe we should adopt a uniform demarcation point for purposes of competitive access, either at the minimum point of entry or at some other point, for all or some class of multiple-unit premises owners. Among other things, commenters should address the need for and benefits of any regime that they propose, any costs for incumbent providers and building owners, any effects on the competitive installation and maintenance of inside wiring, and how any rule should be drafted and implemented.

68. Third, we ask commenters to consider whether our rules governing access to cable inside wiring for MVPDs¹⁷¹ should be extended so as to afford similar access to providers of telecommunications services. Section 76.804 of our rules sets forth procedures governing the disposition of home run wiring (*i.e.*, the wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop) owned by an MVPD when the MVPD ceases to provide service to a building, and governing access to that wiring by other MVPDs after its disposition.¹⁷² In order to take advantage of these procedures, however, a provider must offer multichannel video programming services.¹⁷³ Commenters in other proceedings have argued that this rule offers benefits to providers of video services that are not currently available to telecommunications service providers, and that this distinction not only is arbitrary but creates uneconomic incentives for providers to incorporate video services into their offerings simply to take advantage of the more favorable rules.¹⁷⁴ Indeed, in a world increasingly marked by technological convergence and interchangeable services, we believe a strong argument can be made for applying uniform rules governing access to inside wiring regardless of a provider's service technology or the form of its authorization. Commenters should accordingly address the advantages and disadvantages of extending the MVPD home run wiring rule to benefit telecommunications service providers. In particular, commenters should consider whether extension of the rule in this manner would present practical difficulties for administration, for example, if a telecommunications service provider and an MVPD both seek to use the same wire. We further request comment on whether other of our cable inside wiring rules should also be extended to benefit telecommunications service providers.¹⁷⁵

69. Finally, we request comment on whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act that would protect the ability to place antennas to

C.F.R. §§ 76.800-76.806.

C.F.R. § 76.804.

e 47 U.S.C. § 522(13); 47 C.F.R. § 76.800(c) (defining "MVPD").

e Section 706 Inquiry, Comments of the Wireless Communications Association International, Inc. at 27-29 (filed Sept. 14, 1998)
r Section 706 Inquiry Reply Comments at 15-17.

e 47 C.F.R. § 76.802 (disposition of cable home wiring); 47 C.F.R. § 76.805 (access to molding).

but applying to services that are not within the scope of section 207 would be constitutional, consistent with the analysis in the *OTARD Second Report and Order*.¹⁴¹ In addition, to the extent commenters advocate restrictions on State or local regulation of the placement on end user premises of antennas used to receive and transmit personal wireless services, they should address whether our adoption of such rules would be consistent with section 332(c)(7).¹⁴²

C. Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.

70. In order to serve any customers, whether they are in a fixed location or mobile, a telecommunications service provider must have a means of transporting signals between calling and called parties' locations. This transport of signals may be accomplished using either wireline or wireless technology. Where wireline technology is used, it is often most efficient to place the necessary facilities within the public rights-of-way. The incumbent LECs have long been granted authority to use public rights-of-way for this purpose, and they have extensive facilities in place.

71. Full and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals. For competitive carriers using wireline technology, this may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way. Providers of wireless telecommunications services, by contrast, do not need access to public rights-of-way to transport signals between their transmitting and receiving facilities and their customers' locations. However, wireless service providers do need to connect their antenna facilities to each other and to central switches, and these connections are often most efficiently accomplished by means of wireline facilities that traverse the public rights-of-way. Often, wireless carriers lease capacity on facilities owned by other communications providers, but in some instances they install their own cables. Thus, providers of wireless telecommunications services sometimes require access to public rights-of-way in connection with the provision of service. These carriers will, however, typically impose far less burden on public rights-of-way than carriers that offer service primarily by means of wireline technology.

72. Public rights-of-way generally are controlled and managed by local governments and, to a lesser extent, State governments. These governments are responsible for, among other things, ensuring that the rights-of-way are used in a manner that benefits the public and, in particular, that neither threatens public safety, unnecessarily inconveniences the public, nor imposes uncompensated costs. One challenge for State and local governments in the era of competitive telecommunications service is to administer the public rights-of-way in a manner that serves these ends and at the same time does not unfairly favor incumbent carriers or obstruct other providers' ability to compete effectively in the

^e *OTARD Second Report and Order*, 13 FCC Rcd. at 23883-88, ¶¶ 19-28.

