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OFFICE OF THE SECRETARY

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

VIA HAND DELIVERY  
August 14, 2000

202 328 8000  
Fax: 202 887 5979

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

EX PARTE

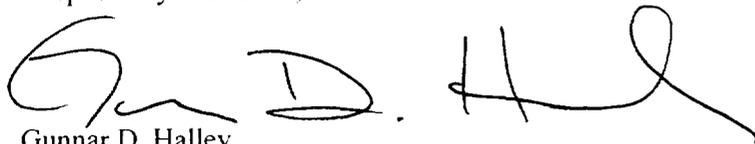
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Yesterday, David Turetsky of Teligent, Inc. provided Kathryn Brown, the Chief of Staff in the Chairman's Office, with a copy of the Smart Buildings Policy Project's August 1, 2000 written ex parte submission (without attachments) filed in the above-referenced dockets.

Because the topics of the written submission 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 Teligent's ex parte presentation.

Respectfully submitted,



Gunnar D. Halley  
Counsel for TELIGENT, INC.

Enclosure

cc: Kathryn Brown

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

Dear Ms. Salas:

On behalf of the Smart Buildings Policy Project, Gunnar Halley, Christopher Duffy, and the undersigned, all of Willkie Farr & Gallagher, met yesterday afternoon with Jeffrey Steinberg, Lauren Van Wazer, Joel Taubenblatt, Paul Noone, and Richard Arsenault of the Wireless Telecommunications Bureau to discuss matters related to the above-referenced proceedings. Specifically, we discussed the analysis contained in the recent decision of the Massachusetts Department of Telecommunications and Energy concerning telecommunications carrier access to tenants in multi-tenant buildings. In addition, we noted that the Cable Services Bureau, in Cavalier Telephone v. Virginia Electric and Power Company, File No. PA 99-005, *Order and Request for Information*, DA 00-1250 at ¶ 7 (rel. June 6, 2000), explained that the Eleventh Circuit's mandate from *Gulf Power II* had not yet issued.

We discussed some reasonable interpretations of Section 224 that would recognize rights-of-way on multi-tenant building rooftops. We mentioned that, in their ex parte submissions to the Commission, some building owner-affiliated carriers have described themselves as CLECs, literally acknowledging their LEC status and the Commission's jurisdiction over them. Moreover, these building owner-affiliated CLECs (or "BLECs") are obtaining rights-of-way to rooftop space from building owners.<sup>1</sup>

We directed the Commission participants' attention to Winstar Communications Inc.'s July 12<sup>th</sup> written ex parte submission in the above-referenced proceedings. In those materials, as well as in the Cypress Communications SEC Form 10-K filed March 30, 2000 with the Securities and Exchange Commission (a copy of which is attached hereto as Attachment 1), the incentives for building owner discrimination in favor of carriers in which they maintain a financial interest become more apparent. For example, in the above-referenced 10-K, Cypress states that:

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<sup>1</sup> See, e.g., Yankee Group at 17 (filed as a written ex parte submission by Winstar Communications in the above-referenced dockets on July 12, 2000) ("Like many of its competitors, [Broadband Office] has also secured roof rights and plans to use wireless as a secondary or redundant method of access."); see also id. ("While [Allied Riser] has not yet provisioned physical fiber diversity into any of its currently served buildings, it has secured roof rights-of-way for use of wireless fiber as a default transport alternative.").

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If . . . potential competitors successfully focus on our market, we may face intense competition which could harm our business. In addition, we may also face severe price competition for building access rights, which could result in higher sales and marketing expenses and lower profit margins. . . . Certain competitors already have rights to install networks in some of the buildings in which we have rights to install our networks. It is not clear whether it will be profitable for two or more different companies to operate networks within the same building. Therefore, it is critical that we build our networks in our target buildings quickly, before our competitors do so. If a competitor installs a network in a building in which we operate, there will likely be substantial price competition.<sup>2</sup>

Building owners have identified telecommunications as an important component of their revenue stream and are becoming increasingly involved in telecommunications.<sup>3</sup> Some real estate entities seek to enter the telecommunications field directly either through direct investment in telecommunications entities or by spinning off telecommunications affiliates.<sup>4</sup> Others seek to share in the revenue derived from telecommunications through revenue sharing or by taking warrants in the telecommunications providers serving their buildings.<sup>5</sup> Still, other building owners view telecommunications as a component of real estate and seek to ensure that their tenants have access to the most advanced and diversified telecommunications capabilities available, regardless of provider. These latter group of building owners may charge for access. However, their interests tend to lie not in the revenue derived from the carriers but rather in increasing the attractiveness of their buildings to potential tenants and in outfitting their buildings with advanced telecommunications infrastructures.<sup>6</sup> To some degree, the manner in which the building owner is

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<sup>2</sup> Cypress Communications Inc. Annual Report, "Risk Factors That May Affect Future Results," (SEC Form 10-K), filed March 30, 2000.

