Before the
Federal Communications Commission
Washington, D.C. 20554

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

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

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Comments and reply comments to be filed only in WT Docket No. 99-217

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. In this item, we further our ongoing efforts under the Telecommunications Act of 1996[1] to foster competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). In the *Competitive Networks NPRM*, we requested comment on the state of access to MTEs and on a variety of potential measures to improve such access.[2] Based on the extensive record compiled in response to that Notice, we adopt several measures to remove obstacles to competitive access in this important portion of the telecommunications market. Specifically, we: (1) prohibit carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access by competing carriers; (2) clarify our rules governing control of in-building wiring and facilitate exercise of building owner options regarding that wiring; (3) conclude that the access mandated by Section 224 of the Communications Act (the "Pole Attachments Act")[3] includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs; and (4) conclude that parties with a direct or indirect ownership or leasehold interest in property, including tenants in MTEs, should have the ability to place antennas one meter or less in diameter used to receive or transmit any fixed wireless service in areas within their exclusive use or control, and prohibit most restrictions on their ability to do so.

2. We also note that, while these measures will help significantly to advance competition and customer choice, they may well be insufficient in themselves to secure a full measure of choice for businesses and individuals located in MTEs. We recognize that the real estate industry has taken some positive steps to facilitate tenant choice of telecommunications providers by working towards the development of best practices and model agreements.[4] We will closely monitor these industry efforts and, if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to unreasonably deny competing telecommunications service providers access to customers in MTEs, we are prepared to consider taking additional action, including adopting rules to assure that MTE owners offer competing telecommunications service providers access to their premises. In order to be prepared to take further action, if necessary, we request comment in a Further Notice of Proposed Rulemaking on the current state of the evolving market for the provision of telecommunications services in MTEs. We also note that a strong case can be made that we have authority to impose obligations on carriers to ensure nondiscriminatory access to MTEs. We seek comment on this legal argument, whether it would be prudent to exercise such authority, the potential scope of such requirements, and how such requirements could be implemented, if adopted. In addition, we seek further comment on several other

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act" or the "Act").

[2] Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673, 12687-12712, ¶¶ 28-69 (1999) (*Competitive Networks NPRM*). In the Notice of Inquiry portion of the same item, we requested comment on issues relating to access to public rights-of-way and franchise fees, state and local taxes, and other means of promoting competitive networks. *Id*. at 12712-19, ¶¶ 70-85. These issues will be addressed separately at another time.

[3] 47 U.S.C. § 224.

[4] *See* Letter from Real Access Alliance to William E. Kennard, Chairman, FCC, dated September 6, 2000 (September 6 Real Access Alliance Letter).

potential Commission actions that may be necessary in the event that competition in the MTE market does not develop sufficiently.

II. SUMMARY

3. In the 1996 Act, Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[5] One of the most important goals of the 1996 Act was to bring competition to the traditionally monopolistic market for local telecommunications services.[6] In order to bring competition to this market, Congress contemplated competitive entry by three means – use of a competitor's own facilities, use of unbundled elements of the incumbent local exchange carrier's (LEC's) network, and resale of the incumbent's service – and it included provisions to prevent incumbent LECs from blocking competitive entry by any of these means.[7] Congress also extended the scope of the Pole Attachments Act to grant access to telecommunications service providers in addition to cable service providers.[8]

4. We remain committed to removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated in the 1996 Act.[9] Nonetheless, we have recognized that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities.[10] Because facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to consumers. Moreover, facilities-based competition offers the best promise of ultimately creating a comprehensive system of competitive networks, in which today's

[5] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (1996 Conference Report).

[6] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15505-06, ¶ 3 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*Iowa Utilities Board*).

[7] *See* 47 U.S.C. §§ 251(c)(2) (requiring incumbent LECs to provide interconnection with the facilities and equipment of any requesting telecommunications carrier on just, reasonable, and nondiscriminatory rates, terms, and conditions), 251(c)(3) (requiring incumbent LECs to provide nondiscriminatory access to network elements on an unbundled basis on just, reasonable, and nondiscriminatory rates, terms, and conditions), 251(c)(4) (requiring incumbent LECs to offer services for resale at wholesale rates, and generally forbidding incumbent LECs from prohibiting or imposing unreasonable or discriminatory conditions or limitations on resale).

[8] 47 U.S.C. § 224.

[9] *See, e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) (promulgating rules governing access to unbundled network elements following United States Supreme Court remand) (*UNE Remand Order*); Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912 (1999) (adopting line sharing and other unbundling rules for Digital Subscriber Line service).

[10] *See Competitive Networks NPRM*, 14 FCC Rcd at 12676-77, ¶ 4.

incumbent LECs no longer will exert bottleneck control over essential inputs, but will compete on a more equal basis with their rivals.[11]

5. One particular benefit that we hope will arise from the growth of facilities-based competition is increased availability of advanced services. In the 1996 Act, Congress directed the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.[12] We have recently found that advanced telecommunications capability is being deployed in a reasonable and timely fashion, although certain groups of consumers may be particularly vulnerable to untimely access.[13] We believe that competitive providers will continue to play a vital role in the growth and ubiquitous availability of advanced services, both by innovating themselves and by placing competitive pressure on the incumbents to offer more advanced services at attractive prices.[14] At the same time, we expect that the ability to offer advanced capabilities that benefit consumers will be an important factor in many competitors' marketplace success.[15]

6. In this item, we take targeted actions to promote the continued deployment of competitive and advanced telecommunications services and reduce the substantial barriers that remain to deployment of these services in MTEs,[16] and we request comment on potential additional actions. The actions we take here are as follows:

- First, we forbid telecommunications carriers from entering into contracts to serve commercial properties that restrict or effectively restrict the property owner's ability to permit entry by other carriers.[17]

- Second, in order to reduce competitive carriers' dependence on the incumbent LECs to gain access to on-premises wiring, while at the same time recognizing the varied needs of carriers and building owners, we establish procedures to facilitate moving the demarcation point to the minimum point of

[11] *See id.* at 12685-86, ¶¶ 20-23.

[12] 1996 Act, § 706, codified as a note to 47 U.S.C. § 157.

[13] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Second Report*, FCC 00-290 (rel. Aug. 21, 2000) (*Section 706 Second Report*).

[14] For example, although competitive LECs currently serve under 7% of asymmetric digital subscriber line (DSL) subscribers, they reportedly have DSL-capable equipment in one-third more central offices than do incumbents, and they appear to be adding DSL customers at a faster rate. *Id*. at para. 102. *See also id.* at paras. 192-193 (discussing competitive LEC investment in DSL infrastructure). Moreover, analysts have projected that terrestrial wireless providers will serve between 12 and 15 percent of the residential and between 14 and 50 percent of the business high-speed market within the next few years, and that satellite providers could serve between 5 and 10 percent of the high-speed market. *Id.* at paras. 197, 202.

[15] *See Competitive Networks NPRM*, 14 FCC Rcd at 12675-76, 12687, ¶¶ 3, 26.

[16] *See* paras. 17-19, *infra* (describing barriers to deployment in MTEs).

[17] *See* Section IV.B, *infra.*

entry (MPOE) at the building owner's request, and we require incumbent LECs to timely disclose the location of existing demarcation points where they are not located at the MPOE.[18]

- Third, we determine that under Section 224 of the Communications Act, utilities, including LECs, must afford telecommunications carriers and cable service providers reasonable and nondiscriminatory access to conduits and rights-of-way located in customer buildings and campuses, to the extent such conduits and rights-of-way are owned or controlled by the utility.[19]

- Fourth, we extend to antennas that receive and transmit telecommunications and other fixed wireless signals our existing prohibition of restrictions that impair the installation, maintenance or use of certain video antennas on property within the exclusive use or control of the antenna user, where the user has a direct or indirect ownership or leasehold interest in the property.[20]

7. The specific actions that we take in today's Report and Order will reduce the likelihood that incumbent LECs can obstruct their competitors' access to MTEs, as well as address particular potentially anticompetitive actions by premises owners and other third parties. We remain concerned, though, that, based on the record, unreasonable discrimination among competing telecommunications service providers by some premises owners remains an obstacle to competition and consumer choice.

8. We recognize the recent efforts of the real estate industry to develop model contracts and best practices aimed at improving MTE owners' processing of tenant requests for service from alternative telecommunications carriers or carrier requests for access to MTEs to serve tenants.[21] In particular, a coalition of 11 trade associations representing over 1 million property owners and operators has committed to a best practices implementation plan including: (1) adopting a firm policy not to enter into any exclusive contracts for building access in the future; (2) responding within 30 days to written tenant requests for a particular telecommunications provider, and accommodating such requests in good faith, where appropriate space is available and the provider intends to execute an access agreement that is substantially in the form of a model contract to be developed by the industry; (3) informing tenants of existing alternatives in buildings that are already served by multiple competitive providers, and encouraging a dialogue with tenants regarding the advantages of additional providers; (4) incorporating these processing guidelines in new leases and notices to existing leaseholders; (5) committing to a clearer and more predictable process for responding to requests from carriers to access the MTE to serve customers, including provision of clear guidance regarding the MTE owner's policies within 30 days, where the carrier agrees that its access to the MTE is conditioned on deploying equipment and/or providing service to tenants by a date certain; (6) establishing an independent clearinghouse to which interested parties could submit allegations of behavior that is inconsistent with either the model contracts or "best practices" developed as part of this initiative; and (7) supporting a periodic, quantitative study of the market for building access, to be conducted under the auspices of the Commission.[22] At least 12

[18] *See* Section IV.C, *infra*. In addition, we take this opportunity to resolve certain pending petitions for reconsideration of our telecommunications inside wiring rules. *Id.*

[19] *See* Section IV.D, *infra.*

[20] *See* Section IV.E, *infra*; 47 C.F.R. § 1.4000.

[21] *See* September 6 Real Access Alliance Letter.

[22] *Id.*

building owners who collectively own or operate over 250 million square feet of office space have committed to these best practices.[23]

9. We are encouraged by those efforts and will closely monitor their progress. At the same time, we are aware of concerns that these voluntary commitments may fall short of protecting tenants' ability to choose among competing carriers.[24] Therefore, if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to discriminate unreasonably among competing telecommunications service providers, we are prepared to consider taking additional action. Accordingly, in a Further Notice of Proposed Rulemaking, we seek comment in several areas:

- First, we seek to refresh the record on the status of the market for the provision of telecommunications services in MTEs in order to evaluate the necessity of a nondiscriminatory access requirement.

- Second, we seek additional comment on the legal argument that we have authority to impose requirements on carriers in order to ensure nondiscriminatory MTE access, and on whether we should exercise such authority.

- Third, we seek comment on the circumstances under which the benefits would exceed the costs of such requirements, and on how any nondiscriminatory access requirement could be implemented.[25]

- Fourth, we ask whether today's prohibition on exclusive access contracts in commercial MTEs should be extended to residential settings, either in addition to or in lieu of a nondiscriminatory access requirement applicable to these premises, and whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.[26]

- Fifth, we seek comment on whether we should proscribe carriers from entering into contracts that grant them preferences other than exclusive access, such as exclusive marketing or landlord bonuses to tenants that use their services, in some or all situations.[27]

- Sixth, we seek additional comment on the definition of "rights-of-way" in MTEs to which a utility must allow access under Section 224.[28]

- Finally, we seek additional comment on whether we should extend our cable inside wiring rules to facilitate the use of home run wiring by telecommunications service providers where an incumbent cable provider no longer has a legal right to maintain its home run wiring in the building.[29]

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[23] *Id*. at 1.

[24] *See* Letter from Thomas Cohen, Smart Buildings Policy Project, to FCC Commissioners, dated September 7, 2000.

[25] *See* Section V.A, *infra.*

[26] *See* Section V.B, *infra.*

[27] *See* Section V.C, *infra.*

[28] *See* Section V.D, *infra.*

III. BACKGROUND

10. The Commission has taken many actions both before and since the 1996 Act to remove obstacles to facilities-based competition in local telecommunications markets. For example, among other things, we have implemented Section 251 of the Communications Act, forborne from enforcing statutory provisions and regulations that could inhibit the ability of new entrants to compete, made additional spectrum available to competitors using wireless technology, and increased the flexibility of use of previously allocated spectrum.[30] These efforts have continued during the past year.[31]

11. In the *Competitive Networks NPRM*, we discussed our thoughts regarding the development of facilities-based competition generally,[32] and in a companion Notice of Inquiry we sought comment generally regarding factors that may be impeding the growth of competitive networks and what actions we should take to ameliorate such impediments.[33] The principal focus of the NPRM, however, was on promoting competitive access to MTEs, such as apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. This important segment of the market poses special challenges to facilities-based entry. In order to offer service in an MTE, a facilities-based competitor must either gain access to existing on-premises wiring or obtain access to conduit and other suitable areas in order to install its own equipment. In addition, providers using wireless technology must obtain access to rooftops or other suitable locations to place their antennas. Access to these facilities and areas is typically controlled by the building owner, the incumbent LEC, or both. Thus, unlike in the case of a stand-alone residence or commercial enterprise, a competitive facilities-based carrier cannot supply service simply by dealing with the end user.[34]

(Continued from previous page)
[29] *See* Section V.E, *infra.*

[30] *See generally Competitive Networks NPRM*, 14 FCC Rcd at 12678-80, ¶¶ 8-10.

[31] *See, e.g.*, Public Notice, "The Wireless Telecommunications Bureau Announces That It Is Prepared to Grant 1848 Licenses to Operate in the 39 GHz Band," DA 00-2242 (rel. Oct. 2, 2000) (announcing licenses ready to grant in 38.6-40.0 MHz band); Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, FCC 00-272 (rel. Aug. 1, 2000) (adopting service rules for 24.25-24.45 and 25.05-25.25 GHz bands); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857 (2000) (declining to extend restriction on incumbent LECs and cable companies holding attributable interests in Local Multipoint Distribution Service Block A licenses, based in part on finding that open eligibility may speed the availability of broadband services in rural areas); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (2000) (establishing service rules for spectrum to be vacated by television broadcasters), *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) (addressing issues raised on reconsideration and seeking comment on potential cost-sharing rules, relocation agreements, and secondary auctions to facilitate clearing of spectrum), *Second Memorandum Opinion and Order*, FCC 00-330 (rel. Sept. 14, 2000) (dismissing additional petition for reconsideration as moot).

[32] *Competitive Networks NPRM*, 14 FCC Rcd at 12683-87, ¶¶ 18-27.

[33] *Id.* at 12719, ¶ 85.

[34] *See id.* at 12688, ¶ 30; *see also Section 706 Second Report* at para. 60 (noting that landlord control over access may create barrier to provision of advanced services in MTEs, especially by competitive providers).

12. Attention to the unique issues and challenges affecting access to MTEs is important because a substantial proportion of both residential and business customers nationwide are located in such environments.[35] Thus, an absence of widespread competition in MTEs would insulate incumbent LECs from competitive pressures and deny facilities-based competitive carriers the ability to offer their services in a sizable portion of local markets, thereby jeopardizing full achievement of the benefits of competition. Moreover, such a situation would directly undermine the express Congressional goal of bringing competition and advanced services to "all Americans."[36] Finally, because MTEs frequently offer a relatively large revenue opportunity in a limited space, they can be the most efficient environments for many competitive LECs initially to serve. Thus, inability to compete in those environments in the short term may jeopardize the business plans and viability of some potentially powerful competitors that could in the long term offer ubiquitous competition throughout an incumbent LEC's service area. Indeed, even if competitive access is available in some MTEs, competitive carriers may be unable to succeed economically, and thus offer competitive choices to any customers, without broad access to MTE markets. For these reasons, we requested comment in the *Competitive Networks NPRM* on the practical concerns involved in serving MTEs, on the state of the market, and on several potential actions that we could take to promote competitive access.

13. The *Competitive Networks NPRM* generated extensive interest among incumbent and competitive LECs, building owners and managers, electric and gas utilities, cable service providers, local governments, and others. We received 438 formal comments and 252 reply comments.[37] In addition, the Commission's Local and State Government Advisory Committee (LSGAC) filed two recommendations.[38] We have also received numerous *ex parte* filings from parties representing a variety of interests, including several members of Congress. Although we do not list these *ex parte* filings individually, we have incorporated them in the record and we have fully considered them in reaching the conclusions set forth herein.[39]

[35] *See Competitive Networks NPRM*, 14 FCC Rcd at 12687-88, ¶ 29.

[36] *See* 1996 Act, § 706(a); 1996 Conference Report at 1.

[37] Commenters and the short forms by which they are cited herein are listed in Appendix A. Unless otherwise indicated, all citations to comments and reply comments herein refer to comments and reply comments on the *Competitive Networks NPRM.* In order to enable the Commission to develop a more comprehensive record in this proceeding, we grant the motions to file further reply comments by the Wireless Communications Association International, Inc. and by Concerned Communities and Organizations.

[38] FCC Local and State Government Advisory Committee Advisory Recommendation Number 19: Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98, dated Nov. 1, 1999 (LSGAC Recommendation No. 19); FCC Local and State Government Advisory Committee Recommendation Number 22: Notice of Proposed Rulemaking, Notice Of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98, dated Aug. 29, 2000 (LSGAC Recommendation No. 22).

[39] Ex parte filings are accessible on the Commission's Electronic Comment Filing System (ECFS), http://www.fcc.gov/e-file/ecfs.html. Instructions for using ECFS are also available on that page.

IV. REPORT AND ORDER / MEMORANDUM OPINION AND ORDER

A. State of The Market

14. Based on the record compiled in response to the *Competitive Networks NPRM*, we conclude that meaningful progress has been made in the competitive development of the market for facilities-based telecommunications services in MTEs, but some obstacles to full competitive choice remain. We are concerned that, at least in certain cases, both building owners and incumbent LECs retain the ability and incentive to discriminate among and impose unreasonable terms on new entrants. As a result, end users have likely been forced to pay unnecessarily high rates for local telecommunications services, and have been denied the benefits of advanced and innovative service options. At the same time, we are mindful that there has been progress in the market, and we are hopeful that this trend will continue to yield more competitive options for increasing numbers of consumers. Indeed, some recent developments indicate that this may be the case.

15. MTEs constitute a substantial portion of both residential and commercial units in the United States. An MTE is any contiguous premises under common ownership or control that contains two or more distinct units occupied by different tenants. Thus, MTEs include, for example, apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. There are over 750,000 office buildings and over one million residential multiple dwelling units in this nation.[40] As of 1990, approximately 28 percent of all housing units nationwide were located in multiple dwelling units, and that percentage is likely growing.[41]

16. There is evidence in the record that both wireless and wireline competitive LECs have made progress in obtaining access to MTEs, especially in commercial markets.[42] For example, WinStar currently provides broadband communications services to over 15,000 small and medium-sized business customers in 31 domestic markets.[43] Virtually all of these customers are located in MTEs. Competitive LECs continue to contract for access to an increasingly large number of commercial buildings. Indeed, there is evidence that the availability of alternative providers for local telecommunications services is often a selling point in leasing negotiations between building owners and prospective tenants and, thus, building owners may have incentives to enter into agreements with competitive LECs for building access.[44] Moreover, in response to the issues raised and developed in this proceeding, some of the leading companies in the real estate industry have recently made a commitment to the Commission to undertake to develop and promote the use of sample contracts for building access, as well as "best practices" to facilitate negotiations for building access.[45] These best practices will include a firm policy not to enter into exclusive contracts for building access; procedures and expedited time frames for

[40] *Access to Buildings and Facilities by Telecommunications Providers*: *Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce,* 106th Cong. 24 (1999) (Written Testimony of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc.).

[41] *Competitive Networks NPRM* at 12687-88, ¶ 29.

[42] *See* Cornerstone Properties, *et al.* Comments at 7-8. *See also Section 706 Second Report*.

[43] WinStar Comments at 2.

[44] Real Access Alliance Comments at 7.

[45] September 6 Real Access Alliance Letter.

processing tenant requests for service from a particular telecommunications provider, where appropriate space is available and the provider intends to substantially accept a model access agreement; a clearer and more predictable process for responding to requests for access generated by carriers; establishment of an independent clearinghouse for complaints by tenants, real estate companies, and service providers; and support for periodic studies of the market under the auspices of the Commission.[46] This initiative represents a positive step in the development of the market for building access.

17. Notwithstanding this progress, however, there is also meaningful evidence that competitive LECs have in many instances encountered unreasonable demands and significant delay in their efforts to obtain access to buildings.[47] Competitive LECs complain that they are being impeded by incumbent LECs and building owners.[48] In some instances, competitive LECs state that they have been denied access to buildings completely, or have been charged exorbitant rates for access or been subjected to unreasonable conditions. And, in others, contract negotiations have reportedly spanned upwards of eighteen months – a timeframe that is particularly problematic for a service provider in a competitive market.[49]

18. Although the record does not contain statistical evidence regarding the prevalence of such activities, competitive LECs cite to specific incidents of unreasonably restrictive behavior on the part of incumbent LECs and building owners that, they assert, are hurting competition and consumers. These include the MTE in New York City that has been through three different owners since 1998, all of whom have denied access to a competitive LEC, despite the fact that tenants in the MTE have sent letters to the owners requesting access for the competitive LEC.[50] Another incident involves the manager of a large office building in Florida who has demanded a rooftop access fee of $1,000 per month and a fee of $100 per month for each in-building hook-up from a competitive LEC.[51] The competitive LEC estimates that this fee structure would cost it about $300,000 per year to service this one building.[52] Yet another incident involves a competitive LEC that has been negotiating for over 18 months with several Boston, Massachusetts MTE owners who claim that they are still examining the telecommunications issues, while their tenants remain without choice of telecommunications service providers.[53]

19. The record further indicates that incumbent LECs are using their control over on-premises wiring to frustrate competitive access to multitenant buildings. Competitive LECs report that they have encountered difficulties with incumbents when attempting to arrange for interconnection or lease unbundled network elements. For example, competitive LECs report that incumbents may fail to timely provide non-proprietary information in their possession, require the presence of their own technicians to

[46] *Id*.

[47] AT&T Comments at 4; Nextlink Comments at 4-5; Teligent Comments at 9-10; WinStar Comments at 16-18.

[48] *Id.*

[49] *See, e.g.*, AT&T Comments at 6-7; Nextlink Comments at 2.

[50] ALTS Comments at 12.

[51] *Id.* at 15.

[52] *Id.*

[53] *Id.* at 9.

supervise competitive LEC wiring, and take unreasonable amounts of time in scheduling such visits.[54] In addition, competitive LECs contend that incumbent LECs often require network configurations which may be disadvantageous for competitors.[55]

20. Building owners argue, however, that competitive LECs have yet to provide service in many of the buildings to which they have obtained rights of access. For example, according to one press account, WinStar has wired 4,000 of the approximately 8,000 buildings for which it has obtained access, while Teligent has wired 3,000 of the approximately 7,500 buildings for which it has obtained access.[56] Building owners argue that these numbers suggest that competitive LECs are not even able to serve the buildings they have rights to access now, and thus are not constrained by any alleged lack of nondiscriminatory access to all buildings.

21. Economic theory supports the idea that building owners may, at least under some circumstances, be able to exert market power over telecommunications access. There is no question that building owners control access to any individual building. Whether that control translates into the ability or incentive to unreasonably restrict access to competitive LECs depends on the circumstances in particular real estate markets, as well as the time frame one is considering. For example, over the long term, tenants may have the ability to neutralize building owners' control by choosing not to occupy buildings that do not offer attractive telecommunications service options. The extent to which tenants may have effective choice in the near term depends on several factors, including the availability of alternative spaces, the typical length of leases, the costs of relocation, and the relative importance of telecommunications among the factors a tenant considers when choosing a space. The extent of tenant power may vary from market to market, including between residential and commercial tenants as well as in different geographic areas and market cycles.

22. A noteworthy development is the emergence of a new type of telecommunications service provider. These service providers, often referred to as "building LECs" or "B-LECs," exclusively serve MTEs. In many instances, these companies own telecommunications facilities only within the buildings they serve, and must interconnect with other carriers to transmit signals outside these buildings. Many of these ventures have been created by, or with the active participation of, the real estate industry. Also, some of the companies partner with major real estate companies in order to serve their buildings. One such company, Broadband Office, Inc., has reportedly partnered with 50 major real estate owners across the country.[57]

23. We are encouraged by the progress we have seen in the development of the competitive market for facilities-based telecommunications services. Competitive LECs have made gains in the overall number of buildings to which they have access. In addition, we believe that the recent effort by representatives of the real estate industry to begin to develop and promote the use of both model

[54] *See* Letter from Frank Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, FCC, dated June 20, 2000.

[55] *Id.*

[56] *See* Letter from Matthew C. Ames, Counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, dated July 3, 2000 (enclosing article from June 16, 2000 edition of *Commercial Property News* entitled "Demetree, Hornig Stress Tenant Needs").

[57] *See* Letter from Kathleen Q. Abernathy, Counsel for Broadband Office, to Magalie Roman Salas, Secretary, FCC, dated May 17, 2000 (enclosing news article entitled "Birth of a BLEC: Service Providers Jump at Chance to Win Over MTU [multi-tenant unit] Audience").

contracts and best practices is a positive step. At the same time, however, we are concerned that the overall pace of the development of the market is sluggish. Based on information in the record, there are over 1.75 million MTEs and, more than four years after the passage of the 1996 Act, facilities-based competitive LECs have access to only a small percentage of these locations. As a result, all too often consumers are left without any choices with regard to the provision of local telecommunications service. Indeed, the record demonstrates that there are at least some circumstances in which building owners have both the ability and incentive to extract excessive profits from the provision of telecommunications services by unreasonably restricting competitive LECs' access to their buildings. While building owners have introduced evidence that tenant mobility constrains their exercise of market power, and that the maximum amount of revenue a building owner could obtain from telecommunications is small compared to the revenues that would be put at risk if tenants were denied the services they want,[58] competitive LECs have provided countervailing evidence suggesting that the costs of relocation and the length of leases often prevent tenants from exerting their will.[59] As a result, we find that the evidence supports the conclusion that, at least in some instances, building owners exercise market power over telecommunications access.

24. In addition to the market power exerted by building owners, we also find that incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs. Although competitive LECs are rapidly building customer base and gaining market share, they still account for less than six percent of local market revenues.[60] Even within their relatively small share of the local market, the revenues of competitive LECs come primarily from special access and local private line services rather than from switched service to end users.[61] Thus, because incumbent LECs still serve the vast majority of customers, they continue to control most facilities useful to the provision of telecommunications service to MTEs that are not controlled by the MTE owners. In the absence of effective regulation, they therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers.

B. Exclusive Contracts

1. Background

25. In the *Competitive Networks NPRM*, we requested comment on whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners.[62] Further, we sought comment on whether we have the authority to forbid common carriers from entering into exclusive contracts with building owners or managers under Section 201 of the Communications Act, which prohibits unjust and unreasonable practices. In addition, we sought comment on the appropriate scope of any rule against exclusive contracts, and how such a rule should be implemented. We asked commenters to address whether a ban on exclusive contracts would be

[58] Real Access Alliance Comments at 8-9.

[59] Teligent Comments at 11; WinStar Comments at 18.

[60] *See* Local Telephone Competition at the New Millennium (Summarizing December 31, 1999 data from Forms 477 and 499-A), Common Carrier Bureau, Industry Analysis Division, August 2000, http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom.pdf at 3.

[61] *See* Local Competition Report, Common Carrier Bureau, Industry Analysis Division, August 1999, http://www.fcc.gov/ccb/stats/lcomp98.pdf at 1.

[62] *See Competitive Networks NPRM*, 14 FCC Rcd at 12706-12707, ¶¶ 61 and 64.

an effective means of securing nondiscriminatory access, and whether such a rule should apply to all telecommunications carriers and contracts or only in some situations, such as unreasonably long contracts or contracts involving carriers with market power.[63] Finally, we requested comment on the legal and policy issues and practical implications of either abrogating existing exclusive contracts or allowing them to remain in force, including any constitutional issues.[64] We noted that the Nebraska Public Service Commission has already prohibited exclusive contracts and marketing agreements between telecommunications companies and property owners, except for contracts and agreements involving condominiums, cooperatives, and homeowners' associations.[65]

26. By and large, most commenters on this issue, including both incumbent LECs and competitive LECs, support a ban on exclusive access contracts.[66] Commenters argue that exclusive access contracts remove choice from the consumer and eventually adversely affect service quality, rates, and innovation since an exclusive carrier lacks the threat of competition within the MTE, thereby removing the incentive to provide quality service.[67] AT&T asserts that the Commission should prohibit incumbent LECs from entering into or enforcing exclusive service agreements with building owners because such agreements allow the incumbent LECs to "lock up" multiple tenant buildings before competition has had an opportunity to develop.[68] A few parties, however, argue that exclusive contracts are necessary under some circumstances in order for competitive carriers to achieve a sufficient return on their investment in serving a building.[69] If exclusive contracts are not permitted, those parties argue, competitive providers simply will not take the risk of entering many buildings, and tenants of those buildings will experience none of the benefits of competition at all. In a recent *ex parte* filing, Real Access Alliance distinguished between residential and commercial markets, arguing that exclusive contracts should be forbidden in commercial buildings but permitted in the residential context.[70]

2. Discussion

27. Based on our review of the record, we will prohibit carriers, in commercial settings, from entering into contracts that effectively restrict premises owners or their agents from permitting access to

[63] *Id*.

[64] *Id*.

[65] Order Establishing Statewide Policy for MDU Access, Application No. C-1878/PI-23, slip op. at 4 (Neb. P.S.C. March 2, 1999) (*Nebraska MDU Order*).

[66] *See, e.g.*, AT&T Comments at 25-27; Qwest Comments at 11; SBC Comments at 7; Teligent Comments at 17-19; WinStar Comments at 24-25.

[67] Teligent Comments at 17.

[68] AT&T Comments at 26.

[69] OpTel Comments at 18; Real Access Alliance Comments at 70.

[70] *See* Letter from Matthew C. Ames, counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, filed June 16, 2000 (June 16 Real Access Alliance Letter). *See also* Section V.B, *infra*. We note that the Commission's rules currently permit exclusive contracts for video programming services. *See* 47 C.F.R. Part 76; s*ee also* Telecommunications Services Inside Wiring Customer Premises Equipment, *Report and Order and Second Further NPRM*, CS Docket No. 95-184, 13 FCC Rcd 3659 at 3778-80, ¶¶ 258-266. (*Inside Wire Report and Order and Second Further NPRM).*

other telecommunications service providers.[71] The use of exclusive contracts in commercial settings poses a risk of limiting the choices of tenants in MTEs in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services.[72] In addition, the record provides no evidence that in commercial settings the ability to enter into exclusive contracts would have efficiency enhancing or pro-competitive effects.[73] Because the record is inconclusive about the likely competitive effects of exclusive contracts for the provision of telecommunications services in residential MTEs, however, we are seeking further information in the *Further Notice of Proposed Rulemaking* below. Moreover, we seek comment in the *Further Notice of Proposed Rulemaking* on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

28. An exclusive contract between a building owner and a telecommunications service provider can be viewed as a type of vertical restraint, or restraint affecting firms in two different markets. The economic analysis of such vertical controls—including, in the extreme, mergers of upstream and downstream firms—is complex. In general, such arrangements can be either beneficial or harmful to the public interest, depending on the precise environment in which they occur. Whether a particular restraint in a specific situation increases or decreases consumer welfare is often a widely debated subject among economic scholars.[74] One finding of the economic literature, however, is that vertically related firms may enter into long term or exclusive contracts that inefficiently deter or foreclose entry to a market and thus harm consumers.[75] We believe that exclusive contracts between building owners and telecommunications providers fit this model. Building owners and service providers may both find it advantageous to enter into such arrangements, yet those arrangements may nonetheless be harmful to MTE tenants.

29. For incumbent LECs, an exclusive contract may essentially constitute a device to preserve existing market power. First, an exclusive contract erects a barrier preventing other telecommunications firms from offering service to tenants in the building(s) covered by the contract. Second, where new entrants face fixed costs or otherwise have costs characterized by increasing returns to scale, the

[71] *See* para. 37 *infra* for a discussion of the types of arrangements that would fall under this prohibition.

[72] The text of the rule that we adopt is set forth in Appendix B. We do not address in this section arrangements that give a preference to a particular carrier but do not effectively restrict the premises owner from permitting other providers access, such as exclusive marketing agreements. Rather, we seek comment on such arrangements in a *Further Notice of Proposed Rulemaking*. *See* Section V.C, *infra*.

[73] Several states have considered this issue and reached the same conclusion. In Connecticut, "[c]ontracts for access and wiring between telecommunications providers and [building] owners" cannot include "[a]ny term that grants an exclusive license to any telecommunications provider." Conn. Gen. Stat. Ann. § 16-247c-6(a)(3) (1997). In Massachusetts, the Department of Telecommunications and Energy recently adopted a rebuttable presumption against exclusive contracts, noting that an exclusive contract "is more likely than not anticompetitive and, therefore, not conformable to statute." Mass. DTE 98-36-A, Slip Op. At 30 (*Massachusetts Nondiscriminatory Access Order*). In Nebraska, the Public Service Commission (PSC) found exclusive contracts and marketing agreements between telecommunications companies and landlords to be "anti-competitive and . . . against public policy." The Nebraska PSC further determined that "[e]xclusionary contracts are barriers to entry and marketing agreements can have a discriminatory effect." *Nebraska MDU Order* at 6.

[74] *See* Jean Tirole, *The Theory of Industrial Organization*, Chapter 4, (1997).

[75] *See id*. at 187-198; Aghion, P. & Bolton, P., "Contracts as Barriers to Entry," 77 *American Economic Review*, No. 3, 388-401 (June 1987).

existence of incumbent LEC exclusive contracts covering some buildings actually would make it more difficult for the entrants to serve other buildings economically. Thus, exclusive contracts between incumbent LECs and building owners may impede the development of competition in the market for local telecommunications service.

30. Although competitive LECs currently hold only a relatively small share of the local telecommunications market as compared to incumbent LECs, we believe that it is necessary to prohibit both competitive and incumbent telecommunications service providers from entering into exclusive access contracts in commercial settings, in order to ensure competitive neutrality in the market. Competitive providers are growing in this market, and new entrants are actively seeking to win customers, especially customers in commercial office buildings, that are now served by the incumbent LEC. In this environment, applying an exclusive contract prohibition only to the incumbent LEC could distort competitive outcomes and ill serve end user interests. Moreover, in the case of competitive LECs, an exclusive contract may essentially constitute a device to create market power. That is, such a contract could entrench a competitive LEC as the sole provider in a building—or as one of two providers, along with the incumbent LEC—and foreclose any further competition. We note that competitive LECs support a ban on exclusive access contracts for all telecommunications providers, as discussed below.

31. An exclusive contract may benefit a building owner when it possesses some market power over tenants, such as where tenants are already committed to long-term leases and moving costs are prohibitive. Where that is the case, building owners may have the ability and incentive to engage in behavior that does not maximize tenant welfare, including the possible use of exclusive contracts. The interests of tenants would not be accounted for in the arrangement between the building owner and the telecommunications provider. We find the assumption that building owners may possess such market power reasonable, at least as a short run matter. Although a tenant has the apparent option to express dissatisfaction with the building owner's choice of local telecommunications service provider by moving to a new building, this choice, as a practical matter, is often not available. The long duration of commercial leases, spanning from five to fifteen years,[76] and typically significant relocation costs may preclude or limit the feasibility of relocation (or the threat of relocation) as a remedy. In addition, zoning laws, environmental regulations, and similar constraints can impede the construction of new office space, resulting in persistent shortages in some local markets and conferring market power on existing owners.

32. We recognize that economic literature shows there are also circumstances in which exclusive contracts may be socially efficient and beneficial. For example, with an exclusive contract, a buyer may be able to obtain advantageous sales arrangements from sellers of goods or services, the benefit of which is then passed on to consumers.[77] In addition, where new, sophisticated services become available, as in telecommunications today, an exclusive contract may be needed in order to give the service provider the incentive to spend adequate resources educating and informing potential customers. We emphasize, though, that no party in this proceeding has argued that these potential benefits are present in the provision of telecommunications service in commercial MTEs. Indeed, the record lacks any evidence of benefits to competition or consumer welfare from the use of exclusive contracts in commercial settings, and commenters that would be subject to the prohibition on such contracts support it.[78] Unlike in the residential context, parties do not allege that exclusive contracts are necessary to give competitive

[76] WinStar Reply comments, Exhibit 1, at 9 (Economic Analysis of the Market for Building Access).

[77] That is, the buyer may be offered a lower price on a per unit basis if the seller can guarantee the buyer's demand for the particular good or service will be high.

[78] *See, e.g.*, AT&T Comments at 25; Bell Atlantic Comments at 5; GTE Comments at 16; Sprint Comments at 20.

providers incentives to provide options to tenants in commercial MTEs. For example, Real Access Alliance has argued that in the commercial context, a typical building generates enough revenue to support multiple providers.[79] Given the apparent lack of benefits in this context, we find that we should not allow exclusive contracts to restrict competitive access and consumer choice. Further, under these circumstances, we see no value in distinguishing among exclusive access arrangements based on the length of the contract or the market position of the carrier.

