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FEDERAL COMMUNICATIONS COMMISSION
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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 Sections 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

OPPOSITION OF AT&T CORP. TO THE PETITIONS FOR RECONSIDERATION

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OPPOSITION OF AT&T CORP.
TO THE PETITIONS FOR RECONSIDERATION

Pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, AT&T Corp. ("AT&T") respectfully submits this opposition in response to the Petitions for Reconsideration seeking modification of the Commission's rulings set forth in its *First Report & Order*,[1]

[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*

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).

INTRODUCTION AND SUMMARY

As demonstrated below, the petitions for reconsideration filed by BellSouth Corporation ("BellSouth"), Commonwealth Edison Company and Duke Energy Corporation ("Comm.Ed./Duke Energy"), Florida Power & Light Company ("Florida Power"), the Real Access Alliance ("RAA"), and Verizon Wireless ("Verizon Wireless") should be denied. These petitions raise no new arguments or facts that would justify reconsideration of the Commission's *First Report & Order*. The Commission, however, should adopt the clarification suggested by the Wireless Communications Association International, Inc. ("WCA") regarding the "safety exception" to the Commission's over-the-air reception device ("OTARD") rules.

First, the Commission should not modify its conclusions regarding the scope of 47 U.S.C. § 224 ("Section 224"). The *First Report & Order* properly implements Section 224 and promotes facilities-based competition for the provision of local telecommunications service. Contrary to the arguments by a few electric utilities, the Commission properly refused to ignore Section 224 by relying solely on 47 U.S.C. § 251. The Commission was correct to recognize that *both* sections must be enforced. By its terms, Section 224 indisputably applies to electric utilities. *See First Report & Order*, ¶ 72 (*quoting* 47 U.S.C. § 224(a)). Moreover, the language of Section 224 also refutes the argument that Section 224 does not apply "inside buildings." To the contrary, Section 224 provides, "without qualification," that utilities shall provide access to

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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) (*First Report & Order*).

"*any* pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (emphasis added).

Petitioners' attack on the Commission's interpretation of "right-of-way" is equally meritless. The arrangements by which utilities have gained access to buildings, and the terms used to describe those rights, vary from building to building and from state to state. As a result, the Commission was correct to conclude that the nature of the right of access, rather than its nomenclature, should govern for purposes of Section 224. Finally, arguments that the Commission's interpretation of Section 224 raises takings concerns are baseless because Section 224 does not apply to MTE owners and to the extent that it deprives utilities of any rights, those deprivations are compensated under Section 224(b)(1). *See* Part I, *infra.*

Second, the Commission's procedures for changing the demarcation point in MTEs to the minimum point of entry ("MPOE") are amply supported by the record and should not be modified. The Commission's modification of those procedures was predicated on substantial record evidence that ILECs were abusing their control over on-premises wiring to frustrate competitive access to MTEs. BellSouth's proposal that ILECs be excused from complying with requests unless MTE owners obtain prior consent from all their tenants would erect an artificial and unnecessary hurdle transparently designed to impede and delay the transfer of the demarcation point. *See* Part II, *infra.*

Third, the Commission's analysis regarding the prevailing market conditions and their impact on MTE tenants and CLECs are fully supported. The prohibition on exclusive access arrangements in commercial MTEs is supported by record evidence that ILECs, as well as some building owners, wield market power over the provision of local telecommunications services. RAA has conceded both that ILECs have market power over competitive access to MTEs and

that building owners have established a two-tiered system whereby competitive LECs must confront terms of access that are less favorable than those applied to ILECs. In short, prevailing market conditions clearly demand the prohibition of exclusive access arrangements. *See* Part III, *infra.*

Fourth, the Commission should continue to include commercial mobile radio service ("CMRS") providers within the prohibition on exclusive access agreements. CMRS providers need access to MTEs to provide service, and an exclusive access agreement between one CMRS provider and a building owner could prevent others from offering such services (including fixed wireless service) to MTE tenants. Verizon Wireless's proposal to exclude CMRS providers from the ban on exclusive access agreements in commercial MTEs would impede the ability of CMRS providers to deploy wireless services by enabling a single telecommunications provider (*i.e.*, an incumbent LEC) to block competitors from gaining access to MTEs. *See* Part IV, *infra.*

