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EX PARTE

May 16, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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:

On behalf of the Smart Building Policy Project,[1] Professor Viet Dinh of Georgetown University Law Center, David Turetsky of Teligent, Inc., Jonathan Askin of the Association for Local Telecommunications Services, Philip Verveer of this firm and myself met this morning with Wilbert Nixon, Leon Jackler, Lauren Van Wazer, Jeffrey Steinberg, Joel Taubenblatt, and Paul Noone of the Wireless Telecommunications Bureau, Commercial Wireless Division, and Cheryl King and Eloise Gore of the Cable Services Bureau, to discuss issues concerning the provision of nondiscriminatory telecommunications carrier access to multi-tenant buildings.

We explained that the issue of constitutional takings does not operate as a bar to the Commission's actions and, indeed, the actions contemplated in the *Competitive Networks* rulemaking may not even constitute a taking of private property. We also explained why the limits of the D.C. Circuit's *Bell Atlantic v. FCC*[2] decision do not apply to the actions considered

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1 The Smart Building Policy Project is a growing coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Commercial Internet Exchange, Digital Microwave Corporation, Harris Corporation, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Siemens, Telecommunications Industry Association, Teligent, Inc., Time Warner Telecom, Winstar Communications, Inc., and the Wireless Communications Association.

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

in the above-referenced dockets, particularly in light of the subsequent decision by the D.C. Circuit in *Nat'l Mining Ass'n v. Babbitt* which limited the application of the *Bell Atlantic* avoidance canon analysis.[3] I attach hereto a copy of the written testimony provided by Professor Dinh to the House Subcommittee on the Constitution as a summary of the substantive takings and related *Bell Atlantic* issues discussed during the course of our meeting.

We also explained the FCC's authority and its interest in permitting the widespread development of facilities-based telecommunications competition were roughly proportional to a rule requiring that multi-tenant building owners permit nondiscriminatory telecommunications carrier access under a *Nollan* analysis.[4] We noted that the Commission has been given jurisdiction over all persons engaged in interstate wire or radio communication in the United States.[5] To the extent that building owners exert control over access to and/or charge for telecommunications carrier access to the intra-building communications network, they become persons engaged in interstate wire communication (as that term is literally defined in the Act),[6] and bring themselves within the jurisdiction of the FCC.

Moreover, because multi-tenant building owners' restrictions on telecommunications carrier access affect the rates and terms for interstate services offered to consumers by communications common carriers, the FCC retains authority to regulate those actions. 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."[7] The record in the FCC's *Competitive Networks* rulemaking demonstrates

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3 172 F.3d 906, 917 (D.C. Cir. 1999).

4 Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); see also Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

5 47 U.S.C. § 152(a).

6 The definition of "wire communication" includes "all instrumentalities, facilities, apparatus, and services . . . incidental to [the] transmission [of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection...]" 47 U.S.C. § 153(51). The telephone unit as well as the local loop have both been deemed an instrumentality or facility of wire communication. One can reasonably infer, then, that the portions of the network between CPE (the telephone itself) and local loops also constitute an instrumentality of wire communication. The FCC unquestionably has subject matter jurisdiction over the use of such in-building facilities for the provision of interstate wire and radio communications.

7 47 U.S.C. § 201(b ). 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

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 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)[8] authorizes the FCC's exercise of jurisdiction over the practices of multi-tenant building owners that affect the provision of interstate wire and radio communication to accomplish the goals of the Act (and, specifically, those outlined in the *Competitive Networks* rulemaking).

During the course of this morning's meeting, we also discussed the effect of the recent Eleventh Circuit *Gulf Power II* decision on the Commission's authority to take action pursuant to Section 224 of the Communications Act. In the *Competitive Networks* Notice of Proposed Rulemaking, the Commission tentatively concluded that the nondiscriminatory access afforded by Section 224 of the Communications Act extends to the covered facilities owned or controlled by utilities within multi-tenant environments ("MTEs").[9] A cursory reading of the recent *Gulf Power II* decision of the Eleventh Circuit may have cast some doubt upon the Commission's continued authority to use Section 224 to provide nondiscriminatory access to MTEs for fixed wireless carriers. A careful reading of this decision, though, illustrates that the Commission retains the jurisdiction conferred by Section 224 to accomplish nondiscriminatory access to MTEs for fixed wireless carriers.

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chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b) (emphasis added).

8 47 U.S.C. § 154(i).

9 Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *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*, FCC 99-141 at ¶ 41 (rel. July 7, 1999).

Section 224(f)(1) provides that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[10] The Communications Act defines "telecommunications carrier" as "any provider of telecommunications services"[11] which is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*"[12] The Commission has confirmed that wireless carriers provide telecommunications services[13] and, therefore, qualify as telecommunications carriers.

Notwithstanding the clear language of Section 224(f)(1) to include any telecommunications carrier (a term that includes wireless carriers and is defined expressly without regard to facilities used), the Eleventh Circuit's recent *Gulf Power II* decision concludes that the Commission lacks authority over attachments to utility poles for wireless communications.[14] Specifically, the decision finds that Section 224 gives "the FCC authority to regulate attachment to poles used, at least in part, for wire communications, and by negative implication does not give the FCC authority over attachments to poles for wireless communications."[15] This appears to be a mistaken textual analysis. The court ignores the clear definition of "telecommunications carrier" in the statute. Moreover, it considers the use of the term "wire communication" that is contained in the definition of "utility" -- the entity that must *provide* nondiscriminatory access -- to give meaning to the definition of "telecommunications carrier" -- the entity that *receives* nondiscriminatory access.