33. In residential markets, by contrast, we do not have enough information in this record to determine whether we should forbid exclusive contracts under some or all circumstances. Some parties argue that in the residential context, potential revenue streams from any one building are typically not enough to attract competitive entry without exclusive contracts.[80] These parties also argue that forbidding exclusive contracts would undermine our cable inside wiring rules by giving former cable providers rights to remain in the building.[81] Other parties argue that we should forbid exclusive contracts without distinction.[82] The record as a whole, however, lacks specific relevant information regarding residential MTEs.[83] We therefore are requesting further comment on whether to forbid or limit residential exclusive contracts, as well as on certain other specific issues relating to practices akin to exclusive contracts, in a *Further Notice of Proposed Rulemaking*.[84]

34. In sum, the record before us indicates that exclusive contracts for telecommunications services in commercial settings hold the potential for limiting tenants' choices, without any countervailing benefits. As noted earlier, an exclusive contract has the immediate and direct effect of limiting telecommunications choices to tenants in an affected building. Only by incurring the time, resources, and expense of actually relocating to another building (possibly even breaking a long-term lease) can a tenant obtain the access to choices we believe was contemplated by the 1996 Telecommunications Act. We note, however, that we view the need for a prohibition of exclusive contracts as primarily a temporary one designed to address a transitional problem. Two aspects of the current situation should change over time. First, competition in the provision of local telephony services will continue to grow, and once competition is well established in commercial markets, it is unlikely that contracts with building owners that are harmful to tenants would be sustainable. Second, over time the market power that building owners may take advantage of today will diminish, as tenants' existing lease

[79] *See* June 16 Real Access Alliance Letter. Real Access Alliance states that an average-sized office building can yield over 13 times as much revenue as a medium-sized apartment building ($240,000 vs. $18,000) and a medium-sized office building can yield 4 times as much revenue as a medium-sized apartment building ($360,000 vs. $90,000).

[80] *Id*.

[81] *Id*. We note that by limiting the rule to commercial buildings, we generally avoid any possible effect on cable inside wiring rules because cable service providers typically do not serve commercial buildings.

[82] *See* Teligent Comments at 17-19; WinStar Comments at 25.

[83] For example, Real Access Alliance provides data for residential video, then concludes without additional support that the same reasoning applies to telecommunications. Parties arguing for a rule against all exclusive contracts do not address residential buildings specifically.

[84] *See* Sections V. B & V. C, *infra*. We also note that we have sought comment in another proceeding on whether we should forbid or limit exclusive contracts for video programming services. *See Inside Wiring Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd at 3778-80, ¶¶ 258-266.

arrangements expire and they are increasingly able to take advantage of opportunities to relocate to other existing or new office space offering preferable telecommunications services.

35. We conclude that we have authority to prohibit telecommunications carriers from entering into exclusive contracts with commercial building owners or their agents for the provision of service that necessarily and inseparably includes interstate exchange access service.[85] We agree with AT&T that exclusive contracts perpetuate the very "barriers to facilities-based competition" that the 1996 Act was designed to eliminate.[86] Similarly, WinStar argues that exclusive access contracts completely contradict the competitive mandate of the 1996 Act and, therefore, should be banned.[87] WinStar in particular contends that the Commission has jurisdiction to adopt rules prohibiting the incumbent LECs from entering into such arrangements since an exclusive access arrangement would render the Commission's decision to require incumbent LECs to provide access to in-building wiring as an unbundled network element meaningless.[88] Given that, in today's marketplace, exclusive contracts for telecommunications service in commercial settings impede the pro-competitive purposes of the 1996 Act and appear to confer no substantial countervailing public benefits, we find that a carrier's agreement to such a contract is an unreasonable practice. Therefore, these contracts implicate our authority under Section 201(b) of the Act to prohibit unreasonable practices.

36. We note that existing exclusive contracts, in addition to new exclusive contracts, may be a barrier preventing customers from obtaining the benefits of the more competitive access environment envisioned in the 1996 Act, and that the Commission has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest.[89] We recognize, though, that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts. Thus, we are inclined to proceed cautiously in this area, and seek further comment in the *Further Notice of Proposed Rulemaking* on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

37. We emphasize that the prohibition on future exclusive contracts that we adopt today applies to all common carrier contracts in commercial settings that effectively restrict a building owner or its agent from providing access to any other telecommunications service provider. Thus, by "exclusive contract" we do not mean only a contract that gives the contracting provider the sole right to serve a building. Rather, we also proscribe, for instance, a contract with a competitive LEC that could permit

[85] Section 201(b) expressly authorizes the Commission to regulate "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable." 47 U.S.C. § 201(b). As the D.C. Circuit recently held, the Commission thus has undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation. *See Cable & Wireless v. FCC*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999).

[86] AT&T Comments at 25-26.

[87] WinStar Comments at 24-25.

[88] *See* WinStar Comments to *Second Further Notice of Proposed Rulemaking* in CC Docket No. 96-98 (rel. April 16, 1999) filed May 26, 1999 at 14.

[89] *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion & Order on Reconsideration*, 10 FCC Rcd 4421, ¶ 5 n.15 (1995); Competition in the Interstate Interexchange Marketplace, *Report & Order*, 6 FCC Rcd 5880, ¶ 151 (1991).

access to that party and the incumbent, but deny access to any other competitor.[90] Similarly, we forbid any contract that would limit access to providers using a particular technology. In addition, we emphasize that contracts between building owners and local carriers that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access, are also prohibited. Finally, we note that contracts may be oral in nature. For the reasons discussed above, we find that all these types of contracts in the commercial context only hold the potential to restrict customer choice, and not to promote choice and competition. Thus, all fall within the rule we adopt today. Parties that allege that a carrier has entered into a contract in violation of the prohibition we adopt today may file a complaint with the Commission under Section 208 of the Act.[91]

38. We recognize that some premises are used for both commercial and residential purposes. First, we define "commercial" for purposes of this rule to encompass all non-residential uses, including, for example, government and non-profit offices.[92] Second, we address instances where a single premises includes both commercial and residential uses. In these cases, a building owner may choose to offer separate access agreements to the residential and commercial portions of the premises, in which case a carrier may enter into an exclusive contract to serve the residential area but not the commercial area. Where, however, a single access agreement covers the entire premises, we find it most consistent with the purposes of our rule to determine its status as residential or commercial by predominant use. Thus, for example, an apartment building that includes retail or professional establishments on the ground floor would be considered residential, whereas an office building that includes one or a few residential users would be considered commercial. We believe that in most instances the predominantly residential or commercial character of a property will be clear on the facts. To the extent there is a question whether a particular property is predominantly residential or commercial in use, we will decide such disputes on a case-by-case basis.

39. We believe that today's action will have little effect, if any, on existing state statutes and regulations governing exclusive telecommunications contracts. First, to the extent any state law prohibits exclusive contracts more broadly than our rule, that prohibition would not conflict with our rule and would remain enforceable. Thus, for example, states may continue to forbid exclusive contracts in residential as well as commercial settings.[93] Second, based on the record, it appears that states which have enacted exclusive contract regulations either have been more rigorous than our rules or have paralleled the principles of our regulation in important respects.[94] Thus, while state regulation that

[90] We note that the State of California similarly bars *de facto* exclusive contracts. California "prohibit[s] all carriers from entering into any type of arrangement with private property owners that has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers such as [competitive LECs]." *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, 1998 WL 1109255, Slip Op. at 48 (Cal. P.U.C. Oct 22, 1998).

[91] *See* 47 U.S.C. § 208.

[92] We note that hotels, or similar establishments, are not covered by the prohibition against exclusive contracts because hotel guests are not "tenants" within the meaning of our rules. At the same time, to the extent that a hotel itself is a tenant in a commercial building, our prohibition against exclusive contracts would apply. Thus, a telecommunications carrier providing service in an MTE that includes a hotel as one of its tenants would be prohibited from entering into an exclusive contract.

[93] *See, e.g.*, *Nebraska MDU Order* at 6; Conn. Gen. Stat. Ann. § 16-2471 (1997*); Massachusetts Nondiscriminatory Access Order* at 30; 16 Tex. Admin. Code § 26.129 (Sept. 7, 2000).

[94] For example, Massachusetts permits a service provider or property owner to rebut the presumption that an exclusive contract is anticompetitive by showing that the contract benefits tenants and is therefore in the public (continued….)

conflicted with our rules on exclusive contracts would potentially be subject to preemption, we do not believe as a practical matter this situation will arise very often. However, to the extent any state's law is alleged to directly conflict with our rules, we will consider the alleged conflict if necessary on a case-by-case basis.

40. Also, we note that our rule is not intended to prevent a premises owner from entering into an exclusive contract when it is acting as a purchaser of telecommunications service on behalf of its affiliated entities, such as subsidiary units, or employees. For example, we recognize that certain state governments develop and administer exclusive contracts for the public agencies or offices under their jurisdiction. Similarly, a college or university may enter into an exclusive contract on behalf of its affiliated schools, departments, faculty, and staff.[95] Given that the purpose of our prohibition on exclusive contracts is to ensure consumer choice, it would not be consistent with this purpose to restrict exclusive arrangements with property owners that are affiliated in this manner with their tenant consumers, and we therefore do not reach such arrangements.

C. Access to Wiring

41. In this section, we take the following actions regarding the demarcation point that marks the division between telecommunications network wiring under LEC control and wiring under building owner/end user control: (1) clarify that the Commission's demarcation point rules, including the revisions adopted in this section, govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these facilities for purposes of installation and maintenance; (2) establish procedures to facilitate the relocation of the demarcation point to the MPOE at the building owner's request in MTEs; (3) require LECs to disclose the location of the demarcation point where it is not located at the MPOE; and (4) resolve pending issues in the Commission's demarcation point proceeding in CC Docket 88-57. We believe that these actions will facilitate access to telecommunications inside wiring by competitive providers of local telecommunications services.[96] In addition, we decline to require a uniform relocation of the demarcation point to the MPOE for the reasons discussed below.

1. Background

42. In the *Competitive Networks NPRM*, we requested comment on how our rules governing the location of the demarcation point between facilities controlled by the local telephone carrier and the

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interest, considering such factors as the duration of the contract, the contracting provider's status as a new entrant, the effect of the exclusive contract on the development of competition and new technology, and efficiency benefits. *Massachusetts Nondiscriminatory Access Order* at 30. Similarly, our regulations permit the waiver of any provision of our rules for good cause shown. *See* 47 C.F.R. § 1.3 (rules may be suspended, revoked, amended, or waived for good cause shown). Thus, in order to comply with both the Massachusetts and the federal regulations, a provider seeking to enter into an exclusive contract must both make the required public interest showing before the Massachusetts Department of Telecommunications and obtain a waiver from the Commission.

[95] *See* Education Parties Comments at 10.

[96] We note that the *Competitive Networks NPRM* also raised the issue of whether the Commission should amend its rules governing cable inside wiring so that telecommunications service providers, as well as multichannel video programming distributors (MVPDs), can take advantage of procedures governing the disposition of home run wiring when an incumbent MVPD no longer has a legally enforceable right to maintain its home run wiring in a building. As discussed in the Further Notice of Proposed Rulemaking, Section V.E, *infra*, we conclude that we lack sufficient information in the record to determine whether to take this action, and seek further comment on the issue.

property owner in multiple unit premises impact competitive provider access and whether modification of those rules is appropriate to promote competitive access.[97]

43. At the time the current telecommunications inside wiring rules were established, there existed essentially no competition in the market for the provision of local telephone services. In the time since the enactment of the Telecommunications Act of 1996, many competitive LECs have begun providing services that were once the exclusive domain of the incumbents. There is evidence, however, that continued incumbent control over much of the wiring in some MTEs has hindered the development of facilities-based competitive LECs as viable competitors by unnecessarily requiring them to deal with their competitors in order to serve these locations.[98] On the other hand, other parties argue that building owner control over inside wiring obstructs the growth of competitors that use unbundled local loops, because they would often not otherwise need to deal with the building owner.[99] In addition, some argue that the Commission's rules create confusion regarding the location of the demarcation point and have permitted demarcation points to be located at inaccessible places.

44. The Commission adopted its demarcation point rules in 1984, in order to foster competition in the market for installation and maintenance of telecommunications inside wiring – the wiring that connects customer premises equipment (CPE) to the public switched telephone network (PSTN) and to other CPE.[100] The new rules established a "demarcation point" that marks the end of wiring under control of the LEC and the beginning of wiring under the control of the property owner or subscriber.[101] Thus, the new rules permitted telecommunications subscribers and premises owners to assume or assign responsibility for installation and maintenance of inside wiring, which previously had been managed solely by the LECs under tariff.[102]

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[97] *See Competitive Networks NPRM*, 14 FCC Rcd at 12708-9, ¶¶ 65-67.

[98] *See, e.g.* Teligent Comments at 78; WinStar Comments at 67.

[99] *See* letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Leon Jackler, Staff Attorney, FCC, dated Aug. 24, 2000 (Covad Letter). Further, building owners would not be obligated to provide "conditioned" lines capable of transmitting Digital Subscriber Line (DSL) signals, as are incumbent LECs.

[100] *See* Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning the Connection of Telephone Equipment, System and Protective Apparatus to the Telephone Network, *First Report and Order*, CC Docket No. 81-216, 97 FCC 2d 527 (1984) (*1984 Demarcation Point Order*); 47 C.F.R. §§ 68.3, 68.213.

[101] *See* 47 C.F.R. § 68.3. This section currently defines the Demarcation Point for multiple unit premises as follows: "(1) In multiunit premises existing as of August 13, 1990, the Demarcation Point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable. (2) In multiunit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing as of that date, the telephone company may establish a reasonable and non-discriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. . . ." *Id.*

[102] *See 1984 Demarcation Point Order*, 97 FCC 2d 527. In several related orders, the Commission determined that the installation and maintenance of inside wiring no longer constituted a common carrier offering under Title II of the Communications Act and therefore detariffed the installation and maintenance of inside wiring. *See* Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies Required by (continued….)

45. In 1990, the Commission revised the demarcation point definition to increase the amount of wiring that may come under the control of the property owner or subscriber.[103] At the same time, in the case of MTEs, the Commission sought to make the definition flexible enough to accommodate existing buildings. Therefore, in multi-tenant buildings existing as of August 13, 1990, the demarcation point is determined in accordance with the carrier's reasonable and nondiscriminatory practices. For new installations, or major renovations, subsequent to August 13, 1990, the carrier may establish a practice of placing the demarcation point at the MPOE.[104] Where the carrier chooses not to do so, the premises owner may determine the location or locations of the demarcation point.[105]

46. In 1997, the Commission again revisited the issue of the demarcation point on reconsideration of the *1990 Demarcation Point Order and Further NPRM*.[106] The Commission clarified that the relocation of the demarcation point to the MPOE cannot be undertaken unilaterally by the incumbent LEC without the property owner's consent, except in the case of major modifications, renovations, or rearrangements.[107] The Commission further stated that, for the purposes of Section 68.3, a request for relocation by the property owner would be considered a major modification or rearrangement of the wiring.[108] The *1997 Demarcation Point Order* also included a Further Notice of Proposed Rulemaking that requested comment on, among other issues, proposed modifications to the demarcation point rule.[109] Two petitions for clarification and reconsideration were filed in response to issues discussed on reconsideration in the *1997 Demarcation Point Order.*[110] In January, 2000, the Commission released an order

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Detariffing of Customer Premises Equipment and Proposed Detariffing of Customer Provided Cable Wiring, CC Docket No. 82-681, *Report and Order*, 48 Fed. Reg. 50534 (1983); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Second Report and Order*, 51 Fed. Reg. 8498 (1986); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd. 1190 (1986).

[103] *See* In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 88-57, 5 FCC Rcd 4686 (1990). (*1990 Demarcation Point Order and Further NPRM*).

[104] The MPOE is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3.

[105] We note that the definition of the demarcation point for telephone company communications facilities is not identical to the demarcation point definition for cable television facilities for purposes of the cable inside wiring rules. 47 C.F.R. § 76.6(mm). In 1997, we declined to establish uniform rules to govern the demarcation point for cable and telephone service providers. *See Inside Wire Report and Order and Second Further NPRM*, 13 FCC Rcd at 3719-30, ¶¶ 129-151.

[106] See, In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 88-57, RM-5643, 12 FCC Rcd 11897 (1997) (*1997 Demarcation Point Order*).

[107] *Id.* at 11915.

[108] *Id.* at *n.*104.

[109] *Id.*

[110] One petition requested that the Commission clarify that it intended to give only prospective effect to its interpretation of the demarcation point definition in the *1997 Demarcation Point Order.* Bell Atlantic Petition for (continued….)

that addressed issues regarding the enhanced wire quality standards raised in petitions relating to the *1997 Demarcation Point Order*.[111] However, the order deferred consideration of the remaining demarcation point issues raised in the two petitions for clarification and reconsideration to the *Competitive Networks* proceeding.

47. As noted above, the current inside wiring rules do not specifically contemplate the new and complex issues involved with competition in the market for local telecommunications services. To this end, in the context of promoting competition for the provision of telecommunications service in MTEs, the *Competitive Networks NPRM* requested comment on how the Commission's existing rules governing the location of the demarcation point impact competitive provider access to inside wiring in MTEs.[112] In particular, the *Competitive Networks NPRM* asked commenters to consider whether the Commission should adopt a uniform demarcation point for purposes of competitive access, either at the MPOE or at some other point, for all or some class of multiple-unit premises owners. In addition, the *Competitive Networks NPRM* asked commenters to consider whether the person who controls wire and related facilities for purposes of installation and maintenance must necessarily be the same person who exercises control for purposes of competitive access, and, if not, whether we should apply different standards for each of these purposes.

48. The *Competitive Networks NPRM* also sought comment on the potential treatment of inside wiring owned or controlled by an incumbent LEC as an unbundled network element under Section 251(c)(3) of the Communications Act.[113] In November, 1999, the Commission issued the *UNE Remand Order*,[114] which established as an unbundled network element the "inside wire" sub-loop. That order defined the loop element as terminating at the demarcation point and required incumbents to make available on an unbundled basis any portion of the local loop as a subloop element, including that portion between the property line and the demarcation point. The *UNE Remand Order* further required incumbent LECs to allow interconnection at any accessible terminal, and to establish a single point of interconnection (SPOI) upon a request from a competitive provider where such a point does not already exist.

(Continued from previous page)
Clarification and Reconsideration of the *1997 Demarcation Point Order (*Bell Atlantic Petition) at 2. The other petition requested that the Commission clarify that its statement in footnote 104 does not authorize unilateral changes by the premises owner to demarcation point location. BellSouth Petition for Clarification and Reconsideration of the *1997 Demarcation Point Order* (BellSouth Petition) at 3-4.

[111] Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Third Report and Order*, 15 FCC Rcd 927 (2000) (*2000 Demarcation Point Third Report and Order*).

[112] *See Competitive Networks NPRM*, 14 FCC Rcd at 12708, ¶ 65.

[113] *See* 47 U.S.C. § 251(c)(3) (requiring incumbent LECs to provide requesting telecommunications carriers unbundled access to elements of their networks on just, reasonable, and nondiscriminatory terms). In 1996, pursuant to Congress' mandate in Section 251, the Commission promulgated rules establishing unbundled network elements (UNEs), and directed incumbent LECs to make them available to competitors. *Local Competition First Report and Order*, 11 FCC Rcd at 15697-99, ¶¶ 392-397; *see* 47 C.F.R. § 51.319(b). The rules were challenged and remanded to the Commission for clarification of the standards by which UNEs were defined. *Iowa Utilities Board*, 525 U.S. 366. In April, 1999, the Commission sought comment on these standards. *See Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, 14 FCC Rcd 8694 (1999).

[114] *See UNE Remand Order*.

2. Discussion

a. Application of Demarcation Point Rules to the Provision of Competitive Telecommunications Service

49. As discussed above, the Commission's Part 68 demarcation point rules were designed to enable the creation of a competitive market in the installation and maintenance of inside wiring, and did not contemplate the use of that wiring to provide competitive local telecommunications service. In light of the developing competition spawned by the 1996 Act, and the subsequent need for competitive providers to gain access to inside wiring, we will apply our demarcation point rules to facilitate access to inside wiring for the purpose of providing competitive local telecommunications service. Thus, we clarify that the Commission's demarcation point rules, including the revisions adopted below, govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these facilities for purposes of installation and maintenance. In the sections below, we adopt several revisions to our demarcation point rules that we believe will foster competition in the local telecommunications market in MTEs, while maintaining the competitive framework for the installation and maintenance of inside wiring.

b. Location of the Demarcation Point

50. A number of commenters contend that uniformly establishing the demarcation point at the minimum point of entry would promote facilities-based competitive access to MTEs.[115] As discussed above, there is evidence in the record that incumbent LECs in many instances are using their control over on-premises wiring to obstruct or delay competitive access.[116] Placing the demarcation point at the MPOE would eliminate the potential for such abuses by permitting competitive carriers to obtain access to inside wire by dealing solely with the premises owner. While our unbundling rules adopted in the *UNE Remand Order* provide requesting carriers with a right of non-discriminatory access to inside wire owned or controlled by incumbent LECs, requesting carriers claim they continue to face difficulty gaining access to MTEs due to incumbent obstruction. Moving the demarcation point, they state, would allow all facilities-based carriers to interconnect with the inside wiring, which would be controlled by the premises owner, at the same point and on the same terms.[117]

51. The record indicates, however, that establishing the demarcation point at the MPOE would disadvantage those competitive LECs that rely on leasing unbundled loops, including most DSL[118] providers, by limiting the availability of the inside wire as part of the loop element.[119] Currently, where the demarcation point is at or near the customer's unit, competitive LECs may obtain access to the incumbent LEC's existing wiring inside the building as part of the unbundled loop (or as a separate subloop element). Relocation of the demarcation point to the MPOE, however, would result in a

[115] *See* ALTS Comments at 22; AT&T Reply Comments at 25; WinStar reply Comments at 61; *see also* GTE Comments at 7-8.

[116] *See* Section IV. A, *supra*.

[117] *See* Teligent Comments at 80.

[118] Digital Subscriber Line (DSL) is a broadband data protocol that provides service over the high frequency portion of conventional copper lines. It is most commonly provided by collocating facilities in a central office of the incumbent LEC and transmitting the signal over unbundled local loops.

[119] *See* Covad Letter.

decrease in the amount of wiring within the building that is available to competitive LECs as part of the loop, which by definition ends at the demarcation point.[120] Thus, competitive LECs that rely on unbundled loops would have to negotiate with both the incumbent LEC and the building owner for each building they seek to serve, thus increasing their costs significantly. Those commenters also raise the possibility that certain building owners would refuse to allow access at all or impose terms which would make the provision of service infeasible. Moreover, commenters allege, their problems are exacerbated by the practice of some incumbent LECs of leaving wires unconnected at the demarcation point, when it is located at the MPOE. This practice not only requires competitive LECs to incur the expense of dispatching their own technicians to the building, but draws the attention of the premises owner to the possibility of extracting concessions from carriers for access to the wiring.[121]

52. Further, several commenters argue that uniformly moving the demarcation point would give rise to legal and practical difficulties, especially in existing buildings.[122] These arguments are not without merit. It is indisputable that the incumbent LECs have made considerable investments over the years in network facilities, and while much of that investment has likely been depreciated or recouped in the rate base,[123] the facilities remain of some value to the incumbents. We agree with GTE that requiring a uniform relocation in existing buildings would be an enormous undertaking.[124]

53. In light of these concerns, we decline to mandate a uniform demarcation point at the MPOE. The record shows that although moving the demarcation point to the MPOE would reduce costs and facilitate deployment for competitive LECs that rely on their own facilities to reach MTEs, it would increase costs and hinder deployment for carriers that rely on unbundled local loops. In the absence of convincing evidence that the benefits to one group of competitors would significantly outweigh the harms to the other, we find the best course is to continue the leave the choice in the first instance to the building owner.

54. At the same time, we take several actions to clarify the building owner's options and facilitate its exercise of its options for the benefit of competition.[125] First, we clarify that in all multiunit

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[120] *See UNE Remand Order*, 15 FCC Rcd at 3773, ¶168.

[121] Whether this practice is consistent with the goals of the 1996 Act is beyond the scope of this proceeding, and we therefore decline to comment on it here.

[122] *See* Bell Atlantic Comments at 9; BellSouth Reply Comments at 17.

[123] *See* CAIS, Inc. Reply Comments at 6.

[124] *See* GTE Reply Comments at 6.

[125] We do not credit several arguments suggesting that we reduce the likelihood tha the location of the demarcation point will be at the MPOE. For example, we find no support for BellSouth's assertion that service quality would suffer if the demarcation point were moved, nor for its assertion that it would lose good will with its customers because of problems with inside wiring no longer under its control. BellSouth Comments at 8. The record also does not support BellSouth's claim that property owners will not be able to undertake responsibility for wiring their premises. *Id* at 19-20. Indeed, the Real Access Alliance has stated that its members advocate having such choice in the hands of premises owners and feel it is the best way to provide tenants with choice in advanced telecommunications services. *See* June 16 Real Access Alliance Letter. We also reject the argument of BellSouth that permitting building owners to control the inside wiring would discourage the placement of fiber facilities in the building and thus discourage the provision of advanced services. We believe that where demand for advanced services exists, there will be sufficient incentive for incumbent LECs, competitive LECs and other third parties to undertake the installation of fiber facilities regardless of the location of the demarcation point. Moreover, contrary (continued….)

premises, the incumbent carrier must move the demarcation point to the MPOE upon the premises owner's request. Section 68.3(b)(2) specifies that in multiunit premises in which inside wiring is installed or subject to a major modification after August 13, 1990, if the carrier does not elect to place the demarcation point at the MPOE, the premises owner shall determine the number and location of the demarcation point or points (*e.g.*, a single point at the MPOE).[126] In the *1997 Demarcation Point Order*, the Commission found that a multiunit premises owner's request to move the demarcation point to the MPOE constitutes a major modification for the purposes of Section 68.3(b)(2).[127] Thus, even in multiunit premises in which the original wiring was installed prior to August 13, 1990, the premises owner may require the carrier to move the demarcation point to the MPOE. We disagree with BellSouth's assertion in its petition for clarification and reconsideration of the *1997 Demarcation Point* that the premises owner should be required to negotiate changes in the demarcation point location with the carrier serving the building.[128] We believe that it would impede the development of facilities-based competition if a carrier could refuse a premises owner's request to move the demarcation point to the property line in order to prevent the connection of inside wiring to a competitive carrier. Thus, we affirm that under Section 68.3 of the Commission's rules, a carrier must move the demarcation point to the MPOE upon the request of a multiunit premises owner, and we deny BellSouth's petition.

55. Second, although we have previously required incumbent LECs to move the demarcation point to the MPOE at the premises owner's request, we have left the terms of relocation and the procedures for negotiating those terms up to the parties involved. The comments of building owners are generally favorable to these rules giving the owner the right to request a that the demarcation point be placed at the MPOE.[129] However, the record indicates that the lack of any guidelines for such terms may provide a disincentive for the parties to negotiate effectively. We hold that in order to further competition, a request by a property owner to relocate the demarcation point to the MPOE must be dealt with in a reasonably timely and fair manner, so as not to unduly delay or hinder competitive LEC access. We therefore direct incumbent LECs to conclude negotiations with requesting building owners in good faith and within 45 days of the initial request. Building owners may file complaints with the Commission for resolution of allegations of bad faith bargaining by LECs.[130] As each situation will vary greatly depending on such characteristics as the age and complexity of the inside wiring, and any previous agreements and practices, we find that this approach will facilitate competition, while protecting the valid property interests of the parties.[131] These rules will apply as well to competitive LECs where they have installed or have had control of the inside wiring.

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to BellSouth's contention, the record indicates that building owners would be willing to pay for and maintain such facilities.

[126] 47 C.F.R. § 68.3(b)(2).

[127] *See 1997 Demarcation Point Order,* 12 FCC Rcd at 11915 n.104; *see* 47 C.F.R. § 68.3(b)(2).

[128] BellSouth Petition at 4.

[129] *See* Real Access Alliance comments at 59.

[130] *See* 47 U.S.C. § 208; 47 C.F.R. §§ 1.720-1.736 (1999).

[131] In this context we see no reason to distinguish between buildings constructed prior to and after August 13, 1990. Therefore we hold that these rules shall apply to all existing buildings regardless of when constructed.

56. The record further indicates that uncertainty as to the actual location of the demarcation point leads to confusion on the part of both building owners and competitive LECs.[132] This confusion can lead to additional expense and delay in the provision of service. Competitive LECs need this information in order to know with which party to negotiate interconnection to the inside wiring. The record contains instances where neither or both the incumbent LEC and building owner claimed ownership of the inside wire, causing delay in the ability of the competitive LEC to commence service to its customers.[133] While our current rules require that incumbent LECs must make the location of the demarcation point available to building owners upon request by the owner, we are concerned that the information may not be provided in as prompt a manner as it reasonably should be.[134] The incumbent LECs are generally in the best position to know the location of the demarcation point, and we believe that they should not be permitted to use their control over such non-proprietary information in order to frustrate competition. Because excessive delay may impose unnecessary costs and impede competition, we hold that if an incumbent LEC fails to produce this information within ten business days of the request, the premises owner may presume the demarcation point to be located at the MPOE. The availability of this information will facilitate fair negotiations, and may even negate the need for any negotiations where, for example, the building owner was unaware that the demarcation point is already at the MPOE. We further require that where LECs do not establish a practice of placing the demarcation point at the MPOE, they fully inform building owners, at the time of installation, of their options regarding placement.

57. Finally, we note that where the building owner chooses to locate the demarcation point at the MPOE, responsibility for installation and maintenance may be contracted out to the incumbent LEC, a competitive LEC or other third party,[135] but control, including determining terms of access, would lie with the building owner. We require that where such duties are contracted to a carrier that is also providing service to that building, the carrier must deal with other LECs on nondiscriminatory terms. Similarly, we expect that those building owners who choose to take control of the inside wiring will exercise that control in a nondiscriminatory way, consistent with the goals of the Telecommunications Act and the public interest.[136]

58. We anticipate that the measures described above will substantially reduce the potential for incumbent LECs to obstruct competitive access to MTEs. These changes will facilitate building owners' exercise of their option to relocate the demarcation point in existing buildings, and prevent incumbent LECs from abusing their control over information regarding the location of the demarcation point. Moreover, we emphasize that to the extent incumbent LECs continue to exercise control over on-

[132] *See* Real Access Alliance Comments at 60; BlueStar Communications Reply Comments at 2.

[133] *Id*.

[134] *See* 47 C.F.R. § 68.110(c). This section of the Commission's Rules requires LECs to make available all technical information regarding the configuration of wiring on the customer's side of the demarcation point, but it does not require that it do so in a specified time. Further, while this section allows the LEC to charge reasonable costs for this technical information, we believe that any costs incurred in providing the location of the demarcation point would be *de minimis* and that the LECs should provide this information freely.

[135] This arrangement would be similar to that in single unit residential properties, where the customer has the option to pay a monthly fee to the incumbent LEC for inside wiring maintenance while retaining ownership and control of that wiring.

[136] *See* September 6 Real Access Alliance Letter.

premises wiring, they must afford access to that wiring as a UNE at forward-looking prices.[137] In light of all these safeguards, we believe it is not necessary or prudent at this time to mandate a uniform move of the demarcation point to the MPOE. Moreover, we believe that it is unnecessary at this time to provide further guidance on legal or technical feasibility issues related to subloop unbundling.

c. Remaining Issues in CC Docket No. 88-57

59. As discussed above, several parties filed petitions for reconsideration of the *1997 Demarcation Point Order*. Those petitions that did not relate to the demarcation point and control over access were resolved earlier this year.[138] However, we determined at that time to defer resolution of those petitions related to the demarcation point, as well as certain issues on which we sought further comment in the *1997 Demarcation Point Order* pending our action in this proceeding.

3. Single Definition of Inside Wiring

60. In the *1990 Demarcation Point Order and Further NPRM*, the Commission stated that the demarcation point definition applied to both simple and complex wiring installations.[139] In response, several petitions were filed asserting that the Commission did not comply with Section 5 of the Administrative Procedures Act (APA) because it provided insufficient notice indicating that a change in complex wiring rules was being considered.[140] In the *1997 Demarcation Point Order*, the Commission found that its revision of the demarcation point definition was proper under the APA because it was a "logical outgrowth" of the proceeding.[141] Noting petitioners' concerns about the Commission's decision to apply the revised demarcation point definition to complex wiring, however, the Commission inquired further into this issue in the *1997 Demarcation Point Order*.[142] Specifically, the Commission requested comment on its proposition that the single demarcation point definition, as revised, avoids the confusion that could result from separate demarcation point definitions for simple and complex wiring,[143] encourages placement of the demarcation point at the MPOE for new multiunit installations, and "foster[s] competition in the inside wiring installation and maintenance markets."[144]

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[137] To the extent parties raise issues regarding incumbent LEC compliance with the UNE rules, they are beyond the scope of this proceeding. Similarly, we do not address in this proceeding whether competitive LECs should also be required to afford access to wiring that they control within MTEs under some statutory authority other than Section 251(c)(3) of the Act.

[138] *See 2000 Demarcation Point Third Report and Order*.

[139] Complex wiring is defined as those installations of four or more lines. *See 1997 Demarcation Point Order*.

[140] *See 1997 Demarcation Point Order*, 12 FCC Rcd at 11907; 5 U.S.C. § 553.

[141] Specifically, the Commission found that because the same demarcation point definition had always applied to both simple and complex wiring, the parties should have realized that a change in the demarcation point definition would be likely to apply to both simple and complex wiring installations. *1997 Demarcation Point Order*, 12 FCC Rcd at 11925; *see also* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *Notice of Proposed Rulemaking*, CC Docket No. 88-57, 3 FCC Rcd 1120 (1988).

[142] *1997 Demarcation Point Order*, 12 FCC Rcd at 11925.

[143] *Id.* at 11926.

[144] *See 1997 Demarcation Point Order*.

61. We agree with commenters that support a single definition of the demarcation point, as it applies to both simple and complex wiring. We developed and have maintained a single demarcation point definition for both simple and complex inside wiring installations because it is simple, and consistent, and promotes consumer control over inside wiring by restricting the extent of network wiring on the customer's premises, yet is flexible enough to respond to the demands of complex, multiunit inside wiring facilities design.[145] We agree with commenters that changing the definition at this time would needlessly risk disruption and confusion, and is not supported by the record.[146] Consequently, we affirm the decision in the *1997 Demarcation Point Order* maintaining the same demarcation point definition for both simple and complex wiring.

4. Safety Concerns Regarding the Placement of the Demarcation Point Away from the Building

62. In the *1997 Demarcation Point Order*, the Commission declined to modify the demarcation point definition to prohibit placement of the demarcation point away from the building. Some petitioners in that proceeding had expressed concern that locating the demarcation point a substantial distance from the building in which telephone wire is located could raise safety concerns.[147] Noting that the National Electrical Code (NEC) requires the placement of surge protection at or near the building, these petitioners concluded that if a network protector is placed by the carrier at a demarcation point near the property line, and that demarcation point is a significant distance from the building, a second network protector should be installed where the wire enters the building.[148] The petitioners further opined that improper "coordination" between these two network protectors could pose a danger to telephone company personnel, customers, or private property.[149] Finally, the petitioners requested that the Commission modify its rules to prohibit location of the demarcation point away from a building, or clarify that the NEC precludes such placement.[150]

63. In the *1997 Demarcation Point Order*, the Commission responded to the petitioners by noting that building owners are generally responsible for safety standards and similar concerns relating to their property and equipment and that the record did not bear evidence of specific difficulties or problems relating to improper protector "coordination."[151] Nonetheless, the Commission requested additional comment on whether it should continue to allow the demarcation point and network protector to be

[145] *1997 Demarcation Point Order*, 12 FCC Rcd at 11905-07.

[146] Multi-Media Telecommunications Association (MMTA) Comments on the *1997 Demarcation Point Order* at 1; Shared Communications Systems (SCS) Comments on *1997 Demarcation Point Order* at 2-3.

[147] The petitioners were AT&T, GTE, Southwestern Bell (SBC), and TIA. *1997 Demarcation Point Order*, 12 FCC Rcd at 11908, 11926.

[148] Specifically, petitioners argued that location of the demarcation point at the MPOE may require the installation of a second network protector at or near the building in order to comply with the NEC. *1997 Demarcation Point Order* 12 FCC Rcd at 11926-27.

[149] *1997 Demarcation Point Order*, 12 FCC Rcd at 11926. Network protector coordination refers to any activities required to ensure that the technical characteristics of multiple network protectors will not cause problems to the network or among themselves.

[150] *Id*.

