

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
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	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98 ✓
	)	
Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57
	)	
	)	
	)	

**FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING in WT Docket No. 99-217, FIFTH REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER in CC Docket No. 96-98, AND FOURTH REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER in CC Docket No. 88-57**

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**Reply Comment Date:** January 22, 2001

Comments and reply comments to be filed only in WT Docket No. 99-217

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

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## I. INTRODUCTION

1. In this item, we further our ongoing efforts under the Telecommunications Act of 1996<sup>1</sup> to foster competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). In the *Competitive Networks NPRM*, we requested comment on the state of access to MTEs and on a variety of potential measures to improve such access.<sup>2</sup> Based on the extensive record compiled in response to that Notice, we adopt several measures to remove obstacles to competitive access in this important portion of the telecommunications market. Specifically, we: (1) prohibit carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access by competing carriers; (2) clarify our rules governing control of in-building wiring and facilitate exercise of building owner options regarding that wiring; (3) conclude that the access mandated by Section 224 of the Communications Act (the "Pole Attachments Act")<sup>3</sup> includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs; and (4) conclude that parties with a direct or indirect ownership or leasehold interest in property, including tenants in MTEs, should have the ability to place antennas one meter or less in diameter used to receive or transmit any fixed wireless service in areas within their exclusive use or control, and prohibit most restrictions on their ability to do so.

2. We also note that, while these measures will help significantly to advance competition and customer choice, they may well be insufficient in themselves to secure a full measure of choice for businesses and individuals located in MTEs. We recognize that the real estate industry has taken some positive steps to facilitate tenant choice of telecommunications providers by working towards the development of best practices and model agreements.<sup>4</sup> We will closely monitor these industry efforts and, if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to unreasonably deny competing telecommunications service providers access to customers in MTEs, we are prepared to consider taking additional action, including adopting rules to assure that MTE owners offer competing telecommunications service providers access to their premises. In order to be prepared to take further action, if necessary, we request comment in a Further Notice of Proposed Rulemaking on the current state of the evolving market for the provision of telecommunications services in MTEs. We also note that a strong case can be made that we have authority to impose obligations on carriers to ensure nondiscriminatory access to MTEs. We seek comment on this legal argument, whether it would be prudent to exercise such authority, the potential scope of such requirements, and how such requirements could be implemented, if adopted. In addition, we seek further comment on several other

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act" or the "Act").

<sup>2</sup> Promotion of Competitive Networks in Local Telecommunications Markets, *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*, 14 FCC Rcd 12673, 12687-12712, ¶¶ 28-69 (1999) (*Competitive Networks NPRM*). In the Notice of Inquiry portion of the same item, we requested comment on issues relating to access to public rights-of-way and franchise fees, state and local taxes, and other means of promoting competitive networks. *Id.* at 12712-19, ¶¶ 70-85. These issues will be addressed separately at another time.

<sup>3</sup> 47 U.S.C. § 224.

<sup>4</sup> See Letter from Real Access Alliance to William E. Kennard, Chairman, FCC, dated September 6, 2000 (September 6 Real Access Alliance Letter).

potential Commission actions that may be necessary in the event that competition in the MTE market does not develop sufficiently.

## II. SUMMARY

3. In the 1996 Act, Congress sought “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>5</sup> One of the most important goals of the 1996 Act was to bring competition to the traditionally monopolistic market for local telecommunications services.<sup>6</sup> In order to bring competition to this market, Congress contemplated competitive entry by three means – use of a competitor’s own facilities, use of unbundled elements of the incumbent local exchange carrier’s (LEC’s) network, and resale of the incumbent’s service – and it included provisions to prevent incumbent LECs from blocking competitive entry by any of these means.<sup>7</sup> Congress also extended the scope of the Pole Attachments Act to grant access to telecommunications service providers in addition to cable service providers.<sup>8</sup>

4. We remain committed to removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated in the 1996 Act.<sup>9</sup> Nonetheless, we have recognized that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities.<sup>10</sup> Because facilities-based competitors are less dependent than other new entrants on the incumbents’ networks, they have the greatest ability and incentive to offer innovative technologies and service options to consumers. Moreover, facilities-based competition offers the best promise of ultimately creating a comprehensive system of competitive networks, in which today’s

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<sup>5</sup> S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. at 1 (1996) (1996 Conference Report).

<sup>6</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15505-06, ¶ 3 (1996) (*Local Competition First Report and Order*), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997), *aff’d in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff’d in part, rev’d in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*Iowa Utilities Board*).

<sup>7</sup> See 47 U.S.C. §§ 251(c)(2) (requiring incumbent LECs to provide interconnection with the facilities and equipment of any requesting telecommunications carrier on just, reasonable, and nondiscriminatory rates, terms, and conditions), 251(c)(3) (requiring incumbent LECs to provide nondiscriminatory access to network elements on an unbundled basis on just, reasonable, and nondiscriminatory rates, terms, and conditions), 251(c)(4) (requiring incumbent LECs to offer services for resale at wholesale rates, and generally forbidding incumbent LECs from prohibiting or imposing unreasonable or discriminatory conditions or limitations on resale).

<sup>8</sup> 47 U.S.C. § 224.

<sup>9</sup> See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) (promulgating rules governing access to unbundled network elements following United States Supreme Court remand) (*UNE Remand Order*); Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912 (1999) (adopting line sharing and other unbundling rules for Digital Subscriber Line service).

<sup>10</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12676-77, ¶ 4.

incumbent LECs no longer will exert bottleneck control over essential inputs, but will compete on a more equal basis with their rivals.<sup>11</sup>

5. One particular benefit that we hope will arise from the growth of facilities-based competition is increased availability of advanced services. In the 1996 Act, Congress directed the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.<sup>12</sup> We have recently found that advanced telecommunications capability is being deployed in a reasonable and timely fashion, although certain groups of consumers may be particularly vulnerable to untimely access.<sup>13</sup> We believe that competitive providers will continue to play a vital role in the growth and ubiquitous availability of advanced services, both by innovating themselves and by placing competitive pressure on the incumbents to offer more advanced services at attractive prices.<sup>14</sup> At the same time, we expect that the ability to offer advanced capabilities that benefit consumers will be an important factor in many competitors' marketplace success.<sup>15</sup>

6. In this item, we take targeted actions to promote the continued deployment of competitive and advanced telecommunications services and reduce the substantial barriers that remain to deployment of these services in MTEs,<sup>16</sup> and we request comment on potential additional actions. The actions we take here are as follows:

- First, we forbid telecommunications carriers from entering into contracts to serve commercial properties that restrict or effectively restrict the property owner's ability to permit entry by other carriers.<sup>17</sup>
- Second, in order to reduce competitive carriers' dependence on the incumbent LECs to gain access to on-premises wiring, while at the same time recognizing the varied needs of carriers and building owners, we establish procedures to facilitate moving the demarcation point to the minimum point of

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<sup>11</sup> See *id.* at 12685-86, ¶¶ 20-23.

<sup>12</sup> 1996 Act, § 706, codified as a note to 47 U.S.C. § 157.

<sup>13</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Second Report*, FCC 00-290 (rel. Aug. 21, 2000) (*Section 706 Second Report*).

<sup>14</sup> For example, although competitive LECs currently serve under 7% of asymmetric digital subscriber line (DSL) subscribers, they reportedly have DSL-capable equipment in one-third more central offices than do incumbents, and they appear to be adding DSL customers at a faster rate. *Id.* at para. 102. See also *id.* at paras. 192-193 (discussing competitive LEC investment in DSL infrastructure). Moreover, analysts have projected that terrestrial wireless providers will serve between 12 and 15 percent of the residential and between 14 and 50 percent of the business high-speed market within the next few years, and that satellite providers could serve between 5 and 10 percent of the high-speed market. *Id.* at paras. 197, 202.

<sup>15</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12675-76, 12687, ¶¶ 3, 26.

<sup>16</sup> See paras. 17-19, *infra* (describing barriers to deployment in MTEs).

<sup>17</sup> See Section IV.B, *infra*.

entry (MPOE) at the building owner's request, and we require incumbent LECs to timely disclose the location of existing demarcation points where they are not located at the MPOE.<sup>18</sup>

- Third, we determine that under Section 224 of the Communications Act, utilities, including LECs, must afford telecommunications carriers and cable service providers reasonable and nondiscriminatory access to conduits and rights-of-way located in customer buildings and campuses, to the extent such conduits and rights-of-way are owned or controlled by the utility.<sup>19</sup>
- Fourth, we extend to antennas that receive and transmit telecommunications and other fixed wireless signals our existing prohibition of restrictions that impair the installation, maintenance or use of certain video antennas on property within the exclusive use or control of the antenna user, where the user has a direct or indirect ownership or leasehold interest in the property.<sup>20</sup>

7. The specific actions that we take in today's Report and Order will reduce the likelihood that incumbent LECs can obstruct their competitors' access to MTEs, as well as address particular potentially anticompetitive actions by premises owners and other third parties. We remain concerned, though, that, based on the record, unreasonable discrimination among competing telecommunications service providers by some premises owners remains an obstacle to competition and consumer choice.

8. We recognize the recent efforts of the real estate industry to develop model contracts and best practices aimed at improving MTE owners' processing of tenant requests for service from alternative telecommunications carriers or carrier requests for access to MTEs to serve tenants.<sup>21</sup> In particular, a coalition of 11 trade associations representing over 1 million property owners and operators has committed to a best practices implementation plan including: (1) adopting a firm policy not to enter into any exclusive contracts for building access in the future; (2) responding within 30 days to written tenant requests for a particular telecommunications provider, and accommodating such requests in good faith, where appropriate space is available and the provider intends to execute an access agreement that is substantially in the form of a model contract to be developed by the industry; (3) informing tenants of existing alternatives in buildings that are already served by multiple competitive providers, and encouraging a dialogue with tenants regarding the advantages of additional providers; (4) incorporating these processing guidelines in new leases and notices to existing leaseholders; (5) committing to a clearer and more predictable process for responding to requests from carriers to access the MTE to serve customers, including provision of clear guidance regarding the MTE owner's policies within 30 days, where the carrier agrees that its access to the MTE is conditioned on deploying equipment and/or providing service to tenants by a date certain; (6) establishing an independent clearinghouse to which interested parties could submit allegations of behavior that is inconsistent with either the model contracts or "best practices" developed as part of this initiative; and (7) supporting a periodic, quantitative study of the market for building access, to be conducted under the auspices of the Commission.<sup>22</sup> At least 12

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<sup>18</sup> See Section IV.C, *infra*. In addition, we take this opportunity to resolve certain pending petitions for reconsideration of our telecommunications inside wiring rules. *Id.*

<sup>19</sup> See Section IV.D, *infra*.

<sup>20</sup> See Section IV.E, *infra*; 47 C.F.R. § 1.4000.

<sup>21</sup> See September 6 Real Access Alliance Letter.

<sup>22</sup> *Id.*

building owners who collectively own or operate over 250 million square feet of office space have committed to these best practices.<sup>23</sup>

9. We are encouraged by those efforts and will closely monitor their progress. At the same time, we are aware of concerns that these voluntary commitments may fall short of protecting tenants' ability to choose among competing carriers.<sup>24</sup> Therefore, if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to discriminate unreasonably among competing telecommunications service providers, we are prepared to consider taking additional action. Accordingly, in a Further Notice of Proposed Rulemaking, we seek comment in several areas:

- First, we seek to refresh the record on the status of the market for the provision of telecommunications services in MTEs in order to evaluate the necessity of a nondiscriminatory access requirement.
- Second, we seek additional comment on the legal argument that we have authority to impose requirements on carriers in order to ensure nondiscriminatory MTE access, and on whether we should exercise such authority.
- Third, we seek comment on the circumstances under which the benefits would exceed the costs of such requirements, and on how any nondiscriminatory access requirement could be implemented.<sup>25</sup>
- Fourth, we ask whether today's prohibition on exclusive access contracts in commercial MTEs should be extended to residential settings, either in addition to or in lieu of a nondiscriminatory access requirement applicable to these premises, and whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.<sup>26</sup>
- Fifth, we seek comment on whether we should proscribe carriers from entering into contracts that grant them preferences other than exclusive access, such as exclusive marketing or landlord bonuses to tenants that use their services, in some or all situations.<sup>27</sup>
- Sixth, we seek additional comment on the definition of "rights-of-way" in MTEs to which a utility must allow access under Section 224.<sup>28</sup>
- Finally, we seek additional comment on whether we should extend our cable inside wiring rules to facilitate the use of home run wiring by telecommunications service providers where an incumbent cable provider no longer has a legal right to maintain its home run wiring in the building.<sup>29</sup>

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<sup>23</sup> *Id.* at 1.

<sup>24</sup> See Letter from Thomas Cohen, Smart Buildings Policy Project, to FCC Commissioners, dated September 7, 2000.

<sup>25</sup> See Section V.A, *infra*.

<sup>26</sup> See Section V.B, *infra*.

<sup>27</sup> See Section V.C, *infra*.

<sup>28</sup> See Section V.D, *infra*.

### III. BACKGROUND

10. The Commission has taken many actions both before and since the 1996 Act to remove obstacles to facilities-based competition in local telecommunications markets. For example, among other things, we have implemented Section 251 of the Communications Act, forbore from enforcing statutory provisions and regulations that could inhibit the ability of new entrants to compete, made additional spectrum available to competitors using wireless technology, and increased the flexibility of use of previously allocated spectrum.<sup>30</sup> These efforts have continued during the past year.<sup>31</sup>

11. In the *Competitive Networks NPRM*, we discussed our thoughts regarding the development of facilities-based competition generally,<sup>32</sup> and in a companion Notice of Inquiry we sought comment generally regarding factors that may be impeding the growth of competitive networks and what actions we should take to ameliorate such impediments.<sup>33</sup> The principal focus of the NPRM, however, was on promoting competitive access to MTEs, such as apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. This important segment of the market poses special challenges to facilities-based entry. In order to offer service in an MTE, a facilities-based competitor must either gain access to existing on-premises wiring or obtain access to conduit and other suitable areas in order to install its own equipment. In addition, providers using wireless technology must obtain access to rooftops or other suitable locations to place their antennas. Access to these facilities and areas is typically controlled by the building owner, the incumbent LEC, or both. Thus, unlike in the case of a stand-alone residence or commercial enterprise, a competitive facilities-based carrier cannot supply service simply by dealing with the end user.<sup>34</sup>

(Continued from previous page)

<sup>29</sup> See Section V.E, *infra*.

<sup>30</sup> See generally *Competitive Networks NPRM*, 14 FCC Rcd at 12678-80, ¶¶ 8-10.

