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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	
Promotion of Competitive Networks in Local Telecommunications Markets	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Review of Section 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	CC Docket No. 88-57

FURTHER COMMENTS OF THE REAL ACCESS ALLIANCE

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SUMMARY

The Real Access Alliance (the "RAA" or the "Alliance") respectfully requests, once again, that the Federal Communications Commission (the "FCC" or the "Commission") abandon its pointless attempt to bring the real estate industry within its regulatory orbit. Neither the facts nor the law can justify Commission regulation of the terms under which telecommunications providers obtain access to privately-owned buildings. The Commission has already concluded that it has no authority to regulate the real estate industry. Despite this, the pending Further Notice of Proposed Rulemaking in WT Docket No. 99-217 (released Oct. 25, 2000) (the "FNPRM") now asks whether the Commission can achieve the same goal through the draconian measure of ordering telecommunications providers to cut off service in buildings whose owners do not comply with the Commission's wishes.

Whether the Commission regulates building owners directly – as proposed in the original Notice of Proposed Rulemaking in this docket (the "NPRM") — or indirectly, as proposed in the FNPRM, makes no difference, because the FCC lacks jurisdiction over building access agreements. Although we speak of providers "serving" buildings, in fact providers serve subscribers who happen to be located within buildings. Building owners are not acting as telephone subscribers or as customers of telecommunications companies when they grant providers the right to use their buildings to reach subscribers. Agreements for building access are agreements for the use of real estate, and therefore outside the Commission's purview, even over carriers.

Furthermore, we fail to see how ordering a telecommunications provider to cut off all service to subscribers in a building could ever advance the Commission's goals: the purpose of promoting competition is to help consumers, not service providers.

Building Owners Respond to Tenant Demand.

The Alliance has demonstrated repeatedly that real property owners and managers are actively advancing the Commission's goal of increasing facilities-based competition because they respond to demands from tenants for access to competitive telecommunications providers. We are confident that this proceeding will once again demonstrate that Commission regulation of building access is unnecessary and unwise.

In response to the NPRM and in the ensuing *ex parte* period, the Alliance introduced two statistically valid surveys of property owners showing that competitive providers were being given access to buildings on fair, commercially reasonable terms and in a timely fashion. We also introduced a survey of office tenants showing that 98% of the respondents were receiving the telecommunications services they desired. The competitive local exchange companies ("CLECs") provided nothing more than a relative handful of anonymous anecdotes alleging unfair treatment.

Furthermore, other than a few *ex parte* letters submitted very late in the proceeding, the Commission has received no complaints from telephone subscribers alleging that building owners have prevented them from obtaining competitive service. One would think that if end users – the people whose interests should be first and foremost in the Commission's eyes – had a problem they would be complaining to the Commission. For example, when consumers found that their long distance service was being changed without their consent, they complained to the Commission and Congress by the thousands. Nothing of the sort has happened regarding building access.

CLEC Industry Has Grown Explosively.

We understand the CLECs' motivation: Asking a sympathetic regulator for a subsidy is neither foolish nor improper. Granting the subsidy, on the other hand, would be, when the record shows that CLECs have been enormously successful at obtaining access to buildings. For example, according to Department of Energy figures, there are about 705,000 office buildings in the country. About 38,000 office buildings exceed 50,000 square feet; of these, 16,000 have more than 100,000 square feet of space. Generally speaking, those large buildings are the buildings to which the CLECs want access. Thus, the relevant comparison is not to the total number of buildings, but to the much smaller number of buildings that is the CLEC's primary market. (To be "large," a building does not have to be a skyscraper: the typical Washington, D.C., office building has between 150,000 and 200,000 square feet of rentable space.) One provider, WinStar, had obtained access to approximately 11,000 buildings as of the end of 2000, which represents a penetration rate in the relevant market of nearly 30%, in less than five years. CLECs as a whole have succeeded so well that it is commonplace for large office buildings in the U.S. today to be served by as many as five, ten, or even more providers.

Facilities-based competition in the residential market has been delayed because building residential networks is more expensive and produces less revenue per customer than the business market. For this reason, the CLEC industry has shown relatively little interest in serving apartment buildings -- but this is a function of fundamental economics, not building access.

Voluntary Real Estate Industry Guidelines.