U.S.C. § 332(c)(7) (providing that, except as provided in section 332(c)(7), nothing in the Communications Act shall limit or the authority of a State or local government over decisions regarding the placement, construction, or modification of personal service facilities).

74. Where a CMRS provider seeks to use public rights-of-way for its facilities, the permissible exercise of State and local authority may also be affected by section 332(c)(3). Under section 332(c)(3), in general, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."¹⁸⁶ However, section 332(c)(3) does not "prohibit a State from regulating the other terms and conditions of commercial mobile services."¹⁸⁷ Thus, a State or local rights-of-way management procedure or requirement, as applied to CMRS providers, is permissible under section 332(c)(3) if it constitutes regulation of terms and conditions of service other than rates or entry. Any requirement that functions as an entry regulation, however, is not permissible as applied to CMRS providers.

75. *Commission and Judicial Precedent.* During the period since the 1996 Act became law, the Commission and the courts have discussed or applied section 253(c) on several occasions. These decisions recognize that State and local governments have an important interest in managing the public rights-of-way to promote the public good, and in obtaining fair and nondiscriminatory compensation for use of the rights-of-way. Thus, for example, we have stated that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage . . . facilities" in the rights-of-way, including such activities as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."¹⁸⁸ At the same time, the cases consistently recognize that certain types of practices are inimical to competition and are not consistent with section 253. For one thing, section 253(c) plainly requires that compensation requirements for use of the public rights-of-way must be imposed "on a competitively neutral and nondiscriminatory basis." Thus, we have made clear that we are troubled by any rights-of-way regulations that, either explicitly or in practical effect, favor incumbent LECs over competing carriers.¹⁸⁹

76. We have also expressed concern about requirements imposed on carriers that use the public

¹⁸⁶ U.S.C. § 332(c)(3). Section 332(c)(3) permits a State to regulate CMRS rates, but not entry, if the State demonstrates in a petition to the Commission that certain conditions are met. *Id.* To date, the Commission has not granted any State's petition under section 332(c)(3). See, e.g., Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the rates of Local Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995), *aff'd sub nom.* Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

¹⁸⁷ U.S.C. § 332(c)(3).

¹⁸⁸ *See* Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, FCC 97-331 at ¶ 105 (rel. Sept. 19, 1997) (*TCL*), *reconsidered*, FCC 98-216 (rel. Sept. 4, 1998); *see also, e.g.*, Classic Telephone, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, at ¶ 39 (1996) (*Classic*) (citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein), *petition for reconsideration denied, sanction and investigation denied*, 12 FCC Rcd. 16577 (1997); Bell Atlantic-Maryland v. Prince George's County, 19 F.3d 3646 at *9 (D.Md. May 24, 1999) (*Prince George's County*)).

¹⁸⁹ *See* *TCL*, FCC 97-331 at ¶ 107.

jurisdiction over the carrier because calls made over the carrier's network would traverse the city's rights-of-way after being transferred to other carriers' networks or because some calls on the carrier's network might travel in part over wireline facilities in the rights-of-way leased from other carriers, holding that local authority to manage the rights-of-way extends only to regulation of physical facilities located in the rights-of-way.¹⁹⁷ In addition, the court held that the principle of competitive neutrality did not require that carriers that use the rights-of-way differently, or do not use the rights-of-way at all, be charged the same fees; indeed, the court noted that charging usage fees to a carrier that leases facilities in the rights-of-way from another carrier would amount to discrimination against that carrier, because it would likely have to pay both its own fees directly to the city and the underlying carrier's fees passed on through its rates.¹⁹⁸

78. Also, some courts have struck down compensation schemes that they found were not reasonably related to a carrier's rights-of-way usage and the costs that use imposes on the local government and its citizens. Thus, for example, the court in *Dallas I* held that the city could not require a carrier to pay four percent of its revenues from all services provided with the city.¹⁹⁹ Similarly, the *Prince George's County* court held that rights-of-way fees must be based on a government's cost of maintaining and improving the rights-of-way and on a provider's rights-of-way use, not on the "value" of the "privilege" of using the rights-of-way, and it therefore struck down a fee of three percent of gross revenues, broadly defined.²⁰⁰

