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Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Promotion of Competitive Networks in
Local Telecommunications Markets

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WT Docket No. 99-217 /

COMMENTS OF THE
SMART BUILDINGS POLICY PROJECT

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SUMMARY

- Unreasonable restrictions on telecommunications carrier access to consumers in multi-tenant environments continue to impair the development of facilities-based competition, demanding swift and firm action from the Commission.
- Building owners increasingly are taking a financial interest in the provision of telecommunications service to their tenants, creating stronger incentives to discriminate against carriers in whom the building owners do not maintain a financial interest.
- The Commission can and should directly prohibit MTE owners from unreasonably discriminating among facilities-based telecommunications carriers in the provision of access to MTE tenants.
- The Commission may accomplish pro-competitive nondiscriminatory access objectives through regulations imposed on carriers themselves and enjoining MTE owners from discriminatory practices through use of the Section 411(a) joinder mechanism, a process of which the Supreme Court approved in its unanimous *Ambassador* opinion.
- The Commission's use of an *Ambassador* approach avoids any credible claim to a taking of private property.
- As further insulation against claims of unconstitutional takings, the Commission, where appropriate, may compel carrier compensation to the MTE owner in exchange for access.
- The principle of technological neutrality and the federal policy of promoting competition through a variety of transmission mechanisms compel the Commission to construe Section 224 in a manner that accounts for telecommunications carrier access through use of technologies other than those used by the incumbent utilities (*i.e.*, by providing Section 224 access to MTE rooftops). Otherwise, carriers using alternative technologies -- such as fixed wireless technology -- could be denied access to particular areas of a building until such time as the incumbent adopts the alternative technology itself.
- Granting building owners a veto right over telecommunications carrier access to in-building ducts, conduits, and rights-of-way owned or controlled by utilities eviscerates the intended pro-competitive benefits of Section 224. Moreover, this principle, would require CLECs nationwide to obtain independent authorization from underlying property owners when stringing wires on poles that traverse the property of third parties, a result that is at odds with the statute's intent of eliminating the requirement that competitors duplicate the infrastructure efforts of incumbents.
- Providing telecommunications carrier access to utility ducts, conduits, and rights-of-way within MTEs will not implicate the property rights of MTE owners.
- The Commission's rules governing facilities-based telecommunications carrier access to tenants in MTEs must apply equally to residential and commercial environments.
- Exceptions to nondiscriminatory access rules should be narrowly tailored with the understanding that the Commission's waiver process remains available to address specific hardships that arise.

- Implementation and enforcement practices may be gleaned from the practices of the Commission itself as well as those of its State regulatory counterparts.
- All exclusive provisions in access agreements for commercial and residential MTEs, existing and prospective, should be rendered null and void upon a tenant's request for service from a competing carrier.
- Preferential marketing agreements between carriers and MTE owners are not *per se* anticompetitive, but should be monitored so that they are not used as a mechanism for denying access to competitive carriers.

BEFORE THE
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WASHINGTON, D.C.

In the Matter of)
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Promotion of Competitive Networks in) WT Docket No. 99-217
Local Telecommunications Markets)

**COMMENTS OF THE
SMART BUILDINGS POLICY PROJECT**

The Smart Buildings Policy Project (“SBPP”)¹ hereby submits its comments in the above-captioned proceeding.²

¹ The Smart Buildings Policy Project is a coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T, Comcast Business Communications, Commercial Internet eXchange Association, Competition Policy Institute, Competitive Telecommunications Association, Digital Microwave Corporation, Focal Communications Corporation, The Harris Corporation, Highspeed.com, Information Technology Association of America, Lucent Technologies, NetVoice Technologies, Inc., Network Telephone Corporation, Nokia Inc., International Communications Association, P-Com, Inc., Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications, Inc., Wireless Communications Association International, WorldCom, and XO Communications, Inc. The SBPP website can be viewed at <www.buildingconnections.org>.

² Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366* (rel. Oct. 25, 2000)(“*Competitive Networks First R&O and FNPRM*”).

I. INTRODUCTION

The Commission's goal of promoting a comprehensive system of facilities-based competitive networks cannot be achieved by temporizing. To be sure, the Commission is only partly responsible for the success or failure of the competitive telecommunications model envisioned by the Telecommunications Act of 1996. The carriers themselves, the financial sector, and the underlying statutory requirements play critical roles that interact with the Commission's rules to develop a telecommunications landscape that should be able to sustain a competitive telecommunications marketplace. But, the Commission has not done all it can do to promote facilities-based telecommunications competition.

