

**SUMMARY OF WRITTEN TESTIMONY OF
JOHN B. HAYES, CHARLES RIVER ASSOCIATES, INC.
BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION
MARCH 21, 2000**

Absent a nondiscriminatory access requirement as contemplated by the FCC, building owners possess considerable control over the development of telecommunications competition and can impede a central goal of the 1996 Telecommunications Act. They can control the pace of competition by limiting facilities-based service provision to certain favored providers or by slowing the rollout of competitive networks. Building owners also can control the form of competition by denying access and effectively forcing competitors to provide service through resale or unbundled elements.

From an economic perspective, the market power possessed by building owners is most easily understood as the power to raise access prices above the cost of providing access, but it also can be expressed in other ways, such as by restricting the number of carriers that are allowed access to buildings. Some building owners have found it profitable to exercise significant market power.

The building owners' exercise of market power imposes real costs on consumers and it has slowed realization of the goals of the 1996 Telecommunications Act. When telecommunications competition is restricted or costs are increased by artificial barriers to entry--such as those imposed by unreasonable building access restrictions--the price reductions that result from competition are reduced or eliminated.

All telecommunications consumers -- including those not residing in multi-tenant buildings -- are harmed if competitive carrier entry is slowed by restrictive building access policies. Barriers to efficient network utilization -- such as eliminating access to a substantial portion of the potential market -- will prevent consumers from realizing the full cost savings benefits of these efficiencies. Similarly, as competitive carriers obtain additional customers and deploy more equipment, equipment costs per unit should fall, resulting in lower costs and additional savings for all customers. Excessive prices for access are particularly damaging to competitors because the incumbent local service provider typically is not assessed charges for access to multi-tenant buildings, placing new entrants at a cost disadvantage.

Weighed against the potential benefits of a nondiscriminatory access rule, the costs of such a rule are comparatively small. As the carriers will pay the access fee to the building owner, the Federal government should incur no cost related to the taking. The evidence from Texas and Connecticut (where there are nondiscriminatory building access statutes) suggests that nondiscriminatory access rules have been or are being implemented with minimal disruption and cost.

There is no realistic prospect that tenant moves are a significant constraint on building owners' market power over telecommunications carrier access to buildings. The direct costs and other barriers associated with moving are prohibitively large. Although it is difficult to quantify, one estimate is that the total cost for a tenant to relocate could equal a full year's rent. Assuming that telecommunications expenditures are 20 percent of rent and a CLEC's service can save tenants 30 percent on their telecommunications bills, it would take more than 16 years (ignoring discounting) for the savings on telecommunications services to pay for a move that cost one year's rent.

Congress included number portability requirements in the 1996 Telecommunications Act because it believed that if customers had to change telephone numbers to access competitive carriers, the development of competition would be slowed because changing telephone numbers was too inconvenient and costly for consumers. The cost and inconvenience of moving are substantially larger than the cost and inconvenience of getting a new telephone number.

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JOHN B. HAYES
CHARLES RIVER ASSOCIATES, INC.

BEFORE THE HOUSE SUBCOMMITTEE ON
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Good morning Mr. Chairman and members of the Subcommittee. My name is John Hayes, and I am an economist employed by Charles River Associates where I specialize in economic analyses of antitrust and regulatory issues in the computer and communications industries. I previously worked as an economist with the Antitrust Division of the U.S. Department of Justice. During that time, I also served as an Adjunct Professor of Economics at Georgetown University. A copy of my C.V. and a list of publications are attached. Thank you for the opportunity to discuss, on behalf of the Smart Building Policy Project, the economic issues surrounding the FCC's *Competitive Networks* rulemaking and building access generally.¹

I. INTRODUCTION

The absence of federal rules governing access to multi-tenant buildings permits building owners to deny facilities-based competitive carriers access to space necessary for the provision of facilities-based telecommunications services. Competitive carriers cannot turn to a substitute for these intra-building facilities in order to provide facilities-based service to customers located in

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.

multi-tenant buildings. Consequently, if competitive carriers are denied access to multi-tenant buildings, they cannot provide facilities-based service to those customers.

