

Pole Attachments Pricing Report and Order and the *Cable Pole Attachments Pricing Report and Order*.²³⁷

93. Several commenters argue that we should require states to recertify that they are regulating pole attachments within buildings, and that we should look behind state certifications to ensure that they are in fact regulating consistent with Section 224.²³⁸ Consistent with our past practice in similar circumstances, we decline to do so. Rather, we will continue to apply our existing regime of presumptions and burden of proof regarding certification. We emphasize, moreover, that federal regulation of access, rates, terms, or conditions for pole attachments is preempted only to the extent a state is actually regulating attachments. Should a state fail to resolve a complaint within specified time limits, the Commission's rules provide that we assume jurisdiction over the complaint.²³⁹

E. Areas Under Tenant Control

1. Background

94. Section 1.4000 of our rules prohibits, with limited exceptions, any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services 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.²⁴⁰ We adopted Section 1.4000 pursuant to Section 303 of the Communications Act as directed by Section 207 of the 1996 Act, which applies to the placement of over-the-air reception devices (OTARDs) in order to receive television broadcast signals, direct broadcast satellite services, and multichannel multipoint distribution services.²⁴¹

In May, 1999, the Wireless Communications Association International, Inc. (WCA) filed a Petition for Rulemaking asking us to extend the principles embodied in Section 1.4000 to the placement of antennas used for any fixed wireless service.²⁴² In the *Competitive Networks NPRM*, we requested comment on

²³⁷ *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

²³⁸ AT&T Comments at 21-22; Teligent Comments at 38; WinStar Comments at 65.

²³⁹ See 47 C.F.R. § 1.1414(e). We note that if it is shown in a complaint proceeding that a state does not regulate access to ducts or conduits within buildings, for example, that state's regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission's jurisdiction over access to ducts or conduits within buildings. In such a case, we would decide the complaint regarding in-building attachments, while continuing to respect the state's authority over those pole attachments that it does regulate.

²⁴⁰ 47 C.F.R. § 1.4000.

²⁴¹ See *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59*, and *Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, Further Notice of Proposed Rulemaking in CS Docket No. 96-83*, 11 FCC Rcd 19276 (1996) (*OTARD First Report and Order*). Section 207 of the 1996 Act states that "[w]ithin 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." 47 U.S.C. § 303 note (1996 Act, Section 207).

²⁴² 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 (continued....)

whether we should adopt rules similar to those adopted in the video context that would protect the ability to place similar antennas to transmit and receive telecommunications signals and other fixed wireless signals that are not covered by Section 207.²⁴³

95. As currently constituted, Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna receiving any video programming described in the Section. For the purposes of Section 1.4000, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: unreasonably delays or prevents installation, maintenance, or use; unreasonably increases the cost of installation, maintenance, or use; or precludes reception of an acceptable quality signal. Section 1.4000 also sets forth principles governing fees or costs that may be imposed for placement of covered antennas and enforcement of covered regulations. Restrictions that would otherwise be forbidden are permitted if they are necessary for certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the rule. Finally, Section 1.4000 includes provisions for waiver and declaratory ruling proceedings.

96. Many parties support an extension of the principles of the OTARD rules to include all fixed wireless devices.²⁴⁴ For example, PCIA contends that extending the antenna exemption rule to include all fixed wireless devices is essential to the Commission meeting its obligation to promote the deployment of advanced telecommunications capability under Section 706(a) of the 1996 Act.²⁴⁵ On the other hand, Real Access Alliance argues that, in extending the OTARD rules to leased property, the Commission has already exceeded its authority and violated the Fifth Amendment. Real Access Alliance contends that further extending the rules to include new services such as telecommunications services would compound the violation.²⁴⁶ Real Access Alliance argues that the statutory language of Section 207 “refers explicitly to video programming, and to three types of antennas used primarily (and at the time of the enactment of the law, solely) to deliver video services.”²⁴⁷ Real Access Alliance concludes that the statutory language is very clear and cannot possibly be construed to permit the Commission to go any further than it already has, under any circumstances.²⁴⁸

(Continued from previous page)

Designed to Provide Fixed Wireless Service (filed May 26, 1999); *see also* Letter from Paul J. Sinderbrand, Counsel for Wireless Communications Association International, Inc., to Magalie Roman Salas, Secretary, FCC, dated September 7, 2000 (asserting that timely deployment of Sprint and WorldCom fixed wireless broadband services is being thwarted by homeowner associations’ antenna restrictions).

²⁴³ *Competitive Networks NPRM*, 14 FCC Rcd at 12710-12712, ¶ 69.

²⁴⁴ *See* AT&T Comments at vi; Fixed Wireless Communications Coalition Comments at 14-15; PCIA Comments at 34-35; Teligent Comments at 46. *Cf.* Real Access Alliance Comments at vii.

²⁴⁵ PCIA Comments at 34-35. *See* 47 U.S.C. § 157(a) note.

²⁴⁶ Real Access Alliance Comments at vii.

²⁴⁷ *Id.* at 72.

²⁴⁸ *Id.* at 72-73.

2. Discussion

a. Extension of OTARD Rules

97. We conclude that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals, as well as multichannel video programming signals that are currently covered by the rules.²⁴⁹ For the purpose of the OTARD rules, “fixed wireless signals” are any commercial non-broadcast²⁵⁰ communications signals transmitted via wireless technology to and/or from a fixed customer location.²⁵¹ As discussed above, Congress intended in the 1996 Act to promote telecommunications competition and the deployment of advanced telecommunications capability.²⁵² Indeed, Congress included several provisions to limit restrictions on the deployment of facilities used for these purposes.²⁵³ To the extent a restriction unreasonably limits a customer’s ability to place antennas to receive telecommunications or other services, whether imposed by government, homeowner associations, building owners, or other third parties, that restriction impedes the development of advanced, competitive services. In the *OTARD First Report and Order*,²⁵⁴ the Commission determined that restrictions on the placement of antennas one meter in diameter or smaller unreasonably limit a video programming customer while restrictions on larger C-band reception antennas might be reasonable. We find that the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided.

98. Moreover, distinguishing in the protection afforded based on the services provided through an antenna produces irrational results. Precisely the same antennas may be used for video services, telecommunications, and internet access. Indeed, sometimes a single company offers different packages of services using the same type of antennas. Under our current rules, a customer ordering a telecommunications/video package would enjoy protection that a customer ordering a telecommunications-only package from the same company using the same antenna would not. Thus, we conclude that the current rules potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer.

²⁴⁹ The text of Section 1.4000, as amended by this Order, appears in Appendix B.

²⁵⁰ Although the definition of “fixed wireless signals” does not apply to broadcast signals, we note that television broadcast signals continue to be covered under our OTARD rules.

²⁵¹ This definition of “fixed wireless signals” does not include, among other things, AM radio, FM radio, amateur (“HAM”) radio, Citizen’s Band (CB) radio, and Digital Audio Radio Service (DARS) signals. We note that State and local regulation of the placement of antennas used for HAM radio is covered by Section 97.15(b) of the Commission’s rules, 47 C.F.R. § 97.15(b).

²⁵² See, e.g., 47 U.S.C. § 251 (each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers to promote the development of competitive markets); 47 U.S.C. § 157 nt (1996 Act, Section 706) (Commission shall encourage the deployment of high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology).

²⁵³ See, e.g., 47 U.S.C. § 253 (removal of barriers to entry); 47 U.S.C. § 332(c)(7) (local zoning authority shall not prohibit the provision of personal wireless service); 47 U.S.C. § 303 nt (1996 Act, Section 207) (Commission shall promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services).

²⁵⁴ *OTARD First Report and Order*, 11 FCC Rcd at 19279, ¶ 5.

99. In extending the OTARD rules to encompass fixed wireless devices, we mean to include all customer-end antennas and supporting structures of the physical type currently covered by the rule, regardless of the nature of the services provided through the antenna (*i.e.*, voice, data, or video). Similarly, the amended rules apply both to satellite and terrestrial services. In addition, the rules apply to antennas that transmit and receive signals, only transmit signals, or only receive signals.²⁵⁵ We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.²⁵⁶

100. We emphasize that the restrictions we adopt today are limited by the expressed limitations of Section 1.4000.²⁵⁷ Thus, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest. Similarly, the extension of the rules applies only to antennas one meter or less in diameter or diagonal measurement, or larger antennas located in Alaska used to receive satellite service, and to masts used to support such antennas.²⁵⁸ In addition, the exceptions permitting certain restrictions for safety and historic preservation purposes continue to apply.²⁵⁹

b. Legal Authority

101. One of the principal goals of the 1996 Act was “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”²⁶⁰ As noted above, these objectives are effectively hindered by restricting OTARD protections to devices that receive

²⁵⁵ Special provisions to protect the public from excessive exposure to radio frequency emissions are discussed at paras. 118-121, *infra*. We note that our existing rule already covers transmission devices that work in tandem with the receiving device and are necessary to select programming on a covered receiving antenna. Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 13 FCC Rcd 18962, 18988 at ¶ 59 (1998) (*OTARD Order on Reconsideration*).

²⁵⁶ Regulations governing the placement of such antennas may, however, be affected by other provisions of the Communications Act or our rules. *See, e.g.*, 47 U.S.C. § 332(c)(7); 47 C.F.R. § 25.104.

²⁵⁷ *See* text of Section 1.4000 in Appendix B.

²⁵⁸ This revision to the OTARD rules does not change the Commission's conclusion in the previous OTARD proceedings that masts that extend more than 12 feet above the roof of the building or that are taller than the distance between the antenna and the lot line may require a safety permit. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶¶ 34-36. This recognition of a possible safety hazard due to the height of the mast may apply, as well, to the non-video antennas now covered by the OTARD rules. We reiterate that permit requirements for masts exceeding this height may be imposed to achieve legitimate safety objectives, not for aesthetic purposes. We do not condone an outright prohibition of such masts unless the safety concerns cannot be addressed adequately. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶ 36. Of course, masts should not be taller than necessary to receive an acceptable quality signal from the desired service.

²⁵⁹ *See* 47 C.F.R. § 1.4000(b).

²⁶⁰ Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (*1996 Act Preamble*).

video programming services. Federal courts have long established that the Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.²⁶¹ Thus, in light of our finding that the existing OTARD regulatory regime effectively hinders one of the principal goals of the 1996 Act, and because Commission action is reasonably ancillary to several explicit statutory provisions, we conclude that the Commission has the statutory authority to extend the OTARD protections to antennas used to transmit or receive fixed wireless signals. We also conclude that preemption of state and local regulation created by the extension of OTARD protections is justified in these circumstances. Finally, we find that Section 332(c)(7) of the Act, which addresses regulation of "personal wireless service facilities," does not apply to customer-end antennas.

102. Section 1 of the Act provides that the Commission was created "for the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges[.] . . ."²⁶² Section 1 also directs the Commission to "execute and enforce the provisions of [the] Act."²⁶³ In promulgating the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals, the Commission is furthering the express objectives of Section 1 of the Act because, as noted above, we are facilitating efficient deployment of competitive communications services.

²⁶¹ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (J. Scalia, writing for the majority, upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

²⁶² 47 U.S.C. § 151.

²⁶³ *Id.*

103. Moreover, we believe that Section 706 of the 1996 Act, which addresses advanced telecommunications incentives, also supports our extension of the OTARD principles. Section 706 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment.”²⁶⁴ We believe that the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals will foster the deployment of advanced telecommunications services.

