- Clearinghouse for Information and Complaints

The Alliance will establish an independent clearinghouse to which tenants, real estate companies and telecommunications providers can submit allegations of behavior inconsistent with the real estate industry's commitments. Such a clearinghouse would not exist to dictate the resolution of specific complaints, but would function on the model of a "better business bureau."

- Quantitative Study

The Alliance welcomes any objective, fact-finding studies of the marketplace. As discussed in the next section, the Alliance proposes working with the telecommunications industry and the Commission to obtain objective data to be gathered by an independent source for use by the Commission and others to assess the status of the marketplace. The Alliance also believes that a disciplined, quantitative study of the development of competition in the office building market, periodically conducted under the auspices of the Commission, will support the view that the market for building access is thriving, and would serve the public interest. The annual video competition or wireless competition report could provide a model for such periodic reports.

C. Rather than Rely on Potentially Biased Information Submitted by the Parties, the FCC Should Retain a Firm To Conduct a Third-Party Study of Building Access Issues, Funded by the RAA and the Telecommunications Industry.

Although we have consistently tried to provide the most objective information to the Commission that we could, we recognize that information submitted by an interested party might be perceived as biased or unreliable.

In addition, we believe that despite the best efforts of the parties, the surveys conducted to date on behalf of the interested parties may not have fully addressed the issues raised by the

Commission. Therefore, in anticipation of the next proposed proceeding to assess the state of the market, the Alliance proposes that the Alliance and the telecommunications industry co-fund a survey, to be conducted by a reputable survey research firm acceptable to the Commission and the participating parties. Rather than have the parties submit data in response to the Commission's questions, the Alliance and telecommunications industry would consult with the Commission to draft the survey questions. In this way, the Commission could ensure that the questions asked are the questions that it needs answered. Co-funding of a single survey would reduce anticipated survey expenditures for both the Alliance and the telecommunications industry. Finally, because the co-funded survey would be performed by a neutral third party, and the Commission would approve the questions, the Commission could have complete confidence in the survey results.

D. Rather than Cater to Telecommunications Industry Demands for Special Treatment, the FCC Should Concentrate on Addressing the Needs of Subscribers.

Throughout this proceeding, the Commission has been focused on the wrong issues. The Commission's fundamental mission is not to promote the interests of particular industry sectors, but to ensure that telephone subscribers have reliable service at reasonable rates. *See Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1118 (3d Cir. 1979). The Commission has embarked on a wild goose chase at the behest of telecommunications providers, even though it has no independent evidence that their claims are correct.

This stands in sharp contrast to the Commission's behavior in other areas. For example, it took years for the Commission to protect subscribers against "slamming," the illegal practice of changing a customer's preferred telephone provider without the customer's consent or knowledge. In 1998 alone, the Commission received *9,597 written complaints* about slamming

from consumers.[71] Subscribers had been complaining about slamming for years[72] - yet the FCC did not issue rules until June 1995.[73] In contrast, the Commission received no comments from tenants in the Competitive Networks proceeding. The only communication the Commission has received from tenants about building access has been a handful of *ex parte* letters, filed in this docket late last year.[74] If building access were a real problem, the issue would be in the press, and consumers would be calling the Commission and Congress, just as they complained loudly about slamming.

Moreover, both government and private industry surveys demonstrate that the biggest impediment to provision of competitive services is not building access. In a report on the status of local telephone competition by the New Jersey Board of Public Utilities found that the two major barriers to growth of competitive telephone service are a lack of standardized Operations Support Systems which allow CLECs an "application to application electronic interface," and lack of access to "unbundled network elements" which allow CLECs to connect customers to the CLECs network.[75] The CLEC Report 2001 stated that CLEC reliance on ILEC network

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[71] Common Carrier Bureau, Federal Communications Commission, "The FCC Telephone Consumer Complaint Scorecard" (Dec. 1998).

[72] The public outcry began in the 1980s. *See CUB To Challenge Long Distance Rules,* Chicago Tribune, May 27, 1986, at C5; *Long Distance Client 'Theft' Common,* Los Angeles Times, Aug. 20, 1989, at D5. Both articles are attached as Exhibits J and K.

[73] Policies and Rules Concerning Unauthorized Charges of Consumer's Long Distance Carriers, *Report and Order*, CC Docket No. 94-129, 10 FCC Rcd 9560 (1995).

[74] These letters were based on a standard form provided by the Smart Buildings Policy Project on its Web site, http://www.buildingconnections.org. From the content of the letters submitted, it appears that some of the "consumers" may actually be employees of telecommunications providers.

[75] New Jersey Board of Public Utilities, "Status of Local Telephone Competition: Report and Action Plan, Docket No. TX98010010, at 6, 15 (July 1998).

elements was the biggest problem facing CLECs.[76] Building access is not the problem that CLECs claim, and it does not warrant Commission action.

What is really happening here is that a few providers would like to reduce their marketing costs by getting the government to give them the right to install their facilities wherever they please. In effect, they seek to have the Commission force the real estate industry to subsidize them. The Commission has no power to do such a thing and must reject any such suggestion.

