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

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

FURTHER REPLY COMMENTS OF THE REAL ACCESS ALLIANCE

Of Counsel:
Gerard Lavery Lederer
Vice President - Industry and Government Affairs
Building Owners and Managers Association International
Suite 300
1201 New York Avenue, N.W.
Washington, D.C. 20005

Matthew C. Ames
Nicholas P. Miller
Mitsuko R. Herrera
Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-0600

Attorneys for the Real Access Alliance

February 21, 2001

Roger Platt
Vice President and Counsel
The Real Estate Roundtable
Suite 1100
1420 New York Avenue, N.W.
Washington, D.C. 20005

Bruce Lundegren
National Association of Home Builders
1201 15th Street N.W.
Washington, DC 20005

Reba Raffaelli
Vice President & General Counsel
National Association of Industrial &
Office Properties
2201 Cooperative Way
Herndon, VA 20171

Tony Edwards
Senior Vice President and General Counsel
National Association of Real Estate
Investment Trusts
1875 Eye Street, N.W., Suite 600
Washington, D.C. 20006

Clarine Nardi Riddle
General Counsel
National Multi Housing Council
Suite 540
1850 M Street, N.W.
Washington, DC 20036

Steven S. Rosenthal
Cooper, Carvin & Rosenthal, PLLC
Suite 200
1500 K Street, N.W.
Washington, DC 20005

SUMMARY

If there is one issue on which the Federal Communications Commission (the "Commission" or "FCC") and the parties responding to the Further Notice of Proposed Rulemaking in WT Docket No. 99-217 (rel. Oct. 25, 2000) (the "FNPRM") appear to agree in this proceeding, it is that the interests of consumers are paramount. The Commission pursues competition in the telecommunications marketplace because it anticipates that competition will lead to better service at lower rates for subscribers. Telecommunications providers are presumably in business to meet the telecommunications needs of their customers. And the Real Access Alliance (the "Alliance" or "RAA") has demonstrated - time and time again - that building owners cannot succeed if they do not ensure that their tenants have access to the telecommunications services they desire.

In these Reply Comments, the Alliance demonstrates once more that tenants in commercial buildings are receiving the services they want, and that building owners do not stand in their way when they need service from competitive local exchange carriers ("CLECs") or other providers. Knowledge Systems and Research, Inc. ("KS&R"), recently conducted a nationwide survey of commercial tenants on behalf of the Alliance. KS&R interviewed 454 respondents chosen from a random sample representing a wide range of businesses leasing space in commercial buildings of all sorts. The survey, which had a margin of error of +/-4.6%, found:

- 97% of all business tenants were "satisfied" or "somewhat satisfied" with their current telecommunications service. 94% stated that they had no telecommunications needs that were not being met at their current location.

- 91% of all business tenants were aware that they can choose alternative telecommunications providers, and 23% actually placed a request for service with such a company in the last year.

- The vast majority of business tenants who chose an alternative provider were able to receive service from the alternative provider and were satisfied with their alternative service.

- Only three respondents – one percent of the total sample -- reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.

- A substantial percentage of business tenants – 39% -- would move at the end of their leases if their telecommunications needs could not be met at their current locations.

- The median lease term of respondents was three years, and the median time remaining on their leases was one year.

This survey, consistent with all the other information the Alliance has provided the Commission, demonstrates that Commission intervention in a competitive market is unwarranted. In addition, the Alliance is continuing with its voluntary initiative to develop and implement a model license agreement. The Alliance respectfully asks the Commission to urge the telecommunications industry to cooperate with the Alliance's voluntary effort, as the best way to achieve the goals of all parties. We also repeat our offer to participate in a joint study.

The remedies proposed in the FNPRM by the CLECs, by contrast, will not achieve the Commission's policy goals. In particular, the Alliance continues to believe that the remedy advocated by many CLECs is not only inappropriate but unlawful. Cutting off service to tenants in buildings whose owners do not comply with the "nondiscrimination" standard proposed by the CLECs would pose a significant threat of harm to telecommunications subscribers and therefore contradicts the Commission's goals and purpose.

In any event, the CLECs have not proposed a workable regulatory model. They completely fail to recognize that agreements for building access are agreements for the use of real estate and thus outside the Commission's jurisdiction. For that reason, the Commission cannot extend its ban on exclusive contracts to residential buildings. Furthermore, the Commission

should not regulate on the basis of protecting a particular company's business plan. Although larger CLECs aimed at serving high-end buildings might be willing to reject exclusive residential agreements, smaller companies need them to assure a return on investment. Building owners support exclusive contracts because they provide an opportunity to create viable alternatives to the incumbent providers. Mandatory access in any form will ultimately reduce competition, by forcing innovators out of the market.

In addition, the CLECs have not explained how a "nondiscriminatory" standard would work. Building owners would be faced with the prospect of entering into agreements without knowing whether they would hold up if challenged, because neither the FNPRM nor the record establish reasonable standards that an owner might use to evaluate its requirements. The Commission cannot develop a fair regulatory structure by adjudicating owners' rights in a vacuum; due process demands that the Commission first articulate some clear and rational standards.

Nor have the CLECs found a way for the Commission to regulate building access without violating the Takings Clause of the Fifth Amendment. Even "indirect" regulation would constitute a *per se* taking. The arguments put forth by the Smart Buildings Policy Project ("SBPP") in particular are circular, essentially saying that Commission would not be taking property if it restricted property rights, because if it did so, building owners would have no rights to be taken. The mere fact that the Commission has had to address the takings issue so often and in so many forms amply illustrates that it should not be treading in this field without express authority from Congress.

The CLECs also have failed to demonstrate that any of the state regulatory models are appropriate. None of the state models involves "indirect" regulation, and none is as extensive as

the approach proposed in the FNPRM. Furthermore, state regulation raises the same Fifth Amendment issues as federal regulation, and the same difficulties regarding standards and administration.

Finally, SBPP and other advocates of regulation repeatedly misstate key principles of property law. The Commission has already gone astray by applying Section 224 to facilities inside buildings, something that Congress never intended. There is no "federally granted right of access" to a building, even if a building contains utility facilities. To extend Section 224 to any area to which a utility might conceivably have access would unquestionably involve a taking of the building owner's property; utility access rights are fixed when the facilities are installed, so even if Section 224 applied, a CLEC could not use other areas of the building without compensating the owner.

In conclusion, the Commission should terminate this proceeding. The CLECs will never be viable competitors as long as they think they can run to the Commission for relief any time they have a business problem. Building owners are prepared to work with telecommunications providers to ensure that their mutual customers are satisfied and successful. But the telecommunications industry must recognize the enormous contribution that the real estate industry makes by creating markets for providers to serve, just as the real estate industry has long recognized the needs of tenants for access to telecommunications services.