Nevertheless, barring reversal on appeal, the force of the decision remains. However, it is not fatal to a Commission attempt to act pursuant to Section 224 as a way to ensure nondiscriminatory telecommunications carrier access to the ducts, conduits, and rights-of-way of utilities that exist on and within MTEs. First, the decision appears to contemplate a mobile wireless technology rather than a fixed wireless technology. In explaining the differences between wireline and wireless systems, the court explains that "wireless networks transmit through a series

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10 47 U.S.C. § 224(f)(1).

11 47 U.S.C. § 153(44).

12 47 U.S.C. § 153(46)(emphasis added).

13 See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 at ¶ 780 (1997).

14 Gulf Power Co. v. F.C.C., Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486, 2000 WL 367727 (11th Cir. 2000).

15 Id. at *8.

of concentric circle emissions that allow the network to continue working if one antenna malfunctions."[16] Technologically, this explanation is inaccurate for fixed wireless systems whose networks rely on the operation of customer-specific building antennas to transmit signals. Hence, it appears that the court uses the term "wireless" to refer implicitly to "mobile wireless" rather than to "fixed wireless."

In addition, the decision states that "it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems. Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers."[17] It has been established on the record in the *Competitive Networks* rulemaking that the utility ducts, conduits, and rights-of-way within MTEs clearly represent a bottleneck for fixed wireless carriers. The *Gulf Power II* court contemplated Section 224's operation as a means by which the Commission could eliminate bottleneck control that inhibits the provision of telecommunications service via competitive networks. Therefore, the presence of this multi-tenant building bottleneck gives the Commission jurisdiction to eliminate that bottleneck control for fixed wireless carrier access pursuant to Section 224 in a manner consistent with the rationale of the *Gulf Power II* decision. Hence, the decision should not be viewed as detrimental to the proposals set forth in the *Competitive Networks* Notice of Proposed Rulemaking.

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16 Id. at *9.

17 Id.

Because these topics concern a pending rulemaking at the Commission, 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 ex parte presentation as well as two copies of Professor Dinh's earlier-referenced written testimony. I also enclose two copies of the written testimony of Timothy Graham of Winstar Communications, Inc. and of John Hayes of Charles River Associates that were submitted contemporaneously with Professor Dinh's testimony to the House Subcommittee on the Constitution as part of the March 21, 2000 hearing. The testimony of Mr. Graham and Dr. Hayes address issues raised in the above-referenced proceedings.

Respectfully submitted,

Gunnar D. Halley

Enclosures

cc: Wilbert Nixon (WTB)
Lauren Van Wazer (WTB)
Joel Taubenblatt (WTB)
Cheryl King (CSB)
Christopher Wright (OGC)
Joel Kaufman (OGC)
Leon Jackler (WTB)
Jeffrey Steinberg (WTB)
Paul Noone (WTB)
Eloise Gore (CSB)
David Horowitz (OGC)
Jonathan Nuechterlein (OGC)

# SUMMARY OF WRITTEN TESTIMONY OF

**VIET DINH**
**ASSOCIATE PROFESSOR OF LAW**
**GEORGETOWN UNIVERSITY LAW CENTER**

**BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION**

**MARCH 21, 2000**

The nondiscriminatory access proposals in the FCC's *Competitive Networks* rulemaking are constitutionally sound and the FCC possesses the statutory authority to promulgate them.

Whether a nondiscriminatory access requirement constitutes a per se taking under the Supreme Court's *Loretto* doctrine has not been addressed directly by the Supreme Court or any lower courts. A requirement that a building owner open its property for any and all telecommunications carriers to install equipment would operate as a per se taking under Supreme Court precedent. But this is not what the FCC proposes to do. Rather, the FCC proposes to impose a requirement that building owners treat telecommunications carriers in a nondiscriminatory manner -- providing new entrant access pursuant to rates and conditions similar to those imposed on the incumbent. This requirement is substantively different for purposes of legal analysis. The FCC's proposal is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964 which the Supreme Court held not to constitute a taking of property.

Nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to the property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. The FCC's nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunications carriers and the nondiscrimination is proportional to the impact of the building owners perpetuating local telecommunications monopolies through discriminatory access.

However, it is not necessary to determine whether a nondiscrimination requirement operates as a taking. Regardless of whether the requirements operate as a taking or not, the FCC's proposals are constitutionally sound because the FCC may ensure that a reasonable, certain, and adequate provision for obtaining compensation exists for any taking of the landlord's property. The just compensation requirements of the Fifth Amendment are satisfied.

The FCC possesses the authority to require nondiscriminatory access whether or not such a requirement constitutes a taking, even under the D.C. Circuit's analysis in *Bell Atlantic v. FCC*. The FCC is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. The Commission has the authority to require new entrants into a building to pay just compensation to property owners. A court reviewing the FCC's actions should grant *Chevron* deference to the agency's interpretation of its authority under the statute.

# WRITTEN TESTIMONY OF


## VIET DINH
## ASSOCIATE PROFESSOR OF LAW
## GEORGETOWN UNIVERSITY LAW CENTER


## BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION

## MARCH 21, 2000

Mr. Chairman and Members of the Subcommittee,

Thank you very much for this opportunity to comment on the constitutional issues raised by the pending FCC Notice of Proposed Rulemaking on nondiscriminatory telecommunications access to multi-tenant environments. I note that there are several bills pending in Congress that seek to ensure the same result as the proposals under consideration by the FCC.