E. The FCC Must Not Ignore the Experience of the Real Estate Industry, Which Is that Many Providers Are Unreliable and Unprepared to Compete.

The desire to remove perceived barriers to competition is understandable. Unfortunately, removing barriers is only effective if the erstwhile competitors are capable of competing effectively. The experience of the real estate industry has been that many new entrants have trouble meeting their commitments, and providers of all kinds neither respect nor understand the legitimate needs and concerns of building owners and managers.

As examples, we have attached two Declarations from officers of property owners, representing residential and office properties, who have dealt with telecommunications providers and video programming providers. Although video programming services are not the subject of this proceeding, the problems that arise for property owners are similar, the increase in the number of competitors is likely to pose the same kinds of problems, regardless of the type of service, and to date residential property owners have more experience with cable operators than they do with multiple telecommunications companies. All of these problems, regardless of the types of service involved, color the views and concerns of property owners.

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[76] CLEC Report 200, ch. 2 at 6; Edward H. Hancock, QCI, A Warning Bell for Local Competition, 4 (Sept. 27, 2000) <http://www.qci.net/whitepapers/CLECs%20in%20Jeopardy.pdf>.

Scott Skokan, Vice President of Maintenance and Technical Services for Bozzutto Management Company, states that:

- In one instance, Bozzutto contacted with a private cable operator to serve two residential communities. The operator proved unable to provide all of the promised services, and after three months the operator stopped providing service, with no warning, leaving residents without service for 45 days.[77]
- In another case, a high speed internet provider stopped deploying its network after building out only two of 32 communities, again without warning. Bozzutto had previously informed residents that service would soon be available, and now faces disgruntled residents. To date, Bozzutto has been unable to find another company interested in providing the service.[78]
- In a third case, a large cable operator agreed to provide local telephone service in two communities. Four months after the agreement was to take effect, the cable company has still not installed the necessary equipment in one of the communities.[79]

Lyn Lansdale is Vice President of Ancillary Services of AvalonBay Communities, Inc., a large residential REIT. She reports the following types of problems:

- Several video providers have failed to provide promised services.[80]
- Several Internet service providers have failed to initiate service, including one company that is a year overdue.[81]

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[77] Skokan Declaration at ¶ 5.

[78] *Id.* at ¶ 6.

[79] *Id.* at ¶ 7.

[80] Lansdale Declaration at ¶ 5.

- Some video programming providers provide very poor service. One company was a source of constant resident complaints for five years, but under the terms of the contract there was little AvalonBay could do.[82]
- Several communities are served by a cable operator that is in bankruptcy and providing very poor service, but again there is nothing the owner can do because of the protection of the bankruptcy laws, while the provider has no incentive or means to improve service in the meantime.[83]
- Telecommunications providers, especially the ILECs, are often slow in installing facilities. These delays cause a great deal of trouble, because they can slow down construction of the entire building. In some cases, service has been unavailable when resident were moving in, and residents had to be issued cell phones – some times by the telephone company, sometimes by AvalonBay.[84]

In addition, the nation's largest publicly-held owner and manager of office buildings has a portfolio of 381 buildings, 89% of which are served by multiple telecommunications providers. In the last year, the company has received complaints from 22 tenants regarding one particular provider. The company is working with the provider to resolve the problems, but the provider's poor service is a problem because by allowing a provider onto the property, tenants often assume that the building owner is recommending the provider's services.

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[81] *Id.*

[82] *Id.* at ¶ 6.

[83] *Id.* at ¶ 7.

[84] *Id.* at ¶¶ 11, 12.

This owner also reports that providers frequently fail to complete installation work in accordance with its standards, and then they often fail to correct deficiencies within an acceptable time period. These problems are more common when providers insist on using their own contractors, rather than contractors recommended by the building owner. Providers also make installation more difficult, by failing to provide scheduling information needed to plan and manage the installation process.[85]

Finally, at least two providers in this company's buildings are having financial difficulties. One is in Chapter 11 and the other has requested permission to remove equipment from a building because of its financial problems. These kinds of problems heighten the owner's concern for maintaining control over equipment rooms and riser space.

These are only a few examples of the problems that arise every day in dealing with telecommunications providers and similar companies.[86] Building owners want to provide their tenants with the services they need and want – but the telecommunications industry is often unable or unwilling to cooperate. These experiences serve only to strengthen the conviction among building owners that they must be able to control their own property.

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[85] Another national company, Arden Realty, states that providers have damaged Arden's buildings during installation, and have either failed to repair the damage or done so poorly. In some cases, installation work has meant trees had to be removed on the exterior. In others, installers have cut cables, thus interrupting tenant service and even putting them temporarily out of business. Installations sometimes do not meet electrical and fire code standards -- Arden has even been cited by government inspectors because of unsafe work done by providers.

