distributed over 3,400 total on-net buildings.[33] Meaning that on average, WinStar's on-net buildings average 27 addressable businesses, and WinStar has installed 271 lines per building.

- Through the third quarter of 2000, Teligent reported that it had installed a total of 433,997 lines to serve 34,189 customers in 4,412 buildings.[34] Thus, on average, a building served by Teligent has at least 8 customers with more than 12 lines each.

Our research makes the same point. CESCR has found that CLECs prefer buildings of at least 150,000 square feet and having 10 or more tenants.[35] This means that published CLEC building penetration rates based on the total number of office buildings in all markets are misleading and irrelevant. CLECs are not attempting to gain access to all buildings in all markets at all times.[36] The CLEC business model is to build a mature network in a few markets, connect large customers in those markets to demonstrate rapid profitability, and then expand in two directions – connecting smaller buildings within the mature-network markets, and repeat the

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[33] WinStar November 8, 2000 Press Release.

[34] Teligent, *Form 10-Q Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, Exhibit – Press Release, U.S. Sec. Exch. Comm'n, Nov. 14, 2000 ("Teligent 10-K Report"), *available at* <http://www.sec.gov/Achives/edgar/data/ 1047021/0001047021-00-000021.txt>. Teligent also reported that it has secured access rights to an additional 7,483 buildings to which it has yet to begin proving service. *Id.*

[35] Bitz Declaration at ¶ 10. Similarly, of the 381 buildings owned by the largest publicly-held office building owner in the country, all but four exceed 75,000 square feet, and 74% exceed 100,000 square feet.

[36] ICG Communications Inc., *Form 10-Q Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, 22, U.S. Sec. Exch. Comm'n, Nov. 14, 2000 ("ICG 10-Q Report"), *available at* <http://www.sec.gov/Archives/edgar/data/1013240/ 000101324000000051/0001013240-00-000051.txt> ("In addition, the Company intends to focus on product sales that utilize existing infrastructure to reduce capital required in the short-term. In general, the Company will scale its geographic expansion and delivery of new products to better match its technical capabilities and capital availability. The Company's 22-city expansion plan originally scheduled for completion at year-end 2000 will be postponed." *Id.*).

cycle in new markets. Thus, to get a true picture of the rate of CLEC building access and service, the Commission should ask the CLECs to provide verifiable data about: (1) the size of each building they serve, (2) the size of each building to which they have gained access; (3) the number of buildings per market they serve, and (4) the number of buildings to which they have gained access.

For example, the U.S. Department of Energy estimates that in 1995, out of a total of 705,000 office buildings, there were 16,000 buildings larger than 100,000 sq. ft., and 22,000 buildings between 50,000 sq. ft. and 100,000 sq. ft. in the U.S., for a total of 38,000 large buildings.[37] In other words, only 5.4% of U.S. office buildings are larger than 50,000 sq. ft.[38] If the Commission were to examine per market penetration rates, and median square footage of buildings to which CLECs have secured access rights, the Commission would find that CLECs have penetrated the majority of large buildings within their targeted markets. WinStar, for example, has achieved a market penetration rate of nearly 30%, based on the 11,000 buildings it has the right to serve and the total of 38,000 buildings larger than 50,000 square feet. And upon such a finding, the Commission should examine other factors as discussed herein, such as CLEC capital-financing constraints, sales force numbers, and willingness to make timely commitments

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[37] EIA Report at 87, Table BC-8. The FNPRM cites 750,000 as the number of office buildings in the county. We have no quarrel with that number, but for the sake of consistency, we will rely on the Energy Department's figures.

[38] To put this in the proper perspective, 50,000 sq. ft., 100,000 sq. ft, and even 150,000 sq. ft. buildings are very common in downtown business districts. For example, a 150,000 sq. ft. building could have ten floors measuring 100 ft. by 150 ft.. A 100,000 sq. ft. building could have ten 100 ft. by 100 ft. floors, or 7 floors measuring 100 ft. by 143 ft. The typical office building in Washington, D.C. has between 150,000 and 200,000 square feet. *See* Insignia ESG, *Commercial Market Report, United States 3rd Quarter 2000: Market Overview – Washington, D.C*, Oct. 2, 2000 <http://www.insigniaesg.com/marketing/market_washingtondc.html>.

to actually serve buildings, as factors that influence the rate of CLEC building access and service.

