obligation imposed on LECs in their dealings with property owners would effect a taking from property owners." *Further Notice*, ¶ 145. The clear answer is no.

AT&T is aware of no holding that supports the conclusion that a party has suffered a "taking" of private property based on regulation of a third party's conduct. Indeed, the proposed regulation of LECs is little different from a regulation prohibiting government employees from staying at private hotels that do not subscribe to a policy of nondiscrimination (*i.e.*, accepting all travelers). To be sure, such a regulation would "influence" the hotel owners to adopt nondiscrimination policies so that they would not lose the business of government employees. But the hotel owners have no cognizable right to the business of government employees and the regulation of the conduct of governmental employees does not take property from hotel owners. The same is true here. As the Commission acknowledges, although a nondiscriminatory access requirement applied against LECs likely would "influence" the conduct of building owners seeking to maintain the benefits of service by those LECs to their MTEs, the regulation does not in any way constitute a taking of their property. Indeed, the Commission's proposal is merely a direct regulation of LECs that creates financial incentives (albeit, strong ones) for building owners that deal with these LECs to choose to allow nondiscriminatory access to their property.[14]

---

[14] The Commission suggests that *dictum* in *Cable Holdings of Georgia* v. *McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992), might provide some support for the notion that "to the extent that a direct regulation would constitute a Fifth Amendment *per se* taking," then "an indirect regulation that leaves the third party no choice but to submit to the same basic result would also constitute an unconstitutional taking." *Further Notice*, ¶ 144 & n.334. But *Cable Holdings* says no such thing. There, the Eleventh Circuit considered a regulation that, if construed as the district court suggested, would have authorized "the permanent physical presence of a franchised cable company inside private apartment buildings *against* the express wishes of the property owner." 953 F.2d at 605 (emphasis added). In contrast, the nondiscriminatory access rule proposed by the Commission does not authorize an occupation of

But even if one could properly analyze the proposed regulation of LECs as if it were instead a regulation of building owners, there would be no taking. Any analysis of whether a regulation is a *per se* taking must begin with *Loretto* v. *Teleprompter Manhattan City Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Supreme Court concluded that a cable system's permanent maintenance of cable equipment on private property without permission of the property owner constituted a *per se* taking requiring payment of just compensation. *Id.* at 439. Although *Loretto* affirmed the traditional principle that a physical invasion of private property constituted a *per se* taking, it also made clear that this principle is a "very narrow" one, *id.* at 441, and that "[s]o long as . . . regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity," *id.* at 440.

Five years later, in *FCC v. Florida Power Corp.*, the Supreme Court upheld the constitutionality of the Pole Attachments Act, ruling that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." 480 U.S. 245, 252 (1987).[15] The Court distinguished *Loretto* by highlighting that the property owner was not required to permit access to his property, but that access, once given, was subject to the statute's regulatory scheme. As the Court explained, "it is the invitation" by the landowner "that makes the difference." 480 U.S. at 252. *Florida Power* stands for the proposition that an invitation by the property owner is a dispositive factor in assessing whether governmental regulation is a *per se* taking.

---

a building owner's property, but instead regulates the circumstances under which a LEC may provide service to an MTE.

[15] As discussed further below, the Eleventh Circuit has since addressed a revised version of the Pole Attachments Act and concluded that it constitutes a *per se* taking but rejected a facial challenge to the Act's "just and reasonable" compensation provisions. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1331-32, 1337 (11th Cir. 1999) ("*Gulf Power I*").

Similarly, in *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992), the Court confirmed that "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.* at 522-23. Applying that distinction, the Court held that a statute "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy" was not a *per se* taking, *id.* at 524, 528, because "[w]hen a landowner decides to rent to tenants, the government *may . . . require the landowner to accept tenants he does not like without automatically having to pay compensation*," *id.* at 529 (emphasis added). Thus, an equal access requirement does not constitute a *per se* taking where a property owner already has invited similarly situated others onto its property.[16]

Thus, where no invitation has been extended, as in *Loretto*, courts are likely to conclude that a requirement that a property owner give access to a third party is a *per se* taking involving physical invasion and triggering the just compensation requirement. By contrast, where the landowner has invited a similar cable company to enter its property, courts have refused to find that regulation requiring nondiscriminatory access effected a taking. *See, e.g.*, *Multi-Channel TV Cable Co.* v. *Charlottesville Quality Cable Co.*, 65 F.3d 1113, 1123-23 (4th Cir. 1995) ("*CQC*

[16] *See also Florida Power*, 480 U.S. at 252-53 (concluding that the Pole Attachment Act did not authorize a *per se* taking because "it is the invitation, not the rent, that makes the difference"); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 83-84 (1980) (concluding that requirement that shopping center, which was open to the public, permit unwanted expressive speech did not effect a taking); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261 (1964) (holding that public accommodations provisions of the Civil Rights Act of 1964 which mandated that property owner serve patrons regardless of race did not constitute a taking).