I am an Associate Professor of Law at the Georgetown University Law Center where I specialize in constitutional law, among other things. Prior to joining the faculty, I was a law clerk to Justice Sandra Day O'Connor on the U.S. Supreme Court, and to Judge Laurence Silberman on the Court of Appeals for the D. C. Circuit. I am currently writing JUDICIAL AUTHORITY AND SEPARATION OF POWERS; A REFERENCE GUIDE TO THE U.S. CONSTITUTION, to by published by Greenwood Press.

Although I appear on behalf of the Smart Building Policy Project,[1] I am here as an analyst and not an advocate. My analysis, therefore, is not necessarily the position of the Project or any of its members; rather, it is simply how I see the constitutional issues in this matter.

The takings issue posed by this hearing's inquiry concerning the FCC's Notice consists of two principal questions: (1) whether a nondiscriminatory access requirement constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment; and (2) even if such a requirement is constitutionally sound, whether the FCC has authority to promulgate the proposed rules. I will address each question in turn. For the

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[1] The members of the growing Smart Building Policy Project currently include the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Teligent, Inc., Winstar Communications, Inc., and the Wireless Communications Association.

reasons detailed below, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them.

## I. The Constitutionality of a Nondiscriminatory Access Requirement

The Fifth Amendment to the Constitution guarantees that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. The proper analysis of the proposed FCC action, accordingly, has two component steps: (A) whether a nondiscriminatory access requirement constitutes a taking of private property; and (B) if it is a taking of property, whether the property owners would not receive just compensation. Only if both inquiries yield affirmative answers would there be a violation of the Fifth Amendment.

### A. Taking.

The Supreme Court has established two tests to determine whether a government action constitutes a taking. A permanent physical occupation of private property is a taking per se, *see, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); the only question is whether there would be adequate compensation. By contrast, other government regulations not involving a permanent physical occupation, such as conditions on the use of private property, are takings only if they fail the multifactor balancing test applicable to regulatory takings. *See, e.g.*, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

Whether a nondiscriminatory access requirement constitutes a permanent physical occupation that is a per se taking under *Loretto* is a close question, one that the Supreme Court has not directly addressed. Nor has my research revealed any holding or discussion in lower court opinions directly on point.

Unlike the proposed nondiscriminatory access requirement, if the FCC were to require building owners to open up their property for any and all telecommunications companies to install their equipment, such a requirement would constitute a per se taking. That much is evident from the facts of *Loretto* itself, and it matters not that the intrusion is minimal—that the ceded area is no "bigger than a breadbox." *Loretto*, 458 U.S. at 438 n.16. In that regard, I think the Court of Appeals for the Eleventh Circuit correctly held in *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999), that the mandatory access provision of 47 U.S.C. § 224 is a per se taking. (The court further held that the taking is constitutional because there are adequate procedures for just compensation, a subject to which I return below in Part B.)

A nondiscriminatory access requirement of the type proposed by the FCC, however, is substantively different. Instead of mandating that a property owner open his property to outsiders, a nondiscrimination provision simply requires that, should the owner open his property to any outsider, he must also entertain others. The proposal, therefore, is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964, which the Supreme Court held not to constitute a taking of property in *Heart of Atlanta Motel, Inc. v.*

*United States*, 379 U.S. 241, 261 (1964). *Heart of Atlanta Motel*, of course, is not directly apposite because Title VII requires general access to places of public accommodation only, and the FCC proposal would provide limited access to property retained for private use. This distinction, however, turns on the public purpose of the government action. With respect to whether the action constitutes a taking, however, it seems to me that the two nondiscriminatory access requirements are quite analogous.

So viewed, nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to his property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Commission conditioned the grant of a building permit upon provision of a permanent easement to provide access to public beaches. The Court held that a permanent access easement is a permanent physical occupation under *Loretto*, *see id.* at 831-32; however, that holding did not end the analysis. The easement requirement constituted a taking only because, as a condition, it did not bear a sufficient nexus to the government's reason for regulating the construction of the residential home. *See id.* at 836-37. The Court later explained that a sufficient nexus exists if there is a "rough proportionality" between the "nature and extent" of the condition and the "impact" of the underlying activity. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Following these guidelines, numerous courts have upheld permanent access easements as reasonable conditions. *See, e.g.*, *Curtis v. Town of South Thomaston*, 708 A.2d 657, 659-60 (Me. 1998) (upholding a fire safety regulation that conditioned approval of a subdivision plan upon the developer building a fire pond and granting the town an easement to maintain and use the pond); *Grogan v. Zoning Board of Town of East Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (upholding zoning board's decision to condition grant of permit to build addition onto house upon owner's granting scenic and conservation easement), *appeal dismissed*, 670 N.E.2d 228 (N.Y. 1996); *Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995) (en banc) (upholding planning commission's decision to condition approval of short plat applications upon dedication of rights of way for road improvement). Just so with the FCC's proposed nondiscriminatory access requirement. Such a nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunication carriers; the nondiscrimination condition is proportional to the impact of the landowners' actions, that is perpetuating local telecom monopolies through discriminatory access.