[86] Arden Realty describes cases in which CLEC personnel have tried to hold marketing events in Arden's buildings without permission, stated falsely to building management that corporate officials had given them permission, and gone so far as to tell building engineers that the building was obligated by law to provide space, power and wiring at no cost to the provider.

II. THE COMMISSION'S AUTHORITY TO REGULATE CARRIERS DOES NOT ALLOW THE AGENCY TO REGULATE BUILDING OWNERS INDIRECTLY.

The FNPRM asserts that the Commission has the power to regulate building access by regulating the practices of LECs rather than by regulating building owners directly. Specifically, the FNPRM seeks comment on whether the Commission could impose a nondiscriminatory access requirement on building owners by prohibiting LECs from dealing with building owners who "discriminate" among providers of telecommunications services. This prohibition on dealing would apparently involve refusing to provide service to subscribers in buildings owned by offending property owners.[87]

The FNPRM cites several sources of this alleged authority, none of which is sufficient for the following reasons: an agency cannot do indirectly what it cannot do directly; the Commission's authority over carriers does not extend to building access agreements; the Commission has no power to direct a carrier to cut off service to subscribers in a building; and such an action would violate the Takings Clause. In addition, the FNPRM's legal theories are all completely novel. As the D.C. Circuit has noted, "[t]he fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well . . . ." *MCI v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978).

In any case, the courts have already stated that when the Commission, acting through a carrier, attempts to regulate the business of a subscriber, a customer, or a third party, it is exceeding its authority. *See, e.g., Ambassador, Inc. v. United States,* 325 U.S. 317, 323 (1945); *Philco Corp. v. AT&T*, 80 F. Supp. 397 (E. D. Pa. 1948). That is exactly the case here, because

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[87] FNPRM at ¶ 143.

building owners are in the business of leasing space, and when a telecommunications provider requests access to a building, it is requesting the right to occupy space in the building. Furthermore, the telecommunications provider's purpose is not to provide service to the building or to the building owner, but to subscribers within the building. The subscribers, not the building owner, pay for the service. The subscribers, not the building owner, get the direct benefit of the provider's presence. The owner benefits because the tenants benefit, and for no other reason. The FNPRM ignores these key distinctions. Commission regulation of carriers that has the effect of regulating the terms of building access is a regulation of the property owner's business, not a regulation of the terms of telecommunications service, and therefore unlawful.

A. As a General Rule, an Agency Cannot Do Indirectly What It Cannot Do Directly.

The rule of law requires that there be limits to a government entity's ability to act. Otherwise, government becomes arbitrary and unaccountable. This is particularly important in the case of administrative agencies, which are not directly answerable to the people and have only those powers delegated to them. Thus, the Commission has a fundamental obligation to exercise its authority judiciously and fairly, always considering whether the means it has chosen are proper and reasonable. The ends do not justify the means, no matter how desirable the means may be. For this reason, the courts have repeatedly stated that the government cannot do indirectly what it cannot do directly. *See, e.g., New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 174 (1st Cir. 1989) (Massachusetts Port authority could not control air traffic — regulated by the FAA — by imposing landing fee); *Dana Corp. v. United States*, 174 F.3d 1344, 1349 (Fed. Cir. 1999) (IRS could not bar certain deductions through change in tax accounting rules); *AT&T Communications of Southwest, Inc. v. Southwestern Bell Tel. Co.,*

Inc., 1998 U.S. Dist. LEXIS 7417 (D. Kan. 1998); *Appeal of Public Svc. Co. of New Hampshire*, 454 A.2d 435 (N.H. 1982) (Public Utility Commission cannot take property by imposing conditions on issuance of securities by utility).

That the Commission may occasionally be tempted is understandable. For it to succumb to temptation, however, is unlawful. The Commission has already acknowledged that it cannot regulate building owners directly, yet it is now tempted to cross the line. Aside from the question of whether the means proposed in the FNPRM are even feasible, the courts will not allow the Commission to proceed. By merely asking the question, the FNPRM admits that what it proposes is improper.

B. The FCC's Authority Over Carriers Does Not Extend to Building Access Agreements.

The FNPRM suggests several theories that allegedly would allow the Commission to regulate building owners indirectly. The fundamental problem with all of them is that the authority of the Commission over carriers does not translate into authority that permits the Commission to regulate building access agreements.

1. Building Access Agreements Are Not Common Carriage.

The Commission only has authority over a carrier's activities to the extent permitted by the Act. If a local exchange carrrier ("LEC") is engaged in a non-common carrier activity, the Commission cannot regulate the LEC. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (dark fiber not offered on a common carrier basis); *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (customer premises equipment not a common carrier service). For example, the Commission cannot regulate the rent a LEC pays for its executive and administrative offices. Nor can the Commission set the price a LEC pays for

fiber optic cable. Similarly, while providing service to subscribers may be a common carrier activity, obtaining the right to occupy space on private property is not such an activity. Even a cursory reading of a typical access agreement makes this clear. The model license attached at Exhibit G, for example, grants a "non-exclusive license to install, operate, maintain and remove. . . the Equipment in the Equipment Room, on the Rooftop Space of the Building, and in the Communications Spaces and Pathways, all for the limited purpose of providing the Services to the Tenants . . . ." Such agreements are not tariffs, tariff conditions, carrier practices, or anything other than grants of the right to use space in a building subject to specified terms. In no way do they represent telecommunications common carriage or any other activity subject to the Communications Act. Consequently, the Commission cannot regulate the terms and conditions of a LEC's access to a building.