<sup>31</sup> See, e.g., Public Notice, "The Wireless Telecommunications Bureau Announces That It Is Prepared to Grant 1848 Licenses to Operate in the 39 GHz Band," DA 00-2242 (rel. Oct. 2, 2000) (announcing licenses ready to grant in 38.6-40.0 MHz band); Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, FCC 00-272 (rel. Aug. 1, 2000) (adopting service rules for 24.25-24.45 and 25.05-25.25 GHz bands); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857 (2000) (declining to extend restriction on incumbent LECs and cable companies holding attributable interests in Local Multipoint Distribution Service Block A licenses, based in part on finding that open eligibility may speed the availability of broadband services in rural areas); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (2000) (establishing service rules for spectrum to be vacated by television broadcasters), *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) (addressing issues raised on reconsideration and seeking comment on potential cost-sharing rules, relocation agreements, and secondary auctions to facilitate clearing of spectrum), *Second Memorandum Opinion and Order*, FCC 00-330 (rel. Sept. 14, 2000) (dismissing additional petition for reconsideration as moot).

<sup>32</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12683-87, ¶¶ 18-27.

<sup>33</sup> *Id.* at 12719, ¶ 85.

<sup>34</sup> See *id.* at 12688, ¶ 30; see also *Section 706 Second Report* at para. 60 (noting that landlord control over access may create barrier to provision of advanced services in MTEs, especially by competitive providers).

12. Attention to the unique issues and challenges affecting access to MTEs is important because a substantial proportion of both residential and business customers nationwide are located in such environments.<sup>35</sup> Thus, an absence of widespread competition in MTEs would insulate incumbent LECs from competitive pressures and deny facilities-based competitive carriers the ability to offer their services in a sizable portion of local markets, thereby jeopardizing full achievement of the benefits of competition. Moreover, such a situation would directly undermine the express Congressional goal of bringing competition and advanced services to “all Americans.”<sup>36</sup> Finally, because MTEs frequently offer a relatively large revenue opportunity in a limited space, they can be the most efficient environments for many competitive LECs initially to serve. Thus, inability to compete in those environments in the short term may jeopardize the business plans and viability of some potentially powerful competitors that could in the long term offer ubiquitous competition throughout an incumbent LEC’s service area. Indeed, even if competitive access is available in some MTEs, competitive carriers may be unable to succeed economically, and thus offer competitive choices to any customers, without broad access to MTE markets. For these reasons, we requested comment in the *Competitive Networks NPRM* on the practical concerns involved in serving MTEs, on the state of the market, and on several potential actions that we could take to promote competitive access.

13. The *Competitive Networks NPRM* generated extensive interest among incumbent and competitive LECs, building owners and managers, electric and gas utilities, cable service providers, local governments, and others. We received 438 formal comments and 252 reply comments.<sup>37</sup> In addition, the Commission’s Local and State Government Advisory Committee (LSGAC) filed two recommendations.<sup>38</sup> We have also received numerous *ex parte* filings from parties representing a variety of interests, including several members of Congress. Although we do not list these *ex parte* filings individually, we have incorporated them in the record and we have fully considered them in reaching the conclusions set forth herein.<sup>39</sup>

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<sup>35</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12687-88, ¶ 29.

<sup>36</sup> See 1996 Act, § 706(a); 1996 Conference Report at 1.

<sup>37</sup> Commenters and the short forms by which they are cited herein are listed in Appendix A. Unless otherwise indicated, all citations to comments and reply comments herein refer to comments and reply comments on the *Competitive Networks NPRM*. In order to enable the Commission to develop a more comprehensive record in this proceeding, we grant the motions to file further reply comments by the Wireless Communications Association International, Inc. and by Concerned Communities and Organizations.

<sup>38</sup> FCC Local and State Government Advisory Committee Advisory Recommendation Number 19: Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98, dated Nov. 1, 1999 (LSGAC Recommendation No. 19); FCC Local and State Government Advisory Committee Recommendation Number 22: Notice of Proposed Rulemaking, Notice Of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98, dated Aug. 29, 2000 (LSGAC Recommendation No. 22).

<sup>39</sup> Ex parte filings are accessible on the Commission’s Electronic Comment Filing System (ECFS), <http://www.fcc.gov/e-file/ecfs.html>. Instructions for using ECFS are also available on that page.

#### IV. REPORT AND ORDER / MEMORANDUM OPINION AND ORDER

##### A. State of The Market

14. Based on the record compiled in response to the *Competitive Networks NPRM*, we conclude that meaningful progress has been made in the competitive development of the market for facilities-based telecommunications services in MTEs, but some obstacles to full competitive choice remain. We are concerned that, at least in certain cases, both building owners and incumbent LECs retain the ability and incentive to discriminate among and impose unreasonable terms on new entrants. As a result, end users have likely been forced to pay unnecessarily high rates for local telecommunications services, and have been denied the benefits of advanced and innovative service options. At the same time, we are mindful that there has been progress in the market, and we are hopeful that this trend will continue to yield more competitive options for increasing numbers of consumers. Indeed, some recent developments indicate that this may be the case.

15. MTEs constitute a substantial portion of both residential and commercial units in the United States. An MTE is any contiguous premises under common ownership or control that contains two or more distinct units occupied by different tenants. Thus, MTEs include, for example, apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. There are over 750,000 office buildings and over one million residential multiple dwelling units in this nation.<sup>40</sup> As of 1990, approximately 28 percent of all housing units nationwide were located in multiple dwelling units, and that percentage is likely growing.<sup>41</sup>

16. There is evidence in the record that both wireless and wireline competitive LECs have made progress in obtaining access to MTEs, especially in commercial markets.<sup>42</sup> For example, WinStar currently provides broadband communications services to over 15,000 small and medium-sized business customers in 31 domestic markets.<sup>43</sup> Virtually all of these customers are located in MTEs. Competitive LECs continue to contract for access to an increasingly large number of commercial buildings. Indeed, there is evidence that the availability of alternative providers for local telecommunications services is often a selling point in leasing negotiations between building owners and prospective tenants and, thus, building owners may have incentives to enter into agreements with competitive LECs for building access.<sup>44</sup> Moreover, in response to the issues raised and developed in this proceeding, some of the leading companies in the real estate industry have recently made a commitment to the Commission to undertake to develop and promote the use of sample contracts for building access, as well as "best practices" to facilitate negotiations for building access.<sup>45</sup> These best practices will include a firm policy not to enter into exclusive contracts for building access; procedures and expedited time frames for

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<sup>40</sup> *Access to Buildings and Facilities by Telecommunications Providers: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce*, 106<sup>th</sup> Cong. 24 (1999) (Written Testimony of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc.).

<sup>41</sup> *Competitive Networks NPRM* at 12687-88, ¶ 29.

<sup>42</sup> See Cornerstone Properties, *et al.* Comments at 7-8. See also Section 706 Second Report.

<sup>43</sup> WinStar Comments at 2.

<sup>44</sup> Real Access Alliance Comments at 7.

<sup>45</sup> September 6 Real Access Alliance Letter.

processing tenant requests for service from a particular telecommunications provider, where appropriate space is available and the provider intends to substantially accept a model access agreement; a clearer and more predictable process for responding to requests for access generated by carriers; establishment of an independent clearinghouse for complaints by tenants, real estate companies, and service providers; and support for periodic studies of the market under the auspices of the Commission.<sup>46</sup> This initiative represents a positive step in the development of the market for building access.

17. Notwithstanding this progress, however, there is also meaningful evidence that competitive LECs have in many instances encountered unreasonable demands and significant delay in their efforts to obtain access to buildings.<sup>47</sup> Competitive LECs complain that they are being impeded by incumbent LECs and building owners.<sup>48</sup> In some instances, competitive LECs state that they have been denied access to buildings completely, or have been charged exorbitant rates for access or been subjected to unreasonable conditions. And, in others, contract negotiations have reportedly spanned upwards of eighteen months – a timeframe that is particularly problematic for a service provider in a competitive market.<sup>49</sup>

18. Although the record does not contain statistical evidence regarding the prevalence of such activities, competitive LECs cite to specific incidents of unreasonably restrictive behavior on the part of incumbent LECs and building owners that, they assert, are hurting competition and consumers. These include the MTE in New York City that has been through three different owners since 1998, all of whom have denied access to a competitive LEC, despite the fact that tenants in the MTE have sent letters to the owners requesting access for the competitive LEC.<sup>50</sup> Another incident involves the manager of a large office building in Florida who has demanded a rooftop access fee of \$1,000 per month and a fee of \$100 per month for each in-building hook-up from a competitive LEC.<sup>51</sup> The competitive LEC estimates that this fee structure would cost it about \$300,000 per year to service this one building.<sup>52</sup> Yet another incident involves a competitive LEC that has been negotiating for over 18 months with several Boston, Massachusetts MTE owners who claim that they are still examining the telecommunications issues, while their tenants remain without choice of telecommunications service providers.<sup>53</sup>

19. The record further indicates that incumbent LECs are using their control over on-premises wiring to frustrate competitive access to multitenant buildings. Competitive LECs report that they have encountered difficulties with incumbents when attempting to arrange for interconnection or lease unbundled network elements. For example, competitive LECs report that incumbents may fail to timely provide non-proprietary information in their possession, require the presence of their own technicians to

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<sup>46</sup> *Id.*

<sup>47</sup> AT&T Comments at 4; Nextlink Comments at 4-5; Teligent Comments at 9-10; WinStar Comments at 16-18.

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g.*, AT&T Comments at 6-7; Nextlink Comments at 2.

<sup>50</sup> ALTS Comments at 12.

<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 9.

supervise competitive LEC wiring, and take unreasonable amounts of time in scheduling such visits.<sup>54</sup> In addition, competitive LECs contend that incumbent LECs often require network configurations which may be disadvantageous for competitors.<sup>55</sup>

20. Building owners argue, however, that competitive LECs have yet to provide service in many of the buildings to which they have obtained rights of access. For example, according to one press account, WinStar has wired 4,000 of the approximately 8,000 buildings for which it has obtained access, while Teligent has wired 3,000 of the approximately 7,500 buildings for which it has obtained access.<sup>56</sup> Building owners argue that these numbers suggest that competitive LECs are not even able to serve the buildings they have rights to access now, and thus are not constrained by any alleged lack of nondiscriminatory access to all buildings.

21. Economic theory supports the idea that building owners may, at least under some circumstances, be able to exert market power over telecommunications access. There is no question that building owners control access to any individual building. Whether that control translates into the ability or incentive to unreasonably restrict access to competitive LECs depends on the circumstances in particular real estate markets, as well as the time frame one is considering. For example, over the long term, tenants may have the ability to neutralize building owners' control by choosing not to occupy buildings that do not offer attractive telecommunications service options. The extent to which tenants may have effective choice in the near term depends on several factors, including the availability of alternative spaces, the typical length of leases, the costs of relocation, and the relative importance of telecommunications among the factors a tenant considers when choosing a space. The extent of tenant power may vary from market to market, including between residential and commercial tenants as well as in different geographic areas and market cycles.

22. A noteworthy development is the emergence of a new type of telecommunications service provider. These service providers, often referred to as "building LECs" or "B-LECs," exclusively serve MTEs. In many instances, these companies own telecommunications facilities only within the buildings they serve, and must interconnect with other carriers to transmit signals outside these buildings. Many of these ventures have been created by, or with the active participation of, the real estate industry. Also, some of the companies partner with major real estate companies in order to serve their buildings. One such company, Broadband Office, Inc., has reportedly partnered with 50 major real estate owners across the country.<sup>57</sup>

23. We are encouraged by the progress we have seen in the development of the competitive market for facilities-based telecommunications services. Competitive LECs have made gains in the overall number of buildings to which they have access. In addition, we believe that the recent effort by representatives of the real estate industry to begin to develop and promote the use of both model

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<sup>54</sup> See Letter from Frank Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, FCC, dated June 20, 2000.

<sup>55</sup> *Id.*

<sup>56</sup> See Letter from Matthew C. Ames, Counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, dated July 3, 2000 (enclosing article from June 16, 2000 edition of *Commercial Property News* entitled "Demetree, Hornig Stress Tenant Needs").

<sup>57</sup> See Letter from Kathleen Q. Abernathy, Counsel for Broadband Office, to Magalie Roman Salas, Secretary, FCC, dated May 17, 2000 (enclosing news article entitled "Birth of a BLEC: Service Providers Jump at Chance to Win Over MTU [multi-tenant unit] Audience").

contracts and best practices is a positive step. At the same time, however, we are concerned that the overall pace of the development of the market is sluggish. Based on information in the record, there are over 1.75 million MTEs and, more than four years after the passage of the 1996 Act, facilities-based competitive LECs have access to only a small percentage of these locations. As a result, all too often consumers are left without any choices with regard to the provision of local telecommunications service. Indeed, the record demonstrates that there are at least some circumstances in which building owners have both the ability and incentive to extract excessive profits from the provision of telecommunications services by unreasonably restricting competitive LECs' access to their buildings. While building owners have introduced evidence that tenant mobility constrains their exercise of market power, and that the maximum amount of revenue a building owner could obtain from telecommunications is small compared to the revenues that would be put at risk if tenants were denied the services they want,<sup>58</sup> competitive LECs have provided countervailing evidence suggesting that the costs of relocation and the length of leases often prevent tenants from exerting their will.<sup>59</sup> As a result, we find that the evidence supports the conclusion that, at least in some instances, building owners exercise market power over telecommunications access.

24. In addition to the market power exerted by building owners, we also find that incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs. Although competitive LECs are rapidly building customer base and gaining market share, they still account for less than six percent of local market revenues.<sup>60</sup> Even within their relatively small share of the local market, the revenues of competitive LECs come primarily from special access and local private line services rather than from switched service to end users.<sup>61</sup> Thus, because incumbent LECs still serve the vast majority of customers, they continue to control most facilities useful to the provision of telecommunications service to MTEs that are not controlled by the MTE owners. In the absence of effective regulation, they therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers.

## **B. Exclusive Contracts**

### **1. Background**

25. In the *Competitive Networks NPRM*, we requested comment on whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners.<sup>62</sup> Further, we sought comment on whether we have the authority to forbid common carriers from entering into exclusive contracts with building owners or managers under Section 201 of the Communications Act, which prohibits unjust and unreasonable practices. In addition, we sought comment on the appropriate scope of any rule against exclusive contracts, and how such a rule should be implemented. We asked commenters to address whether a ban on exclusive contracts would be

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<sup>58</sup> Real Access Alliance Comments at 8-9.

