ORIGINAL

WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

APR 28 2000

VIA HAND DELIVERY

April 28, 2000

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from myself, on behalf of the Smart Building Policy Project, delivered today to Lauren Van Wazer of theWireless Telecommunications Bureau regarding the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's written ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

cc: Lauren Van Wazer
Jeffrey Steinberg
Joel Taubenblatt
Leon Jackler
Eloise Gore

Enclosures

No. of Copies rec'd 0+3
List ABCDE

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

RECEIVED

APR 28 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

VIA HAND DELIVERY

April 28, 2000

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from myself, on behalf of the Smart Building Policy Project, delivered today to Lauren Van Wazer of theWireless Telecommunications Bureau regarding the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's written ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

cc: Lauren Van Wazer
Jeffrey Steinberg
Joel Taubenblatt
Leon Jackler
Eloise Gore

Enclosures

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

VIA HAND DELIVERY

April 28, 2000

EX PARTE

Ms. Lauren Maxim Van Wazer
Senior Attorney, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 4-A223
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98

Dear Ms. Van Wazer:

During the course of an April 11th *ex parte* meeting between members of the Smart Buildings Policy Project and you and several other members of the Commission staff working on the *Competitive Networks* item, you inquired about the Commission's exercise of authority pursuant to Section 4(i) of the Communications Act. Specifically, you explained that you were aware that the regulation of cable television operators found its origin in Section 4(i) in conjunction with the Commission's Title III authority. You asked whether I was aware of additional examples of the Commission regulating pursuant to its authority under Section 4(i). Please find below a written response to that inquiry.

The Commission may act consistent with its authority despite the absence of a specific statutory directive. As I am certain you are aware, Section 4(i) does not provide the Commission with an independent basis of authority but, rather, operates as a "necessary and proper" clause enabling the

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 2290
WU 89-2762
Fax: 202 887 89

Commission to give effect to its responsibilities under the goals of the Communications Act.[1] Some of these responsibilities are delineated specifically, such as the provisions promoting telecommunications competition in the Telecommunications Act of 1996. However, the specific directives are not the sole spheres in which the Commission is authorized to take action to promote telecommunications competition or, indeed, the other broad goals of the Communications Act. That is, where the Commission has jurisdiction, it does not need affirmative and specific statutory support for implementing rules such as the requirement of nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The proper inquiry, therefore, is not whether the Communications Act expressly authorizes Commission action, but whether the Communications Act expressly prohibits Commission action. Barring express prohibition, the Commission determines whether its action is necessary to accomplish its statutory obligations, including, but not limited to, making available, "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[2]

For example, the D.C. Circuit has relied upon "the cases which have recognized implied agency authority to deal with aligned activities which may effect the regulatory system entrusted to the agency. 'Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.' It would 'frustrate the purposes for which . . .[the Communications Act] was brought into being [if Congress had attempted] an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.'"[3]

Similarly, in *FTC Communications v. FCC*, the relevant section of the Communications Act contained no provision granting the Commission the authority to set interim rates, and the appellants argued that no such authority could be implied. The Second Circuit rejected this argument, finding

---

1 47 U.S.C. § 154(i)("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.").

2 47 U.S.C. § 151.

3 Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220, 225 (D.C. Cir. 1967)(citations omitted).

that the Commission's actions were authorized by § 4(i)'s general grant of authority to issue necessary orders.[4] Separately, in the context of license payments, Mtel argued that the lack of affirmative statutory support for requiring a pioneer's preference payment proved that the imposition of such a requirement was not "necessary in the execution of [the Commission's] functions" under the Act, as required by § 4(i). The Court of Appeals for the D.C. Circuit rejected this proposition. It noted that the FCC had the Section 309 duty to determine whether the public interest, convenience, and necessity would be served by the granting of a license application. The Commission determined that the payment was necessary to ensure the achievement of its statutory responsibility, and its judgment was accorded substantial deference by the D.C. Circuit, which upheld the FCC's rule.[5]