[151] *Id.*

located away from the building, at the property line.[152] The Commission also requested that commenters discuss, in the light of actual experiences, whether the presence and coordination of the second protector differs from other safety matters for which property owners are normally responsible.[153] Finally, the Commission solicited comments on the need to require carriers to inform building owners of the need for a second protector and protector coordination for demarcation points and network protectors that are located at the property line.[154]

64. All commenters on this issue in CC Docket 88-57 agree that the current demarcation point definition is reasonable and should not be modified to prohibit location of the demarcation point at the MPOE.[155] Commenters specifically mention that the current demarcation point definition is logical, is practical, affords customers and telephone companies needed flexibility, avoids needless disruption of current practices, and supports facilities-based competition.[156] While acknowledging the possibility of safety concerns,[157] commenters agree that there is no record of "significant safety problems" and advise that it would be "unnecessary and inappropriate" to obligate carriers to notify customers of the possible need for network protector coordination.[158] Commenters also agree that, where the demarcation point and the protector are located away from the building, building owners have the responsibility to ensure

[152] *Id.*

[153] *Id*.

[154] *Id*.

[155] Ameritech Comments on *1997 Demarcation Point Order* at 2-3; Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 1-2; GTE Comments on *1997 Demarcation Point Order* at 3; SCS Comments on *1997 Demarcation Point Order* at 2-3.

[156] Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 1-2; SCS Comments on *1997 Demarcation Point Order* at 2-3. GTE notes that it has adopted a normal business policy of locating the demarcation point for simple inside wiring at the MPOE, and notes its agreement with the Commission's definition. GTE Comments on *1997 Demarcation Point Order* at 3. Ameritech notes that the NEC does not refer to the demarcation point location, and that for various reasons property owners may prefer to limit the extent to which telecommunications service providers may intrude on their property. Ameritech also reports that its standard practice is to locate the demarcation point at the property line only for sophisticated commercial enterprises, as opposed to single tenant residences. Ameritech Comments on *1997 Demarcation Point Order* at 2-3.

[157] GTE states that its company policy for wire extensions that serve separate buildings is to install protectors at both ends of any on-premises wire extension facility that could accidentally come into contact with power facilities carrying voltages of 300 volts or more, or those that extend to a separate building more than 75 feet away. In its initial comments, GTE acknowledges that the addition of the second protector may confuse tenants and building owners as to the location of the demarcation point. It therefore stresses the need for proper coordination among carriers and building owners to enable accurate identification of the demarcation point location, and supports a rule requiring parties that locate simple inside wiring demarcation points at the property line to inform premises owners and tenants of the need for a second protector and protector coordination. GTE Comments on *1997 Demarcation Point Order* at 4-5. In its reply comments, however, GTE agrees with other commenters, now stating that "there is no need for the Commission to modify its rules to address safety and coordination of a second protector," and that "all necessary coordination can be achieved easily without a rule change." GTE Reply Comments on *1997 Demarcation Point Order* at 3-4.

[158] Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 3; BellSouth Reply Comments on *1997 Demarcation Point Order* at 3; GTE Reply Comments on *1997 Demarcation Point Order* at 3-4.

that the building is protected, just as building owners generally bear a variety of obligations and responsibilities regarding safety standards and protection of their property.[159]

65. We find that permitting carriers to locate the demarcation point at or near the property line promotes a competitive telecommunications marketplace. We believe it would impede the development of facilities-based competition if a carrier could refuse a premises owner's request to move the demarcation point to the property line in order to prevent the connection of inside wiring to a competitive carrier. We further note the absence of reports that property owners are experiencing problems, or evidence that problems are likely to arise in relation to locating the demarcation point at the property line. Thus, we see no justification for imposing a requirement compelling carriers to inform property owners of the potential for problems, and we refrain from doing so.

5. Prospective Effect of 1997 Demarcation Point Order

66. The Commission's rules state that the demarcation point for multiunit structures is to be determined "in accordance with the local carrier's reasonable and non-discriminatory standard operating practices."[160] In the *1997 Demarcation Point Order* the Commission clarified that the standard operating practices to which Section 68.3(b)(1) refers are those practices in effect on August 13, 1990.[161] Thus the rule does not authorize changing the demarcation point for an existing building to the minimum point of entry, except pursuant to Section 68.3(b)(2), *i.e.*, if the building owner makes major additions, modifications, or rearrangements in existing wiring. Bell Atlantic/NYNEX requests that the Commission give its clarification in the *1997 Demarcation Point Order* only prospective effect so that buildings in which the demarcation point were improperly moved after Section 68.3(b)(1) was adopted, but before the rules were clarified in the *1997 Demarcation Point Order*, would not be affected.[162] Alternatively, Bell Atlantic/NYNEX asks the Commission to reconsider this portion of the *1997 Demarcation Point Order* to give the proposed interpretation only prospective effect.

67. In the *1990 Demarcation Point Order and Further NPRM*[163] the Commission adopted rules to ensure that the demarcation point would not be located a significant distance from where wiring enters the customer's premises. In the *1997 Demarcation Point Order*, the Commission clarified that it did not intend in the *1990 Demarcation Point Order and Further NPRM* to permit carriers automatically to relocate demarcation points in multiunit buildings.[164] According to Bell Atlantic, some carriers interpreted the rules promulgated in the *1990 Demarcation Point Order and Further NPRM* to permit relocation of the demarcation point to the minimum point of entry, so long as that relocation was approved by the applicable state commission. Accordingly, Bell Atlantic filed tariffs with state

[159] Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 3; GTE Reply Comments on *1997 Demarcation Point Order* at 4; SCS Comments on *1997 Demarcation Point Order* at 2-3.

[160] Section 68.3(b)(1) states, in relevant part, "[i]n multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices." 47 C.F.R. § 68.3(b)(1).

[161] *See 1997 Demarcation Point Order*, 12 FCC Rcd at 11914; 47 C.F.R. § 68.3(b)(1).

[162] Bell Atlantic Petition.

[163] *See 1990 Demarcation Point Order and Further NPRM*.

[164] *1997 Demarcation Point Order*, 12 FCC Rcd at 11914.

commissions, and in five jurisdictions, the state public utility commissions permitted Bell Atlantic to locate the demarcation point for all multiunit buildings at the MPOE.[165]

68. Although Bell Atlantic does not challenge the demarcation point location rules as clarified by the Commission in the *1997 Demarcation Point Order*, it pleads that it was not unreasonable for it and other carriers to have adopted a different interpretation in 1990. Bell Atlantic claims that it would be impossible now, seven years after the fact, for it to "unscramble the egg" and attempt to restore the demarcation points to the original 1990 locations in multiunit buildings in the five affected jurisdictions. Bell Atlantic also reports that the wiring in question has been fully amortized, control and maintenance of the wiring has been turned over to the building owners, and that those owners have likely modified, rearranged, or added to it. Bell Atlantic claims to have no way of knowing whether any such rearrangements or modifications were made, or which were "major," so as to take the building out of the pre-1990 category. Bell Atlantic states that it would be unreasonable to hold it responsible for maintaining wiring that building owners have controlled and maintained, properly or not, for several years. Furthermore, Bell Atlantic argues that moving demarcation points to the MPOE conforms to Commission policy. Finally, Bell Atlantic argues that it should not be penalized for actions taken in good faith and consistent with the Commission's substantive policy, even if those actions are inconsistent with the rule as clarified seven years after it was promulgated.

69. We grant Bell Atlantic's request, and clarify that the statement in paragraph 26 of the *1997 Demarcation Point Order* was intended to have only prospective effect, and does not require carriers to reestablish demarcation points moved under Section 68.3(b)(1) before clarification in the *1997 Demarcation Point Order*. Although our policy supports deference to building owners' choice of location for demarcation points, we recognize the difficulty of determining which demarcation point locations were improperly moved, and note the state public utilities commission approval of the policies under which the demarcation points were moved, indicating that the public interest had been adequately considered before the relocation activity took place. Thus, we find that the public interest will be better served by clarifying that our statement in paragraph 26 of the *1997 Demarcation Point Order*, regarding moving the demarcation point to the MPOE, was intended to have only prospective effect. Reversing the relocations and moving the demarcation point away from the MPOE appears unjustified, would contradict the Commission's policy of supporting location of the demarcation at or near the MPOE, and would be difficult to implement. Finally, there is no indication that granting Bell Atlantic's request will undermine the Commission's support for a competitive telecommunications market and facilities-based competition.

D. Access to Conduits and Rights-of-Way

1. Background

70. Section 224 of the Communications Act provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[166] Congress enacted the original version of Section 224 in 1978 to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. Congress sought to prohibit utilities from engaging in "unfair pole attachments practices . . . and to minimize the effect of

[165] The demarcation point in multiunit buildings was moved to the minimum point of entry in Pennsylvania, Maryland, Virginia, West Virginia and Delaware.

[166] 47 U.S.C. § 224(f)(1).

unjust or unreasonable pole attachments practices on the wider development of cable television service to the public."[167] In 1978, the Commission implemented the original Section 224 by issuing rules governing pole attachments issues and establishing a basic formula for cable pole attachments rates.[168] These rules have been reconsidered, amended and clarified by subsequent Commission orders.[169]

71. The 1996 Act amended Section 224 in important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[170] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.[171] Thus, in passing the 1996 Act, Congress intended to ensure that utilities' control over poles, ducts, conduits, and rights-of-way did not create a bottleneck for the delivery of telecommunications services.

72. As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications."[172] Section 224, however, specifically excludes incumbent LECs from the definition of telecommunications carriers with rights as pole attachers.[173] Because, for purposes of Section 224, an incumbent LEC is a utility but is not a telecommunications carrier, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though the incumbent LEC has no rights under Section 224 with respect to the facilities of other utilities. This is consistent with Congress'

[167] S. Rep. No. 580, 95th Cong., 1st Sess. at 19, 20 (1977) (1977 Pole Attachments Act Senate Report).

[168] Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *First Report and Order*, 68 FCC 2d 1585 (1978); s*ee also Second Report and Order*, 72 FCC 2d 59 (1979) (*Pole Attachments Second Report and Order*); *Memorandum Opinion and Order in CC Docket No. 78-144*, 77 FCC 2d 187 (1980), *aff'd sub nom Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985); Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, *Report and Order*, 2 FCC Rcd 4387 (1987) (*1987 Pole Attachments Revisions Order*).

[169] *Pole Attachments Second Report and Order*, 72 FCC 2d at 59; Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556, *Memorandum Opinion and Order*, FCC 84-325, at ¶ 10 (rel. July 25, 1984). *See also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachments formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *1987 Pole Attachments Revisions Order*, 2 FCC Rcd at 4387. *See also* Amendment of Rules and Policies Governing Pole Attachments, *Report and Order*, CS Docket No. 97-98, 15 FCC Rcd 6453 (2000) (*Cable Pole Attachments Pricing Report and Order*); Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 (1998) (*Telecommunications Pole Attachments Pricing Report and Order*), *rev'd in part sub nom Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power II*).

[170] 47 U.S.C. § 224, as amended by the 1996 Act, § 703.

[171] 47 U.S.C. § 224(a), (f). *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (upholding the constitutionality of Section 224(f)(1)) (*Gulf Power I*).

[172] 47 U.S.C. § 224(a).

[173] 47 U.S.C. § 224(a)(5).

intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[174]

73. Under the pole attachments provisions of the 1996 Act, we have been able to act effectively to promote the development of competition in local telecommunications markets. In the *Local Competition First Report and Order*, we established a program for nondiscriminatory access to utilities' poles, ducts, conduits and rights-of-way, consistent with our obligation to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable attachments rates, terms and conditions with a minimum of administrative costs.[175] We further held that the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law, and determined 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.[176] In the *Local Competition Pole Attachments Reconsideration Order*, we reiterated that the principle of nondiscrimination established by Section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs.[177] We concluded, however, that a utility is not required to exercise its powers of eminent domain, if any, on behalf of third parties in order to expand its existing rights-of-way.[178]

74. In the *Local Competition First Report and Order*, we also held that Section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under Section 251(c)(6).[179] WinStar petitioned for clarification or reconsideration of this holding, requesting a ruling that a LEC must allow telecommunications carriers access pursuant to Section 224 to rooftop facilities and related riser conduits that the LEC owns or controls.[180]

75. Based on the record compiled in response to the WinStar Petition, we tentatively concluded in the *Competitive Networks NPRM* that Section 224 includes a right of access to conduits, ducts, and

[174] 1996 Conference Report at 113.

[175] *Local Competition First Report and Order*, 11 FCC Rcd at 16058-59, ¶¶ 1119-1122. We subsequently promulgated rate formulas to govern telecommunications service providers' access to pole attachments after February 8, 2001. *See Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777.

[176] *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

[177] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Order on Reconsideration*, 14 FCC Rcd 18049 at 18067, ¶ 51. (*Local Competition Pole Attachments Reconsideration Order*).

[178] *Id.* at 18063, ¶ 38.

[179] *Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185.

[180] WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996) (WinStar Petition). Relevant oppositions and comments were filed by American Electric Power Service Corporation et al. (AEPSC et al.), Ameritech, Duquesne Light Company (Duquesne), Edison Electric Institute and UTC, Sprint Corporation (Sprint), and United States Telephone Association. Replies were filed by AEPSC et al., Duquesne, and WinStar. *See also* WinStar Communications, Inc. Opposition to Petitions for Reconsideration at 5-10 (filed Oct. 31, 1996) (replying to Duquesne Opposition).

rights-of-way in MTEs.[181] We therefore proposed in the *NPRM* that, under Section 224, utilities must permit access to rooftops, conduits, and similar rights-of-way that they "own or control" in MTEs, and we requested comment on issues relating to the implementation of this requirement, including the circumstances under which utility ownership or control might be found to exist.[182] At the same time, we tentatively reaffirmed our conclusion that Section 224 does not confer a general right of access to utility property,[183] but we tentatively concluded that Section 224 does confer a right of access where a utility uses property that it owns in the manner of a right-of-way as part of its distribution network.[184]

2. Discussion

76. Based on the record before us and our analysis of the statute, we conclude that the Section 224(f)(1) right of access to poles, ducts, conduits, and rights-of-way that a utility owns or controls is not limited by location or by how the utility's ownership or control was granted. Thus, to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way within an MTE, the utility may not exercise its control in a manner inconsistent with Section 224 to impede competitive access. At the same time, we note that Section 224 applies only to utilities, and was not intended to override whatever authority or control an MTE owner might otherwise retain under the terms of its agreements and state law. We interpret the term "rights-of-way" in the context of buildings to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility's transportation and distribution network.[185] We also clarify that a utility's ability voluntarily to provide access to an area and obtain compensation for doing so is a prerequisite to utility ownership or control under Section 224. Finally, we address several issues relating to the implementation of Section 224, including a determination that states do not have to recertify their regulation of pole attachments rates in response to today's decision. Based on these conclusions, we grant the WinStar Petition for Reconsideration of the *Local Competition First Report and Order* to the extent discussed herein, and we otherwise deny that petition.

a. Scope of areas covered.

77. Initially, we note that access to on-premises conduits and similar rights-of-way is important to the development of telecommunications competition in MTEs. The record compiled in response to the *Competitive Networks NPRM* indicates that competitive LECs often need access to in-building ducts, conduits, and rights-of-way used by incumbent LECs and other utilities in order to expand their networks to serve the building.[186] To the extent that a new entrant is unable or does not desire to use the existing in-building wiring, it must obtain access to building conduit in order to install its own cables and wires. Moreover, even if a competitive LEC utilizes existing wiring for some of its in-building distribution, it may need access to conduits and rights-of-way in order to reach that wiring. For example, a provider

[181] *Competitive Networks NPRM*, 14 FCC Rcd at 12693-98, ¶¶ 39-48.

[182] *Id.* at 12687, ¶ 28.

[183] *Id*. at 12694, ¶ 40.

[184] *Id.* at 12695, ¶ 43.

[185] In the Further Notice of Proposed Rulemaking, we seek additional comment regarding the definition of rights-of-way in the context of MTEs. *See* Section V. D, *infra.*

[186] AT&T Comments at 10; Nextlink Comments at 3-4; Teligent Comments at 7-8; WinStar Comments at 7-9.

using wireless technology, in addition to needing a rooftop or similar location to place its antenna, must have access to conduit in order to connect its antenna to the building system.

78. To the extent that poles, ducts, conduits, and rights-of-way in MTEs are controlled by incumbent LECs, the incumbent LECs would have an incentive in the absence of regulation to deny access to their competitors. Section 251(c) of the Act requires incumbent LECs to grant other carriers access to their facilities under just, reasonable, and nondiscriminatory rates, terms, and conditions under many circumstances.[187] Nothing in Section 251(c), however, appears to address the situation where a building owner has granted a carrier access in order to serve customers in that building, but an incumbent LEC or other utility refuses to allow its competitor reasonable and nondiscriminatory access to conduits or similar pathways that the utility owns or controls. An incumbent LEC's power to deny competitors access to in-building conduits thus could impose a serious impediment to telecommunications choices for affected MTE residents. Our consideration of the effect of Section 224 within MTEs is intended to address this situation.

79. In the *Competitive Networks NPRM*, we tentatively concluded that the plain meaning of Section 224(f)(1) includes a right of access to ducts, conduits, and rights-of-way owned or controlled by a utility that are located in MTEs. In particular, we tentatively concluded that the definition of "right-of-way" as including a publicly or privately granted right to place telecommunications distribution facilities on public or private premises is consistent with the common usage of the term, and we sought comment on this analysis.[188] We also tentatively concluded more specifically that in-building conduit, such as riser conduit, used by a utility and owned or controlled by that utility falls within the scope of Section 224(f)(1) as either "conduit" or a "right-of-way."[189] Competitive LECs generally agree with these tentative conclusions.[190] They state that by not qualifying the terms "right-of-way" or "conduit" in the statute, Congress intended to give a broad scope to the terms such that they encompass rights of access to conduits on private property as well as public rights-of-way.[191] Incumbent LECs and premises owners generally disagree with our tentative conclusions and argue for a narrow interpretation of "right-of-way."192 For example, Bell Atlantic argues that Section 224 was intended to provide cable companies access to structures in public rights-of-way, rather than structures on private property, and therefore does not apply within buildings.[193] Cincinnati Bell contends that the legislative history of Section 224 suggests that the intended meaning of "conduit" is "underground reinforced passages."[194] Real Access Alliance argues that rights-of-way do not exist inside buildings, but rather that building access rights take the form of leases, licenses, and easements.[195]

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[187] *See* 47 U.S.C. §§ 251(c)(2) (interconnection), 251(c)(3) (unbundled access), and 251(c)(6) (collocation).

[188] *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 42.

[189] *Id.* at 12696, ¶ 44.

[190] AT&T Comments at 14; Teligent Comments at 27-28; WinStar Comments at 54.

[191] AT&T Comments at 15; Teligent Comments at 14; WinStar Comments at 45.

[192] *See, e.g.*, GTE Comments at 25; United States Telephone Association Comments at 10.

[193] Bell Atlantic Comments at 7.

[194] Cincinnati Bell Comments at 4.

[195] Real Access Alliance Comments at 49.

80. We conclude that the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility.[196] This interpretation is consistent with the plain meaning of Section 224(f)(1), which requires "non-discriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled"[197] by a utility, without qualification. Our interpretation of Section 224 is also consistent with industry practice, in which the terms duct and conduit are used to refer to a variety of enclosed tubes and pathways, regardless of whether they are located underground or aboveground. Indeed, as AT&T points out, the commonly used term "riser conduit" itself demonstrates that conduit is not generally understood to refer only to underground facilities.[198] Moreover, we recently amended Section 1.1402(i) of our Rules in another proceeding to clarify that "conduits" are not limited to underground facilities.[199]

81. In the *Competitive Networks NPRM*, we noted that the 1977 Pole Attachments Act Senate Report described duct or conduit systems as consisting of underground facilities.[200] We conclude that this legislative history does not circumscribe our authority to apply Section 224 to in-building ducts, conduits, or rights-of-way. The text of the statute, as well as the legislative history relating to its amendment in 1996, in no way limits the terms duct or conduit to underground facilities.[201] Moreover, even where there may be "contrary indications in the statute's legislative history," we are not required to

[196] AT&T Comments at 18; WinStar Comments at 60. The United States Court of Appeals for the Eleventh Circuit recently held that the Commission lacks authority under Section 224(f)(1) over pole attachments for wireless communications. *Gulf Power II*, 208 F.3d at 1263, *petition for reh'g denied*, 2000 WL 1335040 (11th Cir. Sept. 12, 2000). *Gulf Power II* disposed of consolidated petitions for review of the Commission's *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd 6777, implementing 47 U.S.C. § 224, as amended by the 1996 Act. We note that the court has stayed issuance of the mandate in *Gulf Power II* pending the ultimate disposition of any petition for certiorari. Moreover, although some language in *Gulf Power II* could be read to suggest that the scope of Section 224 turns on the identity of the carrier, and thus that even a wireline facility is not covered by Section 224 when used by a "wireless" carrier, we do not believe the decision must necessarily be read in this manner. To the contrary, it is possible that the decision is most reasonably construed to turn in whole or in part on the nature of the particular equipment for which attachments is sought, and thus not to exclude, for example, any telecommunications carrier's wireline facilities within MTEs from the scope of Section 224.

[197] 47 U.S.C. § 224(f)(1) (emphasis added).

[198] AT&T Comments at 19.

[199] *See Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6523, App. A (amending definition of "conduit" to refer to "a structure . . . usually placed in the ground," rather than "a pipe placed in the ground"); *see also* Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Case No. 96-440, *Order* (Ky. P.S.C. Dec. 23, 1996) (holding that incumbent LEC has duty under Section 251(b)(4) of the Act to afford access to rights-of-way in private office buildings).

[200] *See Competitive Networks NPRM*, 14 FCC Rcd at 12696, ¶ 44 & n.98 (citing 1977 Pole Attachments Act Senate Report at 26).

[201] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 91-92 (1995); H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 205-207 (1996).

"resort to legislative history to cloud a statutory text that is clear."[202] This is especially true where, as here, the statute is unambiguous on its face.

82. We also conclude that "rights-of-way" in buildings means, at a minimum, defined pathways that are being used or have been specifically identified for use as part of a utility's transmission and distribution network. The Real Access Alliance argues that there are no "rights-of-way" in buildings, but that utilities' building access rights take the form of leases, licenses, and easements.[203] We note, however, that the term "right-of-way" can have a variety of meanings, including, for example, the equivalent of an easement.[204] As commenters point out, the arrangements under which utilities have obtained and retain access to buildings, as well as the nomenclature used to describe those arrangements and the attendant rights and responsibilities, vary from building to building and from state to state.[205] We believe, consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, that a "right-of-way" should be read to include, at a minimum, any defined pathway in an MTE that a utility is actually using or has specifically identified for its future use, regardless of how its right of access is denominated by the parties or under state law. We do not believe that state concerns with definitions of property interests, including public rights-of-way, will be harmed or affected by the nomenclature we use here solely with reference to Section 224. We therefore conclude that the nature of a right of access, and not the nomenclature applied, governs for these purposes. Consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, we conclude that a right-of-way exists within the meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically designated for use by a utility as part of its transmission and distribution network and (2) the boundaries of that pathway are clearly defined, either by written specification or by an unambiguous physical demarcation.[206] In the Further Notice of Proposed Rulemaking, we request comment on other situations in which an in-building right-of-way may be established.[207]

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[202] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). *See also Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (when language of statute is unambiguous, review of legislative history is unnecessary).

[203] Real Access Alliance Comments at 49.

[204] *See, e.g., Great Northern Ry. Co. v. United States*, 315 U.S. 262, 276-79 (1942) (construing rights-of-way granted by the 1875 Right-of-way Act to constitute easements); *Joy v. City of Saint Louis*, 138 U.S. 1, 44 (1890) (*Joy*); *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520, 527 (Fed. Cir.) ("'Rights-of-way' are another term for easements"), *cert. denied*, 516 U.S. 812 (1995).

[205] Teligent Comments at 26-27; Real Access Alliance Reply Comments at 25-26.

[206] For example, 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.

[207] We note, however, that a utility must take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs. *See Local Competition Pole Attachments Reconsideration Order*, 14 FCC Rcd at 18067, ¶ 51.

83. We further conclude that a "right-of-way" under Section 224 includes property owned by a utility that the utility uses in the manner of a right-of-way as part of its transmission or distribution network. We tentatively concluded in the *Competitive Networks NPRM* that Section 224 does not encompass a general right of access to utility property.[208] No party has advanced any arguments against this proposition, and we therefore reaffirm our earlier conclusion on this record. Thus, for example, the roof of a utility's corporate office is not, in and of itself, subject to access under Section 224. We also tentatively concluded, however, that "Section 224 encompasses a utility's obligation to provide cable television systems and telecommunications service providers with access to property that it owns which it uses as part of its distribution network."[209] GTE argues that the traditional definition of right-of-way and the underlying purpose of Section 224 require that property owned by a utility in fee simple absolute can never be subject to Section 224.[210] We disagree, and find that our tentative conclusion is consistent with both the language and purpose of Section 224.[211] We believe our tentative conclusion is consistent with the use of the term "right-of-way" to denote not only the right to pass over the land of another, but also the land itself.[212] We also believe this definition is consistent with the inclusion in Section 224 of rights-of-way that a utility "owns" as well as "controls." We agree with AT&T that the test for determining when a utility is using its own property in a manner equivalent to a right-of-way should "be broad enough to encompass the wide range of activities that constitute use of property in a manner equivalent to a right-of-way."[213] Thus, where a utility uses its own property in connection with its transmission or distribution network in a manner that would trigger the obligations of Section 224 if it had obtained a right-of-way from a private landowner, we conclude that it should be considered to own or control a right-of-way within the meaning of Section 224.

84. The National League of Cities has expressed concern that application of Section 224 within buildings may preempt implementation or enforcement of state safety-related codes.[214] We emphasize

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[208] *Competitive Networks NPRM*, 14 FCC Rcd at 12694, ¶ 40; *see also Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185 (stating that Congressional intent in promulgating Section 224(f) "was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.").

[209] *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 43.

[210] GTE Comments at 25.

[211] *See* AT&T Comments at 17; WinStar Comments at 56.

[212] *See Joy v. City of Saint Louis*, 138 U.S. at 44; Black's Law Dictionary 1326 (6th ed. 1990). We note that, in interpreting Section 224(f), an arbitration panel of the Michigan Public Service Commission has held that land used for distribution facilities would be considered a "right-of-way" even if it were held by the utility in fee simple absolute. AT&T Communications of Michigan, Inc., Case No. U-11151, *Decision of Arbitration Panel* at 50-52 (Mich. P.S.C. Oct. 28, 1996); *see also* AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Inter-Connection Rates, Terms and Conditions and Related Arrangements with Ohio Bell Telephone Company d.b.a. Ameritech Ohio, Case No. 96-752-TP-ARB, *Arbitration Panel Report* at 52-53.

[213] AT&T Comments at 17.

[214] *See* Petition for Environmental Impact Statement filed by the National League of Cities, the National Association of Counties, the Michigan Municipal League, and the Texas Coalition of Cities for Utility Issues, at 21-24 (August 16, 2000) (National League of Cities, et al. Petition for EIS). We address petitioners' concern regarding the extension of the OTARD rules in paras. 121-123 *infra*. To the extent that the EIS petition expresses concern regarding issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, those issues will be addressed separately at another time. *See* note 2, *supra*.

that our actions taken today are not intended to preempt, or impede, in any way the implementation or enforcement of state safety-related codes. We also note that under Section 224(f)(2) utilities may impose conditions on access to transmission facilities, if necessary for reasons of safety or reliability.[215]

b. Ownership or control.

85. In order for a right of access to be triggered under Section 224, the property to which access is sought not only must be a utility pole, duct, conduit, or right-of-way, but it must be "owned or controlled" by the utility.[216] In this regard, we have previously held that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."[217] Specifically, "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."[218] In the *NPRM*, we asked whether we should federally define the circumstances under which utility ownership or control exists, or whether we should continue to defer to the rights created under state law.[219] Ameritech believes that the Commission should refrain from interpreting when utility ownership or control exists and continue to defer to state law.[220] The Real Access Alliance argues that the Commission must continue to defer to state law because any attempt to alter the property rights of either utilities or property owners would amount to an unconstitutional taking in violation of the Fifth Amendment.[221] AT&T argues that Commission guidance is necessary in determining the existence and scope of ownership or control in particular circumstances, such as where a utility has secured building access rights through a private agreement with a property owner.[222] WinStar argues that federal law should govern in this matter in order to ensure a national policy for access to rights-of-way.[223] WinStar states that it has suffered in states that have not taken action to promote building access, often because building owners with a national presence penalize carriers in states without building access laws for access gained in states that have such laws.[224]

86. In the *Local Competition First Report and Order*, we considered arguments that certain private consent agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.[225] Some commenters in that proceeding argued that under such circumstances, Section 224 does not provide

[215] 47 U.S.C. § 224(f)(2).

[216] 47 U.S.C. § 224(a)(4).

[217] *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

[218] *Id.*

[219] *Competitive Networks NPRM*, 14 FCC Rcd at 12696-97, ¶¶ 45-47.

[220] Ameritech Comments at 4.

[221] Real Access Alliance Comments at 55.

[222] AT&T Comments at 19-20.

[223] WinStar Comments at 62.

[224] *Id.*

[225] *Local Competition First Report and Order*, 11 FCC Rcd at 16081-82, ¶ 1178.

a right of access.[226] Other commenters argued that the statute does not draw distinctions between situations where a private consent agreement exists and situations where one does not exist, and thus provides access regardless of the terms of an agreement or state law.[227] We concluded that the scope of utility ownership or control is a matter of state law. Thus, obligations 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.

87. We conclude that our analysis in the *Local Competition First Report and Order* remains valid, and applies to ducts, conduits, and rights-of-way in buildings as well as to those in other locations. We therefore reject arguments that we should define utility access to a building as in itself establishing utility control over conduits or rights-of-way or establish presumptions in this regard. We emphasize that the right of access granted under Section 224 lies only against utilities, and that Section 224 is not intended to override whatever authority or control MTE owners may otherwise retain under state law.[228] We therefore conclude that, consistent with the purposes of Section 224, utility ownership or control of rights-of-way and 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. As the Real Access Alliance points out, the forms of access arrangements between utilities and building owners, and the resulting rights and responsibilities of each party, can vary greatly depending on the means by which access was originally achieved and on state law.[229] Thus, state law determines 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.

88. We note that existing utility rights-of-way in MTEs, whether created by force of law, by written agreement between the parties, or by tacit consent, generally originated in an era of monopoly utility service. Thus, 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. The parties that established the terms of these rights of access would rarely, if ever, have considered the effect their actions might have on hypothetical future competition. Section 224 addresses the ability of utilities to act anticompetitively with respect to telecommunications competitors as a result of these developments. Our concerns about anticompetitive exclusion by building owners are addressed elsewhere in this item.

89. This approach avoids any constitutional concerns that may arise under the Fifth Amendment. Because we interpret Section 224 to apply only against utilities, there is no taking from premises owners. The only taking under Section 224 is from utilities, who are deprived of the power to exclude others from conduits or rights-of-way to the extent of their ownership or control. This taking, however, is compensated under statute and our rules, and thus is fully consistent with constitutional requirements.[230]

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[226] *Id.*

[227] *Id.*

[228] We note, however, that nothing in Section 224 prevents a state from extending the principles of Section 224 under state law to entities other than those considered to be "utilities," as that term is defined in the federal statute. For example, Massachusetts recently promulgated building access regulations which include a premises owner within the definition of "utility." *Massachusetts Nondiscriminatory Access Order*.

[229] Real Access Alliance Comments at 53-55. We further note that the parties' respective rights and responsibilities may typically be different over rights-of-way located outside buildings than inside buildings. For example, rights-of-way over land are typically used to provide service to the general public, whereas rights-of-way in MTEs ordinarily are used only to provide service to tenants in the MTE.

[230] *See Gulf Power I*, 187 F.3d at 1324.

We note 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 the rates, terms or conditions of access are reasonable.

90. This approach also will not affect the operation of our rules governing the disposition of cable inside wiring. Section 76.804(a) of our rules sets forth the procedures for disposition of "home run wiring" owned by a multichannel video programming distributor (MVPD) in a multiple dwelling unit (MDU) when the MVPD "does not . . . have a legally enforceable right to remain on the premises against the wishes of the MDU owner."[231] As explained above, Section 224 grants a right of access only to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way. It does not grant a legally enforceable right to remain on the premises against the wishes of the MDU owner. Therefore, it does not interfere with the disposition of cable home run wiring under our rules.

c. Implementation issues.

91. Section 224 not only requires utilities to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but mandates that they do so at rates, terms and conditions that are just and reasonable.[232] Section 224 further specifies principles for determining whether a rate is just and reasonable in the context both of cable providers' and telecommunications carriers' attachments, all of which are based on the utility's costs in connection with the pole, duct, conduit, or right-of-way.[233] In order to implement these provisions, we have promulgated formulas to determine just and reasonable rates for access to poles, ducts, and conduits.[234] These formulas do not appear to be directly transferable to the inside the building context and the parties to this proceeding have not suggested how they might be adjusted for use here. Therefore, to the extent the existing formulas do not apply, we will determine reasonable and just compensation consistent with the statute and Fifth Amendment on a case-by-case basis.[235] We will consider initiating a rulemaking proceeding to establish rate formulas for in-building attachments in the future if it proves necessary or efficient to do so. We anticipate, however, that in most instances the existing rules will encourage the parties to agree to reasonable rates through negotiation.

92. Section 224 further provides that the Commission has no jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way for pole attachments in instances where a state has certified to the Commission that it regulates such matters.[236] Consistent with the statute, 19 states have made such certification to the Commission. In those states that do not regulate such matters, we will continue to apply the formula presumptions outlined in the *Telecommunications*

[231] 47 C.F.R. § 76.804(a).

[232] 47 U.S.C. § 224(b)(1).

[233] 47 U.S.C. § 224(d),(e).

[234] *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

[235] *Cf. Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6832, ¶ 121 (holding that the record did not permit us to establish detailed standards for the pricing of access to rights-of-way, and accordingly that we would consider allegations of unjust, unreasonable, or discriminatory rates on a case-by-case basis).

[236] 47 U.S.C. § 224(c).

Pole Attachments Pricing Report and Order and the *Cable Pole Attachments Pricing Report and Order.*[237]

93. Several commenters argue that we should require states to recertify that they are regulating pole attachments within buildings, and that we should look behind state certifications to ensure that they are in fact regulating consistent with Section 224.[238] Consistent with our past practice in similar circumstances, we decline to do so. Rather, we will continue to apply our existing regime of presumptions and burden of proof regarding certification. We emphasize, moreover, that federal regulation of access, rates, terms, or conditions for pole attachments is preempted only to the extent a state is actually regulating attachments. Should a state fail to resolve a complaint within specified time limits, the Commission's rules provide that we assume jurisdiction over the complaint.[239]

E. Areas Under Tenant Control

1. Background

94. Section 1.4000 of our rules prohibits, with limited exceptions, any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.[240] We adopted Section 1.4000 pursuant to Section 303 of the Communications Act as directed by Section 207 of the 1996 Act, which applies to the placement of over-the-air reception devices (OTARDs) in order to receive television broadcast signals, direct broadcast satellite services, and multichannel multipoint distribution services.[241] In May, 1999, the Wireless Communications Association International, Inc. (WCA) filed a Petition for Rulemaking asking us to extend the principles embodied in Section 1.4000 to the placement of antennas used for any fixed wireless service.[242] In the *Competitive Networks NPRM*, we requested comment on

[237] *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

[238] AT&T Comments at 21-22; Teligent Comments at 38; WinStar Comments at 65.

[239] *See* 47 C.F.R. § 1.1414(e). We note that if it is shown in a complaint proceeding that a state does not regulate access to ducts or conduits within buildings, for example, that state's regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission's jurisdiction over access to ducts or conduits within buildings. In such a case, we would decide the complaint regarding in-building attachments, while continuing to respect the state's authority over those pole attachments that it does regulate.

[240] 47 C.F.R. § 1.4000.

[241] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59*, and Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Further Notice of Proposed Rulemaking in CS Docket No. 96-83*, 11 FCC Rcd 19276 (1996) (*OTARD First Report and Order*). Section 207 of the 1996 Act states that "[w]ithin 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." 47 U.S.C. § 303 note (1996 Act, Section 207).

[242] Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas (continued….)

whether we should adopt rules similar to those adopted in the video context that would protect the ability to place similar antennas to transmit and receive telecommunications signals and other fixed wireless signals that are not covered by Section 207.[243]

95. As currently constituted, Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna receiving any video programming described in the Section. For the purposes of Section 1.4000, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: unreasonably delays or prevents installation, maintenance, or use; unreasonably increases the cost of installation, maintenance, or use; or precludes reception of an acceptable quality signal. Section 1.4000 also sets forth principles governing fees or costs that may be imposed for placement of covered antennas and enforcement of covered regulations. Restrictions that would otherwise be forbidden are permitted if they are necessary for certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the rule. Finally, Section 1.4000 includes provisions for waiver and declaratory ruling proceedings.