2. The Statutory Provisions Cited in the FNPRM Do Not Apply to Building Access Agreements.

The drafters of the Communications Act never imagined that the Act would be read to address building access. As originally drafted, the Act presumes the existence of a monopoly provider and is designed to deal with the problems posed by monopoly providers, such as unfair tariff provisions. Although the 1996 Act amended the Communications Act in ways designed to advance competition, many critical sections – including those that the FNPRM now relies on for authority in this context – were not amended.[88] Congress simply has not provided any mechanism that would allow the Commission to regulate building access, directly or indirectly.

[88] Despite the press play given the 1996 Act, it was not truly a comprehensive overhaul of the Communications Act. While it certainly marked a sharp change in Congress's theoretical approach to telecommunications regulation, it did little to alter the underlying structure or provisions of the original Act. Huber, *et al.*, Federal Telecommunications Law (2d ed. 1999) at § 3.2.5 ("when Congress passed the [1996 Act], it did so largely as a series of additions to, not replacements of, the 1934 Act.").

The Commission cannot now distort 65-year old language drafted under entirely different circumstances to claim authority to act in ways that Congress never even conceived might be necessary. *See, e.g., Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 120 S.Ct. 1858, 1868 n.12 (2000) (1986 amendment of 1863 statute did not alter original meaning of unamended provision); *American Casualty Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n. 7 ((2d Cir. 1994) (holding the same); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1057 (D.C. Cir. 1981); *Kirchner v. Kansas Turnpike Authority*, 336 F.2d 222, 230 (10th Cir. 1964).

In its effort to stretch the language of the Act, the FNPRM relies on Title II's framework for Commission regulation of the practices of carriers. The trouble with this approach is simply that the traditional tariffing procedures the FNPRM refers to, principally Sections 201(b), 202(a), and 205(a), apply to the provision of interstate communications services. *See* FNPRM at ¶ 134. But obtaining access to a building is not the provision of communications service — Congress never even dreamed that the Commission would try to apply those sections to such an issue, and by their own terms they do not apply. Similarly, Section 411 does not apply, nor do the cases cited in the FNPRM. We will address these in turn.

Section 201(b) and the International Settlements Decision. The FNPRM seems to assert that Section 201(b) permits the Commission to regulate any contract made by a carrier. FNPRM at ¶ 135. This cannot be true. What the statute requires is that "all charges, practices, classifications and regulations for and connection with such communications service" be "just and reasonable." As discussed above, this section was never intended to apply to building access agreements; Congress was first and foremost concerned with relations between carriers and their subscribers. Section 201(b) does not grant plenary authority over all carrier contracts, and the

further removed a contract is from the subscriber-carrier relationship, the less and less likely it is to be a "practice" "for and in connection with a communications service." A building access agreement, is not such a "practice" because an access agreement is an agreement for the use of real property, and any connection between the terms of access to a building and the terms of service to subscribers is tenuous and remote.

In addition, it is clear from the context that the practices referred to in Section 201(b) are those established by a carrier in its tariffs or service agreements, because the same litany, "charges, practices, classifications, and regulations," sometimes with additional elements included, is repeated in Sections 202, 203, 204 and 205.

The Commission's reasoning must be flawed, simply because it goes too far. If the Commission can regulate any contract made by a carrier under the theory that it is a "practice" "in connection ... communications service," can the Commission regulate the salaries of carrier executives? What about the terms of health insurance policies, working conditions, the prices of equipment, office rents, and everything else that might be a "practice"? The Commission's reading of Section 201(b) simply proves too much.

The FNPRM places great store in *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), claiming that it demonstrates that Section 201(b) authorizes the Commission to indirectly regulate entities outside its jurisdiction.[89] It is true that there is broad dicta in *Cable & Wireless* about the Commission's authority over "the prices U.S. carriers pay to non-FCC-regulated

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[89] The FNPRM cites two other cases for the same proposition. FNPRM at ¶ 139, *citing Radio Television S.A. de C.V. v. FCC,* 130 F.3d 1078 (D.C. Cir. 1997); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). In both cases, the Commission regulated companies affiliated with broadcasters to control the activities of the broadcasters. In this rulemaking, of course, no such affiliate relationship exists, nor is the FCC acting under its authority over broadcasting.

entities for goods and services." 166 F.3d at 1231. The two cases are so distinguishable, however, that this language cannot be said to support the Commission's ability to impose indirect obligations on building owners.

