

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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WT Docket No. 99-217

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In the Matter of)
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Promotion of Competitive Networks)
in Local Telecommunications Markets)
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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)
_____)

REPLY COMMENTS OF AT&T CORP.

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)	

REPLY COMMENTS OF AT&T CORP.

Pursuant to section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") respectfully submits these reply comments in response to the Commission's *Further Notice*,¹ regarding actions to help ensure that competitive telecommunications providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments ("MTEs").

¹ First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 2000 FCC LEXIS 5672 (rel. Oct. 25, 2000) ("*Further Notice*").

INTRODUCTION AND SUMMARY

The comments vividly support the Commission's efforts to break down the artificial barriers to facilities-based telecommunications competition in MTEs that have been erected by incumbent local exchange carriers ("LECs") and MTE owners. There can be no question that two standards currently govern access to MTEs: a more favorable standard for incumbent LECs who wield market power over MTE owners and their tenants, and a discriminatory standard for competitive LECs that are denied access, required to engage in lengthy negotiations and subjected to substantial access fees and costs that incumbent LECs can avoid entirely. The Commission can and should act to address this anti-competitive status quo that threatens the development of facilities-based competition and consumer choice in MTEs.

As demonstrated in Part I, the comments confirm that both incumbent LECs and building owners are impeding efforts by competing carriers to serve tenants in MTEs on a nondiscriminatory basis. Indeed, MTE owners acknowledge that incumbent LECs receive favored treatment because of their substantial market power and that competitive LECs, in contrast, are subjected to discriminatory rates, terms, and conditions governing their access to MTEs. Part I.A., *infra*. Moreover, contrary to the comments of some building owners, it is settled that the Commission has authority under Section 201 and 205 of the Communications Act to promulgate regulations making it an unreasonable practice for LECs to provide service to MTEs that deny nondiscriminatory access to competing carriers. Part I.B., *infra*. That authority does not implicate, let alone violate, the Takings Clause of the Fifth Amendment. Part I.C., *infra*.

As a matter of policy, the comments show that the Commission should draw no distinction between commercial and residential buildings because tenants in both settings are

entitled to the benefits of facilities-based competition and have little recourse when an ILEC and MTE owner deny them the benefits of non-discriminatory access. Further, no commenter has provided any persuasive reason for exempting building LECs (“BLECs”) from a nondiscriminatory access requirement given that discriminatory relationships between BLECs and building owners also can impede access by competitive LECs. As the comments explain, however, the Commission need not apply this nondiscriminatory access principle to Government and other buildings serving transitory residents such as hotels, hospitals, and universities where the true tenant is best represented by the building owner. Part I.D., *infra*.

With respect to implementation, the comments further establish that the Commission should rely upon its substantial experience implementing the nondiscriminatory access requirement of the Pole Attachment Act, 47 U.S.C. § 224(f)(1). The Commission’s proposal should be implemented to ensure that the rates, terms, and conditions of access must apply uniformly to all telecommunications carriers that have or seek access to an MTE. To implement that nondiscrimination standard, incumbent LECs should be required, upon a request for access by a CLEC, to make available the rates, terms, and conditions that govern their access to a particular MTE. Further, because access to an MTE by an incumbent LEC is not triggered by a tenant request, such a discriminatory requirement should not serve as the trigger for a regulation mandating nondiscriminatory access by competitive LECs. Finally, the comments do not call into question the benefit of applying the procedures developed for resolving disputes under the Pole Attachment Act to resolve, in an expeditious and cost-conscious manner, any disputes arising from the Commission’s non-discriminatory access requirements. Part I.E., *infra*.

In Part II, AT&T joins the vast majority of public and private parties who agree that the Commission should extend its prohibition on exclusive access agreements to residential as well

as commercial MTEs. Part II.A., *infra*. Moreover, contrary to arguments by some building owners, there is no question that the Commission can modify these agreements to serve the public interest and that it should do so to prevent ILECs and MTE owners from delaying the introduction of competition in MTEs. Part II.B., *infra*.

As shown in Part III, the comments establish that preferential marketing arrangements can provide benefits to MTE tenants because they create incentives for competitive LECs to invest in the facilities necessary to compete against incumbent LECs. The comments also demonstrate, however, that preferential marketing arrangements can be misused to limit the competitive choices of tenants. Taken together, the comments support an approach whereby competitive LECs should be permitted to enter into preferential marketing arrangements but that ILECs – which do not need additional incentives and for which anti-competitive concerns are pronounced – be prohibited, in the short term, from entering into such arrangements. Part III., *infra*.

Part IV shows that none of the comments provide any persuasive reason for the Commission to adopt an unduly cramped categorical definition of right-of-way. To be sure, ILECs and utilities ask that their obligations under Section 224 be minimized. But their arguments, if accepted, would require that they provide access to competitors when they had secured *narrow* access rights from MTE owners, but not when they had secured *broad* access rights from MTE owners. Congress could not have intended that illogical result. The comments demonstrate that the Commission instead should proceed on a case-by-case basis when a CLEC seeks access to facilities owned or controlled by the utility that fall outside the categorical definition of right-of-way previously adopted by the Commission. Part IV., *infra*.

Finally, Part V shows that there is little enthusiasm for the Commission's proposal to extend the cable inside wiring rules to telecommunications providers. Nothing in the sparse comments filed on this issue undermines the conclusion that the Commission's proposal would not further competition but could instead create anti-competitive incentives. Part V., *infra*.

ARGUMENT

I. THE COMMISSION SHOULD PROHIBIT LOCAL EXCHANGE CARRIERS FROM SERVING MTEs THAT DO NOT PROVIDE NONDISCRIMINATORY ACCESS TO COMPETING CARRIERS.

A. The Competitive Provision Of Telecommunications Service In MTEs Is Being Undermined By The Anticompetitive Behavior Of Incumbent LECs and Some Building Owners.

The comments confirm what the massive record already developed by the Commission establishes: Although progress has been made in establishing facilities-based competition in MTEs, more must be done to address the significant problems that continue to hamper customer choice within MTEs. For its part, AT&T has shown both in the comments it filed in 1999 and in its initial comments in response to the Commission's *Further Notice*, that the artificial barriers that have been erected by ILECs and some MTE owners continue to thwart efforts by competitive LECs to obtain the nondiscriminatory access to MTEs necessary to provide MTE tenants the myriad advantages associated with full competitive choice.² Those conclusions and

² See Comments of AT&T Corp., at 4-8, *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98 (filed Aug. 27, 1999) ("AT&T MTE Access Comments"); Reply Comments of AT&T Corp., at 3-7, *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98 (filed Sept. 27, 1999) ("AT&T MTE Access Reply Comments"); Comments of AT&T, at 6-17, *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217 (filed Jan. 22, 2001) ("AT&T Comments").

the need for immediate Commission action are further buttressed by the most recent comments of other parties.³

The Evidence of Continuing Anticompetitive Practices Is Overwhelming. The evidence of improper conduct by ILECs continues to mount. The GSA, for example, reports “from its own experience that competitive LECs . . . are encountering difficulties in obtaining access to carrier facilities necessary to initiate services for their own end users.” GSA at 3-4. As GSA explains, one ILEC makes it “difficult and costly” to transition service to the CLEC by “assert[ing] that it maintain[s] full control over facilities up to the premises of each tenant on every floor of the building.” *Id.* at 4. As a result of these and other ILEC practices, Federal Executive Agencies “have experienced delays to implement the results of competitive procurements for local telecommunications services.” *Id.* at 4.