96. Many parties support an extension of the principles of the OTARD rules to include all fixed wireless devices.[244] For example, PCIA contends that extending the antenna exemption rule to include all fixed wireless devices is essential to the Commission meeting its obligation to promote the deployment of advanced telecommunications capability under Section 706(a) of the 1996 Act.[245] On the other hand, Real Access Alliance argues that, in extending the OTARD rules to leased property, the Commission has already exceeded its authority and violated the Fifth Amendment. Real Access Alliance contends that further extending the rules to include new services such as telecommunications services would compound the violation.[246] Real Access Alliance argues that the statutory language of Section 207 "refers explicitly to video programming, and to three types of antennas used primarily (and at the time of the enactment of the law, solely) to deliver video services."[247] Real Access Alliance concludes that the statutory language is very clear and cannot possibly be construed to permit the Commission to go any further than it already has, under any circumstances.[248]

(Continued from previous page)
Designed to Provide Fixed Wireless Service (filed May 26, 1999); *see also* Letter from Paul J. Sinderbrand, Counsel for Wireless Communications Association International, Inc., to Magalie Roman Salas, Secretary, FCC, dated September 7, 2000 (asserting that timely deployment of Sprint and WorldCom fixed wireless broadband services is being thwarted by homeowner associations' antenna restrictions).

[243] *Competitive Networks NPRM*, 14 FCC Rcd at 12710-12712, ¶ 69.

[244] *See* AT&T Comments at vi; Fixed Wireless Communications Coalition Comments at 14-15; PCIA Comments at 34-35; Teligent Comments at 46. *Cf.* Real Access Alliance Comments at vii.

[245] PCIA Comments at 34-35. *See* 47 U.S.C. § 157(a) note.

[246] Real Access Alliance Comments at vii.

[247] *Id.* at 72.

[248] *Id*. at 72-73.

2. Discussion

a. Extension of OTARD Rules

97. We conclude that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals, as well as multichannel video programming signals that are currently covered by the rules.[249] For the purpose of the OTARD rules, "fixed wireless signals" are any commercial non-broadcast[250] communications signals transmitted via wireless technology to and/or from a fixed customer location.[251] As discussed above, Congress intended in the 1996 Act to promote telecommunications competition and the deployment of advanced telecommunications capability.[252] Indeed, Congress included several provisions to limit restrictions on the deployment of facilities used for these purposes.[253] To the extent a restriction unreasonably limits a customer's ability to place antennas to receive telecommunications or other services, whether imposed by government, homeowner associations, building owners, or other third parties, that restriction impedes the development of advanced, competitive services. In the *OTARD First Report and Order*,[254] the Commission determined that restrictions on the placement of antennas one meter in diameter or smaller unreasonably limit a video programming customer while restrictions on larger C-band reception antennas might be reasonable. We find that the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided.

98. Moreover, distinguishing in the protection afforded based on the services provided through an antenna produces irrational results. Precisely the same antennas may be used for video services, telecommunications, and internet access. Indeed, sometimes a single company offers different packages of services using the same type of antennas. Under our current rules, a customer ordering a telecommunications/video package would enjoy protection that a customer ordering a telecommunications-only package from the same company using the same antenna would not. Thus, we conclude that the current rules potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer.

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[249] The text of Section 1.4000, as amended by this Order, appears in Appendix B.

[250] Although the definition of "fixed wireless signals" does not apply to broadcast signals, we note that television broadcast signals continue to be covered under our OTARD rules.

[251] This definition of "fixed wireless signals" does not include, among other things, AM radio, FM radio, amateur ("HAM") radio, Citizen's Band (CB) radio, and Digital Audio Radio Service (DARS) signals. We note that State and local regulation of the placement of antennas used for HAM radio is covered by Section 97.15(b) of the Commission's rules, 47 C.F.R. § 97.15(b).

[252] *See, e.g.*, 47 U.S.C. § 251 (each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers to promote the development of competitive markets); 47 U.S.C. § 157 nt (1996 Act, Section 706) (Commission shall encourage the deployment of high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology).

[253] *See, e.g.*, 47 U.S.C. § 253 (removal of barriers to entry); 47 U.S.C. § 332(c)(7) (local zoning authority shall not prohibit the provision of personal wireless service); 47 U.S.C. § 303 nt (1996 Act, Section 207) (Commission shall promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services).

[254] *OTARD First Report and Order*, 11 FCC Rcd at 19279, ¶ 5.

99. In extending the OTARD rules to encompass fixed wireless devices, we mean to include all customer-end antennas and supporting structures of the physical type currently covered by the rule, regardless of the nature of the services provided through the antenna (*i.e.*, voice, data, or video). Similarly, the amended rules apply both to satellite and terrestrial services. In addition, the rules apply to antennas that transmit and receive signals, only transmit signals, or only receive signals.[255] We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.[256]

100. We emphasize that the restrictions we adopt today are limited by the expressed limitations of Section 1.4000.[257] Thus, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest. Similarly, the extension of the rules applies only to antennas one meter or less in diameter or diagonal measurement, or larger antennas located in Alaska used to receive satellite service, and to masts used to support such antennas.[258] In addition, the exceptions permitting certain restrictions for safety and historic preservation purposes continue to apply.[259]

b. Legal Authority

101. One of the principal goals of the 1996 Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[260] As noted above, these objectives are effectively hindered by restricting OTARD protections to devices that receive

[255] Special provisions to protect the public from excessive exposure to radio frequency emissions are discussed at paras. 118-121, *infra.* We note that our existing rule already covers transmission devices that work in tandem with the receiving device and are necessary to select programming on a covered receiving antenna. Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 13 FCC Rcd 18962, 18988 at ¶ 59 (1998) (*OTARD Order on Reconsideration*).

[256] Regulations governing the placement of such antennas may, however, be affected by other provisions of the Communications Act or our rules. *See*, *e.g.*, 47 U.S.C. § 332(c)(7); 47 C.F.R. § 25.104.

[257] *See* text of Section 1.4000 in Appendix B.

[258] This revision to the OTARD rules does not change the Commission's conclusion in the previous OTARD proceedings that masts that extend more than 12 feet above the roof of the building or that are taller than the distance between the antenna and the lot line may require a safety permit. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶¶ 34-36. This recognition of a possible safety hazard due to the height of the mast may apply, as well, to the non-video antennas now covered by the OTARD rules. We reiterate that permit requirements for masts exceeding this height may be imposed to achieve legitimate safety objectives, not for aesthetic purposes. We do not condone an outright prohibition of such masts unless the safety concerns cannot be addressed adequately. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶ 36. Of course, masts should not be taller than necessary to receive an acceptable quality signal from the desired service.

[259] *See* 47 C.F.R. § 1.4000(b).

[260] Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (*1996 Act Preamble*).

video programming services. Federal courts have long established that the Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.[261] Thus, in light of our finding that the existing OTARD regulatory regime effectively hinders one of the principal goals of the 1996 Act, and because Commission action is reasonably ancillary to several explicit statutory provisions, we conclude that the Commission has the statutory authority to extend the OTARD protections to antennas used to transmit or receive fixed wireless signals. We also conclude that preemption of state and local regulation created by the extension of OTARD protections is justified in these circumstances. Finally, we find that Section 332(c)(7) of the Act, which addresses regulation of "personal wireless service facilities," does not apply to customer-end antennas.

102. Section 1 of the Act provides that the Commission was created "for the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges[.] . . . "[262] Section 1 also directs the Commission to "execute and enforce the provisions of [the] Act."[263] In promulgating the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals, the Commission is furthering the express objectives of Section 1 of the Act because, as noted above, we are facilitating efficient deployment of competitive communications services.

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[261] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (J. Scalia, writing for the majority, upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (S*outhwestern Cable*) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[262] 47 U.S.C. § 151.

[263] *Id*.

103. Moreover, we believe that Section 706 of the 1996 Act, which addresses advanced telecommunications incentives, also supports our extension of the OTARD principles. Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment."[264] We believe that the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals will foster the deployment of advanced telecommunications services.

104. Our action also is necessary to further the consumer protection purposes of Sections 201(b), 202(a), and 205(a) of the Act. These statutory provisions are intended to ensure that the rates, terms, and conditions for the provision of common carrier service are just, fair, and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service. [265] Further, Section 201(b) grants us express authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act."[266] To the extent devices used for multichannel video programming services are protected from unreasonable restrictions under the OTARD rules and the same devices when used only for fixed wireless services are not, consumers who want only fixed wireless service may inexorably be forced to pay unjust and unreasonable charges in connection with unwanted video programming. Thus, if we failed to extend the OTARD principles, we would effectively undermine the policies against unreasonable charges and discriminatory policies that are codified in Sections 201(b), 202(a), and 205(a).

105. Because our extension of the OTARD rules is necessary to realize these statutory goals, Sections 303(r) and 4(i) provide the basis for our exercise of ancillary jurisdiction. Section 303 prescribes the general powers of the Commission with respect to radio transmissions.[267] Specifically, it authorizes us to "[m]ake such rules . . . as may be necessary to carry out the provisions of this the Act."[268] Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[269] Federal courts have consistently recognized that these provisions give the Commission

[264] 47 U.S.C. § 157 note.

[265] *See* 47 U.S.C. § 201(b) ("all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . ."); 47 U.S.C. § 202(a) ("[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service. . . ."); 47 U.S.C. § 205(a) ("the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or charges[,] . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . . .").

[266] *See* 47 U.S.C. § 201(b).

[267] 47 U.S.C. § 303; *see also* 47 U.S.C. § 301 ("It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission[.]").

[268] 47 U.S.C. § 303(r).

[269] 47 U.S.C. § 154(i).

broad authority to take actions that are not specifically encompassed within any statutory provision but that are reasonably necessary to advance the purposes of the Act.[270]

106. Indeed, when Congress enacted Section 207, it recognized that Section 303 is a source of authority to promulgate regulations like the ones that we are adopting today. Section 207 directs the Commission to promulgate regulations prohibiting restrictions affecting devices used to receive the specified video programming services "pursuant to Section 303 of the Communications Act."[271] This statutory language reflects Congress' recognition that, pursuant to Section 303, the Commission has always possessed authority to promulgate rules addressing OTARDs. Section 207 *required* us to promulgate rules within 180 days after enactment, effectively removing our discretion on both the timing and the determination of the need for such regulation. Although Section 207 *directed* us to take action in the context of devices designed to receive the named services, nothing in Section 207 precludes us from exercising our power under Section 303 and other provisions to protect the placement of similar antennas that receive or transmit other signals. Indeed, to the extent our action today applies to state and local governments, we previously imposed similar limits on state and local regulation of the placement of antennas both before and subsequent to the 1996 Act.[272] We therefore conclude that the scope of the Section 207 directive to exercise our authority under Section 303 does not limit our independent exercise of the same authority under Section 303 and other provisions in a broader context and, in fact, affirmatively supports our use of Section 303 to extend the OTARD rules to fixed wireless devices.

107. As applied to restrictions imposed by state and local governments, our extension of the OTARD rules also falls well within the bounds of established preemption principles. The Commission may preempt state law when, among other reasons, it "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[273] Moreover, "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[274] In addition, to the extent our regulation affects both interstate and intrastate services, preemption may be upheld "where it [is] not possible to separate the interstate and the intrastate components" of the regulation.[275] As discussed above, state or local regulations that unreasonably restrict a customer's ability to place antennas used for the transmission or reception of fixed wireless signals impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability. Moreover, it is infeasible to use different antennas for

[270] *See* note 261 *supra* (citing federal court cases upholding Commission's exercise of ancillary jurisdiction).

[271] 47 U.S.C. § 303 note.

[272] *See* Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 Rad. Reg. 2d (P&F) 1073 (1986); Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983) (preempting "state and local regulation of SMATV systems . . . ha[s] the effect of interfering with, delaying, or terminating interstate and federally controlled communications services"), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809 (1996).

[273] *Louisiana Pub. Serv. Comm'n v.* FCC, 476 U.S. 355, 368-69 (1986) (*Louisiana PSC*) (citing *Hines v. Davidovitz*, 312 U.S. 52 (1941)).

[274] *Louisiana PSC*, 476 U.S. at 369 (citing *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).

[275] *Louisiana PSC*, 476 U.S. at 376 n.4.

interstate and foreign communications than for intrastate communications. Because fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use,[276] regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority. Our action is therefore fully consistent with the preemption principles set forth in *Louisiana PSC.*

108. Several local government organizations argue that an extension of the Commission's OTARD rules to restrict state and local government regulation of customer-end antennas used for transmitting or receiving telecommunications signals would violate Section 332(c)(7) of the Act.[277] Specifically, they argue that these antennas are "personal wireless service facilities" within the meaning of Section 332(c)(7), and that Section 332(c)(7) forbids the Commission from limiting state and local government regulation of such antennas except on the basis of RF emissions safety. In contrast, WCA argues that Section 332(c)(7) only applies to hub site antennas, and not to customer-end antennas.[278]

109. We believe that, in the context of Section 332(c)(7), the term "personal wireless service facilities" is best read not to include customer-end antennas. The Section defines "personal wireless service facilities" as facilities "for the provision of personal wireless services." Although the term taken by itself could be read to include customer-end facilities, a narrower reading which limits the term to a facility that "provides" the service, *i.e.*, the carrier hub site, is not only reasonable, but also, as discussed below, better reflects the statutory provisions and goals of the 1996 Act in general and those of Section 332(c)(7) in particular. Thus, we find that Section 332(c)(7) does not prevent the Commission from restricting state and local government regulation of these antennas. We note, though, that nothing in this decision affects the well-established rights of state and local governments under Section 332(c)(7) to regulate the placement, construction, and modification of carrier hub sites**.** [279]

110. Read in context with other provisions of the 1996 Act, Section 332(c)(7) is best construed to apply only to hub sites. In particular, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with the simultaneous enactment of Section 207. The amendment of Section 332(c)(7) to preserve local zoning authority over personal wireless service facilities was enacted at the same time that Congress circumscribed local zoning authority over customer-end antennas used for

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[276] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); *cf. Louisiana PSC*, 476 U.S. at 376 n.4 (1986) (acknowledging that where it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

[277] City and County of San Francisco Comments at 16; National Association of Counties, the National Association of Telecommunications Officers and Advisors, and Montgomery County, Maryland Joint Comments at 20; Reply Comments of Concerned Communities and Organizations at 20. LSGAC references the argument regarding Section 332(c)(7) in its Recommendation No. 19, issued November 1, 1999. Section 332(c)(7) states that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 C.F.R. § 332(c)(7). Section 332(c)(7) expressly permits the Commission to regulate State or local government decisions of the siting of personal wireless service facilities on the basis of RF emissions safety.

[278] WCA Further Reply Comments at 14.

[279] *See, e.g., Communications Company of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000).

video services. Given that precisely the same customer-end antennas may be used for telecommunications services as are used for video services, it is unlikely that Congress would preserve local zoning authority over the one at the same time it limited local zoning authority over the other.

111. In addition, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with Congress' use of the term "customer premises equipment" throughout the 1996 Act. In the 1996 Act, Congress defined "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[280] Congress thus did not include such equipment within the category of facilities used by carriers to provide telecommunications services. As a consequence, when Congress sought, in the 1996 Act, to cover CPE along with telecommunications equipment, it specified both CPE and telecommunications equipment.[281] Given Congress' express recognition in the 1996 Act of the Commission's longstanding deregulation of CPE and thus its fundamentally different character,[282] we find it particularly likely that Congress would have specifically referenced this equipment in Section 332(c)(7) if it had intended for this section to apply to that equipment.

112. Moreover, nothing in the legislative history indicates that Congress' preservation of local zoning authority was intended to extend to customer-end antennas. To the extent that the Conference Report gives examples of personal wireless service facilities, it references towers: "conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor's '50-foot tower' in a residential district."[283]

113. A narrower interpretation of "personal wireless service facilities" also best promotes the goals of the 1996 Act and Section 332(c)(7). One of the primary goals of the1996 Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid deployment of new telecommunications technologies."[284] In particular, among other things, Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry.[285] Section 332(c)(7) promotes this goal by imposing certain limitations on state and

[280] 47 U.S.C. § 153(14).

[281] *See, e.g.,* 47 U.S.C. § 255 ("A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable."); 47 U.S.C. § 273 ("A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under Section 271(d) . . . . [subject to requirements and exceptions].")

[282] See 47 U.S.C. § 549 (governing commercial consumer availability of equipment used to access services provided by multichannel video programming distributors). That section states: "Nothing in this section affects Section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premise equipment used in connection with basic common carrier communications services." 47 U.S.C. § 549(d)(2).

[283] S. Conf. Rep. No. 104-230, 104th Cong., 2d sess. at 91 (1996) (1996 Act Conference Report).

[284] *1996 Act Preamble*.

[285] *See Local Competition First Report and Order*, 11 FCC Rcd at 15505-06, ¶ 3. Thus, in Section 251 of the Communications Act, Congress imposed special duties on LECs and incumbent LECs to take actions, including making their facilities and services available to competitors on reasonable terms, that would promote competition. 47 U.S.C. § (continued….)

local regulation of personal wireless service facilities siting while preserving local zoning authority generally. In particular, Section 332 (c)(7) provides that the regulation of the siting of personal wireless service facilities by a state or local government "(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[286] Our action here is consistent with the spirit of this provision.

114. Fixed wireless technologies provide an alternative to the incumbent LECs' offering of basic and advanced services. In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at the fixed site. To a much greater degree than is the case with the carrier hub site, there is little flexibility to place the antenna at another location. Thus, the inability of a customer to place an antenna at the customer's fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer, whereas the inability of a carrier to place a hub site at a specific site will often not result in a denial of wireless service to customers in that area. Therefore, applying a blanket rule against most restrictions on the placement of these customer antennas is consistent with both the broad pro-competitive goals of the 1996 Act and the specific pro-competitive goals of the limitations on state and local regulation set forth in Section 332(c)(7). In particular, unreasonable restrictions on the placement of these antennas almost by definition both effectively prohibit the provision of personal wireless services and disadvantage providers of fixed wireless services as compared to their wireline competitors, thus unreasonably discriminating among providers of functionally equivalent services. Thus, the balance of the pro-competitive goals of the 1996 Act against the goal of preserving local authority is different for these antennas than for hub antennas, and it is reasonable to conclude, in light of the overriding Congressional intent to promote competition, that Congress did not contemplate including these antennas in Section 332(c)(7).

115. For similar reasons, we also think that reading Section 332(c)(7) to exclude customer-end antennas is more consistent with the judicial enforcement mechanism established for Section 332(c)(7) non-RF safety complaints regarding state or local government regulation. Requiring aggrieved parties (usually service providers) to seek a judicial remedy against an adverse local zoning decision involving a hub site was intended as an additional measure to preserve local authority. However, the burden on customers of having to litigate individual zoning decisions in court, as opposed to seeking an administrative remedy, would be substantially greater than the burden Section 332(c)(7) imposes on service providers. Thus, again, the balance among Congress' goals is different for customer-end antennas than for hub sites. For all these reasons, we conclude that customer-end antennas are not personal wireless service facilities within the meaning of Section 332(c)(7), and thus that Section 332(c)(7) does not preserve state and local authority over these antennas.

116. We also find that there is no constitutional impediment to our forbidding restrictions on the placement of antennas on property within the tenant user's exclusive use, where that user has an interest in the property.[287] In the *OTARD Second Report and Order*, we held that such rules as applied to

(Continued from previous page)
251. In Section 271, Congress required the former Bell operating companies to meet a competitive checklist, and to demonstrate either the existence of facilities-based competition in the local exchange market or the absence of a request for access and interconnection to provide local exchange service, before they are allowed to provide in-region interLATA service. 47 U.S.C. § 271.

[286] 47 C.F.R. § 332(c)(7)(B)(i).

[287] *Cf.* Real Access Alliance Comments at vii. (arguing that the Commission has already exceeded its authority and violated the Fifth Amendment by extending the OTARD rules to include leased property and will further compound the error by extending the rules to include new services).

antennas used for the purposes specified in Section 207 did not effect a taking of the premises owner's property within the meaning of the Fifth Amendment because by leasing his or her property to a tenant, the property owner voluntarily and temporarily relinquishes the rights to possess and use the property and retains the right to dispose of the property. [288] Thus, none of the owner's property rights are effectively impacted by a permanent physical occupation of his property, because the landlord voluntarily relinquishes two of those rights (possessing and using) and is free to retain the third right (disposing of the property) when entering into a lease. Therefore, we did and do not believe that it constituted a *per se* taking to prohibit lease restrictions that would impair a tenant's ability to install, maintain, or use a Section 207 reception device within the leasehold. Indeed, we found that prohibiting restrictions on the installation of a satellite dish or other Section 207 device was indistinguishable in a constitutional sense from prohibiting restrictions on the installation of "rabbit ears" – a Section 207 reception device – on the top of a television set. [289] For similar reasons, we conclude that there is no taking here.

c. Other Issues

117. We recognize that today's revision of the OTARD rules will extend the benefits of that rules to fixed wireless devices that have the capability to transmit as well as receive signals. We emphasize that all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable Commission guidelines regarding radiofrequency exposure limits.[290] We also reiterate that the OTARD rules provide an exception for "a clearly defined, legitimate safety objective" provided the objective is articulated in the restriction or readily available to antenna users and is applied in a non-discriminatory manner and is no more burdensome than necessary to achieve the articulated objectives.[291] We believe it is incumbent upon fixed wireless licensees, including satellite providers, to exercise reasonable care to protect users and the public from radiofrequency exposure in excess of the Commission's limits. Generally, we expect subscriber antennas to be installed so that neither subscribers nor other persons are easily able to venture into and interrupt the transmit beams. Such interruptions can degrade the quality of service to the subscriber and ultimately reduce the value of the carrier's service. Thus, providers have economic incentives to avoid temporary interruptions of signal quality that are likely to motivate them to install antennas in locations where such interruptions are less likely to occur.

118. In addition, as a condition of invoking protection under the OTARD rules from government, landlord, and association restrictions, a licensee must ensure that subscriber antennas are labeled to give notice of potential radiofrequency safety hazards of these antennas. We have previously adopted labeling requirements for LMDS, MDS, ITFS, and 24 GHz service antennas, which are types of transceivers that can be placed at a subscriber's premises.[292] Labeling information should include

[288] *See* Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, *Second Report and Order in CS Docket No. 96-83*, 13 FCC Rcd 23874, 23883-85, ¶¶19-20 (1998) (*OTARD Second Report and Order*). We note that this holding is being appealed in the U.S. Court of Appeals in the D.C. Circuit.

[289] *Id*.

[290] *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Report and Order*, 11 FCC Rcd 15123, 15124, 15152 (1996); 47 C.F.R. §§ 1.1307(b)(1), 1.1310.

[291] 47 C.F.R. §1.4000(b).

[292] *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local (continued….)

minimum separation distances required between users and radiating antennas to meet the Commission's radiofrequency exposure guidelines. Labels should also include reference to the Commission's applicable radiofrequency exposure guidelines. In addition, the instruction manuals and other information accompanying subscriber transceivers should include a full explanation of the labels, as well as a reference to the applicable Commission radiofrequency exposure guidelines. While we will require licensees to attach labels and provide users with notice of potentially harmful exposure to radiofrequency electromagnetic fields, we will not mandate the specific language to be used. However, we will require use of the ANSI-specified warning symbol for radiofrequency exposure.[293]

119. Moreover, it is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time.[294] To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition[295] of such requirements under the OTARD rules will not apply.[296]

120. We also note that the Commission plans to initiate a rulemaking proceeding to review and, where necessary, harmonize the Commission's regulations concerning transceiver equipment approval for radiofrequency exposure.

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Multipoint Distribution Service and for Fixed Satellite Service, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking* , 12 FCC Rcd 12545, 12670, ¶ 295 (1997) (*LMDS Order*); Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19129, ¶ 37 (1998) (*MDS/ITFS Order*); Amendment to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, FCC 00-272 (rel. August 1, 2000); 47 C.F.R. § 1.1307(b)(1).

[293] *See Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, FCC Office of Engineering and Technology (OET), OET Bulletin 65, August, 1997, at 53 (available at http://www.fcc.gov/oet/info/documents/bulletins/#65).

[294] *See, e.g., LMDS Order*, 12 FCC Rcd at 12670. We note that professional installation is in fact required for certain antennas used for MDS and ITFS under the Commission's rules. *See* 47 C.F.R. §§ 21.909(n), 74.939(p).

[295] *See, e.g., Declaratory Ruling In re MacDonald***,** 13 FCC Rcd 4844, 4853, ¶ 28 (CSB, 1997) (prohibiting a local government regulation requiring OTARD users to hire an installer).

[296] In the LMDS and MMDS proceedings, we also strongly encouraged the use of safety interlock features on the subscriber units that would prevent a transceiver from continuing to transmit when blocked, to the extent that such features could be made available at a reasonable cost. *See LMDS Order*, 12 FCC Rcd at 12670, ¶ 296; *MDS/ITFS Order*, 13 FCC Rcd at 19129, ¶ 38; *see also* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12779, ¶ 29 (1999) (rules amended to provide for a positive "interlock" feature that prevents inadvertent activation of a newly installed response transmitter when the response antenna is not properly installed so as to receive signals from the associated main or booster transmitters). We do not preclude the possibility that requirements of such interlock features by State or local governments, home owner associations, building owners, or other third parties could under appropriate circumstances be justified under the safety exception in Section 1.4000(b) if the requirement promotes a clearly defined, legitimate safety objective and is no more burdensome than necessary. In addition, we do not preclude the possibility that the Commission could in the future require safety devices for some customer-end transmitters, such as those that transmit above some threshold level of radiated power.

121. Finally, we decline to prepare an environmental impact statement on the extension of the Commission's OTARD rules to customer-end antennas used for the transmission or reception of fixed wireless signals, as requested in a recently-filed petition by several municipal organizations.[297] With respect to the asbestos and other safety concerns raised by the petitioners,[298] we find that the exceptions in the OTARD rules for safety, which continue to apply to the revisions here, adequately address those concerns. [299] Specifically, Section 1.4000(b)(1) provides that any restriction otherwise prohibited by the OTARD rules is permitted if necessary to accomplish a clearly defined, legitimate safety objective and is no more burdensome than necessary to achieve that objective.[300]

122. With respect to the concerns regarding the effect of the extension of our OTARD rules on several species of birds that nest on rooftops and ledges,[301] we believe that the effect will be minimal because, as discussed above, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest.[302] Generally, antenna users do not have the requisite exclusive use or control over rooftops or ledges of the type or location described, such as in high-rise MDUs or MTEs. Moreover, to the extent that special cases do arise, they can be addressed under the waiver and declaratory ruling provisions of the rules.[303]

123. Regarding aesthetics concerns raised by petitioners,[304] we conclude that the environmental effects of the end-user facilities subject to the extension of the OTARD rules would be

[297] *See* National League of Cities, et al. Petition for EIS. We address petitioners' concern regarding issues related to Section 224 in para. 85 *supra*. To the extent that the EIS petition expresses concern regarding issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, those issues will be addressed separately at another time. *See* note 2 *supra*.

[298] *See* National League of Cities, et al. Petition for EIS at 16-24.

[299] *See* 47 C.F.R. § 1.4000(b)(1); para. 100, *supra*.

[300] See 47 C.F.R. § 1.4000(b)(1). We reject the petitioners' assertion that the Cable Services Bureau's *Star Lambert* decision "effectively read that exemption out of the rule (by prohibiting the enforcement of safety related codes and regulations against satellite dish providers." EIS Petition at v-vi. *See* Star Lambert and Satellite Broadcasting and Communications Association of America, *Memorandum Opinion and Order*, 12 FCC Rcd 10455 (CSB 1997) (*Star Lambert*). In that decision, the Bureau determined that the City of Meade, Kansas had not satisfied the safety exception to the OTARD rules because it had not sufficiently identified the type of safety concern it intended to address. *Star Lambert Order*, 12 FCC Rcd at 10469, ¶ 36 (noting that the Meade, Kansas zoning requirement made no more than passing reference to unspecified and general safety concerns). Moreover, the Bureau stated its concern that the general statement of safety interests in the Meade ordinance at issue was so broad and ill-defined that it constituted little more than a pro forma recitation. Thus, the *Star Lambert* decision did not prohibit the enforcement of all State and local safety codes as applied to antennas subject to the OTARD rules, but rather prohibited enforcement of such codes that do not accomplish a clearly defined, legitimate safety objective. Significantly, in the Commission's *OTARD Order on Reconsideration*, which was issued subsequent to the Meade decision, the Commission declined requests to cut back on the safety exception and reiterated the validity of recognizing legitimate safety concerns. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18968-71, ¶¶ 8-15.

[301] *See* National League of Cities, et al. Petition for EIS at 31-38.

[302] *See* para. 100, *supra*.

[303] *See* 47 C.F.R. §§ 1.4000(c), 1.4000(d).

[304] *See* National League of Cities, et al. Petition for EIS at 24-25.

minimal and not significant due to the limited size and location on the end user's premises, as discussed above.[305] We note that the OTARD rules provide, in addition to the safety exception, an exception for historic preservation.[306] As noted above, the OTARD rules also provide for governmental and non-governmental entities to seek a waiver of the application of OTARD to "address local concerns of a highly specialized or unusual nature."[307] Genuine concerns about environmental risks, if not already within the scope of the safety or historic preservation exceptions, may well be appropriate for consideration under this waiver provision.

124. In conclusion, we find that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals. We recognize that the extension of the OTARD rules may not give every potential customer of fixed wireless service an effective right to place a covered antenna. In particular, the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops. However, although our rules generally would not apply to rooftop space in MDUs or MTEs, which typically is not exclusively used or controlled by tenants, the extension of our rules may give building owners stronger incentives to negotiate with competitive LECs to provide them with rooftop access on behalf of the tenants served by the competitive LECs. Under our rules, the tenant would have the right to place an antenna on sections of the MTE under the tenant's exclusive use or control, such as on the tenant's balcony. In some cases, as an alternative to balcony antennas, the building owner may consent to the placement of rooftop antennas.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Non-discriminatory Access Requirement

125. In addition to requesting comment on potential actions to promote competitive access to areas and facilities controlled by incumbent LECs, other utilities, and tenants, as well as on exclusive contracts, the Commission in the *Competitive Networks NPRM* sought comment on whether it should require building owners "who allow access to their premises to any provider of telecommunications services [to] make comparable access available to all such providers under nondiscriminatory rates, terms and conditions."[308] We stated our concern that premises owners may be unreasonably discriminating among competing telecommunications service providers and that such discrimination may be an obstacle to competition and consumer choice. The Commission also sought comment on whether it had the statutory authority to promulgate such a requirement, how such a requirement should be structured, whether such a requirement could be structured so that it would comply with the 5th Amendment Takings Clause of the U.S. Constitution, and whether there were practical issues associated with implementing a nondiscriminatory access requirement.[309] We received substantial comment on these issues.

126. We expect the specific actions that we take in today's Report and Order will reduce the likelihood that incumbent LECs can obstruct their competitors' access to MTEs, as well as address

[305] *See* para. 100, *supra*.

[306] *See* 47 C.F.R.§ 1.4000(b)(2).

[307] 47 C.F.R. § 1.4000(c).

[308] *Competitive Networks NPRM*, 14 FCC Rcd at 12701, ¶ 53.

[309] *Id.* at 12701-07, ¶¶ 53-63.

particular anticompetitive actions by premises owners and other third parties. We remain concerned, however, that, based on the record, the ability of premises owners to unilaterally and unreasonably discriminate among competing telecommunications service providers remains an obstacle to competition and consumer choice. We are encouraged by the real estate industry's recent initiative to develop and promote model contracts and best practices for providing building access. In particular, the industry's efforts have focused on the following issues: (1) adopting a firm policy not to enter into any exclusive contracts for building access in the future; (2) committing to procedures and appropriate timeframes for processing tenant requests for a particular telecommunications provider where appropriate space is available and the provider intends to execute an access agreement that is substantially in the form of a model contract to be developed by the industry; (3) incorporating these processing guidelines in new leases and notices to existing leaseholders; (4) committing to a clearer and more predictable process for responding to requests from carriers to access the MTE to serve customers, where the carrier agrees that its access to the MTE is conditioned on providing service to tenants by a date certain;[310] (5) facilitating the establishment of an independent clearinghouse to which interested parties could submit allegations of behavior that is inconsistent with either the model contracts or "best practices" developed as part of this initiative; and (6) supporting a periodic, quantitative study of the market for building access, to be conducted under the auspices of the Commission.[311] We believe that it is prudent to permit additional time for this initiative to develop, in the hope that the industry can address MTE access issues without further regulatory intervention. We will closely monitor these industry efforts, as well as the development of competition in the market for the provision of telecommunications services in MTEs. We stress that if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to discriminate among competing telecommunications service providers, and such concerns are not resolved by other market forces, we will consider adopting a nondiscriminatory access requirement.

127. To that end, we now seek comment on several additional issues related to the imposition of a nondiscriminatory access requirement. First, because it is essential to have up-to-date market information when evaluating the necessity of such a requirement, we seek to refresh the record on the status of the market for the provision of telecommunications services in MTEs. Second, we note that our specific requests for comments in the *Competitive Networks NPRM* focused primarily on placing a nondiscriminatory access requirement directly on building owners. In some recent filings,[312] a number of

[310] *Id.*

[311] *See* September 6 Real Access Alliance Letter.

[312] *See* Addendum to ALTS Comments at 43-48 (discussing possible ways in which "[t]he Commission can secure tenant access to telecommunications options without imposing requirements directly upon MTE owners and managers"); Letter from Jonathan Askin, Counsel for ALTS, to Magalie Roman Salas, Secretary, FCC, dated April 12, 2000 (noting that "[t]hat the Commission can accomplish MTE access indirectly through its authority to regulate providers of interstate communications. Specifically, it should prohibit carriers from serving MTEs owners or operated by owners or managers that discriminate among telecommunications carriers or otherwise unreasonably restrict access by telecommunications carriers to the tenants in those MTEs. Alternatively, the Commission could prohibit carriers from entering into contracts with MTE owners or managers that provide or allow for discriminatory or unreasonable treatment of other carriers."); Letter from Gunnar Halley, Counsel for Teligent, to Magalie Roman Salas, Secretary, FCC, dated April 28, 2000 (noting that the Commission "may impose suitable obligations upon [carriers] that have the effect of influencing multi-tenant environment owner behavior" and citing *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945) (*Ambassador*)); Letter from Philip L. Verveer, Counsel for WinStar Communications, Inc., to Commissioner Powell, dated June 22, 2000, filed in WTB 99-217 (noting that "[t]he Commission may exercise its jurisdiction over carriers' practices in order to ensure access to buildings on nondiscriminatory and reasonable terms").

competitive carriers advocate the legal argument that, were we to impose a nondiscriminatory access requirement, we could instead place the obligations attendant with such a requirement on local telecommunications providers. We believe that a strong case can be made that the Commission has authority under this theory to impose a requirement on such carriers falling under the jurisdiction of the Commission. We seek comment on this argument as well as on whether it would be prudent to exercise that authority. That decision would be informed by the results of the updated market and technological information we are seeking, and must also take into account possible constitutional and implementation issues. Thus, we seek comment on those sets of issues as well.

1. Update on the State of the Market

128. Although, as noted above, there has been some significant progress toward competition in the market for local telecommunications services,[313] we remain concerned by the possibility that the regulatory changes that we are adopting in this order may ultimately prove insufficient to ensure that this progress continues at an adequate pace. Consequently, at some point in the future, it may still prove necessary to consider imposing a nondiscriminatory access requirement following the FNPRM proceeding. In that light, we encourage interested parties to comment on developments affecting competitive provision of telecommunications services in MTEs so that we can continue to evaluate and monitor the need for such a requirement in light of conditions in the marketplace. In addition, we seek to monitor closely the progress of the real estate industry's initiative to develop and promote both model contracts and "best practices" for acquiring building access, as discussed in paragraph 2, *supra*. We urge the real estate industry to provide additional information on the status and scope of this initiative as it is developed and implemented. We also seek comment from other interested parties, including tenants[314] and competitive LECs, on the progress that has been made through this initiative.

129. In particular, we seek data regarding the state of the market including, but not limited to, the following: (1) the number of MTEs to which competitive LECs have requested access, along with information regarding the characteristics of those MTEs (*e.g.*, number of units; types of use, including commercial, residential, and mixed use MTEs; urban vs. suburban); (2) the number of MTEs to which multiple carriers have obtained access, and the characteristics of those MTEs; (3) the number of local telecommunications service providers that have obtained access to these MTEs and the technologies that they employ (*e.g.*, wireless vs. wireline); (4) among competing carriers that have obtained access to MTEs, the percentage of these MTEs in which they are actually providing services; (5) the average length of time from an initial request for MTE access until the successful conclusion of contract negotiations, along with information regarding how often, by how much, and for what reasons this varies; (6) the number of MTEs in which a request for competitive access has been denied either by an MTE owner or manager or by a LEC, the average length of time from an initial access request until a denial, and the asserted bases for these denials; (7) the average length of time from the initial access request that

[313] *See* paras. 14 -24, *supra*.

