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**ECONOMIC ANALYSIS OF THE FCC'S
PROPOSED POLICY OF "FORCED ACCESS"
FOR CLECS TO PRIVATE BUILDINGS
WT DOCKET NO. 99-217 AND
CC DOCKET NO. 96-98**

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- * The Real Access Alliance is comprised of Building Owners and Managers Association International, National Association of Real Estate Investment Trusts, Institute of Real Estate Management, International Council of Shopping Centers, Manufactured Housing Institute, National Apartment Association, National Association of Home Builders, National Association of Office and Industrial Properties, National Association of Realtors, National Multi Housing Council and National Realty Committee.

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EXECUTIVE SUMMARY

The commercial real estate industry is competitively structured with very low levels of economic concentration, absence of barriers to entry and exit and the presence of savvy customers with both the incentive and ability to identify and exploit the availability of alternative sources of supply. Given the abundance of supply alternatives in the commercial real estate market that we observed and the substantial flexibility with which tenants can exploit the existence of those competitive alternatives, one would be hard-pressed to posit the existence of any meaningful competitive market failures in the commercial real estate industry. Regulatory intervention in the form of forced access would likely “chill” innovation and stifle creative arrangements currently being negotiated in the competitive marketplace, and reduce incentives for creation of new arrangements.

By every objective measure, local telecommunications competition is thriving. CLECs, including fixed wireless providers, are growing rapidly and seemingly about as fast as they have the ability to add customers. The FCC is charged by Congress with facilitating local competition; not with making certain that every competitor’s business plan is successful. The Commission should limit its examination to whether CLECs collectively are gaining access to the facilities they need (in this case, private buildings). The objective evidence suggests they are. For example, according to a survey commissioned by the Real Access Alliance for this proceeding, among the CLECs, Teligent and WinStar have requested access most often and are almost always successful. Furthermore, based on our analysis of the activities of eight large CLECs, they, on average, have obtained access to nearly 230 buildings in each market in which they operate a local network.

The Commission should be concerned, if at all, with preventing only unreasonable discrimination. The Notice, however, does not propose a substantive analysis of what constitutes unreasonable discrimination and whether it is occurring.

Moreover, the Notice does not focus on the threshold issue of whether there is, in fact, an economically remediable market failure. Based on mere assertions by several CLECs, the Commission seems to have concluded that it must take action. The FCC should engage in a reasoned consideration of the effect on general welfare (*e.g.*, the increased costs it would create for building owners/managers and tenants and the loss of innovative and creative arrangements) of a forced access rule. In addition, the Commission should consider the enforcement difficulties associated with such a rule where, as here, the “market” consists of many buildings with quite different characteristics and the transactions in question are themselves often complex. This makes a “one-size-fits-all” rule highly problematic.

We believe the Commission should consider whether CLECs *collectively* are gaining access to the facilities they need (the evidence suggests they are), not whether every competitor’s business plan is successful.

In our opinion, FCC intervention in the competitive commercial real estate market is unwarranted and is likely to be counterproductive.

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I. INTRODUCTION

In recent years, policymakers and regulators at all levels have taken decisive steps to open local telecommunications markets to competition. The Telecommunications Act of 1996 ("The 1996 Act") reflected Congressional intent to accelerate this process with the removal of various barriers to entry. The Federal Communications Commission ("the Commission" or "FCC") was given the primary responsibility for administering this new federal mandate. In response to claims by some competitive local exchange carriers ("CLECs") that building owners and managers are denying them access to private buildings (and thereby to customers or potential customers) or are otherwise discriminating against them, the Commission has proposed taking a number of steps to compel access.¹

In some respects, the Commission's proposed forced access policy can be viewed as an extension of the legislatively mandated "unbundling" of incumbent local exchange carriers' ("ILECs") networks. Indeed, the Commission's Notice suggests that they are all of one piece. There are, however, important distinctions. First, the FCC's proposed policy amounts to an unprecedented extension of public-utility-style regulation into the private sector and, moreover, into a market that is fundamentally competitive. Second, the administration of a forced access requirement appears to us to be unworkable given the large number and variety of sites and the complexity of the relationships involved.

¹ We think it is appropriate to refer to the FCC's proposed policy generically as "forced access" and, accordingly, do so throughout this paper. While the Notice also addresses access to inside facilities owned/controlled by ILECs and other utilities, in addition to those owned/controlled by building owners/managers, we concentrate in this paper on the forced access imposed upon building owners and managers.

In this paper, we provide an economic analysis of the FCC's proposed policy of forced access to private buildings. First, we provide a theoretical framework for our analysis. Then we make the following major points:

1. Forced building access is not essential to promoting local telecommunications competition, indeed, it is likely to prove counterproductive.
2. The market is operating efficiently; *i.e.*, CLECs are getting access to private buildings, and customers are acquiring the capabilities they desire.
3. The Commission should avoid adopting regulatory policies with broad economic impact on unregulated industries based on the special pleadings of a few firms.
4. Especially given its scarce resources and more important responsibilities, the Commission should avoid the extension of public-utility-style regulation into competitive markets, particularly without consideration of the impact of its proposals on the economy generally.

II. THEORETICAL FRAMEWORK

In economic theory a well-functioning market is one that efficiently addresses consumers' preferences for different goods and services. Theory suggests that, in the absence of barriers to expansion (or contraction) of output along different performance dimensions, market forces of supply and demand will provide efficient market equilibrium. Resources can be expected to be deployed or withdrawn as market demands for different service capabilities change.

Where there are *uneconomic* constraints artificially inhibiting market forces from equilibrating supplies and demands, performance failures can result. The key to identification of a genuine failure is a convincing explanation for why market forces cannot be expected to exploit any profit opportunity presented by a failure to meet any otherwise economic demands. The instant setting is one where there exists no basis for thinking that such a performance failure is likely to occur.

The commercial real estate industry is competitively structured with very low levels of economic concentration, absence of barriers to resource mobility and presence of savvy customers with both the incentive and ability to identify and exploit the availability of

alternative sources of supply. In this type of setting, there is no basis for expectation of market failure; nor is there, in fact, any actual evidence thereof.

Alfred Kahn, a former federal and state regulator, describes the appropriate role for government with regard to its treatment of the unregulated private sector:

[The role of government influences on the economy] is generally conceived as one of maintaining the institutions *within* whose framework the free market can continue to function, of enforcing, supplementing, and removing the imperfections of competition — not supplanting it. In these sectors the government does not, or is not supposed to, decide what should be produced and how or by whom; it does not fix prices itself, nor does it control investment or entry on the basis of its own calculations of how much is economically desirable; the government does not specifically control who should be permitted to do what jobs, nor does it specify the permissible dimensions and characteristics of the product.²

Government intervention in an efficient market can tend to reduce the economic efficiency of the market. Regulatory policies that seek to compel particular outcomes (*i.e.*, other than those that an efficient market would yield) can yield sub-optimal and less efficient results than those that would otherwise occur through voluntary actions of economic agents.

III. FORCED ACCESS TO PRIVATE BUILDINGS IS NOT ESSENTIAL TO PROMOTING LOCAL TELECOMMUNICATIONS COMPETITION

There are about 1,000,000 privately owned buildings (or 12.3 billion square feet) in the United States.³ In downtown Manhattan alone, there are 1,397 buildings accounting for 388 million square feet.⁴ In the commercial real estate market, there are substantial opportunities for substitution among different properties. Tenants typically have a wide choice of building

² Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (MIT Press, 1988 edition) Vol. I, at 2 (emphasis in original).

³ U.S. Department of Energy, *Commercial Building Characteristics 1992*, Energy Information Administration, April 1994, at 255.