<sup>59</sup> Teligent Comments at 11; WinStar Comments at 18.

<sup>60</sup> See *Local Telephone Competition at the New Millennium (Summarizing December 31, 1999 data from Forms 477 and 499-A)*, Common Carrier Bureau, Industry Analysis Division, August 2000, [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/LAD/lcom.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/LAD/lcom.pdf) at 3.

<sup>61</sup> See *Local Competition Report*, Common Carrier Bureau, Industry Analysis Division, August 1999, <http://www.fcc.gov/ccb/stats/lcomp98.pdf> at 1.

<sup>62</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12706-12707, ¶¶ 61 and 64.

an effective means of securing nondiscriminatory access, and whether such a rule should apply to all telecommunications carriers and contracts or only in some situations, such as unreasonably long contracts or contracts involving carriers with market power.<sup>63</sup> Finally, we requested comment on the legal and policy issues and practical implications of either abrogating existing exclusive contracts or allowing them to remain in force, including any constitutional issues.<sup>64</sup> We noted that the Nebraska Public Service Commission has already prohibited exclusive contracts and marketing agreements between telecommunications companies and property owners, except for contracts and agreements involving condominiums, cooperatives, and homeowners' associations.<sup>65</sup>

26. By and large, most commenters on this issue, including both incumbent LECs and competitive LECs, support a ban on exclusive access contracts.<sup>66</sup> Commenters argue that exclusive access contracts remove choice from the consumer and eventually adversely affect service quality, rates, and innovation since an exclusive carrier lacks the threat of competition within the MTE, thereby removing the incentive to provide quality service.<sup>67</sup> AT&T asserts that the Commission should prohibit incumbent LECs from entering into or enforcing exclusive service agreements with building owners because such agreements allow the incumbent LECs to "lock up" multiple tenant buildings before competition has had an opportunity to develop.<sup>68</sup> A few parties, however, argue that exclusive contracts are necessary under some circumstances in order for competitive carriers to achieve a sufficient return on their investment in serving a building.<sup>69</sup> If exclusive contracts are not permitted, those parties argue, competitive providers simply will not take the risk of entering many buildings, and tenants of those buildings will experience none of the benefits of competition at all. In a recent *ex parte* filing, Real Access Alliance distinguished between residential and commercial markets, arguing that exclusive contracts should be forbidden in commercial buildings but permitted in the residential context.<sup>70</sup>

## 2. Discussion

27. Based on our review of the record, we will prohibit carriers, in commercial settings, from entering into contracts that effectively restrict premises owners or their agents from permitting access to

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Order Establishing Statewide Policy for MDU Access, Application No. C-1878/PI-23, slip op. at 4 (Neb. P.S.C. March 2, 1999) (*Nebraska MDU Order*).

<sup>66</sup> See, e.g., AT&T Comments at 25-27; Qwest Comments at 11; SBC Comments at 7; Teligent Comments at 17-19; WinStar Comments at 24-25.

<sup>67</sup> Teligent Comments at 17.

<sup>68</sup> AT&T Comments at 26.

<sup>69</sup> OpTel Comments at 18; Real Access Alliance Comments at 70.

<sup>70</sup> See Letter from Matthew C. Ames, counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, filed June 16, 2000 (June 16 Real Access Alliance Letter). See also Section V.B, *infra*. We note that the Commission's rules currently permit exclusive contracts for video programming services. See 47 C.F.R. Part 76; see also Telecommunications Services Inside Wiring Customer Premises Equipment, *Report and Order and Second Further NPRM*, CS Docket No. 95-184, 13 FCC Rcd 3659 at 3778-80, ¶¶ 258-266. (*Inside Wire Report and Order and Second Further NPRM*).

other telecommunications service providers.<sup>71</sup> The use of exclusive contracts in commercial settings poses a risk of limiting the choices of tenants in MTEs in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services.<sup>72</sup> In addition, the record provides no evidence that in commercial settings the ability to enter into exclusive contracts would have efficiency enhancing or pro-competitive effects.<sup>73</sup> Because the record is inconclusive about the likely competitive effects of exclusive contracts for the provision of telecommunications services in residential MTEs, however, we are seeking further information in the *Further Notice of Proposed Rulemaking* below. Moreover, we seek comment in the *Further Notice of Proposed Rulemaking* on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

28. An exclusive contract between a building owner and a telecommunications service provider can be viewed as a type of vertical restraint, or restraint affecting firms in two different markets. The economic analysis of such vertical controls—including, in the extreme, mergers of upstream and downstream firms—is complex. In general, such arrangements can be either beneficial or harmful to the public interest, depending on the precise environment in which they occur. Whether a particular restraint in a specific situation increases or decreases consumer welfare is often a widely debated subject among economic scholars.<sup>74</sup> One finding of the economic literature, however, is that vertically related firms may enter into long term or exclusive contracts that inefficiently deter or foreclose entry to a market and thus harm consumers.<sup>75</sup> We believe that exclusive contracts between building owners and telecommunications providers fit this model. Building owners and service providers may both find it advantageous to enter into such arrangements, yet those arrangements may nonetheless be harmful to MTE tenants.

29. For incumbent LECs, an exclusive contract may essentially constitute a device to preserve existing market power. First, an exclusive contract erects a barrier preventing other telecommunications firms from offering service to tenants in the building(s) covered by the contract. Second, where new entrants face fixed costs or otherwise have costs characterized by increasing returns to scale, the

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<sup>71</sup> See para. 37 *infra* for a discussion of the types of arrangements that would fall under this prohibition.

<sup>72</sup> The text of the rule that we adopt is set forth in Appendix B. We do not address in this section arrangements that give a preference to a particular carrier but do not effectively restrict the premises owner from permitting other providers access, such as exclusive marketing agreements. Rather, we seek comment on such arrangements in a *Further Notice of Proposed Rulemaking*. See Section V.C, *infra*.

<sup>73</sup> Several states have considered this issue and reached the same conclusion. In Connecticut, “[c]ontracts for access and wiring between telecommunications providers and [building] owners” cannot include “[a]ny term that grants an exclusive license to any telecommunications provider.” Conn. Gen. Stat. Ann. § 16-247c-6(a)(3) (1997). In Massachusetts, the Department of Telecommunications and Energy recently adopted a rebuttable presumption against exclusive contracts, noting that an exclusive contract “is more likely than not anticompetitive and, therefore, not conformable to statute.” Mass. DTE 98-36-A, Slip Op. At 30 (*Massachusetts Nondiscriminatory Access Order*). In Nebraska, the Public Service Commission (PSC) found exclusive contracts and marketing agreements between telecommunications companies and landlords to be “anti-competitive and . . . against public policy.” The Nebraska PSC further determined that “[e]xclusionary contracts are barriers to entry and marketing agreements can have a discriminatory effect.” *Nebraska MDU Order* at 6.

<sup>74</sup> See Jean Tirole, *The Theory of Industrial Organization*, Chapter 4, (1997).

<sup>75</sup> See *id.* at 187-198; Aghion, P. & Bolton, P., “Contracts as Barriers to Entry,” 77 *American Economic Review*, No. 3, 388-401 (June 1987).

existence of incumbent LEC exclusive contracts covering some buildings actually would make it more difficult for the entrants to serve other buildings economically. Thus, exclusive contracts between incumbent LECs and building owners may impede the development of competition in the market for local telecommunications service.

30. Although competitive LECs currently hold only a relatively small share of the local telecommunications market as compared to incumbent LECs, we believe that it is necessary to prohibit both competitive and incumbent telecommunications service providers from entering into exclusive access contracts in commercial settings, in order to ensure competitive neutrality in the market. Competitive providers are growing in this market, and new entrants are actively seeking to win customers, especially customers in commercial office buildings, that are now served by the incumbent LEC. In this environment, applying an exclusive contract prohibition only to the incumbent LEC could distort competitive outcomes and ill serve end user interests. Moreover, in the case of competitive LECs, an exclusive contract may essentially constitute a device to create market power. That is, such a contract could entrench a competitive LEC as the sole provider in a building—or as one of two providers, along with the incumbent LEC—and foreclose any further competition. We note that competitive LECs support a ban on exclusive access contracts for all telecommunications providers, as discussed below.

31. An exclusive contract may benefit a building owner when it possesses some market power over tenants, such as where tenants are already committed to long-term leases and moving costs are prohibitive. Where that is the case, building owners may have the ability and incentive to engage in behavior that does not maximize tenant welfare, including the possible use of exclusive contracts. The interests of tenants would not be accounted for in the arrangement between the building owner and the telecommunications provider. We find the assumption that building owners may possess such market power reasonable, at least as a short run matter. Although a tenant has the apparent option to express dissatisfaction with the building owner's choice of local telecommunications service provider by moving to a new building, this choice, as a practical matter, is often not available. The long duration of commercial leases, spanning from five to fifteen years,<sup>76</sup> and typically significant relocation costs may preclude or limit the feasibility of relocation (or the threat of relocation) as a remedy. In addition, zoning laws, environmental regulations, and similar constraints can impede the construction of new office space, resulting in persistent shortages in some local markets and conferring market power on existing owners.

32. We recognize that economic literature shows there are also circumstances in which exclusive contracts may be socially efficient and beneficial. For example, with an exclusive contract, a buyer may be able to obtain advantageous sales arrangements from sellers of goods or services, the benefit of which is then passed on to consumers.<sup>77</sup> In addition, where new, sophisticated services become available, as in telecommunications today, an exclusive contract may be needed in order to give the service provider the incentive to spend adequate resources educating and informing potential customers. We emphasize, though, that no party in this proceeding has argued that these potential benefits are present in the provision of telecommunications service in commercial MTEs. Indeed, the record lacks any evidence of benefits to competition or consumer welfare from the use of exclusive contracts in commercial settings, and commenters that would be subject to the prohibition on such contracts support it.<sup>78</sup> Unlike in the residential context, parties do not allege that exclusive contracts are necessary to give competitive

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<sup>76</sup> WinStar Reply comments, Exhibit 1, at 9 (Economic Analysis of the Market for Building Access).

<sup>77</sup> That is, the buyer may be offered a lower price on a per unit basis if the seller can guarantee the buyer's demand for the particular good or service will be high.

<sup>78</sup> See, e.g., AT&T Comments at 25; Bell Atlantic Comments at 5; GTE Comments at 16; Sprint Comments at 20.

providers incentives to provide options to tenants in commercial MTEs. For example, Real Access Alliance has argued that in the commercial context, a typical building generates enough revenue to support multiple providers.<sup>79</sup> Given the apparent lack of benefits in this context, we find that we should not allow exclusive contracts to restrict competitive access and consumer choice. Further, under these circumstances, we see no value in distinguishing among exclusive access arrangements based on the length of the contract or the market position of the carrier.

33. In residential markets, by contrast, we do not have enough information in this record to determine whether we should forbid exclusive contracts under some or all circumstances. Some parties argue that in the residential context, potential revenue streams from any one building are typically not enough to attract competitive entry without exclusive contracts.<sup>80</sup> These parties also argue that forbidding exclusive contracts would undermine our cable inside wiring rules by giving former cable providers rights to remain in the building.<sup>81</sup> Other parties argue that we should forbid exclusive contracts without distinction.<sup>82</sup> The record as a whole, however, lacks specific relevant information regarding residential MTEs.<sup>83</sup> We therefore are requesting further comment on whether to forbid or limit residential exclusive contracts, as well as on certain other specific issues relating to practices akin to exclusive contracts, in a *Further Notice of Proposed Rulemaking*.<sup>84</sup>

34. In sum, the record before us indicates that exclusive contracts for telecommunications services in commercial settings hold the potential for limiting tenants' choices, without any countervailing benefits. As noted earlier, an exclusive contract has the immediate and direct effect of limiting telecommunications choices to tenants in an affected building. Only by incurring the time, resources, and expense of actually relocating to another building (possibly even breaking a long-term lease) can a tenant obtain the access to choices we believe was contemplated by the 1996 Telecommunications Act. We note, however, that we view the need for a prohibition of exclusive contracts as primarily a temporary one designed to address a transitional problem. Two aspects of the current situation should change over time. First, competition in the provision of local telephony services will continue to grow, and once competition is well established in commercial markets, it is unlikely that contracts with building owners that are harmful to tenants would be sustainable. Second, over time the market power that building owners may take advantage of today will diminish, as tenants' existing lease

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<sup>79</sup> See June 16 Real Access Alliance Letter. Real Access Alliance states that an average-sized office building can yield over 13 times as much revenue as a medium-sized apartment building (\$240,000 vs. \$18,000) and a medium-sized office building can yield 4 times as much revenue as a medium-sized apartment building (\$360,000 vs. \$90,000).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* We note that by limiting the rule to commercial buildings, we generally avoid any possible effect on cable inside wiring rules because cable service providers typically do not serve commercial buildings.

<sup>82</sup> See Teligent Comments at 17-19; WinStar Comments at 25.

<sup>83</sup> For example, Real Access Alliance provides data for residential video, then concludes without additional support that the same reasoning applies to telecommunications. Parties arguing for a rule against all exclusive contracts do not address residential buildings specifically.

<sup>84</sup> See Sections V. B & V. C, *infra*. We also note that we have sought comment in another proceeding on whether we should forbid or limit exclusive contracts for video programming services. See *Inside Wiring Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd at 3778-80, ¶¶ 258-266.

arrangements expire and they are increasingly able to take advantage of opportunities to relocate to other existing or new office space offering preferable telecommunications services.

35. We conclude that we have authority to prohibit telecommunications carriers from entering into exclusive contracts with commercial building owners or their agents for the provision of service that necessarily and inseparably includes interstate exchange access service.<sup>85</sup> We agree with AT&T that exclusive contracts perpetuate the very “barriers to facilities-based competition” that the 1996 Act was designed to eliminate.<sup>86</sup> Similarly, WinStar argues that exclusive access contracts completely contradict the competitive mandate of the 1996 Act and, therefore, should be banned.<sup>87</sup> WinStar in particular contends that the Commission has jurisdiction to adopt rules prohibiting the incumbent LECs from entering into such arrangements since an exclusive access arrangement would render the Commission’s decision to require incumbent LECs to provide access to in-building wiring as an unbundled network element meaningless.<sup>88</sup> Given that, in today’s marketplace, exclusive contracts for telecommunications service in commercial settings impede the pro-competitive purposes of the 1996 Act and appear to confer no substantial countervailing public benefits, we find that a carrier’s agreement to such a contract is an unreasonable practice. Therefore, these contracts implicate our authority under Section 201(b) of the Act to prohibit unreasonable practices.