Another analogous line of cases is the rule in antitrust law that a dominant market participant must provide competitors access to essential facilities it owns. *See, e.g.*, *MCI v. AT&T*, 708 F.2d 1081, 1132-34 (7th Cir. 1983). Despite calls from commentators,[2] my research has uncovered no case holding that such a requirement constitutes a per se taking

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[2] *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1227-40 (1999) (arguing that if a court were to treat Microsoft's operating system software as an essential facility and were to require Microsoft to include Netscape's internet browser in that operating system, the government would have taken Microsoft's property, under the per se rule in *Loretto*, and would be required to pay just compensation).

under *Loretto*. In *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262 (11th Cir. 1990) (per curiam), *vacated as moot*, 499 U.S. 915 (1991), the Eleventh Circuit, sitting en banc, affirmed a district court decision that invoked the essential facilities rationale and ordered the respondent to sell wholesale gas to the petitioner at reasonable prices—over the objections of two dissenting judges that such relief raised Fifth Amendment concerns, *see id.* at 1312-20, and specifically that it would work a per se taking under *Loretto*. *See id.* at 1315 n.52.

In sum, whether a nondiscriminatory access requirement is a per se taking is an open question. Any unqualified answer in the affirmative is in error because it gives conclusive weight to *Loretto* and ignores the competing principles set forth in cases like *Heart of Atlanta Motel* and *Nollan*. I do not venture a conclusion here because the question requires resolving the conflict between two competing lines of cases, both of which are jurisprudentially sensible and legally valid—a task of line drawing that ultimately rests with the Supreme Court. In any event, such a speculation is not necessary to my ultimate conclusion that the FCC proposals are constitutionally sound.

If a nondiscrimination access requirement does not work a per se taking, the proposed FCC action is likely to be upheld as a permissible regulation of the use of private property under the "ad hoc, factual inquiries" into the factors summarized in *Penn Central*: the character of the government action, the economic impact of that action, and its interference, if any, with investment-backed expectations. *See* 438 U.S. at 124. First, the proposed regulations are designed to further the public interest, as defined by Congress, "to foster competition in local telecommunication markets." Notice of Proposed Rulemaking, ¶ 1 (released July 7, 1999); *see* 47 U.S.C. § 251. The Court "has often upheld substantial regulation of an owners' use of his own property where deemed necessary to promote the public interest." *Loretto*, 458 U.S. at 426. Second, the economic impact of the proposed regulations is minimal, at most. Property owners will be directly compensated for the use of property they own and control and indirectly compensated, through rents, for the use of property they own but is controlled by a communications carrier. Third, any expectations backed by the owners' investments are in the use of their property as real estate. These expectations are minimal, if not nil, with respect to ducts and roof space dedicated to utility equipment. Any fortuitous opportunity they now have to participate in the telecommunications business (either as competitors or as lessors of facilities) results from the deregulatory program that the FCC has pursued following a congressional directive. In any event, any investment-backed expectations the owners may have in telecommunications are limited because the owners are operating in a field (telecommunications and/or transacting with communications carriers) that is heavily regulated by the federal government. Such regulations are constantly in flux, rendering unreasonable any assumption or expectation that a nondiscriminatory access requirement or other regulation on the use of their property would not be imposed in the future.

B. Compensation.

Even if, *arguendo*, the proposed FCC regulations constitute a taking, the analysis does not end. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claims against the government for a taking." *Id.* at 195. According to the Notice of Proposed Rulemaking, the FCC contemplates two primary avenues for effecting nondiscriminatory access to multi-tenant environments for communications carriers. First, the FCC may require incumbent local exchange carriers to provide competitors with access, at just, reasonable, and nondiscriminatory rates, to the conduits and rights of way that they control (through leaseholds or other access arrangements) in the buildings. *See* Notice of Proposed Rulemaking, ¶¶ 36, 48. Second, the FCC may require building owners to provide competitive local exchange carriers equal access, at nondiscriminatory rates, to their property for the purpose of installing transmission equipment to service tenants. *See id.* ¶ 60. Under either avenue, the FCC may ensure "that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking." *Wiilliamson County*, 473 U.S. at 194.

First, should the FCC require incumbent carriers to provide access to the conduits and rights of way that they control, 47 U.S.C. § 224(e) permits the carriers to assess charges for such access. The statute sets forth a clear formula for the carrier to recover costs of providing access, through an allocation of the costs of providing both usable and unusable space in the conduits and rights of way. The provision further requires the FCC to promulgate regulations to govern the access charges should "the parties fail to resolve a dispute over such charges." *Id.* § 224(e)(1). "Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." *Id.*

This statutory procedure guarantees the incumbent carrier ample opportunities to obtain just compensation for providing access. In the first instance, it may levy compensatory charges according to the prescribed cost allocation formula. Should there be a dispute as to such charges, it may negotiate at arms length with the competitive carrier to set appropriate rates. Finally, should the dispute not be resolved, the FCC, after appropriate complaints and proceedings, may determine rates that are "just, reasonable, and nondiscriminatory" pursuant to duly promulgated regulations. On its face, therefore, the statute satisfies the just compensation requirement of the Fifth Amendment. I suppose that there is a possibility that a particular agency determination of a "just, reasonable, and nondiscriminatory" rate would not provide, in the final analysis, "just compensation" under the Fifth Amendment. Such risk, however, inheres in every governmental action, and the remote possibility does not render the FCC proposal facially unconstitutional. *See Gulf Power*, 187 F.3d at 1337-38. In any event, the FCC's rate determination, like other agency actions, is subject to judicial review; the incumbent carrier, therefore, is afforded full protection against the risk of such administrative error. *See id.* at 1338.

