

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of)
)
Promotion of Competitive Networks in) WT Docket No. 99-217
Local Telecommunications Markets)

Comments of the Smart Buildings Policy Project

Jonathan Askin
General Counsel
Association for Local
Telecommunications Services
888 17th Street, NW
Suite 900
Washington, DC 20006
(202) 969-2587

on behalf of the
Smart Buildings Policy Project

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SUMMARY

- There are still persistent and pervasive problems precluding competitive access to multi-tenant environments.
- Such problems are the direct result of unreasonable restrictions and onerous conditions on competitive carriers attempting to serve consumers in multi-tenant environments.
- Swift and firm action from the Commission is still necessary to curb anti-competitive behavior.
- The Commission can and should directly prohibit MTE owners from unreasonably discriminating among facilities-based telecommunications carriers in the provision of access to MTE tenants.
- The Commission may accomplish pro-competitive nondiscriminatory access objectives through regulations imposed on carriers themselves and enjoining MTE owners from discriminatory practices through use of the Section 411(a) joinder mechanism.
- The principle of technological neutrality and the federal policy of promoting competition through a variety of transmission mechanisms compel the Commission to construe Section 224 in a manner that accounts for telecommunications carrier access through use of technologies other than those used by the incumbent utilities (*i.e.*, by providing Section 224 access to MTE rooftops).
- Granting building owners a veto right over telecommunications carrier access to in-building ducts, conduits, and rights-of-way owned or controlled by utilities eviscerates the intended pro-competitive benefits of Section 224.
- Providing telecommunications carrier access to utility ducts, conduits, and rights-of-way within MTEs will not implicate the property rights of MTE owners.
- The Commission's rules governing facilities-based telecommunications carrier access to tenants in MTEs must apply equally to residential and commercial environments.
- All exclusive provisions in access agreements for commercial and residential MTEs, existing and prospective, should be rendered null and void upon a tenant's request for service from a competing carrier.
- Every building – most particularly, every essential government facility – should have access to multiple telecommunications carriers with diverse and redundant networks in order to avoid problems caused by a single point of failure.

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The Smart Buildings Policy Project (“SBPP”)¹ hereby submits its comments in the above-captioned proceeding² in response to the Wireless Telecommunications

¹ The Smart Buildings Policy Project is a coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to multi-tenant environments (“MTEs”). The SBPP presently represents Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T, Comcast Business Communications, Commercial Internet eXchange Association, Competition Policy Institute, Competitive Telecommunications Association, Digital Microwave Corporation, Focal Communications Corporation, The Harris Corporation, Highspeed.com, Information Technology Association of America, Lucent Technologies, NetVoice Technologies, Inc., Network Telephone Corporation, Nokia Inc., International Communications Association, P-Com, Inc., Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications, Inc., Wireless Communications Association International, WorldCom, and XO Communications, Inc.

² *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *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*, FCC 00-366 (rel. Oct. 25, 2000) (“*First Report and Order and Further Notice*”).

Bureau's request for comment on the current state of the market for local and advanced telecommunications services in multi-tenant environments.³

I. Introduction

In its *First Report and Order* in the proceeding on Promotion of Competitive Networks in Local Telecommunications Markets (“*Competitive Networks First Report and Order and Further Notice*”), the Commission sought to acquire additional information before determining whether additional regulatory requirements were necessary. At that time, the Commission recognized that its actions in the *Competitive Networks First Report and Order and Further Notice* “may well be insufficient in themselves to secure a full measure of choice for businesses and individuals located in [multi-tenant environments].”⁴ In its *Further Notice* in this docket, the Commission authorized the Wireless Telecommunications Bureau to issue a public notice eight months after the *Further Notice* to request additional information on the state of the market for local and advanced telecommunications services in multi-tenant environments (“multi-tenant environments” or “MTEs”).⁵

The SBPP has worked with its membership, some of whom will file their own comments, to gather information in response to the Commission's request. The SBPP

³ *Public Notice, Wireless Telecommunications Bureau Requests Comment on Current State of the Market for Local and Advanced Telecommunications Services in Multi-Tenant Environments*, DA 01-2751, (rel. Nov. 30, 2001).

⁴ *Competitive Networks First Report and Order and Further Notice* at ¶2.

⁵ Because of various developments, including the May 22, 2001, release by the Real Access Alliance (“RAA”) of its Model Access Agreement, the information request was delayed. On November 30, 2001, the Commission released a public notice requesting this information. At the request of the RAA, the FCC granted an extension of the comment filing deadline until March 8, 2002.

has issued a survey to its members and other competitive telecommunications providers,⁶ and it has collected data about specific acts by building owners and incumbent local exchange carriers (“ILECs”) that prohibited or substantially delayed MTE access by competing carriers.⁷ The results of the survey point to only one conclusion: there are continued significant restrictions on telecommunications carriers accessing tenants in MTEs, and these restrictions pose a real and sufficient problem for the development of facilities-based competitive networks.

In its *Competitive Networks First Report and Order and Further Notice*, the Commission postponed adopting the necessary steps to prevent discriminatory action or other egregious behavior thwarting MTE access by CLECs because, it believed that there were “positive” steps taken by the Real Access Alliance (“RAA”) that could obviate the need for regulatory action. Foremost among these actions was the RAA’s release of the Model Access Agreement. Ironically, although not surprisingly, our survey finds that, in the eight months since the release of the *Competitive Networks First Report and Order and Further Notice*, not one competitive provider has been presented with the Model Access Agreement.⁸

It is time for the Commission to recognize these so-called positive steps for what they are: efforts to delay the Commission from adopting the necessary access requirements to ensure consumers can select their provider of choice.

⁶ The survey questions are attached hereto as Appendix I.

⁷ Survey results are discussed in Section III, *infra*.

⁸ It is important to note that the RAA should not be viewed as representative of the real estate owners throughout the country, as RAA is comprised a small percentage of building owners. Thus, even if their members were using the Model Access Agreement -- which is clearly not the case -- the results would still be diminimus.

The comments of the SBPP are in several parts. First, we review briefly the public interest rationale for the Commission to adopt regulations for ensuring that telecommunications carriers have access to tenants in MTEs. Second, we discuss the conclusions of our survey of competitive providers. Third, we set forth several illustrative examples of problems competitive providers have experienced recently. Fourth, we recommend the actions that the Commission should take.

II. Public Interest Rationale for Commission Adopting Requirements Enabling Customers in MTEs to Select Their Telecommunications Provider of Choice

The Bell Operating Companies (“BOCs”) and other ILECs against whom competitive carriers seek to compete typically have facilities in -- and serve -- virtually every building in their service areas. These incumbent carriers typically enjoy this access free of charge. The breadth of access these incumbents enjoy to virtually every building in their service area is partly what is meant when the industry speaks of incumbents providing broadband and other telecommunications service “in-region.”

This free and ubiquitous building access is one of the important legacies of monopoly that gives the BOCs and other ILECs tremendous economic advantage over competitive local exchange carriers (“CLECs”) for broadband and voice services and creates a significant barrier to facilities-based competitive entry. Competitors, however, sometimes are excluded altogether from multi-tenant buildings by building owners or managers. In other instances, building access for competitors is delayed, or eventually permitted only on costly, discriminatory and burdensome terms.

The incumbents are major beneficiaries of this discriminatory behavior by building owners, while CLECs ultimately are prevented from offering facilities-based competition. This building access barrier protects the incumbents' market share and imposes much higher costs on competitors who seek to connect new networks to customers in multi-tenant environments.

The building access problems faced by potential competitors to the ILECs play a serious role in preventing facilities-based competition, such as the creation of new loops, and ultimately curtail customer choice among a variety of providers. All customers suffer as a result of this building access problem, not only those customers who are completely denied access or are substantially delayed in gaining access to MTEs by the building owners. The tragic events of September 11 demonstrate clearly that every building (and most certainly every essential government building) must have access to more than one facilities-based carrier. This access is essential to minimize disruptions to critical infrastructure and to reduce downtime and loss of major business functions in the event a disruption cannot be avoided. Government must ensure that the public and private sectors have access to these services by reducing the barriers to competitive building access that currently exist. Discriminatory building access policies preclude consumer access to a public good and deny businesses the ability to purchase critical services from providers of their choice.

Many facilities-based carriers, *i.e.*, those who have provided their own loops, switches, and other facilities are in bankruptcy. These and other predominantly facilities-based competitors have had two things in common: (1) the costly and relentless efforts made to win the cooperation of landlords to allow these competitors to reach their

customers, and (2) the extensive and persistent effort made to bring the building access barrier to the attention of regulators and legislators to obtain meaningful pro-competitive relief.

The discriminatory and prohibitive MTE access practices experienced by SPBB members raise costs and impede significant efficiencies of facilities-based competition. For example, building access delays or outright prohibition oftentimes seriously compromises network efficiency. Generally, when competitors are designing their network, they do not know which buildings they will actually succeed in accessing. This makes it very difficult to determine where they need capacity, and compounds the difficulty of designing, building, and operating an efficient network. Teligent, for example, would invest in a base station (a very costly part of the fixed-wireless network) that had the necessary line-of-sight and space to serve many buildings, and arrange substantial backhaul capacity from the base station to the Teligent switch. But instead of gaining access to all of the buildings with potential customers to which the base station had excellent line-of-sight, Teligent sometimes would succeed in gaining access to only 1/3 of the surrounding buildings in which it wished to compete. It could not use its investment efficiently.

Difficulty in securing building places facilities-based competitors attempting to deploy voice and broadband services at a competitive disadvantage *vis-à-vis* the incumbents. Unlike the ILECs, the competitors who rely on connecting their own networks to customers need to coordinate and build (or sometimes contract with) a significant organization -- involving substantial cost and effort -- to work to secure the permission of landlords to allow access. The competitors must begin soliciting buildings to provide

access well before they actually intend to serve a particular market and often before other areas of their planning are completed, because it typically takes many months of sustained effort for CLEC to negotiate a building access agreement. In some cases, in spite of repeated and costly efforts, the competitors cannot obtain access to a building. In a few cases, after persistent and costly efforts to obtain building access, competitors discover that they cannot provide service to the building as expected, perhaps because the location for an anticipated base station providing line of sight could not be leased or due to some other business or engineering development. “Successful” attempts to secure access to a building may generate lengthy, expensive and complex leases that impose many unreasonable limitations, burdens and significant monthly costs on the competitor, including requiring that payment begin immediately.