The Commission concedes that its actions thus far in this docket "may well be insufficient in themselves to secure a full measure of choice for businesses and individuals located in MTEs."³ This self-described "insufficient" action comes in response to hundreds of interested parties filing over 1,250 submissions of exhaustive legal and technical comments to the Commission over the course of nearly a year and a half, and arises after a number of congressional hearings on the topic, debates between the real estate industry and the telecommunications industry, tours of MTEs, submissions of economic analyses, the experience and testimony from several States, and presentations by nationally recognized legal experts. Continued delay, at best, maintains an unacceptable status quo and at worst, results in the ability of MTE owners to further exploit their bottleneck control over facilities-based competition. It is this state of affairs that brought telecommunications carriers to the Commission with this issue almost five years ago, and now -- in a very real manner -- restrictions on access to consumers in

³ *Competitive Networks First R&O and FNPRM* at ¶ 2.

MTEs threaten the potential for facilities-based telecommunications competition like never before. If the Commission truly “recognize[s] that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities,”⁴ it is time to act decisively in a manner that unambiguously places the preference of consumers first. So long as consumers are precluded from exercising their preferences, the market will fail and the possibilities foreseen by the 1996 Act will not be achieved.

II. UNREASONABLE BUILDING ACCESS DELAYS AND RESTRICTIONS CONTINUE TO IMPAIR THE DEVELOPMENT OF FACILITIES-BASED LOCAL EXCHANGE COMPETITION.

In the two and a half months since release of the Commission’s *Report and Order*, competitive facilities-based carriers continue to experience difficulties in obtaining access to MTEs. The first version of the Real Access Alliance (“RAA”) Model Agreement -- the product of a group representing a small fraction of MTE owners nationwide that is suggested rather than mandatory and lacks enforcement mechanisms -- merely reduces to writing the numerous overreaching and invasive conditions required by the MTE owners that carriers believe are unreasonable. The SBPP is hopeful that a more balanced model can be achieved through the active participation of the Commission in the form of workshops or through the submission of drafts to the Commission for its review and approval.

The Model Agreement is only one of several commitments made by the RAA to the Commission just prior to the release of the *Competitive Networks First Report and Order and FNPRM*. These commitments are woefully inadequate in accomplishing pro-competitive objectives and, in some instance, may even increase the difficulty of bringing facilities-based

⁴ Id. at ¶ 4.

competitive choices to tenants in MTEs. Nevertheless, the “best practices” commitments remain either unimplemented or entirely ineffective. In short, they are not making it easier for tenants to take service from competitive telecommunications carriers. Their illusory “solution” should not be permitted to delay Commission action any further.

The Commission should not rely heavily on the “best practices” commitments from the RAA. An agreement on model terms and conditions misses the core issue. Reasonable access terms and conditions are meaningless if access can be denied entirely, or if access can be delayed for months or years. These model terms and conditions are entirely unenforceable without a Commission requirement for granting access. More significantly, the establishment of model terms and conditions still enables the building owners to deny choice for their tenants altogether. Therefore, the RAA’s goal to establish model terms and conditions does not eliminate the Commission’s pivotal role in this matter. Only once an affirmative nondiscrimination requirement is firmly established will all building owners -- even those that otherwise would have resisted nondiscriminatory access entirely -- have an incentive to participate in the development of model terms and conditions of access and to negotiate them directly into their access agreements.

III. THE INCREASING PHENOMENON OF THE REAL ESTATE INDUSTRY TAKING A FINANCIAL INTEREST IN THE PROVISION OF TELECOMMUNICATIONS SERVICES TO TENANTS CREATES INCENTIVES FOR DISCRIMINATORY PRACTICES SUFFICIENTLY POWERFUL THAT COMMISSION PROHIBITION OF DISCRIMINATORY BEHAVIOR IS WARRANTED.

Many MTE owners seek to take advantage of the opportunities to generate revenues from the provision of telecommunications services. MTE owners’ incentives to act in a discriminatory fashion is increased as a result of their affiliation with BLECs, jeopardizing competition and consumer choice. Some charge carriers for access to their tenants; others have found that a

direct investment in a BLEC is more advantageous in adding to their revenues. To some degree, the manner in which the MTE owner is involved in telecommunications affects its willingness to permit telecommunications carrier access and the manner in which such access is provided.

