

**ACCESS TO BUILDINGS AND FACILITIES BY
TELECOMMUNICATIONS PROVIDERS**

HEARING
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION
OF THE
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HOUSE OF REPRESENTATIVES

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CONTENTS

	Page
Testimony of:	
Bitz, Brent W., Executive Vice President, Charles E. Smith Commercial Realty L.P	30
Burnside, Scott, Senior Vice President, Regulatory and Government Affairs, RCN Corporation	11
Case, Jodi, Manager of Ancillary Services, Avalon Bay Communications Incorporated	44
Heatwole, Andrew, Partner, Ripley-Heatwole Realtors	40
Pestana, Larry, Vice President, Engineering, Time Warner Cable	49
Prak, Mark J., Partner, Brooks, Pierce, McLendon, Humphrey, and Leonard	54
Rouhana, William J., Jr., Chairman and CEO, Winstar Communications ..	23
Sugrue, Thomas J., Chief, Wireless Telecommunications Bureau, Federal Communications Commission	6
Windhausen, John D., Jr., President, Association for Local Telecommunications Services	18
Material submitted for the record by:	
Community Associations Institute, prepared statement of	105

ACCESS TO BUILDINGS AND FACILITIES BY TELECOMMUNICATIONS PROVIDERS

THURSDAY, MAY 13, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Oxley, Stearns, Deal, Cubin, Shimkus, Pickering, Fossella, Blunt, Markey, Eshoo, Luther, Klink, Green, and McCarthy.

Also present: Representative Lazio.

Staff present: Mike O'Rielly, professional staff member; Cliff Riccio, legislative clerk; and Andy Levin, minority counsel.

Mr. TAUZIN. The committee will please come to order.

We have a very distinguished and very large panel this morning and so I will ask all of our guests to get seated and comfortable and we expect to hear a very good hearing today and to be a great deal more educated when it is finished. Let me first welcome all of you and thank the witnesses for coming today to discuss this very important issue of access to buildings and facilities by telecommunications providers.

First of all, let me tell you that I realize the issue can generate some rather heated debate. And I hope, instead of heat today, we, of course, shed a little light on some of the real confusion and expose the real issues that, perhaps we in Washington, can help resolve for you. The differences that lie between building owners and telecom providers can be seen in how the different entities refer to the subject matter. Building owners call it "forced access," saying that these companies are trying to force their way onto private property. Telecom companies call it "competitive access," feeling they need to get access to buildings in order to compete with other telecom providers who already are provided access.

The problem that members of our subcommittee are wrestling with is the fact that all of these entities feel very passionately about their positions and are both right to some degree. Clearly, it is my wish and the wish of others on the subcommittee that telecommunications providers be given the chance to compete and that means giving them access to customers in order that they can afford to offer them the choice for whom they want to do business with. In fact, that is what competition means: making a level play-

ing field, giving all the customers a chance to reach the companies they want to reach and the companies a chance to make their case and then, eventually, letting consumers decide who should be the winners and losers in the telecommunications marketplace.

On the other hand, as a champion of property rights, it troubles me when the government wants to tell a private property owner what to do with their private property. And, therefore, it is my hope that the hearings we have today will serve as an attempt toward some sort of compromise, some arrangement, some agreements that will get us the best of these two very important worlds. We must take a look to see where access to buildings is working. I think the representatives from RCN, Winstar, and ALTS can give us some success stories where access was allowed and competition has flourished. They can, unfortunately, also point out a significant number of instances where entry has been delayed or prevented.

On the other hand, building owners, realtors, and apartment association representatives will tell us situations where they feel access was acceptable and, indeed, prosperous. They are also in the unenviable position of having to defend building owners or managers that have used the access control to create a new bottleneck, preventing customers from getting the service that they want.

Consumers want choice in our marketplace and want to be able to get the latest and the greatest technology. That includes the speed at which they can surf the Internet, the number of services they can get on one bill, and the lower prices that competition usually helps provide. FCC has also been invited to discuss with us today what they are doing, what they are working on, and provide us with a sense of timing as to when the FCC itself will complete items that they have or will be having before them on both sides of the inside wiring and the building access issues.

Clearly, there is a lot to consider today. As I said earlier, there is a chance to start dialog and perhaps shed more light than heat. I believe that there is room, indeed, for some sort of balanced compromise. I want to thank, again, the witnesses in advance and I am pleased to welcome now the ranking minority member from the great State of Massachusetts, my friend Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much and I want to commend for calling this hearing. And I think you are correct that we are going to work together with all of the parties if we are going to be able to resolve this very complex issue. This issue is very important if we are going to advance the subcommittee's telecommunications competition policy across all services, be it video, data, and voice communications.

The Telecommunications Act of 1996 contained numerous provisions that repealed or removed barriers to competition. Some of the witnesses at our hearing today represent companies that, in many cases, either would not exist or would not be competing today in certain markets but for passage of the Telecommunications Act. I am not fully satisfied however and I don't think most other members of this subcommittee are either with the progress we have made thus far in providing greater competition to incumbent cable and incumbent telephone companies.

One complaint from competitors that returns to us over and over again is the issue of access to office buildings and multiple dwelling

units. The Telecommunication Act did not contain a specific provision relating to building access for telecommunications services, yet Congress did include section 207 which required the FCC to preempt restrictions on the placement of over-the-air devices to receive video programming. Moreover, the Commission has some underlying authority, such as pole attachment provisions and inside wiring regulations, that can affect building access for competitors. I am eager to hear from our witnesses this morning on their views as to the applicability of these provisions and the effectiveness of these rules.

The issue of access to buildings and MDUs is one that not only is vital to the growth of video data and voice competition, but also forces policymakers to wrestle with questions of building security and tenant safety, compensation for building owners, and constitutional arguments raised with respect to government-mandated access to private property. I am hopeful that we can pragmatically address many of the legitimate concerns of building owners to achieve a result that serves to bring more choices and lower prices to tenants and continues to fuel American economic growth in this important marketplace.

Mr. Chairman, I thank you for holding this hearing and I look forward to hearing from the witnesses.

Mr. TAUZIN. Thank you, Mr. Markey. I am pleased to also welcome my friend from Georgia, Mr. Deal for an opening statement.

Mr. DEAL. Thank you, Mr. Chairman. I don't have an opening statement and look forward to the testimony.

Mr. TAUZIN. Thank you, Nathan. Indeed we have an incredible array of witnesses today and we want to get them going as quickly as we can. Let me first admonish you that we have your written statements and they are good and we thank you for that. And we are going to read them over and over again and more than once before we resolve this issue so please don't read your statements to us. You can see, we try to conduct this very informally in the sense that we would like you to have conversation with us and give us the highlights of what you came here to tell us today and make your best points. We will have a little timer and you all get 5 minutes to do it. We appreciate it. We have to do it that way. And the members will have 5 minutes to dialog with you and I hope out of it, as I indeed pointed out, comes a lot of understanding and perhaps some resolution.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. MICHAEL G. OXLEY, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF OHIO

Thank you, Mr. Chairman, and welcome to our witnesses.

As we all know, the purpose of the '96 Act was to remove barriers to competition. The question before us today is whether restricted access to office complexes and apartment buildings for telecommunications competitors poses a barrier to competition.

In the case of local telephone competition, where some new entrants plan to employ wireless technologies to provide facilities-based competition, the inability to access rooftops to place antennae to serve occupants does appear to serve as a barrier to market entry.

The proposed solution—that building managers should be required to offer reasonable, non-discriminatory access to telecommunications competitors in exchange for full economic compensation—is offered as a way to promote growth and competition

by removing a market distortion favoring incumbent carriers. I believe it is an idea worth exploring, so I commend the Chairman for holding this morning's hearing.

Thank you, Mr. Chairman. I yield back.

PREPARED STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF FLORIDA

Mr. Chairman: Thank you for calling these hearings. The issues before us are quite weighty and they magnify the state, or lack thereof, of competition in the telecommunications industries.

I had hoped this hearing would focus on the issues of building access, as I think they will, but our Subcommittee should devote another hearing entirely to the subject of facilities access.

Issues surrounding facilities access for competitive telephone and cable providers are different from the issues affecting building access. I encourage my Chairman to hold such a hearing in the near future.

As my colleagues know, I do believe our own individual states and localities should play the paramount role in the regulation of telecommunication providers, with the federal government and federal regulators playing a complementary role.

However, Congress and the FCC must lead when barriers to competition are evident and where national telecommunications policy needs to be addressed.

This is what drove us to action to create the Telecommunications Act of 1996. Our nation was in need of federal policy to deliver competition at the local level. Unfortunately, some have delayed competition by choosing to challenge provisions in the Act or challenge how the Act was being implemented.

If Congress and the FCC is forced to act on building access and we are challenged in court, I am confident the courts will continue to recognize our authority in opening uncompetitive markets and industries.

Some will argue about the constitutional provisions protecting private property and I would agree with them.

But in many multi-tenant residential buildings, the tenants *own* their condominiums or apartments and they are denied access to competitive telephone or video services by their property management.

Do these owners not deserve the constitutional protection of private property and, therefore, do they not have the right to receive competitive telecommunication services?

There is no question that access to multi-tenant residential and office buildings is fundamentally important in achieving competitive structures in telecommunications. Without the ability to serve these type of customers, competition in telephony, video, and data services will be stifled.

I believe that sensible solutions to allow sensible access to buildings for competitors is in every one's interest.

I think it is in the building owners interest, and I think they will agree, to provide the best services to retain tenants and to attract tenants. That is why reaching an agreement on building access is achievable.

I had hoped and still hope that the issue can be settled at the state level to allow our states and localities develop policies to achieve competitive access. My home state of Florida had before the state legislature maybe the preeminent bill in the nation concerning access.

The Florida building access bill provided mandatory access for telecommunications carriers to tenants in multitenant buildings on reasonable, technologically neutral, and comparable terms and conditions.

As I understand, all the players concerned from competitive telecommunication providers, incumbents, and building owners were on board with a compromise agreement as the bill was moving through the Florida House.

They reached a settlement that all sides were not entirely satisfied with, but all realized the agreement was the most reasonable approach to achieving building access.

Then for typical political reasons, the bill was held up for personal considerations. The problem remains that if our states capitulate to political obstruction and allow barriers to competition to continue to exist, Congress and the FCC will be forced to step in and create solutions to allow reasonable building access.

I look forward to today's testimony and I hope the witnesses can address the Florida bill and suggest if the Florida bill was an adequate compromise or is there a better solution? Additionally, do you think the Florida legislation can be used as a model for the federal government?

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this important hearing on access to buildings and facilities by telecommunications companies.

The importance of facilities based competition in local telecommunications markets cannot be understated. The competitive industry has a legitimate complaint about not being allowed into residential buildings. However, not all legitimate complaints warrant government involvement.

Two months ago I facilitated a forum in Wyoming on the placement of communication towers. The problem we were trying to resolve had to do with telecommunications providers not being allowed to place much needed cell towers in areas where they can deliver the best coverage and the most advanced services.

Instead of legislating a solution, the meeting educated the public and the public ended up driving the debate on why cell towers are important for public safety, and essential for increasing modem communication services.

I see the issue with accessing buildings in the same way. If there are enough tenants of multi-dwelling units who are unhappy with their current telephone, cable, Internet or any other utility service, they have the option to demand that their building manager or owner change it.

The bottom line is that the building managers and owners are responsible for taking care of their tenants' needs. If the tenants are unhappy with their current telecommunication services, something will need to change.

Congress isn't going to promote competition in this regard: it's going to be the consumer who demands competition by purchasing the latest, greatest and least expensive technology and telecommunications services.

These services are currently available and should be available for people to choose from, but it should not come at the expense of trampling the rights of private property owners.

Mr. Chairman, I look forward to hearing from the witnesses today and yield back the balance of my time.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you Mr. Chairman, I also want to thank you for holding this hearing.

This is an important hearing because it's about *competition*. Competition brings consumers long-term benefits. Competition is the best mechanism to ensure low rates. Competition also brings better service and more choice.

Competition also poses a problem for incumbent providers. Incumbent providers have two ways to respond to competition: meet consumer demand, or perish.

The Telecommunications Act of 1996 says that, as a matter of law, all telecommunications markets are open to competition. The local telephone market, once closed to competition, is no longer a legal sanctuary for monopolists.

Since the Act's passage, critics of the law have complained that competition has not developed quickly enough. These critics, however, choose to ignore the wealth of evidence that shows competitors are making progress.

True: we'd all like to see *more* competition. But the solution there is *not* to turn our backs on the progress we've made. Instead, we should focus on ways to remove the remaining obstacles to competition.

Which brings us to the subject of building access, the so-called "last hundred feet."

This is an important component to promoting competition in local telephone markets. Consumers who live in apartment or commercial buildings are no less entitled to the benefits of competition.

I am therefore concerned when I hear charges that building owners and managers go a long way to deny competitors access to their properties. I know how difficult it must be to accommodate new folks seeking access to office buildings and apartments. However, some building owners and managers are mistakenly restricting access.

I recognize this is not true of all building owners. Some owners and managers support competition in retail sales of electricity, which pleases me. Many owners have done the right thing for their tenants and opened their door to competition.

So we need to find an answer to the following question: how do we take care of the "bad actors?"

The FCC has done some good work in this area. But much work remains, and the FCC ought to be using its power to help us find some solutions.

Let me also say that I strongly support collaborative solutions to this problem. I applaud those building owners and telecommunications companies that have tried to fashion a compromise, and urge you to continue your good work.

But those who choose to dig in their heels should know that we will continue to monitor this situation. I am committed to opening the local loop, and building access is a key component to that effort.

Again, I thank the Chairman for holding this hearing, and I look forward to the testimony of the witnesses.

Mr. TAUZIN. So we will start today by welcoming the chief of the Wireless Telecommunications Bureau, Mr. Thomas Sugrue, who will give us some idea of what the FCC is doing in this area and give us an update on timing and what may be happening, what is going on. So you may all learn something about what is about to happen, all of you, from the FCC.

Mr. Sugrue.

STATEMENTS OF THOMAS J. SUGRUE, CHIEF, WIRELESS TELECOMMUNICATIONS BUREAU, FEDERAL COMMUNICATIONS COMMISSION; SCOTT BURNSIDE, SENIOR VICE PRESIDENT, REGULATORY AND GOVERNMENT AFFAIRS, RCN CORPORATION; JOHN D. WINDHAUSEN, JR., PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES; WILLIAM J. ROUHANA, JR., CHAIRMAN AND CEO, WINSTAR COMMUNICATIONS; BRENT W. BITZ, EXECUTIVE VICE PRESIDENT, CHARLES E. SMITH COMMERCIAL REALTY L.P.; ANDREW HEATWOLE, PARTNER, RIPLEY-HEATWOLE REALTORS; JODI CASE, MANAGER OF ANCILLARY SERVICES, AVALON BAY COMMUNICATIONS INCORPORATED; LARRY PESTANA, VICE PRESIDENT, ENGINEERING, TIME WARNER CABLE; AND MARK J. PRAK, PARTNER, BROOKS, PIERCE, MCLENDON, HUMPHREY, AND LEONARD

Mr. SUGRUE. Thank you, Mr. Chairman and Congressman Markey, members of the subcommittee. I am pleased to accept the invitation to testify today on these important issues.

Apart from my role as chief of the Wireless Bureau at the FCC, I have some personal experience with the benefits of enabling telecommunications providers to have competitive access to apartment buildings. Recently I sold my house and moved into an apartment while awaiting the construction of a new home. I was happy to discover that, when we signed our lease, we were asked which of two providers did we want to select for our local telephone service: Bell Atlantic or Jones Communication. Jones, the cable company in Alexandria, Virginia, is providing telephone service in that city. I felt empowered by the availability of choice and the service packages offered by Jones were attractively priced and included an array of options. I was able to compare the two offerings and pick between them. All Americans should have such a choice.

I should hasten to add that I selected Jones, not out of any unhappiness with my friends at Bell Atlantic, but simply out of professional curiosity.

How does this competition really work and so far the phone seems to work.

Tenants in multiple dwelling units or MDUs potentially play a critical role in the development of local competition. They have the opportunity to be among the very first customers to realize those benefits because of the economies of scale posed by the concentration of customers in these locations. As a result, MDUs could either be the beachhead in which facilities-based competition gets a foot-

hold or they could be the last place competition arises because competitive carriers lack the access to customers.

Competitive access to MDUs is also an important first step toward advancing local competition in non-MDU areas. The foothold Jones has in my apartment building and other MDUs and the customer base and operational experience that it is gaining could enable this carrier to take the next step, serving customers more broadly throughout all of Alexandria.

Now on the video side, I do admit some frustration with my situation. Since my apartment faces northeast, a DBS dish on my balcony won't work. There ain't so satellites up in that direction. So even though I can look out my window toward Boston, I can't receive the New England regional sports channels that cover my beloved Boston Red Sox and Boston College athletic teams a result that, while frustrating to me as a fan, is probably beneficial to my mental health. But, Congressman Markey, I am sure you feel my pain.

But, personal experience aside, the importance of promoting facilities-based local competition cannot be understated as a critical step in reaching the pro-competitive goals Congress established in the Telecom Act of 1996. In a competitive local telecommunications market, competitors will have the incentive to provide advanced features such as broad-band access and innovative service packages in order to attract customers to their offering. This pro-consumer result will be achieved in a timely and efficient manner only in the context of full facilities-based competition by service providers using all delivery technologies.

As my formal testimony more fully explains, the Commission has considered these issues in a number of proceedings aimed at promoting facilities-based competition in video and telecommunications. These proceedings have made inroads in this area, but issues do remain. Particularly in light of the emergence of new competitors in the form of wireless telecommunications providers, like Winstar, Telegent, and NextLink.

The Wireless Bureau has recently deployed Spectrum and will continue to do in the future, which makes the emergence of these new competitors a reality. The Bureau also intends to propose to the Commission soon that it initiate a proceeding that will attempt to address in a more comprehensive manner a number of the inter-related questions about building access issues involving these local telecommunications service providers.

I respectfully suggest that the subcommittee consider whether legislation appropriate to advance competitive access to MDUs. Legislation could clarify the Commission's authority to take action in the public interest to promote reasonable and nondiscriminatory access. Legislation could also provide guidance to the Commission and to reviewing courts on the proper scope of agency action, including the principles that should govern and the limitations that should apply. And it could help ensure that whatever decisions the Commission makes in this area do not get bogged down in protracted litigation initiated by one side or the other in this debate. The Commission staff would be pleased to offer their technical assistance to the subcommittee in this effort.

Again, I thank the subcommittee for this opportunity and I look forward to working with you on this matter.
 [The prepared statement of Thomas J. Sugrue follows:]

PREPARED STATEMENT OF THOMAS J. SUGRUE, CHIEF, WIRELESS
 TELECOMMUNICATIONS BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, Ranking Member, and Members of the Subcommittee: Good morning. I am Thomas Sugrue, Chief of the Wireless Telecommunications Bureau at the Federal Communications Commission. I welcome this opportunity to address the Subcommittee as it considers how best to ensure that residential and business customers located in multiple dwelling units ("MDUs"), such as apartment and office buildings, will have reasonable opportunities to obtain advanced and innovative local telecommunications services and video programming services from competitive service providers.¹

IMPORTANCE OF FACILITIES-BASED COMPETITION

The Commission has worked hard to implement a principal goal of the Telecommunications Act of 1996 ("1996 Act")—the promotion of competition in local telecommunications markets. As you well know, the 1996 Act contemplated three entry strategies for local competitors: use of their own physical facilities, use of unbundled elements of the incumbents' networks, and resale of the incumbents' services. All three of these entry strategies remain important as means of introducing competition, and the Commission continues to take actions to facilitate all three. In the long term, however, the most substantial benefits to consumers will be achieved through facilities-based competition. Only facilities-based competitors can avoid reliance on bottleneck local network facilities. Only facilities-based competition can fully unleash competing providers' abilities and incentives to pursue publicly beneficial innovation.

Facilities-based competition is important not only for the efficient and ubiquitous provision of basic telecommunications services, but also for the availability of advanced and innovative services. In a competitive local telecommunications market, competitors will have the incentive to provide advanced features, such as broadband access, and innovative service packages in order to attract customers to their offerings. This pro-consumer result will be achieved in a timely and efficient manner, however, only in the context of full facilities-based competition by service providers using all delivery technologies.

Moreover, the benefits of competition cannot be fully realized unless competitive local telecommunications services can be made available to all consumers, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. To the extent that certain classes of customers are unnecessarily disabled from choosing among competing telecommunications service providers, the Congressional goal of deploying services "to all Americans" is placed in jeopardy. Furthermore, the fullest benefits of competition cannot be achieved unless, to the extent feasible, competitive services become available in all sectors of the markets of incumbent local exchange carriers ("LECs"). Specifically, facilities-based competition has been especially important in the video area where competing multichannel video program distribution ("MVPD") providers have sought both access to inside wiring installed by cable companies and the ability to install their own antennas on MDU premises.

NATURE AND IMPACT OF THE MDU PROBLEM

I share the Subcommittee's concern in calling this hearing, which is focused on two groups of users and their ability to realize the benefits of facilities-based local telecommunications and video services competition: the millions of Americans who live in apartment buildings and other MDUs; and the many businesses, including small businesses, that are located in office buildings that they do not control. The special difficulty with offering competitive facilities-based services to these customers arises from the need to transport signals across the building owner's premises to the individual customer's unit. For a telecommunications reseller or a user of the incumbent LEC's unbundled local loops, this transport is typically accomplished by piggybacking on the incumbent LEC's existing facilities as part of the resale or unbundled access agreement. A carrier that uses its own wireline or wireless

¹The comments and views expressed in this Statement are offered in my capacity as Chief of the Commission's Wireless Telecommunications Bureau and may not necessarily represent the views of individual FCC Commissioners.

facilities to reach the building owner's premises, however, must then either install its own equipment or obtain access to existing in-building facilities in order to reach individual customers.

Depending on State law and local practices, some or all of the locations and facilities to which competing carriers may require access may be controlled by the incumbent service provider, the building owner, or both. The rules governing ownership and control of existing facilities also differ depending on whether the facilities are used for telecommunications or video programming services. In order for facilities-based competition to be fully available to all customers, however, reasonable and nondiscriminatory access to competing providers must be provided by whomever controls these facilities.