Second, with respect to access to areas owned and controlled solely by property owners, the FCC proposes that the owners be paid "nondiscriminatory" rates for such access. The Commission is currently seeking comments on how such rates should be determined, so the precise parameters of such compensation are not fixed. I note, however, that the Commission proposes that property owners be permitted "to obtain from a new entrant the same compensation it has voluntarily agreed to accept from an incumbent LEC." Notice of Proposed Rulemaking, ¶ 60. Such reliance on the arms-length bargain struck with incumbent carriers seems to me a reasonable approximation of the fair market value of access and thus would provide just compensation for any taking of property. To the extent that changed circumstances or different market conditions may render such original compensation an unreliable indicator of fair value, the Commission has also sought comments on how to tailor any nondiscriminatory access requirement to ensure consumer choice "without infringing on the rights of property owners." *Id.* ¶ 55. Thus, at this point, there is little reason to suspect that the procedures for setting nondiscriminatory access charges would not ensure a fair, certain and adequate process for property owners to obtain just compensation for any taking of their property.

## II. The Commission's Authority to Promulgate the Proposed Rules

The nondiscriminatory access proposals by the FCC also raise certain separation of powers considerations concerning the Commission's authority to promulgate the proposed regulations. For reasons outlined below, I conclude that the Commission would likely be found to have such authority.

As an initial matter, there is little question that, shorn of the Fifth Amendment implications of the proposed requirements, the Commission has authority to regulate access to multi-tenant environments for the provision of telecommunications services. With respect to facilities controlled by incumbent carriers, 47 U.S.C. § 224 explicitly authorizes the Commission to require that a utility provide access to any "duct, conduit, or right-of-way owned or controlled by it," *id.* § 224(f)(1), and the statute defines utility to include communications carriers. *See id.* § 224(a)(1). With respect to property owned and controlled by the building owners, 47 U.S.C. §§ 151, 152 grant the Commission authority to regulate the transmission of interstate wire or radio communication. The definition of wire communication includes "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission" and thus contemplates property used for the purpose of providing interstate communication services. *Id.* § 153(52). And 47 U.S.C. §§ 151, 152 further grant the Commission authority to regulate persons engaged in interstate wire communication, as that term is defined above. Building owners, accordingly, are persons engaged in interstate wire communication by virtue of their control or denial of access to the facilities incidental to the transmission of such communication. Finally, the Commission has authority under 47 U.S.C. § 154(i) to "make such rules and regulations, ... not inconsistent with this chapter, as may be necessary in the execution of its functions" and under 47 U.S.C. § 303(r) to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." Although the authority under the provisions is frequently termed "ancillary jurisdiction" in the telecommunications

parlance, it is more aptly analogized to a general necessary and proper authority to effectuate the purposes and provisions of the statute. *See* PETER HUBER, ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.3.1, at 221 (2d ed. 1999).

The analysis into agency authority, however, is further complicated by the presence of Fifth Amendment considerations as outlined above. In *Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit reviewed orders of the Commission that required carriers to set aside a portion of their central offices for use by their competitors—known as the physical co-location orders. The petitioners challenged the Commission's authority to promulgate the regulations. The court recognized that it would normally defer to the Commission's statutory interpretation under the principles announced in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), but held that it would not do so in this case because the Commission's interpretation raised substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds. *See Bell Atlantic*, 24 F.3d at 1445. Specifically, the court found that the FCC's orders amounted to a forced access requirement, and thus in all cases "will necessarily constitute a taking" under *Loretto*. *See id.* at 1445-46 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). To avoid this perceived constitutional difficulty, the court held that the Commission's authority to order physical co-location must either be found in express statutory language or must be a necessary implication from that language, such that "the grant [of authority] itself would be defeated unless [takings] power were implied." *Id.* at 1446 (quoting *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373 (C.C.W.D.Pa. 1903), *aff'd*, 195 U.S. 540 (1904)) (alterations in original). Finding this "strict test of statutory authority made necessary by the constitutional implications of the Commission's action" not satisfied, the court held that the Commission lacked authority to issue the physical co-location orders. *Id.* at 1447.

Upon closer analysis, however, the holding of *Bell Atlantic* does not apply to the nondiscriminatory access requirements proposed by the FCC. First, the regulation of areas controlled by a communications carrier follow from the express authorization to order a physical taking found in 47 U.S.C. § 224. As to that portion of the proposed rule, therefore, the "strict test" of *Bell Atlantic* is satisfied.[3] Second, the requirement of nondiscriminatory access to areas owned and controlled by landlords, unlike the forced access orders at issue in *Bell Atlantic*, will not "necessarily constitute a taking." As I concluded above, whether the requirement will be judged under the *Loretto* standard or the competing standards applied in *Heart of Atlanta Motel* or *Nollan* is a close question. In *Loretto* the Court rejected the suggestion that the installation of cable equipment was not a per se taking because the property owner retained the right to cease renting his property to tenants and thereby to avoid the requirement. It explained that "a landlord's ability to rent his property may not be

[3] Because 47 U.S.C. § 224(f)(1) requires a carrier to provide access to ducts and conduits "owned or controlled" by it, Congress clearly contemplated that the FCC would regulate property that is merely controlled by a carrier and therefore owned by a third party. Thus, even if the proposed regulations based upon § 224 necessarily effect a taking without just compensation to property owners in every case, Congress in § 224 has expressly granted the FCC the power to effect such takings and has concomitantly authorized the expenditures needed to satisfy those owners' claims for just compensation.

conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17. However, the Commission is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. And the Commission has authority to require new entrants into a building to pay just compensation to property owners under 47 U.S.C. §§ 154(i), 303(r), as such regulations are "reasonably ancillary to the effective performance of the Commission's various responsibilities," *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In particular, the statute requires the Commission to foster competition in local telecommunications markets. On *Bell Atlantic*'s reasoning, therefore, a reviewing court should grant *Chevron* deference to the Commission's interpretation of its authority under the statute.