After the passage of the 1996 Act, the affiliated arrangements between carriers and MTE owners were characterized by granting one carrier exclusive access to the building in exchange for revenue sharing. Exclusive access is perhaps the most egregious form of discrimination against other telecommunications carriers. This device, however, is being replaced by more subtle, but equally serious forms of discrimination. In lieu of exclusives, MTE owners have begun to demand financial incentives for access. The leverage tool most often used by owners is a demand for a revenue-sharing arrangement with a carrier.⁵ As a result, access agreements often provide real estate owners with the opportunity to participate in the telecommunications service revenues within their buildings. A revenue-sharing arrangement is typically in the range of five to seven percent for MTE owners.

In addition, it is not uncommon for MTE owners to insist upon receiving warrants or other equity-related incentives in exchange for providing carriers access to their buildings.⁶ Moreover, some MTE owners receive service incentives, such as free Internet access.⁷

⁵ See Wired Real Estate: The Ultimate Portal, by Deutsche Bank Alex.Brown at 43 (“Deutsche Bank”) (“Many revenue-sharing arrangements, especially with telecom service providers, have been formed. Some arrangements include the issuance of warrants to real estate companies.”); id. at 47 (“The office real estate companies have entered into many revenue-sharing arrangement with telecom providers to allow access for broadband providers to wire buildings, as tenants’ demands for high-speed access are burgeoning.”).

⁶ For example, in exchange for access to Equity Office’s buildings, OnSite has granted Equity Office 2.3 million shares of warrants to acquire OnSite Access common shares for \$2.36 per share. See id. at 92. OnSite Access has also agreed to pass-on five percent of the gross revenues generated by OnSite Access’s fiber optic network services in Equity Office’s properties, comprising 22 million square feet. See id. TrizecHahn also gave access rights to Broadband Office to its buildings in the Mid-Atlantic and Southwest, comprising 22 million square feet. TrizecHahn has entered into a five percent revenue sharing arrangement

Increasingly, MTE owners are entering into revenue sharing agreements with, or making equity investments in, telecommunications providers.⁸ The resulting symbiotic financial relationship motivates the MTE owner to promote its affiliated BLEC within the building. This objective is accomplished in several ways. For example, the affiliated BLEC can be given the “first-mover advantage.”⁹ That is, access negotiations with other carriers are delayed or terminated so that the affiliated BLEC can become the first competitive carrier to serve the building. In addition, the building owner can recommend and promote the services of the affiliated BLEC to tenants. This ability to use “word of mouth” among tenants can be a powerful means of generating interest in an affiliated BLEC’s services. Finally, a building owner can feature affiliated BLECs’ broadband services in its own communications with tenants, including using lobby signage, direct mail, and in-building promotional events to create awareness of their affiliates’ services.

with Broadband Office and received 716,000 common shares at no cost. TrizecHahn has signed an access agreement with OnSite Access for TrizecHahn’s Northeast, Midwest and Los Angeles regions, representing 24 million square feet. TrizecHahn received 2 million warrants with an exercise price of \$2.36 per share, translating into a three percent ownership position in OnSite Access. *Id.* Also, Vornado will share in three to six percent of the revenues that Cypress generates in their buildings and received 1.6 million warrants at an exercise price of \$4.22 per share of Cypress’ common stock, for a value of \$18.9 million (as of May 12, 2000). *Id.* at 92-93.

⁷ See The Yankee Group, *Multi-Tenant Broadband Service Providers: High in the Sky? Data Communications Report*, Vol. 15, No. 6, at 6 (April 2000) (“Yankee Group Report”). “A few wholesalers have established exclusive third-party reseller arrangements with property owners. Such arrangements would require retail BLECs seeking access to a given building to lease the incumbent wholesaler’s facilities (or alternatively default to the ILEC).”

⁸ Deutsche Bank at 39 (“Office companies are forming alliances with B-LECs, or business-centric local exchange carriers. Revenue-sharing agreements and equity investments in broadband service providers are the rage.”).

⁹ See Emerging Telecom & Internet Infrastructure Conference, High Yield Research, Goldman Sachs (June 2000) at 12 (explaining that Allied Riser’s partnership with 12 leading real estate owners provides “a first mover advantage and a strong barrier to entry.”).