⁴ *Cushman & Wakefield Marketbeat Series — Manhattan, Year-End 1998*, at 9.

locations and substantial flexibility in terms of where they can choose to locate.⁵ Demand for rental space in any one building is, in general, likely to be highly elastic given the existence of readily exploitable alternatives. The average commercial lease runs about three years and the average residential lease is one year. Tenants thus possess considerable mobility and have substantial flexibility in terms of their decisions about where to locate. In these circumstances, it is difficult to see how any one building owner (even one who owns a number of properties in a particular area) can be said to possess market power.

Recognizing these market characteristics, in 1996, the Federal Trade Commission ("FTC") exempted eight broad categories of real estate transactions, including business and residential rental property, from pre-merger notification laws under the Hart-Scott-Rodino Act because they were not "likely to violate the anti-trust laws." The FTC noted that most "real property assets that are included within this exemption are abundant, and their holdings are widespread." The FTC further noted that transfers of these properties are relatively small and entry into regional and local markets for the exempted categories of real property assets is usually easy.⁶

The 1992 Economic Census data indicate that market concentration of real estate operators and lessors is extremely low. The largest 50 firms that operate or lease nonresidential buildings account for only 22.1 percent of revenues of that industry nationwide; for residential building operators and lessors, the largest 50 firms account for less than 10 percent of the industry revenues nationwide. The largest 50 firms in the real estate property management industry account for 14 percent of the industry's revenues.⁷ Further, the largest building owner/management firm in the U.S., Jones Lang Lasalle, controls only 680 million square feet,⁸ or 5.5 percent of total square feet of commercial office space in the U.S. In antitrust terms, the

⁵ The fact that many firms possess substantial flexibility in terms of where they can locate (our own firm is a good example) means that there is substantial market discipline so that even firms/tenants with less flexibility are afforded competitive protection.

⁶ FTC, *Premier Notification; Reporting and Waiting Period Requirements*, final rules effective April 29, 1996, obtained at <http://www.ftc.gov/bc/hsr/hsrfrm.htm>, August 2, 1999.

⁷ 1992 Economic Census – Concentration Ratios (FC92-S-1). See www.census.gov/epcd/www/concentration.html. Note: 1997 Economic Census data for real estate concentration will not be available until late 2000.

⁸ *Commercial Property News*, August 1, 1999.

real estate industry is unconcentrated (*i.e.*, competitively structured), and real estate firms are not in a position to exercise any market power.

The provision of state-of-the-art telecommunications options is an increasingly important feature of buildings and is increasingly important to tenant decisions about where to locate. One recent survey indicates that some 72 percent of tenants are willing to pay additional rent to have state-of-the-art features available.⁹ According to a survey of building owners and managers nationwide sponsored by the Real Access Alliance ("Alliance") this proceeding, 61 percent of owners and managers listed tenant interests as their motivation for offering competitive telecommunications services.¹⁰ Further, another 21 percent were motivated by the need to keep their building(s) competitive and marketable.¹¹ As a result, building owners who unreasonably foreclose access by CLECs to their properties would only be affording rival suppliers with attractive selling opportunities. Given the competitive structure of the industry, such behavior would be disciplined by the market; that is, tenants for whom telecommunications is an important input can be expected to "vote with their feet" if a particular building does not provide them with the choices they seek.

It is, thus, difficult to see how *access to any single building* can be considered essential for promoting local telecommunications competition.¹² The FCC should not presume that, because CLECs cannot always acquire building access at terms they judge acceptable, it must step in and award petitioners with what they desire via government fiat. To do so would abridge private-property rights to bestow benefits on a favored class of telecommunications carriers.¹³

⁹ "What Office Tenants Want," 1999 BOMA/ULI Office Tenant Survey Report, at 44.

¹⁰ The margin of error for this survey is plus or minus 6 percent.

¹¹ Charleton Research Company conducted this survey for the Alliance in August 1999 and the results are included in the Alliance's filing in this proceeding. We refer to this survey as the "Alliance Survey."

¹² "Without market power, actual or probable, there is little reason to be concerned with the actions of a single firm." See Ernest Gellhorn, *Antitrust Law and Economics in a Nut Shell*, 3rd Ed. (St. Paul, Minn., West Publishing Co., 1986) at 93.

¹³ The FCC specifically asks parties to provide their "preferred engineering arrangements." Notice at ¶ 34.

The FCC's forced-access proposal, in effect, would treat building access as an essential facility — a concept normally used in public utility regulation or an antitrust setting. Whether a facility is "essential" turns on the existence of alternative sources of supply from an economic and legal standpoint. Policymakers need to consider not only whether the asserted "essential facility" is actually essential (*i.e.*, whether alternatives exist), but also must consider any broader, mostly adverse economic impacts of making allegedly "essential facilities" freely available to petitioners (*e.g.*, disincentives for investments in creation of productive facilities).

Phillip Areeda, the well-known antitrust scholar, suggests that application of the "essential facilities" doctrine should be highly limited and offers a set of principles to guide policymakers.¹⁴ His three primary criteria are:

1. There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.
2. A single firm's facility, as distinct from that of a combination, is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential to competition in the marketplace. 'Critical to the plaintiff's vitality' means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.
3. No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for a monopolist or share the monopolists' gains; or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources.¹⁵

¹⁴ Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal* (Vol. 58, 1990) at 852-853.

¹⁵ In addition, Areeda recommends:

1. Even when all these conditions are satisfied, denial of access is never *per se* unlawful; legitimate business purpose always saves the defendant.
2. The defendant's intention is seldom illuminating, because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits.
3. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. However, the availability of a remedy is not reason to grant one. Compulsory sharing should remain exceptional.

The FCC should apply these guidelines and, in so doing, should undertake a thoughtful examination of the relevant economic realities. In the first instance, facilities owned or controlled by building owners/managers do not meet the criteria for "essential facilities." In the competitive real estate market, access to any particular building cannot be considered essential for promoting local telecommunications competition.

In fact, regulatory intervention may be counterproductive. Another recognized expert points out that,

Perhaps the greatest danger in recognizing an essential facility doctrine is that judges will freely attach the label of 'essential facility' to any asset that confers a competitive advantage upon its owner and will compel access. Among other harmful consequences, indiscriminately forcing access to broadly defined categories of essential facilities can seriously reduce incentives to create, maintain and improve such assets.¹⁶

Regulatory intervention would likely "chill" innovation and stifle creative arrangements currently being negotiated in the competitive marketplace, and reduce incentives for creation of additional properties.¹⁷ The consequence of attempts by regulators to make all buildings all things to all tenants is that few buildings will be suited to meet the particular needs of individual tenants. In short, the FCC has not made the case that compulsory access to the facilities in question is necessary to achieve local telecommunications service competition.¹⁸ Compulsory access may, in fact, prove to be counterproductive.

¹⁶ William E. Kovacic, "Essential Economics and Essential Facilities: The Federal Courts and the Development of Antitrust Principles Governing Transmission Access in the Electric Utility Industry," Advanced Workshop in Regulation and Public Utility Economics (Monterey, California, July 5-7, 1989).

¹⁷ Interestingly, the FCC has been loath to intervene to compel access to cable monopoly broadband facilities lest incentives to develop such facilities be lessened. In the instant setting, the Commission proposes to compel access to competitively supplied facilities with nary a thought about the disincentive effects of such requirements.

¹⁸ In his opinion in *AT&T Corp. et al. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), Justice Breyer, in discussing the FCC's implementation of the 1996 Act's unbundling requirement wrote:

[T]he basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical...And although the provision describing which elements must be unbundled does not explicitly refer to the analogous 'essential facilities' doctrine (an antitrust doctrine that this Court has never adopted), the Act, in my view does impose related limits upon the FCC's power to compel unbundling. In particular, I believe that, given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or 'unbundled') where a new entrant could compete effectively

(continued...)