36. We note that existing exclusive contracts, in addition to new exclusive contracts, may be a barrier preventing customers from obtaining the benefits of the more competitive access environment envisioned in the 1996 Act, and that the Commission has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest.<sup>89</sup> We recognize, though, that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts. Thus, we are inclined to proceed cautiously in this area, and seek further comment in the *Further Notice of Proposed Rulemaking* on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

37. We emphasize that the prohibition on future exclusive contracts that we adopt today applies to all common carrier contracts in commercial settings that effectively restrict a building owner or its agent from providing access to any other telecommunications service provider. Thus, by “exclusive contract” we do not mean only a contract that gives the contracting provider the sole right to serve a building. Rather, we also proscribe, for instance, a contract with a competitive LEC that could permit

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<sup>85</sup> Section 201(b) expressly authorizes the Commission to regulate “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service,” to ensure that such practices are “just and reasonable.” 47 U.S.C. § 201(b). As the D.C. Circuit recently held, the Commission thus has undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation. See *Cable & Wireless v. FCC*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999).

<sup>86</sup> AT&T Comments at 25-26.

<sup>87</sup> WinStar Comments at 24-25.

<sup>88</sup> See WinStar Comments to *Second Further Notice of Proposed Rulemaking* in CC Docket No. 96-98 (rel. April 16, 1999) filed May 26, 1999 at 14.

<sup>89</sup> *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *Competition in the Interstate Interexchange Marketplace, Memorandum Opinion & Order on Reconsideration*, 10 FCC Rcd 4421, ¶ 5 n.15 (1995); *Competition in the Interstate Interexchange Marketplace, Report & Order*, 6 FCC Rcd 5880, ¶ 151 (1991).

access to that party and the incumbent, but deny access to any other competitor.<sup>90</sup> Similarly, we forbid any contract that would limit access to providers using a particular technology. In addition, we emphasize that contracts between building owners and local carriers that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access, are also prohibited. Finally, we note that contracts may be oral in nature. For the reasons discussed above, we find that all these types of contracts in the commercial context only hold the potential to restrict customer choice, and not to promote choice and competition. Thus, all fall within the rule we adopt today. Parties that allege that a carrier has entered into a contract in violation of the prohibition we adopt today may file a complaint with the Commission under Section 208 of the Act.<sup>91</sup>

38. We recognize that some premises are used for both commercial and residential purposes. First, we define “commercial” for purposes of this rule to encompass all non-residential uses, including, for example, government and non-profit offices.<sup>92</sup> Second, we address instances where a single premises includes both commercial and residential uses. In these cases, a building owner may choose to offer separate access agreements to the residential and commercial portions of the premises, in which case a carrier may enter into an exclusive contract to serve the residential area but not the commercial area. Where, however, a single access agreement covers the entire premises, we find it most consistent with the purposes of our rule to determine its status as residential or commercial by predominant use. Thus, for example, an apartment building that includes retail or professional establishments on the ground floor would be considered residential, whereas an office building that includes one or a few residential users would be considered commercial. We believe that in most instances the predominantly residential or commercial character of a property will be clear on the facts. To the extent there is a question whether a particular property is predominantly residential or commercial in use, we will decide such disputes on a case-by-case basis.

39. We believe that today’s action will have little effect, if any, on existing state statutes and regulations governing exclusive telecommunications contracts. First, to the extent any state law prohibits exclusive contracts more broadly than our rule, that prohibition would not conflict with our rule and would remain enforceable. Thus, for example, states may continue to forbid exclusive contracts in residential as well as commercial settings.<sup>93</sup> Second, based on the record, it appears that states which have enacted exclusive contract regulations either have been more rigorous than our rules or have paralleled the principles of our regulation in important respects.<sup>94</sup> Thus, while state regulation that

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<sup>90</sup> We note that the State of California similarly bars *de facto* exclusive contracts. California “prohibit[s] all carriers from entering into any type of arrangement with private property owners that has the effect of restricting the access of other carriers to the owners’ properties or discriminating against the facilities of other carriers such as [competitive LECs].” *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, 1998 WL 1109255, Slip Op. at 48 (Cal. P.U.C. Oct 22, 1998).

<sup>91</sup> See 47 U.S.C. § 208.

<sup>92</sup> We note that hotels, or similar establishments, are not covered by the prohibition against exclusive contracts because hotel guests are not “tenants” within the meaning of our rules. At the same time, to the extent that a hotel itself is a tenant in a commercial building, our prohibition against exclusive contracts would apply. Thus, a telecommunications carrier providing service in an MTE that includes a hotel as one of its tenants would be prohibited from entering into an exclusive contract.

<sup>93</sup> See, e.g., *Nebraska MDU Order* at 6; Conn. Gen. Stat. Ann. § 16-2471 (1997); *Massachusetts Nondiscriminatory Access Order* at 30; 16 Tex. Admin. Code § 26.129 (Sept. 7, 2000).

<sup>94</sup> For example, Massachusetts permits a service provider or property owner to rebut the presumption that an exclusive contract is anticompetitive by showing that the contract benefits tenants and is therefore in the public (continued....)

conflicted with our rules on exclusive contracts would potentially be subject to preemption, we do not believe as a practical matter this situation will arise very often. However, to the extent any state's law is alleged to directly conflict with our rules, we will consider the alleged conflict if necessary on a case-by-case basis.

40. Also, we note that our rule is not intended to prevent a premises owner from entering into an exclusive contract when it is acting as a purchaser of telecommunications service on behalf of its affiliated entities, such as subsidiary units, or employees. For example, we recognize that certain state governments develop and administer exclusive contracts for the public agencies or offices under their jurisdiction. Similarly, a college or university may enter into an exclusive contract on behalf of its affiliated schools, departments, faculty, and staff.<sup>95</sup> Given that the purpose of our prohibition on exclusive contracts is to ensure consumer choice, it would not be consistent with this purpose to restrict exclusive arrangements with property owners that are affiliated in this manner with their tenant consumers, and we therefore do not reach such arrangements.

### C. Access to Wiring

41. In this section, we take the following actions regarding the demarcation point that marks the division between telecommunications network wiring under LEC control and wiring under building owner/end user control: (1) clarify that the Commission's demarcation point rules, including the revisions adopted in this section, govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these facilities for purposes of installation and maintenance; (2) establish procedures to facilitate the relocation of the demarcation point to the MPOE at the building owner's request in MTEs; (3) require LECs to disclose the location of the demarcation point where it is not located at the MPOE; and (4) resolve pending issues in the Commission's demarcation point proceeding in CC Docket 88-57. We believe that these actions will facilitate access to telecommunications inside wiring by competitive providers of local telecommunications services.<sup>96</sup> In addition, we decline to require a uniform relocation of the demarcation point to the MPOE for the reasons discussed below.

#### 1. Background

42. In the *Competitive Networks NPRM*, we requested comment on how our rules governing the location of the demarcation point between facilities controlled by the local telephone carrier and the

(Continued from previous page)

interest, considering such factors as the duration of the contract, the contracting provider's status as a new entrant, the effect of the exclusive contract on the development of competition and new technology, and efficiency benefits. *Massachusetts Nondiscriminatory Access Order* at 30. Similarly, our regulations permit the waiver of any provision of our rules for good cause shown. See 47 C.F.R. § 1.3 (rules may be suspended, revoked, amended, or waived for good cause shown). Thus, in order to comply with both the Massachusetts and the federal regulations, a provider seeking to enter into an exclusive contract must both make the required public interest showing before the Massachusetts Department of Telecommunications and obtain a waiver from the Commission.

<sup>95</sup> See Education Parties Comments at 10.

<sup>96</sup> We note that the *Competitive Networks NPRM* also raised the issue of whether the Commission should amend its rules governing cable inside wiring so that telecommunications service providers, as well as multichannel video programming distributors (MVPDs), can take advantage of procedures governing the disposition of home run wiring when an incumbent MVPD no longer has a legally enforceable right to maintain its home run wiring in a building. As discussed in the Further Notice of Proposed Rulemaking, Section V.E, *infra*, we conclude that we lack sufficient information in the record to determine whether to take this action, and seek further comment on the issue.

property owner in multiple unit premises impact competitive provider access and whether modification of those rules is appropriate to promote competitive access.<sup>97</sup>

43. At the time the current telecommunications inside wiring rules were established, there existed essentially no competition in the market for the provision of local telephone services. In the time since the enactment of the Telecommunications Act of 1996, many competitive LECs have begun providing services that were once the exclusive domain of the incumbents. There is evidence, however, that continued incumbent control over much of the wiring in some MTEs has hindered the development of facilities-based competitive LECs as viable competitors by unnecessarily requiring them to deal with their competitors in order to serve these locations.<sup>98</sup> On the other hand, other parties argue that building owner control over inside wiring obstructs the growth of competitors that use unbundled local loops, because they would often not otherwise need to deal with the building owner.<sup>99</sup> In addition, some argue that the Commission's rules create confusion regarding the location of the demarcation point and have permitted demarcation points to be located at inaccessible places.

44. The Commission adopted its demarcation point rules in 1984, in order to foster competition in the market for installation and maintenance of telecommunications inside wiring – the wiring that connects customer premises equipment (CPE) to the public switched telephone network (PSTN) and to other CPE.<sup>100</sup> The new rules established a “demarcation point” that marks the end of wiring under control of the LEC and the beginning of wiring under the control of the property owner or subscriber.<sup>101</sup> Thus, the new rules permitted telecommunications subscribers and premises owners to assume or assign responsibility for installation and maintenance of inside wiring, which previously had been managed solely by the LECs under tariff.<sup>102</sup>

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<sup>97</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12708-9, ¶¶ 65-67.

<sup>98</sup> See, e.g. *Teligent Comments* at 78; *WinStar Comments* at 67.

<sup>99</sup> See letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Leon Jackler, Staff Attorney, FCC, dated Aug. 24, 2000 (*Covad Letter*). Further, building owners would not be obligated to provide “conditioned” lines capable of transmitting Digital Subscriber Line (DSL) signals, as are incumbent LECs.

<sup>100</sup> See *Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning the Connection of Telephone Equipment, System and Protective Apparatus to the Telephone Network, First Report and Order*, CC Docket No. 81-216, 97 FCC 2d 527 (1984) (*1984 Demarcation Point Order*); 47 C.F.R. §§ 68.3, 68.213.

<sup>101</sup> See 47 C.F.R. § 68.3. This section currently defines the Demarcation Point for multiple unit premises as follows: “(1) In multiunit premises existing as of August 13, 1990, the Demarcation Point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable. (2) In multiunit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing as of that date, the telephone company may establish a reasonable and non-discriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. . . .” *Id.*

<sup>102</sup> See *1984 Demarcation Point Order*, 97 FCC 2d 527. In several related orders, the Commission determined that the installation and maintenance of inside wiring no longer constituted a common carrier offering under Title II of the Communications Act and therefore detariffed the installation and maintenance of inside wiring. See *Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies Required by* (continued....)

45. In 1990, the Commission revised the demarcation point definition to increase the amount of wiring that may come under the control of the property owner or subscriber.<sup>103</sup> At the same time, in the case of MTEs, the Commission sought to make the definition flexible enough to accommodate existing buildings. Therefore, in multi-tenant buildings existing as of August 13, 1990, the demarcation point is determined in accordance with the carrier's reasonable and nondiscriminatory practices. For new installations, or major renovations, subsequent to August 13, 1990, the carrier may establish a practice of placing the demarcation point at the MPOE.<sup>104</sup> Where the carrier chooses not to do so, the premises owner may determine the location or locations of the demarcation point.<sup>105</sup>

46. In 1997, the Commission again revisited the issue of the demarcation point on reconsideration of the *1990 Demarcation Point Order and Further NPRM*.<sup>106</sup> The Commission clarified that the relocation of the demarcation point to the MPOE cannot be undertaken unilaterally by the incumbent LEC without the property owner's consent, except in the case of major modifications, renovations, or rearrangements.<sup>107</sup> The Commission further stated that, for the purposes of Section 68.3, a request for relocation by the property owner would be considered a major modification or rearrangement of the wiring.<sup>108</sup> The *1997 Demarcation Point Order* also included a Further Notice of Proposed Rulemaking that requested comment on, among other issues, proposed modifications to the demarcation point rule.<sup>109</sup> Two petitions for clarification and reconsideration were filed in response to issues discussed on reconsideration in the *1997 Demarcation Point Order*.<sup>110</sup> In January, 2000, the Commission released an order

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Detariffing of Customer Premises Equipment and Proposed Detariffing of Customer Provided Cable Wiring, CC Docket No. 82-681, *Report and Order*, 48 Fed. Reg. 50534 (1983); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Second Report and Order*, 51 Fed. Reg. 8498 (1986); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd. 1190 (1986).

<sup>103</sup> See *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 88-57, 5 FCC Rcd 4686 (1990). (*1990 Demarcation Point Order and Further NPRM*).

<sup>104</sup> The MPOE is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3.

<sup>105</sup> We note that the definition of the demarcation point for telephone company communications facilities is not identical to the demarcation point definition for cable television facilities for purposes of the cable inside wiring rules. 47 C.F.R. § 76.6(mm). In 1997, we declined to establish uniform rules to govern the demarcation point for cable and telephone service providers. See *Inside Wire Report and Order and Second Further NPRM*, 13 FCC Rcd at 3719-30, ¶¶ 129-151.

<sup>106</sup> See, *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules* filed by the Electronic Industries Association, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 88-57, RM-5643, 12 FCC Rcd 11897 (1997) (*1997 Demarcation Point Order*).

<sup>107</sup> *Id.* at 11915.

<sup>108</sup> *Id.* at n.104.

<sup>109</sup> *Id.*

<sup>110</sup> One petition requested that the Commission clarify that it intended to give only prospective effect to its interpretation of the demarcation point definition in the *1997 Demarcation Point Order*. Bell Atlantic Petition for (continued....)

that addressed issues regarding the enhanced wire quality standards raised in petitions relating to the *1997 Demarcation Point Order*.<sup>111</sup> However, the order deferred consideration of the remaining demarcation point issues raised in the two petitions for clarification and reconsideration to the *Competitive Networks* proceeding.

47. As noted above, the current inside wiring rules do not specifically contemplate the new and complex issues involved with competition in the market for local telecommunications services. To this end, in the context of promoting competition for the provision of telecommunications service in MTEs, the *Competitive Networks NPRM* requested comment on how the Commission's existing rules governing the location of the demarcation point impact competitive provider access to inside wiring in MTEs.<sup>112</sup> In particular, the *Competitive Networks NPRM* asked commenters to consider whether the Commission should adopt a uniform demarcation point for purposes of competitive access, either at the MPOE or at some other point, for all or some class of multiple-unit premises owners. In addition, the *Competitive Networks NPRM* asked commenters to consider whether the person who controls wire and related facilities for purposes of installation and maintenance must necessarily be the same person who exercises control for purposes of competitive access, and, if not, whether we should apply different standards for each of these purposes.