79. *Inquiry*. Notwithstanding the case law discussed above, several carriers and their associations have alleged that many State and local governments continue to engage in rights-of-way management and compensation practices that the carriers believe are unreasonable, anticompetitive, and contrary to federal law. While these carriers state that they have generally been successful in challenging such regulations in court, they believe Commission action could help reduce the incidence of those regulations and the need for litigation. At the same time, State and local governments assert that the carriers' complaints are unreasonable, unfounded, and merely designed to impede local jurisdictions' legitimate exercise of their public rights-of-way authority. We note that the rights-of-way regulations that have been brought to our attention, either formally or informally, cover only a relatively small number of communities, and we believe most communities and carriers have arrived at solutions that

III, 1999 WL 324668 at *6-9; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 1998 WL 386168 (N.D. Tex. Jul 1) (*Dallas II*) (wireless service provider); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F.Supp. 928 (W.D. Tex. 1997) (carrier that provided service only by means of resale and use of unbundled network elements).

Dallas II, 1998 WL 386186 at *4-5.

I, at *5 & n.22.

Dallas I, 8 F.Supp 2d at 593; *see also Dallas II*, 1998 WL 386186 at *5 and n.22; *Dallas III*, 1999 WL 324668 at *5.

Prince George's County, 1999 WL 343646 at *10-11; *but see TCG Detroit v. City of Dearborn*, 1998 WL 493128 (E.D. Mich. Aug. 1998) (holding that franchise fee of 4 percent of gross revenues did not violate requirement that fees be fair and reasonable).

however, that some State and local taxes are excessive or are applied in a discriminatory manner. For example, in July 1996, Western PCS I Corporation (Western) filed a petition seeking preemption under sections 253 and 332(c)(3) of the Communications Act of the State of Oregon's assessment of property tax on Western.²⁰⁴ Western alleged that Oregon had calculated the value of Western's property by including the amount Western had paid at auction for its license to serve the Portland Major Trading Area, and that this method of assessment resulted in Western's bearing a substantially higher tax burden than other telecommunications service providers that had not purchased licenses at auction. Subsequently, Western and the Oregon Department of Revenue reached a settlement of most of the issues that were the subject of Western's petition, and Western moved to dismiss its petition without prejudice.²⁰⁵ We granted Western's motion on January 20, 1999.²⁰⁶

83. Other allegations of unfair State and local taxes surfaced in a petition for rulemaking filed by the Cellular Telecommunications Industry Association (CTIA).²⁰⁷ The CTIA Petition asks the Commission to preempt State and local governments from imposing discriminatory or excessive taxes or similar burdens on CMRS providers and services and other telecommunications providers and services. By way of example of the taxes that CTIA finds objectionable, the petition cites the Oregon tax challenged by Western PCS and other property taxes in West Virginia and Kentucky,²⁰⁸ as well as an excise tax imposed on mobile telephone use by Montgomery County, Maryland.²⁰⁹ The Personal Communications Industry Association also has recently filed with us a study detailing what it considers to be the excessive cumulative burden of Federal, State, and local taxes and fees on wireless telecommunications service providers.²¹⁰

84. In recognition of the limits on our expertise and out of respect for principles of federalism, we conclude that it is not appropriate for us to initiate a rulemaking proceeding at this time, and we

²⁰⁴ "Commission Seeks Comment on Petition for Preemption and Motion for Declaratory Ruling filed by Western PCS I Corporation," *Public Notice*, DA 96-1211 (July 30, 1996).

²⁰⁵ Western PCS I Corporation Request for Dismissal Without Prejudice, File No. WTB/POL 96-3 (dated Dec. 9, 1997).

²⁰⁶ Western PCS I Corporation Petition for Preemption of the Oregon Department of Revenue Notice of Proposed Assessment and Motion for Declaratory Ruling, File No. WTB/POL 96-3, *Order*, DA 99-203 (CWD rel. Jan. 20, 1999).

²⁰⁷ Petition for Rule Making of the Cellular Telecommunications Industry Association (filed Sept. 26, 1996) (CTIA Petition)

, Attachment at 2-3.