Evidence of rapidly expanding local competition is supplied by the CLECs themselves and is supported by every other measure we have seen. For example, about 16 CLECs reported to the FCC that they had deployed 1.8 million fiber miles in 1997, amounting to about 35 million route miles or over 33 times the fiber miles and 26 times the fiber route miles reported in 1990.¹⁹ CLEC networks accounted for over 5 percent of total domestic investment in telecommunications network equipment in 1997, up from under 1 percent in 1996.²⁰

In the third quarter 1998, the telecommunications network equipment industry accounted for about 25 percent of investment by venture capitalists. CLECs attracted about 10 percent of network equipment venture capital. Wireless services — which include fixed wireless services — accounted for another nearly 20 percent of network equipment venture capital.²¹

CLEC revenues have grown from \$69 million in 1992 to almost \$2.1 billion in 1997, an increase in the magnitude of 30 times over a five-year period.²² The CLEC industry is expected to continue its rapid growth. Atlantic-ACM estimates an annual growth rate of 45.6 percent through 2003 at which point CLECs will reach \$40.5 billion or 25 percent of the total local exchange market.²³

(...continued)

without that facility, or where practical alternatives to that facility are available. [Also citing *Areeda*]. Slip Opinion at 18.

We find no such “convincing explanation” of the need for forced access in the Commission’s Notice in this proceeding.

¹⁹Jonathon M. Kraushaar, *Fiber Deployment Update— End of Year 1997*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission.

²⁰We developed these estimates from U.S. Bureau of Census data on SIC codes 3661 and 3662, telecommunications network equipment categories, and the reported financial data of the Tier One ILECs, and the largest IXCs. We also accounted for the fact that Tier One ILECs serve about 95 percent of ILEC access lines in the U.S. The remaining amount of total domestic investment in network equipment after subtracting that by ILECs, IXCs, and wireless equipment, can be attributed to CLEC and private network equipment investments.

²¹ Telecommunications Industry Association, “Agenda: Competition,” Chart 5.

²² FCC, *Statistics of Common Carriers, 1997-1998*, at Table 8.14. This estimate includes CLECs, CAPs and local resellers.

²³ *State Telephone Regulation Report*, July 23, 1999 at 9.

We reviewed the market capitalization of 20 publicly traded CLECs.²⁴ Their current market capitalization amounts to \$92 billion. This is about 19 percent of the market capitalization of the RBOCs and GTE.

CLECs have, thus, quickly amassed an impressive amount of capital. Their ability to attract capital continues. For example, Focal Communications, in its recent IPO, experienced a 50 percent increase in the offering price from \$13 to \$19.50 per share after 9.95 million shares were sold.²⁵ Microsoft co-founder, Paul Allen, recently purchased a \$355-million-stake in Allegiance Telecom that could amount to a 10-percent interest if he exercises all of his options.²⁶

The equipment industry is also extending capital to CLECs to support their network expansion. In October 1998, Lucent and WinStar, one of the petitioners, entered a five-year agreement in which Lucent will provide all of WinStar's fixed wireless broadband network as well as grant WinStar up to \$2 billion in credit to finance the build-out.²⁷

By every objective measure of which we are aware, local competition is thriving. CLECs, including fixed broadband wireless providers, are growing rapidly and seemingly about as fast as they have the ability to add customers. In fact, in some instances, CLECs that have successfully negotiated access arrangements with building owners have been slow to

²⁴ The market capitalization reflects the number of shares outstanding and the market price as of July 30, 1999. The CLECs included are: e.Spire Communications, Advanced Radio Telecom, Teligent, Electric Lightwave, Focal Communications, GST Telecom, ICG Telecom Group, Intermedia Communications, McLeodUSA, Metromedia Fiber Network, NEXTLINK, Time Warner Telecom, WinStar Communications, Level 3 Communications, Allegiance Telecom, NorthPoint Communications, FiberNet Telecom, Covad Communications, Cablevision Lightpath, and RCN. This is a conservative estimate as we have not reflected the hundreds of CLECs that are in operation in various cities in the U.S. Further, while we reflect the MFS and Teleport market capitalization (through their purchase prices at the time the mergers were announced), we cannot identify the portion of AT&T's and MCIWorldcom's corporate market capitalization that could be attributed to other local service endeavors. Calculation based on historical trading data taken from www.finance.yahoo.com. The calculation excludes FiberNet Telecom (FTGX), as no historical data were available. It should be noted that only five of these companies were publicly traded prior to passage of the 1996 Act. Further, these stocks have traded, on average, for only 2.6 years.

²⁵ Eric Wahlgren, "FOCUS-Focal Comm IPO Rings a Bell with Investors," Reuters News Service, July 28, 1999.

²⁶ Lee Gomes, "Paul Allen Makes First Major Telecommunications Investment," *Wall Street Journal*, August 5, 1999, at B6.

²⁷ Lucent 1998 Annual Report at 43.

install their facilities. About 18 percent of respondents to the Alliance Survey indicated that at least one CLEC failed to meet its contractual or tenant service obligations. Almost 60 percent of respondents indicated one or more of the following causes: slow or untimely installation, poor service/technology, and never installed or provided service.

We present additional, detailed evidence that the market for building access is working in the next section of this paper. But suffice it to say here, it appears to us that any lack of access to buildings complained of by certain parties in this rulemaking is not adversely affecting the growth of local telecommunications competition.

This leads us to another important point. The FCC is charged by Congress with facilitating local competition; not with making certain that every competitor's business plan is successful. We address this point later in the context of our discussion of discrimination, but we believe the Commission should limit its examination to whether CLECs *collectively* are gaining access to the facilities they need (in this case, private buildings). The objective evidence strongly suggests that they are. That individual CLECs may encounter an occasional problem with a particular building owner should not give rise to a federally-enforced right of access. Indeed, forced access that has the effect of turning private property into common property would predictably result in degradation of performance capabilities, depressed investment incentives and a thwarting of effective competition.

IV. THE MARKET IS WORKING AND CLECS ARE GETTING ACCESS TO PRIVATE BUILDINGS.

The availability of advanced telecommunications services, ranging from high-quality voice and high-speed data to Internet access, is an increasingly important feature of private buildings. Tenants, especially those in information-intensive businesses, are demanding state-of-the-art connectivity and, increasingly, a choice of providers. Currently, 56 percent of tenants covered by a recent survey are located in buildings with at least one of thirteen intelligent features, including fiber-optics capability, Internet access, ISDN, and conduits for power/data/voice cabling.²⁸ Not surprisingly, given the real estate industry's powerful

²⁸ "What Office Tenants Want," 1999 BOMA/ULI Office Tenant Survey Report, at 42.

economic incentive to give consumers what they want, tenants are typically finding the features they desire. For example, 39 percent of high-tech firms are located in buildings with built-in wiring for Internet access, while 42 percent list this feature among the three most important intelligent features.²⁹

The evidence is that building owners are meeting tenants' demands for choice. Results from the Alliance Survey indicate that building owners and managers have offered telecommunications choice primarily in the interests of their tenants and to keep their buildings marketable.³⁰ In many cases, building owners are in the forefront of creating "smart buildings" which serve as showcases for new telecommunications technologies and as magnets for high-tech tenants. In some cases, building owners have taken vacant or rundown properties and have substantially upgraded them. For example, the Rudin Management Company rehabilitated its building at 55 Broad Street, New York City, at a cost of \$15 million, and in so doing, provided extensive telecommunications facilities.³¹ 55 Broad Street has its own web site and is known as the New York Information Technology Center. Local dialtone providers available at that site include MCIWorldcom and affiliates, Teleport Communications Group, Time Warner, and Bell Atlantic.³² We understand that WinStar and Teligent services are now available at 55 Broad Street. Additionally, Telecommunications Management Resources participated in the development of the Newport Financial Center in Jersey City, New Jersey, another "smart building." Among its many features, the Newport Financial Center touts "state-of-the-art telecommunications capabilities in place." The building provides access to networks of TCG, MCIWorldcom, and Bell Atlantic, as well as rooftop management.³³ As we have noted previously, in today's environment, building owners who fail to upgrade their telecommuni-

²⁹ *Ibid.*, at 49.