104. Our action also is necessary to further the consumer protection purposes of Sections 201(b), 202(a), and 205(a) of the Act. These statutory provisions are intended to ensure that the rates, terms, and conditions for the provision of common carrier service are just, fair, and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service.²⁶⁵ Further, Section 201(b) grants us express authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.”²⁶⁶ To the extent devices used for multichannel video programming services are protected from unreasonable restrictions under the OTARD rules and the same devices when used only for fixed wireless services are not, consumers who want only fixed wireless service may inexorably be forced to pay unjust and unreasonable charges in connection with unwanted video programming. Thus, if we failed to extend the OTARD principles, we would effectively undermine the policies against unreasonable charges and discriminatory policies that are codified in Sections 201(b), 202(a), and 205(a).

105. Because our extension of the OTARD rules is necessary to realize these statutory goals, Sections 303(r) and 4(i) provide the basis for our exercise of ancillary jurisdiction. Section 303 prescribes the general powers of the Commission with respect to radio transmissions.²⁶⁷ Specifically, it authorizes us to “[m]ake such rules . . . as may be necessary to carry out the provisions of this the Act.”²⁶⁸ Section 4(i) provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”²⁶⁹ Federal courts have consistently recognized that these provisions give the Commission

²⁶⁴ 47 U.S.C. § 157 note.

²⁶⁵ See 47 U.S.C. § 201(b) (“all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . .”); 47 U.S.C. § 202(a) (“[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service. . . .”); 47 U.S.C. § 205(a) (“the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or charges[,] . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . . .”).

²⁶⁶ See 47 U.S.C. § 201(b).

²⁶⁷ 47 U.S.C. § 303; see also 47 U.S.C. § 301 (“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission[.]”).

²⁶⁸ 47 U.S.C. § 303(r).

²⁶⁹ 47 U.S.C. § 154(i).

broad authority to take actions that are not specifically encompassed within any statutory provision but that are reasonably necessary to advance the purposes of the Act.²⁷⁰

106. Indeed, when Congress enacted Section 207, it recognized that Section 303 is a source of authority to promulgate regulations like the ones that we are adopting today. Section 207 directs the Commission to promulgate regulations prohibiting restrictions affecting devices used to receive the specified video programming services “pursuant to Section 303 of the Communications Act.”²⁷¹ This statutory language reflects Congress’ recognition that, pursuant to Section 303, the Commission has always possessed authority to promulgate rules addressing OTARDs. Section 207 *required* us to promulgate rules within 180 days after enactment, effectively removing our discretion on both the timing and the determination of the need for such regulation. Although Section 207 *directed* us to take action in the context of devices designed to receive the named services, nothing in Section 207 precludes us from exercising our power under Section 303 and other provisions to protect the placement of similar antennas that receive or transmit other signals. Indeed, to the extent our action today applies to state and local governments, we previously imposed similar limits on state and local regulation of the placement of antennas both before and subsequent to the 1996 Act.²⁷² We therefore conclude that the scope of the Section 207 directive to exercise our authority under Section 303 does not limit our independent exercise of the same authority under Section 303 and other provisions in a broader context and, in fact, affirmatively supports our use of Section 303 to extend the OTARD rules to fixed wireless devices.

107. As applied to restrictions imposed by state and local governments, our extension of the OTARD rules also falls well within the bounds of established preemption principles. The Commission may preempt state law when, among other reasons, it “stands as an obstacle to the accomplishment and execution of the full objectives of Congress.”²⁷³ Moreover, “[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”²⁷⁴ In addition, to the extent our regulation affects both interstate and intrastate services, preemption may be upheld “where it [is] not possible to separate the interstate and the intrastate components” of the regulation.²⁷⁵ As discussed above, state or local regulations that unreasonably restrict a customer’s ability to place antennas used for the transmission or reception of fixed wireless signals impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability. Moreover, it is infeasible to use different antennas for

²⁷⁰ See note 261 *supra* (citing federal court cases upholding Commission’s exercise of ancillary jurisdiction).

²⁷¹ 47 U.S.C. § 303 note.

²⁷² See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 Rad. Reg. 2d (P&F) 1073 (1986); Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983) (preempting “state and local regulation of SMATV systems . . . ha[s] the effect of interfering with, delaying, or terminating interstate and federally controlled communications services”), *aff’d sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809 (1996).

²⁷³ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986) (*Louisiana PSC*) (citing *Hines v. Davidovitz*, 312 U.S. 52 (1941)).

²⁷⁴ *Louisiana PSC*, 476 U.S. at 369 (citing *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).

²⁷⁵ *Louisiana PSC*, 476 U.S. at 376 n.4.

interstate and foreign communications than for intrastate communications. Because fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseparable from their intrastate use,²⁷⁶ regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority. Our action is therefore fully consistent with the preemption principles set forth in *Louisiana PSC*.

108. Several local government organizations argue that an extension of the Commission's OTARD rules to restrict state and local government regulation of customer-end antennas used for transmitting or receiving telecommunications signals would violate Section 332(c)(7) of the Act.²⁷⁷ Specifically, they argue that these antennas are "personal wireless service facilities" within the meaning of Section 332(c)(7), and that Section 332(c)(7) forbids the Commission from limiting state and local government regulation of such antennas except on the basis of RF emissions safety. In contrast, WCA argues that Section 332(c)(7) only applies to hub site antennas, and not to customer-end antennas.²⁷⁸

109. We believe that, in the context of Section 332(c)(7), the term "personal wireless service facilities" is best read not to include customer-end antennas. The Section defines "personal wireless service facilities" as facilities "for the provision of personal wireless services." Although the term taken by itself could be read to include customer-end facilities, a narrower reading which limits the term to a facility that "provides" the service, *i.e.*, the carrier hub site, is not only reasonable, but also, as discussed below, better reflects the statutory provisions and goals of the 1996 Act in general and those of Section 332(c)(7) in particular. Thus, we find that Section 332(c)(7) does not prevent the Commission from restricting state and local government regulation of these antennas. We note, though, that nothing in this decision affects the well-established rights of state and local governments under Section 332(c)(7) to regulate the placement, construction, and modification of carrier hub sites.²⁷⁹

110. Read in context with other provisions of the 1996 Act, Section 332(c)(7) is best construed to apply only to hub sites. In particular, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with the simultaneous enactment of Section 207. The amendment of Section 332(c)(7) to preserve local zoning authority over personal wireless service facilities was enacted at the same time that Congress circumscribed local zoning authority over customer-end antennas used for

²⁷⁶ See, e.g., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); cf. *Louisiana PSC*, 476 U.S. at 376 n.4 (1986) (acknowledging that where it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

²⁷⁷ City and County of San Francisco Comments at 16; National Association of Counties, the National Association of Telecommunications Officers and Advisors, and Montgomery County, Maryland Joint Comments at 20; Reply Comments of Concerned Communities and Organizations at 20. LSGAC references the argument regarding Section 332(c)(7) in its Recommendation No. 19, issued November 1, 1999. Section 332(c)(7) states that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 C.F.R. § 332(c)(7). Section 332(c)(7) expressly permits the Commission to regulate State or local government decisions of the siting of personal wireless service facilities on the basis of RF emissions safety.

²⁷⁸ WCA Further Reply Comments at 14.

²⁷⁹ See, e.g., *Communications Company of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000).

video services. Given that precisely the same customer-end antennas may be used for telecommunications services as are used for video services, it is unlikely that Congress would preserve local zoning authority over the one at the same time it limited local zoning authority over the other.

111. In addition, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with Congress' use of the term "customer premises equipment" throughout the 1996 Act. In the 1996 Act, Congress defined "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."²⁸⁰ Congress thus did not include such equipment within the category of facilities used by carriers to provide telecommunications services. As a consequence, when Congress sought, in the 1996 Act, to cover CPE along with telecommunications equipment, it specified both CPE and telecommunications equipment.²⁸¹ Given Congress' express recognition in the 1996 Act of the Commission's longstanding deregulation of CPE and thus its fundamentally different character,²⁸² we find it particularly likely that Congress would have specifically referenced this equipment in Section 332(c)(7) if it had intended for this section to apply to that equipment.

112. Moreover, nothing in the legislative history indicates that Congress' preservation of local zoning authority was intended to extend to customer-end antennas. To the extent that the Conference Report gives examples of personal wireless service facilities, it references towers: "conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor's '50-foot tower' in a residential district."²⁸³

113. A narrower interpretation of "personal wireless service facilities" also best promotes the goals of the 1996 Act and Section 332(c)(7). One of the primary goals of the 1996 Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid deployment of new telecommunications technologies."²⁸⁴ In particular, among other things, Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry.²⁸⁵ Section 332(c)(7) promotes this goal by imposing certain limitations on state and

²⁸⁰ 47 U.S.C. § 153(14).

²⁸¹ See, e.g., 47 U.S.C. § 255 ("A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable."); 47 U.S.C. § 273 ("A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under Section 271(d) [subject to requirements and exceptions].")

²⁸² See 47 U.S.C. § 549 (governing commercial consumer availability of equipment used to access services provided by multichannel video programming distributors). That section states: "Nothing in this section affects Section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premise equipment used in connection with basic common carrier communications services." 47 U.S.C. § 549(d)(2).

²⁸³ S. Conf. Rep. No. 104-230, 104th Cong., 2d sess. at 91 (1996) (1996 Act Conference Report).

²⁸⁴ 1996 Act Preamble.

²⁸⁵ See *Local Competition First Report and Order*, 11 FCC Rcd at 15505-06, ¶ 3. Thus, in Section 251 of the Communications Act, Congress imposed special duties on LECs and incumbent LECs to take actions, including making their facilities and services available to competitors on reasonable terms, that would promote competition. 47 U.S.C. § (continued....)

local regulation of personal wireless service facilities siting while preserving local zoning authority generally. In particular, Section 332 (c)(7) provides that the regulation of the siting of personal wireless service facilities by a state or local government “(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”²⁸⁶ Our action here is consistent with the spirit of this provision.

114. Fixed wireless technologies provide an alternative to the incumbent LECs’ offering of basic and advanced services. In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at the fixed site. To a much greater degree than is the case with the carrier hub site, there is little flexibility to place the antenna at another location. Thus, the inability of a customer to place an antenna at the customer’s fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer, whereas the inability of a carrier to place a hub site at a specific site will often not result in a denial of wireless service to customers in that area. Therefore, applying a blanket rule against most restrictions on the placement of these customer antennas is consistent with both the broad pro-competitive goals of the 1996 Act and the specific pro-competitive goals of the limitations on state and local regulation set forth in Section 332(c)(7). In particular, unreasonable restrictions on the placement of these antennas almost by definition both effectively prohibit the provision of personal wireless services and disadvantage providers of fixed wireless services as compared to their wireline competitors, thus unreasonably discriminating among providers of functionally equivalent services. Thus, the balance of the pro-competitive goals of the 1996 Act against the goal of preserving local authority is different for these antennas than for hub antennas, and it is reasonable to conclude, in light of the overriding Congressional intent to promote competition, that Congress did not contemplate including these antennas in Section 332(c)(7).

115. For similar reasons, we also think that reading Section 332(c)(7) to exclude customer-end antennas is more consistent with the judicial enforcement mechanism established for Section 332(c)(7) non-RF safety complaints regarding state or local government regulation. Requiring aggrieved parties (usually service providers) to seek a judicial remedy against an adverse local zoning decision involving a hub site was intended as an additional measure to preserve local authority. However, the burden on customers of having to litigate individual zoning decisions in court, as opposed to seeking an administrative remedy, would be substantially greater than the burden Section 332(c)(7) imposes on service providers. Thus, again, the balance among Congress’ goals is different for customer-end antennas than for hub sites. For all these reasons, we conclude that customer-end antennas are not personal wireless service facilities within the meaning of Section 332(c)(7), and thus that Section 332(c)(7) does not preserve state and local authority over these antennas.