As Professors Baumol and Merrill explained in assessing whether provisions of the Telecommunications Act of 1996 effect an unconstitutional taking: "[A]s long as the Act includes mechanisms which can provide just compensation for any taking claims found to have merit, these claims, too, should provide no basis to halt the implementation of the Act in the manner deemed most appropriate by regulators to achieve its purpose." William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1056 (1997).

* * *

In the final analysis, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them. Thank you.

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## PUBLICATIONS

JUDICIAL AUTHORITY AND SEPARATION OF POWERS:
A REFERENCE GUIDE TO THE U.S. CONSTITUTION (in progress) — (Greenwood Press, *forthcoming* 2000).
*Reassessing the Law of Preemption* — 88 GEO. L.J. __ (*forthcoming* 2000).
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**SUMMARY OF WRITTEN TESTIMONY OF**
**TIMOTHY GRAHAM**
**GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT**
**WINSTAR COMMUNICATIONS, INC.**
**BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION**
**MARCH 21, 2000**

Increasingly, fixed wireless technology is being recognized as a third vehicle to bring broadband capabilities to U.S. consumers. Fixed wireless networks can be constructed more quickly and at lower installation costs than wireline networks without the inconvenience of excavating streets. A third of Americans live in multi-tenant buildings and there are over 750,000 commercial office buildings in the country. The chief impediment to rapidly extending fixed wireless broadband networks to these consumers is the difficulty of obtaining access rights to the buildings where these consumers live and work.

Unreasonable delay is probably our biggest barrier. In the majority of cases, it takes nine months to two years to negotiate access rights with building owners. At this rate, it will take decades to obtain access rights to all the buildings and customers that fixed wireless networks are designed to reach. Moreover, the incumbent telephone company already is in every building and is prepared to offer service to customers immediately. If the alternative is a year-long wait for service, it becomes difficult for new entrants to compete for customers.

Outright denial of access is another problem. The Real Access Alliance (a coalition of real estate interests) submitted a survey to the FCC in which 44 percent of the respondents to the survey did or may have denied telecommunications carrier access entirely. Other building owners demand unreasonable conditions or rates in exchange for access that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested $50,000 upon signing of an access contract with Winstar in addition to a fee of $1,200 per month! By contrast, the incumbent telephone company typically receives access for free.

It is not realistic to expect tenants to move in order to take advantage of telecommunications competition. The financial benefits of telecommunications competition must exceed the substantial costs of moving locations (not to mention the inconvenience) in order for tenants to engage in such behavior.

Unreasonable access restrictions are costing American consumers too much money. Winstar's average customer -- a small or medium sized business -- orders ten lines. If we have two such customers in a building where the building owner requires $400 per month as an access fee, that raises the telecommunications costs of these small business customers by $20 per telephone line per month!

The Supreme Court repeatedly has held that "it is the owner's loss, not the taker's gain, which is the measure of the value of the property taken" in a takings case. In this case, that amount would be the decrease in the value of the building. But, the value of the building will actually <u>increase</u> from the presence of multiple carriers. Also, carriers will pay the building owner for access. So, the amount of just compensation is likely to be *de minimis*, if anything.

A federal solution is needed. If a carrier seeks enforcement of a particular State's building access requirements, it faces retribution from the building owner in those States that lack such requirements. In Florida last year, the competitive carrier community, along with BOMA and others in the real estate community, agreed to legislative language ensuring nondiscriminatory building access. Thus, no one should tell you today that a legislative or regulatory solution cannot be reached and agreed to throughout the industry. The mere existence of a federal requirement with established times for negotiation will create the incentive for building owners to negotiate with telecommunications carriers reasonably and successfully.

The U.S. Government urged Japan to implement nondiscriminatory building access requirements as a means of promoting telecommunications competition. Canada and Hong Kong already have building access requirements for the same reason. It is time for the United States to catch up and to take proactive measures to ensure that American consumers will enjoy the benefits of telecommunications competition.

# WRITTEN TESTIMONY OF

## TIMOTHY GRAHAM
## GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT
## WINSTAR COMMUNICATIONS, INC.

## BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION

## MARCH 21, 2000

Good morning Mr. Chairman and members of the Subcommittee. My name is Tim Graham. I am the General Counsel and Executive Vice President of Winstar Communications, Inc. ("WinStar") and I am here on behalf of the Smart Buildings Policy Project, whose members include, but are not limited to, AT&T, Association for Local Telecommunications Services (ALTS), Information Technology Association of America (ITAA), Winstar Communications, Inc., International Communications Association (ICA), Telecommunications Industry Association (TIA), Competition Policy Institute (CPI), Nextlink, Teligent, MCI-Worldcom, and the Wireless Communications Association (WCA). Thank you for the opportunity to discuss building access issues. Building access is critical to providing the benefits of facilities-based telecommunications competition for over one-third of American residences and those small and medium-sized business located in the nearly 760,000 commercial office buildings across the nation.