The Alliance has voluntarily taken steps to address the chief complaints of the CLEC industry, even though we feel those complaints are unwarranted. The following best practices guidelines have been endorsed by the leading real estate firms in the country:

- Real estate companies will reject requests for exclusive contracts to serve office buildings.
- The Alliance will establish a clearinghouse for complaints from tenants, telecommunications providers, and building owners.
- Where there is space in a building and a provider is prepared to sign the model license agreement, a building owner will respond to requests for access from a tenant within 30 days.
- Owners will respond to such requests in good faith, and will work with the provider expeditiously to accommodate the tenant's request.
- In responding to requests coming directly from providers, rather than tenants, building owners will provide information on available space and their applicable policies within 30 days of the provider's request for access.

Model License Agreement.

The Alliance is developing a model license agreement for building access. The first draft of this model has been submitted to the telecommunications industry for review, and we hope to develop a standard form that will speed the processing of access requests and, to the degree possible in a free market, encourage uniform treatment of providers.

Alliance Proposes Joint Study.

Despite the continuing efforts by competitive providers to promote an industrial policy where the Commission picks the winners, we remain committed to developing market-based, nonregulatory solutions. We propose that the Commission, the CLEC industry, and the real estate industry conduct a national survey of providers, owners, and tenants designed to answer the specific questions that concern the Commission. In this way, the Commission could retain an independent research firm of its choice, and ask that firm to design and conduct the survey. The Alliance is prepared to bear half the cost of the study, if the telecommunications industry will bear the other half.

FCC Cannot Regulate Building Owners Indirectly.

The Commission cannot circumvent the Constitution and the limits on its jurisdiction by directing telecommunications providers to refuse to provide service in a building if the building owner "unreasonably prevents competing carriers from gaining access to potential customers located within" the building.

Merely by asking the question, the FNPRM establishes that any such regulatory approach would be impermissible, because an agency 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). In addition, the Supreme Court has stated that the Commission cannot regulate the business of a third party (such as a building owner) by acting through a carrier. *Ambassador, Inc. v. United States,* 325 U.S. 317 (1945).

FCC Has No Power To Regulate Building Access Agreements.

The Commission has no authority over building access agreements in the first place. The Commission cannot regulate common carriers to the extent they are engaged in non-common carrier activities. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982). Obtaining access to a building to serve a third party (the tenant within the building) is not a common carrier activity, any more than signing a lease for office space for the carrier's accounting staff or signing a contract for the purchase of fiber optic cable would be.

Although the Alliance does not object to the Commission's ban on exclusive contracts in office buildings as a matter of policy, and continues to stand by its own guidelines, we believe that the Commission has no legal authority to ban exclusive agreements. Like other building access agreements, they are nothing more than licenses to use real estate. The same reasoning

applies to preferential marketing agreements. In addition, exclusive agreements and marketing agreements serve a valuable purpose, by allowing small competitors to develop a toehold in the market. Therefore, the Commission should not ban existing agreements, or extend the ban to residential agreements.

The authority identified in the FNPRM to support the proposed "indirect" regulation simply does not apply to the terms on which a carrier may obtain the right to use property. For example, *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), does not stand for the general proposition that the Commission can regulate entities outside its jurisdiction by regulating carriers. The agreements in question in that case were "for and in connection with" the provision of telecommunications service because they were for payments from domestic carriers to foreign carriers for terminating calls made from the United States. Building access agreements are not agreements "for" the provision of service, nor are they practices "in connection with" telecommunications service.

Furthermore, the Commission has no legal authority to order a telecommunications provider to stop serving building tenants. There is simply no provision of the Act that would justify an action so harmful to the public convenience and necessity.

Indirect Regulation Cannot Circumvent the Constitution.

Even if the Commission could regulate property owners indirectly, it would not be able to circumvent the takings clause. "[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). For example, it would obviously be a taking if the Commission tried 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. This example is legally and analytically indistinguishable from the proposed indirect regulation.

Nor can the Commission avoid the obligation to pay compensation by requiring carriers to pay for building access rights. The Commission has no authority – express or implied — to take the property of building owners in the first place, so the compensation issue never even arises. We discussed this issue at length in our earlier comments, as well as in the constitutional analysis attached to those comments, and in the supplemental constitutional analysis prepared by Cooper, Carvin & Rosenthal and attached to these comments as Exhibit H. Furthermore, the FNPRM does not provide a formula for determining compensation. The Commission would have to develop such a formula because otherwise there would be no assurance that the rate payable under a particular agreement would meet the constitutional test for "just compensation."