<sup>3</sup> Deutsche Bank at 22 ("In our opinion, location and bandwidth will become the mantras of the real estate industry. Connectivity to the Internet will become increasingly important in the Knowledge Age.").

<sup>4</sup> Deutsche Bank at 43 ("Small equity investments have been made by office, retail, industrial and multifamily REITs as an initial move to share in the potential of technology/telecom companies. . . . Spin-offs/IPOs are beginning to occur, and we are expecting additional announcements as a means for real estate companies to unlock value for shareholders.").

<sup>5</sup> Dain Rauscher Wessels at 113 ("Typically, BSPs target property interests, such as REITs, REOCs, property managers, real estate agents, as well as pension funds and insurance companies that own commercial real estate to form strategic relationships. These relationships have often included BSP warrant issuances to the property interests in exchange for building access rights."); *see also* Deutsche Bank at 43 ("Many revenue-sharing arrangements, especially with telecom service providers, have been formed. Some arrangements include the issuance of warrants to real estate companies."); *id.* at 47 ("The office real estate companies have entered into many revenue-sharing arrangement with telecom providers to allow access for broadband providers to wire buildings, as tenants' demands for high-speed access are burgeoning.").

<sup>6</sup> Only 3% of the office buildings with over 10,000 square feet are wired with broadband access. Deutsche Bank at 87.

involved in telecommunications affects its willingness to permit competitive telecommunications carrier access and the manner in which such access is provided.

Telecommunications analysts agree that building owners are well-positioned to exploit their access-to-tenant bottleneck to capitalize upon developments in the telecommunications industry made possible, in large part, by the Telecommunications Act of 1996.<sup>7</sup> As Deutsche Bank describes it in a recent analyst's report, the real estate industry is the "ultimate portal."<sup>8</sup> Whether and how control over that portal is exercised will affect the development of facilities-based telecommunications competition.

In the short history of building owner involvement in telecommunications, the pattern of behavior has evolved. Many of the earlier arrangements between telecommunications entities and building owners were characterized by granting one carrier exclusive access to the building in exchange for revenue sharing. Exclusive access is perhaps the most egregious form of discrimination against other telecommunications carriers. Although exclusives continue to occur, their prominence gradually is being replaced by more subtle, but equally serious forms of discrimination. This evolution has occurred largely because exclusive arrangements force a building owner to rely too heavily on a single carrier. Exclusive arrangements expose the building owner to risks that the exclusive carrier will fail to serve tenants adequately or will not offer the full panoply of available services. Exclusives also force the building owner to rely too heavily on a single technology. As a result, exclusives are finding some disfavor in the real estate community.

In lieu of exclusives, building owners are entering into revenue sharing agreements with or making equity investments in telecommunications providers.<sup>9</sup> The resulting symbiotic financial relationship motivates the building owner to promote the primacy of its affiliated carrier within the building through exercise of its market power over access to tenants. This objective can be accomplished in several ways. For example, the affiliated carrier can be given the "first-mover advantage."<sup>10</sup> That is, access negotiations with other carriers are delayed or terminated so that the affiliated carrier can become the first competitive carrier to serve the building. Indeed, the affiliated carrier's speed-to-service time is sometimes strictly controlled by the building owner with

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<sup>7</sup> These incentives were increased by the recently enacted federal REIT Modernization Act. See Deutsche Bank at 43, 46 ("This legislation gives latitude to real estate management teams to create services and initiatives of value to tenants. From our perspective, RMA is really providing the gateway from which new initiatives that better serve tenants may be launched. The focus for many REITs, initially the office property owners and now multifamily and retail, is wiring their properties for high-speed access, finding the right broadband network solutions to meet their various tenants' needs.").

<sup>8</sup> Deutsche Bank at 105-106 ("We consider properties to be the ultimate portals, and the embedded value in real estate is just beginning to be tapped.").

<sup>9</sup> Deutsche Bank at 39 ("Office companies are forming alliances with B-LECs, or business-centric local exchange carriers. Revenue-sharing agreements and equity investments in broadband service providers are the rage.").