As to building owners, Cox succinctly encapsulates the problem: CLECs are “forced to bear higher costs than incumbents, frequently must agree to terms that are not imposed on the incumbent and, sometimes, cannot compete at all for customers in affected buildings.” Cox at 3. *See also, e.g.,* AT&T Comments at 12; Smart Buildings at 3-8; *cf.* RAA at 65 n.106. Building owners routinely make “monetary demands” on CLECs of as much as “five to seven percent” of gross revenues, amounts “that make service uneconomical.” Cox at 5-6. ILECs generally do not pay such fees. *Id.*; *see also* Cypress at 3-4. Building owners also demand that CLECs – but not

³ *See, e.g.,* Comments of the Smart Buildings Policy Project at 3-8 (“Smart Buildings”); Comments of Winstar Communications, Inc. at 1, 4 (“Winstar”); Comments of Cox Communications at i, 4-12 (“Cox”); Comments of Cypress Communications at 3-4 (“Cypress”) (“ILECs generally do not pay fees for building access” whereas “CLECs generally pay building owners an access fee based on a percentage of revenues generated from serving tenants in a building”); Comments of Florida Public Service Comm’n at 2 (“FPSC recognizes that competitors may face difficulties of serving tenants in MTEs”) (“FPSC”); Comments of General Services Administration at 3-5 (“GSA”); Comments of RCN Telecom Services, Inc., at 5-8 (“RCN”).

ILECs – agree to burdensome conditions such as a lease or license agreement with a short duration. *Id.* at 7.⁴ As a result, CLECs are put at an economic disadvantage that “can make it uneconomic for [them] to serve customers in buildings with only a few tenants.” *Id.* at 5. And some building owners even continue to deny access to CLECs altogether. *See, e.g., id.* at 9 (“in all of its markets across the country,” Cox “continues to face situations in which MTE owners simply refuse to permit access when a tenant has requested that Cox provide service”).⁵

In the face of this wealth of evidence, some commenters nevertheless insist that the Commission is “trying to solve a ‘problem’ where none exists.” RAA at 1; *see also* Comments of Broadband Office Communications, Inc. (“Broadband”) at 4. They argue that “[p]roperty owners are allowing telecommunications providers of all kinds access to their buildings on fair, commercially reasonable terms.” RAA at 1; Broadband at 5. But nothing in the evidence submitted by these commenters even suggests that MTE owners offer CLECs nondiscriminatory access to their facilities.

To the contrary, RAA candidly acknowledges that MTE owners have not in the past (and have no plans in the future) to offer the same rates, terms, and conditions of access to CLECs as they offer to ILECs. RAA at 41-42. Indeed, RAA, which represents “over one million

⁴ *See, e.g.,* Cox at 7 (because CLECs “must amortize [their] construction and equipment costs over the term of its access agreement, a short-term agreement necessarily inflates the cost of serving any customer in the building”; further, CLECs operating under short-term leases with MTE owners are prevented from offering competitive prices that “generally are available only through longer term contracts”); *cf.* RAA at 65 n. 106 (“As far as we are aware, however, it is relatively rare for an ILEC to enter into any kind of an agreement with an MDU owner”).

⁵ *See also* Smart Buildings at 5 (“Exclusive access is perhaps the most egregious form of discrimination against other telecommunications carriers,” but “[t]his device is being replaced by more subtle but equally serious forms of discrimination”); Cox at 9 (short of outright refusals, “some building owners that do not wish to allow access” will delay negotiations and “raise various technical or safety issues” but will not allow CLECs to resolve them or “will delay their responses when Cox addresses those concerns”).

individual building owners and managers,” RAA at 25, goes out of its way to stress that MTE owners have a strong incentive to maintain the discriminatory status quo:

In the building access situation, however, it is the ILECs that have market power 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 [CLECs], on the other hand, are subject to market forces and must negotiate with building owners on a level playing field.

RAA at 41 (emphasis added). Incredibly, RAA complains that Commission intervention is unwarranted because it would not be “fair to the [MTE] owner” if “the CLEC would get the same terms *from the building owner* as the ILEC.” *Id.* at 42 (emphasis in original). Put another way, RAA argues that the Commission should refuse to adopt a nondiscriminatory access rule because it would, in fact, foster precisely the type of level playing field between ILECs and CLECs that is necessary to allow competition to take root. *See* RAA at 42.⁶

In this regard, it is important to recall that the Commission identified as its principal concern the situation “[w]hen a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage,” because “this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of its market – may not qualify as just or reasonable.” *Further Notice*, ¶ 135. RAA now concedes that this concern is well-founded – as a result of the market power exerted by ILECs, building owners must provide “favorable terms” to the ILEC and thereby perpetuate “an unfair competitive disadvantage,”

⁶ Given the substantial record evidence of abuse and RAA’s own admissions, there is plainly no need to delay Commission action or to incur the additional expense of retaining a third-party to conduct a study on building access issues. RAA at 28-29. The results of that study can only confirm what RAA has acknowledged and the record already demonstrates: CLECs do not receive nondiscriminatory access from building owners because ILECs, through the exercise of their market power, are able to force MTE owners to provide more favorable terms. RAA at 41.

Further Notice, ¶ 135, that denies MTE tenants choice in their selection of telecommunications provider.

Further Commission Action Is Clearly Warranted. Notwithstanding the clear evidence of continuing and widespread abuses that deny MTE residents competitive choices, RAA and other commenters insist that further Commission action is unnecessary. *E.g.*, RAA at 29 (“The Commission has embarked on a wild goose chase”). These contentions carry no weight given RAA’s admission that there is a two-tiered structure of terms governing access to MTE facilities: ILECs get favorable terms; CLECs do not. RAA at 41-42.

RAA contends, for example, that “[i]f 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.” RAA at 30. That this problem has not yet received as much attention as slamming is neither surprising nor illuminating. In the context of slamming, consumers would immediately become aware that their chosen telecommunications provider had been changed, without their consent, upon receipt of a monthly billing statement. In contrast, building owners do not generally inform their tenants of the discrimination against competitive telephone carriers; accordingly, tenants have little, if any, way of knowing that they have fewer (or no) telecommunications choices because of such discriminatory policies.