FCC Cannot Regulate Building Access More Effectively than the Market.

Commission regulation is not only unnecessary and unlawful, but impossible. Self-regulation by carriers cannot function properly, because it is not in a carrier's interest to decide to terminate service to a building. In addition, the Commission has shown that it simply cannot handle large numbers of complaints in anything like a timely fashion – the average age of cable rate regulation cases decided by the Commission's Cable Bureau in 2000 was over five years. The Commission will not be able to deal with building access matters any more quickly than the marketplace.

Furthermore, property owners must be allowed to preserve the safety, security and financial viability of their buildings. Building owners have sustained physical damage to their property and been cited for safety code violations because of the actions of providers. Building tenants have lost service through the negligence and inability to perform of providers, and such

incidents injure the reputation of the building owner. These are not trivial considerations, and must not be subsumed to an unproven and unnecessary forced access regime.

FCC Cannot Further Expand the Definition of Right-of-Way.

Finally, the FNPRM asks for comment on the proposed expansion of the term "right-of-way" to include the right to install facilities anywhere inside a building, regardless of where existing facilities may be located. The Commission has already erred by applying Section 224 to facilities inside buildings. To expand the definition further would utterly distort the meaning of the term "right-of-way" and would constitute a *per se*, physical taking within the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

* * *

We respect the Commission's desire to promote local competition. The Commission, however, must understand that the purpose of regulation is to benefit subscribers for telecommunications services, not individual companies or industry sectors. There is no credible evidence that would support regulation of building access. The Real Access Alliance will continue to work with the Commission to develop mutually agreeable approaches that benefit building tenants. The Commission, however, must respect the Constitution and the limits of its jurisdiction.

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FURTHER COMMENTS OF THE REAL ACCESS ALLIANCE

INTRODUCTION

The Real Access Alliance (the "RAA" or the "Alliance")[1] submits these Comments in response to the Further Notice of Proposed Rulemaking issued by the Federal Communications Commission (the "FCC" or the "Commission") in WT Docket No. 99-217 (the "FNPRM").[2] The Alliance once again urges the Commission to abandon any attempt to grant telecommunications providers the right to enter private property or to place their facilities inside buildings without the consent of the owner. This includes any attempt to require carriers to refuse to provide service in buildings on other than allegedly "nondiscriminatory" terms.

The FNPRM is based on two fundamental errors. First, the Commission is trying to solve a "problem" where none exists. Property owners are allowing telecommunications providers of all kinds access to their buildings on fair, commercially reasonable terms. Tenants are receiving the services they want, in large part because of the cooperation of building owners. In an effort to accommodate the telecommunications industry and to improve the service their tenants receive, the Alliance and major property owners have voluntarily developed guidelines for owners and model documents designed to standardize and speed up the process by which

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[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and the Real Estate Roundtable. The members are further described in Exhibit A.

[2] *In the Matter of Promotion of Competitive Networks*, WT Docket No. 99-217, ___ FCC Rcd. ___, (released Oct. 25, 2000) at ¶ 128. Because of uncertainty regarding the accuracy of the pagination of the corrected version of the FNPRM posted on the Commission's web site, as well as multiple paragraph numbers in the FNPRM, we will cite to paragraph numbers in the FNPRM as first released on Oct. 25, 2000.

providers gain access to buildings. But building owners have always recognized that it is in their own interests to ensure that tenants have the services they need, and have done so since long before the Commission began examining this topic. Therefore, Commission regulation is entirely unnecessary.

The FNPRM's second error is that its regulatory proposals are predicated on the belief that carriers serve buildings – in reality, however, carriers serve subscribers who happen to be located in buildings. The relationship between a telecommunications provider and a building owner is not related to the provision of telecommunications service, because the owner is making space available to the provider, not subscribing for service. Accordingly, the Commission has no power to regulate such agreements, directly or indirectly.

I. COMMISION REGULATION OF BUILDING ACCESS REMAINS UNNECESSARY AND ILL-ADVISED.

The Commission has embarked on making a simple, market-driven process needlessly complex and difficult. Building owners are in the business of pleasing tenants. Owners who meet the demands of their tenants for services of all kinds — including access to competitive telecommunications — succeed, and those who do not, fail. It is that simple. We have repeatedly shown the Commission that property owners are advancing competition, not hindering it. Commission regulation of building access is unnecessary.