CLEC	No. of Buildings	No. of Markets/Networks	Average No. of Buildings/Market
WinStar[39]	13,100	60	218
Teligent[40]	11,625	43	270
e.Spire[41]	4,697	38	124
Worldcom[42]	Over 35,000	Over 100	350
AT&T[43]	Over 36,000	89	404
XO Communications (Merged with NEXTLINK June 16, 2000)[44]	48,982	53	924
ICG[45]	9,520	30	317

[39] WinStar November 2000 Press Release; WinStar, *Form 10-Q Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 18, U.S. Sec. Exch. Comm'n, Nov. 14, 2000, *available at* <http://www.sec.gov/Archives/edgar/data/ 1111634/000095013300004526/0000950133-00-004526.txt>.

[40] Teligent 10-K Report, Press Release.

[41] e-Spire, *1999 Third Quarter Fact Sheet* (March 31, 2000), *available at* <http://www. espire.com/investor_relations/fsheet3q 1999.com>.

[42] Worldcom, *Global Operations Overview*, (visited on Jan. 22, 2001) <http://www.worldcom.com/about_the_company/corporate_overview/international_fact_sheet>.

[43] AT&T 10-K Report, Exhibit 13 at 15.

[44] XO Communications Inc., *Form 10-Q Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, U.S. Sec. Exch. Comm'n, Nov. 14, 2000, *available at* <http://www.sec.gov/Archives/edgar/data/1111634/000095013300004526/0000950133-00-004526.txt>: *see also* Nextlink Communications, *Form 10-Q Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, U.S. Sec. Exch. Comm'n, Mar. 31, 2000.

[45] ICG 10-Q Report at 22-23.

If the Commission were to review the average CLEC building access rate per market in this light, the Commission would find that CLECs have access to the majority of their targeted office buildings. As shown in the table above, the seven major CLECs combined have access to over 138,000 buildings, and average 343 buildings per market.[46] Consequently, even if the 38,000 figure for large office buildings is low, the CLECs have connected their networks to their target market several times over. To again put this in perspective, the largest publicly-held property owner in the country owns and manages only 381 buildings, and there are approximately 671 office buildings in downtown Washington, D.C.

e. Average Time For Negotiating Access and Discussion of Reasons For Variations.

We would like to draw the Commission's attention to the Best Practices Guidelines recently developed by the Alliance.[47] While the Alliance has previously submitted survey data regarding average negotiating time, longest negotiation time, and reasons for delays during negotiations,[48] the purpose of the Best Practices Guidelines is to create more uniform and predictable negotiations and thereby reduce the average negotiating time. It is too early to evaluate the effect of the new guidelines on individual negotiations, both because of the short time that has elapsed, and because the guidelines contemplate use of the model license agreement. The Alliance anticipates that in the next proceeding for submission of updated market information, however, there may be additional evidence available regarding streamlining of the negotiation process under the Best Practices Guidelines.

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[46] Of course, these providers serve many of the same buildings, so the numbers of buildings reflect that duplication.

[47] *See infra* Section I.B.

[48] BOMA Survey at 70-71; Charlton Survey at 4, 7-9.