48. The *Competitive Networks NPRM* also sought comment on the potential treatment of inside wiring owned or controlled by an incumbent LEC as an unbundled network element under Section 251(c)(3) of the Communications Act.<sup>113</sup> In November, 1999, the Commission issued the *UNE Remand Order*,<sup>114</sup> which established as an unbundled network element the "inside wire" sub-loop. That order defined the loop element as terminating at the demarcation point and required incumbents to make available on an unbundled basis any portion of the local loop as a subloop element, including that portion between the property line and the demarcation point. The *UNE Remand Order* further required incumbent LECs to allow interconnection at any accessible terminal, and to establish a single point of interconnection (SPOI) upon a request from a competitive provider where such a point does not already exist.

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Clarification and Reconsideration of the *1997 Demarcation Point Order* (Bell Atlantic Petition) at 2. The other petition requested that the Commission clarify that its statement in footnote 104 does not authorize unilateral changes by the premises owner to demarcation point location. BellSouth Petition for Clarification and Reconsideration of the *1997 Demarcation Point Order* (BellSouth Petition) at 3-4.

<sup>111</sup> Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Third Report and Order*, 15 FCC Rcd 927 (2000) (*2000 Demarcation Point Third Report and Order*).

<sup>112</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12708, ¶ 65.

<sup>113</sup> See 47 U.S.C. § 251(c)(3) (requiring incumbent LECs to provide requesting telecommunications carriers unbundled access to elements of their networks on just, reasonable, and nondiscriminatory terms). In 1996, pursuant to Congress' mandate in Section 251, the Commission promulgated rules establishing unbundled network elements (UNEs), and directed incumbent LECs to make them available to competitors. *Local Competition First Report and Order*, 11 FCC Rcd at 15697-99, ¶¶ 392-397; see 47 C.F.R. § 51.319(b). The rules were challenged and remanded to the Commission for clarification of the standards by which UNEs were defined. *Iowa Utilities Board*, 525 U.S. 366. In April, 1999, the Commission sought comment on these standards. See *Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, 14 FCC Rcd 8694 (1999).

<sup>114</sup> See *UNE Remand Order*.

## 2. Discussion

### a. Application of Demarcation Point Rules to the Provision of Competitive Telecommunications Service

49. As discussed above, the Commission's Part 68 demarcation point rules were designed to enable the creation of a competitive market in the installation and maintenance of inside wiring, and did not contemplate the use of that wiring to provide competitive local telecommunications service. In light of the developing competition spawned by the 1996 Act, and the subsequent need for competitive providers to gain access to inside wiring, we will apply our demarcation point rules to facilitate access to inside wiring for the purpose of providing competitive local telecommunications service. Thus, we clarify that the Commission's demarcation point rules, including the revisions adopted below, govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these facilities for purposes of installation and maintenance. In the sections below, we adopt several revisions to our demarcation point rules that we believe will foster competition in the local telecommunications market in MTEs, while maintaining the competitive framework for the installation and maintenance of inside wiring.

### b. Location of the Demarcation Point

50. A number of commenters contend that uniformly establishing the demarcation point at the minimum point of entry would promote facilities-based competitive access to MTEs.<sup>115</sup> As discussed above, there is evidence in the record that incumbent LECs in many instances are using their control over on-premises wiring to obstruct or delay competitive access.<sup>116</sup> Placing the demarcation point at the MPOE would eliminate the potential for such abuses by permitting competitive carriers to obtain access to inside wire by dealing solely with the premises owner. While our unbundling rules adopted in the *UNE Remand Order* provide requesting carriers with a right of non-discriminatory access to inside wire owned or controlled by incumbent LECs, requesting carriers claim they continue to face difficulty gaining access to MTEs due to incumbent obstruction. Moving the demarcation point, they state, would allow all facilities-based carriers to interconnect with the inside wiring, which would be controlled by the premises owner, at the same point and on the same terms.<sup>117</sup>

51. The record indicates, however, that establishing the demarcation point at the MPOE would disadvantage those competitive LECs that rely on leasing unbundled loops, including most DSL<sup>118</sup> providers, by limiting the availability of the inside wire as part of the loop element.<sup>119</sup> Currently, where the demarcation point is at or near the customer's unit, competitive LECs may obtain access to the incumbent LEC's existing wiring inside the building as part of the unbundled loop (or as a separate subloop element). Relocation of the demarcation point to the MPOE, however, would result in a

<sup>115</sup> See ALTS Comments at 22; AT&T Reply Comments at 25; WinStar reply Comments at 61; see also GTE Comments at 7-8.

<sup>116</sup> See Section IV. A, *supra*.

<sup>117</sup> See Teligent Comments at 80.

<sup>118</sup> Digital Subscriber Line (DSL) is a broadband data protocol that provides service over the high frequency portion of conventional copper lines. It is most commonly provided by collocating facilities in a central office of the incumbent LEC and transmitting the signal over unbundled local loops.

<sup>119</sup> See Covad Letter.

decrease in the amount of wiring within the building that is available to competitive LECs as part of the loop, which by definition ends at the demarcation point.<sup>120</sup> Thus, competitive LECs that rely on unbundled loops would have to negotiate with both the incumbent LEC and the building owner for each building they seek to serve, thus increasing their costs significantly. Those commenters also raise the possibility that certain building owners would refuse to allow access at all or impose terms which would make the provision of service infeasible. Moreover, commenters allege, their problems are exacerbated by the practice of some incumbent LECs of leaving wires unconnected at the demarcation point, when it is located at the MPOE. This practice not only requires competitive LECs to incur the expense of dispatching their own technicians to the building, but draws the attention of the premises owner to the possibility of extracting concessions from carriers for access to the wiring.<sup>121</sup>

52. Further, several commenters argue that uniformly moving the demarcation point would give rise to legal and practical difficulties, especially in existing buildings.<sup>122</sup> These arguments are not without merit. It is indisputable that the incumbent LECs have made considerable investments over the years in network facilities, and while much of that investment has likely been depreciated or recouped in the rate base,<sup>123</sup> the facilities remain of some value to the incumbents. We agree with GTE that requiring a uniform relocation in existing buildings would be an enormous undertaking.<sup>124</sup>

53. In light of these concerns, we decline to mandate a uniform demarcation point at the MPOE. The record shows that although moving the demarcation point to the MPOE would reduce costs and facilitate deployment for competitive LECs that rely on their own facilities to reach MTEs, it would increase costs and hinder deployment for carriers that rely on unbundled local loops. In the absence of convincing evidence that the benefits to one group of competitors would significantly outweigh the harms to the other, we find the best course is to continue to leave the choice in the first instance to the building owner.

54. At the same time, we take several actions to clarify the building owner's options and facilitate its exercise of its options for the benefit of competition.<sup>125</sup> First, we clarify that in all multiunit

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<sup>120</sup> See *UNE Remand Order*, 15 FCC Rcd at 3773, ¶168.

<sup>121</sup> Whether this practice is consistent with the goals of the 1996 Act is beyond the scope of this proceeding, and we therefore decline to comment on it here.

<sup>122</sup> See Bell Atlantic Comments at 9; BellSouth Reply Comments at 17.

<sup>123</sup> See CAIS, Inc. Reply Comments at 6.

<sup>124</sup> See GTE Reply Comments at 6.

<sup>125</sup> We do not credit several arguments suggesting that we reduce the likelihood that the location of the demarcation point will be at the MPOE. For example, we find no support for BellSouth's assertion that service quality would suffer if the demarcation point were moved, nor for its assertion that it would lose good will with its customers because of problems with inside wiring no longer under its control. BellSouth Comments at 8. The record also does not support BellSouth's claim that property owners will not be able to undertake responsibility for wiring their premises. *Id.* at 19-20. Indeed, the Real Access Alliance has stated that its members advocate having such choice in the hands of premises owners and feel it is the best way to provide tenants with choice in advanced telecommunications services. See June 16 Real Access Alliance Letter. We also reject the argument of BellSouth that permitting building owners to control the inside wiring would discourage the placement of fiber facilities in the building and thus discourage the provision of advanced services. We believe that where demand for advanced services exists, there will be sufficient incentive for incumbent LECs, competitive LECs and other third parties to undertake the installation of fiber facilities regardless of the location of the demarcation point. Moreover, contrary (continued....)

premises, the incumbent carrier must move the demarcation point to the MPOE upon the premises owner's request. Section 68.3(b)(2) specifies that in multiunit premises in which inside wiring is installed or subject to a major modification after August 13, 1990, if the carrier does not elect to place the demarcation point at the MPOE, the premises owner shall determine the number and location of the demarcation point or points (e.g., a single point at the MPOE).<sup>126</sup> In the *1997 Demarcation Point Order*, the Commission found that a multiunit premises owner's request to move the demarcation point to the MPOE constitutes a major modification for the purposes of Section 68.3(b)(2).<sup>127</sup> Thus, even in multiunit premises in which the original wiring was installed prior to August 13, 1990, the premises owner may require the carrier to move the demarcation point to the MPOE. We disagree with BellSouth's assertion in its petition for clarification and reconsideration of the *1997 Demarcation Point* that the premises owner should be required to negotiate changes in the demarcation point location with the carrier serving the building.<sup>128</sup> We believe that it would impede the development of facilities-based competition if a carrier could refuse a premises owner's request to move the demarcation point to the property line in order to prevent the connection of inside wiring to a competitive carrier. Thus, we affirm that under Section 68.3 of the Commission's rules, a carrier must move the demarcation point to the MPOE upon the request of a multiunit premises owner, and we deny BellSouth's petition.

55. Second, although we have previously required incumbent LECs to move the demarcation point to the MPOE at the premises owner's request, we have left the terms of relocation and the procedures for negotiating those terms up to the parties involved. The comments of building owners are generally favorable to these rules giving the owner the right to request that the demarcation point be placed at the MPOE.<sup>129</sup> However, the record indicates that the lack of any guidelines for such terms may provide a disincentive for the parties to negotiate effectively. We hold that in order to further competition, a request by a property owner to relocate the demarcation point to the MPOE must be dealt with in a reasonably timely and fair manner, so as not to unduly delay or hinder competitive LEC access. We therefore direct incumbent LECs to conclude negotiations with requesting building owners in good faith and within 45 days of the initial request. Building owners may file complaints with the Commission for resolution of allegations of bad faith bargaining by LECs.<sup>130</sup> As each situation will vary greatly depending on such characteristics as the age and complexity of the inside wiring, and any previous agreements and practices, we find that this approach will facilitate competition, while protecting the valid property interests of the parties.<sup>131</sup> These rules will apply as well to competitive LECs where they have installed or have had control of the inside wiring.

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to BellSouth's contention, the record indicates that building owners would be willing to pay for and maintain such facilities.

<sup>126</sup> 47 C.F.R. § 68.3(b)(2).

<sup>127</sup> See *1997 Demarcation Point Order*, 12 FCC Rcd at 11915 n.104; see 47 C.F.R. § 68.3(b)(2).

<sup>128</sup> BellSouth Petition at 4.

<sup>129</sup> See Real Access Alliance comments at 59.

<sup>130</sup> See 47 U.S.C. § 208; 47 C.F.R. §§ 1.720-1.736 (1999).

<sup>131</sup> In this context we see no reason to distinguish between buildings constructed prior to and after August 13, 1990. Therefore we hold that these rules shall apply to all existing buildings regardless of when constructed.

56. The record further indicates that uncertainty as to the actual location of the demarcation point leads to confusion on the part of both building owners and competitive LECs.<sup>132</sup> This confusion can lead to additional expense and delay in the provision of service. Competitive LECs need this information in order to know with which party to negotiate interconnection to the inside wiring. The record contains instances where neither or both the incumbent LEC and building owner claimed ownership of the inside wire, causing delay in the ability of the competitive LEC to commence service to its customers.<sup>133</sup> While our current rules require that incumbent LECs must make the location of the demarcation point available to building owners upon request by the owner, we are concerned that the information may not be provided in as prompt a manner as it reasonably should be.<sup>134</sup> The incumbent LECs are generally in the best position to know the location of the demarcation point, and we believe that they should not be permitted to use their control over such non-proprietary information in order to frustrate competition. Because excessive delay may impose unnecessary costs and impede competition, we hold that if an incumbent LEC fails to produce this information within ten business days of the request, the premises owner may presume the demarcation point to be located at the MPOE. The availability of this information will facilitate fair negotiations, and may even negate the need for any negotiations where, for example, the building owner was unaware that the demarcation point is already at the MPOE. We further require that where LECs do not establish a practice of placing the demarcation point at the MPOE, they fully inform building owners, at the time of installation, of their options regarding placement.

57. Finally, we note that where the building owner chooses to locate the demarcation point at the MPOE, responsibility for installation and maintenance may be contracted out to the incumbent LEC, a competitive LEC or other third party,<sup>135</sup> but control, including determining terms of access, would lie with the building owner. We require that where such duties are contracted to a carrier that is also providing service to that building, the carrier must deal with other LECs on nondiscriminatory terms. Similarly, we expect that those building owners who choose to take control of the inside wiring will exercise that control in a nondiscriminatory way, consistent with the goals of the Telecommunications Act and the public interest.<sup>136</sup>

58. We anticipate that the measures described above will substantially reduce the potential for incumbent LECs to obstruct competitive access to MTEs. These changes will facilitate building owners' exercise of their option to relocate the demarcation point in existing buildings, and prevent incumbent LECs from abusing their control over information regarding the location of the demarcation point. Moreover, we emphasize that to the extent incumbent LECs continue to exercise control over on-

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<sup>132</sup> See Real Access Alliance Comments at 60; BlueStar Communications Reply Comments at 2.

<sup>133</sup> *Id.*

<sup>134</sup> See 47 C.F.R. § 68.110(c). This section of the Commission's Rules requires LECs to make available all technical information regarding the configuration of wiring on the customer's side of the demarcation point, but it does not require that it do so in a specified time. Further, while this section allows the LEC to charge reasonable costs for this technical information, we believe that any costs incurred in providing the location of the demarcation point would be *de minimis* and that the LECs should provide this information freely.

<sup>135</sup> This arrangement would be similar to that in single unit residential properties, where the customer has the option to pay a monthly fee to the incumbent LEC for inside wiring maintenance while retaining ownership and control of that wiring.