Finally, the Commission should not modify its decision to extend its OTARD rules to prohibit restrictions on the placement of subscriber antennas used to provide telecommunications services. RAA raises no new facts or arguments that would support reconsideration. Moreover, both the Commission and the courts have long recognized the Commission's authority to promote competition in the local exchange market and to foster the deployment of new technologies and advanced services. *See* Part V.A., *infra.* The Commission should, however, clarify that any professional installation requirement for fixed wireless services must be narrowly tailored, nondiscriminatory, and serve a legitimate safety purpose. Otherwise, local governments, homeowners' associations, and landlords could adopt professional installation standards not to further concerns regarding safety, but to create artificial and unreasonable barriers to installation of such devices. *See* Part V.B., *infra.*

ARGUMENT

I. THE COMMISSION'S RULES IMPLEMENTING SECTION 224 ARE APPROPRIATE AND FULLY CONSISTENT WITH CONGRESS'S INTENT.

In its *First Report and Order*, the Commission concluded that, under Section 224, a utility must afford telecommunications carriers and cable television systems reasonable and non-discriminatory access to MTE conduits and rights-of-way that are owned and controlled by the utility. *First Report & Order*, ¶¶ 6, 70-93. The Commission explained that the "right of access to poles, ducts, conduits, and rights-of-way that a utility owns or controls is not limited by location or by how the utility's ownership or control was granted." *First Report & Order*, ¶ 76. The Commission interpreted the term "'rights-of-way' in the context of MTEs to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility's transportation and distribution networks." *Id.* In doing so, the Commission explained that, by amending Section 224 in the 1996 Act, "Congress intended to ensure that utilities' control over poles, ducts, conduits and rights-of-way did not create a bottleneck for the delivery of telecommunications service." *Id.* ¶ 71. Moreover, the Commission noted that removal of these bottlenecks would foster "competition by entities using their own facilities" and that such entities "have the greatest ability and incentive to offer innovative technologies and service options to consumers." *Id.* ¶ 4. These conclusions are clearly correct, and the Commission should reject the reconsideration requests of the Real Access Alliance ("RAA") and a few electric utilities. *See* RAA 16-23; Comm.Ed./Duke Energy 2-7; Florida Power at 4-14.

The electric utilities argue that the Commission has ample means to advance Congress's goals under the Telecommunications Act of 1996 under Section 251, 47 C.F.R. § 251; therefore,

they argue, the Commission should "refrain" from regulating utilities under Section 224. Florida Power 4-9; Comm.Ed./Duke Energy 2-4. That argument is based upon the unsupportable presumption that Congress presented the Commission with the choice of *either* implementing Section 251 *or* Section 224, and that the Commission erred when it "rejected" Section 251 by implementing Section 224. To the contrary, the Commission properly recognized that Sections 224 and 251 *complement* one another and that both play an important role in promoting the development of competition for the provision of local telecommunications services. *See, e.g.*, *First Report & Order* ¶ 78. Congress plainly intended and expected that the Commission would implement and enforce *both* statutes. To the extent that petitioners disagree with the obligations that the plain language of Section 224 imposes on them, their dispute is with Congress, not the Commission.

The electric utilities also argue that Section 224's nondiscriminatory access obligations should "apply only to the incumbent LECs," and not electric or other utilities. Florida Power at 9; *see also* Comm.Ed./Duke Energy at 2. That position, however, is foreclosed by the language of Section 224, which "defines a utility as one 'who is a local exchange carrier or *an electric, gas, water, steam or other public utility* and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications.'" *First Report and Order*, ¶ 72 (quoting 47 U.S.C. § 224(a)) (emphasis added). Indeed, one group of electric utility petitioners candidly acknowledges that "the Commission is still constrained by the statutory definitions imposed in Section 224." Comm.Ed./Duke Energy at 3.