116. We also find that there is no constitutional impediment to our forbidding restrictions on the placement of antennas on property within the tenant user’s exclusive use, where that user has an interest in the property.²⁸⁷ In the *OTARD Second Report and Order*, we held that such rules as applied to

(Continued from previous page) _____

251. In Section 271, Congress required the former Bell operating companies to meet a competitive checklist, and to demonstrate either the existence of facilities-based competition in the local exchange market or the absence of a request for access and interconnection to provide local exchange service, before they are allowed to provide in-region interLATA service. 47 U.S.C. § 271.

²⁸⁶ 47 C.F.R. § 332(c)(7)(B)(i).

²⁸⁷ Cf. Real Access Alliance Comments at vii. (arguing that the Commission has already exceeded its authority and violated the Fifth Amendment by extending the OTARD rules to include leased property and will further compound the error by extending the rules to include new services).

antennas used for the purposes specified in Section 207 did not effect a taking of the premises owner's property within the meaning of the Fifth Amendment because by leasing his or her property to a tenant, the property owner voluntarily and temporarily relinquishes the rights to possess and use the property and retains the right to dispose of the property.²⁸⁸ Thus, none of the owner's property rights are effectively impacted by a permanent physical occupation of his property, because the landlord voluntarily relinquishes two of those rights (possessing and using) and is free to retain the third right (disposing of the property) when entering into a lease. Therefore, we did and do not believe that it constituted a *per se* taking to prohibit lease restrictions that would impair a tenant's ability to install, maintain, or use a Section 207 reception device within the leasehold. Indeed, we found that prohibiting restrictions on the installation of a satellite dish or other Section 207 device was indistinguishable in a constitutional sense from prohibiting restrictions on the installation of "rabbit ears" – a Section 207 reception device – on the top of a television set.²⁸⁹ For similar reasons, we conclude that there is no taking here.

c. Other Issues

117. We recognize that today's revision of the OTARD rules will extend the benefits of that rules to fixed wireless devices that have the capability to transmit as well as receive signals. We emphasize that all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable Commission guidelines regarding radiofrequency exposure limits.²⁹⁰ We also reiterate that the OTARD rules provide an exception for "a clearly defined, legitimate safety objective" provided the objective is articulated in the restriction or readily available to antenna users and is applied in a non-discriminatory manner and is no more burdensome than necessary to achieve the articulated objectives.²⁹¹ We believe it is incumbent upon fixed wireless licensees, including satellite providers, to exercise reasonable care to protect users and the public from radiofrequency exposure in excess of the Commission's limits. Generally, we expect subscriber antennas to be installed so that neither subscribers nor other persons are easily able to venture into and interrupt the transmit beams. Such interruptions can degrade the quality of service to the subscriber and ultimately reduce the value of the carrier's service. Thus, providers have economic incentives to avoid temporary interruptions of signal quality that are likely to motivate them to install antennas in locations where such interruptions are less likely to occur.

118. In addition, as a condition of invoking protection under the OTARD rules from government, landlord, and association restrictions, a licensee must ensure that subscriber antennas are labeled to give notice of potential radiofrequency safety hazards of these antennas. We have previously adopted labeling requirements for LMDS, MDS, ITFS, and 24 GHz service antennas, which are types of transceivers that can be placed at a subscriber's premises.²⁹² Labeling information should include

²⁸⁸ See *Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, Second Report and Order in CS Docket No. 96-83*, 13 FCC Rcd 23874, 23883-85, ¶¶19-20 (1998) (*OTARD Second Report and Order*). We note that this holding is being appealed in the U.S. Court of Appeals in the D.C. Circuit.

²⁸⁹ *Id.*

²⁹⁰ See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, Report and Order*, 11 FCC Rcd 15123, 15124, 15152 (1996); 47 C.F.R. §§ 1.1307(b)(1), 1.1310.

²⁹¹ 47 C.F.R. §1.4000(b).

²⁹² See *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* (continued....)

minimum separation distances required between users and radiating antennas to meet the Commission's radiofrequency exposure guidelines. Labels should also include reference to the Commission's applicable radiofrequency exposure guidelines. In addition, the instruction manuals and other information accompanying subscriber transceivers should include a full explanation of the labels, as well as a reference to the applicable Commission radiofrequency exposure guidelines. While we will require licensees to attach labels and provide users with notice of potentially harmful exposure to radiofrequency electromagnetic fields, we will not mandate the specific language to be used. However, we will require use of the ANSI-specified warning symbol for radiofrequency exposure.²⁹³

119. Moreover, it is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time.²⁹⁴ To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition²⁹⁵ of such requirements under the OTARD rules will not apply.²⁹⁶

120. We also note that the Commission plans to initiate a rulemaking proceeding to review and, where necessary, harmonize the Commission's regulations concerning transceiver equipment approval for radiofrequency exposure.

(Continued from previous page)

Multipoint Distribution Service and for Fixed Satellite Service, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12670, ¶ 295 (1997) (*LMDS Order*); Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19129, ¶ 37 (1998) (*MDS/ITFS Order*); Amendment 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. August 1, 2000); 47 C.F.R. § 1.1307(b)(1).

²⁹³ See *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, FCC Office of Engineering and Technology (OET), OET Bulletin 65, August, 1997, at 53 (available at <http://www.fcc.gov/oet/info/documents/bulletins/#65>).

²⁹⁴ See, e.g., *LMDS Order*, 12 FCC Rcd at 12670. We note that professional installation is in fact required for certain antennas used for MDS and ITFS under the Commission's rules. See 47 C.F.R. §§ 21.909(n), 74.939(p).

²⁹⁵ See, e.g., *Declaratory Ruling In re MacDonald*, 13 FCC Rcd 4844, 4853, ¶ 28 (CSB, 1997) (prohibiting a local government regulation requiring OTARD users to hire an installer).

²⁹⁶ In the LMDS and MMDS proceedings, we also strongly encouraged the use of safety interlock features on the subscriber units that would prevent a transceiver from continuing to transmit when blocked, to the extent that such features could be made available at a reasonable cost. See *LMDS Order*, 12 FCC Rcd at 12670, ¶ 296; *MDS/ITFS Order*, 13 FCC Rcd at 19129, ¶ 38; see also Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12779, ¶ 29 (1999) (rules amended to provide for a positive "interlock" feature that prevents inadvertent activation of a newly installed response transmitter when the response antenna is not properly installed so as to receive signals from the associated main or booster transmitters). We do not preclude the possibility that requirements of such interlock features by State or local governments, home owner associations, building owners, or other third parties could under appropriate circumstances be justified under the safety exception in Section 1.4000(b) if the requirement promotes a clearly defined, legitimate safety objective and is no more burdensome than necessary. In addition, we do not preclude the possibility that the Commission could in the future require safety devices for some customer-end transmitters, such as those that transmit above some threshold level of radiated power.

121. Finally, we decline to prepare an environmental impact statement on the extension of the Commission's OTARD rules to customer-end antennas used for the transmission or reception of fixed wireless signals, as requested in a recently-filed petition by several municipal organizations.²⁹⁷ With respect to the asbestos and other safety concerns raised by the petitioners,²⁹⁸ we find that the exceptions in the OTARD rules for safety, which continue to apply to the revisions here, adequately address those concerns.²⁹⁹ Specifically, Section 1.4000(b)(1) provides that any restriction otherwise prohibited by the OTARD rules is permitted if necessary to accomplish a clearly defined, legitimate safety objective and is no more burdensome than necessary to achieve that objective.³⁰⁰

122. With respect to the concerns regarding the effect of the extension of our OTARD rules on several species of birds that nest on rooftops and ledges,³⁰¹ we believe that the effect will be minimal because, as discussed above, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest.³⁰² Generally, antenna users do not have the requisite exclusive use or control over rooftops or ledges of the type or location described, such as in high-rise MDUs or MTEs. Moreover, to the extent that special cases do arise, they can be addressed under the waiver and declaratory ruling provisions of the rules.³⁰³

123. Regarding aesthetics concerns raised by petitioners,³⁰⁴ we conclude that the environmental effects of the end-user facilities subject to the extension of the OTARD rules would be

²⁹⁷ See National League of Cities, et al. Petition for EIS. We address petitioners' concern regarding issues related to Section 224 in para. 85 *supra*. 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*.

²⁹⁸ See National League of Cities, et al. Petition for EIS at 16-24.

²⁹⁹ See 47 C.F.R. § 1.4000(b)(1); para. 100, *supra*.

³⁰⁰ See 47 C.F.R. § 1.4000(b)(1). We reject the petitioners' assertion that the Cable Services Bureau's *Star Lambert* decision "effectively read that exemption out of the rule (by prohibiting the enforcement of safety related codes and regulations against satellite dish providers." EIS Petition at v-vi. See *Star Lambert and Satellite Broadcasting and Communications Association of America, Memorandum Opinion and Order*, 12 FCC Rcd 10455 (CSB 1997) (*Star Lambert*). In that decision, the Bureau determined that the City of Meade, Kansas had not satisfied the safety exception to the OTARD rules because it had not sufficiently identified the type of safety concern it intended to address. *Star Lambert Order*, 12 FCC Rcd at 10469, ¶ 36 (noting that the Meade, Kansas zoning requirement made no more than passing reference to unspecified and general safety concerns). Moreover, the Bureau stated its concern that the general statement of safety interests in the Meade ordinance at issue was so broad and ill-defined that it constituted little more than a pro forma recitation. Thus, the *Star Lambert* decision did not prohibit the enforcement of all State and local safety codes as applied to antennas subject to the OTARD rules, but rather prohibited enforcement of such codes that do not accomplish a clearly defined, legitimate safety objective. Significantly, in the Commission's *OTARD Order on Reconsideration*, which was issued subsequent to the Meade decision, the Commission declined requests to cut back on the safety exception and reiterated the validity of recognizing legitimate safety concerns. See *OTARD Order on Reconsideration*, 13 FCC Rcd at 18968-71, ¶¶ 8-15.

³⁰¹ See National League of Cities, et al. Petition for EIS at 31-38.

³⁰² See para. 100, *supra*.

³⁰³ See 47 C.F.R. §§ 1.4000(c), 1.4000(d).

³⁰⁴ See National League of Cities, et al. Petition for EIS at 24-25.

minimal and not significant due to the limited size and location on the end user's premises, as discussed above.³⁰⁵ We note that the OTARD rules provide, in addition to the safety exception, an exception for historic preservation.³⁰⁶ As noted above, the OTARD rules also provide for governmental and non-governmental entities to seek a waiver of the application of OTARD to "address local concerns of a highly specialized or unusual nature."³⁰⁷ Genuine concerns about environmental risks, if not already within the scope of the safety or historic preservation exceptions, may well be appropriate for consideration under this waiver provision.

124. In conclusion, we find that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals. We recognize that the extension of the OTARD rules may not give every potential customer of fixed wireless service an effective right to place a covered antenna. In particular, the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops. However, although our rules generally would not apply to rooftop space in MDUs or MTEs, which typically is not exclusively used or controlled by tenants, the extension of our rules may give building owners stronger incentives to negotiate with competitive LECs to provide them with rooftop access on behalf of the tenants served by the competitive LECs. Under our rules, the tenant would have the right to place an antenna on sections of the MTE under the tenant's exclusive use or control, such as on the tenant's balcony. In some cases, as an alternative to balcony antennas, the building owner may consent to the placement of rooftop antennas.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Non-discriminatory Access Requirement

125. In addition to requesting comment on potential actions to promote competitive access to areas and facilities controlled by incumbent LECs, other utilities, and tenants, as well as on exclusive contracts, the Commission in the *Competitive Networks NPRM* sought comment on whether it should require building owners "who allow access to their premises to any provider of telecommunications services [to] make comparable access available to all such providers under nondiscriminatory rates, terms and conditions."³⁰⁸ We stated our concern that premises owners may be unreasonably discriminating among competing telecommunications service providers and that such discrimination may be an obstacle to competition and consumer choice. The Commission also sought comment on whether it had the statutory authority to promulgate such a requirement, how such a requirement should be structured, whether such a requirement could be structured so that it would comply with the 5th Amendment Takings Clause of the U.S. Constitution, and whether there were practical issues associated with implementing a nondiscriminatory access requirement.³⁰⁹ We received substantial comment on these issues.