Some building owners, for example, attempt to extort a percentage of telecommunications gross revenues from CLECs that wish to enter their buildings before the carrier is granted building access or is even permitted to market to the tenants in the building. In addition, certain garden apartment complexes require that the competitive provider pay twice to access an apartment building. First, the carrier must enter into an agreement with the entity managing the common space and pay an access fee; then the carrier must negotiate with the particular coop or condo building management for access to the individual building. Moreover, building owners sometimes attempt to raise the price significantly, impose other burdens, or threaten termination when a CLEC’s building access arrangement must be renewed to continue to serve the building. The ILECs are not subject to these access fees or threats.

Because securing building access is often time consuming and must begin well before deployment in a market, competitors are unable to offer service to their customers in a timely manner, consequently placing them at a devastating competitive disadvantage. If CLECs market to customers before gaining building access, they may not be able to serve that customer at all or may lose the customer in the often lengthy period before building access can be secured.

While building owners sometimes complain that competitors are not serving a building in spite of having been granted the right to do so (although rent is paid anyway), the situation, is actually the direct result of the attempts by CLECs to cope with the grossly flawed market -- replete with lengthy but unpredictable delays in securing building access -- created by landlords. Inevitably, some of the building access agreements will be signed before the CLEC can offer service to the building. This is especially likely to occur when an owner of buildings in several markets -- some where the CLEC provides service and others where service will not be provided for some time -- signs an agreement with the CLEC authorizing building access to the owner's entire portfolio of buildings. Often times, however, the competitive carrier is ready and waiting to provide service and does so soon after a building access agreement is signed. This reflects the complexity and inefficiency caused by building access uncertainties. By contrast, the incumbents -- when they are ready and it is convenient for them -- typically enter without having to enter into a license agreement or compensate the building owner.⁹

⁹ Moreover, competitors must also create costly lease administration, accounting, payment and tracking systems to implement and satisfy the requirements of thousands of burdensome lease or license agreements. Most leases or licenses vary in cost; competitive providers must pay and track these varying fees on a monthly basis; competitors must take steps to renew licenses or send notices at times specific to each lease or license; and competitors must track and comply with other restrictions and obligations that are specific to particular leases and buildings. By contrast, the incumbent carrier usually has no lease or

Additionally, discriminatory or prohibitive building access practices result in competitors losing the efficiency that comes from selling, marketing and provisioning a service throughout a particular geographic territory or to a customer that may have offices throughout the U.S. and may wish to enter into an agreement with a CLEC that can provision service to all of the customer's locations. Competitors cannot readily sell or market broadly over a geographic area because they will only have access to some buildings. A competitor must find ways to ensure that the sales force is selling only in those buildings where access is available (or where the company is willing to gamble that it will be available shortly) or the competitor will not be able to provide facilities-based service to the customer. The competitor also must create a system to trigger sales and marketing efforts in buildings to which access later becomes available. Finally, competitors cannot arrange to install or deploy service as efficiently -- rather than systematically install service to all of the buildings on a block at one time, they will have to bring installation crews to the same block again and again as they eventually gain access to buildings where they have been seeking building access for a long time. Nor do the problems competitors have in gaining building access end after the carrier provides service to tenants in the building. The entire negotiating process can begin again with all of the attendant perils to competition when the access agreement nears the end of its initial term and must be renewed. Competitive carriers have experienced problems retaining building access at all or on reasonable terms.¹⁰

license (and, if a lease or license does exist, it will rarely, if ever, be as onerous as that imposed on the CLEC), virtually no accounting and payment requirements relating to building access, and expends proportionally little effort on this issue.

¹⁰ The discussion above reflects just some of the challenges, coordination demands, and costs imposed on competitors as a result of discriminatory behavior by building owners. A competitor must create an organization to secure building access agreements, devise costly systems, and coordinate

What is most critical for the Commission to understand is that these difficulties and barriers persist, and they pose a problem for the development of facilities-based competition. In the next two sections, we will supply current evidence that supports these conclusions.

III. SBPP Questionnaire Provides Marketplace Data Supporting the Need for Commission Action

In January, 2002, the SBPP sent its questionnaire (Attached as Appendix I) to SBPP members. It was also distributed by various trade associations to non-SBPP member telecommunications providers. The SBPP received responses from competitive telecommunications providers that comprise the predominant share of the facilities-based competitive sector. The following are the aggregated responses to the questionnaire:

Question 1.

Is gaining access to tenants in multi-tenant buildings very important to the success of your company?

Response: The respondents were unanimous in stating that gaining access was very important.

Question 2.

Are you seeking access to commercial multi-tenant buildings? residential? or both?

Response: 75% of the respondents were only seeking access to commercial MTEs. The other 25% were seeking access to commercial and residential MTEs.

Question 3.

During 2001, were you unsuccessful in gaining access to tenants in any multi-tenant buildings? If so, how often were you unsuccessful (% of time unsuccessful)?

effectively with deployment, sales, marketing and other organizations. The inefficiency and the myriad opportunities for problems, mistakes and failure, are evident.

Response: Every respondent was unsuccessful at some time in gaining access to MTEs. 50% of the respondents were unsuccessful in at least 30% of the attempts to gain access (and 25% were unsuccessful in 50%).

Question 4.

During 2001, for buildings in which you successfully obtained access, how often (% of instances) were negotiations completed within 30 days? within 60 days to 90 days? within 90 days to 180 days? after 180 days?

Response: Most respondents said that in most instances where they were successful in gaining access they were able to do so within 90 days. In very few instances, was a respondent successful within 30 days, and about one-third of the time they were successful within 60 days. Many respondents commented that after a certain time – often after 90 days – they found that it was inefficient and unproductive to continue discussions and simply gave up trying.

Question 5.

During 2001, how often did you lose customers or potential customers because of a delay in obtaining building access: never, seldom, or frequently?

Response: Every respondent lost customers because of a delay in business access. Over 60% of the respondents stated that they frequently lost customers.

Question 6.

During 2001, did the building owner or landlord seek to use the Model License Agreement for building access drafted by the Real Access Alliance?

Response: The response was unanimous – in no instance did a building owner or landlord seek to use the RAA's Model Access Agreement.

Question 7.

During 2001, did you seek to renew already existing agreements to access commercial multi-tenant buildings? How often were you successful (% of time successful) in renewing these agreements? In these renegotiations, how often were you presented with new contractual terms that you considered unreasonable: never, seldom, or frequently?

Response: 50% of the respondents had no experience with renewals of existing agreements. Of the other 50%, they all said they frequently faced new and unreasonable terms. The success rate of these firms on renewal ranged from 50% to 95%.

Question 8.

During 2001, for those providers seeking access to multi-tenant buildings in Texas or Connecticut (states with laws assisting access), was it significantly easier to negotiate to obtain access than in other states?

Response: 50% of the respondents had any experience operating in Texas or Connecticut. Of these respondents, one-half said it was easier doing business there.

Question 9.

In obtaining access to multi-tenant buildings, how often does the building owner request you pay compensation based on your revenues: never, seldom, or frequently?

Response: Over 60% of the respondents were frequently asked to pay compensation based on revenues. All others answered “seldom”.

The SBPP believes the following conclusions are evident from this survey:

- Competitive providers continue to be denied access far too frequently to serve potential customers in MTEs. For ILECs, the lack of success rate is 0%. For many competitive providers, this rate is over 30%. This is a serious handicap in an otherwise challenging business. These difficulties persist even after a competitive provider obtains access and seeks renewal further attesting to the market power of key building owners.
- Most negotiations where successful attempts occur are completed within 90 days of initiation. We believe that competitive providers in today’s challenging marketplace largely seek access where they have a customer (as opposed to seeking access rights for any building in their service area). Thus, this amount of time needs to be contrasted to the time required for an ILEC to gain access – which is essentially 0 days. Again, this poses a serious competitive problem.
- Because competitive carriers are either denied access or access takes too long, competitive carriers frequently lose customers. As stated in the previous section, this adds significant inefficiency to the CLEC business model because of the costs incurred to make the initial sale and to attempt to gain access.
- Once more in contrast to ILECs, who pay nothing for providing access to buildings, competitive carriers continue to be subject to frequent demands to pay a percentage of revenues – as opposed to just the actual cost of access – to building owners. This further distorts the competitive landscape.

- Finally, the RAA's voluntary efforts are illusory. The SBPP has grave problems with the Model Access Agreement – primarily the fact that it has little to do with the reality of the marketplace negotiations. But, so long as the Commission has relied on it to refrain from moving forward to settle the competitive access problems described herein, it becomes very important. With the unanimous evidence provided here, there is no longer any reason to withhold further Commission action based on these efforts.

The SBPP has stated in the past that a great many building owners cooperate fully with competitive providers in access negotiations. However, when facilities-based networks are a Commission priority and when the actual business is so challenging, anything less than complete compliance with the goals of the 1996 Act poses a real threat to competition. The results set forth here demonstrate that further Commission action is required.

IV. Recent Problems Experienced By Competitive Providers in Obtaining Access to MTEs to Serve Customers

While the foregoing section demonstrates the universality and severe degree of competitive carriers problems in gaining access to MTEs, SBPP thought it appropriate to present a sampling of illustrative and persistent problems experienced by competitive carriers in recent months. Such examples should further demonstrate that the *Competitive Networks First Report and Order and Further Notice*, combined with the RAA's Model Access Agreement, have done little to improve competitive choice in MTEs. There is still obvious need for additional FCC action.