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FURTHER REPLY COMMENTS OF THE REAL ACCESS ALLIANCE

INTRODUCTION

The Real Access Alliance (the "RAA" or the "Alliance")[1] submits these Further Reply Comments in response to the Further Notice of Proposed Rulemaking issued by the Federal Communications Commission (the "FCC" or the "Commission") in WT Docket No. 99-217 (the "FNPRM").[2] The comments of other parties in this proceeding – particularly the competitive local exchange carriers (the "CLECs") – make two points perfectly clear: (1) the telecommunications industry is entirely too dependent on the federal regulatory process; and (2) regulation of building access is unwarranted.

The telecommunications industry seems unable to break a habit of reliance on regulatory favors formed during long years in a monopoly environment. The CLECs in particular apparently believe that the Commission's only purpose is to guarantee their success. Of course, the CLECs disguise their self-interest by feigning concern for promoting "competition" and the welfare of building tenants. Despite numerous opportunities, however, the CLECs have been unable to demonstrate that building owners deny them access to buildings. The CLECs from the beginning have relied on nothing more than anonymous anecdotes to support their case – evidence so weak that in any other forum it would have been ignored. Having been asked to

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

[2] *In the Matter of Promotion of Competitive Networks*, WT Docket No. 99-217, ___ FCC Rcd. ___, (released Oct. 25, 2000) at ¶ 194. The Alliance submitted its Further Comments in response to the FNPRM on January 22, 2001 (the "Further Comments").

refresh the record in the FNPRM, they have merely rehashed their original arguments and provided no quantitative data to support their claims.

Furthermore, and ultimately more important, is the lack of any evidence that tenants believe there is a problem: other than a handful of form letters, not a single building tenant has filed comments in this proceeding or a complaint with the Commission about the terms of building access. In contrast, in these reply comments the Alliance will describe the results of a new statistically-valid survey of tenants in commercial buildings, which shows that tenants receive the services they want, and that building owners are not preventing them from getting those services.

The CLECs' position might be more worthy of attention if they proposed a fair, reasonable solution fitting to a competitive market place. For example, they claim that they are willing to pay building owners for the right to occupy space in buildings. But then they turn around and say that if an incumbent local exchange carrier ("ILEC") is serving a building without paying for access, the CLEC should not have to either; since the ILECs rarely pay for access and generally treat building owners as high-handedly as they do CLECs, the truth is that the CLECs want a free ride. All parties know – and indeed have acknowledged -- that the ILECs' rights are a legacy of the past monopoly marketplace, and that building owners had no choice but to grant access on those terms. We agree that the ILECs are often uncooperative. But that does not mean that CLECs should have the benefit of the ILECs' monopoly legacy, nor even that the ILECs should continue to have it. A reasonable regulatory proposal would not seek to perpetuate the distortions of the monopoly market going forward, but to remove them.

The CLECs have had the opportunity to make their case, and have failed repeatedly. The Commission does not owe anybody a living, and it is time to cut the apron strings. While the

Alliance will cooperate with the Commission and will continue to pursue its previously-announced voluntary commitments, we again urge the Commission to terminate this proceeding.

I. RATHER THAN RELYING ON REGULATION TO ACHIEVE SHORT-TERM BENEFITS, THE COMMISSION SHOULD URGE ALL CARRIERS TO COOPERATE WITH THE RAA'S VOLUNTARY PROCESS.

In December 1998, then-Commissioner Powell spoke at a convention of the Association of Local Telecommunications Services. Commissioner Powell praised ALTS for the entrepreneurial, competitive spirit of its members, and urged the CLECs to retain that spirit, saying:

> What I urge most is that you keep to the message that heavy regulation in the long run is a hindrance to opportunity. At times, as I have observed, it is tempting to play the regulatory "game" in the way the incumbents often do. Begging for regulatory protection. Seeking regulatory favoritism that raise[s] the costs of your competitors. The "game" is fraught with uncertainty, vicissitudes and delay, subjecting your business to the whims of politicians and regulators. Relying too heavily on current regulatory distortions can provide short-term benefits, but it also perpetuates these and other distortions that will not necessarily benefit you over time.

"Local Competition .. CLECs In the Midst of an Explosion," Commissioner Powell, Before the Association of Local Telecommunications Services, (Dec. 2, 1998) at p. 6.

Sadly, the CLEC industry has ignored this advice. Rather than rely on the market and their own entrepreneurial skills, most CLECs have fallen into the very trap Commissioner Powell counseled them to avoid. Cox Communications, for example, specifically rejects "a 'free market' solution to building access problems."[3] The Alliance, on the other hand, is confident that the voluntary commitments undertaken by the real estate industry can yield great benefits. For this to happen, however, the Commission must promote the voluntary process by rejecting calls for regulation of building access. Any suggestion that regulation may be needed or

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[3] Cox Comments at 14.

appropriate will only encourage the CLECs to refuse to cooperate with the voluntary commitment process.

A. The RAA Has Moved Quickly to Implement Its Voluntary Commitments and Develop the Model License Agreement.

In July 2000, the Alliance first committed itself to developing model contracts and best practices for standardizing the terms and improving the speed at which carriers obtain access to buildings. We provided specific details of those practices in September 2000, and 12 of the largest property owners in the country publicly committed to support them. Considering the size and diversity of the real estate industry, this was no small achievement.

Since making the initial commitment, the Alliance has worked very hard to develop the model lease. The Alliance retained expert outside counsel to review the terms of existing agreements and distill them into a model document. The Alliance then posted that document on its Web site, and, beginning on December 15, 2000, circulated it to the SBPP and individual CLECs for comment. The Alliance is now revising the model document and considering ways to establish the proposed clearinghouse for building access complaints. Attached as Exhibit A is a summary of the implementation steps taken by the Alliance's members, prepared by Roger Platt, Coordinator of the Alliance's Best Practices Implementation effort (the "Implementation Report").

Despite these efforts, key CLEC representatives criticize the commitments as "unimplemented," "ineffective," and "illusory."[4] AT&T claims the initiative has not been

[4] SBPP Comments at 4.

implemented expeditiously.[5] The charge that the commitments remain unimplemented is false, as described in the Implementation Report. Furthermore, the effort has barely begun. The voluntary commitments will only be ineffective and illusory if the CLEC industry refuses to cooperate.

We have done everything we can to meet our original commitment and will continue to pursue that approach diligently.

B. The RAA Has Received Valuable Comments from Telecommunications Providers Regarding the Model License Agreement, and Continues to Seek Such Comments.