Other examples abound. In *Media Access Project v. FCC*, the D.C. Circuit explained that "even if the Reform Act had never been enacted, the Commission, in order to respond properly to requests under FOIA, could have adopted the same or similar regulations to govern the charges to be made for responding to FOIA requests. Such regulations would not be inconsistent with the purposes and goals of the Communications Act because they would lead to more efficient processing of FOIA requests."[6]

---

4 FTC Communications, Inc. v. F.C.C., 750 F.2d 226, 231-32 (2d Cir. 1984).

5 Mobile Communications Corp. of America v. F.C.C., 77 F.3d 1399, 1406 (D.C. Cir. 1996). Mtel also argued that because the statute provided two bases upon which the FCC can require payment for radio licenses, the use of a third mechanism was inconsistent with the Communications Act and not within the FCC's power under § 4(i). Again, the D.C. Circuit disagreed. It concluded that "Mtel's reliance on the expressio unis maxim -- that the expression of one is the exclusion of others -- is misplaced. The maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.' Expressio unis 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue." Id. at 1404-1405 (citations omitted). Indeed, a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger." Texas Rural Legal Aid, Inc. v. Legal Serv. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991).

6 Media Access Project v. F.C.C., 883 F.2d 1063, 1066 (D.C. Cir. 1989).

Similarly, the Second Circuit noted that "although the Act makes no mention of Community Antenna Television (CATV), the broad power of the Commission to regulate communications was found to encompass the regulation of this technological development. Our own court has upheld the authority of the Commission to regulate prime time access in television communication despite the absence of any explicit authority in the Act."[7] It went on to explain that an activity's substantial effect on the efficiency of offering communications or the price at which such communications is offered is sufficient to confer FCC jurisdiction. "[E]ven absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, *where such activities may substantially affect the efficient provision of reasonably priced communications service.*"[8]

Consequently, it is important to bear in mind that express mention neither of access to tenants in multi-tenant environments nor of the behavior of building owners in the Communications Act does not leave the Commission without authority. The context of the entirety of the Communications Act and the goals contained therein appropriately serve as a basis for the notion that the Commission possesses authority to require nondiscriminatory telecommunications carrier access to multi-tenant environments.[9] More specifically, though, the effect that unreasonable or discriminatory restrictions on access impose on interstate communication subjects building owners' behavior to the jurisdiction of the Commission.

Indeed, analogous to the context of nondiscriminatory telecommunications carrier access to intra-building and rooftop facilities is the *Lincoln* court's explanation that "facilities or services that

---

7 GTE Service Corp. v. F.C.C., 474 F.2d 724, 731 (2d Cir. 1973)(citations omitted).

8 Id. (emphasis added).

9 See, e.g., Mobile Communications Corp., 77 F.3d at 1406 ("Contrary to Mtel's contention, our decision in *Railway Labor Executives' Ass'n v. National Mediation Bd.* did not enshrine expressio unius as a maxim of universal and conclusive application. The conclusion in *RLEA* that the agency lacked authority for its action followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history. In the very different context of the case before us, we see no conflict between the language and structure of the Communications Act and the imposition of a payment requirement on Mtel.").

substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state. The interconnections provided to MCI do substantially affect provision of interstate communication, that of Execunet, and are thus subject to the jurisdiction of the FCC."[10] Similarly, the D.C. Circuit found that a company was engaged in interstate communication sufficient to warrant FCC jurisdiction because "its facilities are a link in the interstate transportation of television signals" as are the facilities of a multi-tenant building owner.[11]

Cogently stated, "Section 4(i) empowers the Commission to deal with the unforeseen -- even if [] that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries. . . . The power asserted here is less far-reaching than the power the Commission has been allowed to exercise under its implied 'ancillary jurisdiction' to regulate services such as cable television that impinge on the services over which it has explicit statutory jurisdiction."[12]