RAA next complains that “[t]he 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.” RAA at 6. As a CLEC, AT&T’s well-established and consistent practice has been to provide service as soon as possible after completing negotiations with the MTE owner. But as the record already reflects, ILECs have taken affirmative steps to prevent CLECs from serving MTEs even when the MTE owner has provided the CLEC with

access rights. The evidence of such ILEC conduct is substantial. *See, e.g.*, AT&T Comments at 10-11. As the GSA reports “from its own experience” CLECs “are encountering difficulties in obtaining access to carrier facilities necessary to initiate services for their own end users.” GSA at 3-4. Thus, the proper conclusion to draw is *not* that CLECs have overextended themselves in committing to provide service in MTEs, but rather, as the Commission already has found, that ILECs “have the ability and incentive to deny reasonable access to . . . competing carriers.” *Further Notice*, ¶ 24; *see also id.* ¶ 19 (“incumbent LECs are using their market control over on-premises wiring to frustrate competitive access to multitenant buildings”).⁷

The notion that “CLECs have very little interest in serving the residential” MTE tenants is equally absurd. RAA at 4. The Commission is well aware of the enormous investments by AT&T and others to bring facilities-based competition to residential MTEs with both traditional copper connectivity and newer cable and wireless technologies. *See* AT&T MTE Comments at 10-11. AT&T, for example, already serves hundreds of residential buildings and plans to bring competitive services to thousands more residential MTEs. Those efforts have been met with unnecessary delays in negotiations, discriminatory access fees and terms, and flat refusals to grant access. AT&T Comments at 12. To be sure, CLECs such as AT&T also are “interested in serving large commercial office properties,” RAA at 11, but that in no way undermines the substantial efforts by CLECs such as AT&T to provide access to residential MTEs across the nation.

⁷ Not only do ILECs prevent CLECs from providing service in a timely manner, their monopoly market position allows them to delay installation of their own facilities in MTEs. As explained by RAA’s witness Lyn Landsdale, “the biggest complaint . . . in building new apartment communities is the implementation of telephone service by the RBOC [ILEC].” RAA Decl. of Lyn Lansdale ¶ 11. Indeed, “[w]ith almost every recent installation by an RBOC we have experienced delay, incredible frustration and a lack of responsiveness on the part of the RBOC.” *Id.*

Nor can RAA's suggestion that CLECs already are obtaining access to commercial MTEs be credited. *See* RAA at 5, 10. RAA provides anecdotal evidence that some "office buildings in the central business districts of major metropolitan areas have multiple providers," RAA at 10, but RAA makes no attempt to demonstrate that these figures are representative. More to the point, however, RAA does nothing to address the Commission's principal concern of ensuring that ILECs and CLECs compete on a level playing field in which the terms of MTE access offered to CLECs are reasonable and nondiscriminatory. *Further Notice*, ¶ 135. As to that point, RAA admits that based on all the information that it has gathered, the ILEC "often gets favorable terms" not available to competitors. RAA at 41.

Finally, although RAA promises that it has taken "affirmative steps to facilitate faster negotiations," it rejects the conclusion 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.*" RAA at 6 (emphasis added). But there is nothing novel about MTE owners providing access rights to their facilities; they have been providing such access to ILECs for years. Such negotiations are novel for MTE owners only to the extent that they are imposing new terms and conditions on CLECs that do not already apply to ILECs.

RAA's Best Practices Guidelines and Model License Agreement. Although AT&T welcomes any voluntary efforts by MTE owners to provide nondiscriminatory access and recognizes that the Model License Agreement proposed by RAA is only in draft form, nothing in RAA's comments alleviates the substantial doubts about the beneficial effect, if any, of the real estate industry's highly publicized model contract initiative. AT&T Comments at 13-14. Winstar points out that RAA's efforts "are necessarily limited in their utility" because "90 percent or more of the industry [is] not represented by the RAA." Winstar at 4. Further, "there

is no guarantee that *all* or even a majority of the members of the RAA will use the Model Agreement.” *Id.* More fundamentally, the Model Agreement does not even purport to consider, let alone, guarantee nondiscriminatory access to MTE facilities. *Winstar* at 4.⁸ And the attendant delay associated with negotiating each of the numerous terms in the Model Agreement creates a substantial risk that negotiations will continue to be unduly lengthy. *Id.* at 4-5.

With respect to the Best Practices Guidelines (“Guidelines”), they too ignore the issue of non-discriminatory access. Moreover, RAA acknowledges that its members have committed to implement the Guidelines only “[w]here appropriate.” RAA at 26. But one searches in vain to discover the criteria employed by RAA members for determining whether application of the Guidelines in a given circumstance would or would not be “appropriate.” *Id.*⁹

B. The Commission Has Ample Authority To Impose Non-Discriminatory Access Requirements On Carriers.

The Commission has ample “statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE.” *Further Notice*, ¶ 132.¹⁰

⁸ In addition to the Model Agreement’s “Transaction-Specific Terms and Conditions,” the General Terms and Conditions also are discriminatory. For example, Section 11(a) of the Model Agreement specifically states that the MTE owner (“Licensor”) reserves the right to install a central telecommunications cable distribution system (“CDS”) for “use by all competitive service providers in order to reach tenant demarcation points in the Building.” RAA (Exh. G § 11(a)). Thus, CLECs (but not ILECs) would be required to use the MTE owner’s CDC facilities.

⁹ The comments also confirm that the efforts by a handful of states to ensure nondiscriminatory access to MTEs, though positive, currently are inadequate to address the scope of the national problem facing MTE tenants and the CLECs that seek to provide them service. *See AT&T Comments* 14-17; *Smart Buildings* at 35-42.

¹⁰ *See RCN* at 21-23 (“Commission has ample statutory authority . . . under which it can address the building access bottleneck by prohibiting exclusive residential MTE agreements”); *Smart Buildings* at *i*, 8-17 (“Commission should conclude that discrimination by a carrier in the form of participating in, cooperating with, or benefiting from an MTE owner’s decision to prevent tenants from selecting their own facilities-based telecommunications carrier is an unjust and

Specifically, “Sections 201(b) and 205(a) grant the Commission authority to prohibit (or condition) LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE.” AT&T Comments at 18.

Predictably, RAA disagrees. RAA at 37. It contends that the Commission (i) “cannot do indirectly what it cannot do directly,” *id.* at 36, (ii) lacks authority “to regulate building access agreements,” *id.* at 37-49, and, (iii) “does not have the authority to order a carrier not to serve a customer,” *id.* at 49-50. *See also* Broadband at 9. None of these arguments withstands scrutiny.

First, RAA’s contention that the Commission lacks authority to “regulate building owners directly,” RAA at 37, is simply irrelevant, because the Commission’s proposal would not regulate building owners at all. Rather, the Commission proposes to regulate only the practices of LECs that serve tenants located in MTEs. As the Commission explained, “When a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage, this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of its market – may not qualify as either just or reasonable.” *Further Notice*, ¶ 135. RAA’s real complaint is that the nondiscriminatory access proposal “would have an indirect effect on the behavior of the owners of MTEs.” *Further Notice*, ¶ 136. The law is clear, however, that “the Commission does not exceed its authority simply because a regulatory action” has “practical or even foreseeable effects” that may have an impact on the conduct of third parties. *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999).

unreasonable practice and thereby unlawful under Section 201(b)"); Sprint at 2-5 (Commission has “statutory authority to prohibit LECs from providing service to MTEs . . . whose owners refuse to allow non-exclusive access to competing carriers”).