A. The Most Recent Information Available Demonstrates that Building Owners Are Granting CLECs Access to Buildings.

In the FNPRM, the Commission asked for data regarding:

(1) Number of buildings to which CLECs have requested access, and characteristics of buildings.
(2) Number of buildings housing multiple carriers, and their characteristics.
(3) Number of wireless and wireline local service providers with access.
(4) Percentage of buildings in which CLECs have access and are serving.

(5) *Average time for negotiating access and discussion of reasons for variations.*
(6) *Number of buildings in which a request for access has been denied, length of time for denial, and basis for denial.*
(7) *Average time that pending requests have been outstanding.*
(8) *Differences in negotiations or frequency of denial if LEC seeks access after specific request from tenant.*
(9) *Charges imposed for access.*
(10) *State nondiscriminatory access requirements.*
(11) *Experience of owners in states with such requirements.*
(12) *Technology developments that may reduce or obviate need for access.*[3]

1. The Commission Should Not Ignore Data Submitted In Response to the Original Notice of Proposed Rulemaking.

Much of the data requested in the FNPRM was supplied by the Alliance in its previous comments, reply comments, and *ex parte* filings. As part of the comments submitted by the Alliance in response to the August 1999 Notice of Proposed Rulemaking,[4] the Alliance submitted a research survey performed by Charlton Research Company ("Charlton Survey") regarding access granted to competitive telecommunications service providers by real estate owners and managers,[5] and an economic analysis of the proposed mandatory access policy performed by Strategic Policy Research, Inc. ("SPRI Analysis").[6] In response to requests for additional data made by the Commission staff during the *ex parte* period, BOMA financed and

[3] FNPRM at ¶ 128.

[4] *In the Matter of Promotion of Competitive Networks*, 64 FCC Rcd. 41883 (1999) ("NPRM").

[5] *In the Matter of Promotion of Competitive Networks*, Joint Comments of Building Owners and Managers Association et al., WT 99-217 (filed Aug. 27, 1999) (the "August Comments"), at Exhibit C ("Charlton Survey").

[6] August Comments at Exhibit D (Aug. 27, 1999) ("SPRI Analysis").

submitted an additional study regarding demand for telecommunications service by tenants and building owner responses to such demands.[7]

These three studies address many of the questions raised by the Commission in the FNPRM, and should serve as a benchmark for evaluating additional data submitted in response to the FNPRM and future proceedings.

a. Characteristics of Buildings to Which Providers Have Requested Access.

For example, the characteristics of buildings to which CLECs request access was addressed in the Charlton Survey in response to Questions 12 and 14.[8]

Of 530 aggregate provider requests:

- **81%** requested access to **Office** buildings;
- **9%** requested access to **Industrial** buildings;
- **2%** requested access to **Retail** buildings;
- **3%** requested access to **Mixed-Use** buildings;
- **1%** requested access to **Residential** buildings;
- **2%** requested access to **Corporate Facility** buildings; and
- **2%** requested access to **Other** buildings.

Thus, it appears that CLECs have very little interest in serving the residential market, and are primarily concerned with obtaining access to office buildings.

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[7] "Partnering in the Information Age: Critical Connections," submitted to the Commission as *In the Matter of Promotion of Competitive Networks*, *Ex Parte* Letter from Real Access Alliance, WT 99-217 (June 30, 2000) ("BOMA Survey").

[8] Charlton Survey at 5.

b. Number of Buildings to Which Providers Have Requested and/or Obtained Access.

Data regarding the number of buildings in which multiple carriers have obtained access was addressed by the BOMA Survey and one *ex parte* filing. In the BOMA Survey, of 1,097 respondents representing 2,097 buildings, 80% of respondents had more than one telecommunications service provider, and almost 60% offer their tenants three or more telecommunications service providers.[9]

In addition, respondents reported an average of 2.2 CLECs in their buildings.[10]

Moreover, as a specific example of building penetration rates by providers, in the *ex parte* Declaration of Barry Krell,[11] Mr. Krell stated that of the ten CarrAmerica buildings in the District of Columbia, representing a total of 2.3 million square feet:

- 10% have 2-3 competitive providers;
- 30% have 4-5 competitive providers;
- 20% have 6-7 competitive providers; and
- 40% have 8-10 competitive providers.[12]

On average, in the CarrAmerica DC buildings, access has been granted to an average of 6.5 competitive providers per building.[13] We believe the number of providers in CarrAmerica's DC buildings is typical of office buildings in large downtown business districts.