126. We expect 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

³⁰⁵ See para. 100, *supra*.

³⁰⁶ See 47 C.F.R. § 1.4000(b)(2).

³⁰⁷ 47 C.F.R. § 1.4000(c).

³⁰⁸ *Competitive Networks NPRM*, 14 FCC Rcd at 12701, ¶ 53.

³⁰⁹ *Id.* at 12701-07, ¶¶ 53-63.

particular anticompetitive actions by premises owners and other third parties. We remain concerned, however, that, based on the record, the ability of premises owners to unilaterally and unreasonably discriminate among competing telecommunications service providers remains an obstacle to competition and consumer choice. We are encouraged by the real estate industry's recent initiative to develop and promote model contracts and best practices for providing building access. In particular, the industry's efforts have focused on the following issues: (1) adopting a firm policy not to enter into any exclusive contracts for building access in the future; (2) committing to procedures and appropriate timeframes for processing tenant requests for a particular telecommunications provider 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) incorporating these processing guidelines in new leases and notices to existing leaseholders; (4) committing to a clearer and more predictable process for responding to requests from carriers to access the MTE to serve customers, where the carrier agrees that its access to the MTE is conditioned on providing service to tenants by a date certain;³¹⁰ (5) facilitating the establishment of 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 (6) supporting a periodic, quantitative study of the market for building access, to be conducted under the auspices of the Commission.³¹¹ We believe that it is prudent to permit additional time for this initiative to develop, in the hope that the industry can address MTE access issues without further regulatory intervention. We will closely monitor these industry efforts, as well as the development of competition in the market for the provision of telecommunications services in MTEs. We stress that if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to discriminate among competing telecommunications service providers, and such concerns are not resolved by other market forces, we will consider adopting a nondiscriminatory access requirement.

127. To that end, we now seek comment on several additional issues related to the imposition of a nondiscriminatory access requirement. First, because it is essential to have up-to-date market information when evaluating the necessity of such a requirement, we seek to refresh the record on the status of the market for the provision of telecommunications services in MTEs. Second, we note that our specific requests for comments in the *Competitive Networks NPRM* focused primarily on placing a nondiscriminatory access requirement directly on building owners. In some recent filings,³¹² a number of

³¹⁰ *Id.*

³¹¹ See September 6 Real Access Alliance Letter.

³¹² See Addendum to ALTS Comments at 43-48 (discussing possible ways in which "[t]he Commission can secure tenant access to telecommunications options without imposing requirements directly upon MTE owners and managers"); Letter from Jonathan Askin, Counsel for ALTS, to Magalie Roman Salas, Secretary, FCC, dated April 12, 2000 (noting that "[t]hat the Commission can accomplish MTE access indirectly through its authority to regulate providers of interstate communications. Specifically, it should prohibit carriers from serving MTEs owners or operated by owners or managers that discriminate among telecommunications carriers or otherwise unreasonably restrict access by telecommunications carriers to the tenants in those MTEs. Alternatively, the Commission could prohibit carriers from entering into contracts with MTE owners or managers that provide or allow for discriminatory or unreasonable treatment of other carriers."); Letter from Gunnar Halley, Counsel for Teligent, to Magalie Roman Salas, Secretary, FCC, dated April 28, 2000 (noting that the Commission "may impose suitable obligations upon [carriers] that have the effect of influencing multi-tenant environment owner behavior" and citing *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945) (*Ambassador*)); Letter from Philip L. Verveer, Counsel for WinStar Communications, Inc., to Commissioner Powell, dated June 22, 2000, filed in WTB 99-217 (noting that "[t]he Commission may exercise its jurisdiction over carriers' practices in order to ensure access to buildings on nondiscriminatory and reasonable terms").

competitive carriers advocate the legal argument that, were we to impose a nondiscriminatory access requirement, we could instead place the obligations attendant with such a requirement on local telecommunications providers. We believe that a strong case can be made that the Commission has authority under this theory to impose a requirement on such carriers falling under the jurisdiction of the Commission. We seek comment on this argument as well as on whether it would be prudent to exercise that authority. That decision would be informed by the results of the updated market and technological information we are seeking, and must also take into account possible constitutional and implementation issues. Thus, we seek comment on those sets of issues as well.

1. Update on the State of the Market

128. Although, as noted above, there has been some significant progress toward competition in the market for local telecommunications services,³¹³ we remain concerned by the possibility that the regulatory changes that we are adopting in this order may ultimately prove insufficient to ensure that this progress continues at an adequate pace. Consequently, at some point in the future, it may still prove necessary to consider imposing a nondiscriminatory access requirement following the FNPRM proceeding. In that light, we encourage interested parties to comment on developments affecting competitive provision of telecommunications services in MTEs so that we can continue to evaluate and monitor the need for such a requirement in light of conditions in the marketplace. In addition, we seek to monitor closely the progress of the real estate industry's initiative to develop and promote both model contracts and "best practices" for acquiring building access, as discussed in paragraph 2, *supra*. We urge the real estate industry to provide additional information on the status and scope of this initiative as it is developed and implemented. We also seek comment from other interested parties, including tenants³¹⁴ and competitive LECs, on the progress that has been made through this initiative.

129. In particular, we seek data regarding the state of the market including, but not limited to, the following: (1) the number of MTEs to which competitive LECs have requested access, along with information regarding the characteristics of those MTEs (*e.g.*, number of units; types of use, including commercial, residential, and mixed use MTEs; urban vs. suburban); (2) the number of MTEs to which multiple carriers have obtained access, and the characteristics of those MTEs; (3) the number of local telecommunications service providers that have obtained access to these MTEs and the technologies that they employ (*e.g.*, wireless vs. wireline); (4) among competing carriers that have obtained access to MTEs, the percentage of these MTEs in which they are actually providing services; (5) the average length of time from an initial request for MTE access until the successful conclusion of contract negotiations, along with information regarding how often, by how much, and for what reasons this varies; (6) the number of MTEs in which a request for competitive access has been denied either by an MTE owner or manager or by a LEC, the average length of time from an initial access request until a denial, and the asserted bases for these denials; (7) the average length of time from the initial access request that

³¹³ See paras. 14 -24, *supra*.

³¹⁴ We note that we recently received two *ex parte* submissions from groups representing the interests of consumers. In its submission, AARP asserts that "[t]enants, not landlords and building owners, should have the opportunity to choose among carriers for their telecommunications services." Letter from Martin Corry, Director, Federal Affairs, AARP, to William E. Kennard, Chairman, FCC, dated September 20, 2000. Similarly, the Consumers Union asserts that "occupants of MTEs should have the right to select from a variety of carriers. . . . [J]ust compensation does not require that property owners be allowed to block the expansion of local phone competition." Letter from Gene Kimmelman, Co-Director, Washington Office, Consumers Union, to William E. Kennard, Chairman, FCC, dated September 19, 2000.

currently pending access requests have been outstanding; (8) any differences in the length of negotiations, the nature of the negotiations, or the frequency of denials based on whether a competitive LEC is seeking access in response to a service request from a specific tenant; (9) the charges imposed for different types of access to MTEs and the basis on which such charges are determined; (10) state laws or regulations requiring or encouraging nondiscriminatory access, and the nature of those laws or regulations; (11) the experiences of carriers, building owners, and end users in states that have promulgated nondiscriminatory access requirements, including the numbers and types of complaint and enforcement actions that have been filed; and (12) technological developments, such as free-space optical technology,³¹⁵ that may obviate or reduce the need for carriers to obtain direct access to intrabuilding facilities.

130. We believe that any future assessment of the market would be best guided by information that measures the current state of the market and the market after a reasonable period of time has passed after the implementation of the Report and Order and the best practices proposed by the real estate industry. We authorize the Wireless Telecommunications Bureau to issue a public notice requesting information be submitted eight months from the release of the FNPRM. This period should provide the Commission with the opportunity for updating the record with relevant market information that will better enable us to gauge overall competitive market trends.

2. Legal Issues

131. As discussed above, based on competitive developments in the market for the provision of telecommunications services in MTEs, and in response to the measures we adopt today, we may consider adopting a nondiscriminatory access requirement in the future. To that end, we will examine and seek further comment on issues relating to our legal authority.

a. Statutory Authority

132. Based upon our review of the relevant authority, we believe that there is a strong case that the Commission has the statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE. This section sets forth the relevant legal framework for this theory.

133. As a preliminary matter, we observe that regulating LECs in this manner could encourage competition in the exchange access market, a market in which LECs provide customers with a segment of interstate telephone service.³¹⁶ We note that, to the extent a local carrier provides exchange access to originate or terminate interstate telecommunications, the services and the facilities used for that purpose fall within the Commission's jurisdiction under its mandate for regulating interstate communications.³¹⁷

³¹⁵ For example, TeraBeam Internet, a jointly-owned venture of Lucent and TeraBeam Networks, is developing a fiberglass network technology that can send data through the windows of office buildings using optical beams. See Communications Daily, April 13, 2000.

³¹⁶ The Communications Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

³¹⁷ See, e.g., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); cf. *Louisiana PSC*, 476 U.S. at 376 n.4 (acknowledging that where it (continued....))

134. It is well established that the Commission has broad authority to regulate the practices of LECs in connection with their provision of interstate communications services. In addition to the general authority specified in Title I of the Communications Act,³¹⁸ Title II provides a specific, substantive framework for the Commission's regulation of such practices. Thus, Section 201(b) mandates that "[a]ll charges, practices, classifications, and regulations for and in connection with such [interstate or foreign] communication [by wire or radio] service, shall be just and reasonable," and then the section gives the Commission the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act."³¹⁹ Similarly, Section 202(a) declares that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a). Finally, Section 205(a) authorizes the Commission "to determine and prescribe . . . what . . . practice is or will be just, fair, and reasonable" where it is of the opinion that a common carrier practice "is or will be in violation of any of the provisions of this Act."³²⁰

135. When a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage, this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of its market – may not qualify as either just or reasonable.³²¹ We note that, in a

(Continued from previous page) _____

is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

³¹⁸ Under Section 1, the Commission is charged with "execut[ing] and enforc[ing] the provisions of th[e] Communications] Act," 47 U.S.C. § 151, the provisions of which "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States." 47 U.S.C. § 152(a). Section 2(a) makes it clear that the Act applies to the LECs: "The provisions of this act shall apply to . . . all persons engaged within the United States in such communication or such transmission of energy by radio." 47 U.S.C. § 152(a). Moreover, Section 4(i) provides the Commission with general authority to promulgate regulations that are necessary to perform its functions: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Commission's mandate under Title I has justified regulation of common carrier activities that are not specifically addressed in Title II. *See, e.g., Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

³¹⁹ 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 303(r) (stating that the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act").

³²⁰ 47 U.S.C. § 205(a).