First of all, as noted above, Section 201(b) applies to the practices of carriers in connection with communications service. There is no relationship between the right to occupy private property and the terms on which a carrier provides service. The Commission may be entitled to resolve statutory ambiguity, but it is not entitled to wrench statutory language out of its historical context in order to expand its jurisdiction. In *Cable & Wireless*, the FCC was regulating a "practice" within the meaning of Section 201(b): the price U.S. carriers pay foreign carriers for terminating calls. This is a far cry from the alleged practice in this case, because the terms of building access agreements have nothing to do with the actual provision of any service.

Second, there are no parallels between the various parties in the two situations. In *Cable & Wireless*, only two entities — the two carriers — were involved. In the building access case, the Commission wishes, in effect, to regulate the ILEC to force building owners to confer a benefit on the CLEC. The presence of a third entity, who is not engaged in the communications business at all, makes this case entirely different from *Cable & Wireless*.

Third, in *Cable & Wireless*, the court stated that the Commission's position was reasonable "[b]ecause domestic carriers operate in a competitive market [and] ... face a serious dilemma when they bargain with monopolist foreign carriers." 116 F.3d at 1229. In the building access situation, however, it is the ILECs that have market power, not building access. It is extremely risky, if not impossible, for a building owner to deny access to the ILEC, and so the ILEC often gets favorable terms. Competitors, on the other hand, are subject to market forces and must negotiate with building owners on a level playing field. The FNPRM proposes to

establish a least common denominator standard, under which the CLEC would get the same terms *from the building owner* as the ILEC. As between the two carriers that may be fair – but because of the different risks presented to the building owner by the different classes of carriers, it is not fair to the owner. Furthermore, it makes it impossible to argue that only the ILEC is being regulated: there is no question that the party stuck in the middle, the building owner, is the target of the proposed regulations.

So *Cable & Wireless* is readily distinguishable and only superficially helpful to the Commission. In addition, although we will not take the time to discuss it here, the case is loosely — not to say poorly — reasoned. Given the strong factual differences between the two situations, we are confident that if given the opportunity the court would seek to clarify its logic.

Section 202(a). The FNPRM also points to Section 202(a) to justify regulating "discriminatory" access agreements made by carriers. Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

The purpose of Section 202(a) is merely to prohibit discrimination in the provision of service by *carriers* to their *customers*. *See, e.g., American Trucking Associations v. FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The first clause prohibits discrimination "in connection with like communications service," meaning that customers getting the same service must be treated the same way. The first clause clearly does not confer authority over building access agreements because carriers do not provide telecommunications services to building owners under such agreements.

The second clause prohibits the giving of any "undue preference" by a carrier. In its historical context, this clause is intended to prevent carriers from favoring particular types of customers over others. It is based on a provision of the Interstate Commerce Act designed to require railroads and other transportation carriers to serve all places and people on comparable terms. *See* Huber, *et al.*, Federal Telecommunications Law, 2d ed. (1999) at §3.11.4. Building owners are not subscribers, and building access agreements are not tariffs or contracts for service. Consequently, Section 202(a) does not apply.[90]

Section 205(a). The FNPRM relies heavily on Section 205(a), asserting that "there is a strong case that the Commission has the requisite authority, under Section 205(a) of the Act, to promulgate a regulation that bars the practice that contributes to this result," citing *Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981). FNPRM at ¶ 135. Not only does the FNPRM misconstrue the purpose of Section 205(a), but it completely misreads the *Western Union* case. Section 205 (a) states:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation or practice of any carrier or carriers is or will be in violation of any of the provisions of the Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation . . . ."

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[90] In addition, under the FNPRM's theory, it is difficult to see how this section would apply to building access agreements. If anything, it is the owner that is presumably giving the carrier the preference. The very reason the Commission is dealing with this question is that ILECs often have access to buildings on favorable terms. One might argue that it is the CLEC that is giving the preference, but that helps neither the CLEC nor the Commission. If the CLEC refuses to serve the building, it is no better off. And if the CLEC, on order of the Commission, refuses to abide by its agreement, it faces the prospect of being found in breach of contract. It would be more appropriate to argue that a carrier that gives one building owner better terms than another has given an undue preference. But again, that does little to help the CLEC.

Contrary to the FNPRM, therefore, Section 205 does not grant any rulemaking authority. It merely establishes a mechanism for the Commission to direct a carrier to modify a tariff. *See, e.g., AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973). The traditional tariffing process – which was not modified by the 1996 Act, except to allow the Commission to forbear from regulation such as by exempting carriers from the tariff requirement when appropriate – requires a carrier to file tariffs describing the rates and other terms and conditions applicable to its common carrier services.