As applied to the issues contemplated in the *Competitive Networks* rulemaking, unreasonable restrictions on telecommunications carrier access to consumers in multi-tenant environments will frustrate the exercise of the Commission's jurisdiction in promoting interstate telecommunications competition. Such concerns are what led the Court of Appeals for the Fourth Circuit to conclude that "[i]f, as North Carolina is formally proposing and the Attorney General of Nebraska has held to be permissible, state jurisdiction over intrastate communication facilities is exercised in a way that, in practical effect, either prohibits customer-supplied attachments authorized by tariff F.C.C. No. 263 or restricts their use contrary to the provisions of that or any other interstate tariff, the Commission will be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it. The Commission must remain free to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done."[13]

---

[10] Lincoln Tel. & Tel. Co. v. F.C.C., 659 F.2d 1092, 1109 (D.C. Cir. 1981)(citations omitted).

[11] Buckeye Cablevision, 387 F.2d at 225.

[12] North American Telecommunications Ass'n v. F.C.C., 772 F.2d 1282, 1292-93 (7th Cir. 1985)(citations omitted).

[13] North Carolina Utilities Comm'n v. F.C.C., 537 F.2d 787, 793 (4th Cir. 1976).

Finally, it is worth noting that although actual restraint of competitive development is demonstrated in the record of the *Competitive Networks* rulemaking, even the *potential* for restraint is sufficient to justify Commission action.[14] If the Commission perceives the potential for unreasonable behavior affecting interstate communications and the need for intervention to prevent such behavior, Section 4(i) grants it the authority to take action.[15]

Given the context in which Section 4(i) may be used, it is not surprising it has been used so frequently and successfully by the Commission in order to accomplish its statutorily derived responsibilities. Additional examples of the FCC using Section 4(i) as the primary basis for its authority, albeit in conjunction with another statutory provision, include the following:

- Pursuant to Section 4(i), the FCC amended its pioneer's preference rules to condition granted PCS licenses on the payment of an appropriate charge. It engaged in an extensive analysis of the cases interpreting the FCC's 4(i) authority, and concluded that "[t]he rule that emerges from the cases described above is that Section 4(i), although 'not infinitely elastic,' is a 'wide ranging source of authority.' 'Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries.' 'If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions.'"[16]

---

[14] "It is irrelevant that the rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted." GTE Service Corp., 474 F.2d at 731 (citing Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir. 1971)).

[15] For example, the *Lincoln* court noted that "[t]he instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection." Lincoln Tel. & Tel. Co., 659 F.2d at 1109.

[16] Review of the Pioneer's Preference Rules; Amendment of the Commission's Rules to Establish New Personal Communications Services, ET Docket No. 93-266, GEN Docket No. 90-314, PP-6, PP-52, and PP-58, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055 at

- The Commission explained the breadth of its authority under Section 4(i) in adopting certain access charge rules. "Moreover, the existing access compensation arrangements produce results that conflict with Congressional goals other than the elimination of discrimination or preferences that are discussed in Subpart II.D, infra. Congress has conferred broad powers upon this Commission in Section 4(i) of the Act, 47 U.S.C. S 154(i), to adopt orders and regulations to achieve those goals. Those powers would be sufficient to enable us to adopt the access charge rules we are adopting in this Report and Order apart from the powers conferred by Sections 201(a) and 205."[17]

- In enacting an aggressive and far-reaching program for providing people with disabilities more access to telecommunications, the Commission recently concluded that it possessed authority to implement Section 255 of the Act pursuant to Section 4(i), 201(b), and 303(r). It took note of the Supreme Court's holding "'that [section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.' In other words, an individual provision of the Communications Act need not contain an express grant of rulemaking authority in order to empower the Commission to adopt implementing regulations."[18]

- In the *Computer II* proceeding, the Commission concluded that enhanced services were not common carrier offerings subject to Title II. This conclusion, though, did not mean the Commission lacked authority. "This does not mean however that we are void of jurisdiction over enhanced services." The Commission noted the sources of its jurisdiction in Title I and explained

---

¶ 33 (1994)(citations omitted); see also Application of Nationwide Wireless Network Corp. for a Nationwide Authorization in the Narrowband Personal Communications Service, File No. 22888-CD-P/L-94, *Memorandum Opinion and Order*, 9 FCC Rcd 3635 at ¶¶ 25-35 (1994)(explaining that 309(j) was not the only source of the Commission's authority to assess charges for a license and explaining that such authority is found in Section 4(i) in conjunction with other provisions of the Communications Act).