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[9] BOMA Survey at 50-51, Figure 7-1.

[10] *Id.* at 53, Table 7-2.

[11] Declaration of Barry M. Krell, submitted to the Commission as *In the Matter of Promotion of Competitive Networks, Ex Parte* Letter from Real Access Alliance, WT Docket No. 99-217, at B (June 16, 2000) ("Krell Declaration").

[12] *Id.* at ¶ 3.

[13] *Id.* at ¶ 4. In addition, "WinStar and Teligent have both been granted access to 100% of the DC Buildings." *Id.*

c. Percentage of Buildings in Which Providers Have Begun to Provide Service.

As to the percentage of buildings in which CLECs have been granted access, but have not yet begun to provide service, the Krell Declaration stated that of 65 contracts with CLECs, CLECs have yet to provide service under 24 of those contracts. "In other words, the CLECs have failed to honor their building access contracts approximately 37% of the time."[14] As noted above, every one of CarrAmerica's DC buildings is served by one or more competitors. The real problem is not with building owners who deny access, but with providers who do not have the resources to build their networks as quickly as they have promised their investors.

d. Average Negotiation Time.

In regard to the average time for negotiating access to buildings, and reasons for variations in negotiating time, the Alliance has taken affirmative steps to facilitate faster negotiations. As discussed further below, in response to the Commission's desire to reduce the length of time needed to complete negotiations, the Alliance created a model lease agreement as part of the Alliance's Best Practices initiative.

The Alliance, however, has never believed that building owners were primarily responsible for delays in negotiations, or even that the time periods involved were unreasonable, given the novel nature of the agreements involved and the sudden rush of applications from providers. We would like to draw the Commission's attention to previous statistics submitted by the Alliance, demonstrating that the majority of building access negotiations are concluded in less than six months. In the August 1999 Charlton Survey, Question 18 asked building owners how long it takes to negotiate an agreement with a competitive telecommunications provider.

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[14] Krell Declaration at ¶ 5.

More than 70% were negotiated in less than six months, and almost 40% were negotiated in under 3 months.[15] As the SPRI Analysis pointed out, the Charlton Survey also showed that negotiations with typical tenants usually take three months to complete.[16] Given the special complexities involved in granting building access to conduits, risers, and wiring, building access negotiations are not out-of-line with industry experience.

Both the BOMA Survey and Charlton Survey also cited various reasons for delays in negotiations, including: telecommunications service provider employee turnover; disagreement over contract terms and legal liability issues; disagreements over revenue sharing or rent; and engineering or space issues.[17]

The foregoing is only the briefest survey of some of the large amount of quantitative information already provided by the Alliance in this proceeding. We have long recognized that resolving the policy debate before the Commission required examining hard facts, and we are pleased that the FNPRM recognizes this as well. This approach stands in sharp contrast to the anonymous anecdotes submitted by proponents of the forced access regulation. From the beginning the Alliance has been unafraid to submit solid, verifiable facts, because the facts prove that Commission action is unneeded.

Having said that, it is also important for the Commission to consider the starting point for its analysis. The CLEC industry, despite its complaints, has actually grown enormously in a very short time. If the Commission is to assess the growth of building access fairly, it cannot start midway through the process. Therefore, setting January 2001 as a benchmark is inappropriate.

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[15] Charlton Survey at 7.

[16] *Id.* at 9.

[17] *Id.* at 8; BOMA Survey at 71, Table 7-12.

The Commission should start much earlier: if not in 1996, then certainly no later than the date the first reliable information — such as the Alliance's prior submissions — became available.

2. New Data Demonstrates That the Real Estate Industry Continues to Assist the Growth of Telecommunications Competition.

The Alliance has not conducted another survey of building owners, because we believe the information submitted earlier remains valid. We have gathered some additional information in response to the specific questions in the FNPRM, however, and are continuing to gather more.

a. Number of Buildings to Which CLECs Have Requested Access and the Characteristics of the Buildings.

Given the enormous number of property owners in the country and the even larger number of buildings,[18] the Alliance can only provide the Commission with representative samples of CLEC building access penetration rates. In past efforts to provide the Commission with the kind of information it has been seeking, the Alliance and its individual members have asked individual building owners to respond to questionnaires,[19] have commissioned several professional statistical surveys,[20] and have commissioned an additional survey to gather data that will be submitted in the reply round of this proceeding.