Second, there is no merit to RAA's contention that anything related to carriers' agreements with building owners is beyond the scope of the Commission's authority. RAA at 37-38. Indeed, the Commission already has rejected that position. In the context of exclusive access contracts in commercial settings, the Commission concluded that "a carrier's agreement to such a contract is an unreasonable practice" and therefore such agreements "implicate [the Commission's] authority under Section 201(b) of the Act to prohibit unreasonable practices." *Further Notice*, ¶ 35. In doing so, the Commission broke no new ground; its analysis and reasoning fall comfortably within precedent holding that the Commission has "undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation." *Further Notice*, ¶ 35 n.85 (citing *Cable & Wireless*, 166 F.3d at 1230-32).¹¹

RAA concedes that the D.C Circuit in *Cable & Wireless* rejected its cramped view of the Commission's authority, RAA at 40-41, but asks the Commission to ignore that decision, because RAA is "confident that if given the opportunity the court would seek to clarify its logic." RAA at 42. But RAA is simply wrong in claiming that *Cable & Wireless* is distinguishable because "the terms of building access agreements have nothing to do with the actual provision of any service." RAA at 41. To the contrary, the Commission correctly has explained that "an exclusive contract erects a barrier preventing other telecommunications firms from offering service to tenants in the building(s) covered by the contract." *Further Notice*, ¶ 29. In *Cable &*

¹¹ See 47 C.F.R. § 63.14 ("Prohibition on agreeing to accept special concessions"); Report and Order and Order on Reconsideration, *1988 Biennial Regulatory Review Reform of International Settlement Policy and Associated Filing Requirements; Regulation of International Accounting Rates; Market Entry and Regulation of Foreign-affiliated Entities*, 14 FCC Rcd. 7963, 7994-96 (¶¶ 82-87) (1998) ("The 'No Special Concessions' rule prohibits a U.S. international carrier from agreeing to accept special concessions from a foreign carrier that has sufficient market power in the destination market to affect competition adversely").

Wireless, the regulation related to the price of service, whereas here, the proposed regulation is critical to the issue whether there will be *any* such service by a CLEC. In both cases, the regulated conduct is a “practice” in “connection with” the provision of telecommunications service. *See* 47 U.S.C. § 201(b).

RAA points out that in “*Cable & Wireless*, only two entities – the two carriers – were involved,” whereas here the building owner “is not engaged in the communications business at all.” RAA at 41. That too is a distinction without a difference. In *Cable & Wireless*, the Commission regulated agreements between domestic LECs over which it had unquestioned authority and foreign LECs over which the “Commission claim[ed] no authority to directly regulate.” 166 F.3d at 1229. Thus, even if building owners were beyond the Commission’s authority “to directly regulate,” *Cable & Wireless* confirms that the Commission can regulate their building access agreements with regulated carriers. *Id.* at 1231.

RAA next argues that unlike the Commission’s regulation in *Cable & Wireless*, “the building owner, is the target of the proposed regulation.” RAA at 42. But that is not so. As the Commission has explained, the predicate for its nondiscriminatory access requirement is the conduct of the LEC: “When a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage, this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of the market – may not qualify as either just or reasonable.” *Further Notice*, ¶ 135. Indeed, the RAA acknowledges that the conduct of ILECs is the reason that other competitive LECs have been and are being denied nondiscriminatory access to MTEs. RAA at 41. Specifically, RAA explains that “[i]n the building access situation, . . . it is the ILECs that have market power” and therefore “[i]t is extremely risky, if not impossible, for a building owner to deny access to the ILEC.” *Id.* As a

result, “the ILEC often gets favorable terms,” whereas CLECs, “are subject to market forces and must negotiate with building owners on a level playing field.” *Id.*¹²

RAA advances a similar challenge to the Commission’s authority under Section 205(a). It argues that the Commission “completely misreads the *Western Union* case” because “Section 205 does not grant any rulemaking authority.” RAA at 43, 44. That is clearly wrong. In *Western Union Tel. Co. v. FCC*, 665 F.2d 1126 (D.C. Cir. 1981), the Court of Appeals addressed a challenge to the Commission’s decision to require that charges for “terminals, local access lines . . . and message transmission be unbundled.” *Id.* at 1148. The Commission’s ruling was challenged on procedural grounds by a party claiming that Section 205(a) required that “the FCC should have held an evidentiary hearing before ordering unbundling.” *Id.* at 1151. The Court of Appeals did not conclude – as RAA suggests – that Section 205(a) did not apply; rather, it held that the “hearing” requirement of Section 205(a) was satisfied: “FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than an adjudicatory ratemaking proceeding.” *Id.* Any possible ambiguity on this point was resolved by the D.C. Circuit’s direct (and exclusive) reliance on the analysis in *AT&T v. FCC*, 572 F.2d 17, 21 (2d Cir. 1978). In that case, the Second Circuit held that “the hearing

¹² Contrary to RAA’s arguments, *Ambassador, Inc. v. United States*, 325 U.S. 317 (1946), provides additional support for the Commission’s proposal to adopt a nondiscriminatory access requirement on LECs serving MTEs. The *Ambassador* Court held that (i) “where a part of a subscriber’s business [the hotel] consists of retailing to patrons [hotel guests] a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its [the hotel] third party relationships” and (ii) “[s]uch a regulation is not invalid *per se* merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through facilities.” 325 U.S. at 323-24. There can be no doubt that if direct regulation of building owners is authorized, so too is a regulation directed at LECs providing service to MTEs that would, as an indirect effect, create economic incentives for building owners to allow nondiscriminatory access.

requirement of § 205(a) . . . was satisfied by the ‘notice and comment’ procedures” “initiated by the [FCC] by a Notice of Inquiry and Proposed Rulemaking.” *Id.* at 21, 23.

Finally, RAA argues that the Commission lacks the authority “to order a carrier not to serve a customer.” RAA at 49. Specifically, RAA contends that before a carrier could be required to “cu[t] off service to a building whose owner it believes to be discriminating unreasonably, the literal terms of [47 U.S.C. § 214(a)] would require the Commission to certify that ‘neither the present nor future public convenience and necessity will be adversely affected thereby.’” RAA at 49-50 (*quoting* 47 U.S.C § 214(a)). Section 214(a) applies to requests by telecommunications carriers seeking to discontinue their service, not orders by the FCC to prohibit a LEC from continuing to provide service when doing so would constitute an unreasonable practice in violation of Sections § 201(b) and 205(a) of the Act.¹³

RAA’s concern that the Commission’s nondiscriminatory access requirement would result in “cutting off service to wholly innocent subscribers” is overstated in two respects. First, MTE owners are extremely likely to insist that the LEC currently providing service not impede nondiscriminatory access to avoid putting themselves in the position of renting a building without phone service. Moreover, in the unlikely event that a building owner refused to allow CLECs to provide service after an adverse ruling, the Commission could fashion its remedy so that ILECs were prohibited solely from providing more lucrative retail services. In that way, services such as toll service, 911 service and the ILEC’s obligations under Section 251 would remain unaffected.

¹³ Of course, even if Section 214(a) was relevant here, the clause immediately after the language quoted by RAA qualifies the Commission’s responsibility by stating that “the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance . . . without regard to the provisions of this section.” 47 U.S.C. § 214(a).

C. The Proposed Nondiscrimination Regulation Of LECs Will Not Violate the Fifth Amendment.

The comments confirm that the nondiscriminatory access requirement contemplated by the Commission would not violate the Fifth Amendment.¹⁴

The Proposed Regulation Would Not Effect A Taking. The takings theory advocated by RAA – *i.e.*, that a party has suffered a ‘taking’ of private property based on government regulation of a third party’s conduct – is unprecedented. *See* AT&T Comments at 23. None of the cases cited by RAA remotely suggests otherwise. Rather, the cases cited by RAA that address “indirect” takings all deal with situations where an agency *directly* regulates the entity whose property has been taken, but employ an *indirect* means (*e.g.*, by placing a condition on the entity’s actions rather than directly requiring or forbidding it to act in a certain way).¹⁵ Here, of course, there will be no regulation – direct or indirect – of building owners.