RAA joins the electric utilities in arguing that Section 224 should not "include pathways inside buildings." Comm.Ed./Duke Energy at 2; *see also* RAA at 16 ("Section 224's references to ducts, conduits and rights-of-way cannot be understood to apply inside MTEs"). As the

Commission has explained, however, "the plain meaning of Section 224(f)(1) includes a right of access to ducts, conduits, and rights-of-way owned or controlled by a utility that are located in MTEs." *First Report & Order* ¶ 79. That assessment is unquestionably correct, because Section 224(f)(1) provides, "without qualification," *First Report & Order*, ¶ 80, that a utility "shall provide . . . nondiscriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (emphasis added). Indeed, the Supreme Court has explained that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). Moreover, petitioners still have no response to the Commission's conclusion that common industry practice defines the terms "duct and conduit" without regard to where "they are located." *First Report & Order*, ¶ 80.[2] As the Commission explained, the fact that "riser conduit" is a commonly used term in the industry demonstrates that "conduit is not generally understood to refer only to underground facilities," *First Report & Order*, ¶ 80, or, for that matter, to facilities located outside of a building.[3]

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[2] It is settled that Congress is presumed to use words in accordance with their plain and ordinary meaning. *See, e.g.*, *United States* v. *Locke*, 471 U.S. 84, 95 (1985) ("[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used,'" (*quoting Richards* v. *United States*, 369 U.S. 1, 9 (1962)).

[3] RAA mistakenly relies on its characterization of snippets from the legislative history in an effort to undermine the plain meaning of Section 224. RAA at 20. The Commission properly rejected such reliance because it is improper to "resort to legislative history to cloud a statutory text that is clear.'" *First Report & Order*, ¶ 81; *see also Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter,'" *quoting Chevron, U.S.A. Inc.* v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

The petitioners' contention that the Commission adopted an improper definition of "right-of-way" is equally meritless. *See* RAA at 18-22; Comm.Ed./Duke Energy at 4-6. In addition to arguing that there can be no "right of way" inside a building, they also contend that access rights inside buildings take the form of "leases, licenses and easements." RAA at 16; *see also* Comm.Ed./Duke Energy at 5. Both claims ignore the plain language of Section 224. First, as the Commission explained, "the term 'right-of-way' can have a variety of meanings, including, for example, the equivalent of an easement." *First Report & Order* ¶ 82 & n.204 (*citing Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 276-79 (1942), and *Joy* v. *City of St. Louis*, 138 U.S. 1, 44 (1890)).[4] Indeed, RAA's effort to draw a sharp divide between "rights of way" and "easements" is contrary to the established meaning of "easement," which is defined as "[a] right of use over the property of another" including "rights of way." *Black's Law Dictionary* at 509 (6th ed. 1990).[5] Second, contrary to RAA's argument, "the arrangements under which utilities have obtained and retain access to buildings, as well as the nomenclature used to describe those arrangements and the attendant rights and responsibilities, vary from building to building and from state to state." *First Report & Order*, ¶ 82. Accordingly, the

[4] For example, in *Great Northern Railway*, the Supreme Court explained that Congress, when granting "rights of way" to railroads after 1871 was "conveying but an easement." 315 U.S. at 274, 276. And, in *Joy* v. *City of St. Louis*, the Supreme Court noted, with approval, that the term "'right of way'" can be "used to describe . . . a right of passage over any tract" and also "to describe that strip of land which railroad companies take upon which to construct their road-bed.'" 138 U.S. at 44.

[5] Petitioners Commonwealth Edison and Duke Energy simply ignore this precedent when they argue that "[a] right of way is the right to pass over the land of another." Comm.Ed./Duke Energy at 5. Indeed, although they argue that *Black's Law Dictionary* supports their argument, in fact, it provides that a "right of way . . . is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it." *Id.* at 1326.

Commission correctly concluded that "the nature of a right of access, and not the nomenclature applied, governs for" purposes of Section 224. *Id.*[6]

Finally, RAA and Florida Power argue that the Commission's determinations regarding the scope of Section 224 raise takings concerns because "any piggybacking by a CLEC on a utility's intra-building facilities or easements still infringes the owner's right to exclude." RAA at 23; *see also* Florida Power 9-11. That too is wrong, because Section 224 deprives the MTE owner of nothing. As the Commission made clear, the access obligations of Section 224 apply only to *utilities*, and only if the utilities' ownership or control "of rights-of-way and other covered facilities" is such that they can "voluntarily provide access to a third party and would be entitled to compensation for doing so." *First Report & Order*, ¶ 87. Thus, "any constitutional concerns that may arise under the Fifth Amendment" are avoided because (i) Section 224 does not apply to building owners, and (ii) if a utility is "deprived of the power to exclude others from conduits or rights-of-way to the extent of [its] ownership or control," then that deprivation "is compensated under [Section 224]." *First Report & Order*, ¶ 89.