III"); *C/R TV, Inc.* v. *Shannondale*, 27 F.3d 104, 109 (4th Cir. 1994).[17] In short, the Commission's proposed nondiscriminatory access regulations do not require any MTE owner to issue an invitation to a telecommunications provider to serve its tenants, but, instead, merely create strong incentives so that an MTE owner's invitation to one or more telecommunication providers is more likely to be applied in a nondiscriminatory manner.[18]

b. A nondiscriminatory access requirement would not constitute a regulatory taking.

Where, as here, a governmental action does not constitute a *per se* taking, courts engage in "essentially *ad hoc*, factual inquiries" to determine if the governmental action constitutes a regulatory taking. *Penn Central*, 438 U.S. at 124. Under *Penn Central*, three factors have particular significance in the regulatory taking analysis: (1) "the character of the governmental action," (2) "the economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* Application of

[17] Thus, even if the Commission were to promulgate a direct regulation of MTE owners requiring that they not discriminate among telecommunications providers – and the Commission's proposal does no such thing – that would not constitute a *per se* taking because the nondiscriminatory access requirement proposed by the Commission would apply, by definition, only if an MTE owner already had *invited* one or more telecommunications providers onto its property. *See Yee*, 503 U.S. at 529; *Pruneyard Shopping Ctr.*, 447 U.S. at 83-84; *Heart of Atlanta*, 379 U.S. at 261. Because the nondiscriminatory access requirement would apply only if one or more telecommunication providers already had been voluntarily permitted onto the MTE owner's property, the proposed regulation, unlike *Loretto*, does not "prohibit" MTE owners from refusing to allow any access to their property. *See Loretto*, 458 U.S. at 423. To the extent that *Gulf Power I* might be read to reject this distinction, 187 F.3d at 1331, it is contrary to controlling Supreme Court precedent and should be rejected.

[18] *See Yee*, 503 U.S. at 532; *see also Florida Power*, 480 U.S. at 252-53; *Pruneyard Shopping Center*, 447 U.S. at 83-84; *Heart of Atlanta Motel*, 379 U.S. at 261. This is precisely the same reasoning applied in the Commission's *OTARD* decision. *See In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices*, 13 FCC Rcd. 23874, 23884-86 (¶¶ 19-23) (1998).

the *Penn Central* factors demonstrates that the Commission's nondiscriminatory access rules do not constitute a regulatory taking.

The first factor restates the familiar principle that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. As discussed above, the nondiscriminatory access rules do not cause a physical invasion of the MTE owner's property, but merely regulate the terms upon which a LEC can provide service to that property.

Second, because the Commission's proposal would result in "just compensation" to MTE owners, *Further Notice*, ¶ 147, MTE owners could not reasonably claim that they would suffer economically from enforcement of the nondiscriminatory access rules. Here, the Commission proposes to mandate that MTE owners receive "just compensation" from any carrier in return for access to MTE property.

Finally, the nondiscriminatory access rules would not "interfere[ ] with their investment-backed expectations in a manner that requires the government to compensate him." *Good* v. *United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999). This third *Penn Central* factor insures that only those property owners who *reasonably* relied "'on the non-existence of the challenged regulation'" will be entitled to just compensation. *Id.* (quoting *Creppel* v. *United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). It should come as no surprise to the MTE owners that regulations may affect the terms, conditions and practices governing the provision of telecommunications service provided by LECs to their tenants.

In short, the *Penn Central* factors confirm that the nondiscriminatory access proposal does not constitute a regulatory taking.

2. By Requiring "Just Compensation," The Commission Would Address Any Constitutional Concerns.

Even if the proposed LEC access regulations did effect, in some circumstances, a taking of private property – and they do not – the Commission properly suggests that any constitutional concerns could be addressed "if the Commission were to specify that an MTE owner's 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." *Further Notice*, ¶ 147. The Constitution does not prohibit the government from taking private property; it only requires "just compensation" if property is taken. That is, "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

Thus, if the Commission's proposal requires the payment of "just compensation," subject to judicial review, it would be, on its face, constitutional. *See, e.g.*, *Gulf Power I*, 187 F.3d at 1334-35. Put another way, even where a physical invasion constituting a *per se* taking is mandated by the government, the requirement that the party entering the property pay "just and reasonable" compensation, when combined with a judicial review provision, is sufficient to survive a facial challenge under the Takings Clause. *See id.* at 1337. By incorporating the judicial review provisions into the requirement of private payment of just compensation, the Commission would appropriately protect the MTE owner's right to receive constitutionally sufficient compensation. *See id.* at 1336, 1337.

The Commission is further correct in suggesting that the concerns expressed by the D.C. Circuit in *Bell Atlantic* would not bar adoption of a nondiscriminatory access requirement imposed on telecommunications carriers. *Further Notice*, ¶¶ 149-150. In *Bell Atlantic*, the D.C.