Section 205 must be read in conjunction with Sections 203 and 204. Section 203 requires carriers to file tariffs. Section 204 authorizes the Commission to suspend a new tariff for up to five months, pending a hearing on the lawfulness of the tariff, provided that if the proceeding is not completed within five months the tariff will be deemed effective. Section 205 in turn permits the Commission to review and modify an existing tariff. *See, e.g., AT&T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) (Starr, J., concurring); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977); *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

Under Section 205(a), the Commission may only review rates and charges contained in tariffs, and carrier practices set forth in tariffs. *See, e.g., MCI v. FCC*, 561 F.2d 365, 375 at n. 44 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978). In addition, the Commission must hold a hearing. *Id.* And finally, Section 205(a) does not grant any particular authority – the Commission can only examine the tariff to see if "it is or will be in violation of any of the provisions of [the] Act." Section 205(a). Before prescribing a rate or a practice contained in a tariff, the Commission must be able to show that the tariff violates some other provision of the Act. *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

The FNPRM, however, seems to assert that Section 205(a) gives the Commission authority to adopt rules that directly regulate any "practice" of a carrier. FNPRM at ¶ 135. For the reasons noted above, this is obviously not the case, but the FNPRM quotes *Western Union*, claiming that the case upheld rulemaking under Section 205(a). Nothing could be further from the truth. In *Western Union*, the petitioners argued that an FCC decision unbundling telex rates violated Section 205(a), because no hearing had been held. Upholding the decision, the D.C. Circuit stated that "the Commission was not engaged in ratemaking, however, but in making policy." 665 F.2d at 1151. In other words, Section 205(a) simply did not apply, because of the nature of the proceeding. That is not the same thing as saying that Section 205(a) authorizes rulemaking, which is what the FNPRM claims at ¶ 135 and footnote 325.

Section 411 and the Ambassador Hotel Case. Section 411 of the Act and *Ambassador, Inc. v. United States,* 325 U.S. 317 (1945) have absolutely nothing to do with the regulation of building owners or the terms on which carriers are permitted to enter or use private property. The *Ambassador* case stands for the unobjectionable principle that the Commission can interpret and enforce the terms of lawful tariffs filed by carriers. In the course of adjudicating such a case, the Commission may be able to assert jurisdiction over a carrier's customer under Section 411(a). That is as far as the case goes. If *Ambassador* has any relevance at all in this proceeding, it is that it actually limits the Commission's ability to regulate building owners indirectly, because it states that the Commission cannot regulate the business affairs of a subscriber or a third party.

The facts in the case were simple: Hotels in the District of Columbia had obtained telephone service under tariff. The hotels had also installed private branch exchange (PBX) equipment and employed their own personnel to operate the PBX and connect guests with the

public switched network for local and long distance calls. The hotels charged their guests a surcharge on each outside call, which exceeded the tariffed rate at which the hotels paid for service; the tariffs under which the hotels obtained service prohibited the surcharges. In effect, the hotels were subscribing to service, and then reselling it. The Commission asked the Attorney General to seek an injunction against the hotels. An injunction was issued, and the Supreme Court upheld the district court's decision. As part of its holding, the Supreme Court found that the hotels were proper parties to the enforcement action under Section 411(a).

The FNPRM's reliance on *Ambassador* and Section 411(a) is misplaced for the following reasons:

The Ambassador case did not involve a rulemaking proceeding. The FNPRM does not explicitly assert that *Ambassador* or Section 411(a) could be applied to exercise jurisdiction over building owners in the context of a rulemaking, but we wish to dispel any such suggestion. Because *Ambassador* involved an adjudication in district court, the case cannot be said to stand for the proposition that Section 411(a) gives the Commission general jurisdiction or authority to adopt rules affecting hotels or building owners. Nearly all of the cases that cite *Ambassador* involve the interpretation or enforcement of tariffs or other types of adjudications. This is because Section 411(a) was intended to apply only in adjudications: the title of the section is "Joinder of Parties" and the term "joinder" typically arises in the context of litigation rather than rulemaking. Furthermore, Section 411(a) itself states that it applies to proceedings "for the enforcement of the provisions" of the Communications Act, and contains no reference to rulemakings.[91] If Section 411(a) were read any other way, it would subsume the limitations on

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[91] The Commission sometimes has found it necessary to join affiliated entities, successors or predecessors in interest, and sometimes officers, directors and shareholders of regulated entities. *See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co.*, Docket No.

the Commission's jurisdiction in Section 2 of the Act and allow the Commission to initiate rulemakings beyond the bounds set in Section 2.

The Ambassador case does not permit the Commission to regulate the terms of building access. The defendant hotels in *Ambassador* were termed subscribers of the carrier by the Supreme Court, and they had contracts with the carrier in the form of the tariffs under which they obtained telephone service. They then resold service to their guests. It was the hotels' subscriber relationship that was being regulated, and that is a critical difference between the subject of this proceeding and the *Ambassador* case. Building owners may subscribe to receive telecommunications services, and if disputes arise regarding the terms on which service is to be provided, the Commission may have jurisdiction to join building owners because they are subscribers. But as we have noted several times, the terms on which a building owner subscribes to service have nothing to do with any rights a carrier may have to install facilities in a building:

17441, *Memorandum Opinion and Order and Certificate*, 18 F.C.C. 2d 783 at ¶ 13 (969) (AT&T joined as parent of New York Telephone); *Armstrong Utilities v. General Telephone Company of Pennsylvania*, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 F.C.C. 2d 385 at ¶ 8 (1970) (joinder of parent and affiliate); *Warrensburg Cable, Inc. v. United Telephone Co. of Missouri*, Docket Nos. 191951, 19152 P-C-7655 P-C- 7656, *Memorandum Opinion and Order*, 27 F.C.C. 2d 727 at ¶ 22 (1971) (joinder of successor in interest); *Continental Cablevision of New Hampshire, Inc.*, Docket No. 20029, *Memorandum Opinion and Order*, 48 F.C.C. 2d at ¶ 6 (1974) (joinder of parent corporation); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, File No. E-84-1, *Memorandum Opinion and Order*, 103 F.C.C. 2d 600 at ¶ 15 (1985) (predecessor in interest and sole officer, director and shareholder). None of these cases deals with building owners, with real property, or indeed with any party not intimately engaged in an activity clearly subject to Commission regulation. Once again, the essence of the matter before the Commission has to do with the use of real property, not communications. Building owners are not typically affiliated with carriers or involved in managing their activities. If they are, they might become subject to joinder under Section 411(a) in that capacity. But merely allowing a carrier to occupy real estate is not sufficient to justify joinder. Otherwise, the Commission would be able to assert control over any person that has a contractual relationship of any kind with a carrier. For that reason, if the Commission were to attempt to join a building owner under its Section 208 complaint process, any Commission decision would be extremely vulnerable on appeal.

building access agreements are not agreements for the provision of telecommunications services, but rather agreements for the right to use property. Unlike the hotels in *Ambassador*, building owners do not pay LECs for service (in their capacity as building owners) and they do not ordinarily resell service to their tenants.

With the states, the Commission has the authority, jurisdiction, and expertise to regulate the terms on which telecommunications services are provided, but it has neither authority, jurisdiction nor expertise with respect to real estate matters. That a piece of real estate may be used in connection with the provision of telecommunications services is irrelevant: the Commission can no more regulate the terms of building access than it can regulate the rents carriers pay for administrative office space.

The Commission cannot regulate the real estate operations of building owners indirectly by regulating carriers. In *Ambassador,* the Supreme Court stated that a carrier "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 services, the regulation will necessarily affect, to that extent, its third party relationships." 325 U.S. at 323-324. In other words, the only rights a carrier has against a building owner that can be enforced under Section 411(a) are those related to the provision of the carrier's service. It bears repeating that when a building owner grants a telecommunications provider access to a building, the purpose of the agreement is not to extend service to the owner, but to the owner's tenants. Service is not provided to the building or the building owner, but to subscribers occupying the building. The owner is not the subscriber or the recipient of telecommunications services. If anything, the owner is providing a service to the carrier, in the form of the construction and management of the

building, which creates a market for the carrier. Therefore, the Commission cannot impose requirements on carriers that are intended to induce building owners to grant nondiscriminatory access to buildings, because building access is unrelated to the terms of any service to which the building owner may actually subscribe. The Commission may be able to regulate a building owner that is itself reselling services (as in *Ambassador*), acting as an aggregator, or providing Shared Tenant Services. But allowing a carrier to occupy space in a building is not the same as any of those things.

C. The FCC Does Not Have the Authority to Order a Carrier Not To Serve a Customer.

The FNPRM appears to propose to enforce a nondiscrimination requirement by directing carriers not to deal with building owners who "discriminate." FNPRM at ¶ 143. While we understand that various proponents of forced access regulation have suggested this approach and that it did not originate with the Commission, to call the proposal extreme would be the height of civility. The prospect of cutting off service to wholly innocent subscribers in the name of enhancing competition is bizarre. "[C]ustomers, not equipment manufacturers are the special responsibility of the FCC." *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1122 (3d Cir. 1979). Surely the interests of customers are paramount to those of carriers as well.

Even if the Commission possessed the power to regulate building owners indirectly through the agency of telecommunications carriers, the legal pitfalls remain daunting because the proposed sanction is itself unlawful. If a carrier cuts off service to a building whose owner it believes to be discriminating unreasonably, the literal terms of Section 214(a) would require the Commission to certify that "neither the present nor future public convenience and necessity will

be adversely affected thereby." Paramount to the public convenience in such a case would the interests of the tenant subscribers.

Without more, this would not be merely an action "considered to arise from the tariff" and seen "as a sanction directed at the particular customer, rather than as a diminution in the service provided to the community." *Pacific Telatronics, Inc.*, 74 F.C.C. 2d 286, 290 (1979). The residential or commercial subscribers in the building, taken together, plainly constitute a "community or part of a community" within the meaning of the statute. However intended, discipline aimed at the owner would harm the tenants unfairly.