[314] We note that we recently received two *ex parte* submissions from groups representing the interests of consumers. In its submission, AARP asserts that "[t]enants, not landlords and building owners, should have the opportunity to choose among carriers for their telecommunications services." Letter from Martin Corry, Director, Federal Affairs, AARP, to William E. Kennard, Chairman, FCC, dated September 20, 2000. Similarly, the Consumers Union asserts that "occupants of MTEs should have the right to select from a variety of carriers. . . . . [J]ust compensation does not require that property owners be allowed to block the expansion of local phone competition." Letter from Gene Kimmelman, Co-Director, Washington Office, Consumers Union, to William E. Kennard, Chairman, FCC, dated September 19, 2000.

currently pending access requests have been outstanding; (8) any differences in the length of negotiations, the nature of the negotiations, or the frequency of denials based on whether a competitive LEC is seeking access in response to a service request from a specific tenant; (9) the charges imposed for different types of access to MTEs and the basis on which such charges are determined; (10) state laws or regulations requiring or encouraging nondiscriminatory access, and the nature of those laws or regulations; (11) the experiences of carriers, building owners, and end users in states that have promulgated nondiscriminatory access requirements, including the numbers and types of complaint and enforcement actions that have been filed; and (12) technological developments, such as free-space optical technology,[315] that may obviate or reduce the need for carriers to obtain direct access to intrabuilding facilities.

130. We believe that any future assessment of the market would be best guided by information that measures the current state of the market and the market after a reasonable period of time has passed after the implementation of the Report and Order and the best practices proposed by the real estate industry. We authorize the Wireless Telecommunications Bureau to issue a public notice requesting information be submitted eight months from the release of the FNPRM. This period should provide the Commission with the opportunity for updating the record with relevant market information that will better enable us to gauge overall competitive market trends.

2. Legal Issues

131. As discussed above, based on competitive developments in the market for the provision of telecommunications services in MTEs, and in response to the measures we adopt today, we may consider adopting a nondiscriminatory access requirement in the future. To that end, we will examine and seek further comment on issues relating to our legal authority.

a. Statutory Authority

132. Based upon our review of the relevant authority, we believe that there is a strong case that the Commission has the statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE. This section sets forth the relevant legal framework for this theory.

133. As a preliminary matter, we observe that regulating LECs in this manner could encourage competition in the exchange access market, a market in which LECs provide customers with a segment of interstate telephone service.[316] We note that, to the extent a local carrier provides exchange access to originate or terminate interstate telecommunications, the services and the facilities used for that purpose fall within the Commission's jurisdiction under its mandate for regulating interstate communications.[317]

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[315] For example, TeraBeam Internet, a jointly-owned venture of Lucent and TeraBeam Networks, is developing a fiberglass network technology that can send data through the windows of office buildings using optical beams. *See* Communications Daily, April 13, 2000.

[316] The Communications Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

[317] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); *cf. Louisiana PSC*, 476 U.S. at 376 n.4 (acknowledging that where it (continued….)

134. It is well established that the Commission has broad authority to regulate the practices of LECs in connection with their provision of interstate communications services. In addition to the general authority specified in Title I of the Communications Act,[318] Title II provides a specific, substantive framework for the Commission's regulation of such practices. Thus, Section 201(b) mandates that "[a]ll charges, practices, classifications, and regulations for and in connection with such [interstate or foreign] communication [by wire or radio] service, shall be just and reasonable," and then the section gives the Commission the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act."[319] Similarly, Section 202(a) declares that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a). Finally, Section 205(a) authorizes the Commission "to determine and prescribe . . . what . . . practice is or will be just, fair, and reasonable" where it is of the opinion that a common carrier practice "is or will be in violation of any of the provisions of this Act."[320]

135. When a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage, this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of its market – may not qualify as either just or reasonable.[321] We note that, in a

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is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

[318] Under Section 1, the Commission is charged with "execut[ing] and enforc[ing] the provisions of th[e Communications] Act," 47 U.S.C. § 151, the provisions of which "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States." 47 U.S.C. § 152(a). Section 2(a) makes it clear that the Act applies to the LECs: "The provisions of this act shall apply to . . . all persons engaged within the United States in such communication or such transmission of energy by radio." 47 U.S.C. § 152(a). Moreover, Section 4(i) provides the Commission with general authority to promulgate regulations that are necessary to perform its functions: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Commission's mandate under Title I has justified regulation of common carrier activities that are not specifically addressed in Title II. *See, e.g., Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[319] 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 303(r) (stating that the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act").

[320] 47 U.S.C. § 205(a).

[321] *Cf. Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945). In the *Ambassador* case, the Supreme Court held that the Commission's supervisory power was not limited to rates and services, but also, under Section 201(b), extended to practices in connection with such service. *Id*. at 323. The practices at issue involved the terms of telephone company tariff filings, which regulated the relationship that the telephone subscribers had with their third party (continued….)

separate context, the Commission's International Settlements Policy (ISP) mandates that, pursuant to Section 201, all charges and practices of U.S. international carriers be just and reasonable, including a requirement that U.S. carriers receive non-discriminatory treatment from dominant foreign carriers.[322] The Commission has observed that the exchange access market is one of the "last monopoly bottleneck strongholds in telecommunications," and that opening it up to competition will "bring new packages of services, lower prices and increased innovation to American consumers."[323] Without reasonable access to end users for new entrants, the benefits of competition (*e.g.*, more advanced services, reasonable prices, better service to consumers, greater range of choices of service) will not develop fully, thus undermining the express Congressional goal of creating for all Americans an efficient communication system that provides good service at reasonable prices.[324] Under these circumstances, we believe that there is a strong case that the Commission has the requisite authority, under Section 205(a) of the Act, to promulgate a regulation that bars the practice that contributes to this result.[325] We seek comment on the Commission's potential application of Section 205(a), as well as the other relevant provisions of Title II, to prohibit the LEC practices described above that could result in competitive market distortions. Of course, in making the ultimate determination whether to adopt such a policy in this context, the Commission must consider relevant constitutional and marketplace issues, as discussed elsewhere in this item.

136. We recognize that the regulation under discussion here would have an indirect effect on the behavior of the owners of MTEs. While we have asked questions in this proceeding about our statutory authority to regulate MTE owners directly,[326] it does not appear that the same issues would arise from a direct carrier regulation that has indirect effects on the MTE owners. We note that significant

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customers. Specifically, the tariffs stated that provision of telephone service was conditioned on the private branch exchange ("PBX") subscribers (*i.e.*, hotel, apartment house and club owners) not charging their guests any fee in addition to the telephone company's message toll charges for use of the service. The Supreme Court recognized the Commission's authority to review whether the telephone companies' requirements (filed with and reviewable by the Commission pursuant to Section 203) directly affecting the relationship between their subscribers and third parties were "just and reasonable" practices under Section 201(b), and whether use of the tariffs "perpetrate[d] an unjust or unreasonable discrimination or preference" under Section 202. *Id*. The Court stated that these Sections "clearly authorize the [telephone] companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers." *Id*.

[322] The ISP requires: (1) that U.S. carriers receive the same accounting rate from dominant foreign carriers; (2) that the accounting rate be divided evenly between a U.S. carrier and a dominant foreign carrier; and (3) that U.S. carriers receive a proportionate share of return traffic from dominant foreign carriers. 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, *Report and Order and Order on Reconsideration*, IB Docket No. 98-148, 14 FCC Rcd 7963 (1999).

[323] *Local Competition First Report and Order*, 11 FCC Rcd at 15506.

[324] *See* 47 U.S.C. § 151 (stating that purpose of Commission regulation under Act is "to make available to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

[325] 47 U.S.C. § 205(a); *see also Western Union Telegraph Company v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) (rejecting argument that Section 205(a) requires formal evidentiary hearing, stating that "[i]t is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than in an adjudicatory ratemaking proceeding").

[326] *See Competitive Networks NPRM*, 14 FCC Rcd at 12703-04, ¶¶ 57-58.

precedent might support the Commission's authority to proceed in this manner, and we seek comment on the potential application of this precedent.

137. Most recently, the Commission addressed the effects of certain foreign telecommunications carrier practices, which were causing competitive distortions in the marketplace and thus adversely affecting the prices for communications services ultimately paid by U.S. citizens. The Commission, in its *International Settlement Rates Order*,[327] placed certain requirements on U.S. carriers that had an indirect impact on the rates charged by foreign carriers. Specifically, the Commission established benchmark settlement rates that the domestic carriers were allowed to pay foreign carriers for termination of international traffic originating in the United States, and prohibited U.S. carriers from entering into any agreements with foreign carriers if the fees charged by the foreign carriers exceeded a benchmark level.

138. In affirming the Commission, the U.S. Court of Appeals for the District of Columbia Circuit rejected claims that the Commission had exceeded its authority because its action affected the foreign carriers:

> 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.

Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (citations omitted).

139. This approach is also consistent with earlier precedent, such as *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997) (upholding requirement that Mexican affiliate of U.S. broadcast network air issue-responsive programming in order for U.S. network to qualify for Section 325 permit to transmit signals to foreign station for rebroadcast into the United States), and Network Television Broadcasting, *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970) (creating indirect limits on television broadcast network control by regulating the licensed network affiliates), *affd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F. 2d 470 (2d Cir. 1971).

140. Moreover, in *Ambassador*, discussed at note 316 *supra*, the Supreme Court upheld the Commission's exercise of jurisdiction over surcharges imposed by hotels, apartment houses and clubs on end user guests and tenants for interstate and foreign telephone calls. The owners of these multiple tenant environments would typically use a private branch exchange (PBX) system, installed and owned by the telephone company, to route incoming and outgoing calls for guests, and to connect guests to points within the hotel or apartment. Although the hotel owners provided their guests with various services in connection with this system (*e.g.*, secretarial services such as message taking, message routing, message screening) and paid the telephone company monthly charges for the use of the system, the surcharges at issue in this case were calculated on a per call basis, varying in accordance with the toll charge made by the telephone company for the communications service.

141. The Commission had concluded that the hotel owners were serving as agents for the telephone companies and that these surcharges must therefore be reflected in tariffs filed by the telephone companies.[328] The telephone companies then filed tariffs stating that service to the hotels and

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

[328] *See* Special Telephone Charges of Hotels, *Report of the Commission,* Docket No. 6255, 10 FCC 252, 264 (1943).

apartment houses was conditioned on those entities not imposing any such surcharges. The hotel and apartment house interests appealed, and the district court sustained the validity of the tariff without relying on the view that the hotels/apartment houses were agents of the telephone companies. (The court termed them subscribers.) The case was appealed directly to the Supreme Court, which affirmed. The Court held that the Commission's authority permits it to oversee the conditions placed by telephone companies on their subscribers, stating:

> The Communications Act of 1934 recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities. The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is "charges, practices, classifications, and regulations for and in connection with such communication service." 48 Stat. 1070 U.S.C. § 201(b), 47 U.S.C.A. § 201(b). It is in all of these matters that the Act requires the filed tariffs to be "just and reasonable" and declares that otherwise they are unlawful. By none of these devices may the companies perpetrate an unjust or unreasonable discrimination or preference. All of these must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of its business by the company. These provisions clearly authorize the companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers.

Ambassador, 325 U.S. at 323 (footnotes omitted).

142. According to the Court, the main limitation on the use of regulation to affect the behavior of hotel owners is that the "telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business." *Id*. The mere fact, however, that a regulation affects the hotel's dealings with third parties does not invalidate the regulation:

> 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 regulation will necessarily affect, to that extent, its third party relationships. Such a regulation is not invalid per se merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.

Id. at 323-24.[329]

143. Similarly, the purpose behind the regulation under discussion here bears directly on communications services and is focused on the state of the communications market;[330] the Commission would be prohibiting LECs from dealing with MTEs that discriminate among providers of

[329] The Court went on to conclude that, given the fact that the hotels' surcharges on their guests were not based on the service rendered by the hotel, but rather varied in accordance with the toll charge made by the telephone company for communications service, these charges were "so identified with the communications service that they are brought within the prohibitions of this regulation." *Id*. at 324.

[330] *Cf. GTE Service Corp.*, 474 F.2d at 730 (holding that, in light of the threat that common carriers' expansion into computer data processing posed to the efficiency of the communications market and the reasonableness of prices therein, the Commission had the authority to regulate the entry of such carriers into the non-regulated field of data processing services).

telecommunications services in order to ensure that the interstate communications market becomes more competitive and that the rates charged and services provided to the public are just and reasonable. We seek comment on whether a LEC's provision of service to MTEs is sufficiently closely related to an MTE owner's unreasonable discrimination that we can and should exercise jurisdiction over the LEC's practice. We also note that Section 411 of the Act grants us authority to include non-carriers as parties in enforcement proceedings.[331] If we decide to adopt a nondiscriminatory access obligation, we also seek comment on the application of Section 411(a) regarding joinder of MTE owners as parties to any Commission action enforcing such a regulation.

b. Constitutional Issues

144. In the *Competitive Networks NPRM*, we raised a series of questions about the constitutionality under the Fifth Amendment of imposing a nondiscrimination requirement directly on the owners of MTEs.[332] We similarly ask here for comment on the constitutionality of barring the LECs from dealing with MTE owners who maintain a discriminatory policy against competing carriers, and on ways to mitigate any constitutional problems that might exist.[333] While we do not perceive that there are any takings issues with respect to the LECs (since the proposed regulation would not involve use or occupation of LEC property), we acknowledge that the regulation would almost certainly influence MTE owners to act in a manner similar to that which would be required by direct regulation. To the extent that a direct regulation would constitute a Fifth Amendment *per se* taking, there is some suggestion in the case law that an indirect regulation that leaves the third party no choice but to submit to the same basic result would also constitute an unconstitutional taking.[334] In evaluating a rent control ordinance, however, the Supreme Court, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), drew a distinction between a direct requirement that a landowner submit to the physical occupation of his land (which, if uncompensated, would work a *per se* taking in violation of the Fifth Amendment), and a rental requirement that, *inter alia*, barred a mobile park owner from disapproving of the transfer of a mobile home from one tenant to the next (provided the purchaser has the ability to pay the rent). The Court stated:

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[331] Section 411(a) provides as follows: "In any proceeding for the enforcement of the provisions of this Act, . . . it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practices under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 47 U.S.C. § 411(a).

[332] *See Competitive Networks NPRM*, 14 FCC Rcd at 12704-05.

[333] *See, e.g., id*. at 12705 (asking, *e.g.*, if constitutional problems might be mitigated if a requirement were tailored to apply only where the property owner has already permitted another carrier physically to occupy its property, or if the requirement enabled the property owner to obtain from a new entrant the same compensation that it had voluntarily agreed to accept from an incumbent LEC).

[334] *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992). The court noted, in dicta, that if Section 621(a)(1) of the Communications Act were construed to require cable company access in cases where the property owner had previously and privately agreed to provide compatible access to others, the court "would have substantial reservations regarding the constitutionality of the Cable Act." *Id*. The court explained that "[b]ecause every modern apartment building is linked to electric, telephone, and/or video programming services, the district court's interpretation [upon which the court of appeals did not need to pass] effectively grants franchised cable companies the same unencumbered right of access to private property which the Supreme Court held to be a compensable taking in *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Id.*

> At least on the face of the regulatory scheme, neither the city nor the state compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobile Home Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. . . . Put bluntly, no government has required any physical invasion of petitioners' property.

Id. at 527-28 (citation omitted).[335]

145. We ask for comment on the effect of the foregoing case law on the potential regulation at issue here. In particular, we are interested in whether, in light of this case law, an obligation imposed on LECs in their dealings with property owners would effect a taking from property owners. As indicated above, however, even if such a regulation in unqualified form would present constitutional problems, there may be ways of modifying the regulation to mitigate these problems. In addition to the approaches specifically mentioned in paragraph 60 of the *Competitive Networks NPRM*, we also ask whether the constitutional concerns would be answered completely if the Commission provided a judicially reviewable mechanism for ensuring that the property owners received "just compensation" commensurate with what the Fifth Amendment might require in takings situations. In *Gulf Power I*, the court rejected a facial challenge to the constitutionality of Section 224(f) of the Communications Act, ruling that this provision, although working a taking, passed constitutional muster because the statute itself provided for the possibility of just compensation to the plaintiff utilities. Section 224(f) is a mandatory access provision, which states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Under the statutory scheme, the Commission has the authority to review the rates and terms of pole attachments agreements between utilities and cable systems or telecommunications carriers (provided such matters are not regulated by a state) under certain guidelines provided for in the statute. The Commission's determinations in these regards are, of course, judicially reviewable.

146. The court in *Gulf Power I* upheld this basic approach, ruling that it was not facially unconstitutional under the Fifth Amendment "because, at least in most cases, it ensures a utility does not suffer that taking without obtaining just compensation." *Id*. at 1338. In so ruling, the court made it clear that an agency could determine the amount of compensation in the first instance, so long as that determination was judicially reviewable on constitutional grounds:

> [T]he Supreme Court has stated that "all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. at 194-95, 105 S.Ct. at 3120-21 (citation and quotation omitted). While a process in which the judicial branch does not make the final determination of what constitutes just compensation may be constitutionally inadequate, we see no constitutional problem with a process that employs an

[335] *See also Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts because the challenged regulations did not compel surrender of the artifacts, there was no physical invasion or restraint upon the artifacts, and appellees retained the rights to possess, transport, donate or devise the protected birds; "loss of future profits – unaccompanied by any physical property restriction provides a slender reed upon which to rest a takings claim."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that nondiscrimination provision under Title VII of the Civil Rights Act of 1964, requiring general access to places of public accommodation, did not constitute taking of property).

> administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So 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 compensation." *Id*.

Gulf Power I, 187 F.3d at 1333.

147. Given the analysis above, we request comment on whether the constitutional concerns regarding a nondiscrimination requirement (either indirect or direct) would be resolved if the Commission were to specify that an MTE policy is not discriminatory merely because it requires a competing carrier to pay "just compensation" to the building owner for access, and if the Commission's review of the policy were subject to judicial review. Similarly, we ask whether a similar compensation mechanism would resolve questions over the constitutionality of a direct regulation on the owners of MTEs.

148. We recognize that the regulatory framework before the court in *Gulf Power I* was based on a statute that specified a compensation mechanism, unlike the compensation approach under discussion here. While the absence of a statutorily mandated compensation mechanism led the court in *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), to invalidate Commission orders requiring LECs to permit competitive access providers ("CAPs") to connect their facilities to the LEC network through physical collocation (at a rate set by tariff), the critical problem for the *Bell Atlantic* court was not the failure of the statute to specify a compensation mechanism *per se*, but that the ultimate surety for providing just compensation rested on Tucker Act claims that Congress had not specifically authorized.

149. To elaborate, in *Bell Atlantic*, the court was evaluating the Commission's implementation of Section 201(a) of the Communications Act, which creates a common carrier duty "to establish physical connections with other carriers" if the Commission "finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). Construing this provision, the Commission recognized a right on the part of competing carriers to physically co-locate equipment on the incumbent carrier's property. The court observed that the Commission's rules allowed the LECs to file new tariffs under which they would obtain compensation from their competitors for the "reasonable costs" of co-location, but not necessarily for the level of compensation required by the Fifth Amendment (*i.e.*, "just compensation"). Thus, if the compensation required by the tariff were lower than the Fifth Amendment "just compensation," the LEC would not be entitled under any Commission rule to recover the difference from the competitor. Instead, the government would face liability: "But in fact the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment." *Bell Atlantic*, 24 F.3d at 1445 n.3. It was this concern over the exposure of the Treasury "to liability both massive and unforeseen," *id*. at 1445, that led the court to voice concerns that the agency's interpretation of the statute would encroach on Congress's exclusive powers to raise revenue and appropriate funds, which, in turn, led to the court's narrowing construction of the statute under the avoidance canon.[336]

[336] Under the avoidance canon, a court will narrow an agency's construction of a statute in order to avoid substantial constitutional questions. The court in *Bell Atlantic* explained that "when 'there is an identifiable class of cases in which application of [the] statute will necessarily constitute a taking,'" the avoidance canon should take effect. *Bell* (continued….)

150. In contrast, an approach toward MTE owners that specifically provides for the level of compensation mandated by the Fifth Amendment would appear to avoid these concerns; the government would have no liability for Tucker Act claims since the regulation would be structured to entitle the MTE owner to "just compensation" under a nondiscrimination policy, and the regime would not constitute a revenue raising scheme since the competing provider would, on a voluntary basis, pay no more than the value of the access it has received. With the courts having the final say in assessing what constitutes the constitutionally required level of compensation, there should be no "identifiable class of cases in which application of [the] statute will necessarily constitute a taking," *id*., and therefore no basis for applying the policy of avoidance. We seek comment on this analysis.

3. Potential Scope of Application

151. As discussed above, if our concerns regarding the ability of premises owners to discriminate unreasonably among competing telecommunications service providers are not adequately resolved without regulatory intervention, we are prepared to consider adopting a nondiscriminatory access rule, in the form either of a direct regulation of property owners[337] or of a regulation of common carrier practices. To that end, we examine and seek further comment below on the potential scope of such an obligation.

152. We acknowledge that there may be some entities for which the burdens arising out of a nondiscriminatory access rule would outweigh the benefits to competition and customer choice.[338] There also may be situations that the Commission should exempt from a nondiscriminatory access rule for other reasons. For example, should any Commission regulations differentiate between commercial and residential buildings? That is, if we were to adopt a nondiscriminatory access rule, should we exempt residential buildings from whatever regulation we ultimately impose for the same reasons, discussed *infra* Section V.B., that we may distinguish between commercial and residential premises in the context of exclusive contracts? In addition, should a nondiscriminatory access provision be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue? The states that have promulgated nondiscriminatory access requirements often exempt multitenant buildings that have fewer than some minimum threshold of units.[339] Also, should we exempt buildings that are owned by state or local governments? For example, is a nondiscriminatory access rule appropriate in

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Atlantic, 24 F.3d at 1445 (quoting *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 128 n.5 (1985)). The avoidance canon, however, is not applicable to situations in which it is only possible that a statute or regulation might effect a taking. *National Mining Association v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999) (refusing to apply the avoidance canon to interpret the Energy Policy Act to mandate an exemption in the Secretary of the Interior's regulations, even though it was possible that a court might determine in a particular case that application of the regulations had caused a regulatory taking).

[337] In response to the *Competitive Networks NPRM*, 14 FCC Rcd at 12673, we have received extensive comment on the legal issues related to potential imposition of a non-discriminatory access requirement on building owners. Although we do not resolve these legal issues today, we see no need for further comment on these questions, except to the extent expressly discussed above.

[338] See *Competitive Networks NPRM*, 14 FCC Rcd at 12706 (asking commenters whether "we should limit the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners").

[339] *See, e.g., Massachusetts Nondiscriminatory Access Order* (generally exempting residential multidwelling units with fewer than four units); Conn. Gen. Stat. Ann. § 16-2471 (1997) (generally requiring minimum threshold of three units); 16 Texas Admin. Code § 26.129(b)(1)(C) (Sept. 7, 2000) (Texas law applies, inter alia, to "[p]ublic or private property owners of commercially operated residential property with four or more dwelling units . . . .").

either public housing or at municipal airports, in which a local government often leases space to various commercial retail establishments? Should we exempt federal buildings?[340] We seek comment on these issues.

153. For some buildings, other factors may be present that would warrant exempting a particular building or tenancy from a nondiscriminatory access rule. For example, the state of Massachusetts exempts "all tenancies of 12 months or less in duration and transient facilities, such as hotels, rooming houses, nursing homes and [facilities] serviced by payphones."[341] We also note that the state of Texas has exempted "institutions of higher education" from its requirements, and, thus, college dorms appear to be beyond the scope of Texas' nondiscrimination requirement. In addition, representatives of federal, state, and local governments argue that buildings which they own or control should not be subject to any nondiscriminatory access requirements.[342] We seek comment on what circumstances would warrant exempting a building from a nondiscriminatory access requirement, including whether we should adopt exemptions similar to those described above.

154. In addition, as we noted earlier, since the *Competitive Networks NPRM* was adopted, a new type of local telecommunications provider has emerged. These carriers, which are often referred to as "building LECs" or "BLECs,"[343] typically own telecommunications facilities only within MTEs. A building LEC provides telecommunications services to tenants by interconnecting with another LEC that has facilities outside the building. The nature of the relationship between the building owner and the building LEC is often different, however, from the typical competitive LEC/building owner relationship in that the building LEC agrees to give the building owner equity, or has agreed to share a percentage of the telecommunications revenues received in a particular building or group of buildings, in exchange for building access. Indeed, in some instances, consortiums of real estate firms have been the founding members of building LECs.[344]

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[340] We note that the Conference Report associated with H.R. 4475, which was signed into law on October 23, 2000, includes the following language: "The conferees direct the executive branch [to] identify building telecommunications access barriers and take necessary steps to ensure that telecommunications providers are given fair and reasonable access to provide service to Federal agencies in buildings where the Federal government is the owner or tenant." H.R. Conf. Rep. No. 106-940 at 161.

[341] *Massachusetts Nondiscriminatory Access Order* at 18.

[342] *See* LSGAC Recommendation No. 22.

[343] *See* Letter from Kathleen Q. Abernathy, Vice President, Broadband Office, to Magalie Roman Salas, Secretary, FCC, dated May 17, 2000 (enclosing news article entitled "Birth of a BLEC: Service Providers jump at Chance to Win Over MTU [multi-tenant unit] Audience").

[344] For example, BroadBand Office, one such competitive LEC, was founded by the following eight real estate companies: Carr America Realty Corporation, Crescent Real Estate Equities Company, Duke-Weeks Realty Corporation, Equity Office Properties Trust, Highwoods Properties, Inc., the Hines Organization, Mack-Cali Realty Corporation, and Spieker Properties, Inc., along with the venture capital firm of Kleiner Perkins Caufield and Byers. *See* Letter from Kathleen Q. Abernathy, Vice President, BroadBand Office, to Magalie Roman Salas, Secretary, FCC, dated April 13, 2000 (enclosing handout from April 13, 2000 *ex parte* meeting with Commercial Wireless Division staff). Another example is the building LEC OnSite Access, Inc., for which Reckson Service Industries, an affiliate of the real estate investment trust Reckson Associates Realty, is a principal financial backer. Letter from Joseph M. Sandri, Jr., WinStar Communications, Inc., to Magalie Roman Salas, Secretary, FCC, dated November 22, 1999 (noting that, at some point, Reckson held a 42% equity stake in OnSite access).

155. Building LECs may promote the goals of the 1996 Act by bringing competition and advanced services to MTEs that otherwise might not see competitive providers for quite some time. At the same time, we are concerned that these building LEC relationships may create incentives for unreasonable discrimination by building owners and thus undermine competition in MTEs.[345] We therefore seek to create a record on these new developments in order to determine their effect on the market and what, if any, particularized regulation of building owners in these contexts may be appropriate. Specifically, we seek comment on: (1) the types of services offered by building LECs; (2) the nature and scope of the relationships between building owners or real estate investment trusts and the competitive LECs in which they maintain a financial interest; and (3) whether and how these agreements affect competition for local telecommunications services.

4. Potential Implementation Issues

156. If we were to adopt a nondiscriminatory access rule, a number of implementation issues would arise. We seek to develop a fuller record on these issues. Specifically, we seek comment regarding how the Commission would define nondiscriminatory access for all providers given the significant variations in the type and extent of access required by each provider. For example, wireless technologies require access to the roof or other location suitable for placing an antenna, whereas wireline technologies typically enter the building at or below ground and interconnect to the building wiring at a basement or ground floor equipment closet. The access required may also vary depending on the type of services required by a particular end user. In addition, we seek comment on how a nondiscriminatory access rule could be tailored to address the ramifications of requests for different types of access on building management. In particular, we are interested in comments addressing the issues of accommodating building space limitations and ensuring building safety and security.

157. If the Commission were to adopt a nondiscriminatory access rule, we seek comment on whether such an obligation should be triggered only if a tenant requests a particular carrier. Although we sought comment on this issue in the *Competitive Networks NPRM*,[346] our current record is insufficient on this issue. We note again that the nondiscriminatory access regulations in states of Texas and Connecticut contain such provisions.[347] In addition, if we adopt a rule that is triggered by a tenant request, we seek comment on how we would ascertain whether any particular request is a bona fide request for service, and not merely a sham arrangement to get a particular provider into an MTE.

158. We further seek comment on how any nondiscriminatory access rule should be enforced. For example, commenters should consider whether aggrieved parties should invoke the Commission's general procedures for complaints against common carriers,[348] or whether we should implement some special complaint procedure.[349] Parties should also consider the advisability of alternative dispute resolution procedures, as well as whether the states should have a role in the enforcement process. We particularly invite comment regarding the burdens that any enforcement scheme would impose on

[345] *See* Letter from Robert J. Aamoth, Counsel for Edge Connections, Inc., to Magalie Roman Salas, Secretary, FCC, dated September 7, 2000 (referring to alleged 12-month blackout period in MTE served by Broadband Office, limiting service by other CLECs).

[346] *Competitive Networks NPRM*, 14 FCC Rcd at 12706.

[347] *See* Conn. Gen. Stat. Ann. § 16-2471 (1997); 16 Texas Admin. Code § 26.129 (Sept. 7, 2000).

[348] *See* 47 C.F.R. § 1.711 *et seq.*

[349] *See, e.g.*, 47 C.F.R. § 1.1401 *et seq*. (establishing procedures for complaints under the Pole Attachments Act).

telecommunications carriers, property owners, consumers, and the Commission, as well as suggestions for reducing those burdens. In addressing enforcement issues, parties should consider the effects both of direct regulation of property owners and of regulation of carriers.

159. Finally, we seek comment on any other actions we should take to ensure that customers in MTEs will have access to the telecommunications service provider of their choice.

B. Exclusive Contracts

160. In this section, we request comment on whether today's prohibition on exclusive access contracts in commercial MTEs should be extended to residential MTEs, and on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.

1. Residential Exclusive Contracts

161. We request comment on whether we should extend today's prohibition on exclusive access contracts in commercial buildings to residential buildings. We note the Real Access Alliance's argument that exclusive contracts should not be prohibited in residential MTEs because, in these settings, landlords need to offer LECs exclusive contracts to ensure high-quality, inexpensive telecommunications service for their tenants.[350] On the other hand, commenters that advocate prohibiting exclusive contracts generally do not distinguish between commercial and residential markets.[351] However, we note that there may be significant differences between residential and commercial buildings and the impact exclusive contracts may have on each.

162. We recognize that both residential and commercial tenants have limited recourse in addressing the lack of telecommunications choices offered in buildings serviced under exclusive contracts. Typically, the only recourse for the tenant is to accept the lack of choice or move. Although residential and commercial tenants lease space in a generally competitive market, both types of tenants are limited in their ability to move immediately by contractual leasing terms. Commercial tenants, whose lease terms tend to run 5 to 15 years, can be especially affected as opposed to residential tenants, whose lease terms are much shorter, typically 1-year and month-to-month.[352] Residential tenants also differ from commercial tenants in that commercial tenants face significant disincentives in the form of relocation costs when measured relative to the benefits they may forgo under an exclusive provider arrangement. Commercial tenants may have recourse in principle, but because of their long lease terms and other impediments they may face stronger incentives not to pursue their relocation options, as compared with residential tenants. For these reasons, we distinguished commercial and residential buildings and we decided at present to prohibit exclusive contracts only in the commercial context. However, given the paucity of record evidence and in light of our experience with the use of video programming exclusive contracts in residential MTEs, we request further comment on whether we should continue to allow telecommunications providers to enter into exclusive contracts with owners of residential MTEs.

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[350] *See* Letter from Matthew C. Ames, Counsel for Real Access Alliance, to Magalie Roman Salas, Secretary, FCC, filed June 16, 2000.

[351] *See, e.g.*, AT&T Comments at V.; Teligent Comments at 17.

[352] Real Access Alliance Comments at 7.

2. Exclusive Access Provisions in Existing Contracts

163. We seek comment on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs. AT&T has argued that for local competition to thrive among telecommunications carriers in commercial MTEs, building owners must be permitted to terminate their existing exclusive contracts and seek new relationships with competing carriers.[353] Moreover, AT&T argues that the Commission has authority to void exclusive contracts that are currently in effect.[354]

164. We recognize that the Commission has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest.[355] As the Commission explained in our *Expanded Interconnection Order*, the benefit of this approach is that it allows "an incumbent provider's established customers to consider taking service from a new entrant."[356] We recognize, though, that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts. Thus, we are inclined to proceed cautiously in this area. We seek comment on whether prohibiting carriers from enforcing access provisions in existing contracts in either commercial or residential MTEs is necessary to ensure that customers obtain the benefits of the more competitive access environment envisioned in the 1996 Act. We also seek comment on whether, in lieu of an immediate prohibition on the enforcement of exclusive access provisions in existing contracts, we should phase out such provisions by establishing a future termination date for these provisions. We seek comment on what termination date should be adopted if the Commission were to take such action.

C. Preferential Marketing Agreements and Other Preferential Arrangements

165. As noted above, several commenters briefly address various preferential building owner/LEC relationships, such as exclusive marketing arrangements or bonuses given by landlords to tenants who subscribe to the services of particular competitive LECs. Generally, competitive LECs argue that, like exclusive contracts, such preferential arrangements should not be permitted.[357] Qwest notes, in particular, that "[a]n arrangement that is not technically 'exclusive' may in fact have the practical effect of being exclusive, if the building owner refuses to make the same arrangement available

[353] *See, e.g.*, AT&T Comments at 28.

[354] The Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest. AT&T Comments at 27 (citing *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)). The Commission previously has exercised that authority to permit customers to "terminate" their "service arrangements" with a carrier "without being contractually liable for such termination." AT&T Comments at 26-27 (citing Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion & Order on Reconsideration*, 10 FCC Rcd 4421, ¶ 5 n.15 (1995)); s*ee also* Competition in the Interstate Interexchange Marketplace, *Report & Order*, 6 FCC Rcd 5880, ¶ 151 (1991).

[355] Expanded Interconnection with Local Telephone Company Facilities, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶ 197 (1994) (*Expanded Interconnection Order*).

[356] *Id.*

[357] WinStar Comments at 25 (discussing both exclusive contracts and preferences and arguing that they do not promote competition); Qwest Reply Comments at 11.

to other carriers."[358] In contrast, other commenters argue that preferential arrangements are often beneficial.[359] For example, SBC asserts that, in exchange for exclusive marketing and advertising services, LECs may offer consideration, "such as the payment of commissions to . . . property owners and discounted or packaged services for their tenants,"[360] and that the resulting packages can be beneficial to both building owners and tenants. Optel echoes SBC's view and urges that any Commission action prohibiting exclusive marketing agreements "may undermine concessions given to MDU residents (*e.g.*, lower rates) in exchange for marketing services at the MDU."[361] Optel also asserts that these arrangements are not anticompetitive, particularly when they involve carriers that lack market power.[362]

166. Notably, several states have promulgated rules either requiring that the terms of any preferential arrangement be disclosed to tenants or prohibiting preferential arrangements altogether.[363] In particular, the Massachusetts Department of Telecommunications and Energy has noted that marketing agreements, which it defines as contracts in which a building owner "receives compensation from a service provider for allowing it to market its services to tenants or receive compensation for each new tenant that becomes a customer of the service provider" have the "potential to encourage discriminatory behavior."[364] As a result, in that state, the existence and terms of any marketing agreements must be disclosed to tenants. Also, in Connecticut, contracts for building access between telecommunications providers and building owners cannot include "[a]ny term that discriminates in favor of any one telecommunications service provider with respect to the provision of access or compensation requested."[365]

167. As a preliminary matter, we note that preferential arrangements often arise in contexts in which a building owner has a financial interest in a telecommunications carrier. For example, it is our understanding that building LECs often enter into exclusive marketing or other preferential arrangements with their building owner investors. Preferential arrangements are not, however, necessarily limited to this context.[366] We seek comment on the types of preferential arrangements that exist and the contexts in which they occur.

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[358] Qwest Reply Comments at 11. Although we have already prohibited *de facto* exclusive contracts, *see supra para.* 37, we seek comment on whether we should prohibit preferential arrangements that fall short of being considered *de facto* contracts.

[359] SBC Comments at 7 (arguing that, while exclusive access contracts are anti-competitive, exclusive marketing or advertising contracts "are valid business tools"); Optel Comments at 18; *see also* SBC Reply Comments at 9-11.

[360] SBC Comments at 7.

[361] Optel Comments at 18.

[362] *Id.*

[363] *See, e.g., Massachusetts Nondiscriminatory Access Order; Nebraska MDU Order.*

[364] *Massachusetts Nondiscriminatory Access Order* at 30.

[365] Conn. Gen. Stats. Ann. § 16-2471-6(a)(6) (1997).

[366] *See* Letter from Kathleen Q. Abernathy, Vice President, BroadBand Office, to Magalie Roman Salas, Secretary, FCC, dated April 13, 2000 (enclosing handout from April 13, 2000 *ex parte* meeting with Commercial Wireless Division staff); Letter from Joseph M. Sandri, Jr., WinStar Communications, Inc., to Magalie Roman Salas, Secretary, FCC, dated November 22, 1999.