II. THE COMMISSION'S PROCEDURES FOR CHANGING THE DEMARCATION POINT IN MTES ARE FULLY SUPPORTED AND SHOULD NOT BE MODIFIED.

In the *First Report & Order*, responding to evidence that "incumbent LECs in many instances are using their control over on-premises wiring to obstruct or delay competitive access," *id.* ¶ 50, the Commission established "procedures to facilitate moving the demarcation

[6] Some petitioners also argue that "'right of way' cannot mean property owned by the utility." Common. Ed./Duke Energy at 5-6. That argument is predicated on the claim that "a right-of-way and fee ownership are mutually exclusive property law concepts." *Id.* at 6. But as the Commission already has pointed out, their argument fails because "the term 'right-of-way'" can "denote not only the right to pass over the land of another, but also the land itself." *First Report & Order*, ¶ 83.

point to the minimum point of entry (MPOE) at the building owner's request" and "requir[ing] incumbent LECs to timely disclose the location of existing demarcation points where they are not located at the MPOE." *First Report & Order*, ¶ 6; *see also id.* ¶¶ 41-69.[7] The Commission also directed "incumbent LECs to conclude negotiations with requesting building owners in good faith and within 45 days of the initial request." *Id.* ¶ 55.

BellSouth complains that "[c]onspicuously absent" from the Commission's demarcation rules is any "recognition that the needs of actual service-subscribers . . . must be taken into account when a premises owner requests an MPOE demarcation relocation." BellSouth at 3. That is not so. The Commission modified its demarcation rules in response to substantial evidence that "incumbent LECs are using their control over on-premises wiring to frustrate competitive access to multitentant buildings," thereby leaving actual service-subscribers "without any choices with regard to the provision of local telecommunications service." *First Report & Order*, ¶ 19, 23. Thus, the express purpose of the MPOE modifications that BellSouth challenges was to better meet the needs of actual service-subscribers by facilitating competitive choice. *See id.* ¶¶ 50, 54 (to address instances of incumbent LECs abusing "their control over on-premises wiring to obstruct or delay competitive access," the Commission acted "to clarify

[7] AT&T does not object in principle to Verizon Communications' request for clarification of its obligation to disclose to the landlord, upon request, the location of the demarcation point in an MTE. Verizon 1-3. The contact information, however, should be required to be displayed in a prominent position on the incumbent LEC's web-site. Further, AT&T agrees that incumbent LECs should be required to provide both postal addresses and e-mail addresses to which landlords can send their information requests. Verizon at 3.

the building owner's options and facilitate its exercise of its options for the benefit of competition").[8]

BellSouth nonetheless suggests that incumbent LECs "should not be required to comply with a request from the premises owner to relocate the demarcation point to the MPOE unless the request is accompanied by the consent of all service-subscribers." BellSouth at 3 (capitalization altered). BellSouth's proposal is transparently designed to delay and impede competition. Requiring all tenants in an MTE affirmatively to consent to the transfer of the demarcation point likely would prevent many, if not all, requests to transfer the demarcation point to the MPOE, and, at a minimum, would erect an unnecessary barrier to delay such transfers without any corresponding benefit. The Commission already has rejected BellSouth's parallel argument that it be permitted to "negotiate changes in the demarcation point" with the building owner because "it would impede the development of facilities-based competition." *First Report & Order*, ¶ 54. The same logic mandates rejection of BellSouth's request that each tenant in an MTE be given veto power over the building owner's requested transfer of the demarcation point to the MPOE.

Moreover, there is no substantive reason for seeking unanimous MTE tenant consent because there is "no support for BellSouth's assertion that service quality would suffer if the demarcation point were moved." *First Report & Order*, ¶ 54 n.125. The absence of such

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[8] BellSouth provides no support for its claim that the Commission lacks authority to allow building owners to request that the demarcation point of the wiring on their premises be moved to the MPOE. BellSouth at 2-3. That omission is not surprising, because the demarcation rules are clearly within the Commission's authority to regulate the conduct of incumbent LECs. *See, e.g.*, 47 U.S.C. §§ 201, 202, 205. Moreover, to the extent that BellSouth suggests that the Commission lacks authority to permit building owners to file complaints against incumbent LECs, *see* BellSouth at 3, that argument is meritless in light of 47 U.S.C. § 208, which expressly provides that "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier . . . may apply to said Commission by petition" *Id.* § 208(a).