Some CLECs, including WinStar and Teligent, have offered valuable comments on the model license agreement.[6] The Alliance is currently evaluating these comments and discussing them with leading real estate companies. Many have already been incorporated into the model document. We intend to incorporate additional comments and then circulate the revised draft in early March for a final review by real estate owners and telecommunications companies.

Unfortunately, as noted earlier, some parties have not participated as constructively as they might have. AT&T, as noted above, has communicated its concerns to the FCC and has chosen not to participate in the development of the model agreement. SBPP has criticized in general terms the model document in its most recent comments in this docket, even though to

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[5] AT&T Comments at 14. AT&T also lists a number of criticisms of the model agreement at pp. 13-15 of its comments. We will not address these in detail here, as this is not the proper forum for discussing the model. Instead, we urge AT&T to participate in discussions with the RAA intended to resolve such concerns.

[6] We are also gratified by the most recent comments submitted by WinStar in this proceeding, in which Winstar applauds the RAA's efforts and expresses its intention to continue to participate in the voluntary process. Winstar comments both in this proceeding and regarding the model lease have largely been constructive and are being given careful consideration by the RAA. Nevertheless, the RAA does disagree with a number of points raised by Winstar, in its FCC filing as further discussed herein.

date it has not provided any specific written comments to the Alliance. Nonetheless, as stated in the Implementation Report, SBPP has indicated that it is encouraging its members to comment individually, and we appreciate its support in this regard.

C. Commission Involvement in the Process Could Delay Development of Market-Based Solutions and Would Be Tantamount to Regulation.

SBPP insists that the Commission must participate in the preparation of the model document.[7] Commission involvement would be unnecessary and counterproductive, however, and would defeat the entire purpose of the voluntary process. The CLECs are not interested in fair, balanced, market-based solutions; they would prefer to use the threat of regulation to strong-arm the real estate industry into accepting their terms. Consequently, FCC involvement would be tantamount to dictating the terms of the model agreement. Furthermore, FCC involvement is inappropriate because building access agreements are real estate transactions and therefore outside the scope of the Commission's expertise and jurisdiction.

D. The RAA Represents the National Leadership of the Real Estate Industry, and Its Recommendations Regarding Model Documents and Best Practices Will Carry Great Weight.

The CLECs also attempt to undermine the effectiveness of the voluntary commitments by claiming that the RAA does not represent the entire real estate industry, or at least not enough of the industry to matter.[8] Nothing could be further from the truth. The combined membership of the associations that make up the RAA exceeds one million individuals and companies, and BOMA alone represents the owners and managers of more than 8 billion square feet of real estate. NAREIT represents over 95% of the publicly-traded real estate operating companies,

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[7] SBPP Comments at 3.

[8] AT&T Comments at 13; SBPP Comments at 3; Winstar Comments at 4.

including all publicly-traded office companies. The initial group of building owners committed to the best practices included a group of the largest privately-owned and the four largest publicly-held real estate companies in the country. Those companies collectively own or operate over 250 million square feet of office space – the equivalent of about twice the total office space in downtown Washington, D.C. The Alliance, through The Real Estate Roundtable, also represents senior executives of the 85 largest real estate owners, developers and lenders in the country. These individuals, as well as many others of the leading members and the senior staff of the associations making up the RAA, appear frequently at industry conferences. In that role, these individuals help inform and instruct their fellow real estate professionals, and chart the course for the industry. The Alliance, therefore, has the ability to help the telecommunications industry achieve its goals, if that industry is willing to reach a fair, mutually-agreeable, and reasonable compromise on what constitute best practices.

II. THE OVERWHELMING WEIGHT OF THE EVIDENCE BEFORE THE COMMISSION CONTINUES TO SHOW THAT REGULATION OF BUILDING ACCESS IS UNNECESSARY.

Commission action to regulate building access is unnecessary. All the available evidence demonstrates that building access issues can be efficiently resolved in the marketplace without intervention by the Commission.[9] The new tenant survey discussed below is further proof. The CLECs have offered no evidence to the contrary.

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[9] *See generally* Further Comments, Part I. Attached as Exhibit B is the Declaration of Scott Lyle, Vice President of Telecommunications and Technology Services for Arden Realty, Inc., which supports the statements in the Further Comments regarding Arden's experience.

A. The Latest Survey of Office Tenants Shows that They Are Receiving Telecommunications Services from the Providers of their Choice, and that Building Owners Do Not Prevent Tenants from Obtaining those Services.

From the beginning, the Alliance has believed that a relatively simple factual investigation could establish that building access is simply not a legitimate problem. Accordingly, we have sought to provide quantitative data to prove that point.[10] The Alliance continues to believe that sound statistical survey research is the most objective and accurate method of gauging the state of the market. The Alliance again proposes that the Alliance and telecommunications industry work with the Commission to draft a survey questionnaire that would address the salient issues and concerns that the Commission has in the past felt should be answered in order to better understand the building access issue. The Alliance proposes that a reputable survey research firm acceptable to all parties be retained to conduct the survey, and that the Alliance and the telecommunications industry each pay half the cost of conducting the survey. The truth is that this is not a very complicated issue and the facts speak for themselves.

In keeping with this longstanding view, the Alliance most recently decided to get to the heart of the matter by determining whether the true beneficiaries of building access -- tenants in multi-tenant environments -- believe there is a "bottleneck" problem. The Alliance accordingly submits to the Commission the findings of its most recent survey, demonstrating that commercial building tenants are highly satisfied with the level of telecommunications services that they are

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[10] In August 1999, the Alliance commissioned a survey regarding access granted to competitive telecommunications service providers by real estate owners and managers. *In the Matter of Promotion of Competitive Networks*, Joint Comments of Building Owners and Managers Association et al., WT 99-217 (filed Aug. 27, 1999) (the "August Comments"), at Exhibit C. In response to requests for additional data made by the Commission staff during the *ex parte* period, BOMA financed and submitted an additional study regarding demand for telecommunications service by tenants and building owner responses to such demands. "Partnering in the Information Age: Critical Connections," submitted to the Commission as *In the Matter of Promotion of Competitive Networks*, *Ex Parte* Letter from Real Access Alliance, WT 99-217 (June 30, 2000).

now receiving.[11] This survey conclusively demonstrates that FCC regulation is unnecessary – commercial tenants are not having a problem obtaining telecommunications service from competitive providers, and building owners are not standing in the way.