In any case, the Alliance believes that the CLEC industry is in the best position to provide this information. Most CLECs report to the public and their stockholders the aggregate

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[18] The Department of Energy reports that there are 4,579,000 buildings in the United States. Of these, about 705,000 are office buildings. Energy Information Administration, U.S. Dep't of Energy, A Look at Commercial Buildings in 1995: Characteristics, Energy Consumption, and Energy Expenditures (1995) ("EIA Study"). Updated data will be available in Spring 2001.

[19] *See, e.g.*, "NAIOP/NMHC Survey," submitted to the Commission as, *In the Matter of Promotion of Competitive Networks, Ex Parte* Letter from Real Access Alliance, WT 99-217, at A (June 16, 2000);" and "Delivery of High Quality Video Services to Apartment Residents," submitted to the Commission as, *In the Matter of Promotion of Competitive Networks, Ex Parte* Letter from Real Access Alliance, WT 99-217 (March 24, 2000).

[20] *See, e.g.*, BOMA Survey and Charlton Survey.

number of buildings to which they have acquired building access rights, the number of buildings to which they are currently providing service, and the aggregate number of businesses in those buildings in which they are providing services.[21]

For example, WinStar reported tremendous growth in building access during the period in which the Competitive Networks proceeding has been open. In responding to the NPRM, the Alliance noted the following:

- In July 1999, WinStar reported that it had obtained access to more than 700 commercial office buildings in the second quarter 1999.[22] In the same press release, WinStar reported that it had secured building access rights to a total of 5,500 buildings.[23]

In WinStar's recent November 8, 2000, press release, WinStar proclaimed:

- "During the third quarter [of 2000], WinStar added approximately 1,700 new building access rights, bringing its cumulative total to over 13,100..."[24]

Thus, over a one-year period WinStar gained access to 5,900 more buildings, a gain of over 100% in a single year. Between the initial round of NPRM comments and these FNPRM comments, WinStar has gained access to 7,600 additional buildings, a gain of 138%.[25]

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[21] *See, e.g.,* WinStar, *WinStar Gains Access Rights to More Than 700 Buildings in Second Quarter*, WinStar Press Release (July 8, 1999) <http://www.winstar.com/press/1999/0708992.asp> ("WinStar July 1999 Press Release"); WinStar Annual Report, filed March 10, 2000, at 7. The WinStar Annual Report is publicly available at www.sec.gov.

[22] SPRI Analysis at 12, citing WinStar July 1999 Press Release.

[23] WinStar July 1999 Press Release.

[24] WinStar, *Winstar Reports Continued Strong Results*, WinStar Press Release (November 8, 2000) <http://www.winstar.com/press/2000/Templ.asp?fileid=1108001> ("WinStar November 2000 Press Release").

Therefore, it is indisputable that the number of buildings to which CLECs have access continues to grow at an astonishing rate.[26] Building owners have contributed to that success.

b. Number of Buildings Housing Multiple Carriers, and Their Characteristics.

As noted above, the Alliance has submitted survey data regarding the number of telecommunications service providers per building. The Krell Declaration also contained anecdotal information, noting that 100% of the CarrAmerica buildings in the District of Columbia have more than one competitive service provider.

The simple fact is that an extremely high proportion of office buildings in the central business districts of major metropolitan areas have multiple providers. On the other hand, penetration is almost nil in residential buildings, smaller commercial buildings, and commercial buildings in smaller communities. This has nothing to do with building owners, and everything to do with the economics of competitive telecommunications service. The Alliance submits the following new data:

- The Commission reports that between December 1999 and June 2000, the total number of CLEC end-user lines serving medium and large business, institutional and governmental customers grew by 65% from 4,944,582 to 8,149,117.[27] During the

[25] But of the 13,100 buildings to which WinStar has building access rights, only 3,400, or 26% of those buildings are directly connected to the WinStar network. Put another way, of the 13,100 buildings that have granted WinStar access, 74% are not yet receiving service from WinStar.

[26] Overall CLEC access to buildings grew by an astonishing 1294% during 2000. CLEC Report 2001, ch. 6 at 22. In 2000, CLECs gained access to an additional 353,690 buildings, bringing the total number of buildings served by CLECs to 1,146,882. *Id.*

[27] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Telephone Competition: Status as of June 30, 2000, Table 2 (2000) ("Local Telephone Competition Report").

same period, the total number of CLEC end-user lines serving small businesses and residences grew by only 36% from 3,373,662 to 4,597,807 lines.