This hearing is especially timely in light of the Commission's ongoing efforts to make spectrum available to provide fixed wireless telecommunications services. For example, service providers are now offering fixed voice telephony and high-speed Internet access services over spectrum in the 24 GHz and 39 GHz bands. The Commission also recently auctioned Local Multipoint Distribution Service spectrum in the bands around 28 GHz, which should result in a significant number of new licensees offering fixed wireless services over the next few years. It appears that all of these spectrum bands will likely be used primarily for broadband telecommunications applications, although licensees can provide video programming services over this spectrum as well. Because their technology enables them to avoid the installation of new wireline networks, wireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users. It is important that this potential not be threatened by obstacles to these providers' ability to deliver signals over the last 100 feet to their customers' locations.

COMMISSION ACTIONS AND PLANS

Significant Commission action over the past three years has been devoted to facilitating the rapid and efficient arrival of ubiquitous competition, including facilities-based competition, in local telecommunications markets. Beginning with the trilogy of local competition, access charge reform, and universal service rulemakings, and continuing through actions the Commission is taking in such areas as increasing the availability of spectrum, streamlining procedures, and forbearing from enforcing unnecessary statutory provisions and regulations, the Commission is moving to promote the ability of competitive local telecommunications carriers to compete. The Commission has similarly acted to promote competition in video programming distribution markets. With respect to MDU access in particular, the Commission has taken several actions and is considering several others. Specific proceedings that are relevant to access to MDUs include the following:

- In its August 1996 *Local Competition First Report and Order*, the Commission promulgated rules implementing amended Section 224 of the Communications Act. Section 224 requires public utilities, including LECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access under just and reasonable rates, terms, and conditions to poles, ducts, conduits, and rights-of-way that they own or control. Petitions for reconsideration of this portion of the *Local Competition First Report and Order* are pending. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16058-16107 (1996).
- Section 251(c)(3) of the Communications Act requires incumbent LECs to provide other telecommunications carriers with nondiscriminatory access to network elements on an unbundled basis under just, reasonable, and nondiscriminatory rates, terms, and conditions. The United States Supreme Court recently vacated, and remanded for further consideration under the prescribed statutory standards, the Commission's rules identifying which network elements must be made available under this provision. In a Notice of Proposed Rulemaking (NPRM) implementing the Supreme Court's remand, the Commission specifically requested comments regarding whether incumbent LECs should be required to unbundle facilities located at end users' premises. Comments are due on May 26, and reply comments are due on June 10. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, 64 Fed. Reg. 20238 (April 26, 1999).
- In October 1997, the Commission adopted a Report and Order amending its cable inside wiring rules to enhance competition in the video distribution marketplace. At the same time, the Commission adopted an NPRM requesting comment on other issues affecting competitive video service providers' access to MDUs, including whether restrictions should be placed on exclusive contracts

between building owners and multichannel video programming distributors. *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997).

- In November 1998, the Commission adopted rules under Section 207 of the 1996 Act restricting building owners' authority to impose restrictions on the placement of devices for the reception of over-the-air video programming in areas that are within a tenant's exclusive use. However, the Commission held that it could not adopt similar rules governing the placement of antennas in common or restricted access areas under Section 207 because Section 207 did not give it the express authority to do so. *Implementation of Section 207 of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 23874 (1998).
- In March 1996, the Commission amended its rule governing preemption of state and local regulation of satellite earth stations so as to make it consistent, to the extent appropriate, with the rules applicable to smaller receiver antennas. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996).

Looking forward, one of the pending petitions for reconsideration or clarification of the *Local Competition First Report and Order* asks the Commission to clarify the right of access under section 224 to rooftop rights-of-way and riser conduit (spaces inside the walls of a building through which cabling is run) that a LEC or other utility owns or controls. I anticipate that the Commission will act on this petition in the near future. In addition, once comments have been received on the recent NPRM regarding the identification of unbundled network elements following the Supreme Court's remand, the Commission will have a record on which to provide more guidance regarding incumbent LECs' obligations to provide reasonable and nondiscriminatory access to facilities they may own or control within customers' buildings.

Let me assure you that there is a strong recognition within the Commission that a comprehensive and coordinated assessment of competitive providers' access to MDUs is essential. Staff from Bureaus and Offices across the Commission are working together to evaluate and present the various issues that affect building access. As one outgrowth of this process, the Wireless Telecommunications Bureau intends soon to propose to the Commission an item initiating a proceeding that will attempt to address in a more comprehensive manner a number of interrelated questions comprised within the building access problem for local telecommunications service providers.

POTENTIAL OBSTACLES TO EFFECTIVE ACTION

The upcoming Commission actions that I have just described will constitute important steps toward ensuring that customers in MDUs will have a full opportunity to obtain competitive facilities-based local telecommunications services. Some interested parties have argued, however, that the Takings Clause of the Fifth Amendment, as well as limits on the Commission's statutory authority, may limit the Commission's ability to act in this area. These arguments reflect legitimate concerns about ensuring reasonable compensation to building owners and ensuring against unreasonable burdens on their property, and they will be fully considered by the Commission in the course of any rulemaking proceeding. Even assuming, however, that the Commission ultimately determines it has authority to take action under existing law, the arguments in opposition may well form the basis for protracted litigation in the event the Commission decides to adopt any rules.

For this reason, I respectfully suggest that the Subcommittee consider whether legislation is appropriate to facilitate competitive telecommunications carriers' access to MDUs. Legislation could clarify the Commission's authority to take action in the public interest to promote reasonable and nondiscriminatory access to MDUs and to prevent the imposition of restrictions that discriminate or otherwise inhibit the ability of competitive providers to install the facilities necessary to offer their services in MDUs, including wireless equipment such as antennas on the roofs of apartments and office buildings. Legislation could also provide guidance to the Commission, and to reviewing courts, on the proper scope of agency action in this area and the principles that should apply, while still leaving implementation details to be determined in Commission rulemakings and other proceedings. Commission staff will be pleased to offer their technical assistance to the Subcommittee in this effort.

CONCLUSION

Once again, I would like to thank the Subcommittee for inviting me to testify at this important hearing to examine issues of competitive carrier access to customers located in MDUs.

Mr. SUGRUE. With me today is Bill Johnson, who is deputy chief of the Cable Services Bureau. I would like to ask the subcommittee's permission that he join me at the table to answer questions.

Mr. TAUZIN. Without objection, that will be the order of the day.

Mr. SUGRUE. Thank you, sir.

Mr. TAUZIN. We will get to questions in just a while, but we want to know what proceedings are ongoing, where they reside, and, at some point, what is the time line? And we will get to that in a second. I think we will all be very enlightened to learn those things.

Let me now introduce the guests we have here today who will get to the substance of this debate and, perhaps, help us resolve it. First, Mr. Scott Burnside, the senior VP of Regulatory and Government Affairs of RCN, Dallas, Pennsylvania. Dallas, Texas, is not the only Dallas, we find out, in America.

Mr. BURNSIDE. You bet it is not.

Mr. TAUZIN. This is America's hometown, Dallas, Pennsylvania. Mr. Scott Burnside.

STATEMENT OF SCOTT BURNSIDE

Mr. BURNSIDE. Thank you, Mr. Chairman, members of the subcommittee. I am the senior vice president for regulatory and government affairs at RCN corporation and I am appearing before you today to discuss the obstacles RCN faces accessing inside wiring in MDUs. The lack of such access is a serious impediment to the full roll out of competitive cable services and the implementation of both the spirit and intent of the Telecommunications Act. We believe that only congressional action can adequately cure the problems we are encountering. We believe that a legislative solution can be found which will advance competition in the delivery of cable services while, at the same time, preserving the property rights of MDU owners and incumbent cable operators.

My company, RCN, provides long distance and local telephony service, Internet, and cable television service to the residential marketplace. We currently offer service from Boston to Washington, DC, and will initiate service shortly in California. We have committed hundreds of millions of dollars to build our network and are making good progress doing so, despite a barrage of anti-competitive activities from existing cable operators.

Among the most serious problems we have is access to the so-called inside wire within multiple dwelling units. Problems arise in the connection of our network to the individual apartment units. Our preference is to install our own wire always. Do so, however, is frequently not possible because the building owners or managers are unwilling to permit the new construction which would be required to install a second set of wires. When incumbent cable operators refused to allow us to use the existing wire, the result is, in these buildings we have potential customers but no way to bring our signal to them.

FCC rules that govern inside wire are inadequate for two reasons. First, the rules are limited to instances in which the incum-

bent cable provider does not have a legal claim to retain its wiring in the MDU. In most cases, incumbent cable providers assert an ownership interest or claim to have an exclusive contractual arrangement with the MDU. Many States have enacted mandatory access laws granting cable operators the right to install their cable over any building ownership objections. Using these laws, cable operators claim ownership of all distribution wire. The FCC has declined to draft rules preempting these anti-competitive claims, expressing hesitation about its authority to do so.

In many cases, RCN has been denied access because of exclusive contracts between MDU owners and the incumbent. The FCC has declined to override these anti-competitive contracts, even though they are clearly not in the best interests of building residents.

The second reason the FCC rules are deficient focuses on the definition of the word "accessibility" in the current rules. New competitors are allowed to connect their wires at a demarcation point 12 inches outside of the apartment unit, unless that wire is physically inaccessible at that point. If it is, the rules go on to say that the demarcation point is moved to a point where the wires first become accessible outside of the apartment unit. Quite often, we find that building owners will not permit us to drill or cut holes in the wall to pull in our wire and connect to the 12-inch point. In such situations, the first point of access occurs at a junction box in a riser closet or a stairwell. Surprise. The incumbents do not agree and insist that the wire at the 12-point is accessible by FCC definition, even though RCN is not permitted to get at it.

We have attempted to address the interpretation of accessibility with the FCC by seeking a very narrow staff interpretation of the rule when building management will not allow access. That was 8 months ago and to date we have had no response. The interpretation sought by RCN would encourage competition by establishing that a second cable provider can, in such circumstances, access existing wire. Our request does not impair the incumbent's property rights. RCN does not seek to force a sale of the existing wire, but only to negotiate an arrangement so that each company can use it.

With respect to this matter, we ask that Congress persuade the FCC to address this narrow issue of interpretation as quickly as possible. A favorable ruling by the FCC, while a positive result and a good first step, is not the long-term solution. Ultimately, Congress must address the issue of State mandatory access laws and exclusive contracts which the incumbents use to thwart the FCC's inside wire rules. The FCC says it does not have sufficient jurisdiction to address these existing problems.

We have not asked for a rewrite of the Telecom Act. We only wish to have you finish what you started in 1996 by finetuning the Act, adjusting for unanticipated anti-competitive actions by the incumbents. The legislation should allow for the promulgation of FCC rules necessary to permit any cable provider to use, on a non-discriminatory basis, the existing home run wire. And, two, authorize the FCC or a Federal or State court to preempt, when necessary, conflicting State laws for prior and consistent contracts. We need a law which establishes that the competitors must have fair and reasonable access to existing wire which authorizes the FCC

or the courts to preempt conflicting State laws for inconsistent contract.

Thank you, Mr. Chairman.

[The prepared statement of Scott Burnside follows:]

PREPARED STATEMENT OF SCOTT BURNSIDE, SENIOR VICE PRESIDENT, REGULATORY AND GOVERNMENT AFFAIRS, RCN CORPORATION

Mr. Chairman and Members of the Subcommittee: My name is Scott Burnside. I am the Senior Vice President of Regulatory and Government Affairs of RCN Corporation ("RCN") and I am appearing before you today to discuss the obstacles RCN faces accessing "inside wiring" in multiple dwelling units ("MDUs"). The lack of such access is a serious impediment to the full rollout of competitive cable services and the implementation of both the spirit and intent of the Telecommunications Act of 1996 (the "Telecommunications Act"). We believe that only Congressional action can adequately cure the problems we are encountering and we urge this Subcommittee to consider the adoption of legislation addressing this competitive obstacle at the earliest practical moment. We believe that a legislative solution can be found which will advance competition in the delivery of cable services while at the same time preserving the property rights of MDU owners and incumbent cable operators.

First, let me briefly describe where RCN fits into the big picture. As a result of the pro-competitive policies of the Telecommunications Act, RCN was formed to provide residential telecommunications users with a competitive alternative for their telephony, Internet, and cable needs. As a telephony provider we initially supplied services by reselling incumbent services, but increasingly we are building out, and relying on, our own facilities-based, state-of-the-art, fiber optic cable. Through this facilities based network, we are also able to offer high speed Internet and cable services to our customers.

We operate in the Northeast corridor, from Boston to Washington, D.C., and are actively expanding our service in the San Francisco to San Diego corridor. We seek to provide value to our customers by providing superior service while underpricing the competition in each segment of our business and by offering discounts to customers who subscribe to each of our telephony, Internet and cable services. The focus of my testimony today will be on the cable aspect of our business and the competitive hurdles we face accessing inside wiring in MDUs.

RCN operates both as an open video service ("OVS") operator and as a traditional Title VI franchised cable company. As you well know, the OVS concept was developed by Congress and embodied in the Telecommunications Act.¹ You intended OVS to provide a new, and much needed, competitive alternative to the monopolistic incumbent cable companies.² We have tried to implement Congress' vision, and in fact, we like to refer to ourselves—perhaps somewhat boastfully—as the "poster child" of the Telecommunications Act in this regard. We operate OVS systems in Boston and its surrounding communities, in New York City, and here in the District of Columbia metropolitan area through our joint venture with PEPCO known as Star Power Communications. We are also developing traditional franchised cable operations in the Boston, New York and Washington metropolitan areas, and are beginning to plan for and build out OVS and franchised systems in the Philadelphia and San Francisco metropolitan regions. RCN is by far the largest investor in and operator of, OVS. Indeed, there are no other significant OVS operations up and running.

In each market we have entered we have made significant in-roads despite daunting barriers to entry. We believe that we have begun to fulfill the fundamental pro-competitive premise of the Telecommunications Act. We are aggressively pursuing our network build-out and have signed up a significant number of cable customers, especially in Boston and New York. Even so, we face competitive obstacles every step of the way. This Subcommittee, of course, does not need to be persuaded that competition in the cable marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.³ Yet it is interesting to see the theory at work. For instance, RCN's entrance into certain markets has caused cable operators to exercise dramatic restraint in some instances. For example, in late 1997, Time Warner an-

¹47 U.S.C. sec. 573.

²Indeed, Congress and the Commission intended OVS to be the primary source of facilities-based competition to cable operators. See, e.g., *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18259 (1996). (Subsequent history omitted).

³See, e.g., *Communications Daily*, July 15, 1998, p. 2, reporting CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate.

nounced that new rate increases in the range of 10% to 15% would take effect throughout the Boston area,⁴ except in Somerville, where RCN provides competitive cable service.⁵ Similarly, in the City of Boston, Cablevision raised its rates only 2.5%. In New York City, Time Warner has implemented an aggressive bulk discount program in many of the MDUs where RCN offers competitive cable programming.

Yet we have found the going very tough indeed. Economic theory recognizes that the cable incumbents, who have enjoyed a quiet but very prosperous life for decades, do not welcome new competition.⁶ Over the last two years we have been subjected to a barrage of anticompetitive activities by incumbent cable companies: we have been harassed by pleadings seeking the withdrawal of our OVS authority on various specious grounds—pleadings filed both by individual cable companies and by cable trade associations. We have been subjected to multiple administrative proceedings instigated by the cable incumbent in Boston—our first OVS market—as well as litigation in federal court brought by the incumbent cable operator which the presiding judge urged be withdrawn because it was so lacking in merit. We have been denied access to critical programming by our cable competitors both in Boston and New York. Of course, we anticipated resistance but to be candid the extent and intensity of that resistance—the prevalence of anticompetitive practices, has really surprised us. I hasten to add the important point that it has not deterred us but merely required allocating more time and resources to getting into various markets than we had initially anticipated.

One of the principal areas where we face substantial resistance concerns access to inside wiring in MDUs. MDUs account for about 27 percent of all U.S. households and in many cities such as Boston, the percentage is higher. Typically, MDUs have been wired by the local incumbent cable company which has no interest in sharing such wiring with a competitor. In MDUs, the cable signals are delivered to a junction box, usually in an electrical closet in a basement or ground floor of the building. From there the signals are carried by “risers” to junction boxes on each floor. From the junction boxes, the signals are carried to each unit; this segment of the wiring is known as the “home run wiring.” This wiring is, in turn, connected to wiring inside each unit, which is known as “cable home wiring,” and the subscriber’s set is attached to a cable box which is fed by the cable home wiring. The home run wiring and the cable home wiring is usually buried behind walls or ceilings and occasionally embedded in structural elements. Riser cable is also generally inaccessible without opening walls, floors, ceilings, or structural elements. Occasionally, however, the wiring between junction boxes and cable boxes in individual units is carried inside molding which is attached to the outside of existing walls and similar structures.

For RCN, or for any non-incumbent cable provider, problems arise when we attempt to connect our outside distribution network to the individual customer units in MDUs. That is, after our signals have been brought to an MDU by underground or aerial cable, we must distribute it to individual subscribers. Our preference is to install our own wiring. Doing so, however, is frequently not an available option because, if construction or building alterations are required, the MDU owner or manager is unwilling, understandably, to permit the new construction which would be required to install a second set of wires. The incumbent cable company, of course, refuses to allow the overbuilder to use its existing wiring. We have encountered construction blockages in about 1/3 of the MDUs to which we have brought our signal in Boston, and in no case was the incumbent willing to allow us to use the existing wiring. As a result, we have subscribers who have requested our cable service but we have no way to bring our signal to them.

The inside wiring issue has been a problem for cable competitors for some time. Section 624(i) of the Cable Television Consumer Protection and Competition Act of 1992⁷ directed the FCC to adopt rules governing the disposition of wiring within the cable subscriber’s home when such subscriber voluntarily terminates service. The FCC subsequently adopted rules, but they were too restrictive in their applica-

⁴*Boston Globe*, December 21, 1997 (WL 6286769).

⁵*Boston Globe*, November 26, 1997 (WL 6282146). In fact, a cable company executive stated that the company is “looking at a whole new competitive pricing system” and “facing how we deal in a competitive environment for the first time.” See also *FCC En Banc* Presentation on the Status of Competition in the Multichannel Video Industry, December 18, 1997, at pp. 24-30.

⁶See *Predation In Local Cable TV Markets*, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: “Cable television operators pursue a predictable set of reactions...to a potential CATV entrant...beginning with a vigorous lobbying campaign to deny entry rights...selective price cutting, preemptively remarketing the first submarkets to be competitively wired...tying up cable network programming...delaying access to...poles and/or underground conduits...and creating customer confusion...” *Id.* at 11.

⁷47 U.S.C. sec. 544(i).

tion as they applied only to wiring inside individual units and up to 12 inches beyond such units.⁸ In 1997, realizing the need to expand the scope of the rules, the FCC adopted further rules seeking to grant competitors access to the incumbent's inside wiring so that customers requesting a competitor's service could receive such service⁹ and requiring incumbents to cooperate with new entrants to facilitate implementation of the pro-competitive policies embedded in the rules.¹⁰

In formulating its inside wiring rules, the FCC anticipated that incumbent cable companies, especially in the case of service to MDUs, might not cooperate with new cable competitors and adopted rules specifically designed to address such situations. The Commission has gone to great lengths to resolve the many complex bottleneck issues related to inside wiring within MDUs, and has adopted regulations that attempt to successfully moderate the anticompetitive inclinations of incumbents.¹¹ In explaining these procedures, the Commission noted some of the exact problems currently faced by RCN:

[W]e believe that disagreement over ownership and control of the home run wire substantially tempers competition. The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been entered into in an era of an accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service... The result, regardless of the cable operators' motives, is to chill the competitive environment.¹²

Unfortunately, the FCC's inside wiring rules are grossly deficient. The rules are deficient for two principal reasons. First, the rules are limited to instances in which the incumbent cable provider does not have a legal claim to retain its wiring in the MDU. So, even though the FCC rules attempt to grant open access to inside wiring, the rules are inadequate because incumbent cable providers assert an ownership interest in the wires or claim to have an exclusive contractual arrangement to be the sole cable provider within the MDU. In many states, the incumbent cable companies have persuaded the legislature to adopt what are known as "mandatory access laws." These laws, with variations from state to state, grant cable companies a legal right to install their service in MDUs even over the objection of the building's owners or managers.¹³ Because the mandatory access laws were crafted in an era when cable service was invariably monopolistic, they may be used by incumbents to impede the introduction of competition. Relying on such laws, the incumbents claim that they own inside wiring, even when they cannot provide any proof of ownership. For its part, the Commission has declined to draft its rules so as to preempt these anti-competitive statutes, instead expressing hesitation about the scope of its authority to do so.¹⁴ In addition, incumbents often claim competitors cannot enter the MDU because they have an exclusive contractual arrangement with the MDU owner providing that the incumbent be the only cable provider. The FCC has declined to override these existing anticompetitive exclusive contractual arrangements between

⁸See 47 C.F.R. secs. 76.801-2 and 76.5(mm).

⁹See *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, 13 FCC Rcd 3659 (1997) ("Inside Wiring Order"), recon. pending and appeal pending, *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Cir.).

¹⁰See 47 C.F.R. §§ 76.5 (mm) (2) and 76.804(a)(4) and (b)(5).

¹¹*Id.*

¹²*Id.* at ¶38 (footnotes omitted).

¹³There are about 18 such statutes. The Massachusetts Mandatory Access law is codified at M.G.L. Chapter 166A sec. 22. Cablevision, the incumbent cable operator in Boston, has contended that this statute grants it a "legally enforceable right to remain on the premises of the buildings... notwithstanding the owners' wishes." (Oppos. to —, p.7 filed in CSR —).

¹⁴Report and Order and Second Further Notice of Proposed Rulemaking, in Docket No. 95-784, MM Docket No. 92-260, at page 81-101.

cable incumbents and MDU owners, but it is apparent that such contracts are an impediment to competition. Incumbents should not be permitted to rely on the sanctity of anticompetitive contracts, especially in light of new and changed regulatory circumstances, and the intent of the Telecommunications Act.

The second deficiency concerns the interpretation of the rules. The rules allow a new entrant to interconnect in an MDU with cable home wiring at the demarcation point. The demarcation point for cable home wiring is at or about 12" outside the unit unless it is physically inaccessible at that point. The Commission found that, where the cable demarcation point is "physically inaccessible to an alternative [cable provider], the demarcation point should be moved to the point at which it first becomes physically accessible that does not require access to the subscriber's unit."¹⁵ RCN believes that wiring behind the ceilings and walls and which MDU owners will not allow RCN to reach by boring holes, is inaccessible, and as a result, the demarcation point should be moved from 12" outside each unit to the point where it is first accessible or, in such cases, to the junction box. The incumbents, however, do not agree and argue that the demarcation point for the subscriber lines is located at or about 12" outside the subscriber's premises, notwithstanding the fact that the subscriber line is located behind a ceiling or wall and that the MDU owners will not allow RCN to bore through these structures nor install any new wiring.