168. To the extent any arrangement effectively restricts a premises owner from providing access to other telecommunications service providers, it is prohibited under the rules we adopt today. However because building LECs have only recently emerged as local telecommunications service providers, and because we have received few comments on this issue in general, we have decided not to address preferential arrangements generally in the Report and Order. Instead, we seek further comment on whether, and to what extent, the Commission should regulate preferential arrangements. Specifically, we seek comment on the market effects of such arrangements and whether these effects vary with the type of market (*e.g.*, residential vs. commercial). Are they beneficial to consumers because they provide additional incentives for competitive telecommunications carriers to serve multiunit buildings that would otherwise not be economically desirable? Or, do they effectively restrict other carriers from providing additional competitive alternatives? Finally, we seek comment on whether preferences should be viewed differently in the context of an equity or revenue sharing relationship between a building owner and a LEC than in other situations.

D. Definition of Right-of-Way in MTEs

169. In the Report and Order above, we conclude that, for purposes of Section 224, a "right-of-way" in a building includes, at a minimum, a defined pathway that a utility either is actually using or has specifically identified and obtained the right to use in connection with its transmission and distribution network.[367] Some commenters, however, advocate a broader interpretation of the term. In particular, several commenters suggest that where a utility has a right to install facilities anywhere in an MTE, it has a right-of-way over the entire property, which can then be accessed by any party included as a beneficiary under Section 224.[368]

170. We seek additional comment regarding the extent of utility rights-of-way within MTE buildings under Section 224. On the one hand, we recognize that a broad ability by competitive carriers to access areas within MTEs would arguably speed the arrival of telecommunications choices and advanced services to consumers. On the other hand, we are concerned about the ramifications of potentially granting carriers an unbounded right to place facilities anywhere within buildings. First, as a matter of statutory construction, we note that the terms "pole," "duct," and "conduit" refer to defined spaces occupied by a utility as part of its network. We thus seek comment on whether "right-of-way" should also be read to denote only a similar type of defined space.[369] Parties advocating a broader definition should also address how, in the absence of a defined pathway, we would comply with the statutory directive to determine just and reasonable rates by means of an allocation of space.[370] We further seek comment on whether, in the absence of a mechanism for compensating underlying property owners, a broad definition of rights-of-way would effect an uncompensated taking in violation of the

[367] *See* para. 83, *supra.*

[368] *See, e.g.*, AT&T Comments at 19-22; Teligent Comments at 34-35; WinStar Comments at 56.

[369] We note the *in pari materia* rule of statutory construction, which states that when a particular statute is ambiguous, statutes which relate to the same subject matter should be read together so that the legislature's intention can be gathered from the whole of the enactments. *See Undercofler v. L.C. Robinson & Sons, Inc.*, 111 Ga.App. 411, 141 S.E.2d 847, 849 (Ga. App. 1965); *Kimes v. Bechtold*, 342 S.E.2d 147, 150 (W.Va. 1986).

[370] *See* 47 U.S.C. § 224(d),(e).

Fifth Amendment.[371] We also request comment regarding the circumstances, if any, under which a utility might "own or control" a right-of-way in the absence of a defined space, as required to create a right of access under Section 224.[372] Finally, commenters should address whether an expansive definition of "right-of-way" would compromise the operation of our rules governing the disposition of cable inside wire by broadly permitting cable incumbents to remain in an MDU against the wishes of the property owner.[373]

E. Extension of Cable Inside Wiring Rules.

171. In the *Competitive Networks NPRM*, we sought comment on "whether our rules governing access to cable inside wiring for MVPDs [multichannel video program distributors] should be extended so as to afford similar access to providers of telecommunications services."[374] Although a number of commenters addressed extending the application of the cable inside wiring rules to include telecommunications carriers,[375] we find that the record on this issue should be developed further. Accordingly, we seek additional comment.

172. Section 76.804(a) of the Commission's rules, enacted in 1997, sets forth the procedures for disposition of "home run wiring" owned by an MVPD in a multiple dwelling unit (MDU) when the MVPD "does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner . . . ." [376] Several definitions are fundamental to understanding the application of the home run wiring rules. First, an MVPD includes "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming . . . ."[377] Second, MDUs include residential buildings such as apartment buildings, condominiums and cooperatives,[378] but do not include commercial office buildings. Third, home run wiring is "[t]he wiring from the [MVPD] demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop."[379] By contrast, cable home wiring is "[t]he internal wiring contained within the premises of a subscriber which begins at the demarcation point."[380]

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[371] We note our recent holding that a utility is not required to exercise its powers of eminent domain on behalf of third parties in order to expand an existing right-of-way. *See Local Competition Pole Attachments Reconsideration Order*, 14 FCC Rcd at 18063, ¶ 38.

[372] *See* paras. 85-90, *supra.*

[373] 47 C.F.R. § 76.804(a); *see* para. 90, *supra.*

[374] *Competitive Networks NPRM*, 14 FCC Rcd at 12710, ¶ 68 (footnote omitted).

[375] *See, e.g.*, CAI Comments at 28-29; RCN Comments at 18-21; USTA Comments at 18.

[376] 47 C.F.R. § 76.804 (a).

[377] 47 U.S.C. § 522(13).

[378] 47 C.F.R. § 76.800(a).

[379] 47 C.F.R. § 76.800(d).

[380] 47 C.F.R. § 76.5(ll). The cable demarcation point in MDUs, with non-loop-through wiring configurations, is at (or about) 12 inches outside of where the cable wire enters the subscriber's individual dwelling unit. 47 C.F.R. § (continued….)

173. The Commission's home run wiring rules provide that when an MVPD no longer has a legal right to remain on the premises of an MDU,[381] the MDU owner (or another MVPD at the MDU owner's discretion) may negotiate to purchase the home run wiring if it is not removed by the incumbent MVPD.[382] If the parties cannot agree on a price, then the incumbent MVPD "must elect: to abandon without disabling the wiring; to remove the wiring and restore the MDU consistent with state law; or to submit the price determination to binding arbitration by an independent expert."[383] In the *Competitive Networks NPRM*, we noted that "[c]ommenters in other proceedings have argued that this rule offers benefits to providers of video services that are not currently available to telecommunications providers, and that this distinction not only is arbitrary but creates uneconomic incentives for providers to incorporate video services into their offerings simply to take advantage of the more favorable rules."[384]

174. Based upon our review of the comments on this issue in the record, it appears that our proposal to extend application of the home run wiring rules to include telecommunications carriers may not have been entirely clear, and therefore may have been misinterpreted by parties commenting on the issue. We did not intend to solicit comment on application of new rules to "telephone home run wiring" as one party suggested in response to the *Competitive Networks NPRM*.[385] Rather, we intended to seek comment, and do so here, on whether our home run wiring rules should be amended to permit an MDU owner to designate a telecommunications carrier to negotiate to purchase cable home run wiring. The right to appoint a telecommunications carrier to conduct such negotiations would be in addition to the MDU owner's prerogative to designate an MVPD to conduct such negotiations. We also clarify that we are not seeking comment on whether Section 76.802 of the cable inside wiring rules, regarding the disposition of "cable home wiring" within an individual subscriber's unit, should be amended. Section 76.802 already enables the subscriber to purchase cable home wiring from the departing MVPD and, thus, the subscriber could use this wiring for telecommunications service.[386]

175. We note our agreement with CAI that extending the cable home run wiring rules to include telecommunications carriers would result in "[a]dditional . . . home run wiring be[ing] made available for use by alternative providers [thereby] promoting competition."[387] We encourage parties to comment on the technical and policy implications of extending the cable home run wiring rule as proposed above. Parties should address whether there are any technical impediments to using coaxial cable home run wiring to provide telecommunications service. Parties should also address the potential

(Continued from previous page)
76.5(mm)(2). The cable demarcation point in MDUs, with loop-through wiring configurations, is at (or about) 12 inches outside of where the cable enters or exits the first and last individual dwelling units on the loop. 47 C.F.R. § 76.5(mm)(3).

[381] An MVPD's legal right to remain on the premises of an MDU may be extinguished by, among other things, operation of contract, statute or common law.

[382] 47 C.F.R. § 76.804 (a).

[383] 47 C.F.R. § 76.804(a).

[384] *Competitive Networks NPRM*, 14 FCC Rcd at 12710, ¶ 68.

[385] ICTA Comments at 7.

[386] 47 C.F.R. § 76.802.

[387] CAI Comments at 40.

impact on the provision of video service to MDUs if we extend the home run wiring rules to allow MDU owners to designate telecommunications carriers to acquire the wiring.

VI. CONCLUSION

176. The actions that we take today reflect both the progress that is being made toward competitive telecommunications access to MTEs and the obstacles that remain to ubiquitous consumer choice. As we have recognized, consumer choice among telecommunications providers and service offerings in MTEs is vital to the achievement of the procompetitive and deregulatory goals of the 1996 Act. On the one hand, the record shows that meaningful progress toward competition is taking place, and real estate industry leaders are actively working on voluntary measures that have the potential further to promote consumer choice. At the same time, the record shows a significant number of instances in which incumbent LECs and premises owners continue to obstruct competitive access. Taking these considerations together, we therefore undertake targeted actions to ameliorate many of the specific existing obstacles to competitive access to MTEs, while refraining at this time from any comprehensive regulation of the access marketplace. In addition, we seek further comment on the current state of the market and on potential further actions that may become necessary. We intend to actively monitor developments, including the real estate industry's progress on its commitment to develop model contracts and best practices, and we will consider taking additional action if the current impediments to consumer choice are not swiftly ameliorated. In this way, we believe that we best promote the public interest in achieving ubiquitous availability to consumers of competitive, diverse, and advanced telecommunications service offerings.

VII. PROCEDURAL MATTERS

177. Regulatory Flexibility Act Analysis. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603 an Initial Regulatory Flexibility Analysis (IRFA) was incorporated In the *Competitive Networks NPRM* in this proceeding.[388] The Commission sought written public comments on the proposals set forth in the *NPRM*, including the IRFA. Appendix C of this *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order* contains the Commission's Final Regulatory Flexibility Analysis (FRFA) in compliance with the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996). Appendix D of this *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order* contains the Commission's Initial Regulatory Flexibility Analysis (IRFA) regarding issues for further comment, in compliance with the RFA, as amended by the CWAAA).

178. Paperwork Reduction Act Analysis. This First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order contains information collections, as described in Section D of the Final Regulatory Flexibility Analysis in Appendix C infra. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the

[388] *See Competitive Networks NPRM*, 14 FCC Rcd at 12723-34.

same time as other comments on this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order; OMB comments are due 60 days from date of publication of this First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order in the Federal Register. Comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

179. Ex Parte Rules. This First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order constitute a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.[389] Persons making oral ex parte presentations relating to the First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[390] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve International Transcription Services (ITS) with copies of any written ex parte presentations or summaries of oral ex parte presentations in these proceedings in the manner specified below for filing comments.

180. Filing Procedures. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 22, 2000, and reply comments on or before January 22, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

181. Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

182. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor,

[389] *See* Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, *Report and Order*, 12 FCC Rcd 7348, 7356-57, ¶ 27, citing 47 C.F.R. § 1.1204(b)(1) (1997).

[390] *See* 47 C.F.R. § 1.1206(b)(2), as revised.

International Transcription Services, Inc., 445 Twelfth Street, S.W., Room CY-B402, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, S.W., Washington, D.C. 20554.

183. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49, 47 C.F.R. § 1.49, and all other applicable sections of the Commission's Rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

184. Written comments by the public on the information collections are due on or before December 22, 2000. Written comments by the Office of Management and Budget (OMB) on the proposed and/or modified information collections must be submitted on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

185. Further Information. For further information about this proceeding, contact Joel Taubenblatt at 202-418-1513, jtaubenb@fcc.gov, or Lauren Van Wazer at 202-418-0030, lvanwaze@fcc.gov.

VIII. ORDERING CLAUSES

186. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2(a), 4(j), 4(i), 7, 201, 202, 205, 221, 224, 251, 303, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 157, 201, 202, 205, 221, 224, 251, 303, and 405, that the amendments to the Commission's rules set forth in Appendix B are ADOPTED.

187. IT IS FURTHER ORDERED that new Sections 64.2300, 64.2301, and 64.2302 of the Commission's rules, 47 C.F.R. §§ 64.2300, 64.2301, and 64.2302, set forth in Appendix B, and the revisions to Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000, set forth in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication in the Federal Register.

188. IT IS FURTHER ORDERED that the revisions to Section 68.3 of the Commission's rules, 47 C.F.R. § 68.3, set forth in Appendix B, SHALL BECOME EFFECTIVE 120 days after publication in the Federal Register, pending OMB approval.

189. IT IS FURTHER ORDERED that the motions to submit Further Reply Comments filed by Concerned Communities and Organizations and the Wireless Communications Association International ARE GRANTED.

190. IT IS FURTHER ORDERED that the Petition for Clarification and Reconsideration of the *1997 Demarcation Point Order* filed by Bell Atlantic IS GRANTED, as discussed in Section IV.C.

191. IT IS FURTHER ORDERED that the Petition for Clarification and Reconsideration of the *1997 Demarcation Point Order* filed by BellSouth IS DENIED, as discussed in Section IV.C.

192. IT IS FURTHER ORDERED that the Petition for Reconsideration of the *Local Competition First Report and Order* filed by WinStar IS GRANTED to the extent discussed in Section IV.D and otherwise IS DENIED.

193. IT IS FURTHER ORDERED that the Petition for Environmental Impact Statement filed by the National League of Cities, the National Association of Counties, the Michigan Municipal League, and the Texas Coalition of Cities for Utility Issues IS DENIED as discussed in Section IV.E, except to the extent that the Petition concerns issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, which will be addressed separately at a later time.

194. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and* Order *and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Sections 603(a) and 604(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C.A. §§ 603(a), 604(b).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
List of Commenters

Comments	Receipt Date
411 Co., Ltd	08/27/99
Acadiana Apartment Assn.	08/09/99
ACUTA (Education Parties)	08/27/99
Ada Township	08/04/99
Adelphia Business Solutions	08/27/99
Adelphia Communications Corporation	08/27/99
AIMCO	08/16/99
Allen House Apartments	08/23/99
Alliance Residential Management, L.L.C.	08/13/99
Allied Riser Communications Corporation	08/27/99
Alvarado Realty Company	08/13/99
Alvarado Realty Company	08/24/99
Amalgamated Housing Corporation	08/27/99
American Electric Power Service Corporation, et al.	08/27/99
American Shelter Management Company, Inc.	08/20/99
American Water Works Assn.	08/27/99
Ameritech	08/27/99
AMLI Residential	08/19/99
Anchor Estates	08/27/99
Apartment & Office Build. Assn. of Metro.Washington	08/11/99
Apartment Assn. California Southern Cities	08/23/99
Apartment Assn. of greater New Orleans, Inc.	08/16/99
Apartment Assn. of Louisiana	08/09/99
Apartment Investment and Management Company	08/23/99
Apex Site Management, Inc.	08/27/99
Archon Group	08/25/99
Arden Realty, Inc.	08/27/99
Arrowhead Management Company	08/25/99
Artcraft Companies	08/09/99
Assn. for Local Telecommunications Services (ALTS)	08/27/99
AT&T Corp. (AT&T)	08/27/99
Avista Corporation	08/27/99
Ballard Companies	08/16/99
Barton Farms	08/27/99
Baton Rouge Apartment Association, Inc.	08/19/99

Beacon Residential Management	08/19/99
Bell Atlantic	08/27/99
BellSouth Corporation (BellSouth)	08/27/99
Benchmark Apartments	08/24/99
Benicia California	08/17/99
Berkshire Industrial Corporation	08/24/99
Berkshire Realty Company, Inc.	08/17/99
Berkshire Springs	08/24/99
Bexley Village	08/27/99
BGK Properties	08/23/99
Black Rock Cable / John Kehres	08/12/99
Bloomfield Township	07/30/99
Blue Star Communications, Inc.	08/27/99
BOMA Saint Paul (BOMA)	08/13/99
Bowen Real Estate Group	08/16/99
Braden Fellman Group, Ltd.	08/19/99
Bradford Management Company of Dallas	08/09/99
Brandon Glen Apartment Homes	08/12/99
Brandywine Realty Trust	08/16/99
Bridgedale Terrace Apartments	08/20/99
Brigantine Group, Inc.	08/04/99
Brookfield Commercial Properties Inc.	08/12/99
Brookmeadow	08/27/99
Buckeye Real Estate	08/24/99
Burton's Landing	08/27/99
Burtonsville Office Park Limited Partnership	08/13/99
C & G Investment Associates	08/24/99
CAIS, Inc.	08/27/99
California Public Utilities Commission	08/12/99
CAMCO, Inc.	08/20/99
Carbon Development Corp.	08/13/99
CarrAmerica Realty Corporation	08/26/99
Cellular Telecommunications Industry Assn.	08/27/99
Center Management Corporation	08/16/99
Central Management, Inc.	08/26/99
Central Texas Communications, Inc.	08/27/99
CHARLES BOPP	08/13/99
Charter Properties Inc.	08/12/99
Charter Township of Harrison	07/26/99
Charter Township of Ypsilanti	08/20/99
Chris Pierquet	08/26/99
Cincinnati Bell Telephone Company	08/27/99

Cinergy Corp.	08/27/99
City & County of San Francisco	08/27/99
City Milan	07/28/99
City of Alpena	07/30/99
City of Antigo Housing Authority	08/23/99
City of Arlington Texas	08/09/99
City of Arvada	08/23/99
City of Bakersfield	08/24/99
City of Belding	08/02/99
City of Bellingham Washington	08/17/99
City of Benicia	08/13/99
City of Bremerton	08/02/99
City of Burnsville	08/27/99
City of Cadillac	07/30/99
City of Carrollton	08/11/99
City of Coconut Creek	08/06/99
City of Coopersville	08/23/99
City of Denton	08/16/99
City of Dublin	08/09/99
City of Fontana	08/16/99
City of Garland	08/16/99
City of Grand Praire Texas	08/02/99
City of Irondale	08/11/99
City of Ishpeming	08/13/99
City of Kentwood	08/09/99
City of Longview Texas	07/26/99
City of Loveland	07/28/99
City of Malibu	07/30/99
City of Marshall	08/06/99
City of Medina	08/02/99
City of Missouri City	08/03/99
City of Mont Belvieu	08/06/99
City of Plano	08/09/99
City of Richmond, Virginia	08/13/99
City of Rockwall	08/16/99
City of Schertz, Texas	08/02/99
City of Springfield	08/23/99
City of Tamarac	08/17/99
City of Tecumseh, Michigan	08/16/99
City of Walker	07/26/99
City of Waukesha	08/23/99
City of Westland	07/28/99

City of White Plains	08/13/99
City of Wyoming	07/30/99
Clark County Home Builders Assn.	08/17/99
Clark Whitehill	08/16/99
Codina Development Corporation	08/16/99
Coldwell Banker Commercial Hilgenberg Realtors	08/23/99
Colonial Properties Trust	08/13/99
Colony North	08/25/99
Commonwealth Edison Co.	07/26/99
Community Associations Institute et al.	08/27/99
Community Housing Improvement Program, Inc.	07/20/99
Competition Policy Institute	08/27/99
Competitive Telecommunications Association	08/26/99
Cornerstone Properties Inc. (Cornerstone et. al.)	08/26/99
Cooperative Housing Coalition	08/27/99
Coordinating Council of Cooperatives	08/27/99
Cornerstone Real Estate Advisers,Inc.	08/27/99
Corporate Office Properties	08/13/99
Covertry Apartments, DePere, WI	08/26/99
Cresent	08/12/99
Cross Roads Apartments	08/27/99
Crown Pointe Apartments	08/27/99
Curtin Company	08/09/99
Dallas Wireless Broadband, L.P.	08/27/99
Department of Defense / Army	08/12/99
Diamond Lake Apartment Homes	08/27/99
DMHA	08/20/99
Draper and Kramer	08/26/99
Drucker & Flak, LLC	08/26/99
Duke-Weeks Realty Corporation	08/27/99
Dunwoody Court Condo Assoc.	08/09/99
East Group Properties	08/27/99
Eastland Apartments	08/27/99
EBMC	08/20/99
ECI Management Corporation	08/13/99
Edgewood Management Corporation	08/16/99
Electric Utilities Coalition	08/27/99
Ellis Erb, Inc.	08/04/99
Ensemble Communications, INc.	08/27/99
Entergy Services, Inc.	08/27/99
Epoch Management Incorporated	08/19/99
EPT Management Company	08/16/99

Equity Office Properties Trust	08/27/99
Essex Property Trust, Inc.	08/26/99
Etkin & Co.	08/17/99
FDC Management, Inc.	08/24/99
Federation of New York Housing Cooperatives	08/26/99
First Centrum, L.L.C.	08/16/99
First Housing Corporation	08/16/99
First Regional TeleCOM, LLC	08/27/99
Fixed Wireless Communications Coalition	08/27/99
Flagstone	08/24/99
Flordia Power & Light Company	08/26/99
Fox Lake Manor Apartments	08/24/99
Fox Meadow	08/27/99
Foxtree Apartments	08/24/99
Frye Properties	08/11/99
FSC Realty, LLC	08/16/99
Gene B. Glick Company Inc.	08/13/99
General Communications, Inc.	08/27/99
General Growth Properties, Inc.	08/12/99
Gilmour Court Apts., Inc.	08/11/99
Ginsburg Development, LLC	08/18/99
Given & Spindler Companies	08/23/99
Glenwood Management Corporation	08/12/99
Global Crossing Ltd	08/27/99
Golf Side Apartments	08/24/99
Great Atlantic Real Estate-Property Management	08/16/99
Green Store Partners LLC	08/27/99
Greenbelt Homes, Inc.	08/16/99
Gross Builders	08/26/99
Gryboski Rental Properties	08/26/99
GTE	08/27/99
Hampton Management Co.	08/12/99
Harbert Realty Services of Flordia, Inc.	08/26/99
Hendersen-Webb, Inc.	08/18/99
Hepfner Smith Airhart & Day, Inc.	08/16/99
Heritage Apartments	08/27/99
HighSpeed.Com, L.L.C.	08/27/99
Hillcrest Apartments	08/24/99
Hoppe and Harner	08/16/99
Horne Companies, Inc.	08/20/99
Hunter's Glen Apartment	08/24/99
Huntington Brook	08/24/99

Huntington Lakes	08/24/99
ICG Telecom Group, Inc.	08/27/99
Independent Cable & Telecommunications Assn.	08/27/99
Insignia/ESG of Colorado, Inc.	08/17/99
Institute of Real Estate Management	08/26/99
Inverness Properties, LLC	08/16/99
Jamestown Homes, Inc.	08/26/99
Jaymont Realty Incorporated	08/16/99
Jefferson West Apt's.	08/24/99
John M. Stone Management Corporation	08/02/99
JP Realty, Inc.	08/16/99
Kaftan Enterprises, Inc.	08/16/99
Kaiserman Company Inc.	08/16/99
Kansas City Power & Light Company	08/27/99
Kessler Homes, Inc.	08/16/99
Knight Company	08/09/99
Koll Development Company	08/16/99
Kontogiannis Companies	08/24/99
L&B Realty Advisors, Inc.	08/16/99
L&C Land & Co.	08/27/99
LaCrosse Apartments and Carriage House	08/16/99
League of Oragon Cities	08/05/99
Leon N. Weiner & Associates, Inc.	08/20/99
Level 3 Communications	08/27/99
Liberty Heights at Northgate	08/24/99
Lincoln Property Company	08/24/99
Lincoln Springs	08/26/99
Lincolnshire Townhouse Cooperative, Inc.	08/26/99
Lincolnwood Cooperative, Inc.	08/26/99
Lloyd Companies	08/13/99
Local and State Government Advisory Committee	08/05/99
Manchester Village , Inc.	08/26/99
Manco Abbott, Inc.	08/11/99
Mark III Management Corporation	08/26/99
Maxim Property Management	08/24/99
Mayor City of Jacksonville Beach	08/05/99
McDougal Companies	08/10/99
MCI WorldCom, Inc	08/27/99
McLeodUSA Advanced Telecommunication Services	08/26/99
McNeil Real Estate Management, Inc.	08/16/99
Melvin Mark Companies	08/17/99
Metricom, Inc.	08/27/99

Metromedia Fiber Network Services, Inc.	08/27/99
Mid- America Management	08/12/99
Mid- Atlantic Realty Company Inc.	08/12/99
Mid-America Apartment Communities	08/09/99
Mike Tisiker	08/12/99
Millpond Apartments Limited Partnership	08/24/99
Minnesota Power, Inc.	08/27/99
Missouri Apartment Assn.	08/09/99
Mitchell Investments	08/16/99
Montgomery Village Foundation	08/25/99
National Association of Counties, et al.	08/27/99
New Millenium Enterprises, Inc.	08/13/99
NEXTLINK Communications, Inc.	08/27/99
North American Realty	08/12/99
North Shore Cable Commission	08/23/99
North Village Apartments	08/16/99
Nottingham Apartments	08/27/99
NY City Depart. of Info.Tech. & Telecommunications	08/13/99
NY Department of Public Service	08/13/99
Olnick Organization	08/12/99
Omni Properties, Inc.	08/09/99
OpTel, Inc. (OpTel)	08/27/99
Orchard Glen Cooperative, Inc.	08/26/99
Palm Springs II Condominium Association, Inc.	08/09/99
Parkway Properties	08/25/99
Partners Management Company	08/13/99
Paul B. Whitty	08/16/99
PCRM	08/13/99
Peppercorn Apartments	08/27/99
Personal Communications Industry Association	08/27/99
Philard Corporation	08/13/99
Philip J. McBride	08/17/99
Pine Crest Apartments	08/23/99
Plantation Ridge	08/12/99
Pleasant Woods Apartments	08/24/99
Polen Mortgage & Realty Co.	08/26/99
Polinger Shannon & Luchs Company, AMO	08/11/99
Port O'Call Apartments	08/20/99
Post Properties, Inc.	08/17/99
Prairie Creek Apartments	08/22/99
Prescott Place Apartments	08/24/99
Pressly Development Company, Inc.	08/11/99

Princeton Properties Management, Inc.	08/09/99
Providence Apartment Homes	08/24/99
Pyramid Developments, LLC	08/13/99
Radwyn Garden Apartments	08/27/99
Rand Commerical Brokers	08/19/99
RCN Corporation	08/27/99
Real Access Alliance	08/24/99
Real Estate Board of New York	08/13/99
Realvest, R.E. Broker	08/24/99
Regal Crest Village/Regal Crest West	08/16/99
Regency Manor Apartments	08/24/99
RF Development, L.L.C.	08/27/99
RF/Max Commerical Investment	08/12/99
Ridgedale I Apartments	08/23/99
Rittenhouse Claridge	08/24/99
River Park Development Co.	08/16/99
River Park West, Inc.	08/16/99
Robinson Township	08/02/99
Roc-Century Associates	08/12/99
Royal Park Townhouses Assn.	08/09/99
S.L. NUSBAUM Realty Co.	08/16/99
Samuel L. Dolnick (condominium homeowner)	08/11/99
San Diego County Apartment Assn.	08/16/99
SBC Communications Inc.	08/27/99
Security Capital Group Inc.	08/27/99
Seldin Company	08/25/99
Shaker Square	08/27/99
Shared Communications Services, Inc.	08/27/99
Signature Management Corporation	08/12/99
Silverwood Associates, Inc.	08/16/99
Sizeler Real Estates Management Co., Inc.	08/27/99
Skyline Plaza Council of Co-Owners	08/16/99
Skyline Property Management, Inc.	08/17/99
South Central Wireless, Inc.	08/27/99
Southview Apartments	08/27/99
Southwestern Oakland Cable Commission	07/28/99
SpectraPoint Wireless LLC	08/26/99
Spectrum Properties, LC	08/24/99
Sprint Corporation	08/27/99
St. John's Housing Corporation	08/20/99
State Wide Investors Inc.	08/26/99
Sterling House	08/27/99

Stonefield Manor Apartments	08/24/99
Stross Law Firm	08/13/99
Summit Management and Realty Company	08/06/99
Sweetwater Ranch	08/24/99
T&C Management Services, Inc.	08/20/99
T&R Properties	08/11/99
T. J. Adam & Company	08/12/99
Tara Cooperative, Inc.	08/26/99
Teligent, Inc. (Teligent)	08/27/99
Texas Office of Public Utility Counsel	08/27/99
The Altman Group of Companies	08/12/99
The Berkshires of Addison	08/24/99
The Bozzuto Group .	08/12/99
The Brody Companies	08/17/99
The Carter Company, Inc.	08/23/99
The Chateau Apartments Co.	08/25/99
The Education Parties	08/27/99
The Gipson Co.	08/12/99
The Indigo On Forest	08/24/99
The Mid-America Management Corporation	08/24/99
Thompson Partners	08/23/99
Thompson Thrift Development	08/20/99
Tidewater Builders Assn.	08/02/99
Tillman Real Estate	08/02/99
Tomlinson & Associates, Inc.	08/16/99
Toonen Rental Properties	08/26/99
Total Service Development, LLC	08/26/99
Town & Country Apartments	08/27/99
Town of Addison	08/13/99
Town of Yarmouth	08/26/99
Towne Properties Asset Management Company	08/16/99
Township of Lyons	08/06/99
Township of Mullica	08/12/99
Transworld Properties, Inc.	08/20/99
Trust Property Management	08/23/99
TVO Realty Partners	08/19/99
U. S. Department of Defense	08/12/99
U.R. RealTel, Inc.	08/16/99
Union Gap Village Condominium Owners' Assn.	08/09/99
United Dominion Realty Trust, Inc.	08/24/99
United States Telephone Association	08/27/99
United Telecom Council	08/27/99

Urstadt Biddle Properties, Inc.	08/13/99
V. K. Development Corporation	08/24/99
Van Buskirk Companies	08/16/99
VBC, Inc.	08/13/99
Village at McLean Gardens	08/24/99
Village Green	08/26/99
Village of Chelsea	08/16/99
Village of Concord	07/30/99
Village of Lisle	08/27/99
Village of Schaumburg	08/09/99
Village of Wilmette	08/16/99
Wallick Properties Inc.	08/05/99
Ward F. Hoppe	08/16/99
Washington Real Estate Investment Trust	08/23/99
Wayland Township	07/26/99
Weigand- Omega Management, Inc.	08/16/99
Wellsford Real Properties, Inc.	08/16/99
Westwood Heights	08/23/99
Wexenthaller Realty Management	08/27/99
White Birch Apartments	08/20/99
Wiegand- Omega Management, Inc.	08/27/99
Willow Park	08/17/99
Wimbledon Apartments	08/27/99
Windsor at Alden Pond	08/24/99
Windsor at Arbors	08/25/99
Windsor at Asbury Square	08/24/99
Windsor at Ashton Woods	08/24/99
Windsor at Brentwood	08/24/99
Windsor at Britton Woods	08/24/99
Windsor at Butternut Ridge	08/23/99
Windsor at Carolina	08/20/99
Windsor at Cedarbrooke	08/24/99
Windsor at Chateau Knoll	08/24/99
Windsor at Eastborough	08/26/99
Windsor at Fairland Meadow	08/26/99
Windsor at Fieldstone	08/23/99
Windsor at Gaslight Square	08/24/99
Windsor at Hunter's Woods	08/27/99
Windsor at Kingsborough	08/23/99
Windsor at McAlpine Place	08/26/99
Windsor at Old Buckingham Station	08/23/99
Windsor at Park Terrace	08/24/99

Windsor at Pine Ridge	08/23/99
Windsor at Polo Run	08/27/99
Windsor at Quiet Waters	08/20/99
Windsor at River Heights	08/23/99
Windsor at Rockborough	08/24/99
Windsor at Sterling Place	08/23/99
Windsor at Stonington Farm	08/23/99
Windsor at Union Station	08/24/99
Windsor at Woodgate	08/24/99
Windsor Courts at Beverly	08/24/99
Windsor Heights at Marlborough	08/24/99
Windsor Meadows at Marlborough	08/25/99
Windsor Ridge at Westborough	08/25/99
Windsor Shirlington Village	08/20/99
Windsor Village at Hauppauge	08/24/99
Windsor Village at Waltham	08/24/99
Wingate Falls	08/12/99
WinStar Communications, Inc. (WinStar)	08/27/99
Wireless Communications Assn. International, Inc.	08/27/99
Wisconsin Management Company Inc.	08/16/99
Woodberry	08/27/99
Woodmont Real Estate Services	08/10/99
Woolson Real Estate Company, Inc.	08/19/99
Worthings Companies	08/13/99
York Creek	08/27/99

Reply Comments (August 28, 1999 through September 27, 1999)	Receipt Date
1st Properties	09/03/99
A.G. Spanos Companies	09/03/99
Acacia Park Apartments, ElPaso, TX	08/31/99
Accidental Developement	09/07/99
Affordable Housing Fund I	09/01/99
Aitkin Housing Partners Limited Partnership	09/03/99
Albert House Associates	09/01/99
Albert House Associates	09/03/99
Allied Riser Communications Corporation	09/27/99
American Electric Power Service Corporation et al.	09/27/99
Ameritech	09/27/99
AMLI Residential	09/01/99
Apartment Assn. of Orange County	08/31/99
Apartment Investment and Management Company	08/30/99
Apex Site Management, Inc.	09/27/99
Applecreek Apartments, Broken Arrow, OK	08/31/99
Applecreek Apartments, Sand Springs, OK	08/31/99
Arbors of Central Park	09/03/99
Arbors of Killeen	08/30/99
Arbors Wolf Pen Creek	09/07/99
Arden Realty, Inc.	09/27/99
Aspen Circle Management	09/03/99
Aspen Park Apartments, Wichita, KS	08/31/99
Assn. for Local Telecommunications Services	09/27/99
AT&T Corp.	09/27/99
Barcelona Apartments, Tulsa, OK	08/31/99
Bartley Manor Limited Partnership	09/03/99
Bell Atlantic	09/27/99
Belle Meadows Apartments, Oklahoma City, OK	08/31/99
BellSouth Corporation	09/27/99
Beloit Housing Partners	09/01/99
Berlin Housing Partners Limited Partnership	09/03/99
BlueStar Communications, Inc.	09/27/99
Borgata Apartment Community	08/30/99
Boulder Ridge Apartments, Tulsa, OK	08/31/99
Brandywine Apartments, Lexington, KY	08/31/99
Brandywine Apartments, Tulsa, OK	08/31/99
Brookwood Village Apartments, Oklahoma City, OK	08/31/99
CAIS, Inc.	09/27/99

Capistrano Apartments	08/30/99
Cedar Ridge Apartments	09/03/99
Cellular Telecommunications Industry Assn.	09/02/99
Cellular Telecommunications Industry Assn.	09/27/99
Cimarron Point Apartments, Oklahoma City, OK	08/31/99
Cimarron Trails Apartments, Norman, OK	08/31/99
Cimmarron Apartments, Tulsa, OK	08/31/99
Cinergy Corp.	09/27/99
City of Brea	09/07/99
City of Brea	09/08/99
City of Carmel	09/13/99
City of Cerritos	08/30/99
City of Cerritos	09/09/99
City of Commerce City	09/27/99
City of Davison	08/30/99
City of Davison	09/09/99
City of Littlefield	09/24/99
City of Meadows Place	08/30/99
City of Rosenberg	08/30/99
City of Springfield	09/09/99
City Telecommunication Consultants, Ltd.	09/27/99
Cobblestone Apartments, Tulsa, OK	08/31/99
Coldwell Banker, Commercial	08/30/99
Colonial Manor Apartments	09/03/99
Commerce City	09/27/99
Community Associations Institute et al.	09/27/99
Community Programing Board	09/27/99
Competitive Telecommunications Association	09/27/99
ConAM Management Corporation	09/13/99
Concerned Communities and Organizations	09/27/99
Concord Management Limited, Ltd.	09/13/99
Copper Palms Apartment	08/30/99
Cornerstone Properties et. al.	09/27/99
Cornerstone Properties, et al.	08/30/99
Council Place Apartments, Oklahoma City, OK	08/31/99
Country Hollow Apartments, Tulsa, OK	08/31/99
Covered Bridge Apartments	08/31/99
Covina Court	08/30/99
Crossing II Apartments	08/31/99
Crossings I Apartments	08/31/99
Crown Chase Apartments, Wichita, KS	08/31/99
Crown Point Apartments, Oklahoma City, OK	08/31/99