Surely the Commission would not expect to be able to fashion, through rulemaking, the terms of some "blanket" Section 214 termination-of-service authority. It is one thing to grant blanket construction authority *ab initio*, as the Commission has done, 47 C.F.R. § 63.01, but quite another to give carriers the unbounded discretion to discontinue or impair service.[92]

To the extent a carrier becomes an agent for the Commission, in cutting off service or in defining the terms of service in relation to non-customer, third-party building owners, the more the regulation of the carrier looks like regulation of the owner. And the more suspect the regulation becomes, under the statute or the Constitution.

D. The FCC Cannot Avoid the Takings Clause By Ostensibly Regulating Carriers.

In response to the original NPRM, the Real Access Alliance submitted an analysis of the potential violations of the Fifth Amendment posed by the proposals for regulation of building access then under review. That analysis, prepared by the law firm of Cooper, Carvin &

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[92] Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 16 C.R. 529, 538 (1999).

Rosenthal, concluded that forced physical access to buildings would constitute a taking under Loretto.

In response to the Fifth Amendment issues raised by the FNPRM, Cooper, Carvin & Rosenthal has again examined the proposals being considered by the Commission. This analysis (the "Cooper Carvin Analysis"), which is attached as Exhibit H, concludes that regulating building access through regulation of LECs is no more constitutional than direct regulation of building owners. The Commission cannot circumvent *Loretto* by directing carriers to deny service to building owners, because "[t]he Constitution measures a taking of property not by what [the government] ... says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis added).

Just because the proposed rule would not operate against building owners does not mean it would not have the effect of taking their property. As the Cooper, Carvin analysis notes, the proposed rule is not distinguishable from a situation in which the Commission might seek to acquire the permanent use of one floor of a building for its offices by prohibiting all telecommunications providers from providing service to the building until the owner acquiesced.[93] This would obviously be a taking because it would force the owner to choose between permitting the physical occupation of the property, and the destruction of the economic value of the building. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) ("when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking") (emphasis added); *Nollan v. California Coastal Comm'n*, 483 U.S. 825

[93] Cooper Carvin Analysis at 9-10.

(1987) (invalidating attempt to condition building permit for ocean-front residence on grant of permanent public easement across beach).

In the face of these cases, the FNPRM's reliance on by *Yee v. City of Escondido*, 503 U.S. 519 (1992), is entirely misplaced. There was no threat in *Yee* of rendering the mobile home parks "economically idle," nor was the City of Escondido using its regulatory power over one class of entity to extort concessions from property owners. Furthermore, the combined effect of the state and local laws did not constitute "indirect" regulation. *Yee* simply has no bearing on this case at all.[94]

E. Even if the FCC Had the Authority to Regulate Access Agreements Made by Carriers, Effective Regulation Would Be Impossible.

Not only is the "nuclear sanction" of cutting off service to all the tenants in a building unlawful, but it is entirely impractical. Past experience shows that the Commission does not have the resources to handle large numbers of proceedings involving complex issues in a timely manner. The issues posed by the proposed regulation of carriers - particularly the proposed sanction of cutting off services to building tenants - are complicated and time-consuming to adjudicate. The Commission cannot handle potentially thousands of disputes on the terms of access to buildings.

To ask a carrier to detect and judge the existence of unreasonable discrimination is far more complex than the examples recited in the FNPRM. By establishing "benchmark" international settlement rates, the Commission made it relatively easy for U.S. carriers to desist from agreements breaching those benchmarks. FNPRM at ¶137. In the *Ambassador* case, it was relatively easy for the telephone company to insert a clause into its tariff forbidding such

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[94] Copper Carvin Analysis at 11-13.

surcharges. Imagine, however, a carrier trying to write a tariff provision against unreasonable discrimination in building access. FNPRM at ¶¶140-43.[95] How would such a tariff apply to a building owner, who would not be a customer of the carrier?

The trouble is that the FNPRM is concerned with alleged discrimination by building owners – but even if a contract between a building owner and a LEC could be considered discriminatory, it would be the building owner and not the LEC that was discriminating. Furthermore, the owner would be discriminating in favor of the person providing service in the building. It is difficult to see what incentive the carrier would have to refuse to deal with the owner. First, the carrier would have to become aware of the facts alleged to constitute discrimination; second, the carrier would have to become aware that those facts actually constituted discrimination; and third, the carrier would have to refuse to deal, presumably by cutting off service. This is nothing short of madness.

For example, if an ILEC were the only company providing service in a building, how would the ILEC know if the reason it had no competition was because the owner was excluding other providers, or because no other carrier was interested in providing service? Even if the ILEC had reason to suspect "discrimination," how could it cut off service to the building or take any other step that would harm either the owner or the tenants without a determination on the facts and on the legality of its actions? What role would the state commissions have?

Or consider the example of an ILEC providing service without paying an access fee, while a CLEC is required to pay for access. First, the ILEC must become aware that the CLEC

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[95] In the *Ambassador* case, of course, the telephone company itself proposed the corrective action on surcharges, later ratified by the Commission and the court (on different grounds). Here, the Commission effectively would be "prescribing" a practice and would be required to adhere to the requirements of Section 205 of the Communications Act, including a "full opportunity for hearing."