II. BUILDING OWNERS POSSESS AND EXPLOIT MARKET POWER OVER COMPETITIVE CARRIER ACCESS TO TENANTS IN MULTI-TENANT BUILDINGS.

Absent a nondiscriminatory access requirement as contemplated by the FCC, building owners possess considerable control over the development of telecommunications competition in their buildings. By controlling the access bottleneck, building owners can influence both the pace and form of local exchange competition. They can control the pace of competition by limiting facilities-based service provision to certain favored providers or by slowing the rollout of competitive networks. And they can control the form of competition by denying access and effectively forcing competitive carriers to provide service through resale or unbundled elements, if they choose to provide service at all. The Telecommunications Act of 1996 contemplates three forms of competitive entry: resale, unbundled network elements, and facilities-based entry. Hence this control over access can impede a central goal of the Act.

From an economic perspective, building owners possess market power over competitive carrier access to multi-tenant buildings. This market power is most easily understood as the power to raise access prices above the cost of providing access. However, the market power also can be expressed in other ways, such as by restricting the number of firms that are allowed access to buildings. Elementary economics teaches us that building owners will undertake such practices if they are profitable. In fact just last week, the Wall Street Journal reported that some building owners intend to provide telecommunications services to tenants themselves while simultaneously restricting access to buildings by competing carriers.

The FCC and Texas PUC records together contain many examples of multi-tenant building owners demanding excessive fees for access to their buildings. These examples demonstrate that some building owners have found it profitable to exercise significant market power.

III. CONSUMERS AND COMPETITION ARE HARMED BY BUILDING OWNERS' MARKET POWER OVER ACCESS.

The exercise of market power by building owners imposes real costs on consumers in the form of higher telecommunications prices and reduced access to advanced telecommunications services. The ability of building owners to restrict access and raise access prices has slowed realization of the goals of the 1996 Telecommunications Act and will continue to impede the development of dynamic local exchange competition if allowed to continue.

A competitive telecommunications market will drive prices toward the cost of providing service. When competition is restricted or costs are increased by artificial barriers to entry, those price reductions that predictably result from competition are reduced or eliminated altogether. Experts agree that there is considerable scope for price reductions in local telecommunications service. Teligent, for example, routinely prices its service 30% below the incumbent's rates. Other competitive carriers offer similar discounts. Tenants in buildings where competitive carriers are denied access may not be able to realize these savings. Data supplied to the FCC suggest that nearly 10% of building owners have denied all requests for access received from competitive carriers. These same data further indicate that more than 50% of competitive carrier's requests for access are ultimately unsuccessful. Thus, the absence of a nondiscriminatory access requirement denies many tenants the full benefits of a competitive telecommunications market.

The effects of building owners' market power over access are not limited to the multi-tenant buildings where competition is directly limited. All telecommunications customers,

including those not residing in multi-tenant buildings, are harmed if competitive carrier entry is slowed by restrictive access policies. As competitive carriers more efficiently utilize their networks, the cost savings predictably will be passed on to all customers as lower prices for service. Barriers to efficient network utilization — such as eliminating access to a portion of the potential market — will prevent consumers from realizing the full benefits of these efficiencies. Similarly, as competitive carriers obtain additional customers and deploy more equipment, equipment costs per unit should fall, resulting in lower costs and additional savings for all customers. Hence access restrictions to multi-tenant buildings can reduce the benefits of telecommunications competition for all consumers.

Finally, competitive telecommunications carriers are directly harmed when they are overcharged or denied timely access to their customers. Excessive prices for access are particularly damaging to competitors because the incumbent local service provider — their main competitor — typically is not assessed charges for access to multi-tenant buildings, placing new entrants at an immediate cost disadvantage.