, Attachment at 2 n.2.

²⁰⁸ Katz and J. Hayes, "Unintended Consequences: Public Policy and Wireless Competition" (Oct. 1, 1998), filed as an Attachment from Mary McDermott, Chief of Staff and Senior Vice President, Government Relations, Personal Communications Industry Association to John Berresford, Industry Analysis Division, Common Carrier Bureau in CC Docket No. 98-146 (dated Nov. 12, 1998).

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act.

87. As required by the Regulatory Flexibility Act (RFA),²¹² the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking. The IRFA is set forth in the attached Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, as set forth in Section V.C *infra*, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.²¹³ In addition, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA (or summaries thereof), will be published in the Federal Register.²¹⁴

B. Ex Parte Rules.

88. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking initiate and constitute a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²¹⁵ Persons making oral *ex parte* presentations relating to the Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.²¹⁶ Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve International Transcription Services (ITS) with copies of any written *ex parte* presentations or summaries of oral *ex parte* presentations in these proceedings in the manner specified below for filing comments.

²¹² 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Act of 1996 (SBREFA).

²¹³ 5 U.S.C. § 603(a).

²¹⁴ *Id.*

²¹⁵ *Id.* Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-307 and Order, 12 FCC Rcd 7348, 7356-57, ¶ 27, citing 47 C.F.R. § 1.1204(b)(1) (1997).

²¹⁶ 47 C.F.R. § 1.1206(b)(2), as revised.

D. Further Information.

95. For further information about this proceeding, contact Jeffrey Steinberg at 202-418-0896, jsteinbe@fcc.gov, or Joel Taubenblatt at 202-418-1513, jtaubenb@fcc.gov.

VI. ORDERING CLAUSES

96. Accordingly, IT IS ORDERED, pursuant to sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412, this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking is ADOPTED.

97. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Wireless Communications Association International, Inc. on May 26, 1999, is GRANTED.

98. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 253, and 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 253, and 332(c)(3), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Cellular Telecommunications Industry Association on September 26, 1996, is DENIED.

99. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

they control within multiple tenant environments, subject to the Commission's future interpretation of the "necessary" and "impair" standards of section 251, 47 U.S.C. § 251; (3) whether we should require building owners who allow access to their premises to any telecommunications provider to make comparable access available to all such providers on a nondiscriminatory basis; (4) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; (5) whether we should modify our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the landowner on multiple unit premises;²¹ (6) whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services;²² and (7) whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act²³ protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207.

II. Legal Basis

4. The potential actions on which comment is sought in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking would be authorized under sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412.

III. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply

5. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."²⁴ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁵ In addition, the term "small business" has the same meaning as

²¹ 47 C.F.R. § 68.3.

²² 47 C.F.R. §§ 76.800-76.806.

²³ Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000, which prohibits, with limited exceptions, any State or local law or regulatory covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the antenna user has a direct or indirect ownership or leasehold interest in the property.

²⁴ U.S.C. § 605(b).

²⁵ U.S.C. § 601(6).

the potential actions discussed in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, if adopted.

8. Above, we have included smaller incumbent LECs in our analysis. Although some incumbent LECs may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."²³¹

b. Other Utilities

9. The proposal in this Third Further Notice of Proposed Rulemaking with respect to Section 224 of the Communications Act, 47 U.S.C. § 224, if adopted, would affect utilities other than LECs. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The Commission anticipates that, to the extent its section 224 proposal affects non-LEC utilities, the effect would be concentrated on electric utilities.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

10. Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.²³² The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues do not exceed five million dollars.²³³ The Census Bureau reports that 447 of the 1,379 firms listed had total revenues below five million dollars in 1992.²³⁴

²³¹ See 13 C.F.R. § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such incumbent LECs.

²³² 1987 SIC Manual.

²³³ 13 C.F.R. § 121.201.

²³⁴ U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 1 (Bureau of Census data under contract to the Office of Advocacy of the SBA) (*1992 Economic Census Industry and Enterprise Receipts Size Report*).

of entity as a utility that transmits and distributes natural gas for sale.²⁴⁴ The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues do not exceed five million dollars.²⁴⁵ The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.²⁴⁶

15. **Natural Gas Distribution (SIC 4924).** The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.²⁴⁷ The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.²⁴⁸ The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.²⁴⁹

16. **Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925).** The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.²⁵⁰ These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.²⁵¹ The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.²⁵²

17. **Gas and Other Services Combined (SIC 4932).** The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.²⁵³ The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do

87 SIC Manual.

C.F.R. § 121.201.