³²¹ *Cf. Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945). In the *Ambassador* case, the Supreme Court held that the Commission's supervisory power was not limited to rates and services, but also, under Section 201(b), extended to practices in connection with such service. *Id.* at 323. The practices at issue involved the terms of telephone company tariff filings, which regulated the relationship that the telephone subscribers had with their third party (continued....)

separate context, the Commission's International Settlements Policy (ISP) mandates that, pursuant to Section 201, all charges and practices of U.S. international carriers be just and reasonable, including a requirement that U.S. carriers receive non-discriminatory treatment from dominant foreign carriers.³²² The Commission has observed that the exchange access market is one of the "last monopoly bottleneck strongholds in telecommunications," and that opening it up to competition will "bring new packages of services, lower prices and increased innovation to American consumers."³²³ Without reasonable access to end users for new entrants, the benefits of competition (*e.g.*, more advanced services, reasonable prices, better service to consumers, greater range of choices of service) will not develop fully, thus undermining the express Congressional goal of creating for all Americans an efficient communication system that provides good service at reasonable prices.³²⁴ Under these circumstances, we believe that there is a strong case that the Commission has the requisite authority, under Section 205(a) of the Act, to promulgate a regulation that bars the practice that contributes to this result.³²⁵ We seek comment on the Commission's potential application of Section 205(a), as well as the other relevant provisions of Title II, to prohibit the LEC practices described above that could result in competitive market distortions. Of course, in making the ultimate determination whether to adopt such a policy in this context, the Commission must consider relevant constitutional and marketplace issues, as discussed elsewhere in this item.

136. We recognize that the regulation under discussion here would have an indirect effect on the behavior of the owners of MTEs. While we have asked questions in this proceeding about our statutory authority to regulate MTE owners directly,³²⁶ it does not appear that the same issues would arise from a direct carrier regulation that has indirect effects on the MTE owners. We note that significant

(Continued from previous page)

customers. Specifically, the tariffs stated that provision of telephone service was conditioned on the private branch exchange ("PBX") subscribers (*i.e.*, hotel, apartment house and club owners) not charging their guests any fee in addition to the telephone company's message toll charges for use of the service. The Supreme Court recognized the Commission's authority to review whether the telephone companies' requirements (filed with and reviewable by the Commission pursuant to Section 203) directly affecting the relationship between their subscribers and third parties were "just and reasonable" practices under Section 201(b), and whether use of the tariffs "perpetrate[d] an unjust or unreasonable discrimination or preference" under Section 202. *Id.* The Court stated that these Sections "clearly authorize the [telephone] companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers." *Id.*

³²² The ISP requires: (1) that U.S. carriers receive the same accounting rate from dominant foreign carriers; (2) that the accounting rate be divided evenly between a U.S. carrier and a dominant foreign carrier; and (3) that U.S. carriers receive a proportionate share of return traffic from dominant foreign carriers. 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, *Report and Order and Order on Reconsideration*, IB Docket No. 98-148, 14 FCC Rcd 7963 (1999).

³²³ *Local Competition First Report and Order*, 11 FCC Rcd at 15506.

³²⁴ See 47 U.S.C. § 151 (stating that purpose of Commission regulation under Act is "to make available to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

³²⁵ 47 U.S.C. § 205(a); see also *Western Union Telegraph Company v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) (rejecting argument that Section 205(a) requires formal evidentiary hearing, stating that "[i]t is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than in an adjudicatory ratemaking proceeding").

³²⁶ See *Competitive Networks NPRM*, 14 FCC Rcd at 12703-04, ¶¶ 57-58.

precedent might support the Commission's authority to proceed in this manner, and we seek comment on the potential application of this precedent.

137. Most recently, the Commission addressed the effects of certain foreign telecommunications carrier practices, which were causing competitive distortions in the marketplace and thus adversely affecting the prices for communications services ultimately paid by U.S. citizens. The Commission, in its *International Settlement Rates Order*,³²⁷ placed certain requirements on U.S. carriers that had an indirect impact on the rates charged by foreign carriers. Specifically, the Commission established benchmark settlement rates that the domestic carriers were allowed to pay foreign carriers for termination of international traffic originating in the United States, and prohibited U.S. carriers from entering into any agreements with foreign carriers if the fees charged by the foreign carriers exceeded a benchmark level.

138. In affirming the Commission, the U.S. Court of Appeals for the District of Columbia Circuit rejected claims that the Commission had exceeded its authority because its action affected the foreign carriers:

To be sure, the practical effect of the Order will be to reduce settlement rates charged by foreign carriers. But the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.

Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (citations omitted).

139. This approach is also consistent with earlier precedent, such as *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997) (upholding requirement that Mexican affiliate of U.S. broadcast network air issue-responsive programming in order for U.S. network to qualify for Section 325 permit to transmit signals to foreign station for rebroadcast into the United States), and *Network Television Broadcasting, Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970) (creating indirect limits on television broadcast network control by regulating the licensed network affiliates), *aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F. 2d 470 (2d Cir. 1971).

140. Moreover, in *Ambassador*, discussed at note 316 *supra*, the Supreme Court upheld the Commission's exercise of jurisdiction over surcharges imposed by hotels, apartment houses and clubs on end user guests and tenants for interstate and foreign telephone calls. The owners of these multiple tenant environments would typically use a private branch exchange (PBX) system, installed and owned by the telephone company, to route incoming and outgoing calls for guests, and to connect guests to points within the hotel or apartment. Although the hotel owners provided their guests with various services in connection with this system (e.g., secretarial services such as message taking, message routing, message screening) and paid the telephone company monthly charges for the use of the system, the surcharges at issue in this case were calculated on a per call basis, varying in accordance with the toll charge made by the telephone company for the communications service.

141. The Commission had concluded that the hotel owners were serving as agents for the telephone companies and that these surcharges must therefore be reflected in tariffs filed by the telephone companies.³²⁸ The telephone companies then filed tariffs stating that service to the hotels and

³²⁷ *International Settlement Rates, Report and Order*, IB Docket No. 96-261, 12 FCC Rcd 19806 (1997).

³²⁸ See *Special Telephone Charges of Hotels, Report of the Commission*, Docket No. 6255, 10 FCC 252, 264 (1943).

apartment houses was conditioned on those entities not imposing any such surcharges. The hotel and apartment house interests appealed, and the district court sustained the validity of the tariff without relying on the view that the hotels/apartment houses were agents of the telephone companies. (The court termed them subscribers.) The case was appealed directly to the Supreme Court, which affirmed. The Court held that the Commission's authority permits it to oversee the conditions placed by telephone companies on their subscribers, stating:

The Communications Act of 1934 recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities. The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is "charges, practices, classifications, and regulations for and in connection with such communication service." 48 Stat. 1070 U.S.C. § 201(b), 47 U.S.C.A. § 201(b). It is in all of these matters that the Act requires the filed tariffs to be "just and reasonable" and declares that otherwise they are unlawful. By none of these devices may the companies perpetrate an unjust or unreasonable discrimination or preference. All of these must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of its business by the company. These provisions clearly authorize the companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers.

Ambassador, 325 U.S. at 323 (footnotes omitted).

142. According to the Court, the main limitation on the use of regulation to affect the behavior of hotel owners is that the "telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business." *Id.* The mere fact, however, that a regulation affects the hotel's dealings with third parties does not invalidate the regulation:

But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships. Such a regulation is not invalid per se merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.

Id. at 323-24.³²⁹

143. Similarly, the purpose behind the regulation under discussion here bears directly on communications services and is focused on the state of the communications market;³³⁰ the Commission would be prohibiting LECs from dealing with MTEs that discriminate among providers of

³²⁹ The Court went on to conclude that, given the fact that the hotels' surcharges on their guests were not based on the service rendered by the hotel, but rather varied in accordance with the toll charge made by the telephone company for communications service, these charges were "so identified with the communications service that they are brought within the prohibitions of this regulation." *Id.* at 324.

³³⁰ Cf. *GTE Service Corp.*, 474 F.2d at 730 (holding that, in light of the threat that common carriers' expansion into computer data processing posed to the efficiency of the communications market and the reasonableness of prices therein, the Commission had the authority to regulate the entry of such carriers into the non-regulated field of data processing services).

telecommunications services in order to ensure that the interstate communications market becomes more competitive and that the rates charged and services provided to the public are just and reasonable. We seek comment on whether a LEC's provision of service to MTEs is sufficiently closely related to an MTE owner's unreasonable discrimination that we can and should exercise jurisdiction over the LEC's practice. We also note that Section 411 of the Act grants us authority to include non-carriers as parties in enforcement proceedings.³³¹ If we decide to adopt a nondiscriminatory access obligation, we also seek comment on the application of Section 411(a) regarding joinder of MTE owners as parties to any Commission action enforcing such a regulation.

b. Constitutional Issues

144. In the *Competitive Networks NPRM*, we raised a series of questions about the constitutionality under the Fifth Amendment of imposing a nondiscrimination requirement directly on the owners of MTEs.³³² We similarly ask here for comment on the constitutionality of barring the LECs from dealing with MTE owners who maintain a discriminatory policy against competing carriers, and on ways to mitigate any constitutional problems that might exist.³³³ While we do not perceive that there are any takings issues with respect to the LECs (since the proposed regulation would not involve use or occupation of LEC property), we acknowledge that the regulation would almost certainly influence MTE owners to act in a manner similar to that which would be required by direct regulation. To the extent that a direct regulation would constitute a Fifth Amendment *per se* taking, there is some suggestion in the case law that an indirect regulation that leaves the third party no choice but to submit to the same basic result would also constitute an unconstitutional taking.³³⁴ In evaluating a rent control ordinance, however, the Supreme Court, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), drew a distinction between a direct requirement that a landowner submit to the physical occupation of his land (which, if uncompensated, would work a *per se* taking in violation of the Fifth Amendment), and a rental requirement that, *inter alia*, barred a mobile park owner from disapproving of the transfer of a mobile home from one tenant to the next (provided the purchaser has the ability to pay the rent). The Court stated:

³³¹ Section 411(a) provides as follows: "In any proceeding for the enforcement of the provisions of this Act, . . . it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practices under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 47 U.S.C. § 411(a).

³³² See *Competitive Networks NPRM*, 14 FCC Rcd at 12704-05.

³³³ See, e.g., *id.* at 12705 (asking, e.g., if constitutional problems might be mitigated if a requirement were tailored to apply only where the property owner has already permitted another carrier physically to occupy its property, or if the requirement enabled the property owner to obtain from a new entrant the same compensation that it had voluntarily agreed to accept from an incumbent LEC).

³³⁴ See, e.g., *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992). The court noted, in dicta, that if Section 621(a)(1) of the Communications Act were construed to require cable company access in cases where the property owner had previously and privately agreed to provide compatible access to others, the court "would have substantial reservations regarding the constitutionality of the Cable Act." *Id.* The court explained that "[b]ecause every modern apartment building is linked to electric, telephone, and/or video programming services, the district court's interpretation [upon which the court of appeals did not need to pass] effectively grants franchised cable companies the same unencumbered right of access to private property which the Supreme Court held to be a compensable taking in *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Id.*

At least on the face of the regulatory scheme, neither the city nor the state compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobile Home Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. . . . Put bluntly, no government has required any physical invasion of petitioners' property.

Id. at 527-28 (citation omitted).³³⁵

145. We ask for comment on the effect of the foregoing case law on the potential regulation at issue here. In particular, we are interested in whether, in light of this case law, an obligation imposed on LECs in their dealings with property owners would effect a taking from property owners. As indicated above, however, even if such a regulation in unqualified form would present constitutional problems, there may be ways of modifying the regulation to mitigate these problems. In addition to the approaches specifically mentioned in paragraph 60 of the *Competitive Networks NPRM*, we also ask whether the constitutional concerns would be answered completely if the Commission provided a judicially reviewable mechanism for ensuring that the property owners received "just compensation" commensurate with what the Fifth Amendment might require in takings situations. In *Gulf Power I*, the court rejected a facial challenge to the constitutionality of Section 224(f) of the Communications Act, ruling that this provision, although working a taking, passed constitutional muster because the statute itself provided for the possibility of just compensation to the plaintiff utilities. Section 224(f) is a mandatory access provision, which states 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." 47 U.S.C. § 224(f)(1). Under the statutory scheme, the Commission has the authority to review the rates and terms of pole attachments agreements between utilities and cable systems or telecommunications carriers (provided such matters are not regulated by a state) under certain guidelines provided for in the statute. The Commission's determinations in these regards are, of course, judicially reviewable.