evidence is not surprising given that the transfer of the demarcation point to the MPOE does not require that facilities "be moved from existing locations," BellSouth at 4; rather, it simply means that the building owner will "control" such facilities. *First Report & Order*, ¶ 44.[9] Indeed, the Commission has explained that "responsibility for installation and maintenance may be contracted out to the incumbent LEC," so long as "control, including determining the terms of access, would lie with the building owner." *First Report & Order*, ¶ 57.[10]

III. THE COMMISSION'S ANALYSIS OF THE PREVAILING MARKET CONDITIONS AND THEIR IMPACT ON MTE TENANTS AND CLECS ARE FULLY SUPPORTED AND SHOULD NOT BE MODIFIED.

In its *First Report & Order*, the Commission properly noted that "[t]here is no question that building owners control access to any individual building," *First Report & Order*, ¶ 21, and "that the evidence supports the conclusion that, at least in some instances, building owners exercise market power over telecommunications access," *id.* ¶ 23. The Commission also concluded that "incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs," *First Report & Order*, ¶ 24, and that, "[i]n the absence of effective regulation, [incumbent LECs] therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers," *id.* Based on these findings, the Commission determined that it should "prohibit carriers, in commercial settings,

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[9] The "demarcation point" "marks the end of wiring under the control of the LEC and the beginning of wiring under the control of the property owner or subscriber." *Id.* ¶ 44.

[10] BellSouth likewise provides no evidence that would undermine the Commission's prior rejection of BellSouth's position "that it would lose good will with its customers because of problems with inside wiring no longer under its control." *First Report & Order*, ¶ 54 n.125. But if there were actual support for such concerns in an individual case, incumbent LECs such as BellSouth could (indeed, would be required to) negotiate "in a reasonably timely and fair manner" to resolve such concerns. *First Report & Order*, ¶ 55.

from entering into contracts that effectively restrict premises owners or their agents from permitting access to other telecommunications service providers." *Id.* ¶ 27. These conclusions are fully supported both factually and legally and should not be disturbed.

In seeking reconsideration of this prohibition on exclusive access agreements, RAA continues to oppose *all* of the Commissions findings and conclusions, arguing that "[t]hey spring from a misreading of the record and a faulty analysis of the competitive marketplace." RAA at 3. In RAA's view, "the [Commission's building access] proceedings should be terminated." RAA at 3, 24. RAA's own comments, however, confirm the factual predicates of the Commission's building access rules, and the clear need for nondiscriminatory access requirements. Thus, for example, RAA applauds the Commission's new rules that mandate relocation of carrier demarcation points to the MPOE if requested by the owner, even though that action was predicated on the Commission's desire to "reduce the potential for incumbent LECs to obstruct competitive access to MTEs." *First Report & Order*, ¶ 58; *see also id.* ¶ 6. And, in its most-recent comments, RAA admits, point blank, that "in the building access situation," ILECs "have market power." RAA FNPRM Comments at 41 (filed Jan. 22, 2001). That alone supports the Commission's decision to prohibit exclusive access agreements in commercial MTEs.

Nor does RAA's analysis of building owner market power withstand scrutiny. RAA cannot, and does not, dispute that "'building owners control access to any individual building.'" RAA at 7 (quoting *First Report & Order*, ¶ 21). RAA nonetheless contends that the Commission's conclusions regarding "[w]hether control of single buildings translates into unreasonable restrictions on access," are "hypothetical and speculative." RAA at 7. But according to RAA, based on the experiences of its over 1 million MTE owners and managers,

RAA FNPRM Comments at 25, competitive LECs do not receive the same "favorable terms" of access as incumbent LECs, *id.* at 41-42. Indeed, according to RAA, it would not be "fair" to MTE owners if they had to change the *status quo* and offer the same terms of access to competitive LECs that incumbent LECs currently enjoy. *Id.* Thus, competitive LECs are required to negotiate long and detailed building access agreements, *id.* at 6-7, whereas, RAA admits that "it is relatively rare for an ILEC to enter into any kind of agreement with an MDU owner," *id.* at 65 n.106. Viewed against this background, the anecdotal evidence highlighted by the Commission – and dismissed by RAA – merely underscores the practical, real-world consequences of the current two-tiered system governing the market for access to commercial and residential MTEs. *See First Report & Order*, ¶¶ 17-18, 29-30.[11]