IV. THE COSTS OF REQUIRING NONDISCRIMINATORY TELECOMMUNICATIONS CARRIER ACCESS TO MULTI-TENANT BUILDINGS ARE MINIMAL.

Weighed against the potential benefits of a nondiscriminatory access rule, the costs of such a rule are comparatively small. The nondiscriminatory access rule proposals under consideration offer building owners reasonable compensation for the loss of use of the property occupied by the telecommunications carriers' equipment. As the carriers will pay this fee, potentially together with a bond to indemnify building owners against specified carrier failures to perform, the Federal government should incur no costs related to a taking. Moreover, the advanced telecommunications capabilities installed by competitive carriers can increase the value of multi-

tenant buildings, further mitigating any potential harm to the building owner from a reduction in the space available for lease to tenants.

In addition, there is no reason to expect that a nondiscriminatory access rule will limit creative and innovative access arrangements, as some have argued. Investments in telecommunications facilities in multi-tenant buildings, like other investments in building features and functionality, can be recovered through rent. Moreover, there is no reason to expect superior innovation performance in telecommunications markets where competition is restricted. The real danger of reduced innovation is that multi-tenant building owners will exercise market power over access and thereby limit CLEC entry and investment.

Admittedly, some implementation and enforcement costs will be caused by a nondiscriminatory access rule, but these are likely to be comparatively small. We are fortunate in this case to have direct experience with nondiscriminatory access rules in the states of Texas and Connecticut, and we can evaluate the experiences of those states to assess the magnitude of these types of costs. The evidence from Texas and Connecticut suggests that the implementation and enforcement costs of a nondiscriminatory access rule are quite limited. In those states, nondiscriminatory access rules have been or are being implemented with minimal disruption and cost.

V. MARKET IMPERFECTIONS PREVENT TENANTS FROM IMPOSING DISCIPLINE ON BUILDING OWNER BEHAVIOR.

There is no dispute that under the current regime, the only significant constraint on the profitability of restricting competitive carrier access to multi-tenant buildings is the willingness and ability of tenants to move to another building. A central question, therefore, in the policy discussion of nondiscriminatory access rules is whether tenant moves will prevent multi-tenant

building owners from exercising significant market power over access. We can address the empirical importance of tenant moves as a constraint on building owner market power by assessing directly the costs incurred by tenants when moving.

The direct costs and other barriers associated with moving are prohibitively large. These costs may include relocation expenses, lost productivity, and potentially the loss of existing customers. In tight real estate markets, such as currently exist in many communities, tenants can expect to pay more for new space. In addition, leases average 5 to 10 years in length and seriously limit tenant mobility. Although it is difficult to quantify relocation costs precisely, one estimate is that the total cost to relocate could equal a full year's rent. Few tenants would find it economical to move in order to purchase a competitive carrier's service given these costs. A simple example can illustrate the problem. Suppose telecommunications expenditures are 20 percent of rent and that CLEC service can save tenants 30 percent on their telecommunications bills. Under these conditions, it would take more than 16 years (ignoring discounting) for the savings on telecommunications services to pay for a move that cost one year's rent. This is longer than the term of most leases and far too long for most businesses to cost justify the move.

The Real Access Alliance has argued that because a significant proportion of tenants move each year, there is on-going pressure on building owners to offer nondiscriminatory access. This argument assumes too much. While tenant churn likely does constrain the profitability of overcharging for access, it cannot eliminate it. Clearly, most tenant moves occur for reasons unrelated to telecommunications services. Such moves are unlikely to put significant downward pressure on building access prices. The evidence shows that, on balance, tenant churn has not been a sufficient constraint on multi-tenant building owner's market power. For this reason, the

assertion that tenant churn will discipline the exercise of market power over access should be regarded with skepticism.

There are important parallels between the debates over number portability and nondiscriminatory access to multi-tenant buildings. In the debate about number portability, some opponents of a rule requiring number portability argued that local exchange competition could flourish without such regulatory intervention. In contrast, the proponents of a rule argued that if customers had to change telephone numbers to access competitive carriers, the development of competition would be slowed because changing telephone numbers was too inconvenient and costly for customers. Congress apparently agreed with this latter assessment, and included number portability in the Telecommunications Act of 1996. The cost and inconvenience of moving are substantially larger than the cost and inconvenience of getting a new phone number. Following the same reasoning underlying the number portability requirement in the Act, Congress should support a nondiscriminatory access requirement for multi-tenant buildings.