For example, RAA’s reliance upon *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), highlights the analytical problems in its argument. In *Nollan*, the petitioners sought a development permit from the California Coastal Commission so they could replace the bungalow on their property with a larger house. *Id.* at 828. The California Commission determined that a larger house would block more of the ocean view, and conditioned its permit on the Nollan’s agreement to grant an uncompensated easement that would allow the public to pass through the

¹⁴ *See* RCN at 27; Smart Buildings at 17-20; Sprint at 6-8.

¹⁵ *See, e.g., Armstrong v. United States*, 364 U.S. 40, 48 (1960) (concluding that Government’s “total destruction” of value of lienholder’s property was an unconstitutional taking and “not a mere ‘consequential incidence’ of a valid regulatory measure); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 101 (1893) (concluding that federal government could not give a private entity the right to appropriate without compensation the property of a state); *Appeal of Public Serv. Co. of N.H.*, 454 A.2d 435, 440-41 (N.H. 1982) (concluding that public utilities commission’s regulation placing conditions on issuance of securities by utility company constituted a taking of the utility company’s property).

beachfront portion of their property. *Id.* The Supreme Court struck down the easement condition because there was a “lack of nexus between the condition and the original purpose of the building restriction.” *Id.* at 837. Because the California Commission’s action was directed against the *entity* asserting a taking, *Nollan* does not address whether the *indirect* effects of a regulation on one regulated party can constitute a taking of property from another unregulated party.

RAA’s reliance on *Lucas* is similarly misplaced. In *Lucas*, the petitioner purchased ocean-front property with the intent to build single-family residences. 505 U.S. at 1008. While the petitioner was planning the new buildings, the South Carolina legislature enacted a law increasing the size of the coastal zone in which new construction was barred, thereby encompassing petitioner’s land. *Id.* at 1008-09. The Supreme Court concluded that the South Carolina law effected a taking, even though no physical occupation occurred, because the law “denie[d] all economically beneficial or productive use of [petitioner’s] land.” *Id.* at 1015. Thus, the *Lucas* decision involves a regulation of a party who complained that a regulation of its property resulted in a taking and not, as here, a regulation in which the complaining *entity* [the MTE owner] is not regulated at all.¹⁶ In short, none of RAA’s cases – nor any other case that

¹⁶ RAA’s hypothetical suffers from similar problems. RAA argues that there is no principled distinction between the nondiscriminatory access rule and a proposal in which the Commission barred any communications provider from serving a *particular building* unless the building owner acceded to the Commission’s demands for free office space. Unlike here, RAA’s hypothetical quite clearly is directed at the building owner rather than a practice of a LEC that “places its competitors at an unfair competitive disadvantage.” *Further Notice*, ¶ 135. Moreover, even if the hypothetical were actually directed at the LEC, it does not require nondiscriminatory access – to the contrary, it requires discriminatory access by a single entity seeking preferential treatment – and therefore would not fall under the *Yee v. City of Escondido* line of cases. Lastly, unlike the Commission’s proposal, RAA’s hypothetical provides no guarantee of “just compensation,” but instead demands discriminatory, uncompensated access.

AT&T has found – supports the conclusion that there can be a taking where the entity asserting a takings claim is not the entity regulated by the government.

But even if the nondiscriminatory access proposal did regulate MTE owners directly, it would not constitute a taking. Because the proposal is triggered only when an MTE owner has already issued an invitation to a similarly situated LEC, the nondiscriminatory access requirement falls squarely within the line of cases concluding that, once a landowner issues an invitation, the government may implement a nondiscriminatory access requirement without effecting a *per se* taking. *See Yee v. City of Escondido*, 503 U.S. 519, 529 (1992).¹⁷

RAA's efforts to distinguish *Yee* are unavailing. *Yee* involved the interaction of two laws: a mobile home rent-control ordinance and a state law "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy." 503 U.S. at 523-24. Taken together, under these laws, "[p]ark owners [could] no longer . . . decide who their tenants w[ould] be." *Id.* at 526. The Supreme Court concluded that, because the laws essentially required non-discriminatory access, they must be analyzed as a regulatory taking. *Id.* at 528-29. That holding – which RAA ignores – is dispositive because there can be no doubt that the Commission's proposed non-discriminatory access requirement would easily pass muster under the *Penn Central* regulatory takings test. *See* AT&T Comments at 24-26.¹⁸

¹⁷ *See also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83-84 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

¹⁸ RAA's attempt to distinguish *Heart of Atlanta Motel* also is unpersuasive. RAA argues that *Heart of Atlanta* "involve[d] the consideration of specially protected constitutional interests that arise from immutable human characteristics" or "the regulation of temporary lodging in contrast to the permanent occupation by a party pursuing commercial activities on the property at issue." *See* RAA (Cooper, Carvin Analysis) at 12 n.12. Those purported distinctions are specious. *Heart of Atlanta* did not hold that any interests involved in the Civil Rights Act of 1964 provided a justification for ignoring the requirements of the Takings Clause. Rather, as the Supreme

The Proposed Regulation Expressly Provides For Just Compensation. RAA complains that the *Further Notice* does not set forth the precise formula by which just compensation will be measured. But RAA concedes that under the Fifth Amendment “what ‘is required is that a reasonable, certain, and adequate provision for obtaining compensation exist *at the time of the taking.*” RAA (Cooper, Carvin Analysis) at 20 (*quoting Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)) (emphasis added). That is, so long as the just compensation mechanism ultimately adopted is adequate – *i.e.*, is “a governmentally-established rate methodology, which, in turn, can be judged against applicable constitutional standards,” *id.* (Cooper, Carvin Analysis) at 21, it will be just as constitutional as the rate methodology upheld in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999). Accordingly, even if the proposed regulation would effect a taking, adoption of an express just compensation requirement, by ensuring that any LEC given access by a building owner pays the constitutionally requisite compensation for that access, obviates any possible constitutional problems. *See* AT&T Comments at 28-31.

The “just compensation” requirement also addresses the concerns highlighted in *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), and precludes any claim that the Communications Act must be construed “narrowly” to divest the Commission of authority to impose the nondiscrimination requirement. Even assuming that a reviewing court would apply *Bell Atlantic* to the proposed regulation,¹⁹ the Commission’s proposed regulations comply, as

Court has explained, *Heart of Atlanta* stands for the proposition that “[b]ecause they voluntarily open their property to occupation by others, [landowners] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.” *Yee*, 503 U.S. at 530.

¹⁹ In light of the D.C. Circuit’s decision not to apply *Bell Atlantic* in an analytically similar case, it is unclear that a court would even apply *Bell Atlantic* to the proposed regulation. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 687, 690 (D.C. Cir. 2000)

prompted by *Bell Atlantic*, to the constitutional standard of “just” compensation. *Bell Atlantic*, 24 F.3d at 1445 n.3. Because the Commission’s proposal would ensure “just compensation,” *Bell Atlantic* does not bar the Commission’s reasonable interpretation of its own statutes.