- In Los Angeles in September, 2001, an agreement between a competitive provider and a building owner expired. The provider had three customers in the building with a fourth seeking to sign up for service. The provider sought to renew the agreement at the current rent. The building owner countered with a **500%** increase. When the provider refused to pay, the

building owner sent a letter to all tenants telling them the provider would not be renewed, and the provider lost its customers.

- A competitive carrier negotiated an access agreement with a large multi-dwelling unit (“MDU”) developer in Florida in hopes of providing service to three very large condominium developments. Each development had a separate owner, but they were all affiliated with each other. The competitive carrier executed three separate MDU access agreements, one with each developer/owner, which granted the competitive carrier the right to install and use certain equipment and facilities on the properties for the provision of local telephony services to the residents of each of the buildings on each of the MDU properties. The competitive carrier agreed to pay approximately \$1 million for such access rights at all 3 MDU properties. However, when the competitive carrier operations representatives met with some of the condo association presidents and building managers in regard to the installation of facilities and equipment within the buildings, the competitive carrier operations representative was informed that the developer/owner owns only the common areas in the MDU property and not the individual residential buildings. The competitive carrier representatives were told that if they wanted to access the residential buildings themselves, the competitive carrier would have to pay the condo associations and enter into a separate agreement with each of the individual condo associations.

- In early 2001, a competitive carrier was engaged in negotiating for access rights to a large New Jersey development, one of many owned by a large landlord. The landlord is one of the stockholders in the private telephone company/BLEC (“building local exchange carrier” whose business plan is to be the exclusive provider of telecommunications services to MTEs) that currently provides telephone service to all of the residences on the MDU property. The negotiations broke down last year because the building owner, in an apparent effort to favor its BLEC affiliate, insisted that the competitive carrier pay the building owner \$800 per residence, approximately \$1.8 million, merely for the opportunity to market its services to the residents of the complex. Thus, the competitive carrier would be forced to pay the charge regardless of the number of customers it acquired.

- A competitive carrier was forced to discontinue serving a building in Century Park in Los Angeles when the landlord increased the rent of \$750 to \$1,000 per month during the term of the agreement. The landlord further notified the competitive carrier that he would increase the rent to \$1,650 per month during the renewal term since, according to the landlord, other buildings in the area were getting \$2,950 per month. In fact, however, the current comparable market rate for similar buildings in the area was well below \$750 per month.

- A competitive carrier discontinued serving a building in Los Angeles that it had been serving for more than five years after negotiations with the landlord over a reasonable rental rate failed. The landlord's demands for a high percentage of the competitive carrier's revenue from the building made serving the building unprofitable.
- A competitive carrier was forced to discontinue serving a building in Boston when the landlord demanded an increase in rent from \$1,000 *annually* to \$3,000 *per month*. The landlord refused the competitive carrier's final offer of \$400 per month.
- In a building in Los Angeles, a competitive carrier was forced to move equipment into a collocation arrangement to serve a customer due to the landlord's refusal to negotiate reasonable rates. Due to space restraints in the collocation space, the competitive carrier was not able to put in all of the circuits the customer needed and had to advise the customer to place the remainder of its order with the ILEC.
- A competitive carrier was forced to cancel a project in Northern Virginia primarily due to the landlord's unreasonable rent demands. The landlord wanted the competitive carrier to pay \$750 per month, plus annual escalations, for the right to pull each cable to the customer.
- The landlord of a building in Milwaukee, Wisconsin demanded \$1,200 per two inches of space per riser per month. This fee was in addition to the price per square foot for the floor space. The competitive carrier was seeking to provide service to a large customer who needed redundancy. Not only would the landlord not agree to reduce the \$1,200 per month fee, but also would not agree to allow the competitive carrier to make both runs in the risers for the \$1,200 fee for this one customer.
- A competitive carrier was stopped by the landlord of a building in Atlanta, Georgia, from building three feet of conduit and expanding two pull boxes in the building. The competitive carrier has a License Agreement at this building and installed a POP. During renewal negotiations for a 1,100 square foot space, the landlord requested \$3,000 per month for use of a conduit that was installed years ago.
- In another Atlanta building, the landlord stopped a competitive carrier's engineers from adding a conduit and removing an existing one, saying that the competitive carrier would have to enter into a License Agreement and pay a fee of \$75,000. The competitive carrier has three Access License Agreements for this building that are in good standing which cover upgrades, construction, installations and maintenance. After six months of

negotiation, the competitive carrier finally convinced the landlord to allow construction of the needed conduit.

- The landlord of a building in New York City wants to charge a competitive carrier an additional fee to run fiber, even though the competitive carrier has a License Agreement in place that covers fees.
- In a New York City building, a competitive carrier is being stopped by the landlord from building new fiber riser for large customer/tenant. The landlord will probably allow only a home run to this customer.
- In five buildings in New York City, landlords are insisting that the competitive carrier put all fiber in conduit.
- After extended negotiations, a competitive carrier finally agreed to double its rental payment to \$20,000 annually and signed a contract sent by the landlord of a building in Boston, Massachusetts. The landlord subsequently reneged and refused to countersign, demanding instead that the rent double again to \$40,000 annually -- a 400% increase. The competitive carrier refused, since the \$20,000 fee would have been the highest rent in Boston. The competitive carrier has now been told to expect an eviction notice.
- A competitive carrier has a license agreement for a building in Buffalo, New York -- an agreement that is in good standing. In spite of this agreement, the landlord is requiring the competitive carrier to use the MMR,¹¹ at an additional fee, even though the competitive carrier's agreement permits it to meet in the MMR at no additional fee and has the right to make direct connections to its customers.
- In a Northern Virginia building, the landlord hired a telecom consultant who recommended that the competitive carrier pay a monthly fee of \$850 and a one-time license administration fee of \$1,700 for space for one rack of equipment in the lower level MMR room of the building. The consultant refused to negotiate this rate, even though the market rate for floor space between 150-200 square feet in the McLean, Virginia area ran about \$340 a month at the time. The deal he was proposing at \$850 a month equated to \$1,133 per square foot (using nine square feet for a rack footprint), which is about 45 times the average office lease rental rate. The ILEC is not paying anything currently.

¹¹ An "MMR" is a meet-me-room., a room in a building through which all service providers seeking to serve customers must connect.

- A competitive carrier is currently providing service to tenants in a building in New York City where it has no license agreement in place that permits the competitive carrier's continued use of the building agreement. The competitive carrier is paying the landlord under current contract terms; however, the landlord has refused to come to terms with the competitive carrier on a reasonable renewal rate. Because the competitive carrier is in the building with no agreement, the building owner could bar the competitive carrier from further access to its own facilities and could even evict the competitive carrier.
- A competitive carrier provides service to the landlord's own company, as well as many other tenants in this building. The competitive carrier was paying \$400 per month under a valid license agreement which expired 10/01 and automatically renewed, with a 3% increase, for another year's term in 10/02. After the contract had automatically renewed, the landlord said that he did not accept the validity of the competitive carrier's option to renew or even the existence of a contract. The agreement expressly prohibited any oral representations and required any notices to be in writing. The landlord demanded \$2000 per month for access. When the competitive carrier attempted to negotiate a more reasonable rate, the landlord demanded \$4000 per month. The competitive carrier countered with a reasonable offer for space used -- \$50 per square foot. The landlord countered by sending the tenants in the building a memo informing them that "there may be an interruption with service for all [competitive carrier's] customers [in the building]." For any CLECs, paying \$4000/month for access to one building is not a sustainable business model. This is particularly true when, as is usually the case, the ILEC pays nothing (\$0).
- In another New York City building, a competitive carrier has agreements for two POPs – one at \$558 per month and the other at \$312 per month. Both agreements have expired, and the building owner now wants \$5,000 per month for each. Currently, the ILEC pays nothing.
- In another New York City building, the building owner wants the competitive carrier to pay him for every circuit. The competitive carrier has hundreds of circuits in the building.
- In a building in Chicago, the building owner has demanded that a competitive carrier sign a new agreement to renew that limits the competitive carrier's rights and inhibits its ability to do business. The fee the landlord is demanding will cover only the competitive carrier's existing customers. The competitive carrier is required to pay an additional fee for any new customers the competitive carrier secures in the building. The landlord wants \$2000 per month plus \$1500 up front to the

building owner. The competitive carrier is currently paying \$600 per month.

As a result of the challenge filed by BOMA to the Texas building access legislation, one competitive carrier reports that it is currently protesting five to 10 fold increases in rents in multiple buildings in Texas. The competitive carrier currently pays \$10,000 per year for access to one building. For renewal, the landlord is now requesting \$100,000 per year.

V. Recommended FCC Action

Under the assumption that the RAA would self-regulate its members (as well as the vast majority of building owners who are not members of RAA) to resolve pervasive anti-competitive practices, the Commission, to date, has taken little direct action. The Commission, however, has recognized that its limited actions “may well be insufficient in themselves to secure a full measure of choice for businesses and individuals located in [multi-tenant environments].”¹² The fact remains that major obstacles still persist, and it is time for the Commission to take affirmative steps. The SBPP proposes the FCC take the actions recommended and supported below.

A. The Commission Should Prohibit Carriers From Engaging In The Unreasonable Practice Of Serving Customers In MTEs Pursuant To Discriminatory Access Arrangements.

As the Commission begins to address the issue of telecommunications carrier access to MTEs, it may prefer to adopt a measured approach of targeting for regulatory action only those practices of MTE owners that already have demonstrably harmed local competition. MTE owners that do not engage in discriminatory practices would be left untouched by this measured exercise of federal telecommunications regulation.