In the interim, the Alliance would like to again point out to the Commission that CLECs themselves contribute to the delays in negotiating. As young, new companies, CLEC are under tremendous pressure to produce results, *i.e.,* sign up new customers and gain access to buildings with large customer potential. CLECs accomplish this by "cherry-picking." At the local level, CLECs have cherry-picked by connecting larger buildings to their networks, while by-passing smaller buildings:

- CESCR reports, "[i]n our experience, most TSP's want to serve only a smaller and select portion of the portfolio. When we realized this business fact – that as a result of our earlier deals our smaller buildings were getting left out – we insisted in our later deals that they serve virtually every building."[49]

Delays in negotiations have occurred because CLECs do not want to have to commit to connect all properties in a commercial portfolio, as opposed to being free to connect only the largest ones.[50]

Furthermore, negotiations can be delayed by CLEC refusal to make binding commitments to install facilities. As the Alliance has pointed out in previous *ex parte* filings, every time a building owner enters into a building access contract, finite building space must be

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[49] Bitz Declaration at ¶ 10.

[50] The pressure to connect larger buildings results from the standard CLEC financial model. CLEC expend large amount of capital to connect metropolitan areas and create "mature-network" cities. CLECs promise their investors that once these mature-network cities are on-line, these cities will quickly turn profitable. By demonstrating quick profitability, CLECs can meet investor expectations, which in turn, leads to investor confidence and access to investor capital, so that additional mature-network cities can be developed. CLEC Report 2001, ch. 2 at 3-4. Thus, focusing on connecting large buildings in mature-network cities helps make mature-network cities quickly profitable. There are also other reasons for delays, but property owners consistently report that it only takes 3-6 months, and that most of the delays are caused by providers. Bitz Declaration at ¶ 14; Lansdale Declaration at ¶¶ 12, 13; Ansel Declaration at ¶ 9.

reserved for the telecommunications provider.[51] If the provider does not install facilities in the building, the owner has committed space but received no benefit for its tenants. Many building owners have experienced the problem of CLECs delaying roll-out of their networks.

- Boston Properties reports that while "multiple carriers have access rights to our properties pursuant to agreements that have been in place for a year or more on average, the majority of these access rights have yet to exercised by the carriers."[52] Of six portfolio-wide access agreements, "less than 20% of the agreements have resulted in completed installations providing services to customers."[53]
- Bozzuto Management Co. reports that one high speed Internet service provider was granted a contract to service 32 properties, but stopped deploying their network after connecting only 2 properties.[54]

Many building owners also believe that CLECs have a 'land grab' mentality.

- Boston Properties reports: "It has been Boston Properties' experience that the initial urgency to negotiate and execute agreements has generally been followed by extremely slow installation and marketing efforts on the part of service providers."[55]
- AvalonBay reports: "Typically, providers are slow responding to our questions or proposals during negotiations. They are also very slow to make decisions and are

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[51] Krell Declaration at ¶ 6.

[52] Burke Declaration at ¶ 5.

[53] *Id.*

[54] Declaration of Scott Skokan, attached as Exhibit D at ¶ 6 ("Skokan Declaration").

[55] Burke Declaration at ¶ 5.

often unable to commit to a specific time when service will be available and what services will be offered."[56]

Building owners want to provide the best telecommunications services to their tenants.[57] But at the same time, building owners want telecommunications providers to commit to serve all commercial properties regardless of size, and to commit to specific installation dates and services.

f. Number of Buildings in Which a Request For Access Has Been Denied, Length of Time For Denial, and Basis For Denial.

The Alliance has submitted previous survey data and *ex parte* filings regarding these issues, as well.[58] But as the Alliance made clear during the *ex parte* period, the Commission cannot develop a complete picture of the denial of building access issue without also examining the percentage of existing building access contracts and commitments that have yet to be honored by CLECs. As discussed above, CLECs are only providing service to 25% to 50% of all buildings to which they have been granted access. During the *ex parte* period the Alliance submitted a declaration of Barry Krell, Vice President of Telecommunications for CarrAmerica Realty Corp. Mr. Krell stated that because, (1) access space is limited, (2) when a building owner or management company agrees to provide access to a provider, it must reserve scarce access space, regardless of whether the provider actually makes use of the space in a reasonable amount time, and (3) because 37% of building access contracts entered into by CarrAmerica have not yet been fully implemented by competitive telecommunications providers (as

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[56] Declaration of Lyn Lansdale, attached as Exhibit E at ¶ 13 ("Lansdale Declaration").