Let me illustrate the deficiencies in the inside wiring rules for you by reference to one particular matter which is typical of the kinds of difficulties we are experiencing. Our Boston affiliate, RCN-BeCoCom, a joint venture with the Boston Edison Company, initiated OVS service in Boston last year and has been actively expanding its OVS system by providing service to MDUs in the city of Boston. The incumbent cable franchisee has enjoyed a monopoly for some seventeen (17) years and currently serves approximately 320,000 subscribers. RCN has entered into agreements to serve numerous MDUs that the incumbent currently serves.

From its own junction boxes RCN can reach individual subscriber's units either by connecting with the existing wiring at the incumbent's junction boxes or by overbuilding its own subscriber line wiring and connecting to the individual units. In some of these buildings we were able to install our own wiring and have done so. In others, MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint the ceilings and walls in order to install new lines because it is disruptive and eventually could require the replacement of entire ceilings and walls. In these instances RCN has installed all of the facilities necessary to provide service in each of the buildings except the subscriber lines necessary to access the end users. Specifically, RCN's facilities consist of riser cables running vertically between floors and junction boxes in the same utility closets as the incumbent uses. In all but a very few cases, the existing wiring was installed behind structural elements including sheet rock walls, ceilings, or other immovable structures and is therefore inaccessible.

Notwithstanding the Commission's inside wiring rules, the incumbent cable operator recognizes that in those MDUs where RCN is not allowed to install its own wiring it can significantly delay RCN's penetration of its heretofore captive market by refusing to cooperate with RCN. The incumbent claims to own and to have contractual or statutory rights to maintain the wiring, although no evidence has been produced to support such a claim. Going to court to litigate each claim for each MDU is not a viable option.

RCN repeatedly has tried to develop a reasonable *modus operandi* with Cablevision, the incumbent, under which either company could quickly and efficiently transfer a subscriber's service to the other, without interruption or disruption to the subscriber. RCN has suggested using joint junction boxes, shared possession of keys and access to each other's junction box, coordinated appointments among the respective field staffs, and other similar reasonable measures. However, the incumbent, insisting that the wiring behind sheet rock is accessible under the FCC's inside wiring rules, has refused all such suggestions, and instead simply insists that RCN must bore through the sheet rock to install its own wiring, regardless of the MDU owners' or managers' objections.

We have attempted to address the interpretation of "accessibility" with the FCC but, to date, we have not received a response. RCN sought a narrow staff interpretation of the rules to the effect that, when wiring is behind sheet rock and the building management will not allow access to it, the wiring should be considered inaccessible under the rules with the result that the competitor should have the right to interconnect at the junction box. To support this interpretation, RCN relied upon comparable language in the National Electrical Code. The incumbent and a host of other cable interests opposed RCN's request.

¹⁵ *Inside Wiring Order*, *supra* at ¶150.

The interpretation sought by RCN would encourage competition by establishing that a second cable provider can, in such circumstances, access existing wiring. Nor would RCN's request have impaired in any way the incumbent's property rights. RCN did not, nor does it now seek the opportunity to force a sale of the existing wiring to RCN, but only to negotiate an arm's length arrangement for either company to use the wiring. RCN sought to meet the incumbent at the bargaining table with both parties under a Cable Services Bureau mandate to bargain in good faith to resolve this matter. RCN noted that it has previously offered to consider leasing the wiring from the incumbent, and that it would be willing to discuss any reasonable payment arrangements for use of the wiring. Almost eight-months later we have had no indication from the Commission staff how it views the matter. With respect to this matter, we ask that Congress persuade the FCC to address this narrow issue of interpretation immediately.

However, a favorable ruling by the FCC, while a positive result and a good first step, is not the long term solution to ensure competitive access to inside wiring. Ultimately, Congress must address the issue of the incumbents' interpretation of state mandatory access laws and long term exclusive contracts which the incumbents continue to use successfully to thwart the FCC's inside wiring rules. For that reason, we have concluded that, although the Commission is to be commended for committing a great deal of time and energy to its inside wiring rules, the FCC simply does not have sufficient jurisdiction to address the problems which exist. State law with respect to the property rights of cable operators in inside wiring or related facilities is not at all uniform.¹⁶ Service contracts entered into years ago between monopoly cable providers and MDU owners frequently prohibit competitive entry. We have concluded that we must ask for federal legislation.

The purpose of the legislation would be to increase competition and diversity in the cable video market through the elimination of barriers to the distribution of cable programming within MDUs. The legislation should (i) allow for the promulgation of FCC rules necessary to permit any cable provider granted access to an MDU the right to use, on a nondiscriminatory and competitively neutral basis, the existing home run wiring in the MDU in order to provide competitive services to customers requesting such service; (ii) provide for any cable provider with a property interest in home run wiring to be fairly compensated for such use; (iii) provide that any contract, arrangement or agreement between an incumbent cable provider and an owner of an MDU, which is inconsistent with the FCC's rules is unlawful with respect to such inconsistency; and (iv) if the FCC determines that a State or local government has adopted a law, regulation or ruling which discriminates against any cable provider or that is inconsistent with the FCC's rules or open competition, the FCC shall preempt the enforcement of such law, regulation or ruling to the extent necessary to correct such violation or inconsistency.

RCN does not suggest that access to MDU inside wiring requires a massive legislative or regulatory effort; it does suggest, however, that Congress should act to overcome the refusal of the incumbents to make existing facilities available to new competitors on reasonable and equitable grounds. Simply put, to bring competitive cable services to subscribers in MDUs, we need a federal statute which establishes as an overriding principle that competitors must have fair and reasonable access to existing wiring and which authorizes the FCC, or a federal or state court to preempt, where necessary, conflicting state law or prior inconsistent contracts. Such access should be accompanied by a financial obligation which is fair both to the incumbent and to the entrant.

Let me emphasize what we neither need nor want:

We do not seek authority to force incumbents to sell us their wiring. We do not wish to impair property rights or to force incumbents to divest the inside wiring they have been using. All we need is an enforceable right to use that wiring.

We do not seek authority to run roughshod over the preferences of MDU owners or managers. We do ask for an opportunity to sell our services to MDU residents if the residents or the owners do not want such services, we can accept that. Provided that the process of soliciting customers is fair, we are content to have the market decide such questions.

We do not seek a federal right to force an incumbent out of an existing building—only the right to use existing wiring on fair and reasonable terms including cost allocations based on an economically rational approach to costing. We do seek a process, compelled by the legislation, in which the parties are required to negotiate terms and conditions in good faith which are mutually satisfactory. In the event such private negotiations are not adequate, we think it is critical that the legislation

¹⁶See Telecommunications Regulation (New York, 1998), sec. 21.11[2].

provide the entrant with a variety of remedies, including the filing of a formal administrative complaint, or taking the matter to a U.S. district or state court, as the entrant deems most advantageous.

We will persevere with our efforts to bring competitive services to residents of MDUs because that is our vision and our business. Undoubtedly we will continue to make progress. However, it would significantly accelerate the roll-out of competitive cable services if federal legislation were passed which established a broad policy encouraging competitive entry into the MDU market.

Thank you very much.

Mr. TAUZIN. Thank you very much, Mr. Burnside. We are now pleased to welcome the president of the Association of Local Telecommunication Services, or ALTS, Mr. John Windhausen, Jr.

By the way, does that qualify as a weapon? How did you get in here?

Mr. ROUHANA. It is mine.

Mr. TAUZIN. Oh, it is yours. Okay.

Mr. ROUHANA. It is my weapon.

Mr. TAUZIN. Sure. Mr. Windhausen.

Mr. WINDHAUSEN. It is very small.

STATEMENT OF JOHN D. WINDHAUSEN, JR.

Mr. WINDHAUSEN. Thank you, Mr. Chairman. As you noted, my name is John Windhausen. I am president of the Association for Location Telecommunications Services or ALTS. By the way of background, I had the pleasure of working on the staff of the Senate Commerce Committee for 9 years, leading up to passage of the Telecom Act and I had the distinct honor of standing next to you, Mr. Chairman, during an historic signing ceremony in the Library of Congress. But I also will have to admit, I share the misfortune of Mr. Sugrue in also being a Red Sox fan.

As I mentioned, ALTS is the leading association representing facilities-based competitors to the local telephone companies. We currently have 72 members, CLEC members, competitive local exchange companies, and that is up substantially from the time the Act passed. When the act passed, ALTS had 13 members. We are now up to 72. So we are growing quite rapidly.

Our companies are meeting the provision of data services in this country. We have installed over 660 switches around the country and we are very quickly deploying DSL and other high-speed Internet access services. Our members include wireless companies, such as Winstar, Telegent, and Nextlink, that are seeking to install antennas on rooftops. We are represent wire-line companies who are seeking to run fiber optic cables into the basements of buildings and other DSL companies that I mentioned that are simply looking to attach electronics to the wires provided by the phone companies.

Now, in crafting the Telecom Act, Congress identified three barriers to the development of local competition: interconnection with the local telephone company network, State and local laws that prohibited competition, and building owners. All three of these sectors must be handled, must be dealt with for telecommunications competition to become a reality. Congress, in my view, dealt very clearly and dealt well with the first two of those issues. Unfortunately, Congress did not do as good a job in crafting the language to deal with the building owner problem.

Landlords right now are the final hurdle, the last bottleneck, the last checkpoint. All of the benefits that competition was supposed to provide lower prices, greater technologies, new services all the wonderful things that CLECs can provide in the market may never reach the consumer unless the owner of the building allows the CLECs into that building. The building owner literally is the gatekeeper. Not just figuratively, but literally has the keys to the vaults and the basement or to the rooftop to decide whether a CLEC gets into that building and can deliver the services to the tenants or not.

Fortunately, some landlords, and quite many landlords and I believe we are about to hear from Mr. Bitz, who is one of those progressive landlords who has worked out arrangements with CLECs. And, in a lot of cases, these landlords realize the benefits that our telecom companies can provide to consumers. And so we are very happy to be able to make that progress.

Unfortunately, there are many other landlords that are not so farsighted. Many other landlords simply refuse to open their doors to CLECs whatsoever. They just refuse to. They say, we have got provision from the telephone company. Why do we need anybody else in our building?

Mr. TAUZIN. By the way, we invited the company. They refused to come. They just wouldn't be here.

Mr. WINDHAUSEN. Many landlords insist upon a percentage of the revenues as a condition of opening their doors or they assess very large rental fees that are a significant cost to our business, just to get in the door. And that is before we have the cost of actually providing the service, so it is a significant impediment.

Or, in some cases, landlords grant exclusive access to one company and put a contract out for bid and award an exclusive arrangement. No other CLEC can then get in that building. It is a very specific and identifiable harm to competition that results.

In fact, my written testimony identifies many examples of landlords that have charged tens of thousands of dollars just for the right to get into the door and put an antenna on the roof or put a fiber optic cable in the basement. So this situation is particularly harmful because in most cases the ILEC, the incumbent local exchange company, is in for free. They have no had to pay these fees that the CLEC has to pay. So, in this case, the CLEC is the one that is handicapped. It simply can't afford to serve all of the consumers, all of the tenants in those buildings.

So, for this reason, ALTS earlier this year initiated a new campaign called the smart building policy project. The purpose of this initiative is to educate building owners and policymakers and consumers about the benefits of opening buildings up to competition. Our objective is to demonstrate that allowing competitive telephone companies to provide advanced services to buildings will enable tenants to become smart and sophisticated users of telecom services in a way that will increase their productivity and speed up their access to the Internet.

While we believe this project will help to convince building owners to open their doors voluntarily, again, it is also clear that many are simply not interested in doing so. So, unfortunately, we need a legislative solution. And this is why we are here today. As we

heard earlier from Tom Sugrue, the FCC right now has a lot of items on its plate. It is just not certain of what the legal authority is that it has. If Congress could step in and clarify the existing law, that would be of great benefit to tenants and consumers and CLECs alike.

We are willing to work, as an association and as an industry, we are willing to work with the building owners to make sure that they are compensated, as long as that compensation is reasonable. And so we hope to work with them and with the members of this committee in crafting a solution that we all can find and achieve success with the Telecom Act. Thank you.

[The prepared statement of John D. Windhausen, Jr. follows:]

PREPARED STATEMENT OF JOHN D. WINDHAUSEN, JR., PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Good morning Mr. Chairman and members of Congress. My name is John Windhausen, Jr. I am the President of the Association for Local Telecommunications Services ("ALTS"). ALTS is the leading national industry association devoted to the promotion of facilities-based local telecommunications competition and it represents companies that build, own, and operate competitive local networks. Thank you for the opportunity to discuss an issue that is critical to the development of facilities-based local exchange competition as envisioned by the Telecommunications Act of 1996.

Telecommunications carrier access to tenants in multi-tenant buildings is essential to the development of local competition. In order to provide facilities-based service to a tenant in a multi-tenant building, a local telecommunications carrier must install its facilities on or within the building, sometimes to the individual tenant's premises (such as their office or apartment). In some cases, the carrier's facilities extend only from the building owner's property line to the basement telephone equipment room. For example, the carrier's line extends from the curb, across the parking lot to the building. Although this distance may be very short, it is impenetrable without the building owner's consent—the operation of state property laws generally requires that a telecommunications carrier obtain the permission of the building owner prior to installing facilities within and on top of that owner's building.

However, building owners can and do exclude telecommunications carriers from buildings in many different ways. For example, absent a landlord-tenant lease to the contrary—which is very uncommon—the landlord can eliminate a tenant's choice in telecommunications carriers simply by refusing carrier access to the building. Other landlords impose such unreasonable conditions and demand such high rates for access that competitive telecommunications service in those buildings becomes an uneconomic enterprise. Consequently, landlords can perpetuate the monopoly local telephone environment—the bottleneck—that the 1996 Telecommunications Act sought to dismantle.

To give you an idea of the problems that ALTS members confront, I offer you a sampling of examples. This is by no means an exhaustive list of the problems that competitive carriers face, but it does provide some concrete understanding of the unreasonable barriers to competition that some landlords are erecting.

- The manager of one large Florida property has demanded from a CLEC a rooftop access fee of \$1,000 per month and a \$100 per month fee for each hook up in the building. The company estimates that this fee structure would cost it about \$300,000 per year—just to service *one* building.
- The management company for another Florida building demands that a telecommunications carrier pay the management company \$700 per customer for access to the building, in addition to a sizable deposit, a separate monthly rooftop fee, and a substantial monthly fee for access to the building's risers which are the dedicated, horizontal and vertical spaces within a building that contain utility facilities. Taken together, these fees preclude the company from providing tenants in that building a choice of telecommunications carriers.
- In one Arizona building, a CLEC had pulled its fiber cable into the building, had access to the telephone closet and building risers, and had begun providing service to customers in the building with the landlord's permission. However, one of the CLEC's customers in that building recently requested expanded service from the CLEC, requiring an expansion of facilities. The building owner in-

formed the CLEC that it could no longer have access to the telephone closet—that it was the property of the incumbent LEC. Moreover, the building owner informed the CLEC that the building was now under exclusive contract to another carrier and that the CLEC would have to obtain permission from that carrier to service the equipment that the CLEC had already installed in the building. As a result, the customer in the building is experiencing delays in receiving expanded service while the CLEC negotiates with the building owner and the “exclusive” telecommunications carrier for access. Moreover, the CLEC’s relationship with the customer is at risk and the CLEC’s facilities that were installed in the building several years ago are in jeopardy of becoming stranded assets.

- One CLEC sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of \$2,500 per building in addition to space rental of approximately \$800 to \$1,500 per month per building. Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that the CLEC agree to refrain from making any regulatory filings concerning the building access issue.
- Another large property owner and management company demanded \$10,000 per month per building just for access rights to building risers.
- In an Arizona property, the incumbent and one competitive provider had installed facilities. Four additional CLECs requested access. The property owner demanded that the four new CLECs provide conduit, fiber connectivity between buildings, and dark fiber to the property owner free of charge—approximately \$200,000 of in-kind contributed facilities. The property owner also seeks to charge a \$750 per month access fee for access to the property even though the access will not deprive the property owner of leasable space to tenants. This situation places the four new CLECs at a competitive disadvantage to the two providers already inside the building.
- A large number of building owners and managers do not want a second telecommunications carrier in the building because of revenue sharing arrangements with the first carrier and many have entered into exclusive access contracts with a single carrier; indeed, one building management company told a CLEC not to solicit its tenants.
- In Washington state, the owner of a new building put the provision of telecommunications services to the tenants out to bid. The winning bidder would gain exclusive access to provide telecommunications service to the tenants in the building. The incumbent provider was able to outbid all other providers, offering to pay \$10,000 every year to the building owner. The incumbent was thereby able to shut its competitors out of the building entirely.
- Management companies for many other buildings demand revenue sharing arrangements in exchange for access.
- Some owners of newly constructed buildings are installing “central distribution systems” (“CDS”) in their buildings—an intra-building telecommunications network. Rather than allowing carriers to install their own facilities all the way to the customer, the building owner requires the carriers to utilize the CDS. However, some of these facilities are not advanced enough to carry adequately the traffic of more advanced carriers. Moreover, the building owners will not guarantee the reliability of these CDS intra-building networks. In addition, building owners often seek to charge excessive rates for use of a CDS that many carriers would rather not use. Finally, some building owners are requiring telecommunications carriers to sign agreements that once a CDS system is installed, it must be used—forcing CLECs to promise to strand their installed investments within buildings. This creates a tremendous disincentive to serving customers in these buildings.

The tenants in these buildings often are without recourse and cannot obtain access to telecommunications options. Building owner interests sometimes say that the market will take care of the problem—that landlords have the incentive to keep their tenants happy and to allow them access to the telecommunications carriers of their choice. They say that tenants will move out of the building if they are unhappy with their telecommunications options. These arguments are simply wrong.

The building access problem exists, suggesting that these “market incentives” are not working. Of course, in some instances, the market may provide competitive choices, but not until tenants are legally and financially able and willing to move their residence or business for the sake of competitive telecommunications choices. Tenants would be required to incur the substantial expense and inconvenience of breaking their leases and moving locations. Moreover, they may often confront higher leases, given the strength of the real estate markets and the economy generally.

This is an unreasonable pre-condition to the enjoyment of the competition envisioned by the 1996 Telecommunications Act. In fact, many of these tenants—particularly individuals and small and medium-sized businesses (those who have the least power when dealing with landlords)—have never had the opportunity to experience the benefits of telecommunications competition. This is largely a theoretical phenomenon to them. The notion that these tenants would break a lease and incur all of the other identified expenses for this unknown benefit is unrealistic.

The 1996 Telecommunications Act represents a laudable effort to open local telephone markets to competition. A good deal of work went into the construction of the statute to eliminate barriers to competitive entry. However, to a large degree, the 1996 Telecommunications Act assumes that once the incumbent LEC-imposed barriers are removed, competition will be able to flourish. It does not contemplate that even *after* incumbent LEC barriers are dismantled, telecommunications carriers may *still* be prevented from reaching and serving consumers. In short, the 1996 Telecommunications Act assumes that building access is available. Unfortunately, that assumption has proven incorrect. Building access remains a formidable barrier to the accomplishment of local competition.

The building access problem is particularly acute given the nascent stage of local competition. The geographic concentration of a large number of consumers within a building allows economies of scale that enhance the economic attractiveness of providing competitive service. For this reason, multi-tenant buildings are likely to be the first place that residential and commercial facilities-based local exchange competition occurs on a significant scale. Building access restrictions stifle competition precisely in those locations where it is most likely to arise.

This is a problem that warrants a federal solution. The vast majority of States have taken no action to ensure that tenants in multi-tenant buildings are not excluded from a competitive telecommunications environment. Connecticut and Texas both have statutes requiring landlords to permit telecommunications carriers to install their facilities to provide service to tenants therein.⁹ The Ohio Public Utilities Commission held, in an order, that landlords could not forbid or unreasonably restrict any tenant from receiving telecommunications services from any provider of the tenant's choice.¹⁰ Nebraska, too, has mandated building access in residential buildings.¹¹ But that leaves 46 States without building access remedies.

A State-by-State approach to this problem is slow and it fails to guarantee that tenants nationwide will have access to competitive telecommunications choices. Moreover, a State-by-State approach may also be ineffective because of the strategic behavior of property management companies. ALTS members inform me that if they demand compliance with the building access laws in those few States that have them, nationwide property management companies will retaliate. These management companies will penalize the carrier in those other States without building access laws. Therefore, carriers with nationwide operations are sometimes required to waive operation of building access laws thereby undermining the effect of these laws in those few States that have them.

I strongly urge Congress to enact legislation that ensures that tenants in multi-tenant buildings across America can enjoy the benefits of competition arising out of the 1996 Telecommunications Act that other U.S. telecommunications consumers are beginning to enjoy. Access should be nondiscriminatory, reasonable, and technologically-neutral. It should permit landlords to receive compensation in exchange for access—but that compensation must remain at reasonable levels and must be assessed on a nondiscriminatory basis. The Texas and Connecticut statutes offer compromise models for federal legislation that incorporate these principles and I refer you to them. I encourage Congress to act quickly on this issue and emphasize that once building access is assured, Americans will enjoy a marked and rapid increase in competitive options for local telecommunications services. Thank you.

Mr. TAUZIN. Thank you very much, John. The subcommittee is pleased to welcome a colleague from our full committee from New York, Vito Fossella, who will introduce the next witness. Vito. Oh,

⁹See Connecticut General Statutes, Section 16-2471. See also Texas Public Utility Regulatory Act §§ 54.259 and 54.260, implemented by Texas Public Utility Commission Project No. 18000.

¹⁰Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, Supplemental Finding and Order, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sept. 29, 1994).

¹¹In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, Order Establishing State-wide Policy for MDU Access, slip op. at 4 (Neb. PSC, March 2, 1999).

Mr. Lazio is going to do it. Mr. Lazio, from New York, is going to introduce the next witness. Mr. Lazio.

Mr. LAZIO. Thank you very much, Mr. Chairman. I appreciate your extending this courtesy to me. I want to take this opportunity to thank you personally for your interest in this issue—you are really the point person in the House on telecommunications—and for convening this hearing.

We have somebody from my neck of the woods who I think is one of the true visionaries of the field—Bill Rouhana. I am very pleased to see. He has been a director since the inception of Winstar Communications, its chairman of the board since February 1991, and CEO since May 1994. I am not going to read his entire bio except to say that I have had the pleasure of working with Bill Rouhana for the last several months in particular and not just discussing telecommunications issues, but talking about the future: its impact on children, the need for multiple platforms of providing a level playing field to give maximum consumer choice, and to provide for an open and competitive field. In short, to spur the kind of creativity and innovation that is necessary to continue the explosion of technology and to provide the maximum amount of information to our homes and to our businesses.