17 MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 FCC 2d 241 at ¶ 52 (1983)(citations omitted).

18 Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, FCC 99-181 at ¶ 13 (rel. Sept. 29, 1999)(citations omitted).

that Section 2 "confers on this agency broad subject matter jurisdiction." It concluded that "Title II and Title III provide the principal regulatory forms of the Communications Act, but the Commission also has regulatory powers independent of Title II and Title III." The Commission then concluded that enhanced services fell within its subject matter jurisdiction under Title I.[19]

- In reviewing whether to deregulate LEC billing and collection services, the Commission concluded that such services were not common carrier communication services for purposes of Title II regulation. However, the Commission went on to explain that it nevertheless "could invoke our ancillary jurisdiction under Title I of the Communications Act for that purpose." It went on to explain that the combination of Section 4(i) and Section 2(a) (with the accompanying relevant definitions in Section 3) provided the Commission with "powers [that] would be sufficient to enable [the FCC] to regulate exchange carrier provision of billing and collection service to interexchange carriers . . . ."[20]

- The Common Carrier Bureau rejected a Maryland PSC assertion that the FCC lacked jurisdiction over billing and collection services. It stated that "billing and collection service is incidental to the transmission of wire communications, as defined in section 3(a) of the Act, and is subject to the Commission's ancillary jurisdiction under Sections 2(a) and 4(i) of the Act." The Common Carrier Bureau went on to affirm the FCC's authority to preempt state regulation of billing and collection services.[21] The full Commission affirmed the Bureau's decision and reasoning. It reiterated that the Supreme Court had "clearly established that Section 2(a) is a substantive grant of jurisdiction and not merely a description of the forms of communication to which the Act's other provisions governing common carriers (Title II of the Act) and broadcasters (Title II of the Act) apply. Thus, it is well settled that this Commission may assert Title I jurisdiction over activities that are not within the reach of Title II, but that are within the scope of our broad authority granted in Section

---

19 Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384 at ¶ 124-125 (1980).

20 Detariffing of Billing and Collection Services, CC Docket No. 85-88, *Report and Order*, FCC 86-31, 59 Rad. Reg. 2d 1007 at ¶¶ 35-36 (rel. Jan. 29, 1986).

21 Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services, DA 87-361, *Memorandum Opinion and Order*, 2 FCC Rcd 1998 at ¶ 34 (1987).

2(a) over 'interstate communication,' provided that our exercise of jurisdiction is 'necessary to ensure the achievement of [our] . . . statutory responsibilities.'"[22]

- The Commission reiterated that although billing and collection services were not common carrier services, they sufficiently affected the conditions under which interstate carriers offer transmission services as to give the FCC jurisdiction over billing and collection through its Title I authority.[23] The Commission also explained that "[b]esides 'affecting' interstate communications, the billing and collection service that C&P provides for AT&T are also 'closely related to the provision of [such] services,' since billing and collection must occur accurately and efficiently for an interstate carrier to offer its services on an economically sound basis."[24]

- The Commission relied upon its 4(i) authority to permit non-LECs and out-of-region LECs to become open video system operators. "In any event, the Commission also could exercise its authority under Section 4(i) of the Communications Act to permit non-LECs to become open video system operators even assuming arguendo that it was clear and unambiguous that the second sentence of Section 653(a)(1) addressed only the issue of whether cable operators and others could provide programming on a LEC's open video system and did not address the issue of whether non-LECs could also become open video system operators." The Commission explained that "Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority. In these cases, the courts found that the Commission's regulations were not inconsistent with the Act because they did not contravene an express prohibition or requirement of the Act, and were reasonably "necessary and proper" for the execution of the agency's enumerated powers."[25]

---

22 Public Service Commission of Maryland and Maryland People's Counsel Applications for Review of a Memorandum Opinion and Order By the Chief, Common Carrier Bureau Denying The Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services; The Public Utilities Commission of new Hampshire Petition for Rule Making Regarding Billing and Collection Services, *Memorandum Opinion and Order*, 4 FCC Rcd 4000 at ¶ 38 (1989).