92 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

87 SIC Manual.

C.F.R. § 121.201.

92 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

87 SIC Manual.

C.F.R. § 121.201.

92 Economic Census Industry and Enterprise Receipts Size Report, Table 2D.

87 SIC Manual.

revenues do not exceed six million dollars.²⁶³ The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars in 1992.²⁶⁴

21. Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.²⁶⁵ The Census Bureau reports that a total of 1,214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.²⁶⁶ The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.²⁶⁷

(5) Steam and Air Conditioning Supply (SIC 4961)

22. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.²⁶⁸ The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.²⁶⁹ The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.²⁷⁰

(6) Irrigation Systems (SIC 4971)

23. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.²⁷¹ The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues do not exceed five million dollars.²⁷² The Census Bureau reported that 286 of the 297

C.F.R. § 121.201.

92 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

87 *SIC Manual*.

C.F.R. § 121.201.

92 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

87 *SIC Manual*.

C.F.R. § 121.201.

92 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

87 *SIC Manual*.

C.F.R. § 121.201.

definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.²⁷⁸

d. Multichannel Video Program Distributors (SIC 4841)

27. Our inquiry in this Notice of Proposed Rulemaking regarding whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services would affect operators of cable and other pay television services, if such inquiry leads to the adoption of rules. The SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.²⁷⁹ This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.²⁸⁰

e. Neighborhood Associations

28. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207 would affect neighborhood associations, if such inquiry leads to the adoption of rules. Section 601(4) of the Regulatory Flexibility Act, 5 U.S.C. § 601(4), defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 such associations in 1993.²⁸¹

f. Municipalities

29. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not

C.F.R. § 121.201.

C.F.R. § 121.201 (SIC 4841).

92 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841.

e Community Associations Institute Comments in Implementation of Section 207 of the Telecommunications Act of 1996, CS No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19337 (1996).

or are under a certain size.²⁸⁶ Commenters are invited to address the economic impact of all of our proposals on small entities and offer any alternatives.

VI. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

32. None.

²⁸⁶ Section III.D *supra*.

Commission requests comment on whether unbundled access to riser cable and wiring within multiple tenant environments meets the requirements of Section 251. Although we do state that we will apply our decisions in the remand proceeding to the issue of riser cable and wiring in multiple tenant environments presented here, the better course of action in my judgment would be to consider all issues pertaining to unbundled network elements in one proceeding.

Even though my mind remains open to what commenters present, the door is open only a sliver. We may eventually win an "ancillary jurisdiction" argument in court against the building owners and landlords, but it does not seem like good policy to propose a new regulatory dictate on these entities before other measures to evaluate the problem or pursue other non-regulatory initiatives prove inadequate. Nevertheless, I will concur with asking the questions we do in this item, anticipating an end result – based on the record – that is consistent with the law.

My second area of concern is the proposal to consider requiring incumbent LECs to make available "unbundled access" to riser cable and wiring they control within multiple tenant environments pursuant to section 251(c)(3) of the 1996 Act. I feel strongly about our duty to faithfully and quickly implement the Supreme Court's remand of the Commission's unbundled network element rule (the so-called Rule 319). I am therefore concerned about adding yet another possible "network element" to a list that the Supreme Court struck down without the thorough and thoughtful interpretation and application of the "necessary" and "impair" standards of section 251(d)(2).

I will not object to the inclusion of this issue in this item since it basically defers to the UNE remand proceeding, but I am troubled by the growing list of UNEs that we put out for comment before we implement the limiting principle as Congress and the Court required.

Leisure World of Maryland Corporation

3701 Rossmoor Boulevard • Silver Spring, Maryland 20906

(301) 598-1000

August 27, 1999

Federal Communications Commission
445 Twelfth Street, SW, TW-A325
Washington, DC 20554

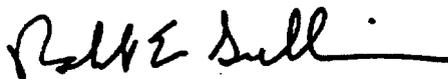
Re: WT Docket No. 99-217
CC Docket No. 96-98

Gentleman:

Enclosed are our comments regarding the FCC Forced Entry Issue.