### I. DESCRIPTION OF COMPETITIVE PROVIDERS.

Winstar, as an example, is a nationwide competitive carrier with broadband FCC licenses in the electromagnetic spectrum at the 28 and 38 GHz bands. Nextlink, Teligent, AT&T, Advanced Radio Telecommunications Corp. MCI Worldcom, Sprint and others also use electromagnetic spectrum to provide facilities-based fixed wireless broadband communications services, including local and long distance, data, voice and video services, as well as high speed

Internet and information services. Winstar currently operates in 42 markets, including, among those, New York City, Washington, D.C., Miami, Orlando, Chicago, Boston, Detroit, Newark, Charlotte, Atlanta, Los Angeles, San Francisco, San Diego and Seattle. Winstar plans to operate in 60 major domestic markets by the end of 2000 and 50 international markets by the end of 2004.

A key element of Winstar's local broadband networks is our *Wireless Fiber*℠ service, which is transmitted over microwave radio spectrum, using small antennas approximately 12-24 inches in diameter. Our *Wireless Fiber*℠ service establishes connections between our customer buildings and our network providing a seamless broadband connection to our customer. Securing building access rights to install our antennas on the roof, plus access to risers and conduits, electricity, telephone closets and pre-existing inside wire, are critical steps in the construction and expansion of our local broadband networks.

Increasingly, fixed wireless technology is being recognized as a significant vehicle for bringing broadband capabilities to U.S. consumers. "Fixed Wireless" is the name that's been applied to the communications networks being built principally by companies such as Winstar, Nextlink, Teligent, AT&T, MCI-Worldcom, Sprint, Advanced Radio Telecommunications, and a few others. The "fixed" term exists to distinguish these broadband radio networks from the networks built by "mobile" wireless companies for cellular telephone service. These advanced fixed radios currently deliver up to 200 megabits per second and this capacity is continually expanding with the development of network technology. For the last few years, fixed wireless carriers have been heavily engaged in constructing state-of-the-art fixed wireless broadband networks around the country for the delivery of data, Internet, voice, and other services to the nation's small and medium-sized business customers that otherwise have been bypassed by the communications revolution.

The basic design of a wireless fiber network consists of a switch centrally located in a metropolitan area, connected by an intracity fiber network to a series of "hub" buildings where traffic is aggregated from a series of end user buildings. Usually the end user buildings are located within one to one-and-a-half miles from a hub site and that have line-of-sight to the hub site building. In the usual case, hub sites will have antennas on the roof that have line-of-sight to between 50 and 250 end user buildings. Each end user building, in turn, has its own roof-mounted antenna with line-of-sight back to the hub site building. The fixed wireless carriers target the end users in the end user buildings. Communications are brought to the roof through internal building facilities (i.e. inside wire) and transmitted from the antenna on the roof back to the hub site. At the hub site, the traffic is aggregated and passed back over lines or via wireless backhaul to the switch site. The fixed wireless carrier switches are interconnected to the public switched telephone networks as well as to any national fiber network the carrier may have constructed, and the traffic received at the switch typically is routed out over the least cost channels to its intended destination. Although the fixed wireless component differentiates fixed wireless carriers from their wireline competitors, fixed wireless networks are equal or superior to wireline fiber networks in terms of functionality and quality of service. Fixed wireless broadband capabilities can be brought to customers much more quickly than cable modem and fiber optic technologies and at a substantially lower cost. Moreover, streets do not have to be excavated, so cities and their residents won't be inconvenienced by fixed wireless network buildout.

From its inception, Winstar has sought to bring these advantages to consumers. More recently, companies like AT&T, MCI WorldCom, and Sprint have begun deploying fixed wireless technology aggressively in local markets as a quick and economic means of delivering broadband capabilities over their own independent networks. In fact, International Data Corporation

estimates that the revenue generated by basic services delivered via fixed wireless technologies will grow from $767.3 million in 1999 to $7.4 billion in 2003. Nevertheless, it recognizes that building access restrictions could operate as a constraint on this growth potential.

Winstar and the other competitive telecommunications carriers owe their existence to the 1996 Telecommunications Act. For example, Section 251 assures that we are able to interconnect with ILECs to provide competitive broadband and local exchange services to consumers. But interconnection with ILECs, important as it is, is only one aspect of providing service. Our ability to serve customers situated in multi-tenant buildings also depends upon our ability to reach them where they are located inside of buildings.

## II. ACCESS DELAY IS A PRIMARY IMPEDIMENT TO COMPETITION

Since 1994, Winstar has successfully negotiated access rights to over 8,000 buildings nationwide, making us the industry leader. Winstar employs nearly 200 people in its Winstar for Buildings Division and their primary goal is to secure building access rights for the purpose of providing communications services. However, as there are over 760,000 commercial buildings in these markets the Winstar access rights represent only about 1.1% of the target market. The chief impediment to extending our networks rapidly and bringing a second or third communications pathway to millions of end users is the difficulty of obtaining access rights to every building where we have a potential customer. Unreasonable delay is probably our biggest barrier. In the majority of cases, it takes nine months to two years to negotiate access rights with building owners. At this rate, it will take decades to obtain access rights to all the buildings and customers that our networks are designed to reach. In fact, in their submissions to the FCC, the building owners acknowledge that 20 percent of the members responding to the Real Access Alliance survey had been involved in building access negotiations lasting over a year. Competition delayed is

competition denied. The incumbent LEC is in every building and is prepared to offer service to customers immediately. Where the alternative is a yearlong wait for service, it becomes very difficult for new entrants to compete for customers.

## III. UNREASONABLE TERMS AND CONDITIONS FOR ACCESS AND OUTRIGHT DENIAL FORECLOSE COMPETITIVE BENEFITS FOR MANY AMERICANS.