RAA also complains that the Commission's analysis "lacks a legal framework." RAA at 8. To the contrary, the Commission explained that "[e]conomic theory supports the idea that building owners may, at least under some circumstances, be able to exert market power over telecommunications access." *First Report & Order*, ¶ 21. The Commission started from the undisputed fact that "building owners control access to any individual building," *id.*, and explained that "[w]hether that control translates into the ability or incentive to unreasonably restrict access to competitive LECs depends on the circumstances in particular real estate markets, as well as the time frame one is considering," *id.* The Commission further noted that, in the "near term," the ability of tenants to neutralize MTE owner control over access by LECs to buildings "depends on several factors, including the availability of alternative spaces, the typical

[11] In passing, RAA suggests that the Commission has concluded that MTEs are "'essential facilities' as the concept is applied in antitrust law." RAA at 7. The *First Report & Order*, however, never even mentions or purports to apply the "essential facilities" doctrine.

length of leases, the costs of relocation, and the relative importance of telecommunications among the factors a tenant considers when choosing a space." *Id.* The Commission then applied that analysis to the record evidence and concluded that "[a]lthough a tenant has the apparent option to express dissatisfaction with the building owner's choice of local telecommunications service provider by moving to a new building, this choice, as a practical matter, is often not available." *Id.* ¶ 31. That analysis is entirely consistent with the notion of "market power as 'the ability profitably to maintain prices above competitive levels for a significant period of time.'" RAA at 8 (*quoting* 12 FCC Rcd. 15765, ¶ 16 n.41). Indeed, RAA has admitted that its members, who span the nation, exercise their market power over competitive LECs by insisting that they agree to terms and conditions that incumbent LECs may avoid and that RAA's members have no intention of dismantling this anticompetitive framework in the future. RAA FNPRM Comments at 41-42.[12]

IV. THE COMMISSION SHOULD CONTINUE TO INCLUDE CMRS PROVIDERS WITHIN THE PROHIBITION ON EXCLUSIVE AGREEMENTS.

As AT&T explained in its comments on the Commission's *Building Access NPRM*, commercial mobile radio service ("CMRS") providers need access to multi-tenant

[12] RAA's discussion regarding "point-to-point" markets is particularly misleading. RAA at 9 (*quoting In re Amendment of the Commission's Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd. 15765, ¶ 67 n.181 (1997)). To be sure, the fact that in point-to-point markets, "one long distance carrier will have 100 percent market share" does not, by itself, compel the conclusion that a particular long distance carrier has market power. 12 FCC Rcd. 15,765, ¶ 67. But RAA omits the Commission's further analysis that market power can be established where "there is credible evidence suggesting that there is or could be a lack of competition in a particular point-to-point market." *Id.* That is precisely the case before the Commission where it is undisputed that competitive LECs operate at a substantial competitive disadvantage because of the conduct of building owners and incumbent LECs.

environments.[13] Verizon Wireless argues that CMRS providers should be excluded from the Commission's rule prohibiting exclusive access to MTEs because CMRS providers do not need access to a particular building in order to provide service to that building or its tenants.[14] According to Verizon Wireless, the anticompetitive concerns that led the Commission to adopt the prohibition on exclusive contracts are not applicable to CMRS carriers. Verizon Wireless's arguments, however, fail to recognize that CMRS may include fixed wireless services that cannot be offered to customers in a specific multi-dwelling unit unless the provider has access to that building to mount antennas and run any associated cabling. An exclusive agreement between one CMRS provider and a landlord could prevent other CMRS providers from offering such services to residents.

While Verizon Wireless may be correct that in some cases mobility services could be provided to a particular building from an adjacent site, CMRS also includes fixed services offered on an ancillary basis[15] and even certain fixed services offered on a co-primary basis on CMRS spectrum.[16] In classifying these fixed services as CMRS, the Commission sought to promote the deployment of competitive alternatives to wireline telephone companies.[17]

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[13] *See* AT&T Comments at 38-39 (filed Aug. 27, 1999); AT&T Reply Comments at 29 (filed Sept. 29, 1999).

[14] *See* Verizon Wireless Petition for Reconsideration at 2.

[15] *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8965 at ¶ 48 (1996) ("*First Flexible Service Order*").