<sup>136</sup> See September 6 Real Access Alliance Letter.

premises wiring, they must afford access to that wiring as a UNE at forward-looking prices.<sup>137</sup> In light of all these safeguards, we believe it is not necessary or prudent at this time to mandate a uniform move of the demarcation point to the MPOE. Moreover, we believe that it is unnecessary at this time to provide further guidance on legal or technical feasibility issues related to subloop unbundling.

**c. Remaining Issues in CC Docket No. 88-57**

59. As discussed above, several parties filed petitions for reconsideration of the *1997 Demarcation Point Order*. Those petitions that did not relate to the demarcation point and control over access were resolved earlier this year.<sup>138</sup> However, we determined at that time to defer resolution of those petitions related to the demarcation point, as well as certain issues on which we sought further comment in the *1997 Demarcation Point Order* pending our action in this proceeding.

**3. Single Definition of Inside Wiring**

60. In the *1990 Demarcation Point Order and Further NPRM*, the Commission stated that the demarcation point definition applied to both simple and complex wiring installations.<sup>139</sup> In response, several petitions were filed asserting that the Commission did not comply with Section 5 of the Administrative Procedures Act (APA) because it provided insufficient notice indicating that a change in complex wiring rules was being considered.<sup>140</sup> In the *1997 Demarcation Point Order*, the Commission found that its revision of the demarcation point definition was proper under the APA because it was a "logical outgrowth" of the proceeding.<sup>141</sup> Noting petitioners' concerns about the Commission's decision to apply the revised demarcation point definition to complex wiring, however, the Commission inquired further into this issue in the *1997 Demarcation Point Order*.<sup>142</sup> Specifically, the Commission requested comment on its proposition that the single demarcation point definition, as revised, avoids the confusion that could result from separate demarcation point definitions for simple and complex wiring,<sup>143</sup> encourages placement of the demarcation point at the MPOE for new multitenant installations, and "foster[s] competition in the inside wiring installation and maintenance markets."<sup>144</sup>

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<sup>137</sup> To the extent parties raise issues regarding incumbent LEC compliance with the UNE rules, they are beyond the scope of this proceeding. Similarly, we do not address in this proceeding whether competitive LECs should also be required to afford access to wiring that they control within MTEs under some statutory authority other than Section 251(c)(3) of the Act.

<sup>138</sup> See *2000 Demarcation Point Third Report and Order*.

<sup>139</sup> Complex wiring is defined as those installations of four or more lines. See *1997 Demarcation Point Order*.

<sup>140</sup> See *1997 Demarcation Point Order*, 12 FCC Rcd at 11907; 5 U.S.C. § 553.

<sup>141</sup> Specifically, the Commission found that because the same demarcation point definition had always applied to both simple and complex wiring, the parties should have realized that a change in the demarcation point definition would be likely to apply to both simple and complex wiring installations. *1997 Demarcation Point Order*, 12 FCC Rcd at 11925; see also Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *Notice of Proposed Rulemaking*, CC Docket No. 88-57, 3 FCC Rcd 1120 (1988).

<sup>142</sup> *1997 Demarcation Point Order*, 12 FCC Rcd at 11925.

<sup>143</sup> *Id.* at 11926.

<sup>144</sup> See *1997 Demarcation Point Order*.

61. We agree with commenters that support a single definition of the demarcation point, as it applies to both simple and complex wiring. We developed and have maintained a single demarcation point definition for both simple and complex inside wiring installations because it is simple, and consistent, and promotes consumer control over inside wiring by restricting the extent of network wiring on the customer's premises, yet is flexible enough to respond to the demands of complex, multiunit inside wiring facilities design.<sup>145</sup> We agree with commenters that changing the definition at this time would needlessly risk disruption and confusion, and is not supported by the record.<sup>146</sup> Consequently, we affirm the decision in the *1997 Demarcation Point Order* maintaining the same demarcation point definition for both simple and complex wiring.

#### 4. Safety Concerns Regarding the Placement of the Demarcation Point Away from the Building

62. In the *1997 Demarcation Point Order*, the Commission declined to modify the demarcation point definition to prohibit placement of the demarcation point away from the building. Some petitioners in that proceeding had expressed concern that locating the demarcation point a substantial distance from the building in which telephone wire is located could raise safety concerns.<sup>147</sup> Noting that the National Electrical Code (NEC) requires the placement of surge protection at or near the building, these petitioners concluded that if a network protector is placed by the carrier at a demarcation point near the property line, and that demarcation point is a significant distance from the building, a second network protector should be installed where the wire enters the building.<sup>148</sup> The petitioners further opined that improper "coordination" between these two network protectors could pose a danger to telephone company personnel, customers, or private property.<sup>149</sup> Finally, the petitioners requested that the Commission modify its rules to prohibit location of the demarcation point away from a building, or clarify that the NEC precludes such placement.<sup>150</sup>

63. In the *1997 Demarcation Point Order*, the Commission responded to the petitioners by noting that building owners are generally responsible for safety standards and similar concerns relating to their property and equipment and that the record did not bear evidence of specific difficulties or problems relating to improper protector "coordination."<sup>151</sup> Nonetheless, the Commission requested additional comment on whether it should continue to allow the demarcation point and network protector to be

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<sup>145</sup> *1997 Demarcation Point Order*, 12 FCC Rcd at 11905-07.

<sup>146</sup> Multi-Media Telecommunications Association (MMTA) Comments on the *1997 Demarcation Point Order* at 1; Shared Communications Systems (SCS) Comments on *1997 Demarcation Point Order* at 2-3.

<sup>147</sup> The petitioners were AT&T, GTE, Southwestern Bell (SBC), and TIA. *1997 Demarcation Point Order*, 12 FCC Rcd at 11908, 11926.

<sup>148</sup> Specifically, petitioners argued that location of the demarcation point at the MPOE may require the installation of a second network protector at or near the building in order to comply with the NEC. *1997 Demarcation Point Order* 12 FCC Rcd at 11926-27.

<sup>149</sup> *1997 Demarcation Point Order*, 12 FCC Rcd at 11926. Network protector coordination refers to any activities required to ensure that the technical characteristics of multiple network protectors will not cause problems to the network or among themselves.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

located away from the building, at the property line.<sup>152</sup> The Commission also requested that commenters discuss, in the light of actual experiences, whether the presence and coordination of the second protector differs from other safety matters for which property owners are normally responsible.<sup>153</sup> Finally, the Commission solicited comments on the need to require carriers to inform building owners of the need for a second protector and protector coordination for demarcation points and network protectors that are located at the property line.<sup>154</sup>

64. All commenters on this issue in CC Docket 88-57 agree that the current demarcation point definition is reasonable and should not be modified to prohibit location of the demarcation point at the MPOE.<sup>155</sup> Commenters specifically mention that the current demarcation point definition is logical, is practical, affords customers and telephone companies needed flexibility, avoids needless disruption of current practices, and supports facilities-based competition.<sup>156</sup> While acknowledging the possibility of safety concerns,<sup>157</sup> commenters agree that there is no record of "significant safety problems" and advise that it would be "unnecessary and inappropriate" to obligate carriers to notify customers of the possible need for network protector coordination.<sup>158</sup> Commenters also agree that, where the demarcation point and the protector are located away from the building, building owners have the responsibility to ensure

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Ameritech Comments on 1997 Demarcation Point Order at 2-3; Bell Atlantic/NYNEX Comments on 1997 Demarcation Point Order at 1-2; GTE Comments on 1997 Demarcation Point Order at 3; SCS Comments on 1997 Demarcation Point Order at 2-3.

<sup>156</sup> Bell Atlantic/NYNEX Comments on 1997 Demarcation Point Order at 1-2; SCS Comments on 1997 Demarcation Point Order at 2-3. GTE notes that it has adopted a normal business policy of locating the demarcation point for simple inside wiring at the MPOE, and notes its agreement with the Commission's definition. GTE Comments on 1997 Demarcation Point Order at 3. Ameritech notes that the NEC does not refer to the demarcation point location, and that for various reasons property owners may prefer to limit the extent to which telecommunications service providers may intrude on their property. Ameritech also reports that its standard practice is to locate the demarcation point at the property line only for sophisticated commercial enterprises, as opposed to single tenant residences. Ameritech Comments on 1997 Demarcation Point Order at 2-3.

<sup>157</sup> GTE states that its company policy for wire extensions that serve separate buildings is to install protectors at both ends of any on-premises wire extension facility that could accidentally come into contact with power facilities carrying voltages of 300 volts or more, or those that extend to a separate building more than 75 feet away. In its initial comments, GTE acknowledges that the addition of the second protector may confuse tenants and building owners as to the location of the demarcation point. It therefore stresses the need for proper coordination among carriers and building owners to enable accurate identification of the demarcation point location, and supports a rule requiring parties that locate simple inside wiring demarcation points at the property line to inform premises owners and tenants of the need for a second protector and protector coordination. GTE Comments on 1997 Demarcation Point Order at 4-5. In its reply comments, however, GTE agrees with other commenters, now stating that "there is no need for the Commission to modify its rules to address safety and coordination of a second protector," and that "all necessary coordination can be achieved easily without a rule change." GTE Reply Comments on 1997 Demarcation Point Order at 3-4.

<sup>158</sup> Bell Atlantic/NYNEX Comments on 1997 Demarcation Point Order at 3; BellSouth Reply Comments on 1997 Demarcation Point Order at 3; GTE Reply Comments on 1997 Demarcation Point Order at 3-4.

that the building is protected, just as building owners generally bear a variety of obligations and responsibilities regarding safety standards and protection of their property.<sup>159</sup>

65. We find that permitting carriers to locate the demarcation point at or near the property line promotes a competitive telecommunications marketplace. We believe it would impede the development of facilities-based competition if a carrier could refuse a premises owner's request to move the demarcation point to the property line in order to prevent the connection of inside wiring to a competitive carrier. We further note the absence of reports that property owners are experiencing problems, or evidence that problems are likely to arise in relation to locating the demarcation point at the property line. Thus, we see no justification for imposing a requirement compelling carriers to inform property owners of the potential for problems, and we refrain from doing so.

##### 5. Prospective Effect of 1997 Demarcation Point Order

66. The Commission's rules state that the demarcation point for multiunit structures is to be determined "in accordance with the local carrier's reasonable and non-discriminatory standard operating practices."<sup>160</sup> In the *1997 Demarcation Point Order* the Commission clarified that the standard operating practices to which Section 68.3(b)(1) refers are those practices in effect on August 13, 1990.<sup>161</sup> Thus the rule does not authorize changing the demarcation point for an existing building to the minimum point of entry, except pursuant to Section 68.3(b)(2), *i.e.*, if the building owner makes major additions, modifications, or rearrangements in existing wiring. Bell Atlantic/NYNEX requests that the Commission give its clarification in the *1997 Demarcation Point Order* only prospective effect so that buildings in which the demarcation point were improperly moved after Section 68.3(b)(1) was adopted, but before the rules were clarified in the *1997 Demarcation Point Order*, would not be affected.<sup>162</sup> Alternatively, Bell Atlantic/NYNEX asks the Commission to reconsider this portion of the *1997 Demarcation Point Order* to give the proposed interpretation only prospective effect.

67. In the *1990 Demarcation Point Order and Further NPRM*<sup>163</sup> the Commission adopted rules to ensure that the demarcation point would not be located a significant distance from where wiring enters the customer's premises. In the *1997 Demarcation Point Order*, the Commission clarified that it did not intend in the *1990 Demarcation Point Order and Further NPRM* to permit carriers automatically to relocate demarcation points in multiunit buildings.<sup>164</sup> According to Bell Atlantic, some carriers interpreted the rules promulgated in the *1990 Demarcation Point Order and Further NPRM* to permit relocation of the demarcation point to the minimum point of entry, so long as that relocation was approved by the applicable state commission. Accordingly, Bell Atlantic filed tariffs with state

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<sup>159</sup> Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 3; GTE Reply Comments on *1997 Demarcation Point Order* at 4; SCS Comments on *1997 Demarcation Point Order* at 2-3.

<sup>160</sup> Section 68.3(b)(1) states, in relevant part, "[i]n multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices." 47 C.F.R. § 68.3(b)(1).

<sup>161</sup> See *1997 Demarcation Point Order*, 12 FCC Rcd at 11914; 47 C.F.R. § 68.3(b)(1).

<sup>162</sup> Bell Atlantic Petition.

<sup>163</sup> See *1990 Demarcation Point Order and Further NPRM*.

<sup>164</sup> *1997 Demarcation Point Order*, 12 FCC Rcd at 11914.

commissions, and in five jurisdictions, the state public utility commissions permitted Bell Atlantic to locate the demarcation point for all multiunit buildings at the MPOE.<sup>165</sup>

68. Although Bell Atlantic does not challenge the demarcation point location rules as clarified by the Commission in the *1997 Demarcation Point Order*, it pleads that it was not unreasonable for it and other carriers to have adopted a different interpretation in 1990. Bell Atlantic claims that it would be impossible now, seven years after the fact, for it to "unscramble the egg" and attempt to restore the demarcation points to the original 1990 locations in multiunit buildings in the five affected jurisdictions. Bell Atlantic also reports that the wiring in question has been fully amortized, control and maintenance of the wiring has been turned over to the building owners, and that those owners have likely modified, rearranged, or added to it. Bell Atlantic claims to have no way of knowing whether any such rearrangements or modifications were made, or which were "major," so as to take the building out of the pre-1990 category. Bell Atlantic states that it would be unreasonable to hold it responsible for maintaining wiring that building owners have controlled and maintained, properly or not, for several years. Furthermore, Bell Atlantic argues that moving demarcation points to the MPOE conforms to Commission policy. Finally, Bell Atlantic argues that it should not be penalized for actions taken in good faith and consistent with the Commission's substantive policy, even if those actions are inconsistent with the rule as clarified seven years after it was promulgated.

69. We grant Bell Atlantic's request, and clarify that the statement in paragraph 26 of the *1997 Demarcation Point Order* was intended to have only prospective effect, and does not require carriers to reestablish demarcation points moved under Section 68.3(b)(1) before clarification in the *1997 Demarcation Point Order*. Although our policy supports deference to building owners' choice of location for demarcation points, we recognize the difficulty of determining which demarcation point locations were improperly moved, and note the state public utilities commission approval of the policies under which the demarcation points were moved, indicating that the public interest had been adequately considered before the relocation activity took place. Thus, we find that the public interest will be better served by clarifying that our statement in paragraph 26 of the *1997 Demarcation Point Order*, regarding moving the demarcation point to the MPOE, was intended to have only prospective effect. Reversing the relocations and moving the demarcation point away from the MPOE appears unjustified, would contradict the Commission's policy of supporting location of the demarcation at or near the MPOE, and would be difficult to implement. Finally, there is no indication that granting Bell Atlantic's request will undermine the Commission's support for a competitive telecommunications market and facilities-based competition.