He is a creator, an innovator, a leader, and I think he has expressed some very legitimate concerns which I hope we can address in a balanced way—together with the rights of building owners—to achieve the end purpose of enhancing the quality of life for Americans. So it is a great pleasure that I see him here today and it is with great pleasure that I thank you for extending the invitation to somebody of his calibre.

Mr. TAUZIN. Thank you, Mr. Lazio. With that kind of buildup, Mr. Rouhana, you better have something very important to say today.

STATEMENT OF WILLIAM J. ROUHANA, JR.

Mr. ROUHANA. Well, I do have something important to say: Good morning, Mr. Chairman, and to the members of the committee and thank you, Congressman Lazio. I am Bill Rouhana. I am the chairman and chief executive officer of Winstar. In the interest of full disclosure, I would like to say I am not a Red Sox fan, so and I am sorry Congressman Markey.

Mr. MARKEY. How about your wife?

Mr. ROUHANA. Well, we can work on that. And I am also the man who is packing the weapon that you discussed a minute ago. In fact, that weapon is right here. And this is an antennae. This is the antennae that we seek to put on building rooftops.

Mr. TAUZIN. Hold it up there. Let us see what it looks like. This is the Winstar antennae.

Mr. ROUHANA. And this is the antennae that would be used by companies like Telegent or Nextlink also. Any wireless fiber type provider would use an antennae like this and, by installing this very small antennae on a rooftop, would be able to provide competitive local, long distance services as well as high-speed Internet access, broad-band data services of all kinds, and really bring the future of communications to tenants in many, many buildings.

Now, we call this wireless fiber service and it really does bring customers onto the information superhighway in a way that allows them to really experience the benefits of this new world we are seeing with the Internet and other things. And this can be installed at a fraction of the cost of a fiber optic cable. It is just as efficient. In fact, it is just as effective and some people might say more effective and more reliable.

We install these radios on rooftops and then we connect them to risers and conduits inside buildings and telephone closets and these are the crucial steps to building and expanding our network. In fact, there are some charts that I brought here today. Since I knew I wasn't going to be as funny as Tom Sugrue was, I wanted to have some show and tell items to help break the monotony. And I have brought a couple of charts for you to see, just so you could understand what we are talking about here.

There are a bunch of people who want to get on the rooftop and they all have a legitimate interest in that, but they are, when you add them all together, a relatively limited number of people who have a lot to offer the tenants in the buildings. Once we are on the rooftop, we need access to the inside wiring, which is already there. And then, using that wiring, we get to the customers in the building. So there is a minimal amount of space required for what we are doing, both outside and inside the building. And it is relatively easy for us to get tenants connected to what is really the first mile. It is their connection to the Internet; it is their connection to the outside world. And so a relatively simple, elegant, and easy solution to extending the broad-band network to people who live and work inside of multiple tenant environments.

You know, since 1994, we have successfully negotiated over 4,800 building access rights across the Nation. That is quite a large number. And we are the country's largest holder of these rights. So this, obviously, is something we know how to do and we know the process. In fact, my colleague next to me is one of our landlords, one of the landlords with whom we have successfully negotiated such rights, Charles Smith. And we find that it is possible to reach agreement over and over with landlords in how we do what we do.

But the chief impediment to extending this network even more rapidly to many more buildings is really the difficulty of obtaining access rights to the vast number of buildings that are out there. There are 750,000 commercial office buildings alone in the United States of America. There are literally scores more multiple dwelling units. In order to get to each and every one of those buildings, one negotiation at a time, taking 9 to 24 months to do it, means we will wait decades for the extension of the broad-band network to people who happen to be unfortunate enough to be in multiple tenant environments. And I don't think that is what any of use want to see happen.

So I would say that the key problem that we have today is an enormous job which, if we must do it one negotiation at a time, will be impossible to do in a reasonable timeframe for our country. And so, as a result, this is the single most important impediment to actually realizing the promise of the Telecom Act. This is the unfulfilled promise of the Act.

Now the building owners and managers really, I think, see it very much our way when you try to get to the bottom line of this. In fact, they have Ten Commandments brochure, which we have attached to our testimony, which talks about how to deal with Telecom providers.

And the No. 2 commandment, which certainly I wouldn't disagree with, is "Don't discriminate among telecom providers." This is not a bad idea. Obviously, it is a good idea. The problem is in the marketplace, discrimination does exist. Landlords do not understand this issue. When they are forced, they take an awful long time to make up their minds about this. As John has correctly said, there are even examples where they can be attempting to use their rather special position as the intermediary between us and the tenants in a way that is really not right. It just doesn't work to the tenants' benefit. They try to extract excess compensation or special benefits.

Now I will say that that is really the exception rather than the rule. The bigger problem is the time. The bigger problem is the time. It takes a long time and there are so many buildings that must be connected, that it will take us decades to do what should be done and could be done in years if we have a framework to operate under that is understood in advance and which is agreed to between us and the building owners in advance. And we would ask you to help us create that framework because we have been unsuccessful in doing it ourselves.

In fact, it is kind of ironic that the U.S. Government has asked another country to do what we are asking the U.S. Government to do. I don't know if you are aware of this, but in the World Trade Organization negotiations, the U.S. Government, through the U.S. trade representative urged the Japanese government to: "Establish rules that facilitate access to privately owned buildings, particularly multiple dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier." So we are just asking the U.S. Government to do, for its citizens, what it is asking the government of another country to do for their citizens. Not an outrageous request, it seems to me, especially given the importance of what we are talking about to the future of our country. Now over the course of a century, clearly gas, electric, telephone, water, cable, virtually all kinds of utilities have been allowed into multiple tenant buildings. This is not some paradigm shift, some outrageous concept that is being invented here today for the first time.

Without competitors, there is no competition. So, unless we are given access to these buildings, we are clearly not going to be able to compete with the incumbents. At this point, without clear national guidelines, what we are going to find is, even as the States move forward on this and, as you know, two States, Connecticut and Texas, have very good access in this regard what we find is that national building owners treat you one way in one State and then, sometimes, if they are not happy that you have used the legislation of one State, they take it out on you in another State.

And this is not necessary because it is quite clear to me that we can reach agreement. In fact, we do. We reach agreement every day. And we did reach agreement in Florida recently on a com-

promise bill with BOMA which I think is clearly an indication that an agreement can be reached again.

Mr. TAUZIN. But that bill did not pass last year.

Mr. ROUHANA. It didn't. Time ran out. But I think, with a little more time, it would have. And hopefully it will next session if we don't have action here. You know, to ensure the competition that we all want, we absolutely have to get to multiple dwelling units. Too many individuals live in multiple dwelling units, too many businesses are in multiple tenant environments. We are going to have two classes in our society in terms of access to the communications infrastructure unless there is a way to remove this impediment. And I don't think we want that. I don't think we need that. And I certainly don't think that that is useful or the things that were envisioned in the Telecom Act just passed.

So, with all that having been said, we need a framework. We think it needs to come from you. And we will work as hard as we can to reach yet another agreement with building owners that we can all live with. Because I think that is quite doable and I thank you for the opportunity to speak.

[The prepared statement of William J. Rouhana, Jr. follows:]

PREPARED STATEMENT OF WILLIAM J. ROUHANA, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, WINSTAR COMMUNICATIONS, INC.

Good morning Mr. Chairman and members of Congress. My name is Bill Rouhana. I am Chairman and Chief Executive Officer of WinStar Communications, Inc. ("WinStar"). Thank you for the opportunity to discuss with you today building access issues that are critical to providing facilities-based competition to the incumbent local exchange carriers ("ILECs") and fulfilling the goals of the Telecommunications Act of 1996.

I. Description of WinStar Communications, Inc.

WinStar is a nationwide competitive carrier with broadband FCC licenses in the electromagnetic spectrum at the 28 and 38 GHz bands. WinStar uses this spectrum to provide facilities-based fixed wireless broadband communications services, including local and long distance, data, voice and video services, as well as high speed Internet and information services. WinStar currently operates in 31 markets, including Baltimore, Boston, Cleveland, Columbus, Detroit, Houston, Los Angeles, Minneapolis, New York City, San Francisco, and Washington, D.C. WinStar plans to expand into 29 additional domestic markets by the end of 2000 and 50 international markets by the end of 2004.

A key part of WinStar's local broadband networks is our *Wireless Fiber*SM service, which is transmitted over microwave radio spectrum, using small antennas approximately 12-24 inches. Our *Wireless Fiber*SM service establishes connections between our customer buildings and other buildings on our network. The quality and capacity of our *Wireless Fiber*SM service meets or exceeds that of typical fiber optic cable, and can be installed at a fraction of the cost. Securing building access rights to install our antennas on the roof, plus access to risers and conduits, telephone closets and pre-existing inside wire, are crucial steps in the construction and expansion of our local broadband networks. Charts outlining these elements are attached.

II. Nondiscriminatory Access To Tenants In Multi-Tenant Environments Is A Critical Component Of A Competitive Telecommunications Market.

WinStar and the other competitive carriers owe their existence to the 1996 Act. We actively use provisions in the 1996 Act, such as Section 251, for interconnection with ILECs to successfully provide competitive local exchange services to consumers. But interconnection with ILECs, important as it is, is only one aspect of providing service. Our ability to serve customers situated in multi-tenant environments ("MTEs") also depends upon our ability to reach them.

Since 1994, WinStar has successfully negotiated access rights to 4,800 buildings nationwide, making us the industry leader. However, the chief impediment to extending our networks rapidly and bringing a second communications pathway to millions of end users is the difficulty of obtaining access rights to every building where we have a potential customer. In the majority of cases, on average, it takes

nine months, but it can take as long as two years to negotiate access rights with building owners. At this rate, it will take decades to obtain access rights to all the buildings and customers that our networks are designed to reach.

WinStar has experienced and is continuing to experience difficulties in obtaining access rights to every building where it has a potential customer. In reality, many building owners do not view access by competitive carriers as a priority for their tenants; some completely prohibit access to their tenants; many others impose unreasonable conditions or rates that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested \$50,000 upon signing of an access contract with WinStar in addition to \$1,200 per month. By contrast, the incumbent provider rarely pays anything to the building owner for access to customers in the building. For tenants, the 1996 Act thus far has failed to provide the choices envisioned by Congress. This problem is not incidental; approximately one-third of U.S. residential units are located in MTEs.¹

The Building Owners Management Association in its publication *Wired for Profit*, provides Ten Commandments for its members to follow when dealing with telecommunications service providers. The commandments are attached to my testimony. You will note that BOMA's Second Commandment states that building owners shall not discriminate among telecommunications service providers. Nevertheless, in the marketplace, a great many building owners do not and have never followed this "commandment." Rather, they discriminate against competitive carriers every day by not allowing us access to their tenants, or by allowing such access on economically unreasonable terms - terms that are not applied to any other utility that traditionally has enjoyed building access privileges.

In Florida last month, as part of a larger telecommunications bill, the competitive carrier community, along with BOMA and others in the real estate community, agreed to legislative language ensuring non-discriminatory building access. Although the overall bill ultimately was not passed, building owners and competitive carriers did reach agreement, as a group, on legislative language.² Thus, no one should tell you today that a legislative solution cannot be reached and agreed to throughout the industry. In fact, the Florida experience is evidence that the interests of competitive carriers and real estate holders are complementary and that a win-win solution to the building access issue can be reached.

Indeed, the United States Government recently encouraged adoption of such a solution in another country. In October 1998, the U.S. Government stated that the Government of Japan should "establish rules that facilitate access to privately owned buildings, particularly multi-dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the incumbent carrier."³ We simply ask the U.S. Government to give the same instruction and care to the citizens of this country as it has advocated for Japanese citizens.

III. A Federal Solution For MTE Access Is Necessary And Appropriate.

A federal solution to building access issues is necessary to promote facilities-based competition in the United States. This is especially true because only two States—Connecticut and Texas—have statutes that require landlords to grant nondiscriminatory access to competitive carriers. Because some MTE owners and management companies hold properties across various jurisdictions, no single State has the capacity to address their unreasonable behavior in a comprehensive fashion. Indeed, in some cases, if a carrier exercises its rights under the building access laws of a particular State (e.g., in Texas), nationwide property management companies will penalize the carrier in other States without building access laws, thereby undermining the effect of State-by-State resolution of the building access problem.

Moreover, the market often cannot be relied upon to secure timely competitive telecommunications options for tenants in MTEs. Tenants often lack the unilateral power to secure access to telecommunications options. The argument that all a tenant need do is move to another location misapprehends the economic realities of commercial tenancy. The effect of long-term leases—typically found in commercial

¹United States Census Bureau, Census of Housing, "Units in Structure" (1990 figures)(available at <www.census.gov/hhes/housing/census/units>). Indeed, MTEs are likely to be the first place that residential facilities-based local exchange competition occurs.

²These parties included BOMA of Florida, the International Council of Shopping Centers, the Florida Apartment Association, AT&T, the Florida Coalition for Competition, the Association for Local Telecommunications Services, e.spire Communications, Inc., NEXTLINK Communications, Inc., Teligent, Inc., Time Warner Telecom, and WinStar.

³See "Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Competition Policy, and Transparency and Other Government Practices in Japan," at 10 (dated Oct. 7, 1998)

environments—renders tenants without recourse to market influences.⁴ Tenants should not be required to incur the substantial costs of breaking a lease and moving to have competitive choice. This is an unreasonable pre-condition to the enjoyment of the competition envisioned by the 1996 Act.

For these reasons, federal government intervention is necessary and appropriate to ensure competitive carriers nondiscriminatory access to MTEs. Such intervention will promote competition and the public interest.

Intervention will not implicate the Takings Clause of the Fifth Amendment. A nondiscriminatory access requirement is similar to the Pole Attachment Act of 1978. The Supreme Court concluded that the Pole Attachment Act of 1978 did not effect a taking because there was no “required acquiescence.”⁵ That Act gave the FCC authority to regulate rates; it did not force pole owners to enter into contracts where there were none. Similarly, a nondiscriminatory access requirement would not permit access to telecommunications providers in the first instance, but would merely provide access to all telecommunications providers once an MTE owner permits one telecommunications provider to enter.

This is comparable to the regulation at issue in *Yee v. City of Escondido, California*.⁶ There, the Court found that a statute may regulate the use of land by regulating the relationship between landlord and tenant. A nondiscriminatory access requirement merely regulates an already existing contractual relationship and does not permit an initial invasion;⁷ thus, a nondiscriminatory requirement is not a “takings.”

Even if a federal nondiscriminatory requirement qualifies as a Fifth Amendment takings, the government can avoid constitutional challenge by providing for reasonable compensation. *Loretto* stands for the proposition that even if a government regulation is a taking, it can still survive constitutional scrutiny. There, the Supreme Court did not invalidate the statute that it found to be a taking since a finding of unconstitutionality required the absence of just compensation. Indeed, the Court did not expressly rule upon the compensation provided for in that particular case.⁸ A State court, on remand, stated that \$1.00 would most likely be adequate compensation in most cases. For building access, the government can overcome any claims of unconstitutionality through a requirement for reasonable compensation. Certainly, as discussed below, the provision of reasonable compensation for access is a condition competitive carriers are willing to stipulate.

IV. The Government Must Mandate Nondiscriminatory Access to MTEs.

Clear guidelines governing building access will promote competitive carriers’ abilities to reach more consumers with less expensive, superior, faster broadband services. This will, in turn, accomplish the goals of the 1996 Act by promoting local competition. In Connecticut and Texas, building access legislation has existed since 1994 and 1995 without significant legal challenge or a hue and cry that this approach is unworkable. For the majority of this century, gas, electric, telephone, and water lines have co-existed in virtually all of the nation’s multi-tenant buildings. Cable is now present. Buildings are not being harmed in any way because of this access by utilities, and they will not be harmed by competitive carriers’ entry.

In order to secure competitive telecommunications service options for tenants within MTEs, nondiscriminatory MTE access must encompass: (1) rooftop access (for fixed wireless antennas); (2) inside wiring; (3) riser cables (both horizontal and vertical); and, (4) telephone closets and Network Interface Devices (“NIDs”). Access to

⁴*Cf. United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974) (explaining that the ability of market participants to wield competitive influence in the marketplace is reduced or eliminated by their participation in long-term requirements contracts).

⁵*Federal Communications Comm’n v. Florida Power Corp.*, 480 U.S. 245 (1987).

⁶503 U.S. 519 (1992).

⁷*Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁸*Id.* at 441. (“Our holding today is very narrow... [O]ur conclusion that § 828 works a taking of a portion of appellant’s property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law’s enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.”) Although there was no subsequent judicial finding on the adequacy of the compensation (partly because landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision), a State court did characterize it as “altogether improbable [that it would be] eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases \$1.00) does not amount to just compensation...” *Loretto v. Group W Cable*, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987). As Justice Blackmun noted in his dissent, the practical effect of *Loretto*’s case amounted to “a large expenditure of judicial resources on a constitutional claim of little moment.” *Loretto*, 458 U.S. at 456, n.12.

these facilities will ensure a technology-neutral capability for carriers to provide telecommunications services to tenants in MTEs.

In furtherance of a competitive market—and in the related interests of maximizing tenant choice—MTE access rules must adhere to the principle of nondiscrimination. Telecommunications carriers should compete on the basis of service quality and rates and should not succeed or fail in the market because of discrimination. The terms, conditions, and compensation for the installation of telecommunications facilities in MTEs must not disadvantage one new entrant vis-à-vis another new entrant. As a function of nondiscrimination, any tenant access rules, recommendations, or conditions should be technologically neutral. Services are and will continue to be offered using a variety of technologies. Discriminatory rules or recommendations that would disadvantage a particular carrier or type of carrier will, by necessity, reduce the choices available to MTE tenants. Therefore, for purposes of telecommunications competition and maximum tenant choice, Congress should work with the FCC to ensure nondiscriminatory access to MTEs among telecommunications carriers.

Additional conditions governing telecommunications carrier access to MTEs should include the following:

- *Carrier assumption of installation and damage costs:* Installing carriers must assume the costs of installation as well as the responsibility for repairs and payments for damages to MTEs. Although indemnity provisions are also warranted, they can entail the expense and delay of seeking judicial resolution. MTE owners and the tenants occupying their MTEs would be better served by a presumption that the cost of any repairs for damages caused by facility installation should be assumed by the installing carrier.
- *No customer prerequisite for access:* MTE owners should not be permitted to require the presence of customers within the MTE as a condition of telecommunications carrier access. Carriers must be permitted to wire a structure prior to seeking customers within it. Otherwise, the delays involved in providing service caused by the need to wire an MTE will operate as a strong disincentive to choosing a competitive provider of telecommunications service and will cause needless delay in the time that a customer can expect to receive service.
- *No exclusivity:* MTE owners should be prohibited from granting exclusive telecommunications carrier access to a building. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications service. The reformation of long-term contracts to eliminate exclusivity provisions when requested by the MTE owner, a telecommunications carrier, or a tenant within the MTE, must be permitted.
- *No charges to tenants for exercising choice:* Under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.
- *Both commercial and residential MTEs should be included within a nondiscriminatory MTE access requirement.* As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As a practical matter, in many urban areas, it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of structures difficult.
- *Reasonable accommodation of space limitations:* As an economic matter, space limitations most likely will not be an issue in practice. The costs attending the installation of telecommunications facilities within an MTE dictate that the endeavor will not be undertaken if consumer demand within the MTE is insufficient to recoup those costs. Logically, the number of carriers seeking to install facilities within an MTE will be limited by the number of services to which potential tenant customers will subscribe. Nevertheless, in the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building and requirements that carriers share certain facilities.

Congress need not establish rates or rate formulae for access. However, it can describe rate structures that are presumed reasonable or unreasonable by adopting a set of presumptions. In this manner, it will eliminate a market failure—the inequality of bargaining positions—derived from the MTE owner's/manager's monopoly status. This method allows parties to negotiate specific rates within parameters already deemed reasonable. Of course, parties should be free to negotiate *mutually acceptable* terms that vary from the model.

Examples of reasonable parameters include the following:

- *Rates should not be based on revenues.* MTE owners' imposition of revenue sharing on a telecommunications carrier is *per se* unreasonable because it does not approximate cost-based pricing and suggests the extraction of monopoly rents.⁹ The surplus benefits of telecommunications competition are more appropriately directed to consumers. Revenue sharing should be permitted as a *voluntary* arrangement to which carriers and landlords can mutually agree (*i.e.*, in exchange for the landlord marketing the carrier's services within the building as a "preferred provider," but *not* in such a manner so as to preclude other carriers from entering into or serving the building).
- *Rates must be nondiscriminatory.* Rates for access to MTEs should be assessed on a nondiscriminatory basis. For example, if the incumbent LEC does not pay for access to an MTE, neither should other telecommunications carriers.
- *Rates must be related to costs.* MTE access rates must be related to the cost of access and must not be inflated by the MTE owner so as to render competitive telecommunications service within an MTE an uneconomic enterprise for more than one carrier.

WinStar is not seeking access to MTEs that is not already provided to ILECs. Nor is it seeking access without providing just and reasonable compensation to building owners for access where compensation is appropriate. WinStar is willing to assume responsibility for any repairs due to damages caused to a building during installation or operation. The use of fixed wireless technology can be, and is being, safely managed. Therefore, it is not a disadvantage for building owners to provide nondiscriminatory access to competitors, such as WinStar.

Mr. TAUZIN. And now Mr. Brent Bitz, Executive VP, Charles E. Smith Commercial Realty L.P. from Washington, DC, New York Avenue here in the city. Mr. Bitz, you have been complimented as a building owner who cooperates. Let us hear your story.

STATEMENT OF BRENT W. BITZ

Good morning, Chairman Tauzin, Mr. Markey. My name is Brent Bitz. I am executive vice president with Charles E. Smith Commercial Realty. Charles E. Smith Commercial Realty owns and manages over 24 million square feet of commercial office space, primarily located in the Mid-Atlantic region and we have some over 2,000 tenants in our portfolio. Today I have the privilege of speaking on behalf of the Building Owners and Managers Association, which represents some 17,000 owners and property management professionals throughout this country and other nations.

Mr. Chairman, BOMA International and its members need and I believe the record will properly document that we have supported a competitive telecommunications marketplace. Such a marketplace is important not only to ourselves but, more importantly, important to our tenant which, of course, is the lifeblood of our industry. Mr. Chairman, I hope to impart two simple but important messages here today. Firstly, that telecommunications competition is alive and thriving in office buildings and, second, that the marketplace is currently working extremely well; that government action will only hurt competition, but not advance it.