VI. CONCLUSION

In conclusion, and based on this review of the facts regarding tenant moves, there is no realistic prospect that tenant moves are a significant constraint on building owners' market power over access to multi-tenant buildings. Under the current regime, market forces are unlikely to drive prices for access down to costs, and consequently consumers may not realize the full benefits of a competitive telecommunications market. The nondiscriminatory access proposals considered in the FCC's *Competitive Networks* rulemaking can correct this market failure and encourage the development of vigorous telecommunications competition in multi-tenant buildings.

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Ph.D. Economics, University of Wisconsin - Madison, 1994
M.A. University of Denver, 1986
B.A. Stanford University, 1983

Professional Experience

1998-present *Principal*, Charles River Associates Incorporated, Boston, MA.
Economic analysis of antitrust and regulatory issues in the computer and communications industries. Authored and presented numerous filings before federal and state competition authorities.

1997-1998 *Senior Economist*, The Tilden Group, Oakland, CA.
Economic analysis to support antitrust litigation.

1993-1997 *Economist*, U.S. Department of Justice. Antitrust Division, Washington, DC.
Economic analysis to support antitrust litigation and Federal competition policy. Advised and trained foreign competition agency personnel. Extensive telecommunications experience including comments filed with the Federal Communications Commission and analysis of mergers.

1995-1996 *Adjunct Professor of Economics*, Georgetown University, Washington, DC.
Taught an undergraduate course in industrial organization.

1989-1991 *Research Assistant*, Wisconsin Vocational, Technical, and Adult Education System, Madison, WI.
Economic analysis of labor market trends affecting enrollment in the VTAE system.

1987-1988 *Project Manager*, US WEST, Strategic Marketing Division, Denver, CO.
Identified new business opportunities. Compared the performance of business units to industry benchmarks. Trained staff in the use of data resources for business performance analysis.

1986-1987 *Research Assistant*, Medical Group Management Association, Center for Research and Ambulatory Health Care, Denver, CO.
Survey design, implementation, analysis, and presentation of results. Authored articles for the association newsletter and journal. Maintained research databases. Prepared research proposals.

Honors and Awards

Federal Reserve System Board of Governors Dissertation Fellowship, 1992.
University of Denver Fellowship, 1986.

PUBLICATIONS

Testimony and White Papers

"An Empirical Analysis of the Footprint Effects of Mergers between Large ILECs." White Paper on behalf of Sprint Corporation, Applications for Transfer of Control to SBC Communications Inc. of Licenses and Authorizations Held by Ameritech Corporation, CC Docket No. 98-141, filed at the FCC on March 31, 1999. With Michael L. Katz and Jith Jayaratne.

"CMRS HHI's from Customer Share Data." Declaration of John B. Hayes. 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, CC Docket No. 98-205, filed at the FCC on January 25, 1999.

"Market Power and the Bell Atlantic-GTE Merger." Declaration of John B. Hayes. Application of GTE and Bell Atlantic for Consent to Transfer of Control, CC Docket No. 98-184, filed at the FCC on November 23, 1998.

"Market Power and the SBC-Ameritech Merger." Declaration of John B. Hayes. Applications for Transfer of Control to SBC Communications Inc. of Licenses and Authorizations Held by Ameritech Corporation, CC Docket No. 98-141, filed at the FCC on October 14, 1998.

"Unintended Consequences: Public Policy and Wireless Competition." White Paper on behalf of the Personal Communications Industry Association, October 1, 1998. With Michael L. Katz.

"Declaration of Carl Shapiro and John Hayes on Behalf of Sprint." Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, filed at the FCC in August 1998.

Research Papers

"Do Firms Play Exit Games? Theory and Evidence on the Strategic Role of Size in an Exit Game." Ph.D. dissertation, Department of Economics, University of Wisconsin-Madison (1994).