23 Id. at ¶ 40.

24 Id. at ¶ 42.

25 Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46, *Second Report and Order*, 11 FCC Rcd 18223 at ¶ 20-21 (1996).

- Radio broadcasters complained that in adopting rules governing the conduct of radio operators, the FCC lacked authority to prohibit conduct that was not already expressly prohibited in the Communications Act. The FCC rejected this position noting its broad authority pursuant to the "necessary and proper" provisions of the Act, including Section 4(i).[26]

- The Commission adopted rules governing the disposition of cable home run wiring pursuant to its authority under Section 4(i). "We conclude that the Commission has authority under Sections 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly Section 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. Section 4(i) permits the Commission to 'perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.' *The Commission may properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.* We invoke Section 4(i) here because, contrary to the arguments posed by some commenters, the Communications Act does not prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace." The Commission noted that "[c]ourts have upheld various Commission regulations that were not within explicit grants of authority under the 'wide-ranging source of authority' of Section 4(i). In these cases, the courts found that the Commission's regulations were not inconsistent with the Communications Act because they did not contravene any provision of the Act and were 'appropriate and reasonable' exercises of authority."[27] The Commission also "conclude[d] that Section 4(i) also invests the Commission with authority to expand our rules in this manner with regard to MVPDs *that are neither radio licensees nor common carriers*. Again, we conclude that the same competitive concerns are present regardless

---

26 Ronald W. Didriksen, Docket Nos. 11317, 11318, 11319, *Memorandum Opinion and Order*, 22 FCC 1151 at ¶ 6 (1957).

27 Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring. CS Docket No. 95-185; MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 3659 at ¶ 83-84 (1997)(citations omitted)(emphasis added).

of the type of service provider that initially installs the broadband inside wiring. In addition, we conclude that such an extension of our rules is necessary in the execution of our functions and is not inconsistent with the Communications Act, as described above."[28]

- The FCC concluded that Sections 4(i) and 4(j) provided it with the authority to require a dial-a-porn provider to submit certain information, tape recordings, and transcripts of messages to the Commission.[29]

- As noted earlier, the Court of Appeals for the Second Circuit concluded that the FCC possesses authority under sections 1 and 4(i) of the Communications Act to regulate data processing activities of common carriers, which pose a "threat to efficient public communications services at reasonable prices."[30]

- The establishment of the high cost fund to support universal service objectives was accomplished pursuant to the Commission's authority in Sections 1 and 4(i) of the Act. The D.C. Circuit explained that since "the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority."[31]

- The FCC's chain broadcasting rules were upheld as proper pursuant to 4(i) and the "necessary and proper" counterpart in Title III. The court explained that "[w]e think it clear from *National Broadcasting Co. v. United States* that § 4(i) and subsections f, g, and i of § 303 of the Communications Act provide statutory authority for the instant regulation."[32] The court went on to explain that "it is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the 'public interest, convenience, and

---

28 Id. at ¶ 101 (citation omitted).

29 Intercambio, Inc., File No. ENF 88-03, *Memorandum Opinion and Order*, 4 FCC Rcd 6860 at ¶ 6 (1989).

30 GTE Service Corp. v. FCC, 474 F.2d at 730-31.

31 Rural Telephone Coalition v. F.C.C., 838 F.2d 1307, 1315 (D.C. Cir. 1988).

32 Metropolitan Television Co. v. F.C.C., 289 F.2d 874, 876 (D.C. Cir. 1961)(citations omitted).

necessity.' And elimination of this danger is consistent with the Commission's duty under the Act to 'encourage the larger and more effective use of the radio in the public interest.'"[33]