Circuit refused to apply deferential review to the Commission's interpretation of a statute because that interpretation "directly implicates the Just Compensation Clause of the Fifth Amendment" in that the regulated entities (the LECs) would "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." 24 F.3d at 1445 & n.3. The Court instead applied a "narrowing construction" to reject the Commission's conclusion that it had statutory authority to require a taking of private property. *Id.* at 1445. The Court concluded that its rejection of traditional *Chevron* deference was necessary to "prevent executive encroachment of Congress' exclusive powers to raise revenue and to appropriate funds," *id.* at 1445 (internal citations omitted), and to prohibit agencies from using "statutory silence . . . to expose the Treasury to liability both massive and unforeseen," *id.* (internal citations omitted).

First, and foremost, "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of a narrowing construction to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *Riverside Bayview Homes*, 474 U.S. at 128. Rather, it is only when "there is an identifiable class of cases in which application of a statute will *necessarily* constitute a taking," that a court might properly adopt "a narrowing construction of a statute to avoid a taking difficulty." *Id.* at 128 n.5; *see Bell Atlantic*, 24 F.3d at 1445. In this case, unlike *Bell Atlantic*, the Commission's proposed nondiscriminatory access rule does not mandate direct physical access by a third party onto a building owner's property. Indeed, the Commission's proposal does not involve regulation of property owners at all, but instead regulates telecommunications carriers and the circumstances under which they may provide service to a building owner. Thus, the predicate for the narrowing construction adopted in *Bell*

Atlantic - "an identifiable class of cases in which application of a statute will necessarily constitute a taking," 24 F.3d at 1445 (internal quotation marks omitted) - is absent from this case. In fact, the D.C. Circuit has recently reconfirmed that it "will not frustrate permissible applications of a statute or regulation based on the specter . . . of a future unconstitutional taking." *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999) (internal citation and quotation marks omitted).

Second, *Bell Atlantic* also rested on an analysis of the Commission's authority to exercise, without express authorization, Congress' "exclusive powers to raise revenue and appropriate funds." *See id.* at 1444 (internal citations omitted); *see also id.* & nn.2, 3. Indeed, *Bell Atlantic* highlighted that the Commission's physical collocation permitted the LECs to recoup only "reasonable" compensation:

> Because the Commission allowed LECs to file new tariffs under which they will obtain compensation from the CAPs [competitive access providers] for the reasonable costs of co-location, it might be thought that there is no threat to the appropriations power at all. 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.

Id. at 144 n.3. Thus, the *Bell Atlantic* Court left open the possibility that the appropriations power may not be implicated where, as here, the compensation required by the Commission was equal to the "just compensation" required by the Fifth Amendment.

Accordingly, even assuming the validity of the D.C. Circuit's decision to deny *Chevron* deference to the agency action in *Bell Atlantic*, 24 F.3d at 1445, that analysis has no application to this case.[19] Here, unlike in the original physical collocation rules vacated by the D.C. Circuit

---

[19] The continued validity of *Bell Atlantic* is subject to doubt. Indeed, the D.C. Circuit recently rejected the underpinnings of *Bell Atlantic* (in a decision in which the relevant portion was drafted by the author of *Bell Atlantic*). *See Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000) (declining to apply canon requiring avoidance of

in *Bell Atlantic*, the proposed nondiscriminatory access rules would explicitly result in private payment of "just" – as opposed to "reasonable," *id.* at 1445 n.3 – compensation. *Further Notice*, ¶ 147. As in *Gulf Power I*, requiring private payment of just compensation, coupled with a judicial review provision, satisfies the Just Compensation Clause of the Fifth Amendment. *Gulf Power I*, 187 F.3d at 1336-37. Indeed, the regulations proposed by the Commission here make clear that the constitutional standard of 'just' compensation is the measure by which compensation would be granted to MTE owners serviced by LECs. *See Further Notice*, ¶ 147. Accordingly, there would be no concerns about "expos[ing] the Treasury to liability both massive and unforeseen." *Bell Atlantic*, 24 F.3d at 1445.

D. The Nondiscriminatory Access Requirement Should Apply to Commercial and Residential Buildings, But Need Not Apply to Government Buildings.

Although the Constitution does not limit the Commission's statutory authority to impose a nondiscriminatory access requirement, policy considerations dictate that the Commission should extend the nondiscriminatory access rule to LEC dealings with both commercial and residential MTE owners, regardless of whether the building owner deals directly with LECs or has appointed a BLEC to handle telecommunications negotiations. Where, however, there is no cognizable divergence of interests between tenants and MTE owners such as in some government MTEs and in hotels that provide transitory housing, a nondiscriminatory access rule is unnecessary and therefore inappropriate.

"constitutional issues" because "[i]f there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us"); *see also National R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 421-22 (1992) (reaffirming "the rule of judicial deference to an agency's statutory interpretation, even when the statute is one authorizing condemnation of private property").