[57] Bitz Declaration at ¶¶ 4, 5, 8; Declaration of Susan Ansel, attached as Exhibit F, at ¶ 4 ("Ansel Declaration"); BOMA Survey at 63-65.

[58] BOMA Survey at 67; Charlton Survey at 5-7; Krell Declaration at ¶¶ 5-7.

demonstrated by the initiation of service), "CarrAmerica has declined to enter into new contracts with certain CLECs until those CLECs honor their commitment to provide service in buildings in which they have already signed a building access contract."[59] Thus, denials for failure to implement previous building access contracts are very difficult to quantify because they require case-by-case analysis.

Furthermore, a true picture of the average denial rate cannot be completed without taking into account the turbulent changes in the venture capital and technology stock markets. Presumably to conserve capital, many CLECs have attempted to negotiate building access contracts that require building owners to guarantee access, but which do not require CLECs to guarantee provision of service.[60] For the space-scarcity reasons discussed above, many building owners do not want to enter into new building access contracts without either service provision requirements, or completion of existing service contracts. Thus, in the context of examining claims that owners deny access, the Commission should examine the ratio of building access to provision of service.

Finally, the Commission should also consider that many building owners and managers have been denied service by particular CLECs. Typically, CLECs have refused to provide service in buildings in which the potential revenue per tenant is not large enough to recover the CLEC's investment. The Alliance is aware of providers that have set per building minimum revenue requirements – until the building owner demonstrates that the minimum revenue requirement can be met, the telecommunications provider will not provide service to any of the buildings tenants. For example, CESCR reports that "our CLECs tried to use a cut off of either

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[59] Krell Declaration ¶ 6.

[60] Bitz Declaration at ¶ 10; Skokan Declaration at ¶ 6; *see also* Burke Declaration at ¶5.

10 [business] tenants per building or a size greater than 150,000 square feet."[61] Another building owner reported that a telecommunications provider required a customer commitment to spend $100,000 per year for a minimum of two years if the provider's building wiring costs exceed $150,000, customer commitment to spend $75,000 per year for a minimum of two years if the provider's building wiring costs are less than $150,000, and in either case, an additional $20,000 per month of future business sales opportunity with the building. The Alliance appreciates that new businesses must operate under strict cost-benefit operating standards. But as a matter of equity, it is disingenuous for CLECs to demand non-discriminatory, unequivocal access to all buildings – regardless of building capacity, tenant demands, or building profit considerations – while at the same time, CLECs continue to be exempt from equivalent requirements to providing service to every building on a non-discriminatory basis – regardless of building size, tenant demands, or profit considerations.

g. Average Time That Pending Requests Have Been Outstanding.

The Alliance believes that CLECs are in the best position to address this issue. Property owners do not keep reports regarding how long requests have been pending. In addition, in practice, building owners usually conduct negotiations with the sales or marketing staff of competitive telecommunications service companies. These marketing people rarely have authority to negotiate terms beyond the standard terms offered by the company. Building owner questions or requests for legally binding language often have to be referred to legal counsel. In addition, legal counsel in individual markets may require authority from higher management before agreeing to terms that may trigger most favored nation clauses in contracts in other markets.

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[61] Bitz Declaration at ¶ 10.

The Alliance intends for the model license agreement to address some of these issues, and indeed, one purpose of the model license is to minimize delays caused by legal questions regarding contract terms. By putting forth expected terms in a standard document, the Alliance hopes that representatives of CLECs will have vetted the license terms with their legal and management staff prior to entering into building access contract negotiations. Because the terms of the model license are still being discussed, however, we are unable to provide the Commission with data regarding the effect of the model on reducing outstanding requests for building access.

h. Differences in Negotiations or Frequency of Denial If LEC Seeks Access After Specific Request From Tenant.

We have no new quantitative data on this point. Once again, however, building owners are extremely sensitive to tenant needs, and will do what is necessary to provide tenants with their preferred choice of telecommunications providers.