The Alliance commissioned a nationwide survey of a random sample of commercial tenants, which was conducted by Knowledge Systems and Research, Inc., in January and February 2001. The survey sample included urban, suburban, and rural businesses.[12] On average, a survey respondent was located in a 2 or 3 story building, which is typical of commercial buildings across the country.[13] The survey, however, also reached consumers in much larger buildings. The respondents included retail, professional services, finance, insurance, real estate, healthcare, manufacturing, educational, government, not-for-profit, consulting, wholesale trade, construction, transportation, utilities, leisure, lodging, tourism and other service industry businesses.

The purpose of the survey was to determine the overall level of satisfaction of commercial building tenants with their telecommunications services, their awareness of alternative telecommunications providers, their ability to get service requests from alternative providers accepted and installed on time, whether building management ever denied their requests to obtain service from their chosen alternative service provider, and whether tenants would consider moving if their telecommunications needs were not met at their current location. Twelve to fifteen minute interviews were conducted with 454 senior decision makers for

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[11] Telecommunications Services Access: Business Tenant Survey, February 13, 2001, attached as Exhibit C ("Business Tenant Survey").

[12] Business Tenant Survey at 21. 53% of respondents were located in urban areas, 34% in suburban, and 13% in rural areas. *Id.* More information on the survey methodology is available on request.

telecommunications services for each business. The survey had a margin of error of +/-4.6%. The survey found:

- Almost all business tenants are either satisfied or very satisfied with their current choices of provider telecommunications service.
- Almost all business tenants are aware that they can choose alternative telecommunications providers.
- The vast majority of business tenants who chose an alternative provider were able to receive service from the alternative provider and are satisfied with their alternative service.
- Only three respondents (less than 1% of those surveyed) reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.
- A substantial percentage of business tenants would move at the end of their lease if their telecommunications needs could not be met at their current location.
- The median lease term is three years, and the median time remaining on a lease is one year.[14]

Business Tenants in MTEs Are Satisfied With Their Telecommunications Service.

Commercial MTE tenants are satisfied with their telecommunications service. Of the 454 respondents, 69% are very satisfied with their telecommunications service and 28% are

[13] *Id* at 21. The average number of floors in a respondent's building was 3.6, and the median number of floors was 2.

[14] This supports the three to five year lease term reported in our August Comments at p. 7.

somewhat satisfied.[15] Only 3% of respondents were not at all satisfied with their telecommunications service.[16] Furthermore, 94% of respondents stated that their business does not have any telecommunications needs which are not being met at their current MTE location.[17]

Business Tenants Are Aware That They Can Choose to Receive Service from Alternative Telecommunications Providers.

Nine-one percent of the respondents are aware that they can choose to receive services from alternative service providers.[18] One hundred six respondents (23%) have placed at least one request for service with someone other than their incumbent telecommunications provider in the past three years.[19] Among these 106 respondents, 87% report that the alternative service provider was able to accept all of their service requests.[20] Of 100 respondents that had service requests accepted by alternative telecommunications providers, 87% report that that they received service by the agreed-upon date.[21] For those that did not receive service by the agreed upon date, on average, the problem was resolved within one month.[22]

Business Tenants Who Do Choose Alternative Service Providers Have Satisfaction Rates Equivalent to Business Tenants in the Aggregate.

Of 100 survey respondents that had their service requests accepted by alternative telecommunications providers, 66% stated that they were very satisfied with service from the

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[15] *Id.* at 8.

[16] *Id.* at 9.

[17] *Id.* at 9. Of the 26 respondents whose needs were not being met, 43% need a DSL connection, 19% want a different Internet connection, and 19% just want better service. *Id.*

[18] *Id.* at 12.

[19] *Id.* at 12.

[20] *Id.* at 13. 9% reported that some service requests were accepted, and some were denied. 2% reported that service requests were denied. *Id.*

[21] *Id.* at 14.

alternative service provider, and 24% reported that they were somewhat satisfied.[23] This satisfaction rate with alternative service providers is just slightly less than the satisfaction rate reported among all respondents (69% very satisfied; 28% somewhat satisfied). Furthermore, of these 100 respondents, 38% reported their experience with the alternative service providers was excellent or good, and 25% reported that it was smooth or easy.[24]

Business Tenants Overwhelmingly Report That Building Owners Are Not Impeding Access to Alternative Service Providers.

The survey confirms that building owners are not blocking tenant access to competitive telecommunications services. Only 3 respondents -- less than 1% of those surveyed -- answered "yes" to the question: "Has your building management ever denied a request by your company to obtain telecommunications service from a provider not already serving your building?"[25] Even if the handful of respondents who did not have the information to answer the question is factored in, the survey still demonstrates that *95% of all surveyed business tenants have never had the building management deny them their choice of telecommunications service provider*. This survey result is consistent with what the Alliance has been telling the Commission for over four years – building owners and managers are not inhibiting competition, and are not a bottleneck to building access by telecommunications service providers.

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[22] *Id.* at 14.

[23] *Id.* at 15. 10% reported that they were not satisfied at all. *Id.*

[24] *Id.* at 15. This question was asked of all 454 respondents. Although only 100 respondents reported requesting service from an alternative provider, the question was asked of all respondents because it is possible for a tenant to contact a building owner first, and decide not to submit a request to a provider if the owner has given a negative response.

[25] *Id.* at 16. 4% of respondents did not know if the building management ever denied a request to obtain service from a service provider not already providing service within the building. *Id.*

Business Tenants Are Willing To Move If Their Telecommunications Needs Are Not Met.

The risk that commercial MTE tenants will leave if their telecommunications needs are not met is significant. Thirty-nine percent of 454 survey respondents replied that they would consider leaving the MTE at lease renewal time if their telecommunications needs were not met.[26] Among survey respondents, the average commercial MTE tenant lease is 3.6 years (median term is 3 years), and the average commercial MTE tenant has 2.1 years remaining on the lease (median remaining length is 1 year). Consequently, this is a very real threat.

Some may claim that by including a broad range of respondents -- businesses of all sizes, in multi-tenant buildings of all sizes, and in communities of all sizes -- the survey somehow misrepresents the relevant market. But the CLECs cannot have it both ways. Either they want to provide facilities-based competition throughout America, or they do not. The fact is that they are primarily interested in serving large office buildings in large markets. As we have repeatedly shown, they have obtained access to a large percentage of those buildings and have achieved remarkable penetration levels in a very short time.[27] On the other hand, if they are interested in serving all kinds of customers in all kinds of markets, then the Business Tenant Survey conclusively shows that building owners do not pose a barrier.

Others may criticize the survey for including only business tenants. The residential and commercial markets, however, are very different in terms of both cost structure and revenue potential. The profit potential of direct facilities-based competition in the residential market is much lower, and consequently very few providers have expressed even the remotest interest in it.

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[26] *Id.* at 17.

[27] Further Comments at 2-34.