Residential and Commercial MTEs. The Commission's proposed nondiscriminatory access requirement should be broad enough to promote competition and to ensure the rights of MTE tenants to pick the telecommunications carrier of their choice. As the Commission notes, the predicate for adoption of a nondiscriminatory access requirement is "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." *Further Notice*, ¶ 125. That concern applies equally regardless of whether the tenant is a "commercial" or a "residential" entity. In both circumstances, a nondiscriminatory access rule would provide significant benefits by ensuring that tenants can choose the telecommunications carriers that best meet their needs. Moreover, the scope of a "residential" exception to a nondiscriminatory access rule would be substantial, as there are more than "one million residential multiple dwelling units in this nation." *Further Notice*, ¶ 15. That fact is important because "even if competitive access is available in some MTEs, competitive carriers may be unable to succeed economically . . . without broad access to MTE markets." *Further Notice*, ¶ 12.[20]

The *Further Notice* suggests that residential tenants might be more likely than commercial tenants to "move" in order to address a lack of choice in telecommunications service. *Further Notice*, ¶ 162. But the premise that a residential tenant is more likely to pack up and move a family from one apartment to another based solely on a lack of choice of

[20] States that have enacted nondiscriminatory access requirements have not exempted "residential" properties. *See* Conn. Gen. Stat. Ann. 16-247*l*(a)(1) (applying obligations to "home or residence"); 16 Texas Admin. Code § 26.129(b)(1)(C) (applying obligations to "residential property"); *Massachusetts Nondiscriminatory Access Order* (applying obligations to "commercial buildings" and "multiple dwelling units"); *Nebraska Nondiscriminatory Access Order* (applying obligations to "residential MDUs").

telecommunications providers strains credulity. And even assuming that residential tenants (some of whom may reside in rent-controlled or rent-stabilized MTEs) were less constrained to "move" to another MTE to obtain more competitive phone service, the residential tenant could not be sure to locate a comparable residence that was not also subject to an exclusive contract with an incumbent or other LEC or that would not be subject to such an arrangement (unless, of course, the Commission prohibits, as it should, *see supra*, all such exclusive arrangements) in the near future.

Building LECs. Nor should the Commission exempt from the nondiscriminatory access requirement MTEs in which the building owner has entered into a relationship with a BLEC. As the Commission has recognized, BLECs "typically own telecommunications facilities only within MTEs" and "provid[e] telecommunications services to tenants by interconnecting with another LEC that has facilities outside the building." *Further Notice*, ¶ 154. The basic strategy of BLECs is to enter into partnerships with building owners and managers to secure the right to install telecommunications networks within the buildings that will provide these services to building tenants. BLECs typically install, at no cost to the building owner, a broadband network that is an asset to the building and the building owner. A BLEC generally provides the building owner with an opportunity to share in the communications revenue that it generates.

AT&T is concerned that the relationships between BLECs and building owners can serve to impede nondiscriminatory access by competitive LECs and therefore stifle consumer choice. At bottom, the Commission's proposed nondiscriminatory access should not be thwarted because such access has been denied by a BLEC acting as agent for a partner building owner rather than the building owner directly. Specifically, where a BLEC is certified as a local exchange carrier, it is subject to the nondiscriminatory access obligations imposed by 47 U.S.C. § 224(f).

Conversely, where a BLEC has not been certified, it should be treated as an agent of the building owner so that a LEC cannot provide service to the MTE where either the BLEC or the building owner have denied nondiscriminatory access. In short, LEC obligations should not be affected by a building owner's decision to enter into a partnership with a BLEC.

Convergence of Interests. AT&T agrees, however, that where there is a convergence of interests between the MTE owner and its tenants, a non-discriminatory access rule would provide no benefit to competition and consumer choice. *Further Notice*, ¶ 152. In those circumstances, concerns dissipate because the entity that controls access is also effectively the telecommunications subscriber. For instance, in government-owned buildings where tenants are also governmental entities, a nondiscriminatory access requirement does not enhance customer choice or competition.[21] Similarly, in buildings serving transitory residents such as hotels, hospitals, and universities, the true tenant is best represented by the building owner and, therefore, a nondiscriminatory access rule would not enhance consumer choice or competition.

The Commission should not, however, draw arbitrary "threshold" distinctions based on the "number of square feet, number of tenants, or gross rental revenue." *Further Notice*, ¶ 152. None of these variables is relevant to building owners' ability to exercise market power by denying their tenants the choice of telecommunications provider, and drawing such arbitrary distinctions would deprive substantial numbers of MTE tenants of competition and consumer choice without any corresponding benefit.

---

[21] Moreover, as the Department of Defense pointed out in its prior comments, government contracts are also subject to competitive procurement procedures that ensure that there is competition in the bidding process. Comments of the Department of Defense at 5, *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98 (citing 48 C.F.R. § 206) (filed Aug. 12, 1999).

E. Implementation of Non-Discriminatory Access Rules.

There are a number of "implementation issues" regarding the Commission's nondiscriminatory access proposal that must be resolved. *Further Notice*, ¶ 156. Specifically, the Commission must decide (i) how it "would define nondiscriminatory access for all providers given the significant variations in the type and extent of access required by each provider," *Further Notice*, ¶ 156, (ii) whether a nondiscriminatory access rule "should be triggered only if a tenant requests a particular carrier," *Further Notice*, ¶ 157, and (iii) how a "nondiscriminatory access rule should be enforced." *Further Notice*, ¶ 158.