For example, CESCR went to great lengths to accommodate a tenant's request for a specific telecommunications provider even though that tenant had entered into a very long-term lease and was in no position to move.[62] Another property owner, Arden Realty, describes an instance in which a new tenant was moving in but had not received all the circuits it had requested from the ILEC. Rather than wait two weeks for the ILEC to complete the installation, the tenant turned to Arden for help. Arden directed the tenant to an alternative provider in the building and the tenant had service within 24 hours. In another case, a tenant requested service

[62] Bitz Declaration at ¶ 9. The CLECs have made much of the so-called "lock-in effect," asserting that tenants with long lease terms are held captive. This completely ignores both the possibility of sub-leasing, and the potential revenue loss to the owner if a disgruntled tenant does leave at the end of the term. CESCR loses an average of $37,500 a month in revenues if a single floor is left vacant. *Id.* at ¶ 5.

from a provider not in the building, and Arden granted the new provider access within just a few days.

i. Charges Imposed For Access.

Building owners charge rates for building access that are in line with the market. Building owners typically charge office tenants rent by the square foot. But rates per square foot can vary widely by location – rent in New York City is significantly higher than in Detroit, building space on Pennsylvania Avenue is Washington D.C. is more expensive than building space in the outlying D.C. suburbs, and the top floor of an office with views of Golden Gate Bridge can be much more expensive to rent than space on the middle floor of a neighboring building with no view. In addition, retail tenants often pay both a fixed monthly rent and a share of gross revenues. From the telecommunications provider's perspective, distance to its network and potential subscriber density are the two key factors. And as previously discussed, the value of building access to the telecommunications provider may depend on the number of customers the telecommunications provider can expect to serve within any given building.

Until relatively recently, telecommunications providers negotiated flat fees for the right to occupy space in buildings. More recently, providers began offering to pay a small percentage of revenues per building and, in some cases, a nominal rent as well.[63] The most recent trend has been for providers to issue stock warrants to building owners with particularly desirable properties. Flat fees have the advantage of predictability, but building access agreements have largely shifted to the revenue sharing model, in recognition of the enormous value created by building owners when they assemble land and tenants into ready-made telecommunications

[63] BOMA Survey at 57. "[T]he number of revenue sharing agreements doubled between 1998 and 1999." *Id.* at n. 35.

markets.[64] The percentage of revenue model has the advantage of tying the provider's payment to the actual value of its presence in the building.

The following are examples of typical building access terms:

- CESCR's access agreements typically charges telecommunications providers a rental fee of 5-8% of gross revenues from provision of service to the building. In some cases a nominal annual rent of $1,000 to $2,000 is also charged. The typical building access contract is for five years, with a 5-year renewal option at market rates.[65]
- AvalonBay's access agreements typically provide for a rental fee of 7-10% of gross revenues from provision of service to the building. The typical building access contract is for 7-10 years.

j. State Nondiscriminatory Access Requirements and the Experience of Owners in States with Such Requirements.

The Alliance is aware that forced access requirements have been enacted in Connecticut, Massachusetts, and Texas.[66] The Alliance does not have data regarding the effects of these regulations. The Massachusetts regulations have been stayed until July 1, 2001,[67] and consequently have had no effect yet. With respect to Texas and Connecticut, as far as we are aware, no provider has sought to apply the existing regulations. In any case, it is important to

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[64] *Id.* at 57.

[65] Bitz Declaration at ¶¶ 6, 11.

[66] 1999 Conn. Gen. Stat. § 16-247L (1999), as amended by, Act of July 19, 1999, ch. 283, sec. 2, § 16-247L, 1999 Conn. Pub. Act 286 (Reg. Sess.)(making technical changes to telecommunications statutes and authorizing municipalities to sell compressed natural gas); Mass. Regs. Code tit. 220, § 45 *et seq.* (2000); Tex. Admin. Code § 26.129 (West 2000).