If the Commission doubts the reliability of the survey or wishes additional information, we will be happy to cooperate in a joint survey as proposed in our Further Comments.

B. CLECs Continue to Rely on Anonymous Anecdotes and Unsubstantiated Allegations Rather than Substantive and Verifiable Evidence.

In the FNPRM, the Commission asked for information on twelve specific issues:

> *(1) Number of buildings to which CLECs have requested access, and characteristics of buildings.*
> *(2) Number of buildings housing multiple carriers, and their characteristics.*
> *(3) Number of wireless and wireline local service providers with access.*
> *(4) Percentage of buildings in which CLECs have access and are serving.*
> *(5) Average time for negotiating access and discussion of reasons for variations.*
> *(6) Number of buildings in which a request for access has been denied, length of time for denial, and basis for denial.*
> *(7) Average time that pending requests have been outstanding.*
> *(8) Differences in negotiations or frequency of denial if LEC seeks access after specific request from tenant.*
> *(9) Charges imposed for access.*
> *(10) State nondiscriminatory access requirements.*
> *(11) Experience of owners in states with such requirements.*
> *(12) Technology developments that may reduce or obviate need for access.*[28]

Only RCN, *et al.*, the Community Associations Institute, and the Alliance even begin to answer these questions. The Alliance can only surmise that the CLECs know that the facts do not support their case.

- AT&T offered just two examples to refresh the record: (1) In Washington State, Qwest-controlled buildings have complicated building access requirements and Qwest charges line access fees three-times higher than other

[28] FNPRM at ¶ 128.

LECs;[29] and (2) BellSouth, SBC and Verizon require AT&T to use their technicians.[30]

- Cox Communications provided only the following unidentified anecdotes:
  - Cox sometimes pays building access fees as high as 5-7% of revenues or a $4,000/month flat fee.[31]
  - Cox entered into 1-2 year contracts that require turning ownership of building wiring over to building owners at end of contract.[32]
  - Building owners have refused to permit Cox access, failed to negotiate, or offered agreements that would only permit Cox access to a single customer.[33]
  - Cox has to agree to building access terms of: $400/mo.; $34,000 initial payment and $6,000 per year; 7% plus $3,000 quarter, and $1,500 up front.[34]
  - Cox had to pay separate building access fees, *e.g.*, fee to traverse land between public right-of-way and building and separate fees for building access. Cox had to pay a fee to rent wall space or equipment room. In both cases, the ILEC was not charged the fees.[35]
  - In every market, Cox has been denied access when tenant has requested service from Cox, usually because of exclusive contracts.[36]
  - "Building owners that do not wish to allow access will raise various technical or safety issues, then not permit Cox to resolve then, or will delay their responses when Cox addresses those concerns.[37]
  - Separate agreements have been required for cable and telephony service in the same building.[38]

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[29] AT&T Comments at 10.

[30] *Id.* at 11.

[31] Cox Comments at i.

[32] *Id.* Note that such a requirement conforms to the Commission's cable inside wiring rules. 47 C.F.R. § 76.804(d).

[33] Cox Comments at i.

[34] *Id.* at 6.

[35] *Id.*

[36] *Id.* at 9.

[37] *Id.*

[38] *Id.* at 10.

The Alliance points out that Cox *did not provide a single piece of identifying information for any of the above anecdotes.* No city, market area, building owner, or name was cited by Cox. Cox provided no information that would allow a party to refute, rebut, or place in context any of the anecdotes, and the Alliance has no reason to believe that information submitted in the next round of comments will be any more substantiated. For example, a $4,000 monthly fee for the right to occupy space in the World Trade Center would be a bargain. In addition, Cox does not distinguish residential from non-residential properties, and access to provide video services from access to provide telecommunications services. These are all relevant factors, because they define the relevant markets and the identity of potential competitors.

- PrimeLink described their contract with the Plattsburgh (New York) Air Force Base Redevelopment Corp., as an example of a telecommunications project into which they invested substantial capital in reliance on an exclusive contract.[39]
- SBPP noted that in return for building access, Equity Office Properties was granted stock warrants and gross revenues from OnSite Access,[40] Trizec Hahn obtain 5% of gross revenues from Broadband Office and OnSite Access for building access,[41] Vornado received 6% from Cypress Communications,[42] and Verizon has announced plans to offer fixed wireless service in addition to

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[39] PrimeLink Comments at 2.

[40] SBPP Comments at 5 and fn 6.

[41] *Id.* at fn. 6

[42] *Id.*

DSL service.[43] This paucity of data can hardly be looked at as serious attempt to refresh the record and provide the Commission with updated data regarding the state of the market for building access rights.

- Sprint cited a Yankee Group report for the proposition that 20% of U.S. households are in MDUs, but only 5% of "this market" is currently served by integrated service.[44]

Of all telecommunications providers, only RCN/Utilicom/Carolina Broadband even attempted to provide responses to the Commission's inquiry.

The Alliance must continually defend the real estate industry against unsubstantiated attacks by the telecommunications industry, in the form of a relative handful of examples abstracted from a much larger base of information. We do not understand why the telecommunications industry will report the actual number of buildings to which they have gained access, the number of markets in which they provide service, the number of buildings to which they are providing service and the number of businesses to which they can now reach to the press, to their stockholders, and to the U.S. Securities and Exchange Commission, but will not report those same figures to the Commission. The Alliance has provided mountains of evidence – at considerable expense -- refuting the claims of the CLECs and showing that providers are gaining access to buildings at record rates, tenants are satisfied with their telecommunications service, and that tenants have access to competitive service providers. It should be clear by now that the CLECs have no case. We respectfully request that the Commission assign anecdotal information that is not supported by statistically valid and

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[43] *Id.* at 26.

[44] Sprint Comments at 8.

verifiable evidence no more weight than should be accorded to unsubstantiated, anonymous allegations.

III. EVEN THE MOST LAUDABLE GOAL DOES NOT ALLOW THE COMMISSION TO COERCE THE COOPERATION OF BUILDING OWNERS BY THREATENING TO HARM TENANTS.

The cavalier willingness of the CLECs to threaten innocent parties with harm in pursuit of their own interest, as reflected in their proposal to terminate service to subscribers in buildings where owners fail to meet some undefined "nondiscrimination" standard, is astounding.[45] Indeed, as we discussed in our Further Comments, the mere suggestion that the Commission should order service to subscribers in noncomplying buildings to be cut off is frivolous and beyond the bounds of rational advocacy. And the fact that so-called "service providers" would propose such a solution aptly illustrates their true priorities.