Application of the Nondiscriminatory Access Requirement. The Commission properly recognizes that the potential carriers competing to serve MTE tenants will have "significant variations in the type and extent of access required" to provide telecommunications service. *Further Notice*, ¶ 156.[22] Given these variations, there is a need to address "how a nondiscriminatory access rule could be tailored to address the ramifications of requests for different types of access on building management," consistent with "accommodating building space limitations and ensuring building safety and security." *Further Notice*, ¶ 157.

The Commission has addressed similar concerns in connection with its implementation of the obligations of utilities under 47 U.S.C. § 224(f). Section 224(f) mandates that utilities provide "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or

[22] As AT&T explained in its prior comments, it anticipates using four primary network architectures to provide service to MTE tenants: (1) through traditional telephone connectivity between AT&T's network and the customer's premises; (2) through its 38GHz wireless network, (3) through a hybrid fiber-coaxial (HFC) network, and (4) through fixed-wireless local loop technology. AT&T MTE Comments 10-11. Although the access needs associated with each of these various architectures overlap in some respects – including access to conduit between the network interfacing device (NID) and the customer's premises – they also diverge in important respects. *Id.* at 10-14.

controlled by it," *id.* § 224(f)(1), but provides that access may be denied "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes," *id.* § 224(f)(2). In construing these provisions, the Commission has determined that "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis" because "there are simply too many variables to permit any other approach." First Report & Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16067, ¶ 1143 (1996) ("*Local Competition Order*").

The Commission, however, established a number of general guiding principles, some of which are equally applicable here. First, because the access required would be "nondiscriminatory," a new entrant would be entitled to access to the same facilities already utilized by the existing LEC and "the rates, terms, and conditions of access must be uniformly applied to *all* telecommunications carriers . . . that have or seek access." *Id.* at 16073, ¶ 1156. Similarly, "[b]efore denying access based on lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." *Id.* at 16076, ¶ 1163. And finally, with respect to "building safety and security," building owners would be entitled to rely in good faith on "industry codes" and "federal requirements, such as those imposed by FERC and OSHA" to "prescribe standards with respect to capacity, safety, reliability and engineering principles." *Id.* at 16071-72, ¶¶ 1151-52.

Nondiscriminatory Access "Trigger." The Commission's proposed nondiscriminatory access requirement should not be limited to situations where a tenant has already requested a particular carrier. *Further Notice*, ¶ 157. Reliance on a tenant request as a triggering mechanism would be inappropriate and would hamper the ability of new entrants to compete on a level

playing field. First, as to existing MTEs, such a limitation would severely limit the ability of new entrants to compete against incumbent LECs because telecommunications carriers currently seek access to buildings prior to engaging in efforts to attract specific customers in those buildings. This strategy is necessary to minimize the sometimes excessive delays that would otherwise occur if new entrants could seek nondiscriminatory access only *after* a specific subscriber had requested service. Second, such a limitation would hobble the ability of new entrants to compete with incumbent LECs with respect to new or newly renovated buildings that lack any current tenants. Denial of nondiscriminatory access protections until *after* tenants arrive would place new entrants at a substantial competitive disadvantage to the telecommunications provider previously chosen by the building owner to provide telecommunications service to its future tenants.

Moreover, such a requirement is unnecessary. New entrants are unlikely to expend the time, energy and scarce resources necessary to obtain nondiscriminatory access to a building if they do not have a reasonable likelihood of securing a revenue stream from future subscribers that would justify their investment. Indeed, any benefit from such a rule would be limited by the costs associated with resolving disputes that will arise regarding 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." *Further Notice*, ¶ 157.

Enforcement of the Nondiscriminatory Access Rule. With respect to enforcement of the nondiscriminatory access rules, the Commission should implement expedited complaint procedures modeled on the existing procedures for enforcing the requirements of the Pole Attachment Act. *See* 47 C.F.R. §§ 1.1401 to 1.1418 ("Pole Attachment Complaint Procedures"). Many of the concerns and issues associated with enforcement of the pole attachment rules are

equally relevant to enforcement of the Commission's proposed nondiscriminatory access rules. For example, the procedures for enforcing the Commission's nondiscriminatory access requirement should include an "expedited review process" because "'time is of the essence.'" *Local Competition Order*, 11 FCC Rcd. at 16101, ¶ 1224. Moreover, expedited procedures would reduce the burdens on all parties by minimizing the time and money associated with traditional discovery, motions practice and trial. In short, the Commission's procedures for enforcing utility access obligations under 47 U.S.C. § 224(f) provide a useful model for the procedures that should be adopted to enforce the Commission's nondiscriminatory access requirement.

To enforce a nondiscriminatory access rule, of course, the competitive LEC must be aware of the terms of access between the MTE owner and the existing LEC that is already providing service to the MTE (generally an ILEC). Thus, when a competitive LEC seeks access to an MTE, the existing LEC must disclose within a reasonable time the terms of its access arrangements with the MTE owner. Specifically, the existing LEC would be required to disclose to the CLEC its arrangements with the building owner including, (i) the terms of its use of space within the MTE, (ii) the access fees, if any, charged by the MTE, (iii) the charges, if any, for use of MTE wiring, and (iv) any profit sharing arrangements between the LEC and the MTE owner.