Specifically, the Commission may prescribe regulations when the practice of a carrier or

carriers violates the provisions of the Communications Act.¹³ The Communications Act prohibits carriers’ “unjust or unreasonable discrimination in . . . practices . . . for or in connection with like communication service, *directly or indirectly, by any means or device . . .*”¹⁴ The Commission should conclude that discrimination by a carrier in the form of participating in, cooperating with, or benefiting from an MTE owner’s decision to prevent tenants from selecting their own facilities-based telecommunications carrier is an unjust and unreasonable practice and thereby unlawful under Section 201(b).¹⁵ The Commission should proceed to adopt a rule prohibiting telecommunications carriers from providing telecommunications service to those MTEs in which the MTE owner unreasonably discriminates against certain telecommunications carriers thereby preventing tenants from selecting their own facilities-based telecommunications carrier. The Commission may enforce this regulation through its complaint process.¹⁶ An MTE owner or manager engaging in discriminatory practices will be a person interested in or affected by the regulation or practice under consideration by the Commission in a complaint proceeding. As such, the MTE owner or manager may be joined as a party and subjected to orders issued by the Commission.¹⁷ In such an action, the telecommunications carrier may be only a nominal defendant, as was the case in *Ambassador, Inc.*¹⁸ The Commission may aid in the resolution of any dispute by

¹² *Competitive Networks First Report and Order and Further Notice* at ¶2.

¹³ 47 U.S.C. § 205(a).

¹⁴ 47 U.S.C. § 202(a)(emphasis added).

¹⁵ 47 U.S.C. § 201(b).

¹⁶ 47 U.S.C. § 208.

¹⁷ 47 U.S.C. § 411(a).

¹⁸ *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945).

requiring affected carriers to file the contracts or agreements into which they have entered with building owners whenever complaints are brought before the Commission.¹⁹

This process was approved unanimously by the Supreme Court in the *Ambassador* decision. The underlying issue involved the protection of consumers in hotels and apartment buildings. Just as with building access in the *Competitive Networks* rulemaking, the Court recognized that telephone service was indispensable to the hotels that were parties defendant.²⁰ The Court also recognized that the hotel-provided services in issue imposed some additional costs on the hotels.²¹

The Commission, after hearing, entered an order requiring the telephone companies to include appropriate terms in their tariffs.²² While the Commission offered the telephone companies a choice of either specifying the actual mark-up prices charged by the hotels or limiting what the hotels could do as subscribers of the service,²³ the important point was that under either approach, the Commission thenceforth would be able to regulate efficiently.

Rejecting the now-familiar claims that the Commission was preparing to become a “national landlord,” the Supreme Court explained:

[o]f course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber’s business consists of retailing to patrons a service dependent on its own contract for utility service, the

¹⁹ 47 U.S.C. § 211(b).

²⁰ *Ambassador, Inc.*, 325 U.S. at 318.

²¹ *Id.*

²² *Id.* at 320. Although the Commission chose to proceed by tariff prescription, the Commission alternatively may proceed by general regulation. 47 U.S.C. § 205(a).

²³ *Id.*

regulation will necessarily affect, to that extent, its third party relationships.²⁴

Section 411(a) was properly applied to join the hotels as parties defendant, and the Court concluded that an injunction against the hotels was appropriate under Section 411(a) even though no injunction issued against the telephone companies.²⁵

The Commission's historic use of Section 411(a), in conjunction with the unanimous Supreme Court decision approving the use of that provision to enjoin non-carriers from certain practices, demonstrates that it would be wholly appropriate for the Commission to employ the provision to accomplish nondiscriminatory telecommunications carrier access to MTEs. The history of the Commission's rules governing the use of recording devices presents a scenario quite similar to the one underlying the *Ambassador* case and the enforcement of those rules is premised partly upon an appropriate reading of Section 411(a). The Commission prescribed telephone company tariff provisions permitting the use of customer-provided telephone recording devices, and mandated a beep tone to ensure that parties to a telephone conversation were aware they were being recorded. In commenting upon the effect of these tariff provisions, Commissioner Kenneth Cox explained:

The tariffs filed by the carriers with this Commission require, as a condition of service covered by those tariffs, that no subscriber may use a recording device in connection with telephone service without the 'beep' tone. It is the scheme and intent of the provisions of the Communications Act that the carriers have the basic responsibility to render service in accordance with the terms and conditions of their tariffs and to insure that their customers comply with such terms and conditions. These tariffs, so long as they are in effect, have the force of law as to both the telephone users and the carriers.

²⁴ *Id.* at 323-24.

²⁵ *Id.* at 325-26.

Failure on the part of users to comply with the terms of the tariff in this respect subjects them to possible loss of service, and to injunctive action pursuant to Sections 401(b) and 411(a) of the Communications Act.²⁶

The Commission has used its Section 411(a) authority on many occasions to join to a proceeding parties who are interested in or affected by the matter at issue, typically above the objections of the joined parties.²⁷ In the FCC decisions citing Section 411(a), the Commission uniformly interprets the provision broadly as enabling joinder of the relevant parties. As a Common Carrier Bureau Order states:

Section 411 of the Communications Act grants broad authority to the Commission as to parties who may be brought before it in any proceeding. . . . The Commission has required the inclusion of parties based on factors such as ownership and control of other essential parties, or where the party to be joined would be interested in or affected by a rule or other matter under scrutiny.²⁸

Similarly, in 1997, the Commission prohibited domestic international carriers from paying more than certain benchmark rates for terminating calls in foreign countries.²⁹ This Commission decision was upheld by the D.C. Circuit which concluded that the Commission's lawful regulations would not be invalid merely because they had

²⁶ *Amendment of Part 64 of the Commission's Rules Relating to Use of Recording Devices by Telephone Companies*, Docket No. 17152, *Notice of Proposed Rulemaking*, 6 FCC2d 587 (1967)(concurring statement of Commissioner Kenneth A. Cox).

²⁷ *See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co.*, Docket No. 17441 et. al, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969); *Armstrong Utilities v. General Telephone Company of Pennsylvania*, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970); *Warrensburg Cable, Inc. v. United Telephone Co. of Missouri*, Docket Nos. 19151, 19152 P-C-7655 P-C-7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985); *Continental Cablevision of New Hampshire, Inc.*, Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d 89 at ¶ 6 (1974).

²⁸ *General Services Administration v. American Tel. & Tel. Co.*, File No. E-81-36, *Order*, 2 FCC Rcd 3574 at ¶6, n.20 (CCB, 1987).

²⁹ *International Settlement Rates*, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19806 (1997).

the practical -- indeed, intended -- effect of altering the behavior of entities arguably outside the agency's jurisdiction.³⁰

Similarly, a Commission rule governing carrier practices predictably should result in MTE owners voluntarily permitting nondiscriminatory telecommunications carrier access given that the alternative is an injunction compelling the same.

Notwithstanding this foreseeable effect, a nondiscriminatory access rule representing an exercise of the Commission's unquestioned statutory authority to regulate telecommunications carriers is sanctioned by the *Cable & Wireless* decision.³¹

Through indirect restrictions such as those contemplated in *Ambassador*, the building owner's property is not being taken in any physical sense, so any taking would have to be a regulatory taking, not a *per se* taking as contemplated in *Loretto*. The Supreme Court has rejected an incantation that restrictions on the right to exclude "amount[] to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants."³² While such an effect may be relevant to a regulatory takings balancing, "it does not convert regulation into the unwanted physical occupation of land."³³

³⁰ *Id.* at 1230 ("To be sure, the practical effect of the Order will be to reduce settlement rates charged by foreign carriers. But the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.") (citations omitted). As the D.C. Circuit suggested, national ambient air quality standards properly imposed on State and local governments by the EPA will have an effect on the automobile industry. Likewise, valid Department of Commerce tariff collections will affect the activities of foreign manufacturers.

³¹ The *Ambassador* approach goes a step beyond the *Cable & Wireless* scenario by actively joining MTE owners in a complaint proceeding and enjoining their unreasonable access practices. It is self-evident that such a course of action will remain unnecessary in the vast majority of cases given the likelihood that building owners voluntarily will grant nondiscriminatory telecommunications carrier access to their MTEs if the agency's response to contrary practices is predictable.

³² *Yee*, 503 U.S. at 530-31.

³³ *Id.* at 531.

A mere reduction in the profitability of one particular use of property is not sufficient in itself to constitute a taking.³⁴ It is well established that a “loss of future profits -- unaccompanied by any physical property restrictions provides a slender reed upon which to rest a takings claim.”³⁵ Moreover, the courts will consider not only the burdens imposed by the Commission’s rule, but also the benefits conferred upon the MTE owner’s property by the operation of the nondiscriminatory access rule.³⁶

If it is determined that nondiscriminatory access under *Ambassador* results in a taking, a Commission requirement that a carrier pay “just and reasonable compensation” to the building owner in exchange for access would satisfy the Fifth Amendment’s requirement of just compensation.³⁷ As long as “the government has provided an adequate process for obtaining compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.”³⁸ The Commission’s compensation decisions would be subject to judicial review. As the Eleventh Circuit explained, “[s]o long as an administrative body’s decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of ‘provid[ing] an adequate process for obtaining just compensation.’”³⁹

³⁴ See, e.g., *Euclid v. Ambler Co.*, 272 U.S. 365, 395-397 (1926)(finding that notwithstanding the alleged diminution in the value of the owner’s land, the zoning laws at issue were facially constitutional as bearing a substantial relationship to the public welfare and inflicting no irreparable injury upon the landowner).

³⁵ *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

³⁶ *Agins v. Tiburon*, 447 U.S. 255, 262 (1980)(“In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.”).

³⁷ See *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

³⁸ *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985)(quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1018 n.21 (1984)).

³⁹ *Gulf Power Co. v. United States*, 187 F.3d 1324, 1333 (11th Cir. 1999), *reversed on other grounds*, 534 U.S. ____ (2002)(“*Gulf Power II*”).

B. The Commission Must Construe The Terms Of Section 224 Liberally To Prevent Incumbents From Controlling The Types Of Technologies That Can Be Offered To Tenants In Multi-Tenant Environments By Their Competitors.

In the *Further Notice*, the Commission sought comment on the extent of utility rights-of-way within MTEs under Section 224.⁴⁰ Section 224 of the Communications Act requires the FCC to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.” Under Section 224(a)(1) of the Communications Act, the term “utility” is defined as “any person 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 any wire communications.” Pursuant to Section 224(a)(4), the term “pole attachment” is defined as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility.”