If your office need any additional information regarding this issue, please contact me on
(301)598-1000.

Sincerely,



Robert E. Sullivan
General Manager

**Leisure World of Maryland Corporation
Robert E. Sullivan, General Manager
3701 Rossmoor Boulevard
Silver Spring, Maryland 20906
August 27, 1999**

**Before the
Federal Communications Commission
Washington, DC 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 Rule making 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)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
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Leisure World of Maryland Corporation
Robert E. Sullivan, General Manager
3701 Rossmoor Boulevard
Silver Spring, Maryland 20906
August 27, 1999

COMMENTS

1. These comments are filed by Leisure World of Maryland, a Community located at 3701 Rossmoor Boulevard, Silver Spring, Maryland. The Community, created for individuals 55 years or more pursuant to special zoning of Montgomery County Maryland consists of some 4,600 dwelling units, both high rise and low rise, in which reside some 6,800 individuals. These units are organized into one cooperative and 22 condominiums, which own, in addition to their own residences, the beneficial interest in a trust consisting of common property such as a medical center, restaurants, clubhouses, etc.

2. At the outset, it should be noted that, it can be assumed that our residents favor competition among suppliers of goods and services where such competition will result in lower costs and better quality. However, by reason of their choice of Leisure World as a residence, they do not want to encourage entry at will upon Leisure World properties by individuals seeking to sell products and services. In fact, our regulations are drawn in such fashion as to protect our residents' privacy and freedom from unwanted solicitation, e.g., entry to our community is restricted. However, residents may allow solicitors to call on them by authorizing entry by notification to our security gate operators.

3. In the case of cable suppliers service is through a contract with the concerned associations. Other than the telephone company, our buildings have been wired through contract with a cable company franchised by the County. Another has recently been franchised. There have been negotiations with satellite providers for a central antennae, but none have resulted as yet in a contract. So far as we know, relatively few residents have installed individuals dishes pursuant to the OTARD rules.

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4. If the FCC is considering a rule authorizing forced entry at will by telecommunications service providers for the purpose of installing wiring, digging ditches for conduits or making other alterations of property to accommodate proposed services we object forcefully. Major safety, security, and service disruption risks are a real possibility. Our senior citizens, many of whom have varying degrees of infirmity may be placed in harm's way with a risk of dangerous consequences.
5. It must be obvious from the above that we oppose any action by the Federal Government which would violate our privacy and subject us to unwelcome intrusion by entrepreneurs seeking to augment their financial well being at the cost of what would appear to be a forced invasion of our private property contrary to our desire for a quiet and peaceful existence.
6. Oddly, the present inquiry, if we understand it correctly, seems to be an attack on representative government, in that it suggests that governing boards do not act in the best interest of their constituencies. Although we are aware that this can happen on occasion, in the case of our residents, there are measures to correct such action such as the elective process.
7. In essence, it appears to us, that petitioners want to place themselves in a position to better sell their services through forced entry into private dwellings. Such an approach should no more be encouraged than a mandate of free access into our homes by sellers of other goods and services.
8. Such power in the Commission, if it exists, would obviously be a delegation by the Congress. We consider it doubtful that Congress has such power under the Constitution,

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and in any event any purported delegation should be made only through clear and unmistakable language, not by inference.

9. In conclusion, we emphasize that we encourage approaches to our residents through conventional channels, and so far as we are aware, no governing body has reason not to consider a competing proposal by any provider who can offer less expensive or better service than an existing provider. Moreover, if a new telecommunications provider is successful in selling its services to our residents, Leisure World Management as well as the governing body of the Condominium or Cooperative involved in the service will cooperate fully with the new provider to coordinate all the necessary activities to accommodate installation of the service. Only in that way can we insure safety for all our residents, security of our community, minimal interference with the daily activities of the community at large, and correction of all damage to common and limited common elements of our properties.
10. For all of the foregoing reasons we cannot endorse the radical approach suggested by the present inquiry, an approach which appears not only to raise constitutional questions but also appears to threaten the right of our residents to choose peaceful possession and enjoyment of their homes.