AT&T claims that the economic incentives would be so strong that building owners would have no choice to comply, so the sanction would never be imposed.[46] This is cold comfort and by no means certain. The fact is that we do not know what "nondiscriminatory" means, how the existence of "discrimination" would be identified, how property owners would be given notice, or whether property owners would have any recourse. Further, given that there are tens of thousands of property owners in the country, practically none of whom have FCC counsel or monitor proceedings at the FCC, it is just a little too pat to say that "there is no significant risk that tenants would actually be denied telecommunication services."[47] Indeed, if the proposed sanction would clearly never be imposed, it would have no value as a sanction.

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[45] AT&T Comments at 17; SBPP Comments at 11; Sprint Comments at 2.

[46] AT&T Comments at 17, note 12.

[47] *Id.*

Similarly, SBPP essentially argues that if the Commission adopts rules, property owners will incorporate those rules into their business practices, and as they do so, the need for Commission adjudication will decrease.[48] We strongly disagree; Commission regulation will do nothing but promote endless litigation. Even if it were true, it begs the question of whether the Commission's rules are necessary or fair. In effect, SBPP is saying that it is acceptable to regulate building access because property owners will have no choice but to comply. Although this argument may soothe the Commission's conscience, it is neither a valid reason nor excuse for any policy.

In short, if the record were not already clear, the comments of the CLEC industry conclusively show that the CLECs are not in the least concerned with extending service to subscribers. Not only do property owners have far more incentive to meet the needs of MTE tenants than the telecommunications industry, but they have repeatedly proven the point in this proceeding.

IV. NONE OF THE COMMENTERS HAS PROPOSED A LAWFUL OR PRACTICABLE PROCEDURE FOR DETERMINING WHEN AN ACCESS ARRANGEMENT IS 'DISCRIMINATORY.'

What is "discrimination," and how can the Commission enforce such a requirement? Although the CLECs urge the Commission to adopt rules prohibiting "discrimination," they are unable to show that anything the Commission might do would be lawful or practical, much less fair to building owners.

The mechanism for indirect regulation put forth in the FNPRM is wholly unworkable, as discussed in our Further Comments.[49] Nevertheless, AT&T proposes that ILECs should be

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[48] SBPP Comments at 42.

[49] Further Comments at 52-55.

required to provide the terms of their building access agreements to CLECs, on request.[50] If the building owner refused to grant access to the CLEC on nondiscriminatory terms, the ILEC would be directed to cut off service to the building. This raises several questions.

First, who decides what the terms of the ILEC's access are? It is common, especially in older buildings, for there to be no written agreement between the ILEC and the building owner, or indeed for there to be no documentation at all. If so, what are the terms of access? What if the building owner and the ILEC in fact disagree on those terms? Does the Commission have the power to adjudicate such a dispute, which would be governed by state property law? We think not, and indeed that is the nub of the problem.[51] Access agreements are not agreements for the provision of telecommunications services. They are agreements for the use of real property, and wholly outside the Commission's expertise and jurisdiction. That a carrier with facilities in a building may use those facilities to provide exchange access is irrelevant.[52] The Commission may have the power to regulate the terms on which the carrier provides access to those facilities – but access to the building is a wholly different matter. Consequently, the Commission may be

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[50] AT&T Comments at 38.

[51] SBPP objects to any "narrow" construction of utility access rights, and then tries to imply that a proper reading of Section 224 and the state law property rights of utilities would "diminish the power of the federal government to exercise its power of eminent domain through Section 224," citing two cases to support the proposition. SBPP Comments at 28, n. 83. SBPP is intent on confusing the issue; property rights are property rights, and they are defined by state law. What SBPP really wants the Commission to do is to misread state law and define property rights too narrowly. This is essentially what the Commission has already done in misdefining "rights-of-way." The FCC cannot declare certain rights not to be property rights just because it claims to be applying Section 224.

[52] As we discussed in our Further Comments at pp. 37-49, the Commission cannot rely on Sections 201(b), 202(a) or 205 for this reason, notwithstanding the arguments of AT&T and SBPP. AT&T Comments at 17-21; SBPP Comments at 10-11. Those provisions apply only to matters related to the provision of communications service or the enforcement of the Act. The right to use real property is an entirely separate matter and outside the Commission's purview.

able to mandate the terms of access to unbundled network elements, because such arrangements do not necessarily require physical access to wiring inside a building. But if a competitor seeks direct physical access to inside wiring, it must obtain not only the right to connect its facilities to the wiring, but also the right to occupy the underlying real estate. Those are two different transactions, involving different parties.

Second, if the CLEC objects to one or more terms and alleges "discrimination," what standard will the Commission apply? AT&T does not say, although its comments imply that any deviation from the ILEC's access terms would qualify.[53] But that is not a prohibition on "unreasonable discrimination" – it is a prohibition on "reasonable discrimination" as well. One of the reasons CLECs sometimes have trouble getting into buildings is that they do not understand the need to satisfy the owner's security and safety concerns, and especially do not appreciate that the owner may have a different view of the risk associated with granting access to a new, untried, and potentially insolvent competitor, as opposed to those associated with dealing with an established incumbent. These differences are realities and are entirely reasonable things for an owner to be concerned about. Indeed, such events as the Chapter 11 filing of ICG

[53] AT&T Comments at 38.

Communications, Inc. demonstrate why this is an issue.[54] The CLECs cannot expect to be treated identically to the ILECs, because they are not identical to the ILECs.

And how practical would it be to require exact equality of terms in other respects? What if a carrier only needs access to the rooftop? Is it "unreasonable discrimination" for the owner to limit a carrier's rights to parts of the building different from those occupied by the ILEC? What if the ILEC does not have or want access to the rooftop? Would a CLEC then insist that it be given access under some "technologically neutral" standard? The possibilities are endless. The Commission simply does not have enough information to establish detailed rules at this point, yet that is what would be needed for owners to protect their interests. The Commission cannot rely on individual adjudications under a standard as vague as "unreasonably discriminatory," especially in an area in which its legal authority is so weak in the first place.

In other words, there would have to be explicit and detailed standards for what constitutes "unreasonable discrimination." But nobody has proposed any, which raises a third question: If a building owner does not know what the standard is for "unreasonable discrimination," how can the owner protect itself against the "nuclear sanction" of service termination? The owner will

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[54] Another example is the latest shelf registration filed with the Securities and Exchange Commission by XO Communications, which states:

> We expect that losses and negative cash flow from operations will continue over the next several years. Our existing operations do not currently, and are not expected in the near future, to generate cash flows from which we can make interest payments on our outstanding notes, make dividend payments on our outstanding preferred stock or fund continuing operations and planned capital expenditures. We cannot know when, if ever, net cash generated by our internal business operations will support our growth and continued operations.