³⁰ The results of the Alliance Survey indicate that only 9 percent of building owners and managers were motivated by additional revenue. See discussion at 4, *supra*.

³¹ Judith Messina, "Rudin's High-Tech Building a Plug for Downtown Plan," *Crain's New York Business*, October 16-22, 1995.

³² See <http://www.55broadst.com> for main web page and <http://www.55broadst.com/technology/local.html> for information on local dialtone providers.

³³ See "What is the Newport Financial Center?" at <http://www.tmrnet.com/newport.htm>, obtained July 21, 1999.

cations offerings (e.g., by denying CLEC access) stand to be punished in the competitive marketplace.

The relevant question for the Commission is: Are CLECs, in general, getting adequate access to buildings in the marketplace? The answer, in the CLECs' own words, seems to be a resounding "yes." Here is what the petitioning CLECs are saying in other contexts:

- At the end of the first quarter 1999, Teligent "connected approximately 800 customer buildings to its local networks, an increase of nearly 350 percent over fourth quarter 1998."³⁴
- WinStar recently reported that it obtained access rights to more than 700 commercial office buildings in the second quarter 1999.³⁵
- WinStar signed agreements with "a large number of property owners, including Boston Properties, Crescent Real Estate Equities Company, Parkway Properties and Great Lakes REIT." WinStar asserts that this additional access is a new company record for a quarter.³⁶
- Mr. William J. Rouhana, WinStar's CEO, states that WinStar is bringing its service to "more buildings and customers than any other broadband or alternative telecommunications provider."³⁷

Table One below summarizes data from eight large CLECs which do business nationally regarding their access to buildings in the U.S. On average, the CLECs listed below have obtained access to over 229 buildings in each market in which they operate a local network. Even ELI, which operates in only seven major markets, has access to more than 100 buildings, on average, in each market. It should be noted that these eight CLECs only scratch the surface. According to the Alliance Survey, building owners and managers listed over 150 telecommunications providers that had requested access.

³⁴"Teligent Reports First Quarter Revenue of \$1.5M, Tripling for Fourth Quarter 1998," Teligent Press Release, May 12, 1999.

³⁵"WinStar Gains Access Rights to More Than 700 Buildings in Second Quarter," WinStar Press Release, July 8, 1999.

³⁶ *Ibid.*

³⁷ *Ibid.*

CLEC	Number of Buildings	Number of Local Markets/Networks	Average Number of Buildings/Market
WinStar	Over 5,500	Over 30	183
Teligent	Over 3,100	26	119
e.Spire	3,231	35	92
MCIW	Over 33,000	100	330
ELI	783	7	111
AT&T	22,680	83	273
NEXTLINK	14,804	38	390
ICG	6,126	18	340

Sources: WinStar Press Release, "WinStar Gains Access Rights to More Than 700 Buildings in Second Quarter," July 8, 1999; Teligent Press Release, "Teligent Report First Quarter Revenue of \$1.5M, Tripling Total for Fourth Quarter 1998," May 12, 1999; "e.Spire Fact Sheet, at <http://www2.espire.net/investorfactsheets/factsheet1q99.cfm>; MCI Worldcom Corporate Overview at www.wcom.com/about_the_company/corporate_overview/international_fact_sheet/; ELI Press Release, "IXC Chooses Electric Lightwave as its Preferred Local Access Provider," July 14, 1999; AT&T Form 10-Q, March 31, 1999; NEXTLINK Communications Form 10-Q, March 31, 1999, filed May 14, 1999; and ICG Communications Form 10-Q, March 31, 1999, filed May 17, 1999.

Table Two below compares the number of requests for access made by seven of the eight CLECs in Table One with the agreements reached with those CLECs. Two significant facts emerge. First, Teligent and WinStar requested access most often and were almost always successful. Second, the distribution of those CLECs that reached agreement is not significantly different from those requesting access. These two facts imply that the market does not discriminate among CLECs. Building owners and managers do not favor wireline over wireless providers, nor do they favor any one, or any group, of CLECs. Given that the majority of building access requests are successfully negotiated and are not exclusive contracts,³⁸ Table Two presents strong evidence of a competitive open market where the likelihood of gaining access may be directly related to the efforts of the CLEC.

³⁸ The Alliance Survey reports that of the owners and managers contacted with contract requests, 75 percent reported that none of the contracts were exclusive, 9 percent reported that 0 to 50 percent of the contracts were exclusive, 1 percent reported that 50 to 100 percent were exclusive, and 15 percent reported that 100 percent of the contracts requested were exclusive. Further, 65 percent of contracts were successfully negotiated. See discussion at 13 below.

CLEC	Percentage of Total Requested Access	Percentage of Agreements Reached
Teligent	17%	17%
WinStar	14%	16%
AT&T/TCG	8%	6%
MCI/MFS/Worldcom	7%	5%
NEXTLINK	4%	4%
ICG	3%	2%
Sprint	3%	4%
e.Spire	3%	2%
Other	42%	44%

Source: Alliance Survey results.

Further examination of the marketplace shows that agreements between building owners and telecommunications service providers are being signed every day. The National Multi-Housing Council received information, in connection with this proceeding, from nine of its members that represent over 3,500 residential properties and over 850,000 units across the country. All of the respondents indicated that, for at least some of their properties, competing telephone service providers were available. Six of the nine were in the process of negotiating or had reached agreement on rooftop access with a competing telephone service provider.

Even though some residential properties include competing local telephone service providers, CLECs are generally concentrating on business customers, not the residential market.³⁹ Results from the Alliance Survey indicate that CLECs are seeking access to properties primarily in urban business districts. About 50 percent of respondents indicated that 100 percent of the buildings to which access was requested were in urban areas. Further, about 53 percent of respondents indicated that 100 percent of the buildings to which access was sought were Class A buildings, whereas 95 percent of respondents indicated that none of the buildings to which access was sought were Class C. About 73 percent of respondents indicated that all of the buildings to which access was sought are office buildings, while 96 percent of respondents indicated that none of the buildings to which access was sought were residential buildings.

³⁹ Gary Kim, "CLECs Go the Distance," posted October 1998, at <http://www.x-changemag.com/articles&a1cover.html>, obtained July 26, 1999.

Building owners and managers are reaching agreement with CLECs in a timely manner. About 71 percent of respondents to the Alliance Survey indicated that negotiations with a competitive telecommunications provider usually were negotiated within six months. About 41 percent of respondents said that the longest it had ever taken to negotiate an agreement with a competitive telecommunications provider was six months or less.⁴⁰

Results of the same Alliance Survey indicate that building access is successfully negotiated over 65 percent of the time.⁴¹ The lack of agreement, however, is not necessarily indicative of rejection by the building owner or manager. The telecommunications carrier may reject terms as well. As we noted earlier, statistics provided by the CLECs themselves indicate that they are obtaining building access. Both of the fixed wireless firms, whose allegations of discriminatory conduct by building owners/managers prompted this Notice, have obtained access to well over 100 office buildings, on average, in each market in which they operate. This number, of course, will increase as Teligent and WinStar expand their networks and reach additional deals with large property owner/management firms.