Thus, Section 224, rather than excluding access to ducts, conduits, poles and rights-of-way in buildings, specifically includes all rights-of-way, conduit, ducts and poles “owned or controlled” by ILECs, regardless of location. The ILECs control, if not own, ducts, conduits, poles and rights-of-way they utilize within tens of thousands of multi-tenant buildings nationwide.

Furthermore, the Commission has stated that “[t]he purpose of Section 224 is to ensure that the deployment of communications networks and the development of

(quoting *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. at 194-95); see also *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000).

competition are not impeded by private ownership and control of scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.”⁴¹

On January 16, 2002, the United States Supreme Court verified that any telecommunications provider is unambiguously entitled to Section 224 access to utility owned or controlled poles, ducts, conduits and rights-of-way, including attachments by wireless providers, and attachments by telecommunications providers that also carry high-speed Internet traffic.⁴² The Supreme Court also upheld the authority of the FCC to regulate the terms and rates for telecommunications provider access to utility controlled or owned ducts, conduits, poles and rights-of-way. The Commission’s earlier reluctance to apply its Section 224 authority to intra-building poles, ducts, conduits, and rights-of-way was based on a misinterpretation of Section 224 by the 11th Circuit, which was reversed by the Supreme Court in *Gulf Power II*. The Supreme Court reversal of the 11th Circuit now opens the door for FCC application of Section 224 to intra-building and rooftop facilities and rights-of-way.

Thus, there is ample support for the Commission to construe Section 224 to include broad utility easements typically granted to utilities by MTE owners to install and upgrade their facilities to serve tenants and other pathways needed by competitors within the definition of “rights-of-way.”

i. The FCC Must Adopt A Broad, Technology-Neutral Definition Of “Rights-Of Way” Under Section 224 To Prevent

⁴⁰ *Competitive Networks First Report and Order and Further Notice*, at ¶ 169.

⁴¹ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777 at ¶ 2 (1998) (“*Pole Attachments Report and Order*”).

⁴² *National Cable Telecommunications Association v. Gulf Power* 534 U.S. ____ (2002) (“*Gulf Power II*”).

**Incumbents From Controlling The Types Of Technologies
That Can Be Offered To Tenants In MTEs By Their
Competitors.**

In its *Competitive Networks First Report and Order and Further Notice*, the Commission recognized that “[a]n incumbent LEC’s power to deny competitors access to in-building conduits . . . could impose a serious impediment to telecommunications choices for affected MTE residents.”⁴³ More specifically, this danger exists if the technology chosen by the utility is permitted to define the scope of the access to an MTE that its competitor will be allowed under Section 224. The Commission has acknowledged that “existing utility rights-of-way in MTEs, whether created by force of law, by written agreement between the parties, or tacit consent, generally originated in an era of monopoly utility service” and that “the purpose behind these rights of access was to ensure that end users could receive service from the single entity capable of providing, or legally authorized to provide, such service.”⁴⁴ Thus, utilities typically have broad rights of access to MTEs that may not specifically contemplate the use of rooftops or other areas of the MTE to accommodate non-traditional transmission technologies. However, pursuant to the broad rights granted utilities to access MTEs to provide service, the scope of these rights-of-way would generally permit them to expand their access to provide service to tenants using new technologies, should the need arise. Competitors must be afforded the same access if Section 224 is to be fully implemented to restrain the ability of utilities to behave anticompetitively toward telecommunications competitors.

The practical effect of a more limited interpretation of “rights-of-way” under Section 224 is that utilities could control what distribution technology may be used by

⁴³ *Competitive Networks First Report and Order and Further Notice* at ¶ 78.

competitors -- the exact result Congress sought to avoid in enacting Section 224. In other words, if the Commission declines to expand the definition of a “right-of-way” under Section 224 beyond the spaces in MTEs that utilities are actually using or are specifically authorized to use, utilities will be able to determine which technologies can be offered by their competitors in particular buildings. To illustrate: in 2000, Verizon announced plans to use a new fixed wireless technology to complement its DSL services.⁴⁵ The service is expected to be introduced next year.⁴⁶ If Verizon were to install fixed wireless equipment on rooftops pursuant to a broadly worded easement, Section 224 would be triggered and competitors also would be permitted to gain access.⁴⁷ However, in the meantime, before Verizon places its equipment on the building rooftop, competitors could not utilize Section 224 to gain similar access. Under a limited interpretation of “rights-of-way,” therefore, utilities would have the ability to decide whether new distribution technologies will be offered to tenants in an MTE when a building owner may be unwilling to permit a competitive provider to independently access the necessary rights-of-way.

ii. The Commission Should Specify That A Utility “Owns Or Controls” A Right-Of-Way When the Utility Has Broad Rights To Install And Upgrade Utility Facilities To Serve Customers.

⁴⁴ *Id.* at ¶ 88.

⁴⁵ Brad Smith, “Bell Atlantic Betting on New Fixed Wireless,” *Wireless Week*, at 1 (Apr. 10, 2000).

⁴⁶ *Id.* at 2.

⁴⁷ *See Competitive Networks First Report and Order and Further Notice* at ¶ 82 n.206 (“[A] broadly worded easement permitting a utility to place facilities throughout a building or “in hallways” would not in itself create a right-of-way under this definition. A utility’s placement of facilities in a defined pathway pursuant to such an easement would, however, create a right-of-way along that pathway, thus giving telecommunications carriers and cable service providers a right of access if the right-of-way is owned or controlled by the utility.”).

The *Further Notice* also asks in what circumstances a utility might “own or control” a right-of-way in the absence of a “defined space.”⁴⁸ The Commission determined that state law should determine “whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224.”⁴⁹ The danger of this approach is that a utility could delay or even prevent access by competitive providers to rights-of-way in MTEs through characterizing its right of access narrowly under State law. The Commission is ill-advised to contend that State laws should guide disputes concerning access to rights-of-way under Section 224. Rather, the Commission must provide guidance concerning the scope of a utility’s ownership or control of rights-of-way in MTEs to ensure that the goals of Section 224 are not eviscerated by narrow or restrictive state law constructions of utility’s access rights.⁵⁰

Where there is no written agreement between the utility and the building owner but the utility’s facilities are present in the MTE, it is likely that the utility has the right to access all areas of the MTE that are used, consistent with industry practice, for the transmission of services to tenants. A utility should be deemed to “own or control” a

⁴⁸ *Id.* at ¶ 170.

⁴⁹ *Id.* at ¶ 87. The *Competitive Networks First Report and Order and Further Notice* also states that “the extent of a utility’s ownership or control of a duct, conduit, or right-of-way under state law must be resolved prior to a complaint being filed with the Commission regarding whether rates, terms or conditions of access are reasonable.” *Id.* at ¶ 89. SBPP notes that this approach is highly impractical, as entities seeking to file a complaint at the Commission could be required to first petition a State court for a declaratory ruling concerning the scope of a utility’s ownership or control of an easement, a process that could take years. This could create the incentive for utilities to deny in all cases that they possess rights-of-way under State law in order to delay the advent of competition in an MTE.

⁵⁰ Although State law may inform the Commission’s decision as to whether there is a property interest for which the utility must be compensated as well as the amount of the compensation due to the utility if there is a taking of that interest, it may not diminish the power of the federal government to exercise its power of eminent domain through Section 224. *See, e.g., Fresno v. California*, 372 U.S. 627, 630 (1963) (holding that State law may not operate to prevent the United States from exercising the power of eminent domain to acquire water rights, even if the federal statute leaves to State law the definition of the property interests, if any, for which compensation must be made); *United States v. Powelson*, 319 U.S. 266, 279 (1943) (“The right of the United States to exercise the power of eminent domain is complete in itself and can neither be enlarged nor diminished by a State.”) (citations omitted).

right-of-way when it has a broad right of access to provide service to consumers using the areas of the MTE, such as ducts, conduit, and rooftop rights-of-way, that are commonly used for the transmission of telecommunications services.⁵¹ Ownership or control of rights-of-way should encompass the entire existing access rights utilities possess, including their inherent rights to implement new technologies to provide services to tenants, not just those pathways being utilized by the utility.⁵²

iii. Granting MTE Owners “Veto” Power over Competitive Providers’ Rights Under Section 224 Would Negate the Purpose of Section 224.

The Commission’s current interpretation of Section 224 appears to contemplate that property owners would have a “veto” power over the rights of competitive providers to access utilities’ rights-of-way and conduit in MTEs.⁵³ This interpretation is not reflected in the plain language of Section 224 or relevant Commission precedent with respect to this provision. Moreover, because Section 224(f)(1) ensures nondiscriminatory access to all telecommunications providers, any requirement to obtain the building owners’ consent to place facilities in utilities’ rights-of-way or other facilities within MTEs also would apply outside of MTEs. Requiring telecommunications carriers to

⁵¹ The *Competitive Networks First Report and Order and Further Notice* states that “utility ownership or control of rights-of-way or other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so.” *Competitive Networks First Report and Order and Further Notice* at ¶ 87. This analysis provides very little guidance. It is not likely that utilities would be specifically prevented from providing access to rights-of-way to competitive providers, as when these rights were granted the parties “would rarely, if ever, have considered the effect their actions might have on hypothetical future competition.” *Id.* at ¶ 88. Moreover, whether utilities are entitled to compensation for providing access to third parties under state law would be difficult -- if not impossible -- to ascertain if the State does not regulate pole attachments.

⁵² Access by competitive providers to these areas would, of course, be constrained by limitations based on safety or reliability and other concerns that were deemed relevant by Congress. *See* 47 C.F.R. § 224(f)(2). However, Congress imposed no other limitations on the right of nondiscriminatory access in Section 224.

obtain the consent of the building owner prior to exercising their rights under Section 224 would have far-reaching effects that would negate the purpose of Section 224.