146. The court in *Gulf Power I* upheld this basic approach, ruling that it was not facially unconstitutional under the Fifth Amendment "because, at least in most cases, it ensures a utility does not suffer that taking without obtaining just compensation." *Id.* at 1338. In so ruling, the court made it clear that an agency could determine the amount of compensation in the first instance, so long as that determination was judicially reviewable on constitutional grounds:

[T]he Supreme Court has stated that "all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 194-95, 105 S.Ct. at 3120-21 (citation and quotation omitted). While a process in which the judicial branch does not make the final determination of what constitutes just compensation may be constitutionally inadequate, we see no constitutional problem with a process that employs an

³³⁵ See also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts because the challenged regulations did not compel surrender of the artifacts, there was no physical invasion or restraint upon the artifacts, and appellees retained the rights to possess, transport, donate or devise the protected birds; "loss of future profits – unaccompanied by any physical property restriction provides a slender reed upon which to rest a takings claim."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that nondiscrimination provision under Title VII of the Civil Rights Act of 1964, requiring general access to places of public accommodation, did not constitute taking of property).

administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of "provid[ing] an adequate process for obtaining compensation." *Id.*

Gulf Power I, 187 F.3d at 1333.

147. Given the analysis above, we request comment on whether the constitutional concerns regarding a nondiscrimination requirement (either indirect or direct) would be resolved if the Commission were to specify that an MTE policy is not discriminatory merely because it requires a competing carrier to pay "just compensation" to the building owner for access, and if the Commission's review of the policy were subject to judicial review. Similarly, we ask whether a similar compensation mechanism would resolve questions over the constitutionality of a direct regulation on the owners of MTEs.

148. We recognize that the regulatory framework before the court in *Gulf Power I* was based on a statute that specified a compensation mechanism, unlike the compensation approach under discussion here. While the absence of a statutorily mandated compensation mechanism led the court in *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), to invalidate Commission orders requiring LECs to permit competitive access providers ("CAPs") to connect their facilities to the LEC network through physical collocation (at a rate set by tariff), the critical problem for the *Bell Atlantic* court was not the failure of the statute to specify a compensation mechanism *per se*, but that the ultimate surety for providing just compensation rested on Tucker Act claims that Congress had not specifically authorized.

149. To elaborate, in *Bell Atlantic*, the court was evaluating the Commission's implementation of Section 201(a) of the Communications Act, which creates a common carrier duty "to establish physical connections with other carriers" if the Commission "finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). Construing this provision, the Commission recognized a right on the part of competing carriers to physically co-locate equipment on the incumbent carrier's property. The court observed that the Commission's rules allowed the LECs to file new tariffs under which they would obtain compensation from their competitors for the "reasonable costs" of collocation, but not necessarily for the level of compensation required by the Fifth Amendment (*i.e.*, "just compensation"). Thus, if the compensation required by the tariff were lower than the Fifth Amendment "just compensation," the LEC would not be entitled under any Commission rule to recover the difference from the competitor. Instead, the government would face liability: "But in fact the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment." *Bell Atlantic*, 24 F.3d at 1445 n.3. It was this concern over the exposure of the Treasury "to liability both massive and unforeseen," *id.* at 1445, that led the court to voice concerns that the agency's interpretation of the statute would encroach on Congress's exclusive powers to raise revenue and appropriate funds, which, in turn, led to the court's narrowing construction of the statute under the avoidance canon.³³⁶

³³⁶ Under the avoidance canon, a court will narrow an agency's construction of a statute in order to avoid substantial constitutional questions. The court in *Bell Atlantic* explained that "when 'there is an identifiable class of cases in which application of [the] statute will necessarily constitute a taking,'" the avoidance canon should take effect. *Bell* (continued....)

150. In contrast, an approach toward MTE owners that specifically provides for the level of compensation mandated by the Fifth Amendment would appear to avoid these concerns; the government would have no liability for Tucker Act claims since the regulation would be structured to entitle the MTE owner to “just compensation” under a nondiscrimination policy, and the regime would not constitute a revenue raising scheme since the competing provider would, on a voluntary basis, pay no more than the value of the access it has received. With the courts having the final say in assessing what constitutes the constitutionally required level of compensation, there should be no “identifiable class of cases in which application of [the] statute will necessarily constitute a taking,” *id.*, and therefore no basis for applying the policy of avoidance. We seek comment on this analysis.

3. Potential Scope of Application

151. As discussed above, if our concerns regarding the ability of premises owners to discriminate unreasonably among competing telecommunications service providers are not adequately resolved without regulatory intervention, we are prepared to consider adopting a nondiscriminatory access rule, in the form either of a direct regulation of property owners³³⁷ or of a regulation of common carrier practices. To that end, we examine and seek further comment below on the potential scope of such an obligation.

152. We acknowledge that there may be some entities for which the burdens arising out of a nondiscriminatory access rule would outweigh the benefits to competition and customer choice.³³⁸ There also may be situations that the Commission should exempt from a nondiscriminatory access rule for other reasons. For example, should any Commission regulations differentiate between commercial and residential buildings? That is, if we were to adopt a nondiscriminatory access rule, should we exempt residential buildings from whatever regulation we ultimately impose for the same reasons, discussed *infra* Section V.B., that we may distinguish between commercial and residential premises in the context of exclusive contracts? In addition, should a nondiscriminatory access provision be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue? The states that have promulgated nondiscriminatory access requirements often exempt multitenant buildings that have fewer than some minimum threshold of units.³³⁹ Also, should we exempt buildings that are owned by state or local governments? For example, is a nondiscriminatory access rule appropriate in

(Continued from previous page)

_____ *Atlantic*, 24 F.3d at 1445 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). The avoidance canon, however, is not applicable to situations in which it is only possible that a statute or regulation might effect a taking. *National Mining Association v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999) (refusing to apply the avoidance canon to interpret the Energy Policy Act to mandate an exemption in the Secretary of the Interior’s regulations, even though it was possible that a court might determine in a particular case that application of the regulations had caused a regulatory taking).

³³⁷ In response to the *Competitive Networks NPRM*, 14 FCC Rcd at 12673, we have received extensive comment on the legal issues related to potential imposition of a non-discriminatory access requirement on building owners. Although we do not resolve these legal issues today, we see no need for further comment on these questions, except to the extent expressly discussed above.

³³⁸ See *Competitive Networks NPRM*, 14 FCC Rcd at 12706 (asking commenters whether “we should limit the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners”).

³³⁹ See, e.g., *Massachusetts Nondiscriminatory Access Order* (generally exempting residential multidwelling units with fewer than four units); Conn. Gen. Stat. Ann. § 16-2471 (1997) (generally requiring minimum threshold of three units); 16 Texas Admin. Code § 26.129(b)(1)(C) (Sept. 7, 2000) (Texas law applies, *inter alia*, to “[p]ublic or private property owners of commercially operated residential property with four or more dwelling units . . .”).

either public housing or at municipal airports, in which a local government often leases space to various commercial retail establishments? Should we exempt federal buildings?³⁴⁰ We seek comment on these issues.

153. For some buildings, other factors may be present that would warrant exempting a particular building or tenancy from a nondiscriminatory access rule. For example, the state of Massachusetts exempts “all tenancies of 12 months or less in duration and transient facilities, such as hotels, rooming houses, nursing homes and [facilities] serviced by payphones.”³⁴¹ We also note that the state of Texas has exempted “institutions of higher education” from its requirements, and, thus, college dorms appear to be beyond the scope of Texas’ nondiscrimination requirement. In addition, representatives of federal, state, and local governments argue that buildings which they own or control should not be subject to any nondiscriminatory access requirements.³⁴² We seek comment on what circumstances would warrant exempting a building from a nondiscriminatory access requirement, including whether we should adopt exemptions similar to those described above.

154. In addition, as we noted earlier, since the *Competitive Networks NPRM* was adopted, a new type of local telecommunications provider has emerged. These carriers, which are often referred to as “building LECs” or “BLECs,”³⁴³ typically own telecommunications facilities only within MTEs. A building LEC provides telecommunications services to tenants by interconnecting with another LEC that has facilities outside the building. The nature of the relationship between the building owner and the building LEC is often different, however, from the typical competitive LEC/building owner relationship in that the building LEC agrees to give the building owner equity, or has agreed to share a percentage of the telecommunications revenues received in a particular building or group of buildings, in exchange for building access. Indeed, in some instances, consortiums of real estate firms have been the founding members of building LECs.³⁴⁴

³⁴⁰ We note that the Conference Report associated with H.R. 4475, which was signed into law on October 23, 2000, includes the following language: “The conferees direct the executive branch [to] identify building telecommunications access barriers and take necessary steps to ensure that telecommunications providers are given fair and reasonable access to provide service to Federal agencies in buildings where the Federal government is the owner or tenant.” H.R. Conf. Rep. No. 106-940 at 161.

³⁴¹ *Massachusetts Nondiscriminatory Access Order* at 18.

³⁴² See LSGAC Recommendation No. 22.

³⁴³ See Letter from Kathleen Q. Abernathy, Vice President, 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”).

³⁴⁴ For example, BroadBand Office, one such competitive LEC, was founded by the following eight real estate companies: Carr America Realty Corporation, Crescent Real Estate Equities Company, Duke-Weeks Realty Corporation, Equity Office Properties Trust, Highwoods Properties, Inc., the Hines Organization, Mack-Cali Realty Corporation, and Spieker Properties, Inc., along with the venture capital firm of Kleiner Perkins Caufield and Byers. See Letter from Kathleen Q. Abernathy, Vice President, BroadBand Office, to Magalie Roman Salas, Secretary, FCC, dated April 13, 2000 (enclosing handout from April 13, 2000 *ex parte* meeting with Commercial Wireless Division staff). Another example is the building LEC OnSite Access, Inc., for which Reckson Service Industries, an affiliate of the real estate investment trust Reckson Associates Realty, is a principal financial backer. Letter from Joseph M. Sandri, Jr., WinStar Communications, Inc., to Magalie Roman Salas, Secretary, FCC, dated November 22, 1999 (noting that, at some point, Reckson held a 42% equity stake in OnSite access).

155. Building LECs may promote the goals of the 1996 Act by bringing competition and advanced services to MTEs that otherwise might not see competitive providers for quite some time. At the same time, we are concerned that these building LEC relationships may create incentives for unreasonable discrimination by building owners and thus undermine competition in MTEs.³⁴⁵ We therefore seek to create a record on these new developments in order to determine their effect on the market and what, if any, particularized regulation of building owners in these contexts may be appropriate. Specifically, we seek comment on: (1) the types of services offered by building LECs; (2) the nature and scope of the relationships between building owners or real estate investment trusts and the competitive LECs in which they maintain a financial interest; and (3) whether and how these agreements affect competition for local telecommunications services.

4. Potential Implementation Issues

156. If we were to adopt a nondiscriminatory access rule, a number of implementation issues would arise. We seek to develop a fuller record on these issues. Specifically, we seek comment regarding how the Commission would define nondiscriminatory access for all providers given the significant variations in the type and extent of access required by each provider. For example, wireless technologies require access to the roof or other location suitable for placing an antenna, whereas wireline technologies typically enter the building at or below ground and interconnect to the building wiring at a basement or ground floor equipment closet. The access required may also vary depending on the type of services required by a particular end user. In addition, we seek comment on how a nondiscriminatory access rule could be tailored to address the ramifications of requests for different types of access on building management. In particular, we are interested in comments addressing the issues of accommodating building space limitations and ensuring building safety and security.