In order to continue its efforts to evaluate and monitor the need for requiring nondiscriminatory access in the market for local telecommunications services to MTEs, the Commission asks parties to comment on the effect of the relationship between BLECs and MTE owners on telecommunications competition and on business and individual consumers that reside in MTEs.¹⁰ Given the expected growth of the BLEC industry, the affiliate relationships between BLECS and MTE owners will hamper consumer choice without a federal nondiscriminatory access rule. Analysts predict continued growth in the BLEC industry and point out that location, bandwidth, and connectivity will become increasingly important.¹¹ Although currently a \$2 billion-a-year market, enterprise infrastructure analyst Patrick Paczkowski at Current Analysis Inc. estimates that the in-building end services market could easily exceed “\$10 billion in the next five years or so.”¹² Meanwhile, a recent New Paradigm Research Group study indicates that BLECs are going after what will possibly be a \$36 billion market.¹³

The recently enacted REIT Modernization Act (“RMA”) is a federal tax structure promoting the real estate industry’s increasing participation in the BLEC industry by enabling REITs to form subsidiaries without jeopardizing the REIT’s advantaged tax status. Through these subsidiaries REITs may now offer many tenant-related services, including telecommunications service, which they previously could not offer without jeopardizing their preferred tax status. This new federal law provides REITs with greater latitude to generate

¹⁰ See *Competitive Networks First R&O and FNPRM* at ¶¶ 125-127.

¹¹ See *Deutsche Bank* at 22.

¹² See Mark Rockwell, *Tenants Anyone?*, tele.com at 2 (Sept. 18, 2000).

¹³ Mark Rockwell, *BLECs Two Sided*, tele.com at 1 (Oct. 24, 2000).

income that is not derived from "rents on real property."¹⁴ As a result of the consequent real estate industry participation, the BLEC industry is predicted to experience staggering growth.

Telecommunications analysts agree that building owners are well-positioned to exploit their access-to-tenant bottleneck to capitalize upon developments in the telecommunications industry made possible, in large part, by the 1996 Act and the RMA.¹⁵ Deutsche Bank describes in a recent analyst's report, the real estate industry is the "ultimate portal."¹⁶ Whether and how control over that portal is exercised will affect the development of facilities-based telecommunications competition.

IV. THE COMMISSION SHOULD PROHIBIT CARRIERS FROM ENGAGING IN THE UNREASONABLE PRACTICE OF SERVING CUSTOMERS IN MTES PURSUANT TO DISCRIMINATORY ACCESS ARRANGEMENTS.

The Commission possesses the authority to regulate directly the access practices of building owners. Where unregulated entities with monopoly power control wire or other facilities or even provide telecommunications services to customers, there remains the danger that the ownership of such facilities will be used to deny the provision of service by some or all carriers. This is an increasing phenomenon, as building owners begin to provide telecommunications service to their tenants, or control the provision thereof. Moreover, some building owners are establishing central distribution systems ("CDS") which comprise the building's internal telecommunications network. These building owners typically require

¹⁴ See Deutsche Bank at 43 ("This legislation gives latitude to real estate management teams to create services and initiatives of value to tenants.").

¹⁵ See Elizabeth Starr Miller, *Birth of the BLEC: Service Providers Jump at Chance to Win Over MTU Audience*, TelecomClick at 2 (May 15, 2000) ("BLECs have a golden opportunity now because the MTU market isn't regulated . . . [t]hey have a bare toe-hold on the market . . . [b]ut nothing free lasts long.").

¹⁶ Deutsche Bank at 105-106 ("We consider properties to be the ultimate portals, and the embedded value in real estate is just beginning to be tapped.").

competitive carriers to utilize the CDS, for a fee and subject to the building owner's terms and conditions, if they serve tenants in the building.¹⁷ Again, given their unregulated status, these building owners can act on incentives to favor carriers in whom the building owner retains a financial interest, be it revenue sharing, equity ownership, or some other financial arrangement -- or they can deny a competitor's access altogether.

To date, the Commission has declined to exercise its authority to mitigate the adverse effects on local exchange competition that building owner practices can cause. The terms and structure of the Telecommunications Act of 1996 recognize the increasing importance of facilities as an independent concept. The literal dis-integration of the telephone network means that more independent firms have begun to contribute piece parts -- rather than the entirety -- of the network. Although such firms do not provide the whole of the end-to-end telephone network, they nevertheless fall within the Commission's jurisdiction over that end-to-end network. Some facilities owners integrate with each other on a regulated basis pursuant to the terms of the 1996 Act, while others integrate themselves with each other on an ad hoc basis. As the latter category finds integration increasingly contentious and difficult for non-technological reasons, the Commission's responsibilities are triggered. More specifically, as the phenomenon of building owner involvement in telecommunications increases, and ILEC control over in-building facilities decreases, the SBPP believes the Commission will find it necessary to exercise its jurisdiction directly to protect the interests of consumers in multi-tenant buildings and, more generally, to accomplish pro-competitive policy objectives. In short, the Commission must remain prepared to adapt quickly to the rapidly changing conditions in the telecommunications