The Notice has few specific examples of alleged abuses on the part of building owners and managers with regard to granting building access to CLECs. It is not, in our view, prudent or necessary—and likely counterproductive—to adopt a far-reaching rulemaking based on what amount to mere assertions of abuse in isolated instances. Beyond assertions that a building owner's conduct in a particular instance is unreasonable, the Commission has no independent knowledge about whether it is. Indeed, as we discuss at greater length subsequently, given the number of buildings and the complexity of the transactions, the Commission likely can never know.⁴²

⁴⁰ The same survey indicates that it typically can take up to three months to negotiate a standard lease with traditional tenants.

⁴¹ Each respondent received an average 2.5 solicitations and have negotiated or are negotiating 1.65 contracts on average. About 37 percent of respondents indicated they denied access to a competitor. The most common reasons for a lack of agreement were the provider's refusal to pay competitive rent or fees, an inability to agree on terms, lack of tenant demand, and limited or no space.

⁴² Fees that, in the abstract, appear to be quite high may be quite reasonable in a particular circumstance. Also, the "demands" of building owners may simply represent opening positions in the process of negotiations in much the way that the "sticker price" of an automobile rarely, if ever, reflects the price actually paid for the car.

Forced-access policies have been considered at the state level, as well. The majority of these states, such as Illinois, have explicitly rejected a forced-access policy.⁴³ We recently analyzed the presence of competitors in exchanges served by Ameritech Illinois through a number of measures, including customer surveys. At least 65 percent of business customers surveyed said that their choices of companies offering local telephone service increased in the past two years.⁴⁴ From one-half to two-thirds of business customers surveyed were marketed local communications services by competitors.⁴⁵ About 32 percent of residential customers surveyed said their choices of companies providing local telephone service increased in the past two years.⁴⁶ Further, we estimated that the share of new investment in telecommunications equipment attributed to CLECs (and private networks) in Ameritech Illinois' service market was 18 percent in 1996 and 20 percent in 1997.⁴⁷ This is far greater than the national average estimates we provided earlier in this paper. It does not appear that a lack of forced access to buildings has inhibited the growth of the CLEC industry in Illinois. Analyses, such as those we undertook in Illinois, are vital to a determination of whether a national forced-access policy is needed to foster the growth of local exchange competition. The FCC should pursue such analyses to complete the record in this proceeding.

V. THE COMMISSION SHOULD NOT ADOPT POLICIES WITH BROAD ECONOMIC IMPACT BASED ON THE SPECIAL PLEADINGS OF A FEW FIRMS

A cursory examination of the current record associated with the NPRM suggests that the impetus for the FCC's forced access proposal is coming from the fixed wireless ("FW")

⁴³ Joseph B. Cahill, "Landlords vs. Telecoms in Building Fee Battle," *Crain's Chicago Business*, February 2, 1998, at 1.

⁴⁴ Direct Testimony of Harry M. Shooshan III, Illinois Commerce Commission Docket No. 98-0860, Ameritech Illinois Ex. 5.0, at 22.

⁴⁵ *Ibid.*, at 23.

⁴⁶ *Ibid.*, at 26. Residential customers in 19 downstate exchanges where Ameritech reclassified certain services as competitive were the subject of the survey.

⁴⁷ *Ibid.*, at 18.

providers.⁴⁸ The Notice itself has been generated by the Wireless Bureau and has been included in the Commission's Common Carrier Docket 96-98 in order, perhaps, to broaden its scope. While the "remedy" being proposed would be available to CLECs generally, there has been no showing that CLECs *as a class* are systematically being denied access to buildings. Indeed, as we have shown, CLEC networks of all technologies are expanding rapidly and are gaining access to private buildings.

The question then becomes whether there is any basis for affording greater weight to the minimal, anecdotal evidence presented by the wireless CLECs in determining if a problem exists and needs correcting. In our opinion, there is not.

First, building owners are generally accustomed to leasing rooftop space for various telecommunications antennas, including VSAT terminals, microwave, land mobile and cellular/PCS antennas. These systems have all been able to gain access to rooftops without FCC intervention.⁴⁹ Additionally, wireline and wireless services are largely substitutes. Narrowband FW technology is comparable in capacity to traditional twisted copper pair, and broadband FW data rates are comparable to those supported by the fiber optic networks being deployed by the various wireline providers.⁵⁰

In some respects, FW service can be viewed as inferior to wireline. There may be a greater likelihood of interference from other radio systems and of signal attenuation due to rain. There may also be a greater risk of unauthorized interception of transmissions and of health and safety problems associated with radio frequency emissions. Finally, unlike other radio-based systems where signals bend around obstacles (*e.g.*, cellular and PCS), the frequencies used for broadband FW exhibit line-of-sight propagation properties which tends to limit (or greatly

⁴⁸ The only specific allegations regarding building owner and manager behavior in the Notice are those described in ¶ 31 and referenced in ¶ 53. These allegations are mostly put forth by Teligent and WinStar.

⁴⁹ This is not to suggest that the various arrangements are without complexities. In fact, precisely because circumstances tend to vary from building to building and among service providers, government intervention in the form of forced access would be especially problematic besides being unwarranted. *See* discussion at 21, *supra*.

⁵⁰ The only difference between the manner in which wireline providers and FW providers "connect" to a building is that the latter requires access to the rooftop (as well as physical access to electric power and a room near the roof to install terminal equipment). By contrast, wireline providers (both ILECs and CLECs) gain access to a building at an interface point in or near the basement (since their transmission systems are typically installed underground).

increase the costs of) extension of service. On the other hand, wireless networks generally have lower fixed costs than wireline networks (e.g., they do not require trenching for installation).

We note these perceived limitations because we believe the FCC needs to carefully consider whether the claims of certain FW providers about lack of building access are the principal obstacle to building out networks more expeditiously. These claims could be thinly veiled attempts to seek government assistance to overcome handicaps characteristic of the services they offer.

VI. THE COMMISSION SHOULD AVOID THE EXTENSION OF PUBLIC-UTILITY-STYLE REGULATION INTO COMPETITIVE MARKETS

Even if one were to assume there is a problem that requires FCC intervention, we see a number of fundamental problems in the approach contemplated in the Notice. Leaving aside questions of the Commission's legal authority to do what it proposes, there is little indication in the Notice of any economic rationale for the forced access regime it contemplates. Even with respect to its regulation of common carriers, the Commission is charged only with preventing *unreasonable* discrimination.⁵¹ However, in the context of this proceeding the Commission has failed to make this distinction. As a result, there is no standard by which the competitors' complaints can be judged. This may lead, in turn, to some leaps of reasoning in the Notice which are difficult to follow.

Among the practices about which the wireless carriers have complained is the differential pricing of building access to different customers. Economic theory, however, suggests such pricing frequently serves a variety of useful, often necessary tasks.

⁵¹ We believe that (even if one assumes the FCC has legal authority) the Commission should be concerned only with conduct that rises to the level of unreasonable discrimination. For the Commission to adopt rules of general applicability, it would have to define precisely what it considers unreasonable discrimination (which its Notice does not consider) and then establish that there is a general pattern or practice on the part of building owners to engage in such unreasonably discriminatory conduct. The record to date does not appear to us to support such a finding. The fact that an individual building owner might on occasion take steps that might be considered unreasonable discrimination and that a particular provider might be adversely affected is not, in our opinion, grounds for regulatory intervention of the scale and scope suggested by the Notice.

Economic price discrimination occurs when different customers are charged different prices and those price differences are not explained by cost differences. Discrimination may improve allocative efficiency and can enhance competition by facilitating experimentation in pricing, even if the firm were a monopoly.⁵² In fact, discrimination is pervasive in the economy at large (*i.e.*, in competitive, largely unregulated industries). For example:

- Firms in many industries offer discounts to senior citizens;
- Doughnut and bagel shops offer discounts on purchases of a dozen;
- Life insurance policies are available on more favorable terms to those who buy policies with large face amounts; *i.e.*, in the hundreds of thousands of dollars;
- Hotels often have special rates for their regular corporate customers;
- Students are often given discounts on theater and movie tickets; and
- A variety of advance purchase discounts are often available for travel services or entertainment events.

