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July 11, 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

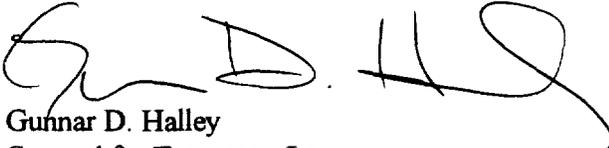
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from David S. Turetsky of Teligent, Inc. delivered today to Commissioner Michael K. Powell regarding the above-referenced proceedings.

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

Respectfully submitted,



Gunnar D. Halley  
Counsel for TELIGENT, INC.

cc: Commissioner Powell	Peter Tenhula	Thomas Sugrue (WTB)
Jeffrey Steinberg (WTB)	Joel Taubenblatt (WTB)	Leon Jackler (WTB)
Mark Rubin (WTB)	Lauren Van Wazer (WTB)	David Furth (WTB)
Paul Noone (WTB)	Eloise Gore (CSB)	Jim Swartz (WTB)
Cheryl King (CSB)	Wilbert Nixon (WTB)	Christopher Wright (OGC)
David Horowitz (OGC)	Joel Kaufman (OGC)	Jonathan Nuechterlein (OGC)

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

The Honorable Michael K. Powell  
Commissioner  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8A204A  
Washington, DC 20554

Dear Commissioner Powell:

During the course of our meeting on June 29, you inquired as to whether nondiscriminatory building access could be accomplished in the *Competitive Networks* rulemaking in a manner that was not inconsistent with the Commission's takings analysis in the *Over the Air Reception Devices Second Report and Order* ("OTARD") (13 FCC Rcd 23874). The analysis briefly outlined below demonstrates that adoption of a nondiscriminatory building access requirement in the *Competitive Networks* rulemaking would be consistent with the Commission's earlier positions for the following reasons:

1. A nondiscriminatory building access rules would not amount to a taking of private property because it would apply only once a property owner voluntarily consents to the occupation of its property by a telecommunications carrier. Such a rule would not mandate that property owners provide space in their buildings to a telecommunications carrier in the first place, unlike the rule that was considered in the *OTARD Second Report and Order*. A nondiscriminatory access rules would only affect the terms and conditions of the occupation (which has occurred in the first instance at the property owner's invitation) by requiring the property owner to provide similar access to additional telecommunications carriers in a reasonable and nondiscriminatory manner, if requested. In the *OTARD Second Report and Order*, the Commission reasoned that this sort of government regulation does not amount to a *per se* taking. (13 FCC Rcd 23874 at ¶¶ 21, 22, and 27.)
2. If a nondiscriminatory access requirement is considered to effect a taking, the rules would remain constitutional because they would contemplate the telecommunications carrier's payment of just compensation to the building owner in exchange for access, unlike the OTARD rulemaking where the Commission appeared to believe it could not order compensation.

3. The avoidance canon upon which the *Bell Atlantic v. FCC* (24 F.3d 1441 (D.C. Cir. 1994)) court relied (and to which the Commission referred in the *OTARD Second Report and Order*) is not applicable to the adoption of a nondiscriminatory building access rule. The avoidance canon applies only where an *unconstitutional* taking would *necessarily* occur. As indicated above, a nondiscriminatory access rule is not *necessarily* a taking. Moreover, even if it were, because a provision is made for the payment of just compensation, it would not be *unconstitutional*.<sup>1</sup>
4. Since the *OTARD Second Report and Order* which read the *Bell Atlantic* decision in a manner that was very limiting of the Commission's authority, the Court of Appeals for the D.C. Circuit (just last year) clarified the limited applicability of the avoidance canon by noting that the canon's limitation of agency authority does not apply if the agency action affects an unconstitutional taking, if at all, only in certain circumstances. Nat'l Mining Ass'n v. Babbitt, 172 F.3d 906, 917 (D.C. Cir. 1999). Again, a nondiscriminatory building access requirement is not necessarily a taking and even if it were, it is constitutional if just compensation is to be paid. Accordingly, *National Mining's* interpretation of the avoidance canon is applicable in the nondiscriminatory building access requirement context rather than the *Bell Atlantic* interpretation.
5. Finally, in its recent Brief in Opposition to the Petitions for Certiorari, in Celpage, Inc. v. F.C.C., Nos. 99-1072, 99-1124 and 99-1249, *Brief for the Federal Communications Commission in Opposition* at 21 (March 2000), the Commission appropriately explained to the Supreme Court the limited application of the avoidance canon suggesting an analysis nearly identical to the one that Teligent is urging the Commission to apply in the *Competitive Networks* rulemaking.

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<sup>1</sup> Where just compensation is provided, constitutional requirements are fulfilled. Put another way, the agency's provisions of compensation would eliminate the need for a doctrine designed to avoid unconstitutional action. The Supreme Court clearly recognized this principle in *Riverside Bayview*, noting that where compensation is otherwise provided, the "adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation." 474 U.S. 121,459-60 (1985)).

The Honorable Michael K. Powell

July 11, 2000

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The analysis above is summary of course. However, if you would find a more in-depth discussion of any component of the analysis to be helpful, we will gladly provide it for you.

Very truly yours,



David S. Turetsky

Senior Vice President, Law & Regulatory

cc: Peter Tenhula                      Thomas Sugrue (WTB)                      Jeffrey Steinberg (WTB)  
Joel Taubenblatt (WTB)              Leon Jackler (WTB)                      David Furth (WTB)  
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