¹⁷ Indeed, the most recent version of the RAA Model Agreement requires entrants to construct part of a CDS in order to gain entry to the MTE.

industry. It is because conditions change so rapidly in the industry that the Commission must not hesitate to act until it has amassed an exhaustive building-by-building record on the state of the market for telecommunications carrier access to MTEs. Such an approach promises a never-ending game of catch-up in which the federal regulatory agency remains the most ineffective participant. Indeed, proper discharge of its statutory authority demands otherwise.¹⁸

As the Commission begins to address the issue of telecommunications carrier access to MTEs, it may prefer to adopt a measured approach of targeting for regulatory action only those practices of MTE owners that already have demonstrably harmed local competition. MTE owners that do not engage in discriminatory practices would be left untouched by this measured exercise of federal telecommunications regulation. Specifically, the Commission may prescribe regulations based on the opinion that a practice of a carrier or carriers violates the provisions of the Communications Act.¹⁹ The Communications Act prohibits carriers' "unjust or unreasonable discrimination in . . . practices . . . for or in connection with like communication service, *directly or indirectly, by any means or device . . .*"²⁰ The Commission should conclude that

¹⁸ See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 175-177 (1968)(approving the FCC's actions notwithstanding the absence of FCC certainty concerning the potential harm to the public interest and noting substantial evidence that the FCC could not "discharge its overall responsibilities" without exercise of authority over a previously unregulated industry); see also GTE Services Corp. v. FCC, 474 F.2d 724, 731 (2d Cir. 1973)("It is irrelevant that the rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted.")(quoting Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir. 1971)); see also Rules re: Microwave TV, Docket Nos. 14895 and 15233, *First Report and Order*, 38 FCC 683 at ¶ 48 (1965)("Our responsibilities are not discharged . . . by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled - i.e., by waiting 'until the bodies pile up' before conceding that a problem exists. Our duty is 'to encourage the larger and more effective use of radio in the public interest' - ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them").

¹⁹ 47 U.S.C. § 205(a).

²⁰ 47 U.S.C. § 202(a)(emphasis added).

discrimination by a carrier in the form of participating in, cooperating with, or benefiting from an MTE owner's decision to prevent tenants from selecting their own facilities-based telecommunications carrier is an unjust and unreasonable practice and thereby unlawful under Section 201(b).²¹ The Commission should proceed to adopt a rule prohibiting telecommunications carriers from providing telecommunications service to those MTEs in which the MTE owner unreasonably discriminates against certain telecommunications carriers thereby preventing tenants from selecting their own facilities-based telecommunications carrier. The Commission may enforce this regulation through its complaint process.²² An MTE owner or manager engaging in discriminatory practices will be a person interested in or affected by the regulation or practice under consideration by the Commission in a complaint proceeding. As such, the MTE owner or manager may be joined as a party and subjected to orders issued by the Commission.²³ In such an action, the telecommunications carrier may be only a nominal defendant, as was the case in *Ambassador, Inc.*²⁴ The Commission may aid in the resolution of any dispute by requiring affected carriers to file the contracts or agreements into which they have entered with building owners whenever complaints are brought before the Commission.²⁵

This process was approved unanimously by the Supreme Court in the *Ambassador* decision. The underlying issue involved the protection of consumers in hotels and apartment buildings. Just as with building access in the *Competitive Networks* rulemaking, the Court

²¹ 47 U.S.C. § 201(b).

²² 47 U.S.C. § 208.

²³ 47 U.S.C. § 411(a).

²⁴ *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945).

²⁵ 47 U.S.C. § 211(b).

recognized that telephone service was indispensable to the hotels that were parties defendant.²⁶ The Court also recognized that the hotel-provided services in issue imposed some additional costs on the hotels.²⁷

The Commission, after hearing, entered an order requiring the telephone companies to include appropriate terms in their tariffs.²⁸ While the Commission offered the telephone companies a choice of either specifying the actual mark-up prices charged by the hotels or limiting what the hotels could do as subscribers of the service,²⁹ the important point was that under either approach, the Commission thenceforth would be able to regulate efficiently.

Rejecting the now-familiar claims that the Commission was preparing to become a “national landlord,” the Supreme Court explained:

[o]f course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber’s business 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.³⁰

²⁶ Ambassador, Inc., 325 U.S. at 318.