In all of these instances, consumers have a number of choices among firms and services.

It is not necessarily unreasonable for building owners, which operate in a highly competitive industry, to treat one set of local telecommunications providers differently from others. Given the complexities created by a market where there are many different types of buildings and differences among CLECs, it is not surprising to see a wide range of deals being struck. Because wireless providers “connect” to buildings differently than wireline providers (and impose costs that wireline providers do not), different arrangements, including recurring and non-recurring charges, may be quite reasonable.

CLECs have suggested (and the Notice seems to agree⁵³) that building owners discriminate if they charge one rate to ILECs and another to CLECs. The conclusion that such differences are *unreasonably* discriminatory does not necessarily follow.

⁵² F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3rd Ed. (Houghton Mifflin, 1990) at 494-500.

⁵³ See Notice at ¶ 53, “In light of the information discussed that a number of building owners may be imposing unreasonable and discriminatory charges on competitive carriers, we seek comment on whether adoption of this principle [*i.e.*, forced access] may be necessary to ensure that consumers in multiple tenant environment have the ability to access the service provider of their choice.”

A key difference among competing providers of local telecommunications services is the obligation to serve. ILECs have an obligation to serve any and all customers in their serving area (even where the ILEC may not currently have facilities in place); CLECs typically do not.⁵⁴ For example, in California, CLECs have no obligation to deploy facilities in order to serve any potential customer. In California, CLECs “are *authorized* to provide service in the areas in which they are designated to serve, but are not *obligated* to provide facilities-based service more than 300 feet from the area abutting the [CLEC’s] facilities” (emphasis in original).⁵⁵ In fact, there are a number of instances where building owners have solicited service from CLECs only to be told that “we don’t go there.”⁵⁶ If a tenant wants service from an ILEC, in contrast, the ILEC is legally obligated to provide it, and the building owner must permit it. Further, a building owner accepts some risk when contracting with a new, unknown provider and may require different compensation for that risk.

Discrimination may also be reasonable and appropriate if the customers (in this case, telecommunications carriers) are not similarly situated.⁵⁷ The Commission has recognized this in other contexts within its jurisdiction. For example, when the FCC investigated AT&T’s Tariff 12 offerings in response to allegations of discriminatory pricing, the Commission analyzed whether the Tariff 12 packages were “like” the individually tariffed services contained in a Tariff 12 package such as SDN (“Software Defined Network”). The FCC found

⁵⁴ There are other differences between ILECs and CLECs (*e.g.*, universal service support and requirements to offer averaged rates) which support our view that they are more unlike than like from a regulatory perspective. It is difficult for us to see how the Commission finds the arguments for symmetrical building access so compelling when it has so far failed to achieve symmetry in other aspects of its regulatory treatment of ILECs and CLECs.

⁵⁵ Decision 95-07-054, before the California Public Utilities Commission of the State of California, *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, R.95-04-043 (Filed April 26, 1995); *Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service*, I.95-04-044 (filed April 26, 1995), July 24, 1995, at 24.

⁵⁶ About 13 percent of the respondents to the Alliance Survey said that they were denied service by a competitive telecommunications provider. Respondents were given reasons such as: building is too small; area not served; and company did not have facilities in place.

⁵⁷ Scherer, at 514.

that Tariff 12 packages were not like the individual services offered because Tariff 12 integrated service offerings and added "turnkey" and network monitoring features.⁵⁸

Some of the petitioners have suggested that exclusive contracts are *per se* discriminatory. We disagree. In the first place, it is difficult to accept this argument when some CLECs have themselves *sought* exclusivity.⁵⁹ Second, requiring an exclusive arrangement may not be unreasonable discrimination if the arrangement is offered to all CLECs (for example, by auctioning off a slot of a building roof). Third, exclusive contracts may actually promote competition by giving new entrants some assurance of a revenue stream (or the chance or create one) to cover the costs of their investment in connecting to a particular building.⁶⁰

The Notice does not propose or seek data on what would constitute just and reasonable rates and conditions for access to facilities controlled by building owners/managers.⁶¹ Lack of such information and analysis will lead to poor economic policy. How is the FCC to determine a standard for "just compensation" when there are about one million heterogeneous buildings located throughout the country? How will the Commission identify the costs associated with access (as opposed to other costs)? Further, the Commission has not defined the elements of building access that it would propose are necessary for CLECs to serve tenants. Overlaying public-utility-style regulation on building owners is an order of magnitude more difficult than imposing it on cable systems (an exercise which, although mandated by Congress, was viewed by most observers as a futile, if not embarrassing, effort on the part of the Commission).⁶²

⁵⁸ In the Matter of AT&T Communications Revision to Tariff FCC No. 12, CC Docket No. 87-568, *Memorandum Opinion and Order on Remand*, released November 22, 1991. See also In the Matter of Competition in the Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, released September 16, 1991.

⁵⁹ About 16 percent of the respondents to the Alliance Survey said that all of the competitive carriers that contacted them requested exclusive access. We note that the FCC almost certainly has the authority to prohibit CLECs from seeking (or signing) exclusive deals. If there is a problem with exclusivity, this may be the way to solve it (as opposed to regulating building owners).

⁶⁰ The FCC acknowledges this possibility. See Notice, at ¶ 61.

⁶¹ The FCC recognizes that the Fifth Amendment to the U.S. Constitution requires "just compensation." Notice, at ¶ 58.

⁶² See, for example, Thomas W. Hazlett and Matthew L. Spitzer, "How Cable TV Rate Controls Backfired," *Consumers' Research Magazine*, January 11, 1998, at 15.

(continued...)

This suggests another problem for the Commission; that of asymmetric information. The remedies sought pose substantial enforcement difficulties. The "market" consists of many buildings that are quite different in terms of age, location, available space (on rooftops and in risers), local zoning regulations, dimensions (e.g., height), aesthetics, and types of tenants and needs. This makes a "one-size-fits-all" rule highly problematic. The Commission clearly lacks the resources to enforce such a rule on a case-by-case basis and can certainly find other more important tasks on which to concentrate its enforcement efforts.

While the FCC engages in legal and Constitutional analysis related to its intent to impose forced access on building owners,⁶³ it needs to focus more on the threshold issue of whether there is, in fact, an economically remediable market failure. The Notice in this proceeding does not provide any guidance as to what constitutes unreasonable discrimination or objectively seek to determine whether such discrimination is indeed occurring. The FCC has reached what seems to be a foregone conclusion that it must take action.⁶⁴ Mere assertions, such as those by a WinStar executive, that unreasonable discrimination has occurred should not be dispositive, particularly if the FCC cannot independently confirm the extent of alleged abuses.

The FCC dedicates few words to consideration of the appropriateness of its proposed policy and its economic impact on private property owners.⁶⁵ For example, the FCC simply asks whether its nondiscrimination requirement is "sound policy"⁶⁶ and whether it should "limit

(...continued)

In fact, the persistent attempts by government to control the rates charged by cable television monopolies have led to frustrating failure, both in the execution of government regulation and in intelligently addressing market realities in the public debate over cable controls. While political authorities seize on the seemingly direct approach of using federal authority to squeeze rates charged by noncompetitive cable systems, the complexity of real-world markets leads, as usual, to unintended consequences.

So now, the FCC is considering regulating the competitive real estate industry?

⁶³ Notice, at ¶¶ 52-60.

⁶⁴ This Notice does not even suggest that the FCC has reached "tentative conclusions." This Notice lacks the typical preliminary analysis and a request for comment on its analysis and conclusions from interested parties.