RAA also relies on *dicta* in *Riverside Bayview Homes*, 474 U.S. 121, 128-29 (1985). The facts in *Riverside Bayview Homes*, which RAA ignores, are instructive. There, the Supreme Court addressed regulations by the Army Corps of Engineers interpreting its authority to require permits for discharging material into “navigable waters,” which were defined to be “the waters of the United States.” *Id.* at 123. The Corps of Engineers interpreted “navigable waters” to include nonnavigable waters, on the ground that such waters are included in the term “waters of the United States.” *Id.* In reviewing this regulation, the Supreme Court rejected the Court of Appeals’ decision to adopt a narrowing construction to avoid a takings issue in light of the fact that the *implicit* availability of compensation rendered it unlikely that any taking problem would result. *Id.* at 127-28. *A fortiori*, the Commission’s proposed regulation would not warrant application of a narrowing construction because it includes an *explicit* “just compensation” provision. *Further Notice*, ¶ 147.²⁰

(applying *Chevron* deference to FERC’s decision that it had statutory authorization to order open access and concluding that there was no Takings Clause violation because “[i]f there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us”). Contrary to RAA’s suggestion, *GTE Serv. Corp. v. FCC* does not undermine this claim, for *GTE* dealt with the interpretation of the term “necessary” in 47 U.S.C. § 251(c)(6) – and not with the *Bell Atlantic* question. 205 F.3d 416, 419, 426 (D.C. Cir. 2000).

²⁰ RAA also directs the Commission to two additional sets of inapposite cases. The first set rejects efforts by private litigants to impart broad interpretations to the Cable Act of 1984, 47 U.S.C. § 541(a)(2), but simply does not apply to the interpretation by an agency of its own governing statutes, *Cf. Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). The second set is cited for the proposition that the executive branch must have statutory authority to take property. RAA (Cooper, Carvin Analysis) at 15 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (*en*

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

There is little dispute that the Commission, in implementing its nondiscriminatory access proposal, should draw no distinction between commercial and residential buildings.²¹ The Commission should, however, decline to apply a strict nondiscriminatory access standard to situations where there is a convergence of interest between the tenant and the building owner (such as governmental buildings and universities). *See* Cox at 12; Department of Defense at 10; Education Parties at 5-7.

Residential MTEs. The comments persuasively demonstrate that the Commission should apply a nondiscriminatory access rule to residential and commercial MTEs. *See* AT&T Comments at 32-33. No one disputes that the size of the residential MTE market is substantial, accounting for as much as 30 percent of all housing units nationwide. *Further Notice*, ¶ 15. "Residential tenants residing in MTEs should be able to choose the facilities-based telecommunications providers for themselves, just as commercial tenants should be permitted to choose their own telecommunications providers." Smart Buildings at 33. If CLECs "are denied access to a residential MTE completely, or if they are forced to pay exorbitant rates for access or are subject to unreasonable conditions, it is unlikely that competition will flourish in that market, to the detriment of the tenants of [residential MTEs]." Sprint at 9. Although the lease terms of residential tenants may be shorter than those of commercial tenants, "it is not at all clear that

banc), *vacated and remanded*, 471 U.S. 1113 (1985), *dismissed as moot on remand*, 788 F.2d 762 (1986) (*en banc*)). Those cases are irrelevant where, as here, the Commission has express statutory authority to promulgate the nondiscriminatory access proposal under Sections 201(b) and 205(a).

²¹ *See* Smart Buildings at 33-34; Bell South at 9-10; Sprint at 8-9; *cf.* SBC at 3-4; RCN at 24-26 (same); Comments of Telecommunications Research and Action Center ("TRAC") at 3.

tenants would choose to move from their home simply or largely because they are limited in their selection of telecommunications service provider.” *Id.* To the contrary, “it may well be the case that residential MTE tenants have relatively little leverage in this regard against a building owner who refuses to allow alternative service providers access to the MTE.” *Id.*²² Nor is an exemption warranted based on the size of a building or the number of tenants. *See* AT&T Comments at 34. As Smart Buildings explains, “[i]n light of Congress’ intent in the 1996 Act to promote competition for the benefit of all consumers, the Commission should avoid blanket limitations on competitive choice.” Smart Buildings at 34.

Government and Other Buildings Where There Is a Convergence of Interests. The comments also support the conclusion that in buildings serving transitory residents such as hotels, hospitals, and universities, the true tenant is best represented by the building owner and therefore a nondiscriminatory access rule would not enhance consumer choice or competition. *See* AT&T Comments at 34; Department of Defense at 5-6; Cox at 12 (citing rules adopted in Massachusetts that exempt hotels, nursing homes, hospitals and other transient environments).

Building LECs. No commentor provides any legitimate ground for exempting from the nondiscriminatory access requirement MTEs in which the building owner has entered into a relationship with a BLEC. Given the comments filed by various BLECs, AT&T remains concerned that the relationships between BLECs and building owners can serve to impede

²² *See also* AT&T Comments at 32-33. To be sure, some commenters maintain that regulation of LEC access arrangements is improper under all circumstances, *e.g.*, Community Associations Institute (“CAI”) at 2, but the Commission already has rejected these broad attacks in prohibiting exclusive access arrangements in the commercial MTE context, *Further Notice*, ¶ 27. Moreover, the argument that residential MTE owners wield less market power than commercial MTE owners, *see, e.g.*, CMS at 2-3; ICTA at 9, is contrary to the record. Although it may be more expensive in absolute terms for a business to move than a family, the costs associated with relocation of a residence are also substantial and the decision to move is informed by myriad concerns other than telecommunications service. *See* AT&T Comments at 32-33.

nondiscriminatory access by competitive LECs and therefore stifle consumer choice. *See* Smart Buildings at 4-8; AT&T Comments at 33-34. Indeed, the comments of some BLECs confirm that they intend to seek preferential terms and conditions of access to MTEs that run directly contrary to the thrust of the Commission's proposal. *See, e.g.,* Broadband at 16-17 (“[A]greements containing preferential or favorable terms . . . are in fact an indication that competition is developing”); CMS at 9 (“The nondiscriminatory access requirement proposed by the Commission . . . is inadvisable as a matter of law, policy, and practice”).