[67] Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services, Mass. Reg. (D.T.E. 98-36-A)(Aug. 18, 2000).

note that in all these cases the regulations are only triggered if a tenant requests service from a provider.[68] None of the state rules mandates prepositioning upon request of a provider. Because building owners have always been highly responsive to tenant requests, the state regulations actually affect the *status quo* far less than it might otherwise appear.

k. Technology Developments That May Reduce or Obviate Need For Access.

The Alliance does not have information to present on this issue.

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The Commission can continue to gather data for as long as it sees fit, and it will always get the same result. Any fair examination of the evidence will show that CLECs are getting access to buildings under reasonable terms and within reasonable time frames. Commission regulation is wholly unwarranted.

B. The RAA's Best Practices Guidelines Will Address the Concerns of the FCC and the CLEC Industry Regarding the Effectiveness of the Market.

The Real Access Alliance, on behalf of over one million individual building owners and managers, made in its July 13, 2000, letter to Chairman Kennard,[69] a voluntary commitment – notwithstanding the fact that the Commission does not have jurisdiction to impose access requirements on building owners – to develop model contracts and best practices aimed at improving the speed of processing tenant and carrier generated requests for access to multi-tenanted manufactured housing, and multi-tenanted office, residential, and industrial buildings.

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[68] Tex. Admin. Code § 26.129(e); 1999 Conn. Gen. Stat. § 16-247L(c)(1),(e), as amended by, 1999 Conn. Pub. Act 286.

[69] "Commitment to Best Practices and Model Lease," submitted to the Commission as *In the Matter of Promotion of Competitive Networks*, *Ex Parte* Letter from Real Access Alliance, WT 99-217 (July 13, 2000).

In its September 6, 2000, letter to Chairman Kennard, the Alliance gave specific details of the proposed best practices.[70] Where appropriate, the members of the Alliance are committed to incorporating the practices summarized below into lease terms offered to new tenants, and into new building access contracts negotiated and entered into with telecommunications service providers. The overriding objective of the implementation of the Best Practice Guidelines is the same as that of the Alliance's basic goal – responsiveness to the needs of tenants in multi-tenanted buildings. As the Alliance's experience with the specific issues relevant to that market increases, the Alliance will review the effectiveness of these commitments and, if warranted, may add additional practices.

The details of the guidelines can be summarized as follows:

- Non-Exclusivity in Office Building Contracts

Real estate companies will reject telecommunications provider requests for exclusive contracts to serve office buildings.

- Speed of Processing

The Alliance continues to believe that the market is working, and therefore tenants are not experiencing significant problems with the speed with which requests for providers' access to buildings are being processed by real estate owners. Nonetheless, any such problems could adversely affect tenants by delaying their access to competitive telecommunications providers. Ameliorating any difficulties that tenants may experience is the paramount reason for speed of processing improvements and commitments.

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[70] "Summary of Best Practices and Model Lease," submitted to the Commission as *In the Matter of Promotion of Competitive Networks*, *Ex Parte* Letter from Real Access Alliance, WT 99-217 (September 6, 2000).

Accordingly, the guidelines state that building owners will respond within 30 days with a yes or no answer to any written request for access that is generated by an office building tenant. Office building owners will proceed, in good faith, to accommodate requests from tenants. Building owners will follow this approach in any instance where:

- there is appropriate, uncommitted space available to accommodate the provider, and
- the provider indicates its intent to execute an access agreement that is substantially in the form of the model license being developed, including the provider's agreement to furnish service to any tenant in the building within a reasonable period of time.

- Policies to be Reflected in New Leases

Building owners will reflect the new policies in new leases with office tenants and in the BOMA standard lease, a widely-used form. Notice of the commitments will also be furnished to existing tenants.

- Clearer, More Predictable Process for Handling Provider-Generated Requests

Some telecom providers have complained that their requests for "pre-provisioning" access are handled in a confusing and often slow manner by building owners and managers. To address this, the guidelines state that property owners will respond within 30 days of receiving any written provider-generated request for space, with clear guidance as to their individual policies regarding such requests. Such guidance would also include a specific timetable governing their decisions to respond to such requests for space.

- 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