⁹The Texas Public Utility Commission's building access Enforcement Policy Paper notes that "[c]ompensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space." *Informal Dispute Resolution: Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions*, Project No. 18000, *Enforcement Policy Memorandum from Ann M. Coffin and Bill Magness, Office of Customer Protection, to Chairman Wood and Commissioners Walsh and Curran* at 6 (Oct. 29, 1997).

And if any of you were reading the Wall Street Journal over the last day or two, you may have noticed that some of the companies represented in this room had announced extremely ambulant revenue growth, extremely attractive numbers, numbers that anyone in my industry would die to have. And I think that should be taken into account, how rapidly this industry has grown, in cooperation with our industry.

Studies have documented that, for an office building to remain competitive in today's marketplace, it must offer tenants not only a wide variety of telecommunication services, but also a wide variety of service providers. Such a marketplace does not need government-mandated access. Telecommunications competition is very alive and very thriving. As my colleagues have already pointed out, hundreds of license agreements, indeed, thousands of license agreements are being signed every year between our industry and the telecommunications industry. These are negotiated in a free, competitive environment at arm's length. We don't need the government to assist us in that process.

While our tenants, we believe, can adequately rely on the marketplace to ensure that their interests are well protected, building owners, if it need be, will look to the U.S. Constitution for our defence. But that is not what I wish to speak about today, because that is adequately documented in our written submission which you have in front of you.

We at the Charles E. Smith Commercial Realty Company are a testament to the competitive marketplace. We ensure that office consumers have not only the widest array of services, but also a wide array of service providers. And my colleagues here have already complimented our company on our ability to do that. We did that of our own competitive interest, as you would expect a company to do. We have eight local exchange carriers in our 102 buildings and this is only our company in the Mid-Atlantic region. We have over 2,000 tenants and I am not aware of 1 single instance where any tenant has had a problem in its telecommunications services as a result of its occupancy in our buildings.

We have every conceivable type of tenant from small entrepreneurs through major professional services firms and very large government agencies. And I am very satisfied that our company has been able to meet their existing telecommunications needs by cooperative effort between ourselves, them, and the telecommunications industry. In any case where we were not able to meet a telecommunications need from a tenant, we certainly were very happy to allow them and, indeed, encouraged them to deal directly with the telecommunications industry. Because the amount of revenues that our industry sees out of this issue is very small relative to the rental issue which is the lifeblood of our business.

I was hearing thousands of dollars mentioned just a moment ago. I must be a very poor negotiator because I am only getting hundreds. I will have to take some tips.

Any government action or mandate in this area, in our opinion, would interrupt the free negotiation and flow between companies. Moreover, the FCC, we believe, in its most recent broad-band deployment docket, found there was no lack of broad-band distribution, no lack of competitive choice being offered in office buildings.

We are at a loss to understand how the proponents of forced building entry could ask this committee or indeed this Congress to inject a static regulatory regime at the intersection of the business and telecommunications revolution.

If there is an issue that has arisen with the tenants in the Charles E. Smith buildings between ourselves and the telecommunications issue, it is where the telecommunications industry has indeed turned us down because not all of our buildings nor all of our tenants are viewed by the industry as being a desirable business investment from their perspective. Now as a businessman, I can understand it and, indeed, I can accept it even if I am not happy. But what I can't accept, Mr. Chairman, is their desire to have a one-sided request for access. Such a benefit for them with no balancing obligation for service, in our opinion, would be unacceptable.

Since neither tenants nor building owners have the right to demand service from a provider, we do not think that the provider should be given the right of forced access. The telecommunications industry cannot have it both ways. They cannot cherry pick the best business opportunities in major buildings and desirable tenants throughout this country and then have no obligation to serve the other thousands upon thousands of smaller buildings that are located throughout this country of ours. Even with the difficulties that I have told you about, it is our opinion that commercial tenants can well rely upon the existing competitive environment to ensure that their telecommunications service needs are being taken care of.

And, in closing, Mr. Chairman, we can understand the CLEC's industry desire for a guaranteed marketplace. In fact, some of my colleagues were hoping that I would be able to arrange with you today a bill for a 100 percent occupancy requirement. But that is not a reasonable request.

Mr. TAUZIN. What the heck.

Mr. BITZ. But as this committee and the Congress has stated before, guaranteeing business success is not the role of government. BOMA would like to suggest that the CLEC industry, very much like Mr. Windhausen has mentioned, that instead of spending our time fending off forced building entry legislation, both at the Federal and the State level, that we join together in a mutual education effort to bring those perhaps less progressive members of our industry forward to understand the benefits to both their companies and their tenants of the competitive environment that we also agree is so important to our national interests.

Thank you very much, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Brent W. Bitz follows:]

PREPARED STATEMENT OF BRENT W. BITZ, EXECUTIVE VICE PRESIDENT, CHARLES E. SMITH COMMERCIAL REALTY L.P.

INTRODUCTION

Chairman Tauzin, Mr. Markey and members of the Subcommittee, good morning, I am Brent Bitz. Executive Vice President of Charles E. Smith Commercial Realty L.P. The Charles E. Smith Company owns and manages over 25 million square feet of property. We serve in excess of 2,000 tenants and we employ more than 1150 individuals, either directly or through contracts at our properties.

BACKGROUND

Today I have the privilege of testifying on behalf of the over 17,000 property management professionals that comprise the Building Owners and Managers Association International.¹ At BOMA, I currently serve as a senior member of the association's National Advisory Council and was appointed to serve as lead representative in meetings earlier this spring that we had with the C-LEC industry represented by Teligent.

The record will document BOMA International and its members need—and have supported—a competitive telecommunications marketplace. Such a marketplace is important to our tenants and is, therefore, vital to us.

The BOMA membership, however, has consistently identified opposition to any governmental effort to mandate access to our properties as a leading advocacy issue. BOMA feels forced building access is unnecessary, unmanageable and unconstitutional.

OFFICE BUILDINGS NEED ROBUST TELECOMMUNICATIONS OFFERINGS

Just as the telecommunications industry has been revolutionized, and ultimately improved, by competition, our industry has recognized the challenges posed by an increase in customer sophistication and customer demands for new telecommunications services. Indeed, these demands will be (and already are) providing opportunities for our businesses to compete, one against the other, for market share. Our members aggressively market the characteristics of their properties, including telecommunications services.²

BOMA, in cooperation with the Urban Land Institute, just released a study entitled, *“What Office Tenant’s Want.”* One portion of the study asked tenants to rank their top three intelligent building features and to indicate whether they would be willing to pay additional rent to have such a missing amenity.

From the array of 13 intelligent building features, survey respondents designated “Built in Wiring for Internet Access” as the number one required feature and placed in an almost statistical tie for positions two through five:

- Wiring for high speed networks,
- Conduits for cabling,
- Fiber optics capability,
- HVAC systems.

¹ Founded in 1907, the Building Owners and Managers Association (BOMA) International is a dynamic federation of 94 local associations whose members own or manage over 8.5 billion square feet of downtown and suburban commercial properties and facilities in North America. The membership—composed of building owners, managers, developers, leasing professionals, facility managers, asset managers and the providers of goods and services—collectively represents all facets of the commercial real estate industry.

² Building owners and managers of America’s real estate increasingly are focused on improving wire management within buildings and targeting investments in what is sometimes called “smart building” technology. The highly competitive office market demands no less of owners, who by nature are inclined to satisfy their tenants by providing ample access to the expansive array of telecommunications products and services needed to facilitate information flows.

In acknowledgment of this investment prerequisite, a number of real estate owners have even devised systems on a building-specific basis that provide cabling (copper or fiber optic) that is accessible to any and all telecommunications providers; this approach is one of the most cost-effective means of ensuring that tenants have the widest possible access to the ever-proliferating number of service providers.

For example, the 31-story, 400,000-square-foot office building located 55 Broad Street in lower Manhattan used to be a “hollow headstone for the Eighties.” It was vacant for more than five years following the bankruptcy of its anchor tenant in the late 1980s. New York City’s moribund downtown real estate market left little hope that the building could ever return to life again. That was before it was retrofitted by its owner (at a cost of more than 15 million dollars) with fiber optic and high-speed copper wire as well as ISDN, T-1, and fractional T-1 lines to enable Internet, LAN and WAN connectivity; voice, video and data transmissions; and satellite accessibility. The building owner suggests that prospective tenants need only “plug in,” and this message has been getting the attention of potential tenants as far away as the West Coast.

Of course, many other building owners prefer not to get into the business of owning or operating telecommunications facilities. But this does not mean they ignore the occupants’ needs. The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and that no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms to the owner’s business plan for the property. Even during the lease term, it is important for building owners and managers to keep their customers satisfied. Happy tenants are more likely to renew their leases and less likely to break them—and building operators have a strong incentive to reduce the administrative costs and disruption that accompany high turnover rates.

Seven out of ten survey respondents answered “yes” when asked if they would be willing to pay additional rent to have one of these intelligent building features added to their building.

NUMBER OF PROVIDERS ALMOST AS IMPORTANT AS NUMBERS OF SERVICES

In addition to the BOMA/ULI study, numerous other studies have documented that for an office building to remain competitive in today’s marketplace, it must offer tenants not only a wide array of telecommunications services, but also an array of choices in telecommunications service providers. Because the commercial real estate business is fiercely competitive, we must provide our tenants with access to the latest telecommunications services or they will go elsewhere, and our buildings’ operations will cease.

MARKETPLACE IS WORKING.

In short, the marketplace does not need government-mandated access; telecommunications competition is alive and thriving in office buildings. Hundreds of license agreements are being signed by office building owners and telecommunications service providers every day. These transactions are negotiated at arm’s length and in a *free market environment*.

CHARLES E. SMITH EXPERIENCE

We at the Charles E. Smith Commercial Realty L.P. are a testament to the competitive marketplace. We ensure that office consumers have access not only to the widest array of telecommunications services, but also have access to numerous service providers. At the Charles E. Smith Company today, we have eight alternative local exchange carriers providing service to our portfolio of 102 buildings. As I mentioned earlier, we have approximately 2,000 tenants in the buildings, which we either own or manage. I am not aware of a single incident where a tenant was unable to meet its telecommunications needs because of issues relating to its occupancy in one of our buildings. We have every conceivable type of tenant in our portfolio. Our tenants range from small entrepreneurs through sophisticated professional service firms and major government agencies. I am completely satisfied that the existing telecommunications service environment adequately meets my tenants’ needs. In every case, if we were not able to meet a tenant’s requirements through existing telecommunications service arrangements, they were able to deal with these service providers on a direct basis. At no time would we ever interfere with a tenant’s desire to obtain improved service in this vital business area.

Mr. Chairman, every one of those license agreements were executed because they made business sense to all parties involved. Any government action or mandate would disrupt that environment. Moreover, the FCC, in its most recent broadband deployment docket, found no lack of broadband distribution nor competitive choice being offered in office buildings. As an industry, we are; therefore, at a loss to understand how the proponents of forced building entry could ask this Committee and this Congress to interject a static regulatory regime at the intersection of the business and the telecommunications revolution.

RECIPROCAL REQUIREMENTS

As a provider of commercial office space, one of the greatest challenges we have faced are instances where telecommunications service providers have elected not to do business with us or with the tenants in our buildings. In each case, the reason the C-LEC elected to pass on our business was that we did not represent an attractive-enough investment opportunity. As a businessman, while I am not happy with their decision I can accept it.

What I can not accept is the telecommunications industry’s one-sided request for forced access, which benefits them with no balancing obligations for service. Since neither tenants nor building owners have the right to demand service from a provider, we do not think that the providers ought to be given the right to forced access. The telecommunications industry cannot have it both ways. They can not cherry pick the best opportunities for business and then unilaterally ignore the rest of our industry’s tenants across this nation.

UNREGULATED ENVIRONMENT WORKS BEST

We believe that an unregulated environment works best. Commercial tenants may rely upon market forces to ensure their access to not only a wide array of telecommunications services, but also a wide array of telecommunication service providers.

CONSTITUTIONAL RIGHTS

And while tenants may rely upon the marketplace to ensure their rights are protected, building owners will look to the U.S. Constitution for our defense. But rather than going on at length about the constitutional protections we enjoy³ and a discussion of how a one-size-fits-all regulatory scheme for access is unmanageable, I have reduced those comments to paper as Appendix One and Two, respectively. I would like to conclude my testimony with a call for a cooperative relationship with the competitive local exchange industry.

COOPERATION & EDUCATION

Mr. Chairman, we can understand the C-LEC industry's desire of a guaranteed marketplace. Some of my colleagues were hoping that perhaps we could have a 100 percent occupancy law passed. But as this Committee and this Congress have stated before: guaranteeing business success is not the role of government.

The C-LEC industry claims that it is being treated unfairly or differently from the incumbent local exchange carriers. If that is true, it is a transition issue. One that will work itself out as more and more building owners learn they may demand the same of incumbent providers that which they are demanding of competitive providers.

BOMA would suggest the C-LEC industry, rather than force us to spend our time fending off forced building entry legislation, join us in an educational effort—an education effort to inform building owners of their right to require incumbent providers to:

- Obtain their permission for access, and
- Comply with the same rules and regulations for gaining access to any given property that we are today asking of C-LECs.

BOMA is currently engaged in this education program. We have produced “*Wired for Profit*” which, in layman’s language explains the world of competitive telecommunications services and then offers model license agreements to govern access to buildings. These license agreements do not discriminate between incumbent and competitive providers. We look forward to the day when *all* access to our buildings by any telecommunications service provider is governed by such a license.

Thank you for the opportunity to testify, and I welcome your questions.

APPENDIX ONE

“FORCED BUILDING ENTRY IS UNCONSTITUTIONAL”

Any attempt by Congress to directly, or indirectly by means of Federal Communications Commission actions, mandate access to multiple-unit buildings by telecommunications providers—whether under the guise of defining demarcation points or otherwise—would lead to a taking of private property under the Fifth Amendment.

The U.S. Supreme Court has held in *Loretto v. TelePrompTer Manhattan*, 458 U.S. 420 (1982), that any regulation allowing a telecommunications provider to emplace its cables in, on, or over a private multi-tenant building is a governmental taking and would violate the owners’ rights under the Fifth Amendment. Involuntary emplacement of wires would be “taking” within the meaning of the Fifth Amendment subject to the requirement for compensation.⁴

For the Congress or the Federal Communications Commission to mandate access for telecommunications providers’ cables in and on private buildings would be just as unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompTer to run its coaxial cables in and on Mrs. Loretto’s apartment building in New York City. *See Loretto v. TelePrompTer Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³Attached to my testimony as Appendix One, is a restatement of the constitutional history on telecommunications wire and the leading case, *Loretto v. TelePrompTer Manhattan*, 458 U.S. 420 (1982) and a restatement of BOMA’s filing with the FCC on why a regulatory response with compensation is unmanageable.

⁴As the Court said in *Ramirez de Arellano v. Weinberger*, 240 U.S. App. D.C. 363, 387 n.95, 745 F.2d 1500, 1524 n.95 (1984) (en banc) *vacated on other grounds*, 471 U.S. 1113 (1985), “the fundamental first question of constitutional right to take cannot be evaded by offering ‘just compensation.’”

A. *Congressional or Commission-mandated Wiring of Private Buildings Would be an Impermissible “Permanent Physical Occupation.”*

The physical requirement that a landlord permit a third party to occupy space on the landlord’s premises and to attach wires to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the “character of the governmental action,” the Supreme Court has said, “is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.” *Loretto, supra*, at 434-35 (emphasis supplied), citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).⁵

B. *Forced Carrier Access Satisfies the Legal Test for an Unconstitutional Taking.*

No de minimis test validates physical takings. The size of the affected area is constitutionally irrelevant. In *Loretto, supra*, at 436-37, the Court reaffirmed that the “rights of private property cannot be made to depend on the size of the area permanently occupied.” *Id.* at 436-37.

The access contemplated by Congress is legally indistinguishable from the method or use of intrusion in *Loretto*, where the Court found a “permanent physical occupation” of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings’ exterior wall. *Id.* at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation of telecommunication wires and hardware constitutes a taking, regardless of the asserted public interest, the size of the affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (*Loretto*) and federal regulation (FCC proposed rule-making).

C. *“Just Compensation” for the Taking Requires Resort to Market Pricing.*

The takings objection to mandated access to private property cannot be avoided by requiring the telecommunications service provider benefited thereby to make a nominal payment to the owner for access. In *Loretto* the New York statute at issue provided for a one-dollar fee payable to the landlord for damage to the property. The Court concluded that the legislature’s assignment of damages equal to one dollar did not constitute the “just compensation” required by the constitution.

While *Loretto* does not address the question of whether the invalidity of a taking is avoided by payment from a third party, other courts have held that takings to benefit a private telecommunications provider are subject to heightened scrutiny. See *Lansing v. Edward Rose Associates*, 442 Mich. 626, 639, 502 N.W. 2d 638, 645 (1993). AMTRAK’s condemnation and conveyance of the Boston & Maine’s Connecticut River railroad tracks to the Central of Vermont Railroad after payment of compensation was narrowly upheld on the technicality that the condemnation was under the adjudicatory oversight of the Interstate Commerce Commission. *Nat’l R.R. Passenger Corp. v. Boston & Maine*, 503 U.S. 407, 112 S.Ct. at 1403-04 (1992). That degree of governmental involvement is not contemplated here.

The practical point is this, *viz.*, that government cannot prescribe a nominal amount as compensation for access—the affected property owner is constitutionally entitled to compensation measured against fair market value. See *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 126 (1950) (current market value); *Bell Atlantic, supra*, at 337 n.3, 24 F.3d at 1445 n.3. Is ascertainment of the disputed market values of differing impingements on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

Congress specifically has previously considered a mandatory access provision and the provision was deliberately omitted in the final version of the Cable Act to avoid a taking. There was not then, nor is there now we believe any Congressional intent to support takings of private property. *Id.* at 156-57, citing 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (floor statement of Cong. Fields).

In *Century SW Cable TV v. CIIF Associates*, 33 F.3d 1068 (1994), the Ninth Circuit, following *Woolley*, reversed the trial court’s application of Section 621(a)(2), be-

⁵ In *Penn Central* the Supreme Court had observed that there was no “set formula” for determining whether an economic taking had occurred and that the Court must engage in “essentially ad hoc, factual inquiries” looking to factors including the economic impact and the character of the government action. No such detailed inquiry is required where there is a permanent physical occupation. *Id.* at 426.

cause there was no evidence of an express dedication. The court found that installation of cable to individual units constituted a physical invasion under *Loretto* that was not authorized by the statute. Accord, *TCI of North Dakota, v. Shriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993).

The kind of forced building access contemplated here would largely replicate the provisions for forced building access in S. 1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

APPENDIX TWO

“FORCED ACCESS IS UNNECESSARY AND UNMANAGEABLE”

There are sound and persuasive reasons why the Congress should not attempt to regulate access to private property. Governmental regulation would be unmanageable and it would interfere with effective on-the-spot management. B. Commission Regulation is Undesirable Because it Would Interfere with Effective On-the-Spot Management.

Not only is government intervention unnecessary, since property owners are already taking steps to ensure that telecommunications service providers can serve their tenants and residents, but it is undesirable. Such intervention could have the unintended effect of interfering with effective, on-the-spot property management. Building owners and managers have a great many responsibilities that can only be met if their rights are preserved, including compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and service providers; and managing limited physical space. Needless regulation will not only harm our members' interests, but those of tenants, residents, and the public at large as well.

1. Safety considerations; code compliance.

Building owners are the frontline in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For government to limit their control would unfairly increase the industry's exposure to liability and would adversely affect public safety.

For example, building and fire codes require that certain elements of a building, including walls, floors and shafts, provide specified levels of fire resistance based on a variety of factors, including type of construction, occupancy classification, and building height and area. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairways) must meet higher fire resistance standards than other portions of a building. The required level of fire-resistance typically ranges between twenty minutes and four hours, depending on the specific application. These “fire resistance assemblies” must be tested and shown to be capable of resisting the passage of floor and smoke for the specified time.

Over the past 10 years, penetrations of fire-resistance assemblies have been a matter of great concern, as such breaches have been shown to be a frequent contributor to the spreading of smoke and fire during incidents. The problem arises because fire-resistance assemblies are routinely penetrated by a wide variety of materials, such as pipes, conduits, cables, wires and ducts. An entire industry has been built around the wide variety of approaches that must be used to maintain the required rating at a penetration. It is not a simple issue of just filling up the hole—the level of fire resistance required, the type of materials of which the assembly is constructed, the specific size and type of material penetrating the assembly, and the size of the space between the penetrating item and the assembly are all factors in determining the appropriate fire-stopping method.

Mandating access to buildings, without adequate supervision and control by a building's owner or manager, would allow people unfamiliar with a building the opportunity to significantly compromise the integrity of fire-resistance-rated assemblies. Telecommunications service personnel are not trained to recognize the importance of such elements in a building's construction, much less to accurately assess the types of assemblies they are penetrating or assuming any responsibility as to code compliance. Thus, while perfectly competent to drill holes and run wire, they would be unable to determine the appropriate hourly rating of a particular wall, floor or shaft, and would not know how to properly fill any resulting holes or recognize those areas that they should not penetrate at all.

In fact, it is unlikely that a person punching holes and pulling cables would even consider patching the holes after they pulled their cables through. Many of these

penetrations are made above suspended ceilings or in equipment rooms where there is little or no aesthetic concern.

Maintaining the integrity of fire-resistance-rated assemblies is already a challenge for building managers because of the large number of people and different types of service providers that may be working in a building. Nevertheless, currently a building operator can restrict access to qualified companies and can seek recourse, by withholding payment or denying future access, if the work is not done correctly. If building operators were forced to allow unlimited access to alternative service providers, or were prohibited from restricting such access, the level of building fire safety could be significantly jeopardized. It is essential that building owners and managers be able to continue to ensure in the future that those personnel performing work in a building do so in a manner that does not compromise other essential systems, including fire protection features; this has not been a generic problem in the past, where building owners and managers have retained control. We emphasize that these are not merely theoretical dangers—we have received reports of actual breaches of firewalls from our members. The only way fire safety can be assured in the future is by allowing building owners and managers to determine who is permitted to perform work on their property.

The same applies to all other codes with which a building owner must comply. *See, e.g.*, Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Congressional or Commission interference in this area could thus have severe unintended consequences for the public safety.