If a competitive LEC's written request for access to an MTE on the same terms as those provided to the existing LEC is denied, then the competitive LEC would be entitled to file a complaint against the existing LEC. *Cf.* 47 C.F.R. § 1.1404; *Local Competition Order*, 11 FCC Rcd at 16101, ¶ 1223. Thereafter, the respondent LEC would have "30 days from the date the complaint was filed within which to file a response," 47 C.F.R. § 1.1407(a), and the complainant competitive LEC would have "20 days from the date the response was filed within which to file

a reply," *id.* Absent extraordinary circumstances, "no other filings and no motions . . . w[ould] be considered." *Id.* The Commission would then determine whether to resolve the dispute based on the pleadings, whether to require "informal meetings with the parties to clarify issues or to consider settlement," or whether to "order evidentiary procedures upon any issues it finds to have been raised by the filings." *Id.* § 1.1411.[23]

II. THE COMMISSION SHOULD EXTEND ITS PROHIBITION ON EXCLUSIVE CONTRACTS TO RESIDENTIAL MTES AND SHOULD LIMIT EXCLUSIVE ACCESS PROVISIONS IN EXISTING CONTRACTS.

The Commission should extend its prohibition on exclusive access contracts to residential buildings and prohibit carriers from enforcing exclusive access provisions in existing contracts.

A. The Commission Should Extend Its Prohibition On Exclusive Contracts to Residential MTEs.

As AT&T showed in its prior comments, (i) "exclusive contracts . . . perpetuate the very 'barriers to facilities-based competition' that the 1996 Act was designed to eliminate"; (ii) allowing "incumbent LECs to enter into 'exclusive' service agreements with building owners . . . subvert[s] their obligations under section 224"; and (iii) exclusive contracts "prohibit new entrants from exercising their [section] 224 rights." AT&T MTE Access Comments at 26. None of these conclusions has been drawn into question. Indeed, the Commission has gone further, explaining that, "[f]or incumbent LECs, an exclusive contract may essentially constitute a device to preserve existing market power" in two respects: by "erect[ing] a barrier preventing other telecommunications firms from offering service to tenants in the building(s) covered by the

[23] Building owners may be included in these proceedings because the Commission has express authority "to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice 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).

contract," and "making it more difficult for the entrants to serve other buildings economically." *Further Notice*, ¶ 29.

But each of these policy concerns applies to residential *and* commercial MTE tenants. Indeed, widespread use of exclusive contracts in residential MTEs, by definition, will undermine the Commission's long-standing goal of "remov[ing] obstacles to facilities-based competition in local telecommunications markets." *Further Notice*, ¶ 10. As the Commission recognizes, "because MTEs frequently offer a relatively large revenue opportunity in a limited space, they can be the most efficient environments for many competitive LECs initially to serve," *Further Notice*, ¶ 12, and, therefore, "inability to compete in those environments in the short term may jeopardize the business plans and viability of some potentially powerful competitors that could in the long term offer ubiquitous competition throughout an incumbent LEC's service areas." *Further Notice*, ¶ 12.[24]

The Commission further recognizes that "both residential and commercial tenants have limited recourse in addressing the lack of telecommunications choices offered in buildings under exclusive contracts": they can "accept the lack of choice or move." *Further Notice*, ¶ 162. The *Further Notice* suggests, however, that residential tenants are freer to exercise the option of moving because their "lease terms are much shorter" and because "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." *Further Notice*, ¶ 162. As demonstrated previously, the notion that a material number of residential tenants are more likely to pack up and move from one apartment to another based solely on a lack of choice of

[24] As noted above, residential MTEs constitute a substantial market that is vital to development of competition and includes "over one million residential dwelling units" that, as of 1990, made up "28 percent of all housing units nationwide." *Further Notice*, ¶ 15.

telecommunications providers is not plausible. And, in any event, the residential tenant could not be sure to locate a comparable residence that had not currently entered into an exclusive contract or would not do so in the near future. Moreover, telecommunications costs are often a substantial expense for sophisticated commercial tenants, and telecommunications options are thus more likely to play a significant role in commercial tenants' relocation decisions.

In short, the pro-competitive goals underlying the 1996 Act, along with the rationales already adopted by the Commission to support the prohibition of exclusive contracts in commercial MTEs, also dictate that the Commission should extend its current prohibition on "exclusive contracts" to residential MTEs.[25]

B. The Commission Should Prohibit Enforcement of Exclusive Access Provisions in Existing Contracts.

The Commission also should "prohibi[t] carriers from enforcing [exclusive] access provisions in existing contracts." *Further Notice*, ¶ 164.[26] In the 1996 Act, Congress sought to bring competition to the traditionally monopolistic market for local telecommunications services. *Local Competition Order*, 11 FCC Rcd. at 15505, ¶ 3. Congress directed the Commission "to

---

[25] Regardless of the Commission's ultimate conclusion regarding the status of "exclusive contracts" in the residential MTE setting, the Commission should reaffirm that, notwithstanding any such contract, incumbent LECs must comply with their unbundling obligations under 47 U.S.C. § 251.