- Charles E. Smith Commercial Realty LP ("CESCR") reports that "virtually every one of our 2,000 tenants in 70 [non-federally] occupied buildings has access to anywhere from eight to twelve" competitive service providers.[28]
- Boston Properties, Inc., reports that of 144 properties totaling 37.1 million square feet, "[t]he average number of [telecommunications service] competitors with access agreements in our larger multi-tenant buildings is between five and eight." Boston Properties has reached portfolio-wide agreements with at least six telecommunications providers.[29]

c. Number of Wireless and Wireline Local Service Providers With Access.

The Alliance is gathering additional data that we believe will provide new evidence regarding the number of wireless and wireline providers with access per building. But again, the Alliance notes that CLECs are in a better position to provide this information.

d. Percentage of Buildings In Which CLECs Have Access and Are Serving.

Industry studies and press reports make it clear that the CLECs are primarily interested in serving large commercial office properties.[30] This is because of both the high concentration of

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[28] Declaration of Brent W. Bitz, attached as Exhibit B, at ¶ 7 ("Bitz Declaration").

[29] Declaration of Robert E. Burke, attached as Exhibit C, at ¶¶ 3-4 ("Burke Declaration").

[30] AT&T, *Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 6, U.S. Sec. Exch. Comm'n, Nov. 14, 2000 ("AT&T 10-K Report") *available at* <http://www.sec.gov/Archives/edgar/data/5907/0000005907-00-000014.txt> ("With a direct sales force in each of its markets, AT&T Business Local initially targets the large telecommunications-intensive businesses concentrated in the major metropolitan markets served by its networks." *Id.*); Time Warner Telecom, *Time Warner Telecom Launches Fiber*

customers in large buildings, and because businesses pay much more for service than residential customers.[31]

The Commission's Local Telephone Competition Report reinforces the presumption that CLECs are primarily focused on serving large businesses, institutional, and government customers. In the six month period covered by the report, CLECs installed 3,551,310 more new lines to serve medium to large businesses, institutional, and government customers, than CLECs installed to serve small businesses and residential customers.[32]

Moreover, CLEC filings and press releases demonstrate that the fixed wireless CLECs are also primarily interested in customers in large office buildings:

- Through the third quarter of 2000, WinStar reported that the company has installed 920,000 lines, and has 95,000 "'addressable business' (businesses located in on-net buildings, where it [WinStar] can provide its full suite of product offering)"

Optic Network in Orange County/Los Angeles, California (Jan. 5, 2001) <http://www.twtelecom.com/jsp/upload/news282001-01-05.PDF>; Teligent, *Teligent Passes "One Billion" Milestone, Announces Boston Properties Building Accord* (Apr. 12, 2000) <http://www.teligent.policy.net/proactive/newroom/release.vtml?id=18401>; WinStar, *WinStar To provide Broadband Communications Services for Businesses at World Trade Center Complex* (Jan. 4, 2000) <http:/www.winstar.com/press/2000/Templ.asp?fileid=0104001>; WinStar, *WinStar Obtains Access to Glenborough Realty Trust* (Jan. 5, 2000) <http:/www.winstar.com/press/2000/Templ.asp?fileid=0105001>; WinStar, *WinStar Obtains Access to Kilroy Realty Corporation Buildings to Provide Advanced Broadband Telecommunications Services* (Jan. 25, 2000) <http:/www.winstar.com/press/2000/Templ.asp?fileid=0125001>; WinStar, *WinStar to Provide PS Business Parks with Advanced Broadband Telecommunications Services* (Apr. 24, 2000) <http:/www.winstar.com/press/2000/Templ.asp?fileid=0424001>; WinStar, *WinStar and Jones LaSalle Sign Relationship Agreement to Provide ["Best in Class" Broadband Products and Services]* (Aug 17, 2000) <http:/www.winstar.com/press/2000/Templ.asp?fileid=0817001>. *See also* CLEC Report 2001. "DSL and wireless technologies will compete for the business market." *Id.*, ch. 1 at 4. "The target customer base for fiber networks is large companies." *Id.*

[31] CLEC Report 2001, ch. 3 at 19.

[32] Local Telephone Competition Report at Table 2.