E. Implementation of Non-Discriminatory Access Rules.

The comments confirm that the “implementation issues” identified in the *Further Notice* are no barrier to the adoption of the Commission's nondiscriminatory access proposal. *See, e.g.,* Cox at ii, 12-15; AT&T Comments at 35-36; Smart Buildings at 34-42. Indeed, “[t]he Commission can address building access concerns by adopting a set of relatively simple requirements.” Cox at 12. Although a few commenters speculate that a nondiscriminatory access requirement would be unwieldy, *e.g.,* RAA at 52-56, Broadband at 6, the core of the proposal is reflected in the straight-forward and easily enforced principle that the Commission should “forbid an incumbent carrier from accepting building access on terms any more favorable than those available to any other carrier.” Cox at 13. Thus, RAA is simply wrong in asserting that the Commission's proposal does not involve any “benchmark” that would make it “relatively easy” to administer the Commission's requirement. RAA at 52. Indeed, the nondiscriminatory access proposal is no different in this regard than the Commission's

“requirement that U.S.-licensed carriers not accept ‘special concessions’ from their foreign corresponding carriers.” Cox at 13 (*quoting* 47 C.F.R. § 63.14); *see also* note 11, *supra*.²³

Apart from AT&T’s prior showing, the comments largely are silent as to whether the Commission’s proposed nondiscriminatory access requirement should be limited to situations where a tenant already has requested a particular carrier. *See* AT&T Comments at 36-37. There can be no question, however, that reliance on a tenant request as a triggering mechanism would (i) severely limit the ability of new entrants to compete against incumbent LECs because it would result in excessive delays, and (ii) hobble the ability of new entrants to compete with incumbent LECs with respect to new or newly renovated buildings that do not have any current tenants. *Id.* Moreover, adoption of such a trigger for a nondiscriminatory access requirement would itself be discriminatory because there is no evidence that ILECs must identify a tenant request prior to seeking access to an MTE.

Finally, no commentor offers any objection to expedited complaint procedures modeled on the existing procedures for enforcing the requirements of the Pole Attachment Act. *See Further Notice*, ¶ 158 n.349; *see also* 47 C.F.R. §§ 1.1401 to 1.1418 (“Pole Attachment Complaint Procedures”); *cf.* Smart Buildings at 35-42. Those procedures would address concerns that FCC adjudications could be too time-consuming and costly. RAA at 54-55. Indeed, the Commission previously adopted this “expedited review process” for Pole Attachment

²³ Broadband’s related argument that “it is not possible to determine a standard to determine what is ‘unreasonable’ discrimination” is incorrect. *See* Broadband at 7. Although a number of variables will inform the reasonableness of the conditions of access, that has not prevented the Commission from administering and enforcing a nondiscriminatory access requirement under 47 U.S.C. § 224(f), or applying the section 202 prohibition against unreasonable discrimination. There is no reason to believe that administration of the Commission’s proposal would be any different or more difficult. *See, e.g.*, 47 U.S.C. § 224(f) (mandating nondiscriminatory access but permitting denial of access based on “reasons of safety, reliability and generally applicable engineering purposes”).

disputes because there, as here, “time is of the essence.” First Report & Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16101, ¶ 1224 (1996) (“*Local Competition Order*”).

A nondiscriminatory access rule, of course, can only work if the competitive LEC is aware of the material terms of access between the MTE owner and the existing LEC that is already providing service to the MTE (generally an ILEC). Thus, when a competitive LEC seeks access to an MTE, the Commission should require the existing LEC to disclose, within a reasonable time, the terms of its access arrangements with the MTE owner. *See* AT&T Comments at 38.²⁴

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

There is broad consensus among the commenters that the Commission should extend its prohibition on exclusive access contracts to residential buildings. *See, e.g.*, SBC at 3; Smart Buildings at 33; Sprint at 8; TRAC at 3; Verizon at 2; BellSouth at 9; FPSC at 2. Moreover, allowing LECs to enforce existing agreements would merely extend the current anti-competitive “*status quo*.” RCN at 18; *see also* Smart Buildings at 42-43; AT&T Comments at 41-42. None of the opposing comments provides any persuasive basis for allowing such existing agreements to accomplish their intended anti-competitive effects.

²⁴ To the extent that the agreement between the ILEC and MTE owner has not previously been reduced to writing, the ILEC should be required to do so within a reasonable 30-day period after the CLEC has requested MTE access. In the event that the ILEC fails to comply, the Commission should presume that any payments demanded by the MTE owner from the CLEC to permit access would be discriminatory.

A. The Comments Strongly Support Extension of the Commission's Prohibition On Exclusive Contracts to Residential MTEs.

Both CLECs, ILECs and governmental authorities agree that the Commission should not draw arbitrary lines between its treatment of commercial MTEs and residential MTEs. For example, the Florida Public Service Commission explains that, based on its analysis, the “prohibition on exclusive access contracts . . . should be extended to residential MTEs” because “[e]xclusionary contracts are inherently anticompetitive and . . . against public policy.” FPSC at 2 (*quoting* 1999 Florida Report on Access by Telecommunications Companies to Customers in Multitenant Environments at 40). ILECs agree that the prohibition should be extended to residential MTEs because there is “no reason to distinguish between residential and commercial MTEs for the purposes of establishing building access regulation.” BellSouth at 9. As Verizon explains, the “lack of competitive choice is the same whether the tenants are businesses or consumers.” Verizon at 3.

Some commenters argue, however, that exclusive access agreements are necessary in residential MTEs to ensure high-quality, inexpensive telecommunications service for their tenants. *See, e.g.*, RAA at 60-65; CMS at 3-4; CAI at 2-3. But that argument ignores that “[n]umerous [CLECs] and ILECs are able to provide high-quality services at reasonable prices without exclusive contracts and have been doing so for several years.” SBC at 3. As the Telecommunications Research and Action Center has noted, “[e]xclusive contracts do little to promote consumer choice and competition” and “one need only look at the disparity between the telephone and advanced service options available to single family homeowners and tenants in residential MTEs to understand why exclusive contracts should be prohibited.” TRAC at 3.

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

Given the consensus that exclusive access agreements thwart competition and deny MTE tenants competitive choices, it follows that LECs also should be prohibited from enforcing existing exclusive access arrangements. RAA suggests that the Commission's authority to "abrogate existing contracts" is questionable. RAA at 65. The Commission's authority in this context, however, is well grounded. The D.C. Circuit has held that "the Commission has the power to . . . modify . . . provisions of private contracts when necessary to serve the public interest." *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *see also* AT&T Comments at 41 n.26 (citing additional precedent). RAA also contends that the Commission need not act because "as existing contracts expire, they will necessarily be replaced by non-exclusive contracts." RAA at 66. But that approach merely extends the *status quo* in direct contravention of Congress' command that the Commission remove "economic and operational impediments" to competition. *Local Competition Order*, 11 FCC Rcd. at 15505, ¶ 3. In the meantime, allowing such contracts to remain in effect would permit incumbent providers to "maintain their stranglehold on consumers while new, innovative competitors . . . must wait for exclusive contracts to expire, in some instances as long as 15 years." RCN at 18.

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

In contrast to the broad agreement regarding the anti-competitive impact of exclusive access arrangements, the comments on preferential marketing agreements are far more ambivalent. Some argue that preferential marketing arrangements are necessary to spur

facilities-based competition. *See, e.g., Smart Buildings* at 45.²⁵ Others point out that such arrangements may “impede competition.” *FPSC* at 2.²⁶ There should thus be no doubt that “the balance that the Commission must strike is a delicate one.” *AT&T Comments* at 44.