While the Commission presently requires telephone companies to comply with local building and electrical codes, *see* Section 68.215(d)(4) of the rules, 47 C.F.R. § 68.215(d)(4), it could not practically enforce the codes, particularly where competing providers would have unrestricted access to common space.

2. Occupant security.

Building operators are also concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors; they may even commit illegal or dangerous acts themselves. Of course, these possibilities exist today, but at least building operators have the right to take whatever steps they consider warranted. The commenting associations' concern is that in requiring building operators to allow any service provider physical access to a building, the Commission may specifically grant—or be interpreted as granting—an uncontrolled right of access by service personnel.

It is simply impracticable for the Commission to develop any set of rules that will adequately address all the different situations that arise every day in hundreds of thousands of building across the country. Consequently, any maintenance and installation activities must be conducted within the rules established by a building's manager, and the manager must have the ability to supervise those activities. Given the public's justifiable concerns about personal safety, building operators simply cannot allow service personnel to go anywhere they please without the operator's knowledge, and the Commission should respect that authority.

3. Effective coordination of occupants' needs.

A building owner must have control over the space occupied by telephone lines and facilities, especially in a multi-occupant building, because only the landlord can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. Although this has traditionally been more of an issue for commercial properties, such coordination may become increasingly important in the residential area as well. Large-scale changes in society—everything from increased telecommuting to implementation of the new telecommunications law—are leading to a proliferation of services, service providers, and residential telecommunications needs. With such changes, the role of the landlord or manager and the importance of preserving control over riser and conduit space is likely to grow.

Building owners must retain maximum flexibility over the control of inside wiring of all kinds. If a building operator chooses to retain complete ownership and control over its property—including inside wiring—it should have that right. Presumably,

if this proves to be a good business practice, the market will reward building owners who decide to retain control over coordinating such issues.

On the other hand, other building operators may find that their tenants' needs require less hands-on management and control by the operator. There may be a market for buildings in which tenants and service providers work these issues out themselves. If there is, property owners will respond by letting the market grow on its own, simply because it is in their interests to serve their tenants as efficiently as possible.

Indeed, it is likely that there is demand for both approaches to managing a building. If so, any governmental action is likely to distort the market and interfere with the efficient operation of the real estate industry. Thus, to serve tenants' needs most effectively, building owners should be allowed to make their own decisions regarding the most efficient way to coordinate the activities of multiple service providers and tenants.

4. Effective management of property.

A building has a finite amount of physical space in which telecommunications facilities can be installed. Even if that space can be expanded, it cannot be expanded beyond certain limits, and it can certainly not be expanded without significant expense. Installation and maintenance of such facilities involves disruptions in the activities of tenants and residents and damage to the physical fabric of a building. Telecommunications service providers have little incentive to consider such factors because they will not be responsible for any ill effects.

As with the discussion of fire and building codes above, telecommunications service technicians are also unlikely to take adequate steps to correct all the damage they may cause in the course of their work. They are paid to provide telecommunications service, and as long as the tenant has that service they are likely to see their job as done. Since they do not work for the building operator, he has little control over their activities. If building management cannot take reasonable steps in that regard, building operators and tenants will suffer financial losses and increased disruption of their activities.

In one instance reported by a member, a cable operator installed an outlet at the request of a tenant but without notifying building management. To do so, the operator drilled a hole in newly-installed vinyl siding and strung the cable across the front of the building. Not only was this unsightly (affecting the marketability of the property), but the hole in the siding created a structural defect that allowed water to collect behind the siding. The building owner was able to resolve the matter under the terms of its carefully-negotiated agreement with the operator. If the Congress grants operators the right of access, however, building owners may find that they cannot rely on such agreements any longer.

5. Physical and electrical interference between *competing providers*.

Allowing a large number of competing providers access to a building raises the concern that service providers may damage the facilities of tenants and of other providers in the course of installation and maintenance. It also poses a significant threat to the quality of signals carried by wiring within the building. Competitive pressures may induce service providers to ignore shielding and signal leakage requirements, to the detriment of other service providers and tenants in the building, or they may accidentally cut or abrade wiring installed by other service providers or occupants.

The building operator is the only person with the incentive to protect the interests of all occupants in a building. Individual occupants are only concerned with the quality of their own service, and service providers are only concerned with the quality of service delivered to their own customers. Neither the Congress nor the Commission can possibly police all of these issues effectively. Consequently, building operators must retain a free hand to deal with service providers as they see fit. If one company consistently performs sloppy work that adversely affects others in the building, the building owner should have the right to prohibit that company from serving the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue because of matters over which it has little control.

Mr. TAUZIN. Thank you, Mr. Bitz.

And, now, Mr. Andy Heatwole from Virginia Beach, Virginia.
Andy.

STATEMENT OF ANDREW HEATWOLE

Mr. HEATWOLE. Thank you, Mr. Chairman. Mr. Chairman, Mr. Markey, members of the subcommittee. My name is Andy Heatwole. I am speaking on behalf of the National Association of Realtors, who represent nearly 730,000 realtors nationwide who are involved in all aspects of the real estate business and their affiliate, the Institute of Real Estate Management, whose members manage 24 percent of the Nation's conventionally financed apartments and 44 percent of the Nation's office buildings. I am a realtor from Virginia Beach, Virginia. My partners and I manage approximately 18,000 multi-family units throughout Virginia and have built approximately 3,000 multi-family. I am honored to speak before this committee today about telecommunications access.

We recognize the changing and evolving telecommunications industry and the need to promote competition in the marketplace. Our customers, residents, and tenants demand new and sophisticated telecommunications capabilities and such services increase the marketability of our property. Consequently, we have an incentive to establish policies that promote the well-being of all residents. Mr. Bitz just alluded to that. If we don't provide the product, our residents go somewhere else, whether or not it is a commercial tenant or a residential tenant.

However, we strongly oppose efforts, such as those being discussed today, which would permit unrestricted access to private property for the installation of telecommunications services. We oppose mandatory access for a variety of reasons.

First, legitimate reasons exist for building owners and managers to maintain control over access to building space. Unrestricted access could prohibit owners and managers from properly operating their properties. It would undermine their ability to responsibly manage complex building systems in order to ensure tenant safety.

I want to take a moment and read the grant of easement and access rights from a telecommunications agreement that was presented to us and if you would allow free and open access on the same terms and conditions which is what Winstar asked for in Virginia. Somebody signed this.

This is the easement you would be giving: "The easement extends throughout the premises both land and improvements close in including raceways, common areas, equipment rooms, equipment buildings, utility areas, and other spaces on, in, and over the premises as reasonably necessary or useful for the location, relocation, installation, maintenance repair, upgrading, monitoring, operation, and removal of the distribution system, subject to the limitations of this agreement, on the location of the distribution system. Permittee further agrees to grant blank free right of access, ingress, and egress to and from the premises for marketing of services at the premises, including door-to-door sales activities and the placement of literature in the management office located on the premises, subject to the limitations contained in this agreement," which was approval of any of their advertising.

"The terms of this agreement shall be deemed to be covenants running with the land, constituting the premises. The provisions of this section two shall survive the expiration or earlier termination of this agreement." That would mean that any service provider, re-

ardless of their ability to perform many of the people here today are extremely sophisticated. And you can reach a negotiated agreement with them and be pretty sure that you are going to get what you pay for and that your residents are going to receive it.

But with language like this and what people generally want is, No. 1, we don't know if our tenants will receive the service they are promised. We have people trenching over our property. We have people running lines over our property. We have people drilling holes in our property. We have people running wires along the baseboard inside the units of our property. And we would have no control over it, plus people going door-to-door and advertisements all over our club house.

The second point is that evidence shows that mandatory access laws actually may lessen competition. Large incumbent service providers are able to block small innovative often less expensive providers from entering the marketplace due to the time and expense it takes to recoup their investment in the wiring of the property. It will also place building owners who offer these services to their tenants at a competitive disadvantage. Owners often plan their properties with their own wiring and, in many instances, the entire system. They should not be penalized for providing state-of-the-art facilities to our tenants and residents.

We have in three properties provided cable TV service to our residents. The way we recently got involved in it is because the cable TV company refused to run the wiring inside. We said, okay, we are going to run the wiring inside, we will own the system. We provide, for \$28 a month, the same service that the cable TV virtually the same service that the cable TV company charges about \$44 in our area for. We have to be able to recoup the cost of our investment in these instances.

Third, mandatory access will invalidate contractual agreements already in place, further eroding competition in the marketplace. Many owners and telecommunications providers have exclusive agreements to provide services to their residents. Without exclusive contracts, many small innovative providers would not be able to enter into the marketplace. Mandatory access would violate these contracts.

And, last, we believe that mandatory access laws violate the private property rights of building owners and constitute a taking under the Fifth Amendment. Under *Loretto v. Teleprompter Manhattan CATV*, 58 U.S. Corp 1987, the Supreme Court stated that, "to the extent that the government permanently occupies physical property, it effectively destroys the owners right to possess, use, and dispose of the property."

I would also mention that, in that same ruling, it says, "A taking does not depend on whether the volume of space it occupies is bigger than a bread box." It is slightly bigger than a bread box, but a taking is a taking, period.

And just a couple of brief personal observations. I am a pretty simple guy and I don't know a whole lot but I know a couple of things. And one is that we appear that we may actually have some property left at this point, private property right. If this type of legislation is passed, we are going to lose that right, plainly and simply.

We are the individuals that take the risk to build the property in the first place. We are getting ready to start 120-unit apartment project in Virginia Beach. We have put \$6.5 million in land and another \$2 million in equity into that property. We are the ones taking the risk. If we don't provide, whether or not negotiated, multiple access for things to residents we won't rent the property out. The marketplace is working, as Mr. Bitz said. But to require this mandatory access I think is preposterous. We are the ones taking the risk.

The only other thing I have that I know is that any time I am in a discussion such as this and there is a group of experts and lawyers on the other side who are telling me that I don't have a problem and it is in my best interests to do this, that is when I really know I have a problem.

I was concerned when I came up here to testify today and that is why. But having heard some of the testimony, I am scared to death at this point. I believe the marketplace is beginning to work. I believe, as owners and managers of properties, we realize the necessity of having the best available services available to our residents. But please do not make this a mandatory access. Thank you.

[The prepared statement of Andrew Heatwole follows:]

PREPARED STATEMENT OF ANDREW HEATWOLE ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE INSTITUTE OF REAL ESTATE MANAGEMENT

Hello. My name is Andrew Heatwole. I am speaking on behalf of the NATIONAL ASSOCIATION OF REALTORS® who represents nearly 730,000 REALTORS® nationwide who are involved in all aspects of the real estate business, and their affiliate, the Institute of Real Estate Management, whose members manage 24 percent of the nation's conventionally financed apartment units and 44 percent of the nation's office buildings. I am a REALTOR® from Virginia Beach, Virginia. My partners and I manage 1800 multifamily units throughout Virginia, and have built approximately 3000 multifamily units. I am honored to speak here before the committee on the very important issue of telecommunications access.

The NATIONAL ASSOCIATION OF REALTORS® and the Institute of Real Estate Management recognize the changing and evolving telecommunications industry and the need to promote competition in the marketplace. Our customers, residents and tenants, demand new and sophisticated telecommunications capabilities and such services increase the marketability of our properties. Consequently, we have an incentive to establish policies that promote the well being of all residents.

Overview

We strongly oppose efforts such as those being discussed today, which would permit unrestricted access to private property for the installation of telecommunications services. We oppose mandatory access for a variety of reasons. First, legitimate reasons exist for building owners and managers to maintain control over access to building space. Unrestricted access could prohibit owners and managers from properly operating their properties. It would undermine their ability to responsibly manage complex building systems in order to ensure tenant safety. Second, evidence shows that mandatory access laws actually lessen competition. Large incumbent service providers are able to block small, innovative, often less expensive providers from entering the marketplace, due to the time and expense it takes to recoup their investment in the wiring of a property. It will also place building owners who offer these same services to their tenants at a competitive disadvantage. Owners often plan their properties with their own wiring, and in many instances, the entire system installed. We should not be penalized for providing state-of-the-art facilities to our tenants and residents. Third, mandatory access will invalidate contractual agreements already in place, further eroding competition in the marketplace. Many owners and telecommunications providers have exclusive and perpetual agreements to provide services to their tenants. Mandatory access would violate these contracts. Last, we believe that mandatory access laws violate the private property rights of building owners, and constitute a taking under the Fifth Amendment.

Managers and Owners Must Maintain Control Over Access To Building Space

Mandatory access to private property by large numbers of communications companies may adversely affect the conduct of business. It will undermine the property owners' and managers' ability to responsibly manage complex building systems; ensure service reliability and tenant safety; compliance with safety codes; as well as needlessly raise legal issues. To require that property owners and managers guarantee building access to a potentially unlimited number of service providers will most certainly result in associated costs and liabilities. Existing buildings have limited space available for installation and maintenance of telecommunications systems. Unlimited access could force owners to incur exorbitant costs for expansion and renovation of riser cable space. Property damage is another issue of concern. What protections will be granted to building owners against property damage from unlimited installations and removals? It is important that property owners and managers maintain control over the space occupied by telecommunications lines, especially in a multi-occupant building. Only the property owner or manager can coordinate the conflicting needs of multiple tenants and multiple service providers.

Private property owners of residential and commercial buildings should have the right to choose and control the telecommunications systems serving their tenants and residents. For all forms of telecommunications system installation, maintenance and service, entry into private property should be provided pursuant to a negotiated agreement between the property owner/manager and the service provider—not by legislative fiat. Negotiation on a competitive basis will allow for consideration of the level of expertise, professionalism, and reputation of the service provider. Owners should have the right to negotiate mutually accepted terms and conditions for granting access to building space and the valuable tenant markets contained within. Building owners negotiate agreements with vendors for *all* of the services they provide to their tenants such as coin operated washer/dryers, vending machines and pay telephones. Telecommunications services should be afforded the same negotiating privileges and controls. The effect of mandatory access will be a decrease in service reliability, tenant safety, and building code compliance.

Mandatory Access Actually Lessens Competition

If allowed unrestricted access, large incumbent service providers could block small, innovative, and less expensive providers from entering the marketplace. The initial investment of time and money required to wire a building for telecommunication services is great and therefore is factored into the negotiated agreement between building owner and provider. Exclusive contracts assist the small provider in recouping costs associated with initial wiring.

Some telecommunications providers argue that with mandatory access, consumers will have the opportunity to purchase local phone service at lower prices and improved service. This is simply not true. The overhead costs of putting a dish on the roof and running phone lines throughout a home are cost prohibitive for single family homes, small businesses and all but the largest of multifamily housing complexes. The costs are too high for these technologies to serve individual consumers and small businesses. In fact, it appears that these providers want mandatory access simply to "cherry pick" those properties that demand the highest volume of services, while ignoring those clients who require less service. Owners of buildings who house these lucrative markets should not be forced to provide access to these tenants upon demand.

Another unfair competitive scenario created by mandated access can arise as more and more property owners include high-tech wiring in the design of their buildings. They own and invest in this wiring, and install it themselves. If property owners have to let competitors run their own lines, it will be very difficult to recover the costs involved in the original wiring. Or how about the scenario where a telecommunications provider refuses to install the wiring but instead waits until the building owner installs it himself or through a competitor and then expects to get access to use the wiring to connect to their cable signal when a tenant subscribes to their service? Some landlords own the cable wiring in their buildings, and rent them to cable providers under a revenue sharing agreement based upon tenant participation. With mandatory access, the owners would have to allow competitors in to compete against their own revenue sharing agreement. Property owners who have invested in technology should not be penalized by legislative action allowing mandatory access. These scenarios are just a snapshot of the potential abuses and unfair practices that can result in a mandatory environment.

Mandatory Access Will Invalidate Contractual Agreements

Property owners often enter into exclusive fixed term or perpetual contracts with telecommunications providers in order to allow them the ability to recoup their in-

vestment over time. To permit access to these properties will create a conflict in which these existing agreements would be undermined and even violated. This would place an unreasonable infringement upon the free-market and could spawn numerous lawsuits. Without the ability to recoup costs through exclusive contracts, many of these businesses would not have the financial ability to enter the marketplace, thus limiting competition for these services. Mandatory access laws prohibit these arrangements, and allow big providers to push the small businesses out of the way. Exclusive contracts allow property owners to negotiate the best possible contracts for both price and level of service, and enable new providers to enter the marketplace and economically compete with established big companies.

Mandatory Access Jeopardizes Private Property Rights

Private property rights are integral to this discussion. There are several court decisions that have shown that mandatory access violates the Fifth Amendment to the Constitution. In *Loretto v. Teleprompter Manhattan CATV Corp* (58 U.S. 419 (1987)), a New York statute provided that a landlord must permit a cable television company to install its wiring on its property, and can only demand payment up to an amount determined by a state commission to be reasonable. In New York, this amount was determined to be \$1.00. The property owner brought a class action suit against the city stating the wiring was a taking without just compensation. The case came before the Supreme Court, who ruled that the State of New York could not require such use of private property without just compensation. They ruled that, "when the character of a governmental action is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." They further stated, that "to the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property." Lastly, they ruled that "the cable installation on the appellant's building constituted a taking under the traditional, physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building." In *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 (1992)), the court similarly ruled that "physical occupations by third parties are more likely to effect takings than other physical occupations."

Furthermore, requiring property owners to provide "non-discriminatory access" is problematic because owners may already be using their valuable property for other purposes. Many building owners already lease space on their roofs to cellular and digital phone companies. In these cases, the lease often involves a monthly payment, and may even include a revenue sharing agreement. Legislation to allow for mandatory access would violate a private owner's right to generate revenue in this manner.

Conclusion

I thank you for this opportunity to present the views of NAR and IREM on this very important issue. As you can see, we have very grave concerns over the prospect of federal legislation permitting the unlimited and unrestricted access to private property for the installation of telecommunication services. Furthermore, the Congress delegated the authority for telecommunications reform to the Federal Communications Commission. The Commission reviewed the issue of mandatory access through a public comment process, and chose not to create a federal policy in this regard. I strongly urge you to reconsider the need for such legislation at this time.

Mr. TAUZIN. Thank you, Mr. Heatwole. You can be scared of them, but don't be scared of us.

We are pleased to welcome the manager of ancillary services Ms. Jodi Case, Avalon Bay Communities Incorporated, here in Alexandria, Virginia. Ms. Case.

STATEMENT OF JODI CASE

Ms. CASE. You should be frightened of me, however.

Actually, I am Jodi Case. I am a manager of ancillary Services for Avalon Bay communities. Avalon Bay is the leading provider of quality affordable apartment living. Our firm owns and manages and actually has in the development pipeline more than 50,000 apartment units that would be combined; not 50,000 in the devel-

opment pipeline in 17 different States. We clearly take pride in providing what we consider legendary service to the people who live in our communities.

I, too, am frightened. I am here today to actually augment what has been discussed previously. Virginia is not a mandatory access area where you currently operate. Avalon Bay does have communities that are currently operating in forced access States. I come to you with examples, the real problems, the real issues.

You had mentioned earlier that you thought that this might be some type of mud wrestling, which is very appropriate since I have, typically, mud all over my face because I am in mud. I am in middle. I am in the trenches every single day. The residents, the community managers. I am not a CEO. I am a manager of the telecommunications services for our communities. One person. I am not compensated by any amount of revenue that is generated, because, clearly, with contracts that have just been described, we spend a lot more on attorney fees to try to get that language out.

I am here today on behalf of three principal trade associations representing the private apartment industry: the National Multi Housing Council; its affiliate, the American Seniors Housing Association; and the National Apartment Association. A written statement has been submitted to the subcommittee, so I will limit my comments fortunately for you to some of the specific examples and observations on the key issues of forced access.

I don't have any props and I wish that that well, I don't have any props, but I do have I don't want I wish that wasn't a prop.

While there are extremely important constitutional and private property rights issues associated with implementing forced access for telecommunication providers, my comments will only focus on the practical market and physical effect of such policies. Remember, I am in the mud. I am knee deep in the trench of this. When choosing an apartment, most residents demand the best available telecommunications at the level they can afford, along with other issues. They will not consider communities that don't have telephone, video, Internet service. As a result, apartment owners face a very dynamic and competitive environment and telecommunications services are part of that market.

At Avalon Bay, we confront this challenge every day. The 120 units that are being built in Virginia Beach, they can go across the street and choose another community. With a great deal of choice in the marketplace, we hope that they choose our communities for the key stones of Avalon Bay, being high quality of living experience and outstanding customer service.

We, too, like competition, reality contracts. We know, unfortunately, from direct, first-hand experience, that forced access statutes mean less competition and less choice for residents. Why? The threat of a large established provider being able to come onto the property drives away the smaller competitors who do not believe it is worth the economic risk. The economics just aren't there and our residents suffer because of the lack of competition.

I want you to consider the language that was just read. In a forced access State, where there is no competition, we have no option. We must abide by that language or we don't have cable or telephone or Internet, which actually occurred in one of our Mel-

ville, New York, communities. It was a brand-new construction. We sent several RFPs out, had a lot of interested parties, some of which are here. Unfortunately, being a forced access State, it just wasn't economically feasible. The number of units, et cetera. The cable company was certainly had the upper hand and used tactics such as: Here is our agreement. If you would like us to provide service to your community, you must sign this agreement. And it contained language that was amazingly onerous. We had the PUC involved. 90 days went by and new residents moved in without cable television. Cable television; 90 days.

In New Jersey it is the same type of scenario. Because of forced access there, the private cable operator has not been able to sign up enough residents and have turned their attention to States that do not have forced access.

By the way, this particular private operator has approached the multiple system operator, the franchise operator, about selling their systems. They are completely removing themselves from mandatory access.

I could go into more details on these and other examples, but I do know my time is limited, even though I could speak as much as you would like me to.

Some telecommunications providers have begun seeking forced access to apartment properties in the name of opening the market. Fortunately, the legislatures in Florida, Georgia, Indiana, Iowa, and Virginia have recently resisted the lobbying pressures of the telecommunications providers and rejected forced access proposals. Faced with defeat on a State level, some of these providers are turning their efforts aggressively, pursuing either the State public service commission route or asking the Federal Government for help.

Why do the telecommunication providers say that they need forced access? Landlords are not opening their doors? On the one hand, they complain to the State and Federal legislative and regulatory bodies that commercial property owners are blocking the use of new technologies. On the other hand, however, we hear in press releases the signing of one new customer after another.

You had invited landlords to come today, those that are the gatekeepers and none were available. I believe because there are zero landlords out there that are gatekeepers, there are none to be found. We would ask why they simultaneously tell policymakers that they don't have market entry and then tell the shareholders and potential new investors that the marketplace is gobbling up their products. It would believe that they believe that forced access would make the market for their products even better or very possibly some may want to sign up just enough of a market so they can sell to the larger companies before the harsh economic realities of forced access are realized.