Section 224(f)(2) provides that a utility is permitted to deny access to its rights-of-way where there is “insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”⁵⁴ The list of exceptions notably does *not* include the failure of an underlying fee owner to allow access to the utility right-of-way by the telecommunications carrier. There is no reason for the Commission to read into Section 224 such a limitation because, as discussed below, such an interpretation would eviscerate the substantial pro-competitive benefits of this provision. Prior Commission interpretations of Section 224 also indicate that where a telecommunications carrier obtains access to a utility’s right-of-way pursuant to Section 224, the underlying fee owner cannot preempt the carrier’s federally-granted right of access. For example, in the *Local Competition Order*, the Commission explained that “the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.”⁵⁵

Notwithstanding the plain language of the statute and its pro-competitive goals, the Commission could not require the consent of the building owner solely for access to MTEs, yet leave the procedures for accessing other utility rights-of-way and facilities unchanged without creating an unreasonable discrimination between rights-of-way in

⁵³ See, e.g., *Competitive Networks First Report and Order and Further Notice* at ¶ 90 (Section 224 “does not grant a legally enforceable right to remain on the premises against the wishes of the MDU owner.”).

⁵⁴ 47 U.S.C. § 224(f)(2).

⁵⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1179 (1996).

buildings and other rights-of-way.⁵⁶ Indeed, the Commission has concluded that the non-discrimination requirement of Section 224(f)(1) mandates that “the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by the utility.”⁵⁷ Therefore, any requirement for the consent of the owner of the underlying property would necessarily have to apply to *all* rights of access under Section 224.

If separate authorization of the underlying fee owner is required before obtaining access to a utility right-of-way -- whether it be from the owner of the land on which rights-of-way for stringing telephone lines between poles are located or the owner of the building through which a utility right-of-way extends -- telecommunications carriers effectively would be required to duplicate the rights of access to property that the utilities have at their disposal. Such an interpretation is entirely at odds with the statutory provision, as well as current industry practice.

Section 224 was designed to eliminate the need for telecommunications carriers to obtain separate rights-of-way from underlying fee owners.⁵⁸ Requiring telecommunications carriers to independently and redundantly obtain this authorization would eviscerate the intent and effective operation of Section 224.

iv. A Case-By-Case Approach To Just And Reasonable Rates Is Appropriate And Would Ensure That The Utility Is Compensated For Access Provided To Competitors.

⁵⁶ See *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997) (“[A]n agency must provide an adequate explanation before it treats similarly situated parties differently”); *United States v. Diapulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1984) (“Deference to administrative discretion or expertise is not a license to a regulatory agency to treat like cases differently.”).

⁵⁷ *Competitive Networks First Report and Order and Further Notice*, at ¶ 80. The Commission also determined that this interpretation is consistent with industry practice. *Id.*

⁵⁸ See *Pole Attachments Report and Order* at ¶ 2.

The *Further Notice* also seeks comment on how the Commission would comply with the statutory directive to determine just and reasonable rates by means of an allocation of space in connection with the more inclusive definition of rights-of-way urged by fixed wireless carriers.⁵⁹ The appropriateness of the rates for access sought by competitive providers pursuant to Section 224 can be determined by looking at a variety of factors, such as those considered in the Texas rules discussed below. If a competitive provider seeks access to rooftops to install equipment, the rate paid to the utility for that access could be compared to the rates that would be paid to the property owner for such access. There is ample evidence that competitive providers, including BLECs, are negotiating such rates with building owners. For example, there are BLECs that have secured roof-top rights-of-way for use of wireless technology as default transport alternatives.⁶⁰ In the context of Section 224, such rates would be subject to judicial review and could be adjusted so as to avoid a Fifth Amendment takings issue.⁶¹

C. Residential Telecommunications Consumers Should Enjoy The Same Access To Competitive Choice That Commercial Telecommunications Consumers Receive.

The Commission asks whether there are situations in which it should exempt certain properties, such as residential buildings or buildings owned by the federal

⁵⁹ *Competitive Networks First Report and Order and Further Notice* at ¶ 170.

⁶⁰ Yankee Group Report at 16-17.

⁶¹ *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1337 (11th Cir. 1999) (“Allowing an administrative body, such as the FCC, a role in the process of determining just and reasonable compensation for a taking is permissible so long as its order is subject to judicial review to ensure that a court makes the ultimate determination of just compensation.”) *reversed on other grounds*, 534 U.S. ____ (2002).

government or state or local governments, from its nondiscriminatory access rules.⁶² In applying its nondiscriminatory access rules, the Commission should not treat commercial and residential MTEs differently. Competition must benefit all consumers. In Nebraska, the PSC created an access policy for residential Multiple Dwelling Unit Access. As stated by the Nebraska PSC in its FNPRM Comments, it deemed its access policy for residential MDUs “necessary to foster competition while simultaneously providing the residents of MDUs a realistic opportunity to select their preferred telecommunications provider.”⁶³ That reasoning should apply here. Residential tenants residing in MTEs should be able to choose their facilities-based telecommunications providers for themselves, just as commercial tenants should be permitted to choose their own telecommunications providers. Moreover, the 1996 Act does not distinguish between residential and commercial consumers in promoting the provision of local exchange competition. As such, it would be inappropriate for the Commission to make such a distinction here.⁶⁴

D. There Should Be Few Exceptions to the FCC’s Nondiscriminatory Access Rules.

The Commission asked in the *Competitive Networks First Report and Order and Further Notice* whether its access rules should “be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue.”⁶⁵ The Commission must be guarded in providing explicit exemptions from its

⁶² *Competitive Networks First Report and Order and Further Notice* at ¶ 152.

⁶³ See Nebraska PSC FNPRM Comments at 1.

⁶⁴ As noted by the Nebraska Public Service Commission in its FNPRM Comments and discussed more fully below, both residential and commercial tenants have limited recourse in addressing the lack of telecommunications choices offered in MTEs. See *id.*

⁶⁵ *Competitive Networks First Report and Order and Further Notice* at ¶ 152.

nondiscriminatory access requirements. In light of Congress' intent in the 1996 Act to promote competition for the benefit of all consumers, the Commission should avoid blanket limitations on competitive choice. Where parties can demonstrate that the nondiscriminatory access requirements would be overly burdensome compared with the benefits offered to consumers, it may be appropriate for the Commission to exempt certain categories of MTE owners from the FCC's requirements.⁶⁶ However, the SBPP cautions the Commission not to include broad, sweeping exemptions in its nondiscriminatory access rules, especially because entities may seek a waiver of the Commission's rules if necessary.

The SBPP agrees that it is appropriate for the Commission to apply its nondiscriminatory access requirements to only those MTEs (residential and commercial) that meet a certain size requirement. This is because the burden of complying with FCC rules on the owners of small MTEs may not justify the benefits that would occur for promoting local competition. The SBPP is satisfied with the Texas rule, which applies to those MTEs having four or more units,⁶⁷ and the SBPP supports the Commission's adoption of that approach.

⁶⁶ For example, the Department of Defense and the County of Los Angeles, California have requested exemption from the Commission's nondiscriminatory access rules, citing unique circumstances for their respective facilities. The SBPP understands that some governments or their agencies may procure exclusive arrangements with telecommunications carriers on a competitive basis for the telecommunications needs of the individual organizations, and it does not seek to upset those arrangements. This is because such arrangements are the equivalent of a company determining to enter into an exclusive provider agreement with a particular carrier for its own telecommunications needs. However, where a government entity is an MTE owner leasing space to consumers (*i.e.*, the general public), it should not be exempted from the Commission's requirements. The government entity is no longer distinguishable from any other MTE owner. *See Reeves v. Stake*, 447 U.S. 429, 439 n.12 (1980)("[W]e cannot ignore the similarities of private businesses and public entities when they function in the marketplace."). As a result, the Commission should limit any exemption for a government agency to those situations in which it is procuring telecommunications services solely for itself.

⁶⁷ 16 TAC § 26.129(b)(1)(C).

E. The Commission's Own Practices And The Practices Of Its State Regulatory Counterparts Provide An Ideal Model For the Implementation Of Nondiscriminatory Access Requirements.

The Commission requests comments on the issues it faces in implementing nondiscrimination access rules.⁶⁸ If the Commission adopts an indirect mechanism for ensuring that tenants receive access to their facilities-based telecommunications carrier of choice under an *Ambassador, Inc.* approach, the practical implementation of nondiscriminatory access requirements will occur on a case-by-case adjudicatory basis, allowing the Commission to address particular problems as they arise, rather than responding prospectively to a comprehensive set of potential conflicts through the enactment of detailed rules. If approached in the proper manner, the adjudicatory mechanism can be used in a way to approximate the effect on the industry of Commission nondiscriminatory access rules. The more comprehensive the Commission's rulings and the more willing it is to decide such disputes, the more quickly industry standards will develop in response to the requirements that arise out of such adjudications.

If the Commission is inclined to adopt rules directly applicable to MTE owners, these rules can be promulgated and implemented in a practical manner as demonstrated by the rules adopted in Texas. The Commission should require MTE owners to permit a carrier access to their properties at terms, conditions, and compensation rates that are nondiscriminatory upon a carrier's request. Upon receipt of a carrier's request, the MTE owner should be required to enter into negotiations with the carrier for access. To facilitate negotiations between the parties, the Commission may adopt rules, such as time

limits for negotiations, opportunities to inspect properties, and the exchange of information between MTE owners and the carriers, such as technical drawings of the property and specifications of the telecommunications equipment.

The SBPP supports the rules established by the PUC in Texas. There, the PUC clearly established the relative rights of MTE owners and carriers. Parties have thirty days to negotiate access to properties, they are provided specific rights to request information from each other, and as discussed below, the rules provide for remedies when negotiations fail.⁶⁹

The Commission also requested comments on how it should address ensuring building safety and security and building space limitations.⁷⁰ The Texas rules are instructive in this regard. To ensure safety in MTEs, Texas requires carriers to comply with all applicable federal, state, and local codes and standards, *e.g.*, fire codes, electrical codes, safety codes, building codes, and elevator codes when installing and maintaining their equipment.⁷¹ It also addresses space constraints and unreasonably unsafe access. If an MTE owner can demonstrate that it does not have the requisite space for the carrier to install its equipment to provide service or if the MTE owner can demonstrate that the installation of equipment would be unreasonably unsafe to the MTE or its occupants, then the MTE owner would be excused from providing access to that carrier. However, carriers are given the opportunity to inspect the MTE at issue and dispute the MTE

⁶⁸ *Competitive Networks First Report and Order and Further Notice* at ¶¶ 156-159.