#### **D. Access to Conduits and Rights-of-Way**

##### **1. Background**

70. Section 224 of the Communications Act 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."<sup>166</sup> Congress enacted the original version of Section 224 in 1978 to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. Congress sought to prohibit utilities from engaging in "unfair pole attachments practices . . . and to minimize the effect of

<sup>165</sup> The demarcation point in multiunit buildings was moved to the minimum point of entry in Pennsylvania, Maryland, Virginia, West Virginia and Delaware.

<sup>166</sup> 47 U.S.C. § 224(f)(1).

unjust or unreasonable pole attachments practices on the wider development of cable television service to the public.”<sup>167</sup> In 1978, the Commission implemented the original Section 224 by issuing rules governing pole attachments issues and establishing a basic formula for cable pole attachments rates.<sup>168</sup> These rules have been reconsidered, amended and clarified by subsequent Commission orders.<sup>169</sup>

71. The 1996 Act amended Section 224 in important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.<sup>170</sup> Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.<sup>171</sup> Thus, in passing the 1996 Act, Congress intended to ensure that utilities’ control over poles, ducts, conduits, and rights-of-way did not create a bottleneck for the delivery of telecommunications services.

72. As amended by the 1996 Act, Section 224 defines a utility as one “who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications.”<sup>172</sup> Section 224, however, specifically excludes incumbent LECs from the definition of telecommunications carriers with rights as pole attachers.<sup>173</sup> Because, for purposes of Section 224, an incumbent LEC is a utility but is not a telecommunications carrier, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though the incumbent LEC has no rights under Section 224 with respect to the facilities of other utilities. This is consistent with Congress’

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<sup>167</sup> S. Rep. No. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 19, 20 (1977) (1977 Pole Attachments Act Senate Report).

<sup>168</sup> Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *First Report and Order*, 68 FCC 2d 1585 (1978); see also *Second Report and Order*, 72 FCC 2d 59 (1979) (*Pole Attachments Second Report and Order*); *Memorandum Opinion and Order in CC Docket No. 78-144*, 77 FCC 2d 187 (1980), *aff’d sub nom Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985); Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, *Report and Order*, 2 FCC Rcd 4387 (1987) (*1987 Pole Attachments Revisions Order*).

<sup>169</sup> *Pole Attachments Second Report and Order*, 72 FCC 2d at 59; Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556, *Memorandum Opinion and Order*, FCC 84-325, at ¶ 10 (rel. July 25, 1984). See also *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission’s pole attachments formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *1987 Pole Attachments Revisions Order*, 2 FCC Rcd at 4387. See also Amendment of Rules and Policies Governing Pole Attachments, *Report and Order*, CS Docket No. 97-98, 15 FCC Rcd 6453 (2000) (*Cable Pole Attachments Pricing Report and Order*); Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 (1998) (*Telecommunications Pole Attachments Pricing Report and Order*), *rev’d in part sub nom Gulf Power Co. v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000) (*Gulf Power II*).

<sup>170</sup> 47 U.S.C. § 224, as amended by the 1996 Act, § 703.

<sup>171</sup> 47 U.S.C. § 224(a), (f). See *Gulf Power Co. v. United States*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999) (upholding the constitutionality of Section 224(f)(1)) (*Gulf Power I*).

<sup>172</sup> 47 U.S.C. § 224(a).

<sup>173</sup> 47 U.S.C. § 224(a)(5).

intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.<sup>174</sup>

73. Under the pole attachments provisions of the 1996 Act, we have been able to act effectively to promote the development of competition in local telecommunications markets. In the *Local Competition First Report and Order*, we established a program for nondiscriminatory access to utilities' poles, ducts, conduits and rights-of-way, consistent with our obligation to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable attachments rates, terms and conditions with a minimum of administrative costs.<sup>175</sup> We further held that the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law, and determined that the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.<sup>176</sup> In the *Local Competition Pole Attachments Reconsideration Order*, we reiterated that the principle of nondiscrimination established by Section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs.<sup>177</sup> We concluded, however, that a utility is not required to exercise its powers of eminent domain, if any, on behalf of third parties in order to expand its existing rights-of-way.<sup>178</sup>

74. In the *Local Competition First Report and Order*, we also held that Section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under Section 251(c)(6).<sup>179</sup> WinStar petitioned for clarification or reconsideration of this holding, requesting a ruling that a LEC must allow telecommunications carriers access pursuant to Section 224 to rooftop facilities and related riser conduits that the LEC owns or controls.<sup>180</sup>

75. Based on the record compiled in response to the WinStar Petition, we tentatively concluded in the *Competitive Networks NPRM* that Section 224 includes a right of access to conduits, ducts, and

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<sup>174</sup> 1996 Conference Report at 113.

<sup>175</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16058-59, ¶¶ 1119-1122. We subsequently promulgated rate formulas to govern telecommunications service providers' access to pole attachments after February 8, 2001. See *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777.

<sup>176</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

<sup>177</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Order on Reconsideration*, 14 FCC Rcd 18049 at 18067, ¶ 51. (*Local Competition Pole Attachments Reconsideration Order*).

<sup>178</sup> *Id.* at 18063, ¶ 38.

<sup>179</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185.

<sup>180</sup> WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996) (WinStar Petition). Relevant oppositions and comments were filed by American Electric Power Service Corporation et al. (AEPSC et al.), Ameritech, Duquesne Light Company (Duquesne), Edison Electric Institute and UTC, Sprint Corporation (Sprint), and United States Telephone Association. Replies were filed by AEPSC et al., Duquesne, and WinStar. See also WinStar Communications, Inc. Opposition to Petitions for Reconsideration at 5-10 (filed Oct. 31, 1996) (replying to Duquesne Opposition).

rights-of-way in MTEs.<sup>181</sup> We therefore proposed in the *NPRM* that, under Section 224, utilities must permit access to rooftops, conduits, and similar rights-of-way that they “own or control” in MTEs, and we requested comment on issues relating to the implementation of this requirement, including the circumstances under which utility ownership or control might be found to exist.<sup>182</sup> At the same time, we tentatively reaffirmed our conclusion that Section 224 does not confer a general right of access to utility property,<sup>183</sup> but we tentatively concluded that Section 224 does confer a right of access where a utility uses property that it owns in the manner of a right-of-way as part of its distribution network.<sup>184</sup>

## 2. Discussion

76. Based on the record before us and our analysis of the statute, we conclude that the Section 224(f)(1) right of access to poles, ducts, conduits, and rights-of-way that a utility owns or controls is not limited by location or by how the utility’s ownership or control was granted. Thus, to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way within an MTE, the utility may not exercise its control in a manner inconsistent with Section 224 to impede competitive access. At the same time, we note that Section 224 applies only to utilities, and was not intended to override whatever authority or control an MTE owner might otherwise retain under the terms of its agreements and state law. We interpret the term “rights-of-way” in the context of buildings to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility’s transportation and distribution network.<sup>185</sup> We also clarify that a utility’s ability voluntarily to provide access to an area and obtain compensation for doing so is a prerequisite to utility ownership or control under Section 224. Finally, we address several issues relating to the implementation of Section 224, including a determination that states do not have to recertify their regulation of pole attachments rates in response to today’s decision. Based on these conclusions, we grant the WinStar Petition for Reconsideration of the *Local Competition First Report and Order* to the extent discussed herein, and we otherwise deny that petition.

### a. Scope of areas covered.

77. Initially, we note that access to on-premises conduits and similar rights-of-way is important to the development of telecommunications competition in MTEs. The record compiled in response to the *Competitive Networks NPRM* indicates that competitive LECs often need access to in-building ducts, conduits, and rights-of-way used by incumbent LECs and other utilities in order to expand their networks to serve the building.<sup>186</sup> To the extent that a new entrant is unable or does not desire to use the existing in-building wiring, it must obtain access to building conduit in order to install its own cables and wires. Moreover, even if a competitive LEC utilizes existing wiring for some of its in-building distribution, it may need access to conduits and rights-of-way in order to reach that wiring. For example, a provider

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<sup>181</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12693-98, ¶¶ 39-48.

<sup>182</sup> *Id.* at 12687, ¶ 28.

<sup>183</sup> *Id.* at 12694, ¶ 40.

<sup>184</sup> *Id.* at 12695, ¶ 43.

<sup>185</sup> In the Further Notice of Proposed Rulemaking, we seek additional comment regarding the definition of rights-of-way in the context of MTEs. See Section V. D, *infra*.

<sup>186</sup> AT&T Comments at 10; Nextlink Comments at 3-4; Teligent Comments at 7-8; WinStar Comments at 7-9.

using wireless technology, in addition to needing a rooftop or similar location to place its antenna, must have access to conduit in order to connect its antenna to the building system.

78. To the extent that poles, ducts, conduits, and rights-of-way in MTEs are controlled by incumbent LECs, the incumbent LECs would have an incentive in the absence of regulation to deny access to their competitors. Section 251(c) of the Act requires incumbent LECs to grant other carriers access to their facilities under just, reasonable, and nondiscriminatory rates, terms, and conditions under many circumstances.<sup>187</sup> Nothing in Section 251(c), however, appears to address the situation where a building owner has granted a carrier access in order to serve customers in that building, but an incumbent LEC or other utility refuses to allow its competitor reasonable and nondiscriminatory access to conduits or similar pathways that the utility owns or controls. An incumbent LEC's power to deny competitors access to in-building conduits thus could impose a serious impediment to telecommunications choices for affected MTE residents. Our consideration of the effect of Section 224 within MTEs is intended to address this situation.

79. In the *Competitive Networks NPRM*, we tentatively concluded that the plain meaning of Section 224(f)(1) includes a right of access to ducts, conduits, and rights-of-way owned or controlled by a utility that are located in MTEs. In particular, we tentatively concluded that the definition of "right-of-way" as including a publicly or privately granted right to place telecommunications distribution facilities on public or private premises is consistent with the common usage of the term, and we sought comment on this analysis.<sup>188</sup> We also tentatively concluded more specifically that in-building conduit, such as riser conduit, used by a utility and owned or controlled by that utility falls within the scope of Section 224(f)(1) as either "conduit" or a "right-of-way."<sup>189</sup> Competitive LECs generally agree with these tentative conclusions.<sup>190</sup> They state that by not qualifying the terms "right-of-way" or "conduit" in the statute, Congress intended to give a broad scope to the terms such that they encompass rights of access to conduits on private property as well as public rights-of-way.<sup>191</sup> Incumbent LECs and premises owners generally disagree with our tentative conclusions and argue for a narrow interpretation of "right-of-way."<sup>192</sup> For example, Bell Atlantic argues that Section 224 was intended to provide cable companies access to structures in public rights-of-way, rather than structures on private property, and therefore does not apply within buildings.<sup>193</sup> Cincinnati Bell contends that the legislative history of Section 224 suggests that the intended meaning of "conduit" is "underground reinforced passages."<sup>194</sup> Real Access Alliance argues that rights-of-way do not exist inside buildings, but rather that building access rights take the form of leases, licenses, and easements.<sup>195</sup>

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<sup>187</sup> See 47 U.S.C. §§ 251(c)(2) (interconnection), 251(c)(3) (unbundled access), and 251(c)(6) (collocation).

<sup>188</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 42.

<sup>189</sup> *Id.* at 12696, ¶ 44.

<sup>190</sup> AT&T Comments at 14; Teligent Comments at 27-28; WinStar Comments at 54.

<sup>191</sup> AT&T Comments at 15; Teligent Comments at 14; WinStar Comments at 45.

<sup>192</sup> See, e.g., GTE Comments at 25; United States Telephone Association Comments at 10.

<sup>193</sup> Bell Atlantic Comments at 7.

<sup>194</sup> Cincinnati Bell Comments at 4.

<sup>195</sup> Real Access Alliance Comments at 49.

80. We conclude that the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility.<sup>196</sup> This interpretation is consistent with the plain meaning of Section 224(f)(1), which requires “non-discriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled”<sup>197</sup> by a utility, without qualification. Our interpretation of Section 224 is also consistent with industry practice, in which the terms duct and conduit are used to refer to a variety of enclosed tubes and pathways, regardless of whether they are located underground or aboveground. Indeed, as AT&T points out, the commonly used term “riser conduit” itself demonstrates that conduit is not generally understood to refer only to underground facilities.<sup>198</sup> Moreover, we recently amended Section 1.1402(i) of our Rules in another proceeding to clarify that “conduits” are not limited to underground facilities.<sup>199</sup>

81. In the *Competitive Networks NPRM*, we noted that the 1977 Pole Attachments Act Senate Report described duct or conduit systems as consisting of underground facilities.<sup>200</sup> We conclude that this legislative history does not circumscribe our authority to apply Section 224 to in-building ducts, conduits, or rights-of-way. The text of the statute, as well as the legislative history relating to its amendment in 1996, in no way limits the terms duct or conduit to underground facilities.<sup>201</sup> Moreover, even where there may be “contrary indications in the statute’s legislative history,” we are not required to

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<sup>196</sup> AT&T Comments at 18; WinStar Comments at 60. The United States Court of Appeals for the Eleventh Circuit recently held that the Commission lacks authority under Section 224(f)(1) over pole attachments for wireless communications. *Gulf Power II*, 208 F.3d at 1263, *petition for reh’g denied*, 2000 WL 1335040 (11<sup>th</sup> Cir. Sept. 12, 2000). *Gulf Power II* disposed of consolidated petitions for review of the Commission’s *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd 6777, implementing 47 U.S.C. § 224, as amended by the 1996 Act. We note that the court has stayed issuance of the mandate in *Gulf Power II* pending the ultimate disposition of any petition for certiorari. Moreover, although some language in *Gulf Power II* could be read to suggest that the scope of Section 224 turns on the identity of the carrier, and thus that even a wireline facility is not covered by Section 224 when used by a “wireless” carrier, we do not believe the decision must necessarily be read in this manner. To the contrary, it is possible that the decision is most reasonably construed to turn in whole or in part on the nature of the particular equipment for which attachments is sought, and thus not to exclude, for example, any telecommunications carrier’s wireline facilities within MTEs from the scope of Section 224.

<sup>197</sup> 47 U.S.C. § 224(f)(1) (*emphasis added*).

<sup>198</sup> AT&T Comments at 19.