²⁷ Id.

²⁸ Id. at 320. Although the Commission chose to proceed by tariff prescription, the Commission alternatively may proceed by general regulation. 47 U.S.C. § 205(a).

²⁹ Id.

³⁰ Id. at 323-24.

Section 411(a) was properly applied to join the hotels as parties defendant, and the Court concluded that an injunction against the hotels was appropriate under Section 411(a) even though no injunction issued against the telephone companies.³¹

The *Ambassador* case represents the entirety of judicial consideration of Section 411(a). The provision is derived from an analogous provision in the Interstate Commerce Act.³² Judicial interpretations of the Interstate Commerce Act provision lend additional support to the conclusion of the *Ambassador* Court that the joinder provisions give the regulatory agency the authority to impose judgments against non-carriers in appropriate circumstances.³³

The Commission's historic use of Section 411(a), in conjunction with the unanimous Supreme Court decision approving the use of that provision to enjoin non-carriers from certain practices, demonstrates that it would be wholly appropriate for the Commission to employ the provision to accomplish nondiscriminatory telecommunications carrier access to MTEs. The history of the Commission's rules governing the use of recording devices presents a scenario quite similar to the one underlying the *Ambassador* case and the enforcement of those rules is premised partly upon an appropriate reading of Section 411(a). The Commission prescribed telephone company tariff provisions permitting the use of customer-provided telephone

³¹ Id. at 325-26.

³² S. Rep. No. 781, 73d Cong., 2d Sess., at 10 (1934) ("Section 411 carries forward provisions of the Elkins Act and of section 16(4) of the Interstate Commerce Act relating to joinder of parties and payment of money.").

³³ See, e.g., United States v. Baltimore & O.R. Co., 333 U.S. 169, 171 n.2 (1948) (jurisdiction over stock yard practices); see id. at 177 ("Of course it does not deprive a property owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve."); see also United States v. City of Jackson, Mississippi, 318 F.2d 1, 9-11 (5th Cir. 1963) (enjoining sheriff's enforcement of racially segregated waiting areas in railroad and bus terminals, and citing to the extensive use of Section 42 of the Interstate Commerce Act to enjoin the practices of non-carriers).

recording devices, and mandated a beep tone to ensure that parties to a telephone conversation were aware they were being recorded. In commenting upon the effect of these tariff provisions, Commissioner Kenneth Cox explained:

The tariffs filed by the carriers with this Commission require, as a condition of service covered by those tariffs, that no subscriber may use a recording device in connection with telephone service without the 'beep' tone. It is the scheme and intent of the provisions of the Communications Act that the carriers have the basic responsibility to render service in accordance with the terms and conditions of their tariffs and to insure that their customers comply with such terms and conditions. These tariffs, so long as they are in effect, have the force of law as to both the telephone users and the carriers. Failure on the part of users to comply with the terms of the tariff in this respect subjects them to possible loss of service, and to injunctive action pursuant to Sections 401(b) and 411(a) of the Communications Act.³⁴

The Commission has used its Section 411(a) authority on many occasions to join to a proceeding parties who are interested in or affected by the matter at issue, typically above the objections of the joined parties.³⁵ In the FCC decisions citing Section 411(a), the Commission uniformly interprets the provision broadly as enabling joinder of the relevant parties. As a Common Carrier Bureau Order states:

Section 411 of the Communications Act grants broad authority to the Commission as to parties who may be brought before it in any proceeding. . . . The Commission has required the inclusion of parties based on factors such as ownership and control of other essential

³⁴ Amendment of Part 64 of the Commission's Rules Relating to Use of Recording Devices by Telephone Companies, Docket No. 17152, *Notice of Proposed Rulemaking*, 6 FCC2d 587 (1967)(concurring statement of Commissioner Kenneth A. Cox).

³⁵ See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co., Docket No. 17441 et. al, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969); Armstrong Utilities v. General Telephone Company of Pennsylvania, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970); Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, Docket Nos. 19151, 19152 P-C-7655 P-C-7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971); Comark Cable Fund III v. Northwestern Indiana Telephone Co., File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985); Continental Cablevision of New Hampshire, Inc., Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d 89 at ¶ 6 (1974).

parties, or where the party to be joined would be interested in or affected by a rule or other matter under scrutiny.³⁶

Similarly, in 1997, the Commission prohibited domestic international carriers from paying more than certain benchmark rates for terminating calls in foreign countries.³⁷ Foreign telecommunications companies challenged the Commission's Order, claiming, *inter alia*, that the agency unlawfully asserted regulatory authority over foreign carriers and foreign telecommunications services.