Delta County, Colorado	08/30/99
Delta County, Colorado	09/03/99
DMC Management Company	08/30/99
Double Tree Apartments, ElPaso, TX	08/31/99
Drucker & Falk	08/30/99
Drucker & Falk, LLC	09/03/99
Duckworth Company Incorporated	09/01/99
Eagle Point Apartments, Tulsa, OK	08/31/99
Edward Rose Associates	09/07/99
Elliot Point	08/30/99
Entergy Services, Inc.	09/27/99
Equestrian on Eastern	08/30/99
First Management Services	08/31/99
First Worthing Company	08/31/99
First Worthing Company	09/02/99
Florida Power & Light Company	09/24/99
Florida Power and Light Co.	09/27/99
Flower Mound	09/01/99
Foothill Apartment Assn.	08/30/99
Fox Acres Apartments	08/30/99
Fox Run Apartments, Wichita, KS	08/31/99
Great West Services, Ltd.	08/31/99
Grouse Run, Oklahoma City, OK	08/31/99
GTE Service Corporation	09/27/99
Hill Park Management	09/03/99
Howard Hughes Corporation	08/30/99
Hudson River Management LLC	09/02/99
Institute of Real Estate Management	09/17/99
Inverness Apartments, Broken Arrow, OK	08/31/99
Island Club	08/30/99
Janesville Housing Partners Limited Partnership	09/01/99
Kennedy Wilson Properties, Ltd	09/07/99
Kensington Park Apts.	08/31/99
Key Management Company	09/14/99
Kimball Tirey & St. John	08/30/99
KOS Management Systems	08/30/99
Lakeside South	08/31/99
Larrymore Organization	09/01/99
Leisure World of Maryland Corporation	08/30/99
Lexington Commons Apartments, Bartlesville, OK	08/31/99
Lincoln Heights Limited Partnership	09/03/99
Local and State Government Advisory Committee	09/03/99

Madison Area Apartment Assn.	08/31/99
Maplewood Apartments	08/30/99
MCI WorldCom, Inc	09/27/99
Meadow Green Apartments, Phoenix, AZ	08/31/99
Medford- Gilman Housing Partners LP	09/03/99
MediaOne Group, Inc.	09/27/99
Meeting House Garden Apartments and Townhouses	08/30/99
Meridian Group, Inc.	09/01/99
Meridian Group, Inc.	09/02/99
Michigan Communities	09/03/99
Mid-Continent Properties	08/30/99
Mission Shadows	08/30/99
Monarch Management & Realty, Inc.	08/31/99
Mountain Village Apartments, ElPaso, TX	08/31/99
NEXTLINK Communications, Inc.	09/27/99
Obervation Point Apartments, Tulsa, OK	08/31/99
Occidential Develm., LTD.	09/07/99
Office of Advocacy, U.S. Small Business Admin.	09/02/99
OpTel, Inc.	09/27/99
P. M. One, Ltd.	08/31/99
Pacific Bay Club	08/30/99
Paige East Associates, Ltd.	08/31/99
Paradise Foothills	08/30/99
Park 86 Apt. Corp.	08/30/99
Parkview Mobile Home Court	09/02/99
Peninsula Housing & Builders Assn.	08/30/99
Personal Communications Industry Association	09/27/99
Picerne Management	08/30/99
Pinehurst Apartments, Oklahoma City, OK	08/31/99
Pinkney Dayton Apartments	09/02/99
Polo Club Apartments, Dallas, TX	08/31/99
Polo Club Apartments, Tulsa, OK	08/31/99
Polo Run Apartments, Tulsa, OK	08/31/99
Princeton Creek Apartments	08/31/99
Quail Hollow Apartments, Tulsa, OK	08/31/99
Quest Comm. Corp.	09/27/99
Qwest Communications Corporation	09/27/99
Racine Housing Partners Limited Partnership	09/03/99
Raintree Apartment, Wichita, KS	08/31/99
Rance King Properties, Inc.	09/08/99
RCN Corporation	09/27/99
Red River Apartments, Tulsa, OK	08/31/99

Rent Stabilization Assn.	08/30/99
Ridge Park Apartments, Tulsa, OK	08/31/99
River Ranch	08/30/99
Riverchase Apartments, Tulsa, OK	08/31/99
Riverpark Apartments, Tulsa, OK	08/31/99
Rosewood Apartment	08/30/99
Royal Arms Apartments, Tulsa, OK	08/31/99
Sagewood Apartments	08/30/99
SBC Communications Inc.	09/27/99
Shadow Ridge Apartments, ElPaso, TX	08/31/99
Shared Communications Services, Inc.	09/27/99
Silver Creek Apartments, Tulsa, OK	08/31/99
Silver Springs Apartments, Wichita, KS	08/31/99
Silverstone Apartments, Tulsa, OK	08/31/99
South Glen Apartments, Tulsa, OK	08/31/99
Southridge Manor Apartments	09/03/99
Statewide Housing Partners Limited Partnership	09/02/99
Sterling House of Lincoln	08/30/99
Sterling Point Apartments	08/30/99
Stillwater Housing Partners Limited Partnership	09/03/99
Sugarberry Apartments, Tulsa, OK	08/31/99
Summerstone Duplexes, Tulsa, OK	08/31/99
Summit Apartments Homes	08/30/99
Sun Wood	08/30/99
Sunchase Apartments, Ridgeland, MS	08/31/99
Sunchase Apartments, Tulsa, OK	08/31/99
Sundance Apartments, Tulsa, OK	08/31/99
Sunset View Limited Partnership	09/03/99
Tammaron Village Apartments, Oklahoma City, OK	08/31/99
Teligent, Inc.	09/27/99
The Commons on Anniston Road	08/31/99
The Electric Utilities Coalition	09/27/99
The Franciscan of Arlington	09/02/99
The Greens of Bedford Apartments, Tulsa, OK	08/31/99
The Lakes Apartments, Tulsa, OK	08/31/99
The Lewiston Apartments, Tulsa, OK	08/31/99
The Links Apartments, Phoenix, AZ	08/31/99
The Lodge on the Lake Apts., Oklahoma City, OK	08/31/99
The National Association of Counties , et al.	09/27/99
The Patriot Apartments, ELPaso, TX	08/31/99
The Phoenix Apartments, ElPaso, TX	08/31/99
The Real Access Alliance	09/27/99

The Remington Apartments, Wichita, KS	08/31/99
The Springs Apartments, Tulsa, OK	08/31/99
The Summit at Sunridge	08/30/99
The Warrington Apartments, Oklahoma City, OK	08/31/99
Tim Pawlenty	09/07/99
Time Warner Cable	09/27/99
Total Service Development, L.L.C.	08/31/99
Town & County Apartments	08/30/99
Town and Country Management Company	08/31/99
Town and Country Management Company	09/01/99
Town and Country Management Company	09/02/99
Town of Flower Mound	09/02/99
Town of Flower Mound Texas	09/07/99
Trails East Apartments, Mesa, AZ	08/31/99
Trammel Crow Residential	09/07/99
Two Harbors Housing Partners Limited Partnership	09/03/99
Twyckeham Apartments	08/31/99
U S West , Inc.	09/27/99
United States Telephone Association	09/27/99
United Telecom Council and Edison Electric Institute	09/27/99
US Small Business Administration	09/10/99
Village Green Companies	08/30/99
Village Green of WI Limited Partnership	09/03/99
Village of Paw Paw	08/30/99
Village of Paw Paw	09/09/99
Village of Roselle	09/01/99
Village of Roselle	09/02/99
Village Square Limited Partnership	09/03/99
Walker's Station Apartments, Oklahoma City, OK	08/31/99
Wampold Companies	08/31/99
Washington Quarters	08/30/99
Waterford Apartments, Tulsa, OK	08/31/99
Weigand-Omega Management, Inc.	08/30/99
Westgate Apartments, Irving, TX	08/31/99
Westminster Management	09/08/99
Windmill Terrace Apartments, Bedford, TX	08/31/99
Windsail Apartments, Tulsa, OK	08/31/99
Windsor At Lakepointe	08/31/99
Windsor At Windermere Place	09/17/99
Windsor At Wood Creek	08/30/99
Windsor Gardens	09/08/99
WINSTAR COMMUNICATIONS, INC.	09/27/99

Wireless Comm. Assn., Int'l.	09/27/99
Wisconsin Apartment Assn.	08/31/99
Yuma County, AZ.	09/17/99

Further Reply comments	**Receipt Date**
Wireless Comm. Assn., Int'l.	10/22/99
Concerned Communities and Organizations	10/28/99

APPENDIX B
Final Rules

New Exclusive Contract Rules

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. A new Subpart Z is added to Part 64 of Title 47 entitled:

Prohibition on Exclusive Telecommunications Contracts

2. New Section 64.2500 of Subpart Z, Part 64 of Title 47 provides:

Prohibited Agreements. No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises.

3. New Section 64.2501 of Subpart Z, Part 64 of Title 47 provides:

Scope of Limitation. For the purposes of this subpart, a multiunit premises is any contiguous area under common ownership or control that contains two or more distinct units. A commercial multiunit premises is any multiunit premises that is predominantly used for non-residential purposes, including for-profit, non-profit, and governmental uses. Nothing in this subpart shall be construed to forbid a common carrier from entering into an exclusive contract to serve only residential customers on any premises.

4. New Section 64.2502 of Subpart Z, Part 64 of Title 47 provides*:*

Effect of State Law or Regulation. This subpart shall not preempt any state law or state regulation that requires a governmental entity to enter into a contract or understanding with a common carrier which would restrict such governmental entity's right to obtain telecommunications service from another common carrier.

Revised OTARD Rules

Subpart S of Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The title of Subpart S, Part 1 of Title 47 is revised to read:

PREEMPTION OF RESTRICTIONS THAT "IMPAIR" THE ABILITY TO RECEIVE TELEVISION BROADCAST SIGNALS, DIRECT BROADCAST SATELLITE SERVICES, OR MULTICHANNEL MULTIPOINT DISTRIBUTION SERVICES OR THE ABILITY TO RECEIVE OR TRANSMIT FIXED WIRELESS COMMUNICATIONS SIGNALS.

2. The title of Section 1.4000 of Subpart S, Part 1 of Title 47 is revised to read:

Restrictions impairing reception of television broadcast signals, direct broadcast satellite services, or multichannel multipoint distribution services and restrictions impairing reception or transmission of fixed wireless communications signals.

3. Section 1.4000 of Subpart S, Part 1 of Title 47 is revised to read:

(a)(1) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of:

(i) An antenna that is (1) used to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, and (2) one meter or less in diameter or is located in Alaska;

(ii) An antenna that is (1) used to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or to receive or transmit fixed wireless signals other than via satellite, and (2) that is one meter or less in diameter or diagonal measurement;

(iii) An antenna that is used to receive television broadcast signals; or

(iv) A mast supporting an antenna described in paragraphs (a)(1)(i), (a)(1)(ii), or (a)(1)(iii) of this section;

is prohibited to the extent it so impairs, subject to paragraph (b) of this section.

(a)(2) For purposes of this section, "fixed wireless signals" means any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location. Fixed wireless signals do not include, among other things, AM radio, FM radio, amateur ("HAM") radio, Citizen's Band (CB) radio, and Digital Audio Radio Service (DARS) signals.

(a)(3) For purposes of this section, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it:

(i) Unreasonably delays or prevents installation, maintenance, or use;

(ii) Unreasonably increases the cost of installation, maintenance, or use; or

(iii) Precludes reception or transmission of an acceptable quality signal.

(a)(4) Any fee or cost imposed on a user by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this section except pursuant to paragraph (d) or (e) of this section. In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) of this section, if a proceeding is initiated pursuant to paragraph (d) or (e) of this section, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a user, the user shall be granted at least a 21-day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the user if the user complies with the adverse ruling during this grace period, unless the proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the user's claim in the proceeding was frivolous.

(b) Any restriction otherwise prohibited by paragraph (a) of this section is permitted if:

(1) It is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble, or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply; or

(2) It is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance, or use of other modern appurtenances, devices, or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) It is no more burdensome to affected antenna users than is necessary to achieve the objectives described in paragraph (b)(1) or (b) (2) of this section.

(c) In the case of an antenna that is used to transmit fixed wireless signals, the provisions of this section shall apply only if a label is affixed to the antenna that: (1) provides adequate notice regarding potential radiofrequency safety hazards, *e.g.*, information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310 of this chapter.

(d) Local governments or associations may apply to the Commission for a waiver of this section under § 1.3. Waiver requests must comply with the procedures in paragraphs (f) and (h) of this section and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) Parties may petition the Commission for a declaratory ruling under § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this section. Petitions to the Commission must comply with the procedures in paragraphs (f) and (h) of this section and will be put on public notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(f) Copies of petitions for declaratory rulings and waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the petition. In addition, in a Commission proceeding brought by an association or a local government, constructive notice of the proceeding must be given to members of the association or to the citizens under the local government's jurisdiction. In a court proceeding brought by an association, an association must give constructive notice of the proceeding to its members. Where constructive notice is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

(g) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance, or use of devices used for over-the-air reception of video programming services or devices used to receive or transmit fixed wireless signals shall be on the party that seeks to impose or maintain the restriction.

(h) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Copies of the petitions and related pleadings will be available for public inspection in the Reference Information Center, Consumer Information Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

Revised Demarcation Point Rules

Part 68 of Title 47 of the Code of Federal Regulations is amended as follows:

The Demarcation Point definition in Section 68.3 is revised to read:

1. Demarcation point: The point of demarcation and/or interconnection between telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises. Carrier-installed facilities at, or constituting, the demarcation point shall consist of wire or a jack conforming to subpart F of part 68 of the Commission's rules. "Premises" as used herein generally means a dwelling unit, other building or a legal unit of real property such as a lot on which a dwelling unit is located, as determined by the telephone company's reasonable and nondiscriminatory standard operating practices. The "minimum point of entry" as used herein shall be either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The telephone company's reasonable and nondiscriminatory standard operating practices shall determine which shall apply. The telephone company is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations.

   (a) Single unit installations. For single unit installations existing as of August 13, 1990, and installations installed after that date the demarcation point shall be a point within 30 cm (12 in) of the protector or, where there is no protector, within 30 cm (12 in) of where the telephone wire enters the customer's premises, or as close thereto as practicable.

   (b) Multiunit installations.

   (1) In multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable.

   (2) In multiunit premises in which wiring is installed, including major additions or rearrangements of wiring existing prior to that date, the telephone company may place the demarcation point at the minimum point of entry (MPOE). If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate such locations for each customer. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point 30 cm (12 in) from where the wiring enters the customer's premises, or as close thereto as practicable. At the time of installation, the telephone company shall fully inform the premises owner of its options and rights regarding the placement of the demarcation point or points and shall not attempt to unduly influence that decision for the purpose of obstructing competitive entry.

(3) In any multiunit premises where the demarcation point is not already at the MPOE, the telephone company must comply with a request from the premises owner to relocate the demarcation point to the MPOE. The telephone company must negotiate terms in good faith and complete the negotiations within forty-five days from said request. Premises owners may file complaints with the Commission for resolution of allegations of bad faith bargaining by telephone companies. *See* 47 U.S.C. Section 208; 47 C.F.R. Sections 1.720-1.736 (1999).

(4) The telephone company shall make available information on the location of the demarcation point within ten business days of a request from the premises owner. If the telephone company does not provide the information within that time, the premises owner may presume the demarcation point to be at the MPOE. Notwithstanding the provisions of 47 U.S.C. § 68.110(c), telephone companies must make this information freely available to the requesting premises owner.

(5) In multiunit premises with more than one customer, the premises owner may adopt a policy restricting a customer's access to wiring on the premises to only that wiring located in the customer's individual unit that serves only that particular customer.

Appendix C

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[391] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, released July 7, 1999 (*Competitive Networks NPRM*).[392] The Commission sought written public comment on the proposals in the *Competitive Networks NPRM*, including comment on the IRFA. The comments received are discussed below. In addition, an IRFA was incorporated in the Second Further Notice of Proposed Rulemaking in CC Docket No. 88-57 (*1997 Demarcation Point Order on Reconsideration*).[393] This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[394]

A. Need for, and Objectives of, the Rules

In this *Competitive Networks First Report and Order*,[395] the Commission furthers its ongoing efforts under the Telecommunications Act of 1996[396] to foster competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). MTEs include apartment buildings, office buildings, office parks, shopping centers, and manufactured housing communities. Based on the extensive record compiled in response to the *Competitive Networks NPRM*, the Commission adopts several measures to remove obstacles to competitive access in this important portion of the telecommunications market. Specifically the Commission: (1) prohibits carriers from entering into contracts in commercial buildings that prevent access by competing carriers; (2) clarifies its demarcation point rules[397] governing control of in-building wiring and facilitates exercise of building owner options regarding that wiring; (3) concludes that the access mandated by Section 224 of the Communications Act (the "Pole Attachments Act")[398] includes access to poles, ducts, conduits or rights-of-way that are owned

[391] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. Seq*., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[392] Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673, 12723-12734 (1999) (*Competitive Networks NPRM*).

[393] Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 88-57, 12 FCC Rcd 11897, 11934-39 (1997) (*1997 Demarcation Point Order on Reconsideration*).

[394] *See* 5 U.S.C. § 604.

[395] Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order*, WT Docket No. 99-217, FCC 00-366 (adopted Oct. 12, 2000) (*Competitive Networks First Report and Order).*

[396] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act" or the "Act").

[397] *See* 47 C.F.R. § 68.3.

[398] 47 U.S.C. § 224.

or controlled by a utility within MTEs; and (4) concludes that tenants in MTEs should have the ability to place antennas one meter or less in diameter used to receive or transmit any fixed wireless service in areas within their exclusive use or control, and prohibits most restrictions on their ability to do so by extending the Commission's rules governing Over-the-Air Reception Devices (OTARDs).[399]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

Comments in response to the *Competitive Networks NPRM* IRFA were filed by the Community Associations Institute, *et al.* (CAI),[400] the National Association of Counties, *et al.* (NACO),[401] the Real Access Alliance (RAA),[402] and the Office of Advocacy of the U.S. Small Business Administration (SBA).[403]

CAI states that community associations (*i.e.*, condominiums, cooperatives and planned communities) would incur undue expense and disruptions if the Commission provides telecommunications carriers so-called "forced access" to association property.[404] Similarly, RAA states that the Commission's "proposals will interfere with the ability of landlords to insure compliance with safety codes; provide for the safety of tenants, residents, and visitors; coordinate among tenants and service providers; and manage limited physical space."[405] CAI requests that community associations be exempted from any "forced access" rules adopted by the Commission,[406] while RAA requests that all affected "small businesses" be exempted.[407] RAA also states that the *Competitive Networks NPRM* should be withdrawn and reissued with a revised IRFA.[408]

The actions taken in the *Competitive Networks First Report and Order* today do not impair the authority of property owners or managers, including community associations, under state law to exclude telecommunications carriers from their property.[409] Rather, the *Competitive Networks First Report and Order* makes clear that "the right of access granted under Section 224 lies only against utilities,"[410] as

[399] *See* 47 C.F.R. § 1.4000.

[400] CAI IRFA Response (filed Aug. 27, 1999).

[401] NACO IRFA Comments (filed Aug. 27, 1999) and NACO Comments (filed Oct. 12, 1999).

[402] RAA Joint Regulatory Flexibility Act Comments (filed Aug. 27, 1999).

[403] SBA Reply Comments (filed Sept. 10, 1999).

[404] CAI IRFA Response at 6-14.

[405] RAA Joint Regulatory Flexibility Act Comments at 7.

[406] CAI IRFA Response at 16-17.

[407] RAA Joint Regulatory Flexibility Act Comments at 8.

[408] *Id.* at 8-9.

[409] *See Competitive Networks First Report and Order*, at para. 76 ("Section 224 was not intended to override whatever authority or control an MTE owners may otherwise retain under the terms of its agreements and state law.").

[410] *Id*.

defined in Section 224(a)(1) of the Act.[411] We also note that our authorization of small antennas for the provision of non-video services is limited to antennas situated on property under the control of a community association member rather than common property of the association, and therefore will not impose undue burdens or expense on community associations or small building owners.[412] CAI also states that prohibiting exclusive telecommunications contracts would adversely impact community associations.[413] The *Competitive Networks First Report and Order* does not prohibit such contracts for residential properties.[414] Accordingly, even assuming that such a prohibition would significantly impact community associations, no such impact will result from the actions taken in the *Competitive Networks First Report and Order* today.[415]

In its comments filed August 27, 1999, NACO states that the Commission's proposals "for building owners and managers represent the federalizing of what is currently a growing local market in site leasing."[416] We have deferred to the *Competitive Networks Further Notice of Proposed Rulemaking* (*FNPRM*) the issue of whether the Commission should impose a nondiscriminatory access requirement on building owners and managers.[417] NACO also states that "[l]ocal communities would be . . . deprived of a revenue stream that could reduce local tax burdens . . . ."[418] In later filed comments, NACO reiterates its concern over "the impact of lost right-of-way and tax revenues and the impact on infrastructure of loss of management control over the public right of way."[419] Although we sought comment on issues related to access to public rights-of-way and franchise taxes in the *Competitive Networks Notice of Inquiry*, we take no action in this regard today.

SBA states that the IRFA "inappropriately excludes small incumbent LECs from the definition of small business," and requests that the Commission reconcile its definition of small incumbent LEC with SBA's definition.[420] SBA states that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[421] In the *Competitive Networks*

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[411] 47 U.S.C. § 224(a)(1).

[412] *See Competitive Networks First Report and Order,* Section IV.E., *supra*.

[413] CAI IRFA Response at 14-15 (filed August 27, 1999).

[414] *Competitive Networks First Report and Order*, at para. 27.

[415] In Section V.A. of the *Competitive Networks FNPRM*, we seek comment on extending the prohibition on exclusive contracts to residential MTEs. Issues regarding the potential impact of such an action on small entities, including community associations, are discussed in the *Competitive Networks FNPRM* IRFA, *infra.*

[416] NACO IRFA Comments at 3 (filed Aug. 27, 1999).

[417] *Competitive Networks FNPRM,* Section V.A., *supra.*

[418] NACO IRFA Comments at 3 (filed Aug. 27, 1999).

[419] NACO Comments at 48 (filed Oct. 12, 1999).

[420] SBA Reply Comments at 3-4.

[421] *Id.* at 4. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g.*, Implementation of the Local Competition Provisions of the (continued….)

NPRM IRFA, we determined that, for the purposes of the IRFA, we would use the term "small incumbent LECs" to refer to incumbent LECs that might be defined by the SBA as small business concerns,[422] and would explicitly include small incumbent LECs in the analysis. In this present FRFA, *infra*, we have included small incumbent LECs within the definition of small business.

SBA and RAA separately state that the IRFA did not comply with the RFA. NACO concurs with RAA's comments in this regard. SBA states that "[t]he Commission does not adequately discuss any significant economic impact its access proposal may have on small business nor does it propose sufficient alternatives that might minimize this impact, as is required by the RFA."[423] The Commission's access proposal included two key elements: (1) a requirement that building owners provide reasonable and nondiscriminatory access to their premises; and (2) a requirement, under Section 224 of the Act, that utilities provide telecommunications carriers access to their poles, ducts, conducts, and rights-of-way within buildings. As noted above, we are deferring to the *Competitive Networks FNPRM* the issue of whether and, if so, the extent to which, the Commission should impose a nondiscriminatory access requirement on building owners.[424] With respect to the proposed implementation of Section 224, in the *Competitive Networks NPRM*, we inquired:

> whether an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners, *including small building owners*, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties.[425]

After a thorough review and analysis of the comments filed on our Section 224 proposal, we have determined that a broad definition of utility ownership or control would not best serve the public interest. Rather, in order to minimize the impact of our proposal on utilities (and the buildings that they serve) that must provide access to telecommunications carriers pursuant to Section 224, we find that "state law determines 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."[426] The *Competitive Networks First Report and Order*, moreover, in no way impairs the authority under state law of building owners, including small building owners, to exclude telecommunications carriers from their property.[427]

(Continued from previous page)
Telecommunications Act of 1996, CC Docket, 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

[422] *Competitive Networks NPRM* IRFA, 14 FCC Rcd at 12726, ¶ 8. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." 5 U.S.C. § 601(3).

[423] SBA Reply Comments at 4 (filed Sept. 10, 1999).

[424] *Competitive Networks FNPRM*, Section V.A., *supra*. In the *Competitive Networks NPRM* IRFA, we inquired "whether we should limit the scope of any building owner obligation . . . [and noted] that a potential rule could exempt buildings that housed fewer than a certain number of tenants or are under a certain size." *Competitive Networks NPRM* IRFA, 14 FCC Rcd at 12733, ¶ 31.

[425] *Competitive Networks NPRM*, 14 FCC Rcd at 12697, ¶ 47.

[426] *Competitive Networks First Report and Order*, at para. 87.

[427] *See id.*

In addition, we note that in the *Competitive Networks NPRM* IRFA we discussed certain alternatives that might have lessened the possible economic input on small entities. We stated:

> [W]ith respect to our Section 224 proposal, we seek comment on whether an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners, including small building owners, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties. In addition, with respect to our inquiry into building owner obligations, we seek comment on whether we should limit the scope of any building owner obligation in order to avoid imposing unreasonable regulatory burden on building owners, and we suggest that a potential rule could exempt buildings that house fewer than a certain number of tenants or are under a certain size.[428]

This discussion of alternatives included cross-references to the text of the *Competitive Networks NPRM*, to assist the reader. We note that the final rules that we adopt here will benefit small telecommunications carriers by fostering facilities-based competition. We also anticipate that our final rules will benefit small building owners and their tenants, by ensuring that utilities cannot block access to their rights-of-way.

SBA states that, while we suggested some alternatives to assist small entities in the IRFA, on the whole our efforts were "inadequate." SBA states that a broader analysis was required, directed not only toward the alternatives described in the above paragraph but also toward alternatives for "small LECs and the many other small businesses listed in the IRFA."[429] We find that we have met the requirements of the RFA. We chose reasonable alternatives to discuss, and did not discuss alternatives for every affected entity where it would not have seemed reasonable or, perhaps, where it simply did not occur to us. We believe that the RFA requires a good faith effort on our part, but it does not require a discussion of a minimum of four alternatives[430] for each of the possibly affected entities. As noted above, we specifically discussed one definitional issue and one possible exception, to assist small entities. We also sought comment from small entities on other issues throughout the *Competitive Networks NPRM* and IRFA. We appreciate the comments supplied by SBA and others as a result, and have considered them in the *Competitive Networks First Report and* Order and this IRFA.

Finally, RAA contends that the IRFA provided inadequate notice as a matter of law.[431] We note that the IRFA was sufficient to generate comments from representatives of the small business community and that the record demonstrates that the IRFA met the objectives of the RFA. Delaying issuance of final rules at this time would not, therefore, advance those objectives. The IRFA provided sufficient information so that the public could react to the Commission's proposal in the *Competitive Networks NPRM* in an informed manner. We note that, pursuant to the Administrative Procedure Act,[432] the Commission must provide ample opportunity for the public to comment on proposed rules. In this proceeding, the Commission provided a 37-day filing period or initial comments, followed by a 21-day

[428] *Competitive Networks NPRM* IRFA, 14 FCC Rcd at 12733, ¶ 31 (internal citations omitted).

[429] SBA Reply Comments at 2.

[430] *See id.* at 5.

[431] RAA Joint Regulatory Flexibility Act Comments at 3-5.

[432] *See* 5 U.S.C. § 553.

period for reply comments. The public thus had nearly two months to provide comments. In addition, numerous parties filed *ex parte* statements with the Commission during the course of the 13-month period after the formal comment period closed. More than 1000 comments and other submissions were filed in this proceeding. Many of the commenters, including small businesses, enthusiastically endorsed the proposals in the *Competitive Networks NPRM*.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[433] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[434] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[435] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[436] For many of the entities described below, we utilize SBA definitions of small business categories, which are based on Standard Industrial Classification ("SIC") codes.

We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[437] The SBA contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[438] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

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[433] 5 U.S.C. § 605(b).

[434] 5 U.S.C. § 601(6).

[435] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[436] Small Business Act, 15 U.S.C. § 632.

[437] 5 U.S.C. § 601(3).

[438] SBA Reply Comments at 3-4. *See also* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, *to* William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. §121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

This *Competitive Networks First Report and Order* adopts rule changes that impose requirements on local exchange carriers and other utilities, building owners and managers, neighborhood associations, and small governmental jurisdictions, as discussed below.

a. Local Exchange Carriers

The legal interpretation of Section 224 set forth today, and the rule changes adopted today regarding exclusive contracts, demarcation point, and an extension of the OTARD rule will affect small LECs. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[439] The SBA has defined establishments engaged in providing "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[440] According to recent *Telecommunications Industry Revenue* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.[441] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,348 providers of local exchange service are small entities or small incumbent LECs that may be affected by the rules and policies adopted today.

b. Other Utilities

The legal interpretation of Section 224 set forth today will affect utilities other than LECs. Section 224 defines a "utility" 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. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state." The Commission anticipates that, to the extent its legal interpretation of Section 224 affects non-LEC utilities, the effect would be concentrated on electric utilities.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.[442] The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues

[439] *See* 13 C.F.R. § 121.201, SIC Code 4813.

[440] 13 C.F.R. § 121.201. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987) (*1987 SIC Manual*).

[441] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000)

[442] *1987 SIC Manual.*

do not exceed five million dollars.[443] The Census Bureau reports that 447 of the 1,379 firms listed had total revenues below five million dollars in 1992.[444]

Electric and Other Services Combined (SIC 4931). The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[445] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[446] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars in 1992.[447]

Combination Utilities, Not Elsewhere Classified (SIC 4939). The SBA defines this type of utility as providing a combination of electric, gas, and other services that are not otherwise classified.[448] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues do not exceed five million dollars.[449] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars in 1992.[450]

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

Natural Gas Transmission (SIC 4922). The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[451] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues do not exceed five million dollars.[452] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars in 1992.[453]

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[443] 13 C.F.R. § 121.201.

[444] U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA) (*1992 Economic Census Industry and Enterprise Receipts Size Report*).

[445] *1987 SIC Manual.*

[446] 13 C.F.R. § 121.201.

[447] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[448] *1987 SIC Manual.*

[449] 13 C.F.R. § 121.201.

[450] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[451] *1987 SIC Manual.*

[452] 13 C.F.R. § 121.201.

[453] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

Natural Gas Transmission and Distribution (SIC 4923). The SBA has classified this type of entity as a utility that transmits and distributes natural gas for sale.[454] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues do not exceed five million dollars.[455] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.[456]

Natural Gas Distribution (SIC 4924). The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[457] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.[458] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.[459]

Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925). The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.[460] These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.[461] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.[462]

Gas and Other Services Combined (SIC 4932). The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[463] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[464] The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars in 1992.[465]

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[454] *1987 SIC Manual.*

[455] 13 C.F.R. § 121.201.

[456] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[457] *1987 SIC Manual.*

[458] 13 C.F.R. § 121.201.

[459] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[460] *1987 SIC Manual.*

[461] 13 C.F.R. § 121.201.

[462] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[463] *1987 SIC Manual.*

[464] 13 C.F.R. § 121.201.

[465] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

(3) Water Supply (SIC 4941)

The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[466] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues do not exceed five million dollars.[467] The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars in 1992.[468]

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[469] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[470] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars in 1992.[471]

Refuse Systems (SIC 4953). The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[472] The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues do not exceed six million dollars.[473] The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars in 1992.[474]

Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.[475] The Census Bureau reports that a total of 1,214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.[476] The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.[477]

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[466] *1987 SIC Manual.*

[467] 13 C.F.R. § 121.201.

[468] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[469] *1987 SIC Manual.*

[470] 13 C.F.R. § 121.201.

[471] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[472] *1987 SIC Manual.*

[473] 13 C.F.R. § 121.201.

[474] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[475] *1987 SIC Manual.*

[476] 13 C.F.R. § 121.201.

[477] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

(5) Steam and Air Conditioning Supply (SIC 4961)

The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[478] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.[479] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.[480]

(6) Irrigation Systems (SIC 4971)

The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[481] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues do not exceed five million dollars.[482] The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars in 1992.[483]

c. Building Owners and Managers

The rule changes adopted today will affect multiple dwelling unit operators and real estate agents and managers.

(1) Multiple Dwelling Unit Operators (SIC 6512, SIC 6513, SIC 6514)

The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating $5 million or less in revenue annually.[484] According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[485] Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than $5 million in revenue that were in operation for at least one

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[478] 1*987 SIC Manual.*

[479] 13 C.F.R. § 121.201.

[480] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[481] *1987 SIC Manual.*

[482] 13 C.F.R. § 121.201.

[483] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[484] 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

[485] 1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration) (*1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*).

year at the end of 1992.[486] The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

(2) Real Estate Agents and Managers (SIC 6531)

The SBA defines real estate agents and managers as establishments primarily engaged in renting, buying, selling, managing, and appraising real estate for others.[487] According to SBA's definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.[488]

d. Neighborhood Associations

The extension of the OTARD rules adopted today will affect neighborhood associations. The Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." [489] This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there are 205,000 such associations.[490]

e. Municipalities

The extension of the OTARD rules adopted today will affect neighborhood associations. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."[491] As of 1992, there were approximately 85,006 governmental entities in the United States.[492] This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566, or 96%, have populations of fewer than 50,000.493 The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,606 (96%) are small entities.

f. Cable Services or Systems

[486] *1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report,* Table 4, SIC 6513.

[487] *1987 SIC Manual.*

[488] 13 C.F.R. § 121.201.

[489] *See* 5 U.S.C. § 601(4).

[490] CAI IRFA Response at 5 (filed Aug. 27, 1999).

[491] 5 U.S.C. § 601(5).

[492] U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

[493] *Id.*

The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[494] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[495]

The Commission has developed its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[496] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[497] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[498] The Commission has determined that there are 66,690,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 666,900 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[499] Based on available data, we find that the number of cable operators serving 666,900 subscribers or less totals 1,450.[500] We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000,[501] and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

g. International Services

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[494] 13 C.F.R. § 121.201, SIC code 4841.

[495] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[496] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[497] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[498] 47 U.S.C. § 543(m)(2).

[499] 47 C.F.R. § 76.1403(b).

[500] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[501] We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to Section 76.1403(b) of the Commission's Rules. *See* 47 CFR § 76.1403(d).

The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is generally the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC).[502] This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts.[503] According to the Census Bureau, there were a total of 848 communications services providers, NEC, in operation in 1992, and a total of 775 had annual receipts of less than $9.999 million.[504] The Census report does not provide more precise data.

International Broadcast Stations. Commission records show that there are 20 international broadcast station licensees. We do not request or collect annual revenue information, and thus are unable to estimate the number of international broadcast licensees that would constitute a small business under the SBA definition. However, the Commission estimates that only six international broadcast stations are subject to regulatory fee payments.

International Public Fixed Radio (Public and Control Stations). There are 3 licensees in this service subject to payment of regulatory fees. We do not request or collect annual revenue information, and thus are unable to estimate the number of international broadcast licensees that would constitute a small business under the SBA definition.

Fixed Satellite Transmit/Receive Earth Stations. There are approximately 2,679 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request or collect annual revenue information, and thus are unable to estimate the number of the earth stations that would constitute a small business under the SBA definition.

Fixed Satellite Small Transmit/Receive Earth Stations. There are approximately 2,679 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. We do not request or collect annual revenue information, and thus are unable to estimate the number of fixed satellite transmit/receive earth stations that would constitute a small business under the SBA definition.

Mobile Satellite Earth Stations. There are 11 licensees. We do not request or collect annual revenue information, and thus are unable to estimate the number of mobile satellite earth stations that would constitute a small business under the SBA definition.

Radio Determination Satellite Earth Stations**.** There are four licensees. We do not request or collect annual revenue information, and thus are unable to estimate the number of radio determination satellite earth stations that would constitute a small business under the SBA definition.

Direct Broadcast Satellites. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[505] This definition provides

[502] An exception is the Direct Broadcast Satellite (DBS) Service, *infra*.

[503] 13 C.F.R. § 120.121, SIC code 4899.

[504] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4899 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[505] 13 C.F.R. § 120.121, SIC code 4841.

that a small entity is one with $11.0 million or less in annual receipts.[506] As of December 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that would be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, there are several new entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as small businesses, if independently owned and operated.

Fixed Satellite Very Small Aperture Terminal (VSAT) Systems**.** These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single "blanket" application may be filed for a specified number of small antennas and one or more hub stations. The Commission has processed 377 applications. We do not request nor collect annual revenue information, and thus are unable to estimate the number of VSAT systems that would constitute a small business under the SBA definition.

h. Multipoint Distribution Service (MDS).

MDS involves a variety of transmitters, which are used to relay programming to the home or office, similar to that provided by cable television systems.[507] In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues for the three preceding years not in excess of $40 million.[508] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[509] These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.[510] Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.[511] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business. There are 2,050 MDS stations currently licensed. Thus, we conclude that there are 1,634 MDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

i. Wireless Services

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues

[506] 13 C.F.R. § 121.201, SIC code 4841.

[507] For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

[508] 47 C.F.R. § 1.2110 (a)(1).

[509] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

[510] 47 U.S.C. § 309(j).

[511] *Id.* A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. *See* Rand McNally *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

of $40 million or less in the three previous calendar years.[512] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[513] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[514] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[515] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of a small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[516] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[517] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent Trends in Telephone Service data, 808 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio Telephone (SMR) service, which are placed together in the data.[518] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 808 or fewer small cellular service carriers that may be affected by any regulations adopted pursuant to this proceeding.