Eric Winig, "XO's shelf registration may be cause for concern," Washington Business Journal (Feb. 16-22, 2001) at p. 4.

never know, in negotiating with a CLEC, what it can or cannot do. Yet if it denies access, the owner faces the prospect of some day finding that telephone service has been cut off, or will be if the owner does not sign whatever the CLEC puts on the table. So the bottom line would be that, without standards, the only safe thing to do is give the CLEC whatever the CLEC asks for. This would not be a fair regulatory scheme – indeed, it would be arbitrary and unjust. The Commission should not be a party to such naked, self-interested coercion.

And this raises a fourth question: Even if standards are established, how will the Commission protect the owner's procedural rights? AT&T, SBPP and others claim that the Commission can rely on Section 411 to bring a building owner into a proceeding. As we discussed in our Further Comments, this is just not so.[55] Section 411 was intended to deal with the relations of a carrier with its customers and other carriers. A Section 411 proceeding must deal with "the enforcement of the provisions of [the] Act," and the whole reason the CLECs have been forced to propose indirect regulation is that the Act does not apply to building owners or to agreements between building owners and carriers for the right to use or occupy real estate.[56] Thus, the Commission is being asked to interfere in the relationship between a building owner

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[55] Further Comments at 45-49.

[56] Unable to cite to any relevant authority under the Communications Act, SBPP is forced to cite irrelevant decisions. For example, *GSA v. AT&T*, Order, 2 FCC Rcd 3574 (CCB, 1987) has nothing to do with this case. It stands only for the proposition that the Bell Operating Companies are successors in interest to the original AT&T in certain instances, and thus can be brought before the Commission under Section 411. The ICC cases cited by SBPP do not support the proposition that a building owners is a person interested in or affected by a practice as required by 47 U.S.C. § 411(a). In general, the ICC cases deal with shippers and carriers, not third parties. In *United States v. Baltimore & Ohio RR*, 333 U.S. 169 (1948), the issue was not access to property, but access to track, which is not the same thing. In *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), a provision of the Interstate Commerce Act was held to permit an injunction to be issued preventing the City from enforcing racial segregation laws. The FCC does not have the power to issue injunctions, nor are the issues in building access remotely comparable to those in civil rights cases.

and an ILEC – a relationship that is at bottom nothing more than a real estate license or something similar – without telling the owner in advance what it can or cannot do, and without the ability to ensure that the property owner has a chance to explain the reasons for its actions or its interpretation of any relevant arrangements. This sort of situation was never contemplated by the Communications Act.

In sum, we still do not know what constitutes "discrimination," and the Commission has no lawful way of applying any standard it might develop.

V. IN URGING THE COMMISSION TO FURTHER DISTORT THE MEANING OF SECTION 224, VARIOUS CLEC COMMENTERS MISSTATE AND OVERSIMPLIFY KEY PRINCIPLES OF REAL ESTATE LAW.

As we noted in the Further Comments, the FNPRM's interpretation of Section 224 is based on a misunderstanding of the term "rights-of-way." Failing to acknowledge that "rights-of-way" is a term of art, the Commission redefined the term to suit its own ends, declaring that a "right-of-way" is a "publicly or privately granted right to place telecommunications distribution facilities on public or private premises...."[57] To avoid taking the property of building owners, the FNPRM limits the right to attach under Section 224 to property that a utility can grant access to and obtain compensation for,[58] but this does not avoid the consequences of the erroneous definition.

In the process, the FNPRM misconstrues the effects of our argument that building access rights consist of leases, licenses or easements, and not rights-of-way. Our point was that a "right-of-way" encompasses certain legal rights, and that the kinds of rights granted by a "right-of-way" do not exist inside buildings. Therefore, by definition, Section 224 cannot apply to the

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[57] FNPRM at ¶ 79.

[58] FNPRM at ¶ 87.

right to enter a building. The FNPRM seems to miss this point. Instead, asserting that "the nature of a right of access, and not the nomenclature applied, governs . . . .", FNPRM at ¶ 82, the FNPRM concludes that the general purpose for which an access right is being used controls, rather than its underlying legal nature. But this logic leads the FNPRM to misstate the actual meaning of the term "rights-of-way," and implies that any right of access might be considered a "right-of-way," regardless of how that right was created or defined.[59] We agree that names alone are not determinative, but names – when properly used – do describe legal rights. Thus, a "right-of-way" does not grant access to a building, because of the nature of the rights created when a right-of-way is created. Similarly, licenses, easements and leases may be used to grant access to a building, but the actual legal rights conveyed differ. Thus, when a name properly describes a legal right, the use of the name has important consequences.

The FNPRM's logic has encouraged the CLECs to argue that they should be permitted to install facilities anywhere in a building if an ILEC or other utility is present in the building.[60] Apparently, the CLECs believe that the FNPRM has defined a right-of-way to include any access right in a building, no matter what legal rights are contained in the access grant. For example, SBPP claims that this approach will not take the owner's property, but will only affect the utility's rights, and the utility would be compensated under Section 224. This, of course, assumes that the utility always has a property right for which it can be compensated. It also assumes that access rights are not limited to specific areas. Both assumptions are false. A

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[59] Note that this does not appear to be what the FCC intended, because the FNPRM also requires that a provider have the consent of the building owner before occupying a building. FNPRM at ¶¶ 87, 90. Thus, the FNPRM appears to separate access to the property from access to the facilities. While we agree with that separation, there appears to be some contradiction between the FNPRM's logic supporting the existence of right-of-way inside buildings and some of the consequences of that conclusion.

[60] *See, e.g.*, SBPP Comments at 21.

correct understanding of Section 224 and the meaning of "rights-of-way" would avoid these problems.

A. As a Matter of Property Law, There Are No Rights-of-Way Inside Buildings.

SBPP urges the Commission to ignore "state law constructions of . . . access rights."[61] This is not surprising, given the Commission's apparent willingness to ignore state law in determining what constitutes a "right-of-way." SBPP then goes even further and asserts that "[w]here there is no written agreement between the utility and the building owner . . . it is likely that the utility has the right to all areas of the MTE . . . ."[62] This is simply not the law,[63] and SBPP therefore cannot cite any authority for the proposition.

The term right-of-way has two simple meanings: it can refer to either the unimpeded right to pass over another's land, or the strip of land used to exercise the right.[64] This right has never been understood to apply to a right to enter a building. Indeed, the FNPRM cites no authority whatsoever for that proposition. It is true that a right-of-way can take the form of an easement, but that does not mean that all easements are rights-of-way, nor does it mean that an easement that extends inside a building is a right-of-way. In fact, because of the degree of control exercised by a property owner, it is simply impossible for a building access right, however denominated, to be a right-of-way. The right to enter a building is always subject to interference: a building owner may close and lock the building; may limit after-hours entry to its

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[61] SBPP Comments at 28.