[26] "[T]he 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." *Western Union Tel. Co.* v. *FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). As the Commission notes, "the benefit of this approach is that it allows 'an incumbent provider's established customers to consider taking service from a new entrant.'" *Further Notice*, ¶ 164 (quoting *Memorandum Opinion and Order*, Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd. 5154, ¶ 197 (1994)). Of course, as its own precedent indicates, the Commission generally only has authority to abrogate contracts when it seeks to correct unreasonable common carrier rates or practices that violate sections 201 through 205 of the Communications Act. *See AT&T MTE Access Comments* at 29-30 & n.32 (discussing limits on Commission's ability to abrogate or modify existing contracts).

remove not only statutory and regulatory impediments to competition, but *economic and operational impediments as well.*" *Id.* (emphasis added). For example, in 47 U.S.C. § 224(f), Congress dictated that utilities were mandated to provide nondiscriminatory access to facilities necessary to provide local exchange service. Likewise, in this proceeding, the Commission has resolved to "remov[e] obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated by the 1996 Act," *Further Notice*, ¶ 4, and expressed concern about evidence that competitive LECs "are being impeded by incumbent LECs and building owners." *Id.*

There can be no more certain or effective method for impeding competition for the provision of telecommunications service in the MTE environment than exclusive access agreements. So long as such contracts remain in effect, there can be no competition. Further, so long as such contracts remain in effect, competitive LECs' nondiscriminatory access rights under section 224(f) are rendered meaningless because a competitor would have no incentive to exercise its attachment rights unless it were able to reach the MTE tenant. Although the Commission expresses concern that "the modification of existing exclusive contracts . . . would have a significant effect on the investment interests of those building owners and carriers that have entered into those contracts," *Further Notice*, ¶ 164, Congress has, as stated above, directed that the Commission eliminate such "economic and operational" barriers to the development of facilities-based competition. Neither building owners nor incumbent LECs are entitled to rely on windfall profits derived from "exclusive contracts" that serve to perpetuate their market power and monopoly hold over local telecommunications service provided to MTE tenants.

III. THE COMMISSION SHOULD PROHIBIT INCUMBENT LECS FROM ENTERING INTO PREFERENTIAL MARKETING AGREEMENTS.

The Commission should prohibit, at least in the near term, efforts by incumbent LECs to enter into preferential marketing arrangements until competition and consumer choice have had an adequate opportunity to take root. This approach, which parallels the structure adopted by Congress in Section 224, would prevent incumbent LECs from using preferential marketing arrangements to maintain their dominance and to impede efforts by competitive LECs to install competing facilities and provide competing services. Preferential marketing arrangements can be a powerful anticompetitive weapon in the hands of dominant providers in markets that are not fully competitive. Here, after years of monopoly control, the appropriate course is to bar incumbent LECs from entering preferential marketing arrangements until vibrant and sustainable MTE competition exists and the incumbent LECs' dominance has been dissipated.

Preferential marketing agreements obligate a building owner to market or advertise the services of a particular telecommunications carrier to his tenants. Under such arrangements, the building owner generally receives compensation from the telecommunications provider for each tenant that chooses to subscribe to that telecommunications provider. There is nothing inherently objectionable about such arrangements. Indeed, tenants can benefit from such arrangements because they may provide them with additional information regarding telecommunication services and may entitle them to special "discounted or packaged services.'" *Further Notice*, ¶ 165. Such arrangements may also foster competition and consumer interests by enabling, with the assistance of building owners, competitive LECs to obtain a foothold in MTEs that can support their substantial entry costs.

Preferential marketing arrangements, however, can also raise serious competitive concerns when they involve dominant providers in markets that are not yet fully competitive.

Such concerns are especially acute with respect to incumbent LECs because they already "possess market power" over facilities necessary to provide local telecommunications services, *Further Notice*, ¶ 24, and "have the ability and incentive to deny reasonable access to the[ir] facilities to competing carriers." *Id.* The incumbent LECs' enormous market shares and existing relationships with the vast majority of building owners already give them a formidable competitive advantage. In these circumstances, the Commission must take particular care to ensure that the incumbent LECs cannot use other devices, such as exclusive or preferential arrangements with building owners, to stifle emerging competition before it can develop. The incumbent LECs fully recognize this and are currently entering preferential marketing arrangements with building owners across the nation.

Accordingly, the balance that the Commission must strike is a delicate one. AT&T submits that the Commission should not forsake the benefits of preferential marketing arrangements entered into by new entrants based on the substantial concerns regarding "discriminatory behavior" when incumbent LECs wielding market power enter into such arrangements to cement their monopoly hold over MTE tenants. Rather, the Commission should prohibit only such arrangements entered into by incumbent LECs.