[16] *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *Second Report and Order*, 15 FCC Rcd. 14680 at ¶¶ 7-8 (2000).

[17] *See First Flexible Service Order* at ¶ 3; H.R. CONF. REP. NO. 103-213, at 493 (1993).

Verizon Wireless's proposal to exclude CMRS providers from the ban on exclusive agreements would impede the ability of CMRS providers to deploy fixed wireless services by enabling a CMRS provider or even a landline provider to block competitors from gaining access to certain MTEs.[18] Because neither the Commission nor the industry can predict what new and innovative services will be offered using CMRS spectrum in the future, modifying the building access rules to exclude CMRS prospectively could prove to be extremely short sighted.

Even traditional mobile service providers, however, can be adversely affected by exclusive contracts because such contracts limit the locations where traditional mobile services facilities can be sited. As the Commission is well aware, finding appropriate sites for wireless facilities and gaining local approval is already a difficult and lengthy process.[19] Eliminating CMRS providers from the prohibition on exclusive contracts would only make this difficult process worse by reducing the number of available site locations and thereby putting CMRS providers at a competitive disadvantage.

Verizon Wireless's request to remove CMRS providers from the exclusive contract prohibition therefore should be denied.

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[18] At a minimum, an exclusive arrangement between a landlord and one CMRS provider potentially conflicts with the right of competing CMRS providers to locate antennas on subscriber premises under the extended OTARD rules adopted in this proceeding.

[19] *See* Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process between the Federal Communications Commission's Local and State Government Advisory Committee, the Cellular Telecommunications Industry Association, the Personal Communications Industry Association, and the American Mobile Telecommunications Association (Aug. 5, 1998); see also *Wireless Industry, Localities Forge Tower Siting Agreement*, TR DAILY (Aug. 5, 1998) (quoting then Chairman Kennard stating "This agreement will hasten the day when antenna siting no longer is [a big] problem."); *FCC Members Reluctant to Preempt Local Tower Limits*, TR DAILY (Feb. 24, 1998) (quoting then Chairman Kennard who stated that "this problem can be solved").

V. THE COMMISSION SHOULD ENSURE THAT WIRELESS PROVIDERS HAVE REASONABLE AND NON-DISCRIMINATORY ACCESS TO MULTI-TENANT ENVIRONMENTS.

A. The Commission Has Full Authority to Extend the OTARD Rule to Fixed Wireless Antennas.

As part of its ongoing effort to encourage competition in all telecommunications markets, the Commission extended its existing over-the-air reception device ("OTARD") rules to prohibit restrictions on the placement of subscriber antennas used to provide telecommunications services.[20] Echoing its comments and reply comments in this docket, RAA asserts that the Commission had no authority to extend the OTARD rules to cover fixed wireless antennas.[21] RAA raises no new facts or arguments on reconsideration, and for that reason alone its petition should be dismissed.[22] In any event, the Commission's general authority to effectuate the provisions and purposes of the Act provides it with ample authority to apply the OTARD rules to fixed wireless facilities.[23]

Both the Commission and the courts have long recognized the broad scope of the Commission's authority under Sections 4(i) and 303(r) to further the goals of the

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[20] *See* 47 CFR § 1.4000. Previously, only antennas used to receive video programming were protected under the Commission's rules. In the *First Report & Order*, the Commission extended the rules to include antennas used to receive and transmit fixed wireless signals. *See First Report & Order*, ¶¶ 97-100.

[21] *See, e.g.*, RAA Comments at 29-35 (filed Sept. 27, 1999); Letter to Magalie Roman Salas, Secretary, FCC from Matthew C. Ames, Attorney for Real Access Alliance (Oct. 25, 1999); Letter to Magalie Roman Salas, Secretary, FCC from Matthew C. Ames, Attorney for Real Access Alliance (Nov. 12, 1999); Letter to Magalie Roman Salas, Secretary, FCC from Matthew C. Ames, Attorney for Real Access Alliance (May 10, 2000).

[22] 47 C.F.R. § 1.429.

[23] *See First Report & Order*, ¶ 105-06.