157. If the Commission were to adopt a nondiscriminatory access rule, we seek comment on whether such an obligation should be triggered only if a tenant requests a particular carrier. Although we sought comment on this issue in the *Competitive Networks NPRM*,³⁴⁶ our current record is insufficient on this issue. We note again that the nondiscriminatory access regulations in states of Texas and Connecticut contain such provisions.³⁴⁷ In addition, if we adopt a rule that is triggered by a tenant request, we seek comment on how we would ascertain whether any particular request is a bona fide request for service, and not merely a sham arrangement to get a particular provider into an MTE.

158. We further seek comment on how any nondiscriminatory access rule should be enforced. For example, commenters should consider whether aggrieved parties should invoke the Commission's general procedures for complaints against common carriers,³⁴⁸ or whether we should implement some special complaint procedure.³⁴⁹ Parties should also consider the advisability of alternative dispute resolution procedures, as well as whether the states should have a role in the enforcement process. We particularly invite comment regarding the burdens that any enforcement scheme would impose on

³⁴⁵ See Letter from Robert J. Aamoth, Counsel for Edge Connections, Inc., to Magalie Roman Salas, Secretary, FCC, dated September 7, 2000 (referring to alleged 12-month blackout period in MTE served by Broadband Office, limiting service by other CLECs).

³⁴⁶ *Competitive Networks NPRM*, 14 FCC Rcd at 12706.

³⁴⁷ See Conn. Gen. Stat. Ann. § 16-2471 (1997); 16 Texas Admin. Code § 26.129 (Sept. 7, 2000).

³⁴⁸ See 47 C.F.R. § 1.711 *et seq.*

³⁴⁹ See, e.g., 47 C.F.R. § 1.1401 *et seq.* (establishing procedures for complaints under the Pole Attachments Act).

telecommunications carriers, property owners, consumers, and the Commission, as well as suggestions for reducing those burdens. In addressing enforcement issues, parties should consider the effects both of direct regulation of property owners and of regulation of carriers.

159. Finally, we seek comment on any other actions we should take to ensure that customers in MTEs will have access to the telecommunications service provider of their choice.

B. Exclusive Contracts

160. In this section, we request comment on whether today's prohibition on exclusive access contracts in commercial MTEs should be extended to residential MTEs, and on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

1. Residential Exclusive Contracts

161. We request comment on whether we should extend today's prohibition on exclusive access contracts in commercial buildings to residential buildings. We note the Real Access Alliance's argument that exclusive contracts should not be prohibited in residential MTEs because, in these settings, landlords need to offer LECs exclusive contracts to ensure high-quality, inexpensive telecommunications service for their tenants.³⁵⁰ On the other hand, commenters that advocate prohibiting exclusive contracts generally do not distinguish between commercial and residential markets.³⁵¹ However, we note that there may be significant differences between residential and commercial buildings and the impact exclusive contracts may have on each.

162. We recognize that both residential and commercial tenants have limited recourse in addressing the lack of telecommunications choices offered in buildings serviced under exclusive contracts. Typically, the only recourse for the tenant is to accept the lack of choice or move. Although residential and commercial tenants lease space in a generally competitive market, both types of tenants are limited in their ability to move immediately by contractual leasing terms. Commercial tenants, whose lease terms tend to run 5 to 15 years, can be especially affected as opposed to residential tenants, whose lease terms are much shorter, typically 1-year and month-to-month.³⁵² Residential tenants also differ from commercial tenants in that commercial tenants face significant disincentives in the form of relocation costs when measured relative to the benefits they may forgo under an exclusive provider arrangement. Commercial tenants may have recourse in principle, but because of their long lease terms and other impediments they may face stronger incentives not to pursue their relocation options, as compared with residential tenants. For these reasons, we distinguished commercial and residential buildings and we decided at present to prohibit exclusive contracts only in the commercial context. However, given the paucity of record evidence and in light of our experience with the use of video programming exclusive contracts in residential MTEs, we request further comment on whether we should continue to allow telecommunications providers to enter into exclusive contracts with owners of residential MTEs.

³⁵⁰ See Letter from Matthew C. Ames, Counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, filed June 16, 2000.

³⁵¹ See, e.g., AT&T Comments at V.; Teligent Comments at 17.

³⁵² Real Access Alliance Comments at 7.

2. Exclusive Access Provisions in Existing Contracts

163. We seek comment on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs. AT&T has argued that for local competition to thrive among telecommunications carriers in commercial MTEs, building owners must be permitted to terminate their existing exclusive contracts and seek new relationships with competing carriers.³⁵³ Moreover, AT&T argues that the Commission has authority to void exclusive contracts that are currently in effect.³⁵⁴

164. We recognize that the Commission has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest.³⁵⁵ As the Commission explained in our *Expanded Interconnection Order*, the benefit of this approach is that it allows “an incumbent provider’s established customers to consider taking service from a new entrant.”³⁵⁶ 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. We seek comment on whether prohibiting carriers from enforcing access provisions in existing contracts in either commercial or residential MTEs is necessary to ensure that customers obtain the benefits of the more competitive access environment envisioned in the 1996 Act. We also seek comment on whether, in lieu of an immediate prohibition on the enforcement of exclusive access provisions in existing contracts, we should phase out such provisions by establishing a future termination date for these provisions. We seek comment on what termination date should be adopted if the Commission were to take such action.

C. Preferential Marketing Agreements and Other Preferential Arrangements

165. As noted above, several commenters briefly address various preferential building owner/LEC relationships, such as exclusive marketing arrangements or bonuses given by landlords to tenants who subscribe to the services of particular competitive LECs. Generally, competitive LECs argue that, like exclusive contracts, such preferential arrangements should not be permitted.³⁵⁷ Qwest notes, in particular, that “[a]n arrangement that is not technically ‘exclusive’ may in fact have the practical effect of being exclusive, if the building owner refuses to make the same arrangement available

³⁵³ See, e.g., AT&T Comments at 28.

³⁵⁴ The Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest. AT&T Comments at 27 (citing *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)). The Commission previously has exercised that authority to permit customers to “terminate” their “service arrangements” with a carrier “without being contractually liable for such termination.” AT&T Comments at 26-27 (citing *Competition in the Interstate Interexchange Marketplace, Memorandum Opinion & Order on Reconsideration*, 10 FCC Rcd 4421, ¶ 5 n.15 (1995)); see also *Competition in the Interstate Interexchange Marketplace, Report & Order*, 6 FCC Rcd 5880, ¶ 151 (1991).

³⁵⁵ *Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶ 197 (1994) (*Expanded Interconnection Order*).

³⁵⁶ *Id.*

³⁵⁷ WinStar Comments at 25 (discussing both exclusive contracts and preferences and arguing that they do not promote competition); Qwest Reply Comments at 11.

to other carriers.”³⁵⁸ In contrast, other commenters argue that preferential arrangements are often beneficial.³⁵⁹ For example, SBC asserts that, in exchange for exclusive marketing and advertising services, LECs may offer consideration, “such as the payment of commissions to . . . property owners and discounted or packaged services for their tenants,”³⁶⁰ and that the resulting packages can be beneficial to both building owners and tenants. Optel echoes SBC’s view and urges that any Commission action prohibiting exclusive marketing agreements “may undermine concessions given to MDU residents (e.g., lower rates) in exchange for marketing services at the MDU.”³⁶¹ Optel also asserts that these arrangements are not anticompetitive, particularly when they involve carriers that lack market power.³⁶²

166. Notably, several states have promulgated rules either requiring that the terms of any preferential arrangement be disclosed to tenants or prohibiting preferential arrangements altogether.³⁶³ In particular, the Massachusetts Department of Telecommunications and Energy has noted that marketing agreements, which it defines as contracts in which a building owner “receives compensation from a service provider for allowing it to market its services to tenants or receive compensation for each new tenant that becomes a customer of the service provider” have the “potential to encourage discriminatory behavior.”³⁶⁴ As a result, in that state, the existence and terms of any marketing agreements must be disclosed to tenants. Also, in Connecticut, contracts for building access between telecommunications providers and building owners cannot include “[a]ny term that discriminates in favor of any one telecommunications service provider with respect to the provision of access or compensation requested.”³⁶⁵

167. As a preliminary matter, we note that preferential arrangements often arise in contexts in which a building owner has a financial interest in a telecommunications carrier. For example, it is our understanding that building LECs often enter into exclusive marketing or other preferential arrangements with their building owner investors. Preferential arrangements are not, however, necessarily limited to this context.³⁶⁶ We seek comment on the types of preferential arrangements that exist and the contexts in which they occur.

³⁵⁸ Qwest Reply Comments at 11. Although we have already prohibited *de facto* exclusive contracts, *see supra para.* 37, we seek comment on whether we should prohibit preferential arrangements that fall short of being considered *de facto* contracts.

³⁵⁹ SBC Comments at 7 (arguing that, while exclusive access contracts are anti-competitive, exclusive marketing or advertising contracts “are valid business tools”); Optel Comments at 18; *see also* SBC Reply Comments at 9-11.

³⁶⁰ SBC Comments at 7.

³⁶¹ Optel Comments at 18.

³⁶² *Id.*

³⁶³ *See, e.g., Massachusetts Nondiscriminatory Access Order; Nebraska MDU Order.*

³⁶⁴ *Massachusetts Nondiscriminatory Access Order* at 30.

³⁶⁵ Conn. Gen. Stats. Ann. § 16-2471-6(a)(6) (1997).

³⁶⁶ *See* Letter from Kathleen Q. Abernathy, Vice President, BroadBand Office, to Magalie Roman Salas, Secretary, FCC, dated April 13, 2000 (enclosing handout from April 13, 2000 *ex parte* meeting with Commercial Wireless Division staff); Letter from Joseph M. Sandri, Jr., WinStar Communications, Inc., to Magalie Roman Salas, Secretary, FCC, dated November 22, 1999.

168. To the extent any arrangement effectively restricts a premises owner from providing access to other telecommunications service providers, it is prohibited under the rules we adopt today. However because building LECs have only recently emerged as local telecommunications service providers, and because we have received few comments on this issue in general, we have decided not to address preferential arrangements generally in the Report and Order. Instead, we seek further comment on whether, and to what extent, the Commission should regulate preferential arrangements. Specifically, we seek comment on the market effects of such arrangements and whether these effects vary with the type of market (e.g., residential vs. commercial). Are they beneficial to consumers because they provide additional incentives for competitive telecommunications carriers to serve multiunit buildings that would otherwise not be economically desirable? Or, do they effectively restrict other carriers from providing additional competitive alternatives? Finally, we seek comment on whether preferences should be viewed differently in the context of an equity or revenue sharing relationship between a building owner and a LEC than in other situations.

D. Definition of Right-of-Way in MTEs

169. In the Report and Order above, we conclude that, for purposes of Section 224, a “right-of-way” in a building includes, at a minimum, a defined pathway that a utility either is actually using or has specifically identified and obtained the right to use in connection with its transmission and distribution network.³⁶⁷ Some commenters, however, advocate a broader interpretation of the term. In particular, several commenters suggest that where a utility has a right to install facilities anywhere in an MTE, it has a right-of-way over the entire property, which can then be accessed by any party included as a beneficiary under Section 224.³⁶⁸

170. We seek additional comment regarding the extent of utility rights-of-way within MTE buildings under Section 224. On the one hand, we recognize that a broad ability by competitive carriers to access areas within MTEs would arguably speed the arrival of telecommunications choices and advanced services to consumers. On the other hand, we are concerned about the ramifications of potentially granting carriers an unbounded right to place facilities anywhere within buildings. First, as a matter of statutory construction, we note that the terms “pole,” “duct,” and “conduit” refer to defined spaces occupied by a utility as part of its network. We thus seek comment on whether “right-of-way” should also be read to denote only a similar type of defined space.³⁶⁹ Parties advocating a broader definition should also address how, in the absence of a defined pathway, we would comply with the statutory directive to determine just and reasonable rates by means of an allocation of space.³⁷⁰ We further seek comment on whether, in the absence of a mechanism for compensating underlying property owners, a broad definition of rights-of-way would effect an uncompensated taking in violation of the

³⁶⁷ See para. 83, *supra*.