<sup>10</sup> See Goldman Sachs at 12 (explaining that Allied Riser's partnership with 12 leading real estate owners provides "a first mover advantage and a strong barrier to entry.").

potentially negative consequences.<sup>11</sup> In addition, the building owner can recommend and promote the services of the affiliated carrier to tenants above the services of other carriers in the building or can charge access prices to non-affiliated carriers that effectively preclude competitive service to the building.<sup>12</sup> The building owner practices and involvement in telecommunications are not inherently negative and, indeed, may promote competition in telecommunications insofar as discrimination -- which impairs efficient operation of the market and harms consumer welfare -- can be eliminated. Consequently, it is imperative that as building owners become more involved in the provision of telecommunications service (either by providing such service directly or by taking a financial interest in a carrier), a regulatory check be placed on their incentives and abilities to discriminate in favor of carriers with whom they maintain a financial relationship.

We explained that pursuant to the Commission's ancillary jurisdiction, the Commission can require building owners to provide nondiscriminatory telecommunications carrier access to their buildings in order to serve the tenants therein. As an alternative, some parties explained to the Commission in the comment round of this rulemaking that nondiscriminatory access could be accomplished through indirect means.<sup>13</sup> We expanded upon the practical method of implementing this approach where the Commission wished to avoid asserting its jurisdiction directly over building owners.

Specifically, the Commission may prescribe regulations based on the opinion that a practice of a carrier or carriers will violate provisions of the Communications Act.<sup>14</sup> The Commission should conclude that discrimination by a carrier in the form of participating in, cooperating with, or enjoying the benefits of a building owner's decision to prevent tenants from selecting their own

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<sup>11</sup> See *Yankee Group* at 15 ("Despite the external market pressures, it is the Yankee Group's belief that MBSPs will ultimately face more harm from the property owners with which they have aligned themselves. REITs know very well that their MBSP partners are also securing relationships with many of their competitors (i.e., other REITs). Obviously, it is in a REIT's best interest to ensure that a competitor's building is not lit with services before its own. Subsequently, many property owners are demanding contractual arrangements whereby the MBSP must ensure that services will be turned up *simultaneously* among a specific group of buildings. For property owners, establishing this contractual arrangement ensures that the individual REIT's buildings are turned up at the same time as competitors' buildings. In order to secure valuable real estate, MBSPs are agreeing to such terms. However, the downfall of such arrangements is twofold. First, they require MBSPs to wire buildings in markets that may not be immediately profitable. Second, they require MBSPs to expend significant up-front capital costs across multiple geographic areas. The Yankee Group believes that these factors may have detrimental repercussions for the financial well-being of many MBSPs. We also suspect that some MBSPs may try to work around such restrictions by turning up buildings quickly with minimal capital outlay (i.e., using lower-cost, non-carrier-grade equipment, building less redundancy into their networks, or using leased facilities).").

<sup>12</sup> See *Yankee Group* at 17 (explaining that Broadband Office's REIT investors recommend BBO's services to tenants and share associated revenues).

<sup>13</sup> See, e.g., "Bringing Telecommunications Competition to Tenants in Multi-Tenant Environments," at 43-48, filed as an attachment to the Comments of the Association for Local Telecommunications Services in the above-referenced proceeding (filed Aug. 27, 1999).

<sup>14</sup> 47 U.S.C. § 205(a).

facilities-based telecommunications carrier is an unjust and unreasonable practice under Section 201(b). A confirmation of this conclusion can be found in the prohibition on carriers' "unjust or unreasonable discrimination in . . . practices . . . for or in connection with like communication service, *directly or indirectly, by any means or device . . .*"<sup>15</sup> It should then adopt a rule prohibiting telecommunications carriers from participating in, cooperating with, or enjoying the benefits of (*i.e.*, through serving a building) a building owner's decision to prevent tenants from selecting their own facilities-based telecommunications carrier by discriminating against certain telecommunications carriers. A regulation prohibiting cooperation in, or service to a building affected by, discrimination inhibiting subscriber choice can be enforced, *inter alia*, through the Commission's complaint process.<sup>16</sup> In the course of this complaint process, a building owner or manager engaging in discriminatory practices will be a person interested in or affected by the regulation or practice under consideration. As such, the building owner or manager may be joined as a party and subjected to orders issued by the Commission.<sup>17</sup> In such an action, very often the telecommunications carrier will be only a nominal defendant, as was the case in Ambassador, Inc. v. United States.<sup>18</sup> The Commission may aid in the resolution of any dispute by requiring affected carriers to file the contracts they have entered into with building owners whenever complaints are brought before the Commission.<sup>19</sup>

This process was approved by the Supreme Court in the 7-0 Ambassador decision. In that case, the underlying issue involved the protection of consumers in hotels and apartment buildings. Just as with building access in the *Competitive Networks* rulemaking, the Court recognized that telephone service was indispensable to the hotels that were parties defendants. The Court also recognized that the hotel-provided services in issue imposed some additional costs on the hotels.