"An Exit Game with Continuously Adjustable Output and Efficiency Differences." Working paper, Department of Economics, University of Wisconsin-Madison (1994).

"Labor Market Information for the Trade and Industry Occupations." Wisconsin Board of Vocational, Technical, and Adult Education, Madison, WI (1992). With James Eisner.

"Labor Market Information for Business and Marketing Occupations." Wisconsin Board of Vocational, Technical, and Adult Education, Madison, WI (1992). With Catherine M. Cotter and Ronald J. Hustedde.

"Optimal Exit Strategy in a Stochastically Declining Market." Applied Microeconomics Workshop, Department of Economics, University of Wisconsin-Madison (1990).

**SUMMARY OF WRITTEN TESTIMONY OF
TIMOTHY GRAHAM
GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT
WINSTAR COMMUNICATIONS, INC.
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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 increase 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.

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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*SM service, which is transmitted over microwave radio spectrum, using small antennas approximately 12-24 inches in diameter. Our *Wireless Fiber*SM 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 still 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.

VI. THE CONSTITUTIONALLY REQUIRED COMPENSATION FOR ACCESS IS *DE MINIMIS*.

What will nondiscriminatory access cost? If nondiscriminatory access is considered a taking, I suspect the cost of compensation will be very low. The Supreme Court has repeatedly held that "it is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987), quoting *United States v. Causby*, 328 U.S. 256, 261 (1946). In valuing the compensation due for the taking of an easement for a telecommunications carrier to install its rooftop antenna and string its coaxial cable, the proper measure is the decrease in the value of the building.

In fact, the value of the building will likely experience a net increase from nondiscriminatory access. Building owners themselves have stated to the FCC that the presence of competitive carriers in their buildings and the ability of their tenants to choose among an array of advanced telecommunications services enhances the value of their buildings. This value enhancement must also be taken into account when determining the appropriate value of compensation. Finally, it must be remembered that it is standard industry practice for telecommunications carriers to bear all costs of facility installation and indemnify the building owner for any damage to the property that may inadvertently occur.

Nevertheless, I do not believe a federal nondiscriminatory access requirement will result in judicial challenges. With limited exceptions, I strongly suspect that the *mere existence* of a nondiscriminatory access requirement with established time frames for negotiation will result in building owners and telecommunications carriers successfully negotiating access agreements with each other. Again, Texas offers an example. A building owner refused to permit Time Warner Telecom access to a building where a tenant had requested Time Warner's service. Time Warner

Telecom filed a complaint with the Texas PUC. Within a week, the landlord against whom the complaint was filed apparently changed its policy to allow telecommunications carrier access. I understand that now the landlord -- after Time Warner Telecom filed its complaint-- has begun negotiating not only with Time Warner Telecom, but with other telecommunications carriers as well. Within a week after filing the complaint, Time Warner Telecom requested abatement of its complaint given the landlord's willingness to negotiate. The Texas PUC never had to consider the matter. But, this example indicates that the mere existence of the Texas statute and the availability of the Texas Public Utilities Commission to enforce that statute are having a positive effect on the problem.

VII. A FEDERAL SOLUTION IS NEEDED.

Only two States have nondiscriminatory access statutes. (As an aside, it is worth noting that neither of these statutes have been challenged in court.) Many of the larger real estate interests hold properties across many different States. If carriers insist on enforcing the statutes in Texas and Connecticut, they risk retribution from building owners in States that lack access statutes by building owners with properties nationwide. A federal nondiscriminatory access solution is not only sorely needed, it is eminently possible. In Florida last year, as part of a larger telecommunications bill, the competitive carrier community, along with BOMA and others in the real estate community, agreed to legislative language ensuring non-discriminatory building access. Although the overall bill ultimately was not passed, building owners and competitive carriers did reach agreement, as a group, on legislative language. Thus, no one should tell you today that a legislative or regulatory solution cannot be reached and agreed to throughout the industry. In fact, the Florida experience is evidence that the interests of competitive carriers and real estate

holders are complementary and that a win-win solution to the building access issue can be accomplished.