- Finally, the operation of Title I authority served as the basis of FCC authority to regulate and deregulate CPE. "As it had with enhanced services, the Commission found that CPE is within the scope of sections 152 and 153 of the Act, which gives the Commission jurisdiction over 'all instrumentalities, facilities, apparatus, and services ... incidental to' 'interstate and foreign communication by wire or radio.' The exertion of jurisdiction over CPE pursuant to these sections was justified, the Commission found, because including CPE charges in tariffs has a direct effect upon interstate transmission rates. The Commission therefore ordered, first, that all CPE be unbundled from transmission services; that is, no carrier can offer CPE as part of a transmission offering. Second, the Commission ordered that AT&T can offer CPE only through a separate subsidiary. These requirements were designed to ensure fair competition in the CPE market and to prevent AT&T from cross-subsidizing its competitive services through its monopoly services."[34]

One of the FCC's obligations under the Act is to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate radio and wire] communication service, shall be just and reasonable." 47 U.S.C. § 201(b).[35] The record in the FCC's *Competitive Networks* rulemaking demonstrates that unreasonable restrictions on telecommunications carrier access to tenants in multi-tenant environments either prohibits altogether the practice of providing interstate radio and wire communication or imposes such onerous costs necessitating an unreasonable increase in the charges therefor in conflict with the goals of the Act. In order to maintain just and reasonable rates for interstate communication by wire and radio, the FCC possesses the authority to ensure that the component inputs of such communication -- inputs such as the rates for and requirements by which carriers obtain access to consumers in multi-tenant environments -- remain reasonable. In this manner, Section 4(i) authorizes the FCC's exercise of jurisdiction to accomplish the goals of the Act (and, specifically, those outlined in the *Competitive Networks* rulemaking).

---

33 Id. (citations omitted).

34 Computer and Communications Industry Ass'n v. F.C.C., 693 F.2d 198, 208 (D.C. Cir. 1982)(citations omitted).

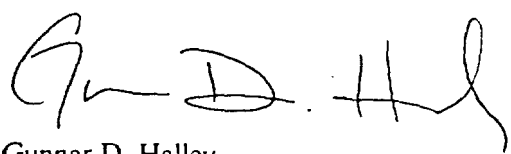
35 The Act goes on to explain that "[c]harges or services, whenever referred to in this Act, include charges for, *or services in connection with*, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b) (emphasis added).

Similarly, the record in *Competitive Networks* demonstrates that other goals of the Communications Act -- including the ability of consumers to choose among competing facilities-based providers of telecommunications services -- are threatened by the discriminatory and unreasonable restrictions that are being imposed on telecommunications carriers by many multi-tenant building owners.

Finally, those who control multi-tenant environments may be engaged in telecommunications and thus subject to the direct jurisdiction if they own or control intra-building wiring and related apparatus. Even where they do not, the FCC has undoubted jurisdiction over carriers serving multi-tenant environments and may impose suitable obligations upon them that have the effect of influencing multi-tenant environment owner behavior.[36]

I believe this analysis, and the examples provided above, demonstrate sufficiently that Section 4(i) allows the Commission to take the action necessary to ensure that the goals of the Communications Act -- such as those outlined in the *Competitive Networks Notice of Proposed Rulemaking* -- can be achieved.

Very truly yours,



Gunnar D. Halley

cc: Jeffrey Steinberg
Joel Taubenblatt
Leon Jackler
Eloise Gore

---

36 See Ambassador, Inc. v. United States, 325 U.S. 317 (1945)("We do not think it is necessary in determining the application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission"); see also Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 480-81 (2d Cir. 1971)("The fact that the statute contains no explicit authority to regulate the activity of networks is not conclusive . . . The syndication and financial interest rules, though direct regulations of networks, as well as the prime time access rule, are within the Commission's statutory power")(citations omitted).