The providers who are pushing forced access have also changed the materials to call for this is a nice one resident and consumer rights, instead of forced access, assuming that no one would be against resident rights. We say, please don't be fooled.

Avalon Bay will never lose sight of the larger field of opportunity. We will stick to our core competencies: sales and customer service. We will continue to create communities where the Telecom

Act initiatives are enhancements that make choosing in Avalon Bay an even more attractive and compelling choice. Remember, if we lose one resident and that rent, any deal that could have been struck was not worth it.

Thank you and I will be pleased to answer any questions.
[The prepared statement of Jodi Case follows:]

PREPARED STATEMENT OF JODI CASE, MANAGER OF ANCILLARY SERVICES, AVALONBAY COMMUNITIES, INC. ON BEHALF OF AMERICAN SENIORS HOUSING ASSOCIATION, NATIONAL APARTMENT ASSOCIATION, AND THE NATIONAL MULTI HOUSING COUNCIL

Chairman Tauzin and Members of the Subcommittee: I am Jodi Case, Manager of Ancillary Services for AvalonBay Communities, Inc. of Alexandria, Virginia. AvalonBay is a leading provider of quality, affordable apartment living. Our firm owns and manages more than 50,000 apartment units in 17 different states. We take great pride in providing "legendary service" to the people who live in AvalonBay communities.

I am here today on behalf of three principal trade associations representing the private apartment industry: the National Multi Housing Council (NMHC), its affiliate the American Seniors Housing Association (ASHA), and the National Apartment Association. The National Multi Housing Council represents the apartment industry's largest and most prominent firms with the principal officers of these organizations serving as members. ASHA firms, similarly, are the leading providers of assisted living in the United States. The National Apartment Association is the largest national federation of state and local associations of apartment industry professionals, comprised of 150 affiliates which represent more than 25,000 professionals who own and/or manage more than 3.3 million apartments. NMHC, ASHA and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry. Our combined memberships are engaged in all aspects of the development and operation of apartments, including ownership, construction, finance, and management.

The U.S. apartment industry provides homes for approximately 15 million families and individuals nationwide, representing the full spectrum of America's population. Apartments account for about 15 percent of the entire housing stock, and they generate more than \$75 billion annually in rental revenues and \$16 billion in new construction value. Approximately 400,000 jobs are provided through apartment management and operation, while new apartment construction has created jobs for an additional 200,000 workers.

We are here today to talk about telecommunications and forced building access. While there are extremely important Constitutional and private property rights issues associated with implementing forced access for telecommunications providers, my comments will focus on the practical market and physical affects of such policies.

To understand the impact of forced access legislation on the apartments, one must first understand how the apartment industry operates. To begin with, apartment owners are very concerned about the viability of the telecommunications marketplace. Our residents have a wide selection of apartment communities from which to choose, and it is not unusual for 50 percent of our apartment residents to turnover in a given year. When choosing an apartment, most residents will demand the best available telecommunications at the level they can afford. They will not consider communities that do not have the telephone, video or Internet services they are seeking. As a result, apartment owners face a very dynamic and competitive environment, and telecommunications services are an important part of that market.

Telecommunications and Apartments

Until just recently, each new apartment community was routinely wired for phone, and if they were lucky, cable service by the local providers. Where cable wasn't available, a satellite master antenna system was used. In the past few years, however, we have witnessed the advent of competing systems and rapid changes in the technologies that are available. Some telecommunications providers began seeking "forced access" to apartment properties in the name of "opening the market." There are now approximately 15 states that have enacted forced access statutes in one form or another, although the pace of enactment by other states has slowed to a crawl. Just recently, legislatures in Florida, Georgia, Indiana, Iowa, and Virginia resisted the lobbying pressure of the telecommunications providers and rejected forced access proposals. Faced with defeat on a state level, some of these providers

are turning their effort to aggressively pursuing either the state Public Service Commission route or asking the Federal government for help.

Why do the telecommunications providers say they need “forced access?” On the one hand, they complain to state and federal legislative and regulatory bodies that commercial property owners are blocking the use of new technologies. On the other hand, however, their own press releases trumpet the signing of one new customer after another.

We would ask why they simultaneously tell policymakers that they don’t have market entry and then tell their shareholders and potential new investors that the marketplace is gobbling up their product? It would appear that they believe that “forced access” would make the market for their products even better. The providers who are pushing forced access have also changed their materials to call for “resident and consumer rights” instead of “mandatory access,” assuming that no one would be against “resident rights.” We say, don’t be fooled. Whatever you call it, mandatory or forced access will actually harm competition and the residents of our buildings by driving a number of new competitors out of the market.

Forced Access Legislation will Actually Stifle Competition

Basic economics says that monopolies are bad. And when it comes to granting a telecommunications provider a monopoly to serve a *geographic* region, traditional economics is right. Those types of monopolies are bad for competition. But, when you consider granting telecommunications providers exclusive rights for a limited time period to service a specific property, you actually help foster competition. These property-exclusive contracts enable new providers the time required to recoup the investment required to wire a property and expand their operations. When multiple telecommunications companies compete toe-to-toe on a single property, new competitors often lack the financial muscle to win. Apartment owners can also leverage exclusive contracts with telecommunications providers to ensure that residents receive good and reliable service.

The truth is that mandatory access states have, in many cases, unwittingly given the big incumbent service providers a competitive edge because the big incumbent provider can always threaten to come into a building that a small, new provider is trying to serve. This actual or implied threat has driven competition out of many markets.

If Forced Access “Why Not a Two-Way Street?”

The dollar value of the telecommunications market is huge and growing everyday. At the same time, the costs associated with providing service are also large and vary depending upon the service being provided, the affluence of the market being served, and the geographic area to be served. As a result, many telecommunications providers gravitate to the more lucrative areas and properties. This tendency to “cream” the best of the market can severely limit the choices of more moderate income households.

If legislators are truly concerned with the rights of residents, why not make forced access a two-way street. That is, if you allow any telecommunications provider to service a given property without the owners consent, then telecommunications providers should also be required to offer service to any resident who requests it. Otherwise, telecommunications providers are receiving a special privilege without having the responsibility to provide service to those who request it. Some have argued that the incumbent provider, usually the Bell System, must be a provider of last resort, but that is not the same as requiring a two-way street for all providers.

Forced Access Can Compromise Building Safety

Apartment and seniors housing communities are designed and maintained to comply with very strict fire and safety codes to protect their residents. The constant wiring and rewiring of a property that occurs when forced access is granted to providers compromises the ability of the property manager to adequately address building safety and fire hazards.

Where do you start and where do you end with “forced access?” Apartment property owners and managers have to be concerned with many different and competing priorities. It is simply not practical to allow numerous telecommunications providers to come and go from a property. Allowing several or more telecommunications competitors onto a given property will result in damage to the property and chaos as wiring is constantly installed and removed as residents move in and move out.

A recent rulemaking by the Federal Communications Commission has given rights to tenants to install a satellite dish receiver on their balcony without the prior approval of the apartment owner/manager. Under the mistaken doctrine that a resident has rights that go beyond a mutually agreed lease and heat, light, and power, the Commission has shrugged aside the practical implications of residents

mounting a dish on a balcony railing. No credit is given to the fact that the dish might be mounted in an unsafe manner. No credit is given to the fact that it might be a high-rise building in a dangerously high-wind and storm location in the country. A satellite dish is "similar to a deck chair or a bicycle on a balcony," is what we have heard. We assure you, bicycles and deck chairs are not mounted on the top of balcony railings. When a high wind blows one of these dishes off onto a young child, we doubt that the FCC will be there to pay all of the legal and medical damages.

Will "New" Service Actually be Provided?

The ability of a telecommunications provider to assign a contract to another provider should be of great concern as you analyze the multi dwelling unit market. Many providers do not actually provide programming or service the properties with which they contract. Instead, they turn around and assign their recently acquired contracts to other providers. This transaction, which is encouraged by forced access laws, does not actually further the competitive process or create a more vibrant marketplace.

Conclusion

Apartment community owner/managers must be able to choose the best service for a given community from a broad array of reliable providers. Forced access actually creates less competition in the marketplace.

The telecommunications marketplace is highly competitive and innovative products are coming along every day. Apartment communities are taking advantage of these new products whenever and wherever appropriate. But just as auto makers do not put new and untried products in cars, apartment owner/managers need to make sure that a given product will work and that the service will be there when the product breaks down. Just because someone claims to be a telecommunications provider does not mean that the products of that company should have an automatic license to come into a given apartment community in the name of "tenant rights."

We repeat our previous statement which is based upon actual experience in the marketplace: exclusivity in a geographic area results in less competition. However, exclusive contracts for a given community actually work to the benefit of the resident because it allows an apartment community owner/manager to negotiate the best possible contract for both price and level of service and it enables new providers to economically enter a geographic market and compete with established providers.

Mr. TAUZIN. Thank you, Ms. Case.

The last two witnesses represent cable and then broadcasters. So we are pleased now to welcome Mr. Larry Pestana, vice president of engineering for Time Warner Cable for your discussion. Mr. Pestana.

STATEMENT OF LARRY PESTANA

Mr. PESTANA. Thank you, Mr. Chairman, members of the subcommittee. My name is Larry Pestana. I am the vice president of engineering for Time Warner Cable in New York City and I appear today solely on behalf of Time Warner Cable and not on the behalf of the cable industry in general.

Time Warner Cable's New York City's system serves perhaps the greatest concentration of multiple dwelling units or MDU buildings anywhere in this country. In Manhattan alone, Time Warner's cable system serves over 30,000 MDU buildings, accounting for 850,000 residential units. Time Warner is currently engaged in a massive upgrade of its New York City system. Upon completion, Time Warner will be able to provide additional tiers of digital service, including high definition television as well as high-speed cable service.

Time Warner Cable has invested millions of dollars to install its broad-band distribution facilities in MDU buildings in Manhattan alone. Continued ownership of these facilities is crucial for us to offer a wide array of services to our customers.

I would first like to speak to you about the access to premises issue. As you may know, in many States, including New York, certain video providers enjoy statutory access to premises rights. Most States, in enacting access to premises laws, have limited their benefits to locally franchised cable operators. This is because unique public interest responsibilities on franchise cable operators such as public access channels and universal service. By contrast, unfranchised operators do not have similar obligations. In fact, they make no secret of their policy to serve only upscale and high-density areas, a strategy often referred to as cherry picking or cream skimming.

It has been suggested that a national access to premises law is necessary for video service competition to flourish within the Nation's MDU buildings. Such legislation raises thorny issues relating to taking of private property without just compensation and promotion of competition. Congress has declined to adopt such legislation in the past. We believe that the best approach is to continue to allow each State to adopt any appropriate legislation tailored to address the unique situation faced in that particular State.

Let me turn now to the related but distinct issue of access to wiring. An incumbent provider has invested many thousands of dollars to install and maintain the internal distribution system within any building it serves. Allowing a competitor, *carte blanche*, to highjack Time Warner's property for its own use and benefit does not constitute legitimate competition. Furthermore, if Time Warner is forced to turn over its wiring to a competitor for a particular unit or building, then it is precluded from using the wiring itself, not just for video, but also for high-speed modem service, telephony, and other alternative services. Any competitor that wishes to compete within a particular building should be required to construct and pay for its own facilities.

In the 1992 Cable Act, Congress directed the FCC to adopt rules the positioning of wiring inside a subscriber premises upon termination of cable service. As the legislative history makes clear, in an MDU context, this provision was intended to apply exclusively to wiring within the four corners of an individual resident's unit, not to the internal wiring installed in the common areas of the building. In constructing the rules, the FCC was wise not to move the cable demarcation point to the location of the current telephone demarcation point. Otherwise, cable operators' abilities and incentives to offer non-video services to MDU residents would have been destroyed.

Unlike in a narrow-band telephony context, a broad-band provider such as a cable operator must retain exclusive control over its entire internal broad-band distribution infrastructure if it is to offer any combination of voice, video, data transmission services to MDU residents. In the spirit of the new FCC rules, Time Warner is actively working to resolve the often contentious issues in this arena, such as shared use of building molding, coordinating installations in newly constructed buildings, developing policies to properly handle customer changes in buildings where we compete unit by unit.

Finally, allow me to briefly address the issue of exclusive contracts. Exclusive contracts inhibit the ability of MDU residents to

obtain services from competing providers. There is no consensus on this issue of exclusive contracts to serve MDUs. Various cable operators, incumbent telephone companies, and competing providers have taken positions, both for and against exclusive contracts. Groups representing MDU owners understandably oppose any restrictions on exclusivity. Time Warner is prohibited from entering into exclusive contracts in New York City, which has led to significant competition. We would favor a ban on exclusive contracts, so long as such a restriction applies to all providers equally and recognizes the sanctity of contracts.

There is just no legitimate, pro-consumer reason to discriminate between providers when it comes to exclusivity. Similarly, any ban on exclusivity should apply to all communications services equally. For example, if the exclusive agreements between landlords and video service providers are banned, then exclusive agreements between landlords and telephone service providers also should be banned. Moreover, any ban on exclusivity must not interfere with existing contracts. Accordingly, any such restriction should operate on a prospective basis only.

Time Warner fully agrees that landlords are often the greatest impediment to competitive alternatives for MDU residents. If landlords were banned from accepting consideration from telecommunication providers beyond the nominal for the space occupied by the providers' facilities, then the landlord would have a great incentive to accept providers based on the quality of services offered to MDU residents, rather than the provider offering the largest piece of the action to the landlord.

I thank you very much for your attention and I look forward to your questions.

[The prepared statement of Larry Pestana follows:]

PREPARED STATEMENT OF LARRY PESTANA, VICE PRESIDENT OF ENGINEERING, TIME WARNER CABLE OF NEW YORK CITY

Mr. Chairman, members of the subcommittee, my name is Larry Pestana, Vice President of Engineering of Time Warner Cable of New York City. In this capacity, I am responsible for issues relating to the design and construction of Time Warner Cable's distribution infrastructure. In New York City, much of this plant is installed inside multiple dwelling unit, or MDU, buildings, ranging in size from brownstones with just a few units to high-rises with hundreds of units. Time Warner Cable must constantly attempt to coordinate with other video providers in New York City who offer competitive alternatives to MDU residents. I am here to communicate to you Time Warner's, as well as my own individual perspective, on issues relating to access to buildings and inside wiring. I appear today solely on behalf of Time Warner Cable, and not on behalf of the cable industry generally.

Time Warner Cable's New York City system serves perhaps the greatest concentration of MDU buildings anywhere in the country. In Manhattan alone, Time Warner's cable system serves over 30,000 MDU buildings accounting for over 850,000 residential units. Time Warner is currently engaged in a massive upgrade of its New York City system, which, upon completion, will allow us to provide additional tiers of digital cable service, including HDTV, as well as high speed cable modem service.

Cable system architecture in an MDU generally involves three basic elements. First, there are the riser cables which typically run vertically throughout the height of the building. At each floor, there is usually a junction box or lockbox. From the lockbox, separate home run cables are installed running to each unit on that floor, although a home run is sometimes shared by more than one unit. At the demarcation point, the home run enters the individual unit, where the inside wiring then runs to each TV set or other device in the subscriber's premises.

In most buildings in New York City, the home runs are installed in hallway moldings which can be snapped open for easy access. In some buildings, riser cables and home runs are installed in metal tubes or conduits.

Time Warner Cable has invested millions of dollars to install its broadband distribution facilities in MDU buildings in Manhattan alone. Landlords are required to pay to have telephone wiring installed in their buildings, and accordingly they immediately own that wiring. On the other hand, landlords are typically unwilling to pay the cost of cable installation, and indeed often expect payments from the cable operator for the right to wire the building. In New York, cable operators are prohibited from making such payments to landlords, although such restrictions do not apply to our competitors. With such a significant up-front investment, and the crucial nature of the ownership of these facilities to offer a wide array of services to our customers, it should be apparent why Time Warner and other cable operators must take appropriate steps to protect their right to continued use of their distribution plant in MDU buildings. Otherwise, their investment would be for naught.

ACCESS TO PREMISES

I would first like to speak to you about the access to premises issue. As you may know, in many states, including New York, certain video service providers enjoy statutory access to premises rights. These laws have generally been upheld by the courts, following the analysis of the U.S. Supreme Court in the *Loretto* decision. In that case, the Supreme Court found that the installation of wiring on a landlord's property constitutes a "taking" for which the property owner is entitled to just compensation. The New York State access to premises law was amended to include such a compensation mechanism. These laws ensure that MDU residents have a real choice between the franchised cable operator and the competing video service provider, whose interests are often aligned with the financial interest of the landlord.

Most state legislatures enacting access to premises statutes have limited their benefits to locally franchised cable operators because they recognize the unique public interest responsibilities franchised cable operators shoulder. Indeed, franchised cable operators must meet public interest obligations far beyond those imposed on any competing providers. For example, locally franchised cable operators are typically required to support local public, educational and governmental access channels within the community. In addition, locally franchised cable operators must construct their facilities throughout their franchise territories, offering services to high income and low income neighborhoods alike. By contrast, unfranchised operators, such as RCN, do not have similar obligations and, in fact, make no secret of their policy to serve only upscale and high-density areas, a strategy often referred to as "cherry-picking" or "cream-skimming."

There is an easy solution for those complaining about the right of access laws. In the 1992 Cable Act, Congress expressly directed that all cable franchises must be non-exclusive and cannot be unreasonably denied. Thus, any competitor can enjoy the benefits of any state access to premises statute merely by obtaining a cable franchise. Indeed, many competing video providers, including RCN, now routinely obtain cable franchises. It is entirely appropriate for an entity seeking the benefits of a local cable franchise be required to assume the attendant responsibilities.

It has been suggested that a national access to premises law is necessary for video service competition to flourish within the nation's MDU buildings. Conversely, representatives of landlords will likely argue that such laws interfere with their property rights and are confiscatory. Without question, such legislation raises thorny issues relating to taking of private property without just compensation and promotion of competition, and Congress has declined to adopt such legislation in the past. We believe that the best approach is to continue to allow each state to adopt any appropriate legislation, tailored to address the unique situation faced in a particular state.

CABLE HOME WIRING

Let me turn now to the related but distinct issue of access to wiring. This topic has to do not with service providers' rights to access a building, but their efforts to use pre-existing wiring and other equipment already installed in the building by the incumbent provider. Obviously, any video service provider, as they initiate service to a new building, would love to have the ability to access or take over pre-existing wiring located within the building and avoid the significant cost of building such a system. Where the landlord has paid the full cost of the installation of the wiring, there is typically little dispute over the landlord's right to select the service provider authorized to use such facilities. But where the incumbent provider has borne the

costs of installing its distribution infrastructure in an MDU, it should not be forced to give up ownership or control of its property solely for the benefit of a competitor.

An incumbent provider has invested many thousands of dollars to install and maintain the internal distribution system within any building it serves. Indeed, Time Warner has spent many millions of dollars to wire the buildings of Manhattan alone, and it is clear that Time Warner must retain ownership of the wiring and related equipment in order to protect its investment. Allowing a competitor *carte blanche* to hijack Time Warner's property for its own use and benefit does not constitute legitimate competition. Furthermore, if Time Warner is forced to turn over its wiring to a competitor for a particular unit or building, then it is precluded from using the wiring itself, not just for video, but also for high speed cable modem service, telephony, and other alternative services. Any competitor that wishes to compete within a particular building should be required to construct, and pay for, its own facilities.

In the 1992 Cable Act, Congress directed the FCC to adopt rules governing the disposition of wiring inside a subscriber's premises upon termination of cable service. As the legislative history makes clear, in the MDU context, this provision was intended to apply exclusively to wiring installed within the four corners of an individual residents' unit, not to the internal wiring installed in the common areas of the building. In its initial implementation of this provision, the FCC was true to legislative intent. It established rules that prevent a cable operator from removing the wiring inside a tenant's unit, when that resident terminates cable service, without first offering to sell the wiring to the MDU resident at a reasonable price.

More recently, the FCC has expanded the scope of this provision well beyond its initial intent. The FCC improperly adopted procedural requirements relating to "home run" wiring—the wiring in the MDU extending from the riser or junction box, through the common areas of the building, to the residents' actual dwelling unit. These "home run" rules provide that the after receiving notice from the property owner that it desires unit-by-unit or building-by-building competition, the cable operator must choose one of three options: one, remove the wiring; two, abandon the wiring; or three, sell the wiring to the landlord or the new provider.

On their face, these rules do not apply where the cable operator has a legal right to retain its facilities in a building after a particular customer discontinues service, as is the case in New York State. In practice, however, the FCC has improperly shifted the burden such that cable operators could be forced to obtain injunction from a court every time the ownership of the cable operator's property is questioned. These new rules also operate such that if an incumbent provider's home run wiring is installed within certain categories of building material, it is automatically deemed inaccessible and the individual unit resident has the right to acquire ownership of the cable operators' facilities, which sometimes extend hundreds of feet outside that resident's unit. Time Warner is confident that the courts will ultimately determine that these rules were not authorized by Congress in the 1992 Cable Act.

The FCC was wise not to move the cable demarcation point to the location of the current telephone demarcation point, the minimum point of entry (typically somewhere in the basement of the MDU). Had the FCC moved the broadband point of demarcation to the minimum point of entry, cable operators' ability and incentives to offer non-video services to MDU residents would have been destroyed. Unlike in the narrowband telephony context, a broadband provider such as a cable operator must retain exclusive control over its entire internal broadband distribution infrastructure if it is to offer any combination of voice, video and data transmission services to MDU residents. Once it is forced to turn over its entire distribution network, there is no way for it to provide any of these services to the MDU's residents.

In the spirit of the new FCC rules, Time Warner is actively working to resolve the often contentious issues in this arena such as shared use of building molding, coordinating installations in newly constructed or refurbished buildings, and developing policies to properly handle customer changes in buildings where we compete unit by unit.

EXCLUSIVITY

Finally, allow me to briefly address the issue of exclusive contracts. The FCC is currently considering whether and to what extent it should allow MDU owners to enter into exclusive agreements with cable operators and other video providers to offer service in their buildings. Landlords have argued that a ban on exclusive contracts would interfere with their ability to manage and maximize the value of their property. On the other hand, exclusive contracts inhibit the ability of MDU residents to obtain services from competing providers. But even such an exclusive contract cannot preclude the inevitable onslaught of competition. In its recent proceed-

ing dealing with the installation of off-air reception devices, the FCC made clear that MDU residents have the right to install DBS reception equipment in their units, for example, even in the face of an exclusive contract between the landlord and a cable operator.