Indeed, the United States Government encouraged adoption of nondiscriminatory building access requirements in another country. In October 1998, the U.S. Government stated that the Government of Japan should "establish rules that facilitate access to privately owned buildings, particularly multi-dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier." Other countries such as Canada and Hong Kong already have requirements that building owners permit telecommunications carrier access to tenants in their buildings. In this regard, the United States is woefully behind in supporting the components of competitive independent network construction necessary for full-blown, dynamic telecommunications competition and the widespread availability of affordable broadband capabilities.

VIII. CONCLUSION

In conclusion, I strongly recommend active support for the FCC's attempts to ensure that commercial and residential tenants can choose their telecommunications carrier, can enjoy the benefits of competition, and can take advantage of the dynamic broadband capabilities that true telecommunications competition can offer. The FCC's proposals and the telecommunications carrier requests are reasonable and should be kept in perspective. Facilities-based competitors are not seeking access to multi-tenant buildings that is not already provided to ILECs. Nor are they seeking access without providing just and reasonable compensation to building owners for access where compensation is appropriate. The facilities-based competitors are willing to assume responsibility for any repairs due to damages caused to a building during installation or operation -- indeed, they already do. The use of fixed wireless technology can be, and is being, safely

managed. The presence of competitive telecommunications carriers and the availability of broadband services enhances the value of multi-tenant buildings. Therefore, it is not a disadvantage for building owners to provide nondiscriminatory access to competitors, such as Winstar, and it is a tremendous advantage to Americans. Unreasonable restrictions on access to multi-tenant buildings is costing America too much to allow it to continue.

Attachments

WALL STREET JOURNAL REPORT CONFIRMS THAT BUILDING OWNERS ARE PREVENTING CONSUMERS FROM CHOOSING TELECOMMUNICATIONS CARRIERS

A recent Wall Street Journal article, attached for your review, confirms what telecommunications carriers have been experiencing for some time: some building owners are prohibiting telecommunications carrier access to tenants in their buildings. Last week's Wall Street Journal article reports that "[a]ccording to people familiar with BroadBand Office, six of the seven original REITs involved with BroadBand don't intend to allow into their buildings any direct competitors to BroadBand." The article goes on to report that BroadBand Office enjoys preferred agreements with CarrAmerica, Spieker, Crescent Real Estate Equities Co., Duke-Weeks Realty Corp., Highwoods Properties, Inc. and Mack-Cali Realty Corp.

By way of background, in October, the Wall Street Journal reported that the nation's biggest office landlords were forming BroadBand Office -- a company to provide telecommunications services to their multi-tenant buildings. The October article, also attached for your review, reported that these building owners said they wouldn't "force tenants to use BroadBand Office and will give other telecommunications companies access to their buildings." Telecommunications carriers viewed this claim with skepticism given that building owners already were prohibiting CLEC access to buildings. Their financial interest in offering telecommunications services only increased the incentive for building owners to discriminate against competing telecommunications carriers with respect to access. Last week's Wall Street Journal article indicates that the telecommunications carriers' skepticism was well-founded.

The FCC is considering requirements that would ensure that commercial and residential tenants in multi-tenant buildings would not be held hostage to the building owner's choice of carriers but, rather, could choose their own telecommunications carrier. Similarly, H.R. 3487 would prohibit building owners from denying telecommunications carrier access or imposing unreasonable conditions or rates for access where a tenant had requested that carrier's services. Given the detrimental effect on broadband availability and telecommunications competition caused by discriminatory building owner practices, these measures deserve your support. The planned behavior reported in last week's Wall Street Journal heightens the need for action by the FCC and Congress to ensure that tenants in multi-tenant buildings will not be held hostage to their building owner's telecommunications services and, instead, can enjoy the benefits of telecommunications competition.

REIT INTEREST

By Barbara Martinez

It Adds Up to More Than Just Semantics

BACK IN OCTOBER, seven real-estate investment trusts announced the formation of BroadBand Office Inc. with the backing of venture-capital giant Kleiner Perkins Caufield & Byers. BroadBand Office is touted as a one-stop provider of telephone, high-speed Internet and other high-tech services.