³⁶⁸ See, e.g., AT&T Comments at 19-22; Teligent Comments at 34-35; WinStar Comments at 56.

³⁶⁹ We note the *in pari materia* rule of statutory construction, which states that when a particular statute is ambiguous, statutes which relate to the same subject matter should be read together so that the legislature’s intention can be gathered from the whole of the enactments. See *Undercofler v. L.C. Robinson & Sons, Inc.*, 111 Ga.App. 411, 141 S.E.2d 847, 849 (Ga. App. 1965); *Kimes v. Bechtold*, 342 S.E.2d 147, 150 (W.Va. 1986).

³⁷⁰ See 47 U.S.C. § 224(d),(e).

Fifth Amendment.³⁷¹ We also request comment regarding the circumstances, if any, under which a utility might “own or control” a right-of-way in the absence of a defined space, as required to create a right of access under Section 224.³⁷² Finally, commenters should address whether an expansive definition of “right-of-way” would compromise the operation of our rules governing the disposition of cable inside wire by broadly permitting cable incumbents to remain in an MDU against the wishes of the property owner.³⁷³

E. Extension of Cable Inside Wiring Rules.

171. In the *Competitive Networks NPRM*, we sought comment on “whether our rules governing access to cable inside wiring for MVPDs [multichannel video program distributors] should be extended so as to afford similar access to providers of telecommunications services.”³⁷⁴ Although a number of commenters addressed extending the application of the cable inside wiring rules to include telecommunications carriers,³⁷⁵ we find that the record on this issue should be developed further. Accordingly, we seek additional comment.

172. Section 76.804(a) of the Commission’s rules, enacted in 1997, sets forth the procedures for disposition of “home run wiring” owned by an MVPD in a multiple dwelling unit (MDU) when the MVPD “does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner”³⁷⁶ Several definitions are fundamental to understanding the application of the home run wiring rules. First, an MVPD includes “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming”³⁷⁷ Second, MDUs include residential buildings such as apartment buildings, condominiums and cooperatives,³⁷⁸ but do not include commercial office buildings. Third, home run wiring is “[t]he wiring from the [MVPD] demarcation point to the point at which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop.”³⁷⁹ By contrast, cable home wiring is “[t]he internal wiring contained within the premises of a subscriber which begins at the demarcation point.”³⁸⁰

³⁷¹ We note our recent holding that a utility is not required to exercise its powers of eminent domain on behalf of third parties in order to expand an existing right-of-way. See *Local Competition Pole Attachments Reconsideration Order*, 14 FCC Rcd at 18063, ¶ 38.

³⁷² See paras. 85-90, *supra*.

³⁷³ 47 C.F.R. § 76.804(a); see para. 90, *supra*.

³⁷⁴ *Competitive Networks NPRM*, 14 FCC Rcd at 12710, ¶ 68 (footnote omitted).

³⁷⁵ See, e.g., CAI Comments at 28-29; RCN Comments at 18-21; USTA Comments at 18.

³⁷⁶ 47 C.F.R. § 76.804 (a).

³⁷⁷ 47 U.S.C. § 522(13).

³⁷⁸ 47 C.F.R. § 76.800(a).

³⁷⁹ 47 C.F.R. § 76.800(d).

³⁸⁰ 47 C.F.R. § 76.5(II). The cable demarcation point in MDUs, with non-loop-through wiring configurations, is at (or about) 12 inches outside of where the cable wire enters the subscriber’s individual dwelling unit. 47 C.F.R. § (continued....)

173. The Commission's home run wiring rules provide that when an MVPD no longer has a legal right to remain on the premises of an MDU,³⁸¹ the MDU owner (or another MVPD at the MDU owner's discretion) may negotiate to purchase the home run wiring if it is not removed by the incumbent MVPD.³⁸² If the parties cannot agree on a price, then the incumbent MVPD "must elect: to abandon without disabling the wiring; to remove the wiring and restore the MDU consistent with state law; or to submit the price determination to binding arbitration by an independent expert."³⁸³ In the *Competitive Networks NPRM*, we noted that "[c]ommenters in other proceedings have argued that this rule offers benefits to providers of video services that are not currently available to telecommunications providers, and that this distinction not only is arbitrary but creates uneconomic incentives for providers to incorporate video services into their offerings simply to take advantage of the more favorable rules."³⁸⁴

174. Based upon our review of the comments on this issue in the record, it appears that our proposal to extend application of the home run wiring rules to include telecommunications carriers may not have been entirely clear, and therefore may have been misinterpreted by parties commenting on the issue. We did not intend to solicit comment on application of new rules to "telephone home run wiring" as one party suggested in response to the *Competitive Networks NPRM*.³⁸⁵ Rather, we intended to seek comment, and do so here, on whether our home run wiring rules should be amended to permit an MDU owner to designate a telecommunications carrier to negotiate to purchase cable home run wiring. The right to appoint a telecommunications carrier to conduct such negotiations would be in addition to the MDU owner's prerogative to designate an MVPD to conduct such negotiations. We also clarify that we are not seeking comment on whether Section 76.802 of the cable inside wiring rules, regarding the disposition of "cable home wiring" within an individual subscriber's unit, should be amended. Section 76.802 already enables the subscriber to purchase cable home wiring from the departing MVPD and, thus, the subscriber could use this wiring for telecommunications service.³⁸⁶

175. We note our agreement with CAI that extending the cable home run wiring rules to include telecommunications carriers would result in "[a]dditional . . . home run wiring be[ing] made available for use by alternative providers [thereby] promoting competition."³⁸⁷ We encourage parties to comment on the technical and policy implications of extending the cable home run wiring rule as proposed above. Parties should address whether there are any technical impediments to using coaxial cable home run wiring to provide telecommunications service. Parties should also address the potential

(Continued from previous page) _____

76.5(mm)(2). The cable demarcation point in MDUs, with loop-through wiring configurations, is at (or about) 12 inches outside of where the cable enters or exits the first and last individual dwelling units on the loop. 47 C.F.R. § 76.5(mm)(3).

³⁸¹ An MVPD's legal right to remain on the premises of an MDU may be extinguished by, among other things, operation of contract, statute or common law.

³⁸² 47 C.F.R. § 76.804 (a).

³⁸³ 47 C.F.R. § 76.804(a).

³⁸⁴ *Competitive Networks NPRM*, 14 FCC Rcd at 12710, ¶ 68.

³⁸⁵ ICTA Comments at 7.

³⁸⁶ 47 C.F.R. § 76.802.

³⁸⁷ CAI Comments at 40.

impact on the provision of video service to MDUs if we extend the home run wiring rules to allow MDU owners to designate telecommunications carriers to acquire the wiring.

VI. CONCLUSION

176. The actions that we take today reflect both the progress that is being made toward competitive telecommunications access to MTEs and the obstacles that remain to ubiquitous consumer choice. As we have recognized, consumer choice among telecommunications providers and service offerings in MTEs is vital to the achievement of the procompetitive and deregulatory goals of the 1996 Act. On the one hand, the record shows that meaningful progress toward competition is taking place, and real estate industry leaders are actively working on voluntary measures that have the potential further to promote consumer choice. At the same time, the record shows a significant number of instances in which incumbent LECs and premises owners continue to obstruct competitive access. Taking these considerations together, we therefore undertake targeted actions to ameliorate many of the specific existing obstacles to competitive access to MTEs, while refraining at this time from any comprehensive regulation of the access marketplace. In addition, we seek further comment on the current state of the market and on potential further actions that may become necessary. We intend to actively monitor developments, including the real estate industry's progress on its commitment to develop model contracts and best practices, and we will consider taking additional action if the current impediments to consumer choice are not swiftly ameliorated. In this way, we believe that we best promote the public interest in achieving ubiquitous availability to consumers of competitive, diverse, and advanced telecommunications service offerings.

VII. PROCEDURAL MATTERS

177. Regulatory Flexibility Act Analysis. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603 an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Competitive Networks NPRM* in this proceeding.³⁸⁸ The Commission sought written public comments on the proposals set forth in the *NPRM*, including the IRFA. Appendix C of this *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order* contains the Commission's Final Regulatory Flexibility Analysis (FRFA) in compliance with the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996). Appendix D of this *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order* contains the Commission's Initial Regulatory Flexibility Analysis (IRFA) regarding issues for further comment, in compliance with the RFA, as amended by the CWAAA).

178. Paperwork Reduction Act Analysis. This First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order contains information collections, as described in Section D of the Final Regulatory Flexibility Analysis in Appendix C *infra*. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the

³⁸⁸ See *Competitive Networks NPRM*, 14 FCC Rcd at 12723-34.

same time as other comments on this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order; OMB comments are due 60 days from date of publication of this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order in the Federal Register. Comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

179. Ex Parte Rules. This First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order constitute a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.³⁸⁹ Persons making oral ex parte presentations relating to the First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.³⁹⁰ Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve International Transcription Services (ITS) with copies of any written ex parte presentations or summaries of oral ex parte presentations in these proceedings in the manner specified below for filing comments.

180. Filing Procedures. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 22, 2000, and reply comments on or before January 22, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

181. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

182. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor,

³⁸⁹ See Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, *Report and Order*, 12 FCC Rcd 7348, 7356-57, ¶ 27, citing 47 C.F.R. § 1.1204(b)(1) (1997).

³⁹⁰ See 47 C.F.R. § 1.1206(b)(2), as revised.

International Transcription Services, Inc., 445 Twelfth Street, S.W., Room CY-B402, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, S.W., Washington, D.C. 20554.

183. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49, 47 C.F.R. § 1.49, and all other applicable sections of the Commission's Rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

184. Written comments by the public on the information collections are due on or before December 22, 2000. Written comments by the Office of Management and Budget (OMB) on the proposed and/or modified information collections must be submitted on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

185. Further Information. For further information about this proceeding, contact Joel Taubenblatt at 202-418-1513, jtaubenb@fcc.gov, or Lauren Van Wazer at 202-418-0030, lvanwaze@fcc.gov.

VIII. ORDERING CLAUSES

186. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2(a), 4(j), 4(i), 7, 201, 202, 205, 221, 224, 251, 303, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 157, 201, 202, 205, 221, 224, 251, 303, and 405, that the amendments to the Commission's rules set forth in Appendix B are ADOPTED.

187. IT IS FURTHER ORDERED that new Sections 64.2300, 64.2301, and 64.2302 of the Commission's rules, 47 C.F.R. §§ 64.2300, 64.2301, and 64.2302, set forth in Appendix B, and the revisions to Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000, set forth in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication in the Federal Register.

188. IT IS FURTHER ORDERED that the revisions to Section 68.3 of the Commission's rules, 47 C.F.R. § 68.3, set forth in Appendix B, SHALL BECOME EFFECTIVE 120 days after publication in the Federal Register, pending OMB approval.

189. IT IS FURTHER ORDERED that the motions to submit Further Reply Comments filed by Concerned Communities and Organizations and the Wireless Communications Association International ARE GRANTED.

190. IT IS FURTHER ORDERED that the Petition for Clarification and Reconsideration of the 1997 *Demarcation Point Order* filed by Bell Atlantic IS GRANTED, as discussed in Section IV.C.

191. IT IS FURTHER ORDERED that the Petition for Clarification and Reconsideration of the 1997 *Demarcation Point Order* filed by BellSouth IS DENIED, as discussed in Section IV.C.