Such regulatory treatment is appropriate because incumbent LECs and competitive LECs are not similarly situated. First, one of the principal benefits of preferential marketing arrangements is that they provide an incentive for new entrants to install their own facilities in MTEs and thereby promote facilities-based competition in an arena long dominated by incumbent monopolists. The need for an incentive for competitive LECs is clear because "more than four years after the passage of the 1996 Act, facilities-based competitive LECs have access to only a small percentage of [MTEs]." *Further Notice*, ¶ 23. Indeed, Congress codified this

same distinction in 47 U.S.C. § 224, which provides "telecommunications carriers" with a right to "nondiscriminatory access to any pole, duct, conduit, or right-of-way" but expressly excludes "incumbent local exchange carrier[s]" from those benefits. 47 U.S.C. § 224(a)(5). In the context of Section 224, incumbent LECs do not need a right of non-discriminatory access to facilities that they already own or control. In the same way, incumbent LECs do not need an incentive to obtain a foothold in an arena that they currently dominate or to install telecommunications facilities that they long ago installed.

Second, the concerns regarding the anti-competitive potential of preferential marketing agreements arise directly from the incumbent LECs existing dominance. As the Commission has explained, incumbent LECs "still serve the vast majority of customers" and "continue to control most facilities useful to the provision of telecommunications service to MTEs." *Further Notice*, ¶ 24. Further, "incumbent LECs are using their control over on-premises wiring to frustrate competitive access to multitenant buildings." *Further Access*, ¶ 19. Incumbent LECs should not be permitted yet another means by which they can frustrate the ability of competitive MTEs to provide competition and consumer choice to MTEs. Indeed, the Commission traditionally has "distinguished two kinds of carriers – those with market power (dominant carriers) and those without market power (non-dominant carriers)." Order, *In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, ¶ 4 (1995). Thus, incumbent LECs are properly subject to increased regulation because customers affected by their practices lack "the option of taking service" from another carrier. *Id.*

To be sure, the Commission has prohibited "both competitive and incumbent telecommunications service providers from entering into exclusive access contracts in commercial settings." *Further Notice*, ¶ 30. That conclusion, however, was borne of the

Commission's concern that "an exclusive contract may essentially constitute a device to create market power," and the Commission's effort "to ensure competitive neutrality in the market." *Further Notice*, ¶ 30. Neither of these concerns is implicated here. Preferential marketing agreements by competitive LECs do not constitute "a device to create market power" because they would not, by their terms, deny access to the incumbent LEC or any other carrier. In fact, to the extent that a preferential marketing agreement "effectively restricts . . . access to other telecommunications service providers, it is prohibited." *Further Notice*, ¶ 168. Given the current state of the market, the only means of ensuring "competitive neutrality" is to provide competitive LECs an incentive to install competing facilities. Accordingly, until such time as the provision of local services to MTE tenants is subject to full and fair competition, the Commission should prohibit incumbent LECs from impeding competitive entry through preferential marketing arrangements.

IV. THE COMMISSION SHOULD DECLINE TO ADOPT A NARROW READING OF THE DEFINITION OF "RIGHT-OF-WAY" UNDER SECTION 224.

Although AT&T agrees with the Commission that, "at a minimum," "for purposes of Section 224, a 'right-of-way' in a building includes . . . 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," *Further Notice*, ¶ 169, the Commission should decline to narrow, categorically, the definition of right-of-way. Instead, the Commission should leave open, for case-by-case adjudication, whether competitive LECs also would be entitled to nondiscriminatory access to a right-of-way owned or controlled by a utility where that right-of-way is *not* limited to a "a defined pathway" the utility is actually using, or "has specifically identified and obtained the right to use." *Further Notice*, ¶ 169.

Under Section 224, the term "utility" is defined to include "*any* person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who *owns or controls* . . . rights-of-way used, *in whole or in part*, for any wire communications." 47 U.S.C. § 224(a)(1) (emphases added). AT&T demonstrated in its opening comments that "a utility with a right to use a . . . right-of-way has sufficient ownership or control over that venue regardless of whether the utility actually chooses to exercise that right." AT&T MTE Access Comments 21. As a matter of straightforward, statutory construction, if a utility has secured "ownership or control" over a right-of-way, then a competitive LEC would be entitled to obtain nondiscriminatory access to that "right-of-way."

The Commission does not appear to dispute this analysis as a general matter. *Further Notice*, ¶ 82. Indeed, the Commission reaffirms that "a utility must take all reasonable steps to expand capacity to accommodate requests for attachments as it would expand capacity to meet its own needs." *Further Notice*, ¶ 82 n.207. The Commission expresses concern, however, "about the ramifications of potentially granting carriers an unbounded right to place facilities anywhere within the building." *Further Notice*, ¶ 170. That concern, AT&T respectfully submits, is overstated because nondiscriminatory access rights to rights-of-way under Section 224 are limited in two important respects.

First, under Section 224(f), a competitive LEC is entitled only to "nondiscriminatory" access; that is, a competitive LEC has a right to insist that "a utility may not favor itself over other parties." *Local Competition Order*, 11 FCC Rcd. at 16073, ¶ 1157. Thus, only in cases where a building owner already has granted a utility ownership or control of an unbounded right-of-way throughout its building, would the utility be required to provide access to the same right-of-way to competing LECs. It simply does not make sense to interpret Section 224 to put a