The Commission, after hearing, entered an order requiring the telephone companies to include appropriate terms in their tariffs. While the Commission gave the telephone companies a choice of either specifying the actual mark-up prices charged by the hotels or limiting what the hotels could do as subscribers of the service, the important point was that under either approach, the Commission thenceforth would be able to regulate efficiently. It is clear that the Commission can proceed either by tariff prescription or by general regulation.<sup>20</sup>

The Supreme Court explained that "[o]f course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber's business

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<sup>15</sup> 47 U.S.C. § 202(a)(emphasis added).

<sup>16</sup> 47 U.S.C. § 208.

<sup>17</sup> 47 U.S.C. § 411(a).

<sup>18</sup> 325 U.S. 317 (1945).

<sup>19</sup> 47 U.S.C. § 211(b).

<sup>20</sup> 47 U.S.C. § 205(a).

consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships.”<sup>21</sup> Section 411(a) was properly applied to join the hotels as parties defendant, and the Court concluded that an injunction against the hotels was appropriate under Section 411(a) even though no injunction issued against the telephone companies.<sup>22</sup> Enclosed as Attachment 2 are copies of the parties’ Supreme Court briefs in this case (along with a brief summary thereof) for the meeting participants’ review.

As far as we have been able to discern, *Ambassador* represents the entirety of judicial consideration of Section 411(a). The provision is derived from an analogous provision in the Interstate Commerce Act.<sup>23</sup> Judicial interpretations of the Interstate Commerce Act provision lend additional support to the conclusion of the *Ambassador* Court that the joinder provisions give the regulatory agency the authority to impose judgments against non-carriers in appropriate circumstances.<sup>24</sup> This is consistent with the recognition by many States that a bottleneck controlled by an unregulated entity between a carrier and a consumer can prevent efficient operation of the market and impair realization of policy goals. In response, these States enacted requirements ensuring tenant access to their carrier of choice, as outlined in a letter from Philip Verveer to Kathryn Brown, filed with the Secretary as an ex parte submission in the above-referenced proceedings by the Smart Buildings Policy Project on Thursday, July 27<sup>th</sup>, a copy of which was provided to yesterday’s meeting participants.

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<sup>21</sup> Ambassador, Inc., 325 U.S. at 323-24. A copy of the decision was provided to participants of yesterday’s meeting.

<sup>22</sup> Id. at 325-26.

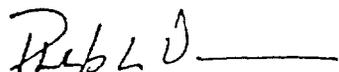
<sup>23</sup> See S. Rep. No. 781, 73d Cong., 2d Sess., at 10 (1934)(“Section 411 carries forward provisions of the Elkins Act and of section 16(4) of the Interstate Commerce Act relating to joinder of parties and payment of money.”). The analogous provision of the Interstate Commerce Act is now found at 49 U.S.C. § 42.

<sup>24</sup> See, e.g., United States v. Baltimore & O.R. Co., 333 U.S. 169, 171 n.2 (jurisdiction over stock yard practices); see id. at 177 (“Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.”); see also United States v. City of Jackson, Mississippi, 318 F.2d 1, 16-19 (5<sup>th</sup> Cir. 1963)(enjoining sheriff’s enforcement of racially segregated waiting areas in railroad and bus terminals, and citing to the extensive use of Section 42 of the Interstate Commerce Act to enjoin the practices of non-carriers).

Ms. Magalie Roman Salas  
August 1, 2000  
Page 7 of 7

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 Buildings Policy Project's ex parte presentation.

Respectfully submitted,



Philip L. Verveer

Counsel for the  
SMART BUILDINGS POLICY PROJECT

Enclosures

cc: Thomas Sugrue (WTB)  
Lauren Van Wazer (WTB)  
Paul Noone (WTB)

Jeffrey Steinberg (WTB)  
Joel Taubenblatt (WTB)  
Richard Arsenault (WTB)

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