In striking that balance, the Commission should consider that none of the comments undermines the conclusion that ILECs and CLECs are not similarly situated with respect to preferential arrangements. On the one hand, it is clear that ILECs do not need additional incentives sought by some CLECs to provide service to MTEs because ILECs already provide such services to almost all consumers through existing facilities. *See AT&T Comments* at 44. Moreover, the ILECs’ established monopoly positions create acute risks that preferential marketing arrangements will be imposed upon otherwise unwilling MTE owners through the force of their substantial “market power.” *See RAA* at 41. Although the Commission has previously expressed concerns regarding “competitive neutrality,” *Further Notice*, ¶ 30, “in considering the appropriate limits of regulatory involvement, . . . it is important that the Commission draw a distinction between unfair competitive advantages that result from prior monopolistic relationships, and appropriate competitive advantages that result from offering innovative and advanced services.” *Broadband* at 17. In these circumstances, it is clear that, at least in the near term, the Commission should prohibit incumbent LECs (but not CLECs) from entering into preferential marketing arrangements until competition and consumer choice have had an adequate opportunity to take root.

²⁵ *See also CMS* at 7 (“exclusive marketing agreements are a functional, middle-ground MTE business practice that the Commission should view as a win-win situation”); *Cypress* at 9; *ICTA* at 12; *RAA* at 66-67; *SBC* at 5; *Verizon* at 3.

²⁶ *See Smart Buildings* at 45 (“the Commission should remain prepared to address preferential marketing arrangements that interfere unreasonably with the ability of other carriers to obtain access to MTEs”); *see also AT&T Comments* at 43-44.

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

It comes as no surprise that ILECs and other utilities seek to minimize their obligations under Section 224 and thus bristle at the suggestion that they should be required to provide nondiscriminatory access to any “right-of-way” that they own or control. They argue that their access obligations are triggered only when their “right-of-way” is “a defined pathway that a utility either is actually using or has specifically identified and obtained the right to use in connection with its transmission and distribution network.” *Further Notice*, ¶ 169.²⁷ Although this categorical definition adopted by the Commission sets an appropriate floor on the obligations of utilities, the Commission should reject efforts to transform this floor into a ceiling. *See AT&T Comments at 46-48.*²⁸ Instead, the Commission should allow for case-by-case determination whether a CLEC is entitled to nondiscriminatory access where a utility has acquired access rights that are broader than the Commission’s minimal definition of “right-of-way.” *See id.* at 48; *Smart Buildings at 31-32.*

In arguing to the contrary, the utilities ignore that nondiscriminatory access obligations are triggered only when the right-of-way is “owned or controlled” by the utility. 47 U.S.C. § 224(f)(1). As a result, if “[e]lectric utilities simply do not have the right . . . to place their wires outside of the pathways which have been identified for electric wiring,” (CE/DP at 4; *see also Florida Power at ii, 15*), then their lack of “ownership” or “control” would limit their obligations under Section 224(f). *See AT&T Comments at 48.* Similarly, Verizon argues that, “[a]t most,

²⁷ *See, e.g., BellSouth at 10; Broadband at 19-21; SBC 6-7; UTC/EEI 3-5; Verizon 10-12; RAA 57-60; Commonwealth Edison Co. and Duke Power 2-4; Florida Power & Light 6-18; ICTA 6-9.*

²⁸ *See also Smart Buildings at 20-33* (“if a utility could access an area of a building pursuant to its existing access rights to provide service to tenants, a CLEC should be able to do the same pursuant to the non-discrimination requirement of Section 224”).

[the utility] controls only the specific space in the MTE in which it has the right to place its telecommunications facilities.” Verizon at 8. But under Section 224(f), where the utility has obtained ownership or control of facilities throughout the building, a CLEC should be entitled to the same nondiscriminatory access. *See* 47 U.S.C. 224(f)(1).²⁹

In the end, the arguments of the utilities rest on the counterintuitive notion that they must provide nondiscriminatory access when they have obtained *narrow* and *precisely defined* access rights, but not when they have obtained *broad* and *unbounded* rights of access from MTE owners. That position makes no sense and cannot be reconciled with the nondiscriminatory access provision of Section 224(f), which requires, at its core, that “a utility may not favor itself over other parties.” *Local Competition Order*, 11 FCC Rcd. at 16073, ¶ 1157. Indeed, adoption of the utilities’ categorical and artificial limitation on “right-of-way” would deny the Commission the flexibility necessary where the access needs of a CLEC do not track an ILEC’s current access needs, but nevertheless fall within the ILEC’s broad access rights under its arrangement with the MTE owner.³⁰

V. THE COMMISSION SHOULD NOT MODIFY ITS RULES TO ALLOW TELECOMMUNICATIONS CARRIERS TO ACQUIRE MVPD HOME RUN WIRING.

The comments confirm (by their silence) that there is little interest or enthusiasm for the Commission’s proposal regarding the extension of the cable inside wiring rules to telecommunications providers. Apart from AT&T, only two parties even addressed the

²⁹ That the MTE owner has ceded “ownership” or “control” to the utility is a complete response to any claims that the Commission’s definition effects a taking from the MTE owner. *See* RAA at 59-60; SBC at 7. Similarly, there are no takings concerns with respect to the utility because it would be compensated for the access that it provides. *See* 47 U.S.C. § 224(b)(1).

³⁰ Adoption of expedited procedures, *see* AT&T Comments at 48, will largely address concerns that “Section 224 will provide a new and fertile field for litigation,” ICTA at 9.

Commission's proposal, and they offer nothing more than bare conclusions. *Compare* TRAC at 3-4 (Commission's proposal "is inadequate in ensuring tenants choice") *with* ICTA at 14 ("extension of the Commission's rules governing the disposition of cable inside wiring would tend to defeat the pro-competitive purposes of those rules"). That lack of enthusiasm is an implicit confirmation that extension of the cable inside wiring rules to telecommunications providers is not necessary to advance competition and therefore should not be adopted. *See* AT&T Comments at 48-55.

CONCLUSION

For the foregoing reasons, the Commission should (i) adopt a non-discriminatory access obligation on LECs, (ii) extend the prohibition on exclusive contracts to residential MTEs and rule that existing exclusive contracts may not be enforced, (iii) prohibit incumbent LEC preferential marketing arrangements, (iv) modify its construction of the scope of "right-of-way" obligations under section 224 to allow for case-by-case analysis of access requests falling outside the Commission's categorical definition, and (v) decline to extend the cable inside wiring rules to telecommunications providers.

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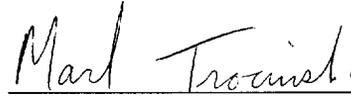
February 21, 2001

APPENDIX A:
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E. Ann Bailey
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Florida Power & Light Co. (“Florida Power”)
Florida Public Service Commission (“FPSC”)
General Services Administration (“GSA”)
Independent Cable & Telecommunications Association (“ICTA” or “IMCC”)
PrimeLink, Inc. (“PrimeLink”)
RCN Telecom Services, Inc., Utilicom Networks LLC and Carolina Broadband, Inc. (“RCN”)
Real Access Alliance (“RAA”)
SBC Communications, Inc. (“SBC”)
Smart Buildings Policy Project (“Smart Buildings”)
Sprint Corp. (“Sprint”)
Telecommunications Research and Action Center (“TRAC”)
United States Department of Defense (“Department of Defense”)
United Telecom Council and Edison Electric Institute (“UTC”)
Verizon Communications Corp. (“Verizon”)
Winstar Communications, Inc. (“Winstar”)

CERTIFICATE OF SERVICE

I, Mark Trocinski, do hereby certify that, on this 21st day of February, 2001, I served a copy of the Reply Comments of AT&T Corp. via First Class mail on the attached service list.



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