<sup>199</sup> See *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6523, App. A (amending definition of “conduit” to refer to “a structure . . . usually placed in the ground,” rather than “a pipe placed in the ground”); see also *Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Case No. 96-440, *Order* (Ky. P.S.C. Dec. 23, 1996) (holding that incumbent LEC has duty under Section 251(b)(4) of the Act to afford access to rights-of-way in private office buildings).

<sup>200</sup> See *Competitive Networks NPRM*, 14 FCC Rcd at 12696, ¶ 44 & n.98 (citing 1977 Pole Attachments Act Senate Report at 26).

<sup>201</sup> See H.R. Rep. No. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 91-92 (1995); H.R. Rep. No. 104-458, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 205-207 (1996).

“resort to legislative history to cloud a statutory text that is clear.”<sup>202</sup> This is especially true where, as here, the statute is unambiguous on its face.

82. We also conclude that “rights-of-way” in buildings means, at a minimum, defined pathways that are being used or have been specifically identified for use as part of a utility’s transmission and distribution network. The Real Access Alliance argues that there are no “rights-of-way” in buildings, but that utilities’ building access rights take the form of leases, licenses, and easements.<sup>203</sup> We note, however, that the term “right-of-way” can have a variety of meanings, including, for example, the equivalent of an easement.<sup>204</sup> As commenters point out, the arrangements under which utilities have obtained and retain access to buildings, as well as the nomenclature used to describe those arrangements and the attendant rights and responsibilities, vary from building to building and from state to state.<sup>205</sup> We believe, consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, that a “right-of-way” should be read to include, at a minimum, any defined pathway in an MTE that a utility is actually using or has specifically identified for its future use, regardless of how its right of access is denominated by the parties or under state law. We do not believe that state concerns with definitions of property interests, including public rights-of-way, will be harmed or affected by the nomenclature we use here solely with reference to Section 224. We therefore conclude that the nature of a right of access, and not the nomenclature applied, governs for these purposes. Consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, we conclude that a right-of-way exists within the meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically designated for use by a utility as part of its transmission and distribution network and (2) the boundaries of that pathway are clearly defined, either by written specification or by an unambiguous physical demarcation.<sup>206</sup> In the Further Notice of Proposed Rulemaking, we request comment on other situations in which an in-building right-of-way may be established.<sup>207</sup>

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<sup>202</sup> *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). See also *Burlington N. R.R. Co. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461 (1987) (when language of statute is unambiguous, review of legislative history is unnecessary).

<sup>203</sup> Real Access Alliance Comments at 49.

<sup>204</sup> See, e.g., *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 276-79 (1942) (construing rights-of-way granted by the 1875 Right-of-way Act to constitute easements); *Joy v. City of Saint Louis*, 138 U.S. 1, 44 (1890) (*Joy*); *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520, 527 (Fed. Cir.) (“‘Rights-of-way’ are another term for easements”), *cert. denied*, 516 U.S. 812 (1995).

<sup>205</sup> Teligent Comments at 26-27; Real Access Alliance Reply Comments at 25-26.

<sup>206</sup> For example, a broadly worded easement permitting a utility to place facilities throughout a building or “in hallways” would not in itself create a right-of-way under this definition. A utility’s placement of facilities in a defined pathway pursuant to such an easement would, however, create a right-of-way along that pathway, thus giving telecommunications carriers and cable service providers a right of access if the right-of-way is owned or controlled by the utility.

<sup>207</sup> We note, however, that a utility must take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs. See *Local Competition Pole Attachments Reconsideration Order*, 14 FCC Rcd at 18067, ¶ 51.

83. We further conclude that a “right-of-way” under Section 224 includes property owned by a utility that the utility uses in the manner of a right-of-way as part of its transmission or distribution network. We tentatively concluded in the *Competitive Networks NPRM* that Section 224 does not encompass a general right of access to utility property.<sup>208</sup> No party has advanced any arguments against this proposition, and we therefore reaffirm our earlier conclusion on this record. Thus, for example, the roof of a utility’s corporate office is not, in and of itself, subject to access under Section 224. We also tentatively concluded, however, that “Section 224 encompasses a utility’s obligation to provide cable television systems and telecommunications service providers with access to property that it owns which it uses as part of its distribution network.”<sup>209</sup> GTE argues that the traditional definition of right-of-way and the underlying purpose of Section 224 require that property owned by a utility in fee simple absolute can never be subject to Section 224.<sup>210</sup> We disagree, and find that our tentative conclusion is consistent with both the language and purpose of Section 224.<sup>211</sup> We believe our tentative conclusion is consistent with the use of the term “right-of-way” to denote not only the right to pass over the land of another, but also the land itself.<sup>212</sup> We also believe this definition is consistent with the inclusion in Section 224 of rights-of-way that a utility “owns” as well as “controls.” We agree with AT&T that the test for determining when a utility is using its own property in a manner equivalent to a right-of-way should “be broad enough to encompass the wide range of activities that constitute use of property in a manner equivalent to a right-of-way.”<sup>213</sup> Thus, where a utility uses its own property in connection with its transmission or distribution network in a manner that would trigger the obligations of Section 224 if it had obtained a right-of-way from a private landowner, we conclude that it should be considered to own or control a right-of-way within the meaning of Section 224.

84. The National League of Cities has expressed concern that application of Section 224 within buildings may preempt implementation or enforcement of state safety-related codes.<sup>214</sup> We emphasize

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<sup>208</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12694, ¶ 40; see also *Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185 (stating that Congressional intent in promulgating Section 224(f) “was to permit cable operators and telecommunications carriers to “piggyback” along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.”).

<sup>209</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 43.

<sup>210</sup> GTE Comments at 25.

<sup>211</sup> See AT&T Comments at 17; WinStar Comments at 56.

<sup>212</sup> See *Joy v. City of Saint Louis*, 138 U.S. at 44; Black’s Law Dictionary 1326 (6<sup>th</sup> ed. 1990). We note that, in interpreting Section 224(f), an arbitration panel of the Michigan Public Service Commission has held that land used for distribution facilities would be considered a “right-of-way” even if it were held by the utility in fee simple absolute. AT&T Communications of Michigan, Inc., Case No. U-11151, *Decision of Arbitration Panel* at 50-52 (Mich. P.S.C. Oct. 28, 1996); see also AT&T Communications of Ohio, Inc.’s Petition for Arbitration of Inter-Connection Rates, Terms and Conditions and Related Arrangements with Ohio Bell Telephone Company d.b.a. Ameritech Ohio, Case No. 96-752-TP-ARB, *Arbitration Panel Report* at 52-53.

<sup>213</sup> AT&T Comments at 17.

<sup>214</sup> See Petition for Environmental Impact Statement filed by the National League of Cities, the National Association of Counties, the Michigan Municipal League, and the Texas Coalition of Cities for Utility Issues, at 21-24 (August 16, 2000) (National League of Cities, et al. Petition for EIS). We address petitioners’ concern regarding the extension of the OTARD rules in paras. 121-123 *infra*. To the extent that the EIS petition expresses concern regarding issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, those issues will be addressed separately at another time. See note 2, *supra*.

that our actions taken today are not intended to preempt, or impede, in any way the implementation or enforcement of state safety-related codes. We also note that under Section 224(f)(2) utilities may impose conditions on access to transmission facilities, if necessary for reasons of safety or reliability.<sup>215</sup>

**b. Ownership or control.**

85. In order for a right of access to be triggered under Section 224, the property to which access is sought not only must be a utility pole, duct, conduit, or right-of-way, but it must be “owned or controlled” by the utility.<sup>216</sup> In this regard, we have previously held that “[t]he scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law.”<sup>217</sup> Specifically, “the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.”<sup>218</sup> In the *NPRM*, we asked whether we should federally define the circumstances under which utility ownership or control exists, or whether we should continue to defer to the rights created under state law.<sup>219</sup> Ameritech believes that the Commission should refrain from interpreting when utility ownership or control exists and continue to defer to state law.<sup>220</sup> The Real Access Alliance argues that the Commission must continue to defer to state law because any attempt to alter the property rights of either utilities or property owners would amount to an unconstitutional taking in violation of the Fifth Amendment.<sup>221</sup> AT&T argues that Commission guidance is necessary in determining the existence and scope of ownership or control in particular circumstances, such as where a utility has secured building access rights through a private agreement with a property owner.<sup>222</sup> WinStar argues that federal law should govern in this matter in order to ensure a national policy for access to rights-of-way.<sup>223</sup> WinStar states that it has suffered in states that have not taken action to promote building access, often because building owners with a national presence penalize carriers in states without building access laws for access gained in states that have such laws.<sup>224</sup>

86. In the *Local Competition First Report and Order*, we considered arguments that certain private consent agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.<sup>225</sup> Some commenters in that proceeding argued that under such circumstances, Section 224 does not provide

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<sup>215</sup> 47 U.S.C. § 224(f)(2).

<sup>216</sup> 47 U.S.C. § 224(a)(4).

<sup>217</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

<sup>218</sup> *Id.*

<sup>219</sup> *Competitive Networks NPRM*, 14 FCC Rcd at 12696-97, ¶¶ 45-47.

<sup>220</sup> Ameritech Comments at 4.

<sup>221</sup> Real Access Alliance Comments at 55.

<sup>222</sup> AT&T Comments at 19-20.

<sup>223</sup> WinStar Comments at 62.

<sup>224</sup> *Id.*

<sup>225</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16081-82, ¶ 1178.

a right of access.<sup>226</sup> Other commenters argued that the statute does not draw distinctions between situations where a private consent agreement exists and situations where one does not exist, and thus provides access regardless of the terms of an agreement or state law.<sup>227</sup> We concluded that the scope of utility ownership or control is a matter of state law. Thus, obligations apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.

87. We conclude that our analysis in the *Local Competition First Report and Order* remains valid, and applies to ducts, conduits, and rights-of-way in buildings as well as to those in other locations. We therefore reject arguments that we should define utility access to a building as in itself establishing utility control over conduits or rights-of-way or establish presumptions in this regard. We emphasize that the right of access granted under Section 224 lies only against utilities, and that Section 224 is not intended to override whatever authority or control MTE owners may otherwise retain under state law.<sup>228</sup> We therefore conclude that, consistent with the purposes of Section 224, utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so. As the Real Access Alliance points out, the forms of access arrangements between utilities and building owners, and the resulting rights and responsibilities of each party, can vary greatly depending on the means by which access was originally achieved and on state law.<sup>229</sup> Thus, state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224.

88. We note that existing utility rights-of-way in MTEs, whether created by force of law, by written agreement between the parties, or by tacit consent, generally originated in an era of monopoly utility service. Thus, the purpose behind these rights of access was to ensure that end users could receive service from the single entity capable of providing, or legally authorized to provide, such service. The parties that established the terms of these rights of access would rarely, if ever, have considered the effect their actions might have on hypothetical future competition. Section 224 addresses the ability of utilities to act anticompetitively with respect to telecommunications competitors as a result of these developments. Our concerns about anticompetitive exclusion by building owners are addressed elsewhere in this item.

89. This approach avoids any constitutional concerns that may arise under the Fifth Amendment. Because we interpret Section 224 to apply only against utilities, there is no taking from premises owners. The only taking under Section 224 is from utilities, who are deprived of the power to exclude others from conduits or rights-of-way to the extent of their ownership or control. This taking, however, is compensated under statute and our rules, and thus is fully consistent with constitutional requirements.<sup>230</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> We note, however, that nothing in Section 224 prevents a state from extending the principles of Section 224 under state law to entities other than those considered to be “utilities,” as that term is defined in the federal statute. For example, Massachusetts recently promulgated building access regulations which include a premises owner within the definition of “utility.” *Massachusetts Nondiscriminatory Access Order*.

<sup>229</sup> Real Access Alliance Comments at 53-55. We further note that the parties’ respective rights and responsibilities may typically be different over rights-of-way located outside buildings than inside buildings. For example, rights-of-way over land are typically used to provide service to the general public, whereas rights-of-way in MTEs ordinarily are used only to provide service to tenants in the MTE.

<sup>230</sup> See *Gulf Power I*, 187 F.3d at 1324.

We note that the extent of a utility's ownership or control of a duct, conduit, or right-of way under state law must be resolved prior to a complaint being filed with the Commission regarding whether the rates, terms or conditions of access are reasonable.

90. This approach also will not affect the operation of our rules governing the disposition of cable inside wiring. Section 76.804(a) of our rules sets forth the procedures for disposition of "home run wiring" owned by a multichannel video programming distributor (MVPD) in a multiple dwelling unit (MDU) when the MVPD "does not . . . have a legally enforceable right to remain on the premises against the wishes of the MDU owner."<sup>231</sup> As explained above, Section 224 grants a right of access only to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way. It does not grant a legally enforceable right to remain on the premises against the wishes of the MDU owner. Therefore, it does not interfere with the disposition of cable home run wiring under our rules.

**c. Implementation issues.**

91. Section 224 not only requires utilities to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but mandates that they do so at rates, terms and conditions that are just and reasonable.<sup>232</sup> Section 224 further specifies principles for determining whether a rate is just and reasonable in the context both of cable providers' and telecommunications carriers' attachments, all of which are based on the utility's costs in connection with the pole, duct, conduit, or right-of-way.<sup>233</sup> In order to implement these provisions, we have promulgated formulas to determine just and reasonable rates for access to poles, ducts, and conduits.<sup>234</sup> These formulas do not appear to be directly transferable to the inside the building context and the parties to this proceeding have not suggested how they might be adjusted for use here. Therefore, to the extent the existing formulas do not apply, we will determine reasonable and just compensation consistent with the statute and Fifth Amendment on a case-by-case basis.<sup>235</sup> We will consider initiating a rulemaking proceeding to establish rate formulas for in-building attachments in the future if it proves necessary or efficient to do so. We anticipate, however, that in most instances the existing rules will encourage the parties to agree to reasonable rates through negotiation.

92. Section 224 further provides that the Commission has no jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way for pole attachments in instances where a state has certified to the Commission that it regulates such matters.<sup>236</sup> Consistent with the statute, 19 states have made such certification to the Commission. In those states that do not regulate such matters, we will continue to apply the formula presumptions outlined in the *Telecommunications*

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<sup>231</sup> 47 C.F.R. § 76.804(a).

<sup>232</sup> 47 U.S.C. § 224(b)(1).

<sup>233</sup> 47 U.S.C. § 224(d),(e).

<sup>234</sup> *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

<sup>235</sup> *Cf. Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6832, ¶ 121 (holding that the record did not permit us to establish detailed standards for the pricing of access to rights-of-way, and accordingly that we would consider allegations of unjust, unreasonable, or discriminatory rates on a case-by-case basis).

<sup>236</sup> 47 U.S.C. § 224(c).