⁶⁹ *See generally* 16 TAC §26.129.

⁷⁰ *Competitive Networks First Report and Order and Further Notice* at ¶ 156.

⁷¹ 16 TAC §26.129(d)(3)(B).

owners' conclusion that space is unavailable or that installation would be unreasonably unsafe.⁷²

The Commission seeks guidance on how its rules should be tailored to address different types of access by carriers.⁷³ The Commission's nondiscrimination requirements must be flexible enough to permit all carriers to reach consumers in MTEs - whether they used fixed wireless, wireline, satellite, or some other transmission mechanism. The Commission must not permit the technology of a particular carrier to be used as a means for exclusion. For example, a fixed wireless CLEC should not be denied MTE access due to the need to place a small and unobtrusive antenna on an MTE rooftop nor should a fiber-based carrier be denied access due to the need to run fiber under the sidewalk of an MTE, unless the MTE lacks the requisite space to accommodate the carrier's equipment or it would be unreasonably unsafe for the carrier to install its equipment. Thus, the Commission's nondiscriminatory access requirements should expressly include all types of CLEC technologies. This is consistent with the FCC's promotion of developing technologies to provide competitive services to consumers and the intent of the 1996 Act.⁷⁴

⁷² Pursuant to the Texas rules, if an MTE owner rejects an access request based on space constraints or safety concerns, the MTE owner must demonstrate that its property lacks adequate space or that an "unreasonable safety hazard" exists. Moreover, the MTE owner must allow the carrier to inspect the property for itself, and the carrier is allowed the opportunity to dispute the MTE owner's assertions. 16 TAC §26.129(g)(1) & (2).

⁷³ *Competitive Networks First Report and Order and Further Notice* at ¶ 156.

⁷⁴ Pursuant to the Joint Board's recommendation, and as directed by the statute, the Commission added the principle of "competitive neutrality" to those enumerated in §§ 254(b)(1)-(6). See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 at ¶¶ 46-47 (1997) ("Universal Service Order"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87 at ¶ 23 (1996).

The FCC also requests comment on how its nondiscriminatory access rule should be enforced.⁷⁵ Carriers must be able to bring complaints to the Commission for expeditious review if the 30-day negotiation process does not render an access agreement.⁷⁶ Expeditious resolution of disputes is critical to the effective operation of the nondiscriminatory access rules. The Commission should employ summary procedures, such as the pole attachment complaint procedures, to ensure quick resolutions.⁷⁷ In addition, the FCC should establish benchmark rates in order to facilitate private negotiations between carriers and MTE owners. Benchmarks also will streamline the adjudication process at the FCC for those negotiations that fail. The Commission has successfully utilized benchmarks for determining the reasonableness of rates in a variety of contexts including cable rate regulation, subscriber list information, and international settlement rates. The Supreme Court has approved this approach:

It is plain that the Constitution does not forbid the imposition, in appropriate circumstances, of maximum prices upon commercial and other activities. A legislative power to create price ceilings has, in "countries where the common law prevails," been "customary from time immemorial . . ." Its exercise has regularly been approved by this Court. No more does the Constitution prohibit the determination of rates through group or class proceedings. This Court has repeatedly recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties.⁷⁸

⁷⁵ *Competitive Networks First Report and Order and Further Notice* at ¶ 158.

⁷⁶ If the property in dispute is located in a State that has a nondiscriminatory access requirement already in force, then the party would have the option of bringing its complaint to the Commission or the appropriate State enforcement body.

⁷⁷ See 47 C.F.R. § 1.1401 *et seq.*

⁷⁸ *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-69 (1968)(citations omitted).

The benchmark rates for access would become rebuttable presumptions in the event of an adjudication. They could be established on a variety of bases. The rates paid by ILECs offer a reliable and easily ascertainable measure of reasonableness.⁷⁹ If warranted, the Commission could allow some level of variance to the benchmark rates due to other factors such as geographic or metropolitan region or age of the building.

It also would be effective for the Commission to identify factors it would consider particularly relevant in resolving claims that the benchmark rates are inappropriate in any given case. The Texas PUC adopted a list of seven factors to consider in assessing the reasonable amount of compensation due an MTE owner for the installation of a telecommunications carrier's equipment. Those seven factors are:

1. the location and amount of space occupied by installation of the requesting carrier's telecommunications equipment;
2. evidence that the property owner has a specific alternative use for any space which would be occupied by the requesting carrier's telecommunications equipment and which would result in a specific quantifiable loss to the property owner;
3. the value of the property before and after the installation of the requesting carrier's telecommunications equipment and the methods used to determine such values;
4. possible interference of the requesting carrier's telecommunications equipment with the use and occupancy of the property which would cause a decrease in the rental or resale value of the property;
5. actual costs incurred by the property owner directly related to installation of the requesting carrier's telecommunications equipment;
6. the market rate for similar space used for installation of telecommunications equipment in a similar property; and
7. the market rate for tenant leasable space in the property or a similar property.⁸⁰

⁷⁹ The SBPP recognizes that in most instances, the ILEC pays nothing in exchange for access to the MTE. For those MTEs in which the ILEC pays nothing for access, rates for CLEC access could be based upon a variety of factors (such as those adopted in Texas) and then applied to the ILEC, as well, on a going-forward basis.

⁸⁰ 16 TAC § 26.129(i)(3)(B)(iii)(I)-(VII).

The Texas PUC allows parties to file a complaint at the PUC or, in the alternative, submit the dispute to settlement by alternative dispute resolution.⁸¹ Given the Commission's expressed preference for voluntarily negotiated solutions in other contexts,⁸² the Commission may consider permitting an option for resolution of disputes within certain time limits under federal access rules similar to the ones provided by Texas.

If an access dispute concerns solely the appropriate rate to be paid (*i.e.*, there are no outstanding issues of space constraints or safety hazards), the Commission should expedite service to consumers by permitting access while the rate dispute resolution occurs. The carrier would be responsible for true-up to the MTE owner for the Commission-approved rate for the period during dispute resolution in which the carrier received access. Connecticut has adopted this approach.⁸³

It is not likely that enforcement procedures will unduly burden carriers or MTE owners because, as a practical matter, once the regulations are implemented, it is unlikely that they will be used often because the parties will have the necessary incentive to negotiate access rather than face regulatory intervention. Indeed, in those States that have nondiscriminatory access requirements, there have been only a few complaints filed. Even where complaints are filed, however, over time any burden on the parties or the

⁸¹ 16 TAC § 26.129(i)(1).

⁸² *See, e.g., Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, GC Docket No. 91-119, *Initial Policy Statement and Order*, 6 FCC Rcd 5669 at ¶ 9 (1991) ("[T]he Commission will make every effort possible to resolve appropriate disputes through mediation, arbitration, settlement negotiation, negotiated rulemaking and other means of dispute resolution where the parties involved consent to their use and where such practice is consistent with our statutory mandate. We have successfully employed alternative dispute resolution techniques on an informal basis in past Commission proceedings. Based on that experience we are

Commission is likely to decline as the Commission's responses to access disputes become predictable, thereby reducing the need for parties to involve the Commission. This has been confirmed in other areas of the FCC's regulations that have instituted complaint procedures, such as cable programming access and pole attachments. In fact, despite allegations that the cable program access rules would potentially result in a "flood" of complaints,⁸⁴ since the rules became effective in July 1993, less than 50 complaints have been filed. As for pole attachment complaints, at the end of 1999, only nine complaints remained pending with the Cable Services Bureau,⁸⁵ and in 2000, only five pole attachment complaints were filed.⁸⁶

Such results are consistent with the thinking surrounding norm theory and are likely to occur with the implementation of nondiscriminatory access rules. Norm theory predicts that the likelihood that the business community will, in time, voluntarily adopt government standards is enhanced,⁸⁷ and the value of contract terms incorporating the government standards will likely increase due to their common usage.⁸⁸ Thus, once established, the Commission's rules will set the standard for acceptable arrangements,

confident that alternative dispute resolution procedures provide us with an effective tool for dealing with conflict, while avoiding the expense and the delay of adversarial proceedings.").

⁸³ See C.G.S.A. § 16-2471(g).

⁸⁴ See *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, 3525 (1993).

⁸⁵ See *Public Notice, Pole Attachments Complaints and Petitions before the Cable Services Bureau*, 15 FCC Rcd 6203 (2000) (citing those initial complaints pending with the Cable Services Bureau; this number does not include those complaints which were filed for reconsideration).

⁸⁶ See *Cable Telecom. Assoc. of MD, DE and DC v. BGE Co. and Bell Atlantic-MD, Inc.*, FCC Complaint No. PA 00-001, Feb. 2, 2000; *TCI Cablevision of Montana, Inc. v. Energy Northwest, Inc.*, FCC Complaint No. PA 00-002, Apr. 14, 2000, (Order at 15 FCC Rcd 15130); *Alabama Cable Telecom. Assoc. v. Alabama Power Co.*, FCC Complaint No. PA 00-003, June 23, 2000 (Order at 2000 FCC LEXIS 4726, DA 00-2078); *Florida Cable Telecom. Ass'n v. Gulf Power Co.*, FCC Complaint No. PA 00-004, July 10, 2000; and, *Teleport Communications v. Georgia Power*, FCC Complaint No. PA 00-005, Nov. 14, 2000.