To allay fears that the office REITs were going to limit the number of telecom competitors in their buildings, they all professed their lack of so-called exclusivity pacts with BroadBand. In other words, as Craig Vought, co-chief executive of Spieker Properties Inc., a member of the BroadBand group, put it, "it doesn't preclude any other telecom company in the country from servicing these buildings."

But what really wasn't spelled out is just how much choice the tenants would really get. The little-publicized portion of the announcement was that six of the seven REITs struck "preferred" relationships with BroadBand, meaning they will not only help BroadBand market its services to tenants in their buildings, they could actually discourage certain other companies from wiring up their buildings.

"We're not trying to take sides here," says Philip L. Hawkins, chief operating officer of CarrAmerica Realty Corp., another BroadBand member. "We have national and regional agreements with more than 20 communications companies."

But ask Mr. Hawkins what would happen if Allied Riser Communications Corp., one of the most aggressive and successful telecom companies targeting office buildings to date, asked to wire up CarrAmerica's Washington portfolio, and Mr. Hawkins responds: "We'd say we're not interested at this point."

According to people familiar with BroadBand Office, six of the seven original REITs involved with BroadBand don't intend to allow into their buildings any direct competitors to BroadBand, such as Allied Riser and Onsite Access Inc. Those two companies appear to be the most formidable competitors to BroadBand be-

cause they want to go beyond just offering the telecommunications lines inside buildings. Like BroadBand, they want to offer services that can essentially take over a tenant's entire communications needs, from phone service to e-mail.

In addition to CarrAmerica and Spieker, the other REITs that have given BroadBand a preferred agreement are Crescent Real Estate Equities Co., Duke-Weeks Realty Corp., Highwoods Properties Inc. and Mack-Cali Realty Corp.

The REITs that chose the preferred method could risk tenant backlash if BroadBand fails to meet expectations of excellent service. But Gene Zink, executive vice president at Duke-Weeks, says the REITs have "structured a number of performance-re-

lated outs if the service is not" up to par.

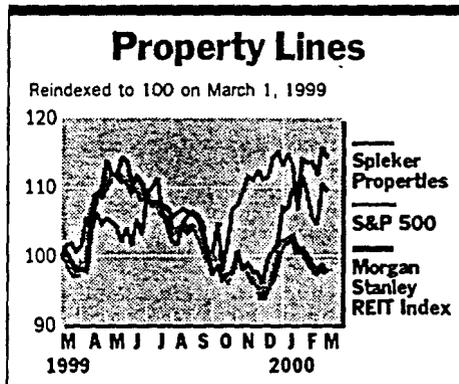
The office REITs involved weren't as direct about the practice as is CarrAmerica's Mr. Hawkins. Last week, Spieker's Mr. Vought said Allied Riser hasn't tried to wire up Spieker's buildings. "Neither side has pursued a relationship," he said.

But David Crawford, CEO of Allied Riser, says that simply wasn't true. "We've met with representatives of Spieker on numerous occasions in an effort to obtain access to their buildings to no avail," he says.

Reached a second time, Mr. Vought said he had misspoken. "It was an incomplete statement on my part . . . David did come to see us in the spring of last year," he said, but a deal was never reached.

Equity Office Properties Trust is the only member of the REIT group that didn't confer upon BroadBand the preferred status. In fact, Equity Office has either an equity or revenue-sharing interest in Allied Riser, Onsite Access and BroadBand.

The preferential treatment could complicate building owners' defense against complaints by phone companies that they're being denied access. The Federal Communications Commission is considering whether to force landlords to allow all telecom providers equal access.



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WSJ
Oct. 5, 1999

Big Landlords Are Joining Telecom Fray

By SCOTT THURM AND BARBARA MARTINEZ
Staff Reporters of THE WALL STREET JOURNAL

Ma Bell, meet Sam Zell.