⁶⁵ See Appendix, *Initial Regulatory Flexibility Analysis*, where questions are raised regarding the impact on small businesses, but not the industry at large.

⁶⁶ Notice, at ¶ 61.

the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners.”⁶⁷ The FCC’s forced access proposal will affect *all* owners and managers of the almost one million buildings throughout the United States as well as all of their tenants. Forced access, along the lines apparently contemplated by the FCC will create costs that will ultimately raise rental rates for millions of tenants across the country. Yet there is every indication that building owners/managers are properly compelled by the market to reach agreements with competitive telecommunications providers to the benefit of all parties involved, including tenants. Evidence presented by the Alliance Survey clearly demonstrates that the real estate industry has responded to such needs of its tenants.

The FCC has not analyzed the benefits of its forced access proposal in the context of the impact upon societal welfare. In this proceeding, the FCC seeks to benefit a few firms at a substantial cost to society as a whole.

When government crosses the line described by Dr. Kahn earlier in this paper, without good cause, the integrity of the marketplace can be impaired and general welfare reduced. Forced access would result in outcomes less efficient than those which the market would yield. If building owners were compelled to supply access to valuable inputs on terms and conditions below those at which they would otherwise be voluntarily willing to make such access available, they are being compelled to effectively subsidize the business activities of others, *viz.*, CLECs. Further, a “one-size-fits-all” rule developed by Federal regulators would seem to preclude creative solutions such as those developed for 55 Broad Street and the Newport Financial Center.

The FCC takes great pains to build a record to establish its legal footing while seemingly taking for granted that its proposals embody sound economic policy. In our view, this is an unwise course. In performing the economic analysis that is lacking in this proceeding to date, the FCC should seriously consider whether the interests of petitioners are necessarily coincident with the interests of consumers.

⁶⁷ Notice, at ¶ 62.

VII. Summary and Conclusions

Our analysis shows that forced access to buildings is not essential to promoting local telecommunications competition. The FCC's proposal is effectively an application of the essential facilities concept, normally used in a public utility or antitrust setting, to a competitive, unregulated market. The market is, in fact, working. Local competition is thriving. CLECs have access to capital and are getting access to buildings. Given the abundance of supply alternatives in the commercial real estate market that we observed and the substantial flexibility with which tenants can exploit the existence of those competitive alternatives, one would be hard-pressed to posit the existence of any meaningful competitive market failures in the commercial real estate industry.

The FCC should not adopt regulatory policies with broad economic impact on unregulated industries for the benefit of a few firms. These firms' "evidence" is not dispositive that unreasonable discrimination is indeed taking place. The FCC should resist accepting those self-serving claims without any independent analysis or consideration of whether widespread discrimination is actually occurring and whether any discrimination that is alleged to have occurred is unreasonable. The Notice cites no such analysis. While the FCC has taken great pains to discuss its legal authority to take action, the FCC has not yet established an economic rationale for action on its part.

The Notice also lacks any consideration of the impact of its proposals on the economy generally. Every building owner/manager in the country and all of their tenants stand to be affected by the FCC's proposed forced access policy. In our opinion, for those reasons, FCC intervention in the competitive commercial real estate market is unwarranted and is likely to be counterproductive.



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CONSTITUTIONAL ANALYSIS OF THE FCC'S NOTICE OF PROPOSED RULEMAKING, FCC 99-141

August 27, 1999

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APPENDIX

Declaration of Gerald L. Hagood

Declaration of Allan Heaver

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EXECUTIVE SUMMARY

The NPRM proposes a number of rules that, if promulgated, would take the private property of building owners without providing them just compensation. While these rules vary in the nature and extent of the uncompensated taking they would effect, all of them share the characteristic of requiring building owners to acquiesce to the presence of an uninvited person on their private property. The Supreme Court's decisions under the Takings Clause of the Fifth Amendment of the Constitution leave no doubt that such forced access rules automatically constitute a taking of property requiring just compensation.

The Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), established that a law authorizing a telecommunications carrier to effect a permanent physical occupation of private property constituted a *per se* taking of private property under the Takings Clause. The decision, which dealt specifically with the installation of cable wiring on top of a building, left no doubt that such an invasion of real property always effects a taking, regardless of how small the physical occupation may be in relation to the remainder of the owner's estate.

It is an equally central tenet of eminent domain law that property rights are defined not by the Takings Clause or by any particular regulatory regime, but

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rather by existing rules or understandings that stem from an independent source such as state law. The significance of this central principle is that the FCC is not free to restrict a property owner's rights simply by making general findings or conclusions as to the extent of what a landowner's property interests should be in light of the FCC's regulatory goals, but rather must respect whatever property rights are recognized under local law—such as the right to grant limited access only to specific telecommunications providers, or the right to enter into leases with restrictive covenants—and may not infringe upon those rights without implicating the Takings Clause.

Accordingly, if it is clear under relevant property law that a landowner has the right to exclude new telecommunications providers from his property, then, notwithstanding the existence of a grant to an incumbent provider, the FCC cannot require the landowner to provide nondiscriminatory access to all other providers, at least not without providing just compensation for the property interest being taken. There is no authority for the proposition that a property owner can be forced to provide nondiscriminatory access without implicating the Takings Clause, and the decision in *Loretto* plainly dictates that such a nondiscriminatory access provision would constitute a *per se* taking of property. The same result applies in the case where a telecommunications provider who has obtained a limited access license from a landowner is required to allow other providers to “piggyback” on his access rights, or in the case where a landlord has

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entered into a lease that prohibits tenants from installing certain telecommunications equipment on their balconies. In both instances, so long as it is clear under local property law that the landowner has retained the right to exclude other providers or to prohibit the installation of certain equipment, the FCC cannot infringe on those rights by mandating physical access without creating a *per se* taking under the holding in *Loretto*.

In addition to creating a *Loretto* taking, the NPRM's proposals also would be found to constitute a taking of property if analyzed under the balancing test applied to non-*per se*, regulatory takings. Building owners have a reasonable, investment-backed expectation that they have the right to control and manage the delivery of telecommunications services to their tenants, and have every incentive to actively engage in the performance of this function so as to attract and retain tenants (or, as they are increasingly called, "customers"). For this reason, the FCC cannot promote the interests of the telecommunications industry over those of the real estate industry without running afoul of the regulatory takings doctrine, which seeks to prevent the government from unfairly benefiting one interest group over another.

The Telecommunications Act of 1996 does not provide the FCC with the authority to exercise the power of eminent domain, and there is ample Supreme Court precedent holding that such a power cannot be inferred from a statute that in no way gives an agency the power to effect takings. For this reason, the

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Commission cannot rely solely on its general jurisdiction to enforce the Telecommunications Act in order to implement the rules in the NPRM that would effect takings of the private property of real property owners.

This result is underscored by the fact that, although the promulgation of the NPRM's proposals would create the largest liability for the government ever triggered under the Takings Clause, Congress gave no indication in the Telecommunications Act that an award of just compensation to real property owners was required or expected. Indeed, although this legislation was enacted after the D.C. Circuit held that the Commission did not have authority to issue collocation rules that would constitute a taking of the property of incumbent carriers, there is nevertheless nothing in the statute that could plausibly authorize the Commission to take property from, and then pay just compensation to, owners of real estate. While the rate-making measures in the act may lead to a different conclusion with respect to the authority to take property from incumbent carriers, the Commission has no similar ability to compensate landowners.

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I. INTRODUCTION

In its Notice of Proposed Rulemaking, FCC 99-141 ("NPRM"), the Federal Communications Commission ("Commission") seeks comment on a number of rules that would significantly impact the rights of property owners. This submission,¹ attached as an exhibit to comments submitted by the "Real Access Alliance," analyzes the extent to which the NPRM implicates the Takings Clause of the Fifth Amendment.