The D.C. Circuit explained that it "must sustain the Commission's view as long as the Order reasonably represents an exercise of its statutory authority to regulate domestic carriers engaged in foreign telecommunications."³⁸ The court conceded that "regulating what domestic carriers may pay and regulating what foreign carriers may charge appear to be opposite sides of the same coin."³⁹ Nevertheless, the court concluded that the Commission's lawful regulations would not be invalid merely because they had the practical -- indeed, intended -- effect of altering the behavior of entities arguably outside the agency's jurisdiction.⁴⁰

³⁶ General Services Administration v. American Tel. & Tel. Co., File No. E-81-36, *Order*, 2 FCC Rcd 3574 at ¶6, n.20 (CCB, 1987).

³⁷ International Settlement Rates, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19806 (1997).

³⁸ Cable & Wireless PLC v. FCC, 166 F.3d 1224, 1229 (D.C. Cir. 1999)(citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

³⁹ Id. at 1229.

⁴⁰ Id. at 1230 ("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.")(citations omitted).

As the D.C. Circuit suggested, national ambient air quality standards properly imposed on State and local governments by the EPA will have an effect on the automobile industry.⁴¹ Likewise, valid Department of Commerce tariff collections will affect the activities of foreign manufacturers.⁴² Similarly, a Commission rule governing carrier practices predictably should result in MTE owners voluntarily permitting nondiscriminatory telecommunications carrier access given that the alternative is an injunction compelling the same. Notwithstanding this foreseeable effect, a nondiscriminatory access rule representing an exercise of the Commission's unquestioned statutory authority to regulate telecommunications carriers is sanctioned by the *Cable & Wireless* decision.⁴³

The solutions provided by the *Ambassador* and *Cable & Wireless* decisions do not require the Commission to exercise comprehensive authority over an entire industry, such as the real estate industry, that currently is subject only to minimal regulation by the agency.⁴⁴ Rather, this approach addresses only those practices that are unreasonable and discriminatory, leaving unregulated those arrangements that are reasonable and nondiscriminatory. In addition, the *Ambassador* approach enables the Commission to tailor remedies to the specific problem at issue

⁴¹ Id.

⁴² Id.

⁴³ The *Ambassador* approach goes a step beyond the *Cable & Wireless* scenario by actively joining MTE owners in a complaint proceeding and enjoining their unreasonable access practices. It is self-evident that such a course of action will remain unnecessary in the vast majority of cases given the likelihood that building owners voluntarily will grant nondiscriminatory telecommunications carrier access to their MTEs if the agency's response to contrary practices is predictable.

⁴⁴ See, e.g., 47 C.F.R. § 68.3 (prescribing limits on a multi-unit premises owner's ability to determine the location of a demarcation point); see also 47 C.F.R. § 68.213(b) (restrictions on subscribers and premises owners in the installation, removal, reconfiguration, and rearrangement of inside wiring).

in a given dispute, while providing guidance to the real estate and communications industries on appropriate practices.

V. THE APPLICATION OF AN INDIRECT *AMBASSADOR* MECHANISM WILL NOT PRODUCE CONSTITUTIONAL INFIRMITY.

A nondiscriminatory telecommunications carrier access requirement imposed directly on MTE owners, on its own, does not amount to a taking of private property.⁴⁵ The possibility that a taking of a third party's property will result from a requirement imposed on telecommunications carriers is even less likely. An MTE owner would have to demonstrate first that the Commission's rule -- a rule, it must be remembered, that applies only to carriers -- somehow eliminates the MTE owner's right to exclude telecommunications carriers. A demonstration that the right to exclude telecommunications carriers had been eliminated would be fairly difficult given that the effect of the Commission's rule ultimately would result in the exclusion of *all* telecommunications carriers. Nevertheless, even if such a showing could be made, the MTE owner would then have to demonstrate that its right to exclude telecommunications carriers is so essential to the use or economic value of the MTE as a whole

⁴⁵ See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Comments of Teligent, Inc.* at 53-60 (filed Aug. 27, 1999); *Comments of Winstar Communications, Inc.* at 39-42 (filed Aug. 27, 1999).

that the Commission's elimination of it operates as a taking.⁴⁶ Again, even a regulation against the use of property for a particular end does not, itself, render a taking.⁴⁷