Outright denial of access is another problem. Many building owners do not want to deal with the process of negotiations with competitive carriers and simply refuse access as a result. Indeed, 44 percent of the respondents to the Real Access Alliance survey did or may have denied telecommunications carrier access entirely. Other building owners do not view broadband capabilities at competitive rates as a priority for their tenants so they impose unreasonable conditions or rates that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested $50,000 upon signing of an access contract with Winstar in addition to $1,200 per month. By contrast, the incumbent provider rarely pays anything to the building owner for access to customers in the building. Another major property owner, after entering into an agreement with Winstar to allow access to its entire portfolio, subsequently denied Winstar access to the majority of buildings in that portfolio in clear violation of its contract. That building owner recently announced their involvement in a consortium of building owners established to provide telecommunications services in commercial office buildings. Incidents of denial or unreasonable conditions placed on access have occurred hundreds of times with Winstar. This issue is not unique to us and many of the members of the Smart Buildings Policy Project, and others, have provided detailed information to the Federal Communications Commission (FCC) describing the problem. We have attached articles from the October 1,1999

and March 15, 2000, Wall Street Journal which clearly shows that non-discriminatory access by competitive providers is being openly frustrated across the country.

## IV. CONSUMERS SHOULD NOT BE FORCED TO MOVE IN ORDER TO ENJOY THE BENEFITS OF FACILITIES-BASED COMPETITION ENVISIONED BY THE 1996 TELECOMMUNICATIONS ACT.

Not surprisingly, some real estate interests will assert that there is no building access problem -- that the real estate market is competitive and responsive to tenant desires. The implication is that if tenants are not given the telecommunications options they desire, they can always move locations. This proposition is flawed and somewhat disingenuous.

In order for a tenant to actually move his home or residence, the financial benefits of telecommunications competition must exceed the substantial costs of moving locations. Moving is expensive and inconvenient. Realistically, very few consumers would actually move just to take telecommunications service from a competitive carrier. Competitive carriers would need to find zealots to take their service because of the costs and burdens of access while ILECs would merely need to find ordinary customers.

Congress obviously felt that consumers would not take advantage of competitive telecommunications choices if they had to change their telephone number in order to do so. Hence, number portability obligations were included in the 1996 Telecommunications Act. Physically moving locations is much more burdensome than changing telephone numbers and federal measures should be taken to ensure that consumers need not physically move as a precondition to enjoying the benefits of facilities-based telecommunications competition.

## V. BUILDING ACCESS RESTRICTIONS ARE COSTING THIS COUNTRY TOO MUCH MONEY.

One of the issues for discussion at today's hearing is the costs involved of requiring nondiscriminatory telecommunications carrier access to multi-tenant buildings. I will explain later why these costs are *de minimis* and should not preclude the FCC or the Congress from making the policy choices that are best for Americans. But what is often lost in the debate is how much unreasonable terms and rates for building access are costing Americans today and how much Congress could save the country by eliminating these restrictions.

If you look at the problem from the small business tenant's point of view, the harmful effects of unreasonable access restrictions become apparent. Carriers like Winstar target small businesses and medium-sized businesses as potential customers. Let us assume for the moment that a building owner is willing to grant us access in a timely manner to reach a small business customer in a building. Let us also assume that the access payment that the building owner charges the carrier is $300-400 per month. (Remember this is not necessarily an average monthly access fee. The record in the FCC's *Competitive Networks* rulemaking demonstrates that some building owners demand five to ten times that amount. But, we will work with conservative figures for the sake of discussion.)

Also, assume that Winstar is able to win the service of one other small business tenant in the building that will order another ten lines from Winstar. The $300-400 monthly building access fee that the building owner charges must be spread out over just the 20 lines being offered to the customer. The building access fee raises the telecommunications costs of these small business customers by $20 per telephone line per month. The incumbent does not make these access fee payments. And, believe it or not, Winstar is <u>still</u> able to win customers with these built-in discriminatory costs. Imagine doubling that $400/month fee and you see why high building access

fees effectively eliminate the benefits of competition for commercial and residential tenants or severely limit the buildings that a competitive carrier can afford to serve.

Unreasonable terms and conditions for access cause serious problems for large businesses too. Texas has a statute that requires building owners to provide nondiscriminatory telecommunications carrier access to their buildings and just and reasonable rates when a tenant requests service. The Texas Public Utilities Commission is in the process of promulgating rules to implement that statute and is holding hearings on the issue as part of that effort. Just last month, a representative from Shell Oil testified before the Texas PUC. Shell had the potential of saving $30,000 a month by taking service from a competitive telecommunications carrier. Notwithstanding the Texas statute, the building owner refused to permit Shell to access the competitive carrier unless it paid $1500 a month for closet space. There were no space constraints or security issues attending the competitive carrier's facility installation. In fact, the building owner would not require Shell to pay this excessive fee if it took the service from Southwestern Bell. In this building, Shell occupies 50 floors, so moving locations to take service from the competitive carrier would have been too expensive to justify. The Shell Oil representative concluded her testimony by asking, "[w]ho is building management to determine what carrier we should go with and what type of technology we should implement?"

You have a technology and a group of competitive telecommunications carriers that can provide residences and small and medium-sized businesses with broadband capabilities that even large businesses did not enjoy several years ago. Moreover, the rates of competitive telecommunications carriers are usually a fraction of those offered by the incumbent. Elimination of unreasonable access restrictions will allow Americans to realize these incredible benefits.