The most far reaching of the NPRM's proposals would require building owners to provide access to their premises to all telecommunications providers on a nondiscriminatory basis. Other proposals include requiring local exchange companies ("LECs") and other public utilities to make their in-building facilities available to cable companies and telecommunications providers on nondiscriminatory terms, and extending the rule prohibiting restrictions against tenants installing antennas for video services to cover antennas for non-video services as well.

Underlying the policy proposals contained in the NPRM is the attempt to improve the access rights of all telecommunications providers to residents or businesses located in multiple tenant environments.² In this effort, which is

¹ This submission was prepared by COOPER, CARVIN & ROSENTHAL, but is submitted by the entire Real Access Alliance, including two specific property owners who have attached their own declarations to this exhibit.

² See NPRM, ¶ 29.

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intended to enhance the level of competition and the availability of competitive services, the Commission would override and undervalue the property rights of the owners of the multiple tenant environments. In a number of specific instances, the Commission's proposals would violate the constitutional rights of these owners by taking their property without payment of just compensation. Moreover, the government's liability to pay just compensation that would be triggered by the proposals would almost certainly exceed any amount ever previously awarded under the Takings Clause. Because Congress did not grant the Commission statutory authority to exercise eminent domain powers with respect to real estate owners nor to effectively appropriate the substantial public funds required to pay just compensation, the Commission must limit the extent of its proposal so as not to raise the constitutional concerns described herein.

In order to analyze the manner in which the Commission's proposals overstep the Commission's authority, we first consider how the proposals will effect a taking of private property within the meaning of the Fifth Amendment of the Constitution.

II. THE COMMISSION'S PROPOSALS WOULD LEAD TO THE TAKING OF THE PRIVATE PROPERTY OF BUILDING OWNERS WITHIN THE MEANING OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution provides that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S.

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CONST., Amendment V. Based on the fundamental principle that some property owners should not be required "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Takings Clause has matured into a robust protection of private property rights against a range of government actions and regulations. In particular, the Takings Clause provides an absolute protection whenever the government appropriates property by authorizing a private citizen to take possession or control of another's private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The Takings Clause is often understood as operating through two distinct doctrines. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). First, it provides an absolute prohibition against uncompensated *per se* takings, which are defined as occurring whenever there is a government-authorized, permanent physical occupation of private property.³ Central to this doctrine is the principle that if the government overrides a property owner's right to exclude others from his property, it has effected a taking, regardless of the level of economic harm suffered by the private party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A second category of takings is described as "regulatory takings," which are defined according to a balancing test used to

³ Of more recent vintage is a second category of *per se* takings. "When the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave

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determine when a government regulation goes "too far" in burdening a property owner so that "justice and fairness" requires payment of just compensation. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Because determination of a regulatory taking involves a balancing test and a subjective determination, its focus is different from that of a *per se* taking, relying heavily on the extent of economic harm suffered by the property owner, the interference with investment backed expectations, and the importance of the government interest at stake. See, e.g., *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986).

Several of the proposed rules contained in the NPRM would, if promulgated, result in unauthorized takings of the private property of building owners in violation of the Fifth Amendment. Because these proposals require building owners to acquiesce to the physical presence on their premises of uninvited telecommunications providers, they fall squarely within the *per se* takings rule as articulated by the Supreme Court in *Loretto*. Moreover, even if analyzed under the different standards of a regulatory taking, these proposals unfairly transfer substantial economic value from building owners to investors in telecommunications businesses, and thereby unreasonably interfere with the investment backed expectations of the real estate industry.

In sum, the NPRM fails to appreciate that the value of the assets owned by the real estate industry includes as a major component the ability of building

his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505

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owners to manage, and thereby better facilitate, the delivery of a range of services—including telecommunications services—to their customers. In so doing, the NPRM proposes not only to authorize the physical occupation of building owners' property, but also to appropriate assets of substantial economic value to the property owners and to transfer them free of charge to telecommunications companies. Absent this governmental action, these companies would have to pay for these various assets, including access to private property.

(A) The Supreme Court's Decision in *Loretto* Demonstrates The Constitution's Absolute Protection Against A Requirement That Building Owners Provide Uncompensated Access To Their Property By Telecommunications Carriers

In its effort to promote "facilities-based competition,"⁴ the NPRM proposes a number of rules that would require telecommunications carriers to be given forced access to facilities that are either owned by building owners or ceded by them to specific carriers—and not to the public at large.⁵ In doing so, the NPRM implicates over a century of well-established Supreme Court precedent, culminating in *Loretto*, that applies the Takings Clause to any forced expansion of the nation's telecommunications' network, however small, onto or into privately owned property.

U.S. 1003, 1019 (emphasis added); see also *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

⁴ E.g., NPRM, ¶ 1.

⁵ See NPRM ¶¶ 36-48, 52-63, 69.

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In *Loretto*, the Supreme Court held that a New York statute authorizing a cable television company to place cable equipment onto Ms. Loretto's building constituted a taking under the Fifth Amendment. The decision rested upon the following basic principle:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative. *Loretto*, 458 U.S. at 426.

Thus, no balancing test is required where a Government act authorizes a physical occupation of private property. In reaching this conclusion, the Court emphasized that a physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435. In discussing the long line of authority that supports the view that "physical intrusions" are property restrictions of "an unusually serious character," the Court paid special attention to the importance of protecting a landowner's "right to exclude." *Id.* at 426. In two places in the opinion, the Court reiterated that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," or "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *See Id.* at 433, 435 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The decision therefore leaves no doubt that a property owner is

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constitutionally entitled to the right to exclude others from his property, no matter what may be the reasons for, or the degree of, the potential invasion.

It is therefore well established in constitutional jurisprudence that the expansion of the country's telecommunications infrastructure implicates the Takings Clause. Indeed, it has long been held by the Supreme Court, and followed elsewhere as the law of the land, that any rule requiring a land owner to acquiesce to the presence of a telecommunications carrier on his private property constitutes a taking of property under the Fifth Amendment. See *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U.S. 540 (1904); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *GTE Northwest v. Public Util. Comm'n*, 900 P.2d 495 (Or. 1995). The significance of *Loretto* was to make clear that this result in no way depends on the balancing tests applied in other areas of takings law, and also that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436 (emphasis added).

Demonstrating that the size or degree of the physical occupation is of no moment, the Court noted its favorable earlier citation of a decision to the effect that the existence of a single wire stretching over private property—and never touching it—would constitute a taking. See *Loretto*, 458 U.S. at 436, n. 13 (referring to *United States v. Causby*, 328 U.S. 256 (1946) and its approving citation

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of *Butler v. Frontier Telephone Co.*, 186 N.Y. 486 (1906)). Indeed, in *Loretto* itself, the Supreme Court found that a taking occurred even though the total area occupied was less than two cubic feet, and stated that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Loretto*, 458 U.S. at 438, n.16. In short, the *Loretto* rule cannot be avoided by arguing that the physical intrusion is too small or insignificant to matter.

The proposals contained in the NPRM require real property owners to acquiesce to the physical presence of uninvited telecommunications service providers onto their property. As the NPRM observes, "In order to serve customers in multiple tenant environments, telecommunications carriers typically require a means of transporting signals across facilities located within the building or on the landowner's premises to individual units." NPRM, ¶ 30 (emphasis added). These facilities consist of, among other things, poles, ducts, conduits, in-building wiring, rights of way, and rooftops. See, e.g. NPRM, ¶ 28, 36, 44. The NPRM's proposals have as their overarching objective the requirement that such facilities be made fully available to any and all telecommunications carriers so that carriers not previously able to use these facilities will have an unfettered right to do so. To the extent building owners have ownership, under state and local property law, of any of the facilities subject to one of the NPRM's proposed rules, the NPRM plainly effects a *per se*