Eight of the nation's biggest office landlords, including the biggest, Mr. Zell's Equity Office Properties Trust of Chicago, are making an unusual leap into the crowded telecommunications arena. Joined by venture-capital heavyweight Kleiner Perkins Caufield & Byers, they are expected to announce today that they have formed a new company, Broadband Office, to offer their tenants both local and long-distance phone service as well as high-speed data lines.

The move signals that real-estate owners are tired of just sitting back and collecting the rent. They have amassed giant portfolios of buildings full of captive customers and are now ready to tap into some of the billions of dollars these tenants spend on various products and services.

For instance, Equity Office, which owns more than 285 properties in 23 states, has more than 320,000 people walking in and out of its buildings daily. Broadband Office's owners control 2,000 buildings, representing about 10% of the nation's offices.

The landlords are joining a big crowd in the lucrative telecommunications market, including the Baby Bells, long-distance providers, and up-start companies focused on both telephone and Internet services. Businesses spend about \$125 billion annually on telephone service, according to market researcher International Data Corp.

Amid the bewildering array of choices, backers of Broadband Office say they will appeal to tenants on simplicity, convenience and cost. They'll offer a single contact for local phone service, long-distance, and data connections. Broadband Office plans to spend as much as \$100 million during the next 12 months to install fiber-optic and other high-speed lines through its owners' buildings. The plan is to undercut prices the Bells typically charge, which can approach \$1,000 a month for a single high-speed data line. Broadband says new users will have to wait a matter of days, not weeks, to get its service.

"This is a way of bundling services under one provider that only focuses on business customers," said Craig Vought, co-chief executive of Spieker Properties Inc., of Menlo Park, Calif., one of the new company's owner-members.

Broadband Office will have one clear advantage over outside telecommunications suppliers: When the property owners who also own stakes in Broadband Office sign up new tenants, they will refer them to the new service. The backers

Please Turn to Page B4, Column 4

NOW CONTRADICTED.

SEE Mar. 15, 2000 WSJ, p. B12

Office Owners Are Joining Telecom Fray

Continued From Page B1

say they won't force tenants to use Broadband Office and will give other telecommunications companies access to their buildings.

The assurances may help address complaints from upstart phone companies, who say some landlords have sweetheart deals with established telephone companies and drag their feet or deny access altogether to new telephone-service providers. The Federal Communications Commission is considering whether to force landlords to allow all telecom providers access to their buildings.

"We are still leaving with our tenants total flexibility in how they obtain their service," said Staman Ogilvie, executive vice president of Hines, a Houston owner of 80 buildings and another partner in Broadband Office.

Both Hines and Equity Office have

stakes in a rival venture, Allied Riser Communications Corp., of Dallas, which filed for an initial public stock offering in August. Indeed, Mr. Ogilvie said Hines is aligned with both Broadband Office and Allied Riser to promote competition. More services at lower prices, the landlords hope, will attract more tenants willing to pay big rents.

Backers say Broadband Office expects to raise \$50 million to \$100 million in equity to install equipment and wire buildings during the next year. Although Broadband Office officials say they hope to sign up other more equity investors, for now Kleiner Perkins is the only one. The property owners received undisclosed stakes in Broadband Office in exchange for the access and tenant references.

Eventually, the company's backers would like to take the company public. Dan

Chu, an associate partner at Kleiner Perkins, will be Broadband Office's director of business development. Kleiner Perkins's other telecommunications investments include America Online Inc., AtHome Network, a unit of Excite At Home Corp., and Juniper Networks Inc.

Mr. Chu says Broadband Office expects to begin offering service on Nov. 1. The company has recruited executives from MCI WorldCom Inc., BellSouth Corp., and Level 3 Communications Inc. It still is seeking a CEO.

Meanwhile, Allied Riser has raised \$117 million from Goldman Sachs & Co. and other investors and hopes to raise \$232 million more via its IPO. Another player, OnSite Access, New York, has raised \$60 million from venture-capital firms and AT&T Corp.'s AT&T Ventures. Allied Riser and OnSite Access focus mainly on high-speed Internet access.

WSJ, Oct. 5, 1999