[62] SBPP at ¶ 28.

[63] Comments of Florida Power and Light at 7-8.

[64] *See* Reilly, The Language of Real Estate (2d ed. 1982) at 418; *Kalinowski v. Jacobowski*, 100 P. 852 (Wash. 1909) ("right-of-way" is the right "to travel over a particular tract of land without interference"); 65 Am. Jur. 2d, Railroads § 50.

employees or tenants; may limit entry by service personnel to certain hours or conditions, such as by requiring that they be escorted; and so on. Because there is no right of unimpeded access inside a building, there is no right of passage that conforms to the definition of a "right-of-way." Furthermore, there can be no physical strip of property associated with a right of passage that does not exist.

The Commission cannot ignore state property law by converting specific grants to one entity into general rights of access. The fact remains that there are no rights-of-way inside buildings, as a matter of law. Consequently, the Commission cannot convert any particular grant of access into a right for a third party to install facilities anywhere it chooses.

B. By Its Terms, Section 224 Does Not Apply to Facilities Inside Buildings.

Despite having defined "rights-of-way" incorrectly, the Commission did correctly conclude that property owners have the right to prevent competitive providers from obtaining access to buildings.[65] SBPP's assertion that the "plain language" of Section 224 mandates access over an owner's objections is utterly unfounded.[66] There is simply no "federally granted right of access."[67] Nevertheless, the Commission has invited this type of argument by failing to recognize that Section 224 was never intended to apply to any facilities inside buildings.

Section 224 contains no reference to building access or the right to enter or use buildings or the property of any person other than a "utility." The statute only grants rights with respect to facilities owned or controlled by utilities, and the statute and the legislative history make it clear that Congress intended to allow cable companies – and later CLECs – merely to take advantage

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[65] FNPRM at ¶¶ 87, 90.

[66] SBPP Comments at 29.

[67] SBPP Comments at 30.

of existing transmission facilities. The Commission has failed to see that there is a fundamental distinction between access to true "rights-of-way" and access to a building. Building owners invest enormous amounts of capital to create attractive environments for people to work, shop, and live in. They incur equally large expenses in maintaining those environments, and manage every detail, from aesthetics, to the services available to tenants and the mix of tenants, all intended to ensure the profitability of the investment both for themselves, and in commercial buildings, for their tenants. This is far different from the nature of the property Congress intended to address in Section 224. The rights-of-way encompassed by Section 224 exist for only one purpose: to allow the installation of various types of transmission facilities. Once a telephone line leaves a right-of-way and enters a building, it is occupying a fundamentally different kind of property.

SBPP makes several arguments that distort the language of Section 224 and other provisions of the Act beyond recognition. For example, SBPP argues that Section 224(f)(2) only allows a utility to deny a carrier access to rights-of-way where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." SBPP Comments at 29. From this, SBPP reaches the startling conclusion that Section 224 requires the Commission to order building owners to allow CLECs access to buildings. Of course, the law says nothing of the kind. The reasons listed in Section 224 do not include owner consent because Congress never imagined that Section 224 would be applied in a context in which other issues might be relevant. As noted by SBC,[68] Section 224(e)(2) and (3) provide that the cost of providing space is to include both an element for usable space and an element for unusable space. Under that formula, access to a building would seem to require an apportionment of the

[68] SBC Comments at 7.

cost of maintaining the entire building, since the area outside the area of the immediate attachment would constitute the unusable space. Of course, that really makes no sense in this context, which is exactly the point. The statute assumes that the attaching entity will only be dealing with the utility that owns or controls the poles, and further takes as a paradigm the case of a telephone pole. If Congress had meant to authorize regulation of rates for building access, it would have recognized that this would raise far different and more complex issues. It is also critical to remember that the Pole Attachment Act was a response to the Commission's conclusion that it had no power to regulate the electric companies and other utilities that owned the poles; surely if Congress had meant to include facilities and access rights inside buildings it would have said so, if only to avoid any future ambiguity regarding Commission jurisdiction over building owners.

On the general grounds of promoting competition, SBPP would have the Commission extend the definition of "right-of-way" to include areas that "could" be used by incumbent utilities, even if they are not. SBPP provides no legal authority for this expansion, however. It is true that the Commission has taken steps in the past to promote competition in various arenas, but that is beside the point. The mere goal of promoting competition is not a grant of authority from Congress. The fact that the Commission adopted a regulatory scheme for certain wireless services outside the scope of Title II has absolutely no bearing on this case; nobody has questioned the Commission's power to regulate the wireless industry: the trouble is that the Commission cannot and should not regulate the real estate industry. Furthermore, SBPP would have the Commission reinterpret existing utility access rights without regard to what they actually permit under state law. To that extent, even if the Commission's underlying decision to apply Section 224 inside buildings were lawful, the proposed extension would not be.

In addition, SBPP has asked the Commission to adopt rules in direct defiance of the 11th Circuit's decision in *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *reh'g en banc denied*, 226 F.3d 1220 (11th Cir. 2000), *cert. granted*, *FCC v. Gulf Power*, 2001 U.S. LEXIS 953 (2001) and stay their effectiveness until the Supreme Court decides the case.[69] As the law now stands, however, wireless providers are not entitled to the benefits of Section 224, so what SBPP asks is simply illegal. The Commission cannot disregard the clear holding of a federal appellate court; issuing rules would amount to a rejection of the 11th Circuit's authority, even if the rules never became effective. The Supreme Court has not reversed the 11th Circuit and very well may not – SBPP's proposal thus is wholly inappropriate.

Finally, SBPP refers to the Commission's interpretation of Section 222(e), which specifically authorizes the Commission to establish reasonable rates for subscriber list information. The Commission has acknowledged that Section 224 does not apply to building owners, so there is no parallel here: the FCC cannot regulate rents charged by building owners under Section 224. SBPP also cites to the Commission's questionable expansion of the OTARD rule. The application of the OTARD rule to leased property is under review, and the recent expansion is subject of a petition for reconsideration. Unless affirmed by a court, which is doubtful, the OTARD decision has no precedential value.

VI. THE FIFTH AMENDMENT REMAINS AN INSURMOUNTABLE OBSTACLE.

The Fifth Amendment obstacles to the rule set forth in the FNPRM were discussed in depth in our Further Comments. The other comments submitted to the Commission raised only a few substantive points on this topic to which we respond below.

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[69] SBPP Comments at 21.