Communications Act.[24] RAA's attempt to distinguish those cases from the present proceeding is unavailing.[25] The Commission properly exercised its authority under sections 4(i) and 303(r) to promote important statutory objectives including competition in the local exchange market, the deployment of new technologies, and the deployment of advanced services.[26]

One of Congress' clear objectives in enacting the Telecommunications Act of 1996 was to promote competition in the local exchange market.[27] Extending the OTARD rules to cover devices used to transmit and receive fixed wireless services will help fulfill that goal by encouraging the deployment of wireless services that can compete with the services offered by the incumbent wireline carriers. Extending the OTARD rules to cover fixed wireless antennas also promotes the deployment of new technologies.[28] Although RAA attempts to dismiss section 7 as simply a "policy statement," the Commission clearly has an obligation to advance congressional statements of policy. RAA also fails to note that section 7 places the burden on opponents of new technologies, like RAA, to demonstrate why the use of new technologies is not in the public interest. RAA has clearly failed to meet its burden here. Finally, fixed wireless technologies will be used to provide advanced services,[29] and extending the OTARD rules to

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[24] *See First Report & Order*, ¶ 101 n.261 (listing numerous cases upholding the Commission's exercise of general or ancillary authority to achieve statutory goals).

[25] *See* RAA at 15.

[26] *See First Report & Order*, ¶¶ 101-05.

[27] *See, e.g.*, H.R. REP. NO. 104-204, at 48 (1995) (finding that the main component of the Act "promotes competition in the market for local telephone service"); S. REP. NO. 104-23, at 5 (1995) (recognizing that the legislation "reforms the regulatory process to allow competition for local telephone services by cable, wireless, long distance" and other entities).

[28] Communications Act, Section 7 (47 U.S.C. § 157).

[29] *See, e.g.*, *Winstar in Partnership Talks With Cable TV Provider*, TR DAILY (Mar. 7, 2001) (explaining how a cable TV operator hoped to used Winstar's fixed wireless services to offer broadband services in residential multi-tenant environments).

cover fixed wireless antennas will promote the congressional directive to encourage the timely and widespread deployment of such services.[30] Because sections 4(i), 7, and 303(r) provide clear authority to extend the OTARD rules to fixed wireless antennae in fulfillment of statutory goals, RAA's petition for reconsideration should be denied.

B. The Commission Should Clarify that Any Professional Installation Requirement Is Subject to the Existing Limitations on Safety-Related Restrictions.

In expanding the OTARD rule to include fixed wireless devices, the Commission retained the existing "safety exception," which permits safety-related restrictions that would otherwise impair the installation, maintenance, or use of subscriber antennas as long as the restrictions are narrowly tailored, nondiscriminatory, and serve a legitimate safety purpose.[31]

The Commission also noted that the existing prohibition against professional installation requirements would not apply to fixed wireless subscriber equipment.[32] AT&T agrees with the Wireless Communications Association ("WCA") that the Commission should clarify that any professional installation requirement must satisfy the same criteria as other safety requirements. Otherwise, fixed wireless service providers may be subjected to arbitrary and unreasonable installation requirements designed to prevent the use of fixed wireless subscriber equipment.[33]

As WCA explains, the Commission's decision to permit and indeed recommend the professional installation of fixed wireless subscriber equipment could be interpreted to permit local governments, homeowners' associations, and landlords to adopt and enforce such

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[30] 47 U.S.C. § 157 note.

[31] 47 C.F.R. § 1.4000(b)(1); *First Report & Order*, ¶ 117.

[32] *See First Report & Order*, ¶ 119.

[33] *See* WCA Petition for Partial Reconsideration at 3.

requirements without ensuring that they have a clearly defined, legitimate safety objective and are neither discriminatory nor more burdensome than necessary. For example, a local government, homeowners' association, or landlord could require that all fixed wireless subscriber equipment be installed by only one individual, which could effectively prevent many such devices from being installed at all. To ensure that professional installation requirements are not used to prevent consumers from receiving fixed wireless service by creating unreasonable barriers to installation, the Commission should clarify that any professional installation requirement adopted by a landlord, homeowners' association, or local government must comply with the existing limitations on safety-related restrictions.

CONCLUSION

For these reasons, the petitions for reconsideration filed by BellSouth, Commonwealth Edison Company/Duke Energy Corporation, Florida Power and Light, the Real Access Alliance, and Verizon Wireless should be denied, and the petition for partial reconsideration filed by the Wireless Communications Association should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2001, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to the Petition for Reconsideration to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 14, 2001
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