Fixed Microwave Services. Microwave services include common carrier,[519] private-operational fixed,[520] and broadcast auxiliary radio services.[521] At present, there are approximately 22,015 common

[512] *See* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824, 7850-52, ¶¶ 57-60 (1996) (*Cross Ownership Report & Order*); *see also* 47 C.F.R. § 24.720(b).

[513] *Cross Ownership Report & Order*, 11 FCC Rcd at 7852, ¶ 60.

[514] *See*, *e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84, ¶¶ 114-20 (1994).

[515] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997).

[516] 13 C.F.R. § 121.201, SIC code 4812.

[517] *1992 Census*, Series UC92-S-1, at Table 5, SIC code 4812.

[518] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

[519] 47 C.F.R. §§ 101 *et seq*. (formerly, part 21 of the Commission's Rules).

carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e., an entity with no more than 1,500 persons.[522] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

Rural Radiotelephone Service. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[523] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[524] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[525] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Competitive Networks First Report and Order* requires incumbent LECs to respond promptly to requests by building owners to identify the location of the demarcation point. The *Competitive Networks First Report and Order* holds that if an incumbent LEC fails to produce this information within ten business days of the request, the premises owner may presume the demarcation point to be located at the minimum point of entry (MPOE).[526] The *Competitive Networks First Report and Order* further requires that where LECs do not establish a practice of placing the demarcation point at the MPOE, they fully inform building owners, at the time of installation, of their options regarding placement.

The *Competitive Networks First Report and Order* holds that in order to further competition, a request by a property owner to relocate the demarcation point to the MPOE must be addressed by an incumbent LEC in a reasonably timely and fair manner, so as not to unduly delay or hinder competitive

(Continued from previous page)

[520] Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[521] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. §§ 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[522] 13 C.F.R. § 121.201, SIC 4812.

[523] The service is defined in Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[524] BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[525] 13 C.F.R. § 121.201, SIC code 4812.

[526] The minimum point of entry is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3 (definition of demarcation point).

LEC access. The *Competitive Networks First Report and Order* therefore directs incumbent LECs to conclude negotiations with requesting building owners within 45 days of such a request. If the parties are unable to come to reasonably agreeable terms, they must submit to binding arbitration to settle the dispute.[527]

In addition, the *Competitive Networks First Report and Order* requires, as a condition of invoking protection under the OTARD rule from government, landlord and association restrictions, that licensees ensure that subscriber antennas be labeled to give notice of potential radiofrequency safety hazards of antennas used for fixed wireless transmissions. Labeling information should include minimum separation distances required between users and radiating antennas to meet the Commission's radiofrequency exposure guidelines. Labels should also include reference to the Commission's applicable radiofrequency exposure guidelines. In addition, the instruction manuals and other information accompanying subscriber transceivers should include a full explanation of the labels, as well as a reference to the applicable Commission radiofrequency exposure guidelines.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

The rule changes adopted in this *Competitive Networks First Report and Order* are intended to promote competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in MTEs. The actions taken today will benefit consumers, telecommunications carriers, and building owners, including small entities.

In the *Competitive Networks NPRM*, we sought comment on seven proposals: (1) the tentative conclusion that, to the extent that LECs or other utilities own or control rooftop and other rights-of-way or riser conduit in MTEs, Section 224 of the Act[528] requires that they permit competing providers access to such rights-of-way or conduit under just, reasonable and nondiscriminatory rates, terms, and conditions; (2) whether we should require incumbent LECs to make available to any requesting telecommunications carrier unbundled access to riser cable and wiring that they control within MTEs, subject to the Commission's future interpretation of the "necessary" and "impair" standards of Section 251 of the Act;[529] (3) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all such providers on a nondiscriminatory basis; (4) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; (5) whether we should modify our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the landowner on multiple unit premises; (6) whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (7) whether we should adopt rules similar to those adopted in the video context under Section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under Section 207. After careful

[527] We note that our cable inside wiring rules contain similar provisions for transferring ownership from the cable operator to the property owner. *See* 47 C.F.R. §§ 76.804(a)(2)-(3) & 76.804(b)(2).

[528] 47 U.S.C. § 224.

[529] 47 U.S.C. § 251.

review and analysis of the voluminous record developed in response to the *Competitive Networks NPRM*, we take action on four proposals today.

First, we prohibit telecommunications service providers from entering into exclusive contracts to serve commercial buildings. In the *Competitive Networks NPRM*, we solicited comment on this proposal as an alternative to our proposal to require building owners to provide nondiscriminatory access to their premises to telecommunications providers.[530] As noted above, we received comment opposed to this second alternative. We have not adopted the latter proposal in the *Competitive Networks First Report and Order*; however, we do seek additional comment on it in the *Competitive Networks FNPRM*.[531] In the *Competitive Networks NPRM*, we also inquired whether we should abrogate existing exclusive contracts.[532] Based on the record in this proceeding, we have determined that abrogating exclusive contracts may interfere with the investment-backed expectations of the parties to such contracts, including small entities, and thus we defer consideration of this issue to the *Competitive Networks FNPRM*.[533] We also find that the record is not sufficiently developed to determine whether the prohibition on exclusive contracts should apply to residential MTEs,[534] and therefore defer this issue to the *Competitive Networks FNPRM*.[535] We note that there was widespread support in the record for prohibiting future exclusive contracts in commercial MTEs.[536] We also note our expectation that small entities, including small telecommunications carriers and small building owners, will benefit from the competitive telecommunications environment that the ban on exclusive contracts will foster.

Second, with respect to modifying the Commission's demarcation point rules, we sought comment on, *inter alia*, establishing a uniform demarcation point at the minimum point of entry (MPOE) to multiple unit premises.[537] We have weighed the evidence in the record concerning this proposal carefully. We find that the potential financial burden of moving the demarcation point to the MPOE and the fact that it may hinder deployment of facilities by carriers, including small entities, which utilize unbundled local loops outweigh the potential benefits of adopting this proposal.[538] In the alternative, we take the following actions to promote access to telecommunications wiring by competing carriers, including small entities: (1) we clarify that the Commission's demarcation point rules govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these

[530] *Competitive Networks NPRM*, 14 FCC Rcd at 12707, ¶ 64.

[531] *See Competitive Networks FNPRM*, Section V.A., *supra*.

[532] *Competitive Networks NPRM*, 14 FCC Rcd at 12707, ¶ 64.

[533] *See Competitive Networks First Report and Order*, at para. 36, and *Competitive Networks FNPRM*, Section V.A., *supra*.

[534] *See Competitive Networks First Report and Order*, at para. 33.

[535] *See Competitive Networks FNPRM*, Section V.B., *supra*.

[536] *See, e.g.*, AT&T Comments at 26; Qwest Comments at 11; SBC Comments at 7; and Teligent Comments at 17-19.

[537] *Competitive Networks NPRM*,14 FCC Rcd at ¶¶ 67 & 68. The minimum point of entry is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3 (definition of demarcation point).

[538] *Competitive Networks First Report and Order*, at paras. 52-53.

facilities for purposes of installation and maintenance; (2) we require that incumbent LECs conclude negotiations with building owners to relocate the demarcation point to the MPOE within 45 days of the building owner's request and submit to binding arbitration if the parties are unable to agree upon the terms of relocation; and (3) we require that incumbent LECs fulfill their duty to disclose the location of the demarcation point, where it is not located at the MPOE, within ten business days of a building owner's request.[539] Collectively, these actions "will substantially reduce the potential for incumbent LECs to obstruct competitive access to MTEs," [540] while imposing only minimal financial burdens. We expect that that many smaller carriers seeking competitive entry will benefit directly from these actions.

Third, we have adopted our proposal under Section 224 of the Act[541] to require LECs and other utilities which own or control poles, ducts, conduits and other rights-of-way in MTEs, to permit competing providers access to such facilities under just, reasonable and nondiscriminatory rates, terms, and conditions. We anticipate that this action will benefit many small entities, including property owners and managers. We emphasize that our proposal as adopted will not impair the authority under state law, of property owners and managers to exclude telecommunications carriers from their property.[542] Rather, building owners and managers, and their tenants, will benefit from our proposal because utilities, as defined in Section 224(a)(1) of the Act,[543] will no longer have the unfettered ability to exclude telecommunications carriers from their poles, ducts, conduits, and defined rights-of way in MTEs. Telecommunications carriers, including small entities, will benefit from increased access to MTEs. We note that, although it did not file comments on the IRFA, the National League of Cities expressed concern that our proposed implementation of Section 224 within buildings may preempt implementation or enforcement of state safety-related codes.[544] As we make clear in the *Competitive Networks First Report and Order*, "our actions taken today are not intended to preempt, or impede, in any way the implementation or enforcement of state safety-related codes."[545]

Fourth, we are amending Section 1.4000 of our rules (the "OTARD rule")[546] to protect the ability of customers to place antennas used for transmitting and receiving all forms of fixed wireless transmissions. Section 1.4000 currently prohibits any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.

Currently, Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, including direct-to-home

[539] *See Competitive Networks First Report and Order,* at paras. 54-57.

[540] *Id.*, at para. 58.

[541] 47 U.S.C. § 224.

[542] *See Competitive Networks First Report and Order,* at para. 87.

[543] 47 U.S.C. § 224(a)(1).

[544] National League of Cities, *et al.* Petition for EIS at 21-24.

[545] *Competitive Networks First Report and Order*, at para. 84.

[546] 47 C.F.R. § 1.4000.

satellite services, that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, and local multipoint distribution services, and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna receiving any video programming described in the section. For the purposes of Section 1.4000, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it unreasonably delays or prevents installation, maintenance or use, unreasonably increases the cost of installation, maintenance or use, or precludes reception of an acceptable quality signal. Section 1.4000 also includes provisions for waiver and declaratory ruling proceedings.

There is widespread support in the record for an extension of the OTARD rule to include all fixed wireless services.[547] Moreover, we believe that extending the OTARD rule to include all fixed wireless services is essential to meeting our obligation to promote the deployment of advanced telecommunications capability under Section 706(a) of the 1996 Act.[548] To the extent a restriction unreasonably limits a customer's ability to place antennas to receive communications services, that restriction may impede the development of advanced, competitive services.

The *Competitive Networks First Report and Order* underscores the policy rationale for amending the OTARD rule:

> [D]istinguishing in the protection afforded based on the services provided through an antenna produces irrational results. Precisely the same antennas may be used for video services, telecommunications, and internet access. Indeed, sometimes a single company offers different packages of services using the same type of antennas. Under our current rules, a customer ordering a telecommunications/video package would enjoy protection that a customer ordering a telecommunications-only package from the same company using the same antenna would not. Thus, we conclude that the current rules potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer.[549]

We do not anticipate that today's rule change will have a significant adverse economic impact on small entities. To the contrary, we expect that small communications carriers that previously were unable to serve customers in MTEs may now be able to do so as a result of our rule change. However, we emphasize that "the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops."[550] Rather our extension of the OTARD rule to wireless services "applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest."[551]

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[547] *See e.g.*, AT&T Comments; PCIA Comments; Fixed Wireless Communications Coalition Comments; and Teligent Comments.

[548] 47 U.S.C. § 157 note.

[549] *Competitive Networks First Report and Order*, at para. 98.

[550] *Id.*, at para. 124.

[551] *Id.*, at para. 100.

We also note that any impact on small entities is mitigated by our preservation of the exceptions to the OTARD rule permitting certain restrictions for safety and historic preservation purposes. Restrictions that would otherwise be forbidden are permitted if they are necessary to achieve certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the OTARD rule. Finally, to address any potential concerns regarding transmitting antennas, we have determined that "[t]o the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition of such requirements under the OTARD rule will not apply."[552]

Report to Congress: The Commission will send a copy of the *Competitive Networks First Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Competitive Networks First Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Competitive Networks First Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

[552] *Id.*, at para. 119.

Appendix D

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[553] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Competitive Networks Further Notice of Proposed Rulemaking (FNPRM)*, WT Docket No. 99-217. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the *Competitive Networks FNPRM* provided above in paragraph 179 of the *Competitive Networks FNPRM***.** The Commission will send a copy of the *Competitive Networks FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[554] In addition, the *Competitive Networks FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[555]

A. Need for, and Objectives of, the Rules

In the *Competitive Networks FNPRM*, the Commission seeks comment on a number of proposals to further its ongoing efforts under the Telecommunications Act of 1996[556] to foster competition in local communications markets. Specifically, we seek comment on measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). MTEs include apartment and office buildings, office parks, shopping centers, and manufactured housing communities. Each of the proposals in the *Competitive Networks FNPRM* is intended to benefit telecommunications carriers, building owners and their tenants by creating a more competitive MTE telecommunications service environment.

The *Competitive Networks FNPRM* seeks comment on: (1) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all providers on a nondiscriminatory basis; (2) whether we should prohibit local exchange carriers from serving buildings that do not afford nondiscriminatory access to all telecommunications service providers; (3) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners; (4) whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs; (5) whether we should phase out exclusive access provisions by establishing a future termination date for such provisions; (6) whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out; (7) whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission; (8) whether the Commission's rules governing access to cable

[553] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[554] *See* 5 U.S.C. § 603(a).

[555] *See id*.

[556] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act" or the "Act").

home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (9) the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[557]

B. Legal Basis

The potential actions on which comment is sought in this *Competitive Networks FNPRM* would be authorized under Sections 1, 2(a), 4(i), 201(b), 202(a), 205(a), 224(d), 224(e), 303(r), and 411(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 201(b), 202(a), 205(a), 224(d), 224(e), 303(r), and 411(a), and Sections 1.411 and 1.412 of the Commission's Rules, 47 C.F.R. §§ 1.411 and 1.412.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

The RFA requires that an IRFA be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[558] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[559] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[560] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[561] For many of the entities described below, we utilize SBA definitions of small business categories, which are based on Standard Industrial Classification ("SIC") codes.

We have included small incumbent LECs in this present IRFA. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[562] The SBA contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[563] We have therefore

[557] 47 U.S.C. § 224.

[558] 5 U.S.C. § 605(b).

[559] 5 U.S.C. § 601(6).

[560] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[561] Small Business Act, 15 U.S.C. § 632.

[562] 5 U.S.C. § 601(3).

[563] SBA Reply Comments at 3-4 (filed Sept. 10, 1999). *See also* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, *to* William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business (continued….)

included small incumbent LECs in this IRFA, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

This *Competitive Networks FNPRM* proposes rule changes that, if adopted, would impose requirements on local exchange carriers and other utilities, building owners and managers, neighborhood associations, and small governmental jurisdictions, as discussed below.

a. Local Exchange Carriers

Many of the potential rule changes on which comment is sought in this *Competitive Networks FNPRM*, if adopted, would affect small LECs. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[564] The SBA has defined establishments engaged in providing "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[565] According to recent *Telecommunications Industry Revenue* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.[566] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,348 providers of local exchange service are small entities that may be affected by the potential actions discussed in this *Further Notice of Proposed Rulemaking*, if adopted.

b. Other Utilities

The proposals in the *Competitive Networks FNPRM* with respect to the application of Section 224 of the Act, if adopted, would affect utilities other than LECs. Section 224 defines a "utility" 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. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state." The Commission anticipates that, to the extent its legal interpretation of Section 224 affects non-LEC utilities, the effect would be concentrated on electric utilities.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

(Continued from previous page)
concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

[564] *See* 13 C.F.R. § 121.201, SIC Code 4813.

[565] 13 C.F.R. § 121.201. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987) (*1987 SIC Manual*).

[566] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000)

Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.[567] The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues do not exceed five million dollars.[568] The Census Bureau reports that 447 of the 1,379 firms listed had total revenues below five million dollars in 1992.[569]

Electric and Other Services Combined (SIC 4931). The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[570] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[571] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars in 1992.[572]

Combination Utilities, Not Elsewhere Classified (SIC 4939). The SBA defines this type of utility as providing a combination of electric, gas, and other services that are not otherwise classified.[573] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues do not exceed five million dollars.[574] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars in 1992.[575]

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

Natural Gas Transmission (SIC 4922). The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[576] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues do not exceed five million

[567] *1987 SIC Manual.*

[568] 13 C.F.R. § 121.201.

[569] U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA) (*1992 Economic Census Industry and Enterprise Receipts Size Report*).

[570] *1987 SIC Manual.*

[571] 13 C.F.R. § 121.201.

[572] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[573] *1987 SIC Manual.*

[574] 13 C.F.R. § 121.201.

[575] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[576] *1987 SIC Manual.*

dollars.[577] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars in 1992.[578]

Natural Gas Transmission and Distribution (SIC 4923). The SBA has classified this type of entity as a utility that transmits and distributes natural gas for sale.[579] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues do not exceed five million dollars.[580] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.[581]

Natural Gas Distribution (SIC 4924). The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[582] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.[583] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.[584]

Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925). The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.[585] These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.[586] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.[587]

Gas and Other Services Combined (SIC 4932). The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[588] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do not exceed

[577] 13 C.F.R. § 121.201.

[578] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[579] *1987 SIC Manual.*

[580] 13 C.F.R. § 121.201.

[581] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[582] *1987 SIC Manual.*

[583] 13 C.F.R. § 121.201.

[584] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[585] *1987 SIC Manual.*

[586] 13 C.F.R. § 121.201.

[587] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[588] *1987 SIC Manual.*

five million dollars.[589] The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars in 1992.[590]

(3) Water Supply (SIC 4941)

The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[591] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues do not exceed five million dollars.[592] The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars in 1992.[593]

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[594] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[595] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars in 1992.[596]

Refuse Systems (SIC 4953). The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[597] The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues do not exceed six million dollars.[598] The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars in 1992.[599]

Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.[600] The Census Bureau reports that a total of 1,214 such firms were in

[589] 13 C.F.R. § 121.201.

[590] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[591] *1987 SIC Manual.*

[592] 13 C.F.R. § 121.201.

[593] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[594] *1987 SIC Manual.*

[595] 13 C.F.R. § 121.201.

[596] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[597] *1987 SIC Manual.*

[598] 13 C.F.R. § 121.201.

[599] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[600] *1987 SIC Manual.*

operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.[601] The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.[602]

(5) Steam and Air Conditioning Supply (SIC 4961)

The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[603] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.[604] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.[605]

(6) Irrigation Systems (SIC 4971)

The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[606] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues do not exceed five million dollars.[607] The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars in 1992.[608]

c. Building Owners and Managers

Our proposals in the this *Further Notice of Proposed Rulemaking* regarding the scope of in-building rights-of way under Section 224 of the Act, termination or phasing out of exclusive contracts between commercial MTEs and telecommunications carriers, and nondiscriminatory access to MTEs, if adopted, would affect multiple dwelling unit operators and real estate agents and managers.

(1) Multiple Dwelling Unit Operators (SIC 6512, SIC 6513, SIC 6514)

The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating $5 million or less in revenue annually.[609] According to the Census Bureau, there were 26,960

[601] 13 C.F.R. § 121.201.

[602] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[603] *1987 SIC Manual.*

[604] 13 C.F.R. § 121.201.

[605] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[606] *1987 SIC Manual.*

[607] 13 C.F.R. § 121.201.

[608] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[609] 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

operators of nonresidential buildings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[610] Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[611] The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

(2) Real Estate Agents and Managers (SIC 6531)

The SBA defines real estate agents and managers as establishments primarily engaged in renting, buying, selling, managing, and appraising real estate for others.[612] According to SBA's definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.[613]

d. Neighborhood Associations

Section 601(4) of the Regulatory Flexibility Act, 5 U.S.C. § 601(4), defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. We note that these groups would be indirectly affected by our proposals. The Community Associations Institute estimates that there are 205,000 such associations.[614]

e. Municipalities

Our proposals in the this *Competitive Networks FNPRM* regarding the scope of in-building rights-of way under Section 224 of the Act, termination or phasing out of exclusive contracts between commercial MTEs and telecommunications carriers, and nondiscriminatory access to MTEs would, if adopted, affect municipalities. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."615 As of 1992, there were approximately 85,006 governmental entities in the United States.616 This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566, or 96%, have populations of fewer than 50,000.617 The Census

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[610] 1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration) (*1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*).

[611] *1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*, Table 4, SIC 6513.

[612] *1987 SIC Manual.*

[613] 13 C.F.R. § 121.201.

[614] CAI Response to *Competitive Networks NPRM* IRFA at 5 (filed Aug. 27, 1999).

[615] 5 U.S.C. § 601(5).

[616] U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

[617] *Id.*

Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,606 (96%) are small entities.

f. Cable Services or Systems

Our proposals in the this *Competitive Networks FNPRM* regarding the scope of in-building rights-of way under Section 224 of the Act, nondiscriminatory access to MTEs, and extension of the cable home run wiring rule to telecommunications carriers, would, if adopted, affect owners and operators of cable systems. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[618] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[619]

The Commission has developed its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[620] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[621] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[622] The Commission has determined that there are 66,690,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 666,900 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[623] Based on available data, we find that the number of cable operators serving 666,900 subscribers or less totals 1,450.[624] We do not request nor do we collect information concerning whether cable system operators

[618] 13 C.F.R. § 121.201, SIC code 4841.

[619] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[620] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[621] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[622] 47 U.S.C. § 543(m)(2).

[623] 47 C.F.R. § 76.1403(b).

[624] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

are affiliated with entities whose gross annual revenues exceed $250,000,000,[625] and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

g. Multipoint Distribution Service (MDS).

This service involves a variety of transmitters, which are used to relay programming to the home or office, similar to that provided by cable television systems.[626] In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues for the three preceding years not in excess of $40 million.[627] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[628] These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.[629] Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.[630] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business. There are 2,050 MDS stations currently licensed. Thus, we conclude that there are 1,634 MDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

h. Wireless Services

Many of the proposals in this *Competitive Networks FNPRM*, if enacted, could affect providers of wireless services regulated by the Commission.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. [631] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has

[625] We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.1403(b) of the Commission's rules. *See* 47 C.F.R. § 76.1403(d).

[626] For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

[627] 47 C.F.R. § 1.2110 (a)(1).

[628] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

[629] 47 U.S.C. § 309(j).

[630] *Id*. A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. *See* Rand McNally *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

[631] *See* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824, 7850-52, ¶¶ 57-60 (1996) (*Cross Ownership Report & Order*); *see also* 47 C.F.R. § 24.720(b).

average gross revenues of not more than $15 million for the preceding three calendar years.[632] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[633] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[634] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of a small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[635] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[636] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent Trends in Telephone Service data, 808 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio Telephone (SMR) service, which are placed together in the data.[637] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 808 or fewer small cellular service carriers that may be affected by any regulations adopted pursuant to this proceeding.

Fixed Microwave Services. Microwave services include common carrier,[638] private-operational fixed,[639] and broadcast auxiliary radio services.[640] At present, there are approximately 22,015 common

[632] *Cross Ownership Report & Order*, 11 FCC Rcd at 7852, ¶ 60.

[633] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84, ¶¶ 114-20 (1994).

[634] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released Jan. 14, 1997).

[635] 13 C.F.R. § 121.201, SIC code 4812.

[636] *1992 Census*, Series UC92-S-1, at Table 5, SIC code 4812.

[637] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

[638] 47 C.F.R. §§ 101 *et seq*. (formerly, part 21 of the Commission's Rules).

[639] Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e., an entity with no more than 1,500 persons.[641] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

Rural Radiotelephone Service. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[642] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[643] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[644] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Competitive Networks FNPRM Rulemaking* proposes no additional reporting, recordkeeping or other compliance measures. We note *supra*, however, that the *Competitive Networks FNPRM* seeks comment on termination or phase out of exclusivity and preferential provisions in contracts between telecommunications providers and MTEs.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[645]

In this *Competitive Networks FNPRM*, we seek comment on proposals that are intended to promote competition in local communications markets by ensuring that competing telecommunications providers are able to serve customers in MTEs. We anticipate that the proposals, if enacted in whole or

(Continued from previous page)

[640] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. § 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[641] 13 C.F.R. § 121.201, SIC 4812.

[642] The service is defined in Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[643] BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[644] 13 C.F.R. § 121.201, SIC code 4812.

[645] 5 U.S.C. § 603(c).

in part, would benefit consumers, telecommunications carriers and building owners, including small entities.

Specifically, we seek comment on the following proposals: (1) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all providers on a nondiscriminatory basis; (2) whether we should prohibit local exchange carriers from serving buildings that do not afford nondiscriminatory access to all telecommunications service providers; (3) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners; (4) whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs; (5) whether we should phase out exclusive access provisions by establishing a future termination date for such provisions; (6) whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out; (7) whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission; (8) whether the Commission's rules governing access to cable home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (9) the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[646]

In this *Competitive Networks FNPRM*, we seek comment on whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all such providers on a nondiscriminatory basis. To enable us to evaluate the necessity of such a requirement, we have asked commenters to provide the Commission updated information on the market for telecommunications services in MTEs. Second, we seek comment on issues related to our legal authority to place the obligations attendant with a mandatory access requirement on local telecommunications providers and/or building owners. Third, we seek comment regarding how a nondiscriminatory access requirement, if adopted, should be implemented.

We recognize that certain aspects of a nondiscriminatory access requirement have the potential to burden small entities. In this *Competitive Networks FNPRM*, we note that "there may be some entities for which the burdens arising out of a nondiscriminatory access rule would outweigh the benefits to competition and customer choice."[647] Thus, we inquire whether it would be appropriate to differentiate between commercial and residential buildings if a nondiscriminatory access requirement is implemented and whether such a requirement should "be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue?"[648] Further, in order to minimize any potential burden on building owners, including small entities, should they be subject to a nondiscriminatory access requirement, we seek comment on "accommodating building space limitations and ensuring building safety and security."[649]

[646] 47 U.S.C. § 224.

[647] *Competitive Networks FNPRM*, at para. 152.

[648] *Id.*

[649] *Id.*, at para. 156.

In the *Competitive Networks First Report and Order*, we enacted a prospective ban on exclusive contracts between commercial MTEs and telecommunications service providers. However, we found that the record was not sufficiently developed to determine whether the prohibition on exclusive contracts should apply to residential MTEs.[650] In the *Competitive Networks FNPRM*, we seek comment on whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners. We also seek comment on prohibiting carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs. We recognize that abrogating exclusive contracts may interfere with the investment back expectations of the parties to such contracts, including small entities. Therefore, in the alternative, we seek comment on whether we should phase out exclusive access provisions by establishing a future termination date for these provisions. We believe that a future sunset or phase-out of exclusive contract provisions would have a lower likelihood of interfering with the investment back expectations of the parties to such contracts. We also seek comment on whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out. Finally, we expect that small entities, including small telecommunications carriers and small building owners, would benefit from the competitive telecommunications environment that a ban on and/or phase out of residential MTE exclusive contracts would foster.

We seek comment on whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission. Such agreements may lessen telecommunications service competition in MTEs by fostering discriminatory behavior. We believe that competition among telecommunications service providers and limiting the scope and/or duration of such agreements could enhance service options for customers within MTEs.

We also seek comment on whether the Commission's rules governing access to cable home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services. Our proposal is intended to foster competitive entry of alternative telecommunications service providers, including small entities, by increasing their access to MTE inside wiring. We seek comment on whether our proposal, if adopted, would affect providers of multichannel video programming services, including small entities.

Finally, we seek comment on the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[651] Our proposals in this regard are intended to add clarity to the rights and obligations of utilities, including small entities, that are subject to Section 224 and to facilitate competitive entry by competing LECs, including small LECs. We anticipate that this action will benefit many small entities, including property owners and managers.

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[650] *See Competitive Networks First Report and Order*, at para. 33.

[651] 47 U.S.C. § 224. In the *Competitive Networks First Report and Order* we found that LECs and other utilities which own or control poles, ducts, conduits and other rights-of-way in MTEs, must permit competing providers access to such facilities under just, reasonable and nondiscriminatory rates, terms, and conditions. *Competitive Networks First Report and Order*, Section IV.D., *supra.*

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

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

I respectfully dissent from this item, which purports: to prohibit exclusive or effectively exclusive contracts between common carriers and business customers[1]; to modify the rules governing access to inside wiring by competitive carriers[2]; to permit wireless service providers to invoke the benefit of our pole attachment rules[3]; to extend our rules governing over-the-air reception devices ("OTARD") to providers of telephone and other non-video telecommunications service[4]; and to engage in further rulemaking on, among other things, the issue of mandatory access for wireless providers to private property[5]. For the reasons stated below, I find each of these decisions to be ill-considered, from both legal and practical standpoints.

Ban On Exclusive Contracts

First, I question the ultimate efficacy of the new, extremely restrictive regulation of private contracts adopted today. While we likely have statutory authority under section 201 over the common carrier conduct at issue here, *see generally Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), nothing in our regulations stops building owners from making their contracts *de facto* exclusive ones. That is, they remain free, even under our new rule, simply to decline to enter into contracts with providers other than the existing one. We certainly have no legal authority to force building owners to enter into contracts for service with other carriers.

Moreover, I question the evidentiary assumption that exclusive contracts between carriers and businesses are generally "unjust or unreasonable," as required by section 201. In many cases, such contracts may allow for the provision of service in buildings that would otherwise have gone unsaved or allow for higher quality service that it otherwise might have received from multiple providers. Contrary to the Commission's approach, the question is not whether there is sufficient evidence of these pro-competitive benefits to warrant rejection of the proposed rule, *see supra* at para. 32, but whether there is enough proof of harmful effects to justify its adoption. I submit that the record is devoid of such empirical support.

[1] *See supra* Part IV.B.

[2] *See id.* Part IV.C.

[3] *See id.* Part IV.D.

[4] *See id.*, Part IV.E.

[5] *See id.* Part V.

Inside Wiring

I likewise dissent from the changes to our inside wiring rules. Although the Commission is wise not to mandate a uniform demarcation point for all inside wiring, *supra* at para. 53, I would not have required the demarcation point to be moved to the minimum point of entry upon the request of the building owner. Instead, I would simply have relied on the section 251-based duty of non-discriminatory access to unbundled network elements that incumbent local exchange carriers might owe under their interconnection agreements to remedy any problems that competitive carriers face. We should allow markets, not federal regulation, to sort out where any particular demarcation point should be located and thus who will be responsible for this infrastructure. Nor do I think that the Commission should have taken the further step of regulating negotiations between owners and carriers as to the relocation of demarcation points. *See id*. at paras. 55-56.

Access to Conduits and Rights-of-Way

At this time, I can not support the use of section 224 of the Communications Act to allow attachments by wireless or internet service providers to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The legal uncertainty surrounding our statutory authority to do so makes this application of the statute highly imprudent.

In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), the U.S. Court of Appeals for the Eleventh Circuit "h[e]ld that the FCC lacks authority [under section 224] to regulate the placement of wireless equipment on utility poles and attachments for Internet service." *Id.*at 1266. In fact, the Court went on to say that "Congress did not give the FCC authority to regulate the placement of wireless carriers' equipment under section 224 (*or any other section*) of the Telecommunications Act of 1996." *Id.* at 1275 (emphasis added).

The full Court has denied the Commission's petition for rehearing *en banc*. Although the Court recently granted a stay of its mandate while the Solicitor General decides whether to file a petition for certiorari in the Supreme Court, it is unlikely that these rules can ultimately apply to grant wireless carriers or providers of internet service a right of attachment.[6] The chances of obtaining review in the Supreme Court are always slim; and this case concerns, at bottom, a straightforward question of statutory construction – not the typical sort in which certiorari is granted. If the Supreme Court denies a future petition for certiorari in this case and the stay is lifted, the Commission will just have a larger body of unlawful regulations to deconstruct than it otherwise would have had. Moving ahead with these rules at now, with this legal cloud looming over the application of the rules to wireless carriers and internet service providers, is extremely imprudent. Regardless of the Eleventh Circuit's temporary stay, the most responsible course of action is first to establish the rules' legality in any further appellate processes and then adopt them, instead of the other way around.

Extension of OTARD Rules

I dissent from the extension of OTARD rules to cover devices used to receive services other than video programming. We simply have no statutory authority to do so, whatever the policy reasons that the majority might have to favor that action. Section 207 of the 1996 Telecommunications Act applies only

[6] The *Gulf Power* Court consolidated appeals from the pole attachment Order filed in the Third, Fourth, Sixth, Eighth, and D.C. Circuits, *see* 208 F. 3d at 1270-1271, and, pursuant to 28 U.S.C. section 2342, its ruling is of nationwide applicability.

to "restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services," not restrictions of a person's ability to receive telecommunications services by way of fixed wireless technology.

I do not think that Commission's invocation of ancillary jurisdiction can get it over this clear textual hurdle. As I have said repeatedly, when Congress has spoken specifically to the topic at hand, the Commission's oft-invoked theory of ancillary jurisdiction renders inoperable any "plain language" boundaries of a specific statutory provision:

> On [the Commission's] view of administrative law, Congress must expressly prohibit the Commission from going further than a particular provision authorizes it to go in order to make the textual limits of any provision stick. In an administrative scheme based on delegated powers -- where the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress -- this approach to jurisdiction is clearly erroneous.

Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339 (rel. Aug. 7, 2000).[7]

The Commission's strained attempt to read section 207 as creating only a time deadline for the exercise of the substantive authority already possessed by the Commission under section 303, *see id.* at para. 107, is cute in the extreme. Section 303(r) is a purely procedural provision, giving the Commission authority to adopt regulations "necessary to carry out the provisions of this Act," 47 U.S.C. section 303(r), it is not an independent grant of substantive authority. Moreover, the Commission's understanding of section 207 renders it a largely useless exercise on the part of the Congress that passed it and the President who signed it into law: if the Commission already had the authority to extend OTARD rules to services other than those delineated in section 207, then everything in that section apart from the short introductory clause regarding the timing of the rulemaking was surplusage. Such a reading of the statute is contrary to venerable principles of statutory construction. *See, e.g., Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.")

Finally, I question the Commission's sweeping and conclusory assertion of authority to preempt all state and local laws governing the placement of fixed wireless devices. *See* Order at para. 108. Principles of comity and federalism teach that, just as state legislatures are beginning their work on the general question of building access for telecommunications carriers, we should not pull the rug out from

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[7] I also note (with what at this point in my tenure I can only describe as weary bemusement) the dramatic inconsistency between the Commission's approach to the "plain language" of the OTARD and pole attachment statutes. *See supra* at paras. 80-81 (relying, in discussion of pole attachment regulations, on "plain meaning of Section 224(f)(I)" and arguing against "'resort to legislative history to cloud a statutory text that is clear'") (internal citation omitted). Here, of course, the unambiguous import of the OTARD section carries no weight at all with the Commission. *See id*. at paras. 102-106. It seems that a statute's "plain meaning" only controls when it allows for the exercise of Commission authority, not when it restricts the Commission's reach.

under them by preemption. On top of that, we have no clear expression of Congressional intent in the Communications Act to oust States of regulatory jurisdiction over this class of zoning and contract decisions. *See generally Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986) ("The critical question in *any* pre-emption analysis is always whether Congress intended that federal regulation supersede state law.") (emphasis added). Given that neither section 207 nor any other provision of the Act expressly grants the sort of regulatory authority at issue here, there is no clear legislative statement sufficient to justify federal preemption. Of course, zoning and the enforcement of basic contracts such as homeowners' covenants are classic examples of the sort of matters that have been traditionally reserved to the States, and I thus think it doubtful that Congress meant to disable state and local governments in these areas.

Issuance of Further Notice of Proposed Rulemaking.

In my view, further rulemaking on the issue of rights of access for wireless service providers and others is unnecessary. Worse, it harms the private negotiations now taking place in the market. It is clear from the first notice and the comments received in response that we lack unambiguous statutory authority to impose a right of access, or even a or duty of "non-discrimination," on building owners, and the Commission points to none in its discussion of the matter. *See* Order at paras. 133-143.[8] Even if such authority existed on a discretionary basis, the exercise thereof would raise serious constitutional questions; I cannot set forth the reasons why this is so better than Professor Tribe did. *See* Comments of the Real Access Alliance, Memorandum of Laurence H. Tribe, "Takings Issues Raised by NPRM in FCC No. 99-141 (filed Aug. 24, 2000). There is no reason to continue to pursue a policy inquiry when this much is clear about the law.

Given my view that we lack clear authority in this area, I also would not leave open this proceeding and threaten future action. While I am pleased that the Commission declines to adopt a right of access today, the suggestion that it might do so in the future will itself influence private market behavior.

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For the foregoing reasons, and notwithstanding my pleasure that the Commission does not today adopt a right of building access, I cannot vote to adopt this Report and Order and Further Notice of Proposed Rulemaking,

[8] Notably, the Senate passed on October 12 and the President now has before him legislation that would grant telecommunications service providers a right of access to government-owned buildings. *See* S. 1301, Competitive Access to Federal Buildings Act (106th Congress) (now contained in Treasury-Postal Appropriations Conference Report). This action suggests that, contrary to the Commission's argument, we do not currently possess statutory authority over the issue of access; if we did, there would have been no reason for the Senate to pass this bill. And if the bill is ultimately signed into law, it will be even more persuasive in terms of establishing our lack of authority in this area. *See FDA v. Brown & Williamson*, 120 S.Ct. 1291, 1306 (2000) (explaining that "'[t]he "classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute" and that this is "particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand") (internal quotation omitted)