Prohibitions on the provision of telephone service to an MTE may decrease the attractiveness of a building to potential tenants, but this is a state of affairs that is chosen by the building owner when it decides to engage in discriminatory access practices. It is of little moment that the building owners' decision to provide nondiscriminatory access to additional telecommunications carriers rather than go without telephone service in the building is not "voluntary" in the sense that it is impossible, as a practical matter, to have a multi-tenant environment without any telecommunications services. Any such compulsion to provide access results ultimately from conditions of the market, not actions of the Commission.⁴⁸ "This element of required acquiescence is at the heart of the concept of occupation."⁴⁹

Through indirect restrictions such as those contemplated through an *Ambassador* approach, the building owner's property is not being taken in any physical sense, so any taking would have to be a regulatory taking, not the *per se* type contemplated in *Loretto*. The Supreme Court has rejected an incantation that restrictions on the right to exclude "amount[] to compelled

⁴⁶ See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980)(finding that the appellants had failed to demonstrate that the right to exclude others was "so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'").

⁴⁷ See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)(holding that a local ordinance forbidding further excavation of land that had been used for mining for over thirty years did not constitute a taking).

⁴⁸ Indeed, a prohibition on carriers allows market forces to operate properly, eliminating the market failure that results in discrimination against carriers.

⁴⁹ FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987); see also Yee v. Escondido, 503 U.S. 519, 527 (1992)("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.")(emphasis in original).

physical occupation because it deprives petitioners of the ability to choose their incoming tenants.”⁵⁰ While such an effect may be relevant to a regulatory takings balancing, “it does not convert regulation into the unwanted physical occupation of land.”⁵¹

A mere reduction in the profitability of one particular use of property is not sufficient in itself to constitute a taking.⁵² It is well established that a “loss of future profits -- unaccompanied by any physical property restrictions provides a slender reed upon which to rest a takings claim.”⁵³ Moreover, the courts will consider not only the burdens imposed by the Commission’s rule, but also the benefits conferred upon the MTE owner’s property by the operation of the nondiscriminatory access rule.⁵⁴ As with any FCC action, specific decisions remain subject to as-applied challenges from individual building owners. Facially, though, the use of “indirect” means to accomplish nondiscriminatory access is constitutionally sound.

If it is determined that nondiscriminatory access using the *Ambassador* approach results in a taking, a Commission requirement that a carrier pay “just and reasonable compensation” to the building owner in exchange for access would satisfy the Fifth Amendment’s requirement of just compensation.⁵⁵ As long as “the government has provided an adequate process for obtaining

⁵⁰ Yee, 503 U.S. at 530-31.

⁵¹ Id. at 531.

⁵² See, e.g., Euclid v. Ambler Co., 272 U.S. 365, 395-397 (1926)(finding that notwithstanding the alleged diminution in the value of the owner’s land, the zoning laws at issue were facially constitutional as bearing a substantial relationship to the public welfare and inflicting no irreparable injury upon the landowner).

⁵³ Andrus v. Allard, 444 U.S. 51, 66 (1979).

⁵⁴ Agins v. Tiburon, 447 U.S. 255, 262 (1980)(“In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.”).

⁵⁵ See FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).

compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.”⁵⁶ The Commission’s compensation decisions would be subject to judicial review. As the Eleventh Circuit explained, “[s]o 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 just compensation.’”⁵⁷

If a reviewing court finds that the compensation provided is not “just,” then the agency, on remand, can revise its order to the constitutionally adequate level. The party receiving access, not the federal government, will be held responsible for compensating the property owner appropriately. Failure to do so will result in the denial of access. Thus, the existence of a constitutionally adequate compensation scheme would render any residual risk to the public fisc pursuant to Tucker Act claims highly speculative.

VI. THE COMMISSION MUST CONSTRUE THE TERMS OF SECTION 224 LIBERALLY TO PREVENT INCUMBENTS FROM CONTROLLING THE TYPES OF TECHNOLOGIES THAT CAN BE OFFERED TO TENANTS IN MULTI-TENANT ENVIRONMENTS BY THEIR COMPETITORS.

The Notice seeks comment on the extent of utility rights-of-way within MTEs under Section 224.⁵⁸ Section 224 requires that “[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or

⁵⁶ Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985)(quoting Ruckelshaus v. Monsanto, 467 U.S. 986, 1018 n.21 (1984)).

⁵⁷ Gulf Power Co. v. United States, 187 F.3d 1324, 1333 (11th Cir. 1999) (quoting Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. at 194-95); see also Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000).

⁵⁸ Id. at ¶ 169.