⁸⁷ See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 Int'l Rev. L. & Econ. 369, at *9 (1999).

further reducing uncertainty. As a result, the mere existence of Commission guidelines and adjudication mechanisms is likely to promote voluntarily-negotiated solutions to access disputes. Moreover, where the administrative response to disputes is predictable, norm theory further counsels that the need for parties to seek intervention by the Commission in the form of adjudication will likely decrease greatly, and in those instances where intervention is required, predictable outcomes are likely to result in streamlined adjudication.⁸⁹

F. The Commission Should Protect All Tenants -- Residential And Commercial Alike -- By Prohibiting All Exclusive Access Agreements.

As a matter of policy and law, the Commission should prohibit carriers from entering into exclusive access contracts with residential MTE owners.⁹⁰ In addition, any provisions of existing access contracts between telecommunications carriers and residential and commercial MTE owners that provide for exclusivity of access should become null and void upon a tenant's request for service from a competing carrier.

The 1996 Act was premised upon the principle that telecommunications competition will promote the interests of all consumers by providing them choice. However, exclusive access contracts remove choice from consumers and eventually adversely impact service quality, rates, and innovation because exclusive carriers lack the

⁸⁸ See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757, 761-765 (1995).

⁸⁹ See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv. L. Rev. 637, 649-653 (1976).

⁹⁰ See, e.g., Nebraska PSC FNPRM Comments at 2 ("We found that exclusionary contracts are barriers to entry Accordingly, the Nebraska Commission supports the FCC's efforts in prohibiting exclusionary contracts").

threat of competition, thereby removing the incentive to provide quality service.⁹¹

Allowing carriers to continue to enter into exclusive contracts with residential MTEs violates this central tenet of the 1996 Act.

Tenants, rather than their landlords, are more appropriate arbiters of which carrier offers the telecommunications services and prices they want. If MTE owners make this choice instead of tenants, it will be the MTE owners that determine which carriers succeed in the market, not the end users of telecommunications services. Thus, the Commission should prohibit carriers from entering into exclusive contracts with residential MTE owners on a going forward basis.

To the extent that it is economically feasible for only one carrier to upgrade and serve a residential MTE, natural market forces will lead to *de facto* exclusives. There is no reason to permit the transformation of *de facto* circumstances into *de jure* arrangements. Indeed, if future costs of upgrades decrease or if different technologies render it economical for there to be multiple service providers in a residential environment, a *de jure* exclusive would prevent those advances from benefiting consumers. Any presumption should be in favor of competition and against exclusivity. To the extent that a carrier absolutely needs an exclusive in a residential environment to

⁹¹ As duly noted by the Commission, both residential and commercial tenants have “limited recourse in addressing the lack of telecommunications choices offered in buildings serviced under exclusive contracts.” *Competitive Networks First Report and Order and Further Notice* at ¶ 162. To achieve the choice intended by the 1996 Act, they would have to move. However, the terms of the lease and the high costs to move typically outweigh the savings consumers would receive from switching carriers. See Written Testimony of John B. Hayes, Charles River Associates, Inc. before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives (March 21, 2000)(explaining that where the total cost to relocate equals a full year’s rent, if telecommunications expenditures are 20 percent of rent, and if a CLEC can save tenants 30 percent on their telecommunications bills, then it would take *16 years* (ignoring discounting) for the savings on telecommunications services to pay for a move).

cost-justify the investment, it may seek a waiver of the Commission's prohibition at that time.

Moreover, if existing exclusive arrangements are prohibited only after a tenant requests a competitor's service, then the exclusive carrier has the necessary incentive to provide quality service and rates to the tenants presently. Such impact cannot be viewed as harmful since the Commission merely will be permitting competitive forces to work as intended by the 1996 Act. Indeed, ILECs and rural carriers have complained of the devastating effect of competition on incentives for investment, and both Congress and the Commission have rejected those arguments. As the Commission explained, "Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers."⁹² Allowing the maintenance of prohibitions on competition in residential MTEs for the proposition that competition could be ruinous to carriers in those MTEs would be in severe conflict with this Commission's policies and the 1996 Act.

G. Need for Diverse and Redundant Networks

⁹² *AVR, L.P. d/b/a Hyperion of Tennessee Petition for Preemption of Tennessee Code Annotated s. 65-4-201(D) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, CC Docket No. 98-92, *Memorandum Opinion and Order*, 14 FCC Rcd 11064 at ¶ 20 (1999). In that same decision, the Commission also explained that "we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service. Moreover, by requiring competitive neutrality, Congress has already decided, in essence that outright bans of competitive entry are never 'necessary' to preserve and advance universal service within the meaning of section 253(b). . . . As the Commission has previously stated, we reject the assumption that competition and universal service are at cross purposes, and that in rural areas the former must be curtailed to promote the latter." *Id.* at ¶¶ 18, 20.

Finally, as indicated above, in order to minimize disruption of telecommunications services, particularly in essential government facilities, the Federal government must do everything in its power to avoid having a single point of failure through promotion and deployment of diverse and redundant network facilities.

As a starting point, it should be the policy of every Federal entity to purchase local telecommunications services from at least two providers with distinct network facilities. This policy is necessary to ensure that government entities have telecommunications services that are diverse and redundant. This is a crucial element to protect the ability of the government to remain in operation and in communication with the public and others during a disaster or other emergency, and to increase the stability of our government networks. The Commission should be working with other government agencies, such as the Government Services Administration, to promote such a worthy policy objective.

Diversity involves establishing physically different routes into and out of and a building, and different equipment; so as to better ensure continued operations in the event that one route or network is impacted adversely by a disaster or other form of interference.

Redundancy involves having extra capacity available, generally from more than one source, and also incorporates aspects of diversity. Not only does redundancy entail having capacity in reserve to handle sudden increases in demand or partial outages, but it also entails securing service from more than one provider where practicable. The use of multiple providers increases the probability that service will be maintained or restored in the event of a disaster, emergency, or carrier-specific problem, and decreases the chances that all communications capabilities will be affected in the same way at any given time.

It ensures the availability of two distinct workforces to serve the customer and the opportunity to try two different approaches to solve a common or related problem.

This requirement will help the government to reap the benefits of continued competition. Having multiple providers and diverse facilities enables the federal government to increase or decrease the use of a provider or set of facilities, thus creating continued incentive on the part of the carriers to provide good service, favorable pricing and continued innovation and cooperation. A multi-vendor strategy provides valuable leverage to federal tenants.

Ensuring that multiple companies will have a greater opportunity to provide local service and serve federal tenants is a way to promote and advance the goals of the Telecommunications Act of 1996 while at the same time providing a valuable benefit to the government in its capacity as a purchaser of telecommunications services. This requirement also would create an economic stimulus that would promote telecommunications investment, competition, and jobs.

Another worthy policy objective that the FCC should promote is to encourage the federal government to lease space from a private landlord only in buildings where any telecommunication provider or any tenant can have physical access to the building promptly at fair rates and on reasonable and nondiscriminatory terms.

This requirement is vital to ensure that federal lease dollars are spent only in buildings where federal and other tenants have the right to choose multiple facilities-based telecommunications providers in order to secure diversity and redundancy in

telecommunications services to better ensure continued communications during a disaster or provider-specific emergency.

Without this requirement, building access by facilities-based telecommunications providers would be at the discretion of the current or future building owner. Even if federal or commercial tenants chose a *single* telecommunications provider, that choice could be thwarted, and the landlord could choose a different carrier.

This requirement also is necessary to ensure that savings from the competitive procurement of local telecommunications services by the government can actually be realized—otherwise the chosen provider(s) may not be able to obtain building access on fair and reasonable terms.

Federal leasing dollars should not be showered on buildings that block, impede or delay telecommunications competition and thereby harm federal and other tenants—those dollars should be spent in a way that allows the federal government and other tenants to reap the benefits of the Telecommunications Act of 1996 and thus spurs the development of network facilities.

VI. Conclusion

For the foregoing reasons, the SBPP believes that there are still pervasive and persistent problems in competitive access to multi-tenant environments. Without additional Commission action, as detailed above, tenants in multi-tenant environments will never obtain the full benefits of promised by telecommunications competition – a choice of innovative, affordable technologies and services.

Respectfully submitted,

SMART BUILDINGS POLICY PROJECT

/s/

Jonathan Askin
General Counsel
Association for Local
Telecommunications Services
888 17th St., NW
Suite 900
Washington DC, 20006
(202) 969-2587

on behalf of the
SMART BUILDINGS POLICY PROJECT

March 8, 2002

APPENDIX I

SMART BUILDINGS POLICY PROJECT QUESTIONNAIRE FOR COMPETITIVE TELECOMMUNICATIONS PROVIDERS REGARDING ACCESS TO MULTITENANT BUILDINGS January, 2002

Question 1.

Is gaining access to tenants in multi-tenant buildings very important to the success of your company?

Question 2.

Are you seeking access to commercial multi-tenant buildings? residential? or both?

Question 3.

During 2001, were you unsuccessful in gaining access to tenants in any multi-tenant buildings? If so, how often were you unsuccessful (% of time unsuccessful)?

Question 4.

During 2001, for buildings in which you successfully obtained access, how often (% of instances) were negotiations completed within 30 days? within 60 days to 90 days? within 90 days to 180 days? after 180 days?

Question 5.

During 2001, how often did you lose customers or potential customers because of a delay in obtaining building access: never, seldom, or frequently?

Question 6.

During 2001, did the building owner or landlord seek to use the Model License Agreement for building access drafted by the Real Access Alliance?

Question 7.

During 2001, did you seek to renew already existing agreements to access commercial multi-tenant buildings? How often were you successful (% of time successful) in renewing these agreements? In these renegotiations, how often were you presented with new contractual terms that you considered unreasonable: never, seldom, or frequently?

Question 8.

During 2001, for those providers seeking access to multi-tenant buildings in Texas or Connecticut (states with laws assisting access), was it significantly easier to negotiate to obtain access than in other states?

Question 9.

In obtaining access to multi-tenant buildings, how often does the building owner request you pay compensation based on your revenues: never, seldom, or frequently?