There is no consensus on the issue of exclusive contracts to serve MDUs. Some cable operators have argued that exclusive agreements are necessary or useful for the efficient marketing of service and should be permitted. Other cable operators favor competition on a subscriber-by-subscriber basis and have argued that MDU owners should not be permitted to limit access to buildings by selling exclusive rights.

Similarly, alternative providers have taken divergent positions on this issue. Many argue that long-term exclusive agreements are necessary to enable them to successfully challenge incumbent cable operators, so they should be allowed to enter into exclusive contracts, but cable operators should not. Others oppose all exclusive contracts, arguing that exclusivity is not necessary to promote competitive entry. Still others favor allowing all providers to enter in to short-term exclusive contracts of no more than five years, but would ban longer term exclusive contracts. Groups representing MDU owners understandably oppose any restrictions on exclusivity.

Time Warner is prohibited from entering into exclusive contracts in New York City. We would favor a ban on exclusive contracts, so long as such a restriction applies to all providers equally and recognizes the sanctity of contracts. There is just no legitimate, pro-consumer reason to discriminate between providers when it comes to exclusivity. Similarly, any ban on exclusivity should apply to all communications services equally. For example, if exclusive agreements between landlords and video service providers are banned, then exclusive agreements between landlords and telephone service providers also should be banned. Moreover, any ban on exclusivity must not modify or abrogate existing contracts, so as not to violate the Constitution. Accordingly, any such restrictions should operate on a prospective basis only.

Time Warner fully agrees that landlords are often the greatest impediment to competitive alternatives for MDU residents. If landlords were banned from accepting consideration from telecommunications providers, beyond the nominal rent for the space occupied by the providers facilities, then the landlord would have a greater incentive to select providers based on the quality of services offered to MDU residents, rather than the provider offering the largest "piece of the action" to the landlord.

Thank you very much for your attention, and I look forward to your questions.

Mr. TAUZIN. Thank you, Mr. Pestana.

And, finally, Mr. Mark Prak, special counsel to the National Association of Broadcasters, a partner of Brooks, Pierce, McLendon, Humphrey, and Leonard in Raleigh, North Carolina. Mr. Prak.

STATEMENT OF MARK J. PRAK

Mr. PRAK. Thank you, Mr. Chairman, ranking member, members of the committee. It is a pleasure to be here with you this morning.

I am going to focus a little more narrowly in my comments this morning. As perhaps the chairman was indicating, this issue gets described broadly as forced access or competitive access. And it is certainly true that you can listen to adjectives and figure out where people are coming from. I guess if I were asked to engage in that process, I would say that I am the only panelist here talking to you this morning who can be fairly characterized as talking to you about universal lifeline access, because I represent the NAB, which represents the Nation's television industry, among other things.

And we are here to talk to you about a provision of the law that we thought already fixed these problems. It is a much narrower fix, from our point of view, because there is no question that section 207 of the Telecommunications Act of 1996 was designed to allow every American citizen, regardless of their income or place of residence, to be able to receive the signals of our free, over-the-air, local television stations. And, as you know, section 207 required the

FCC to promulgate rules to prohibit restrictions on the use of good old fashioned television antennas for that purpose.

The FCC, after a couple of years, adopted some rules and, in fairness to the Commission, they go pretty far, but they don't go far enough. Where you really get down to focusing in on the rules, is that they do leave some persons in our country, who reside in multiple unit dwellings, apartment or condominiums, I guess we have come to call them multiple unit dwellings, for those folks, there are situations occurring now where they are being denied access to free, over-the-air local television.

Why should you care about that? Well, I think every member of the committee should be concerned about that for a couple of reasons. The first is that when you understand how people receive video in our country we know that 67 percent of the country is connected to cable; 33 percent of the country does not choose to subscribe to cable; and when you think about that universe of people, I think it likely that, for many of those people, they either can't afford cable or they choose not to purchase cable. But for those people in that universe of folks who reside in MDUs, we are now looking at a situation where such people can be denied access to what has become the universal lifeline service. And I say that not as an exaggeration.

I was looking this morning, before coming over here to Capitol Hill, at electronic media and I see pictures of the tornadoes in Oklahoma. And I see headlines that say: Twister takes toll but TV warnings helped. Well, when you get right down to it, we have a Federal interest and a national telecommunications policy that calls for the existence of an emergency alert system. It calls for a means by which, if the President needs to, he can communicate with everyone in our country. It allows local television stations and also local cable systems to participate in letting people know when there is a tornado coming, an earthquake, or other natural disaster or unusual weather that requires people to take cover and look out for things. And that is where free, over-the-air television comes in.

As many of you know in your districts, there are television stations who operate street-level accurate Doppler weather radar. I mean, it is amazing when you watch the weather at night, and that is one of the things almost all of us do, is you can see the ability of local weather personnel to predict where things are going and, even as things are happening, they can show you down in my market where I live in North Carolina, they can show you what streets the storm is coming toward. So it is very helpful in letting people know to get out of the way.

It seems to me imprudent to have a national system of this type and to have people who can be excluded from it by virtue of choices made by landlords. I don't think this was a problem, frankly, if you go back and think to way telecommunications has grown so explosively. Prior to the early 1980's, when cable was really growing and hitting its stride, most landlords had a master antennae for all of their residents. They wanted to be able to provide this. It was only after they had been going to seminars on there's money for you in video provision to your tenants that we start having these problems with seeing even local television signals delivered to residents of MDUs.

So how shall we solve this problem? Well, we have got another component of the problem I don't think it is as complicated as the landlords make out but we are also engaged right now in this country in building out a new digital television system throughout the United States. That system and all of the congressional and FCC policy judgments that have been made are based on the assumption that every American citizen, if they need to, can use and access a rooftop antennae for the purpose of receiving local television signals. So we have got a significant Federal interest, an interest that I know is of concern to this committee, in seeing that this not become a problem.

What do we ask you to do? Well, we say the FCC got a little timid on us, with all due respect to Mr. Sugrue and Bill Johnson, folks at the agency. We think that the landlords cowed the agency. If you read section 207, it is pretty straightforward. It doesn't say: prohibit restrictions that would inhibit the use or impair a viewer's access to television if you think it is a good idea and if there aren't any complexities involved. It says do it. And what we got was a solution to virtually everything that I think is a good workable rule for which they are to be congratulated, but they didn't get over the last hump, which is the MDUs, which, as both the chairman and the ranking member have noted in their opening statements, are critical to the system working the way it is intended.

So I guess I would say is that one of the things we would ask you to do, we think the rule we proposed to the commission was simple, reasonable, and straightforward. They did not adopt our rule. There are petitions for rulemaking pending or for reconsideration of the final order, pending. I guess, Mr. Chairman, if I could tell you what we at the NAB would like to have you do, is we would like to have you put your arms around the representatives of the FCC and tell them to go back and it is all right to go ahead and adopt the approach that we have advocated.

And I might just say at the ending here, before we get to questions, that the fact is the rule we have taken and proposed was designed to leave the status quo, in terms of individual buildings, as much as possible, in the hands of the individual building owner. If they use a master antennae, they have to. First the tenant has the right to use an antennae. If the building owner doesn't like that, they can provide a master antennae, which we all know for many years was no big controversy. If they already have an arrangement with cable television to provide we know that local broadcast signals are carried on cable television then that would be good enough as well.

The key point, at the end of the day, should be that every American citizen, regardless of whether they live in an MDU or stately Wayne Manor have the ability to access free, over-the-air local television. So I will say that. I will leave it at that. I don't think it is near as complicated as my friends who are real estate interests make out and I will be happy to respond to questions.

[The prepared statement of Mark J. Prak follows:]

PREPARED STATEMENT OF MARK J. PRAK, SPECIAL COUNSEL TO THE NATIONAL
ASSOCIATION OF BROADCASTERS

Good morning. My name is Mark Prak, and I appear on behalf of the National Association of Broadcasters. NAB is a non-profit, incorporated association of tele-

vision stations and radio stations located throughout the country. NAB serves and represents the American broadcast industry.

My testimony will be focused on the implementation of Section 207 of the Telecommunications Act of 1996 by the Federal Communications Commission (FCC). Presently, the FCC has pending before it petitions for reconsideration of its *Second Report and Order* issued last November which adopted final rules designed to implement the mandate of Section 207. Suffice it to say that, with all due respect, the agency's rule has segregated Americans into two classes: those who live in single family homes and are able to receive the signals of free over-the-air television stations and those who cannot receive free over-the-air television signals merely because they reside in apartments, condominiums, or other multiple-unit dwellings.

This result is unacceptable from a public policy standpoint. It must not be accepted by this Subcommittee, the parent Commerce Committee or the Congress.

The Commission has extended the benefits of Section 207 preemption to *some* consumers who rent their homes or apartments and have access to suitable balconies, patios or other areas "under their control" for installing an antenna. But, it has failed to extend its Section 207 rules to "common or restricted areas" of rental property. In so doing, the Commission fell well short of fulfilling the statutory mandate or Section 207 to "prohibit restrictions" that impair a viewer's reception of over-the-air video programming signals. As a result, the Commission has created an artificial and false distinction between rental property "under the control" of a tenant and "common or restricted" property and has created a "have-and-have not" distinction between homeowners and renters. In the end, a tenant is a tenant and a restriction is a restriction. The Commission erred in extending its Section 207 rules to *some* tenants, but not others, and by prohibiting *some* restrictions which impair the reception of over-the-air signals, but not others.

I. BACKGROUND

The FCC instituted a rule making proceeding in response to the passage of the Telecommunications Act of 1996 (the "1996 Act").¹ Section 207 of the 1996 Act requires the FCC to adopt regulations prohibiting state and local restrictions on the use of over-the-air television antenna to receive television transmissions. Specifically, this provision, titled "Restrictions on Over-the-Air Reception Devices," (OTARD) provides as follows:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, 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.

In its initial *Report and Order and Memorandum Opinion and Order* shortly after the Act's passage, the Commission adopted a single rule to implement Section 207. The rule prohibits any state law or regulation, local law or regulation, or any private covenant, homeowner's association rule or similar restriction that impairs the "installation, maintenance, or use" of antennae designed to receive over-the-air television, DBS, or MDS signals. Out of what it described as "concern with the state of the record before it," however, the Commission limited the application of the rule to property "within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property."² In issuing a *Further Notice of Proposed Rule Making (FNPR)* and requesting further comment, the Commission concluded that the record before it was "incomplete and insufficient to extend our rule to situations in which antennae may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter."³ The Commission offered no rationale for drawing this distinction.

In its *FNPR*, the Commission asked for comment, among other things, on: (1) the application of the preemption rule to rental property and to common property which a citizen does not own but instead has rights in common with others; (2) the FCC's legal authority to prohibit nongovernmental restrictions that impair reception by citizens that do not have exclusive use or control and a direct or indirect ownership interest in the property and, specifically, whether this implicates the Takings Clause of the United States Constitution; and (3) the proposal of a satellite DBS provider that community associations should be allowed to make video programming

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² *FNPR* at ¶ 5.

³ *FNPR* at ¶ 63.

available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation.

NAB provided comments and reply comments to the FCC on these points. On September 25, 1998, the FCC issued an Order denying reconsideration of its original rule regarding the use of antennas and other OTARD equipment by persons other than those in MDU's and that the MDU issue would be addressed in a subsequent order.

On November 20, 1998, the FCC issued its Order creating "video haves" and "have-nots" based on a citizen's residence in an MDU. NAB and others petitioned the FCC in January of this year to reconsider its decision. Those petitions for reconsideration remain pending.

The following argument explains why the Commission's final rule fails to fulfill the intent of Congress in adopting Section 207.

II. THE COMMISSION WAS DUTY BOUND TO ADOPT AN ANTENNA PREEMPTION RULE WHICH APPLIES TO MULTIPLE DWELLING UNITS AND OTHER SIMILARLY SITUATED PROPERTIES

The right of all citizens, no matter where they reside, to have access to video programming services of their choosing is fundamental to Congressional communications policy. Indeed, a primary objective of the Communications Act of 1934, as amended, (the "Communications Act"), is to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."⁴ Section 1 of the Communications Act does not exempt persons living in apartments, condominiums or other such residences. For decades, the Commission has sought to implement the Congressional policy reflected in Section 1 of the Communications Act by allocating television frequencies to communities throughout the nation. In so doing, the Commission's first priority has been to assure the availability of at least one television service to all of the people of the United States.⁵ A second priority has been to make competing television signals available to all people.⁶ The nation's television broadcast service is now mature, ubiquitous and competitive; virtually all citizens receive at least four competing over-the-air television services and most receive many more. Los Angeles, for example, receives service from 17 television stations.⁷

The right of citizens to enjoy uninhibited access to video programming takes on special importance with respect to over-the-air television broadcasting. Over-the-air television remains the cornerstone of the nation's video delivery system, a system that has been expanded in recent years by cable television, VCRs, DBS, MMDS and other video delivery technologies.⁸ Nevertheless, terrestrial over-the-air television is the nation's free, universal television service, and it remains the means by which all Americans, regardless of financial means, can receive television news, information, entertainment and sports programming. Accordingly, Congress determined, in adopting Section 207, that all citizens, whether they own or rent a home, condominium, townhouse or apartment, should be able to employ a simple roof-top television antenna to receive the terrestrial television stations in the local market where they live.

Our national communications policy is premised on the notion that citizens may, by use of a conventional roof-top antenna, have access to local broadcasting tele-

⁴ Communications Act of 1934, as amended, § 1, 47 U.S.C. § 151.

⁵ *Sixth Report and Order*, 41 FCC 148, 167 (1952); see also, *WITN-TV, Inc. v. FCC*, 849 F.2d 1521, 1523 (D.C. Cir. 1988).

⁶ *Id.*

⁷ *TV & Cable Factbook* (Warren 1996 ed.), p. A-99.

⁸ *Second Annual Report (Video Competition)*, FCC 95-491 (Released: December 11, 1995), at p. 2, ¶3.

vision stations.⁹ Thus, the residents of multiple dwelling units¹⁰ cannot be relegated to a video programming service of their landlord's or homeowner association's choosing. Instead, they must be free to select the television programming service of their own choice. The failure of the FCC to extend its rules implementing Section 207 to all residents of MDUs means that residents of many such dwellings do not have access to the nation's free, universal, over-the-air television service.

Moreover, Congress and the FCC, by statute and regulation, require television broadcasters to provide certain programming deemed to be in the public interest. Political programming and children's educational programming are examples.¹¹ It would be illogical in the extreme for Congress to require the broadcast of such programming without prohibiting restrictions—wherever imposed—on antennae and devices necessary to receive that programming.

Accordingly, the NAB proposed that the Commission adopt the following rule to implement Section 207:

Any private restriction on the placement of television receiving antennae imposed by deed, covenant, easement, homeowner's association agreement, lease or any similar instrument shall be deemed unenforceable, provided, that a reasonable restriction on the placement of television receiving antenna in or on a multiple dwelling unit shall be enforceable if the signals of all television stations placing a predicted Grade B contour (as that term is defined in sections 73.683 and 73.684 of this chapter) or an actual Grade B signal as measured under the provisions of this chapter over the premises are transmitted without material degradation to all dwelling units subject to the restriction via a common antenna or other means without separate charge to the owners or tenants of those dwelling units.

III. THE COMMISSION'S RULE AND ORDER EXPLAINING THE RULE IS INTERNALLY INCONSISTENT AND FAILS TO FULFILL THE CONGRESSIONAL MANDATE TO "PROHIBIT RESTRICTIONS" WHICH IMPAIR THE RECEPTION OF OVER-THE-AIR SIGNALS

In addressing the application of Section 207 to rental property in the *Second R&O*, the Commission concludes:

"[W]e agree with those commenters that argue that Section 207 applies on its face to all viewers, and that the Commission should not create different classes of "viewers" depending upon their status as property owners. For instance, if a local government imposed a zoning restriction that prohibited a landlord from installing a master antenna system for his tenants to receive over-the-air broadcast signals, such a restriction would be preempted, notwithstanding the fact that the viewers in that situation are renters." *Second R&O* at 13 (footnote omitted).

The FCC's conclusion is a recognition that, in passing Section 207, Congress did not intend for the Commission to create or foster a "second class" viewer that is relegated to receiving video programming service of their landlord's or homeowner association's choosing. Chairman Kennard, in his Separate Statement, echoed this conclusion, going so far as to claim, "The Commission has thus eliminated the have-

⁹Congress' concern that citizens have access to their local broadcast stations is also reflected in the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. Public Law No. 102-385, 106 Stat. 1460, *codified at* 47 U.S.C. § 534. In addition, out of concern for those who live in areas that, because of terrain obstructions or other interference, cannot receive broadcast television network programming from a local station, Congress in 1988 enacted the Satellite Home Viewer Act ("SHVA"), P.L. 103-369, 17 U.S.C. § 119. The SHVA created a special exemption from conventional copyright law to provide satellite carriers a statutory copyright to enable them to retransmit the signal of a distant network station and deliver that signal by satellite to home dish owners who are unable to receive a signal of at least Grade B intensity from a local affiliate of that network. The SHVA gives a blanket compulsory copyright for satellite delivery of independent television stations. The SHVA is a truly extraordinary intrusion into the traditional free market in copyrights and reflects a longstanding Congressional concern for assuring access by the American people to television broadcast programming. That concern was reflected again in The Cable Television Consumer Protection and Competition Act of 1992, *supra*, which exempts from that Act's retransmission consent provisions the retransmission by satellite of distant network stations to home dish owners who are beyond the reach of a local network affiliate.

¹⁰Apartments, condominiums, townhouses and other forms of multiple dwelling units which, under state laws and/or private contracts, provide common areas for the benefit of residents are referred to as "MDUs."

¹¹*See* 47 U.S.C. §§ 312(a)(7), 315 (political programming); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. § 303a, 303b, 394; 47 C.F.R. §§ 73.1930, 73.1940, 73.1941, 73.1942, 73.1943, 73.1944 (political rules); 47 C.F.R. § 83.670, 73.671 (children's TV rules).

and-have not distinction that gave homeowners access to the competitive video market but denied it to all apartment dwellers.”

But that is not the case. Despite its recognition of the intent of Congress to create a single class of viewers, the Commission stopped well short of eliminating the classification of viewers based upon their status as property owners. By failing to extend the benefits of preemption to renters who do not have suitable property “under their control” to install an antenna, the Commission has relegated tenants who do not exercise “control” over an area suitable for placement of an over-the-air antenna to “second class” status in today’s video programming marketplace.

Effectively, the Commission’s order now sanctions different classes of viewers, even within a single building. For example, because of the Commission’s unjustifiable distinction between property “under the control of a tenant” and “common or restricted” property, a tenant on one side of an apartment building with a balcony may exercise his or her right to receive free, over-the-air broadcast (or other video) programming while a tenant on the opposite side of the building—who perhaps does not have a balcony or whose balcony faces in a direction such that he or she cannot receive over-the-air signals—is not allowed to receive such signals. This is exactly the sort of distinction that Congress sought to eliminate in Section 207.

National communications policy is premised on the notion that citizens may, by use of a conventional roof-top television antenna, have access to local broadcast television stations—both NTSC and digital. Thus, residents of multiple dwelling units should not be relegated to a video programming service of their landlord’s choosing. Instead, Section 207, and national communications policy, compels that they must be free to select the television programming service of their choice.

IV. THE COMMISSION’S ORDER IS INCONSISTENT WITH FUNDAMENTAL NATIONAL POLICY FAVORING PRESERVATION OF THE FREE, OVER-THE-AIR BROADCAST SYSTEM

In its *Second R&O*, the Commission pays lip service to the preservation of over-the-air broadcasting and the diversification of video programming services. The Commission states: “[W]e believe that Section 207 promotes the substantial governmental interests of choice and competition in the video programming marketplace . . . [E]xpansion of our rules will promote the important governmental interest in enhancing viewers’ access to ‘social, political, esthetic, moral and other ideas.’ . . . The Supreme Court has ‘identified a . . . ‘governmental purpose of the highest order’ in ensuring public access to ‘a multiplicity of information sources.’” *Id.* at ¶24 (footnotes omitted).

Similarly, in its orders requiring television broadcasters to convert to digital television, the Commission has found that the preservation of access to free, over-the-air television service is a paramount goal of public importance.¹² In this context, the Commission stated:

First, we wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television’s unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible.¹³

This policy is part and parcel of the Commission’s overriding statutory mandate to “make available . . . to all the people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service.”¹⁴ It is also a reflection of the undeniable fact that “broadcast television has become an important part of American life.”¹⁵

Section 207 preemption serves to promote the preservation of free, over-the-air broadcasting. Without complete prohibition of restrictions on antenna placement, landlords will be free to dictate to their tenants what video programming services they may receive and may completely deny access to free, over-the-air broadcast service if they so choose. By not completing the task assigned to it by Congress, the

¹² See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, *Fifth Report and Order*, MM Docket No. 87-268, FCC 97-116 (Released: April 21, 1997), ¶1 (“*Fifth Report and Order*”). See also *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10541 (Released: April 21, 1995) (“*Fourth Further Notice/Third Inquiry*”), at 10541.

¹³ *Fifth Report and Order*, ¶5.

¹⁴ Communications Act of 1934, as amended, § 1 (47 U.S.C. § 151).

¹⁵ *Fifth Report and Order*, ¶ 19 (citing *Fourth Further Notice/Third Inquiry*, at 10543).

Commission has left a gaping hole in the implementation of Section 207 to the degradation of over-the-air broadcasting which, of course, depends on viewers being able to install and use antennas.

V. THE COMMISSION HAS FASHIONED A THREE-PART TEST OUT OF WHOLE CLOTH WHICH FINDS NO SUPPORT IN THE LEGISLATIVE HISTORY

The Commission applies a three-part test in evaluating whether to prohibit over-the-air antenna restrictions with respect to “common and restricted” areas of rental property. *See, e.g., Second R&O*, at ¶7 (“We find that Section 207 obliges us to prohibit restrictions on viewers who wish to install, maintain or use a Section 207 reception device within their leasehold because this does not impose an affirmative duty on property owners, is not a taking of private property, and does not present serious practical problems.”).

The Commission’s creation of a three-part test in complying with the directive of Section 207 is symptomatic of its fundamental misunderstanding of the nature of the task before it. Congress directed the Commission in Section 207 to adopt rules prohibiting *all* restrictions that impair a viewer’s ability to receive the specified video programming services through over-the-air reception devices; Congress did not direct the Commission to pick and choose among the restrictions to be prohibited, yet this is exactly the result which the Commission’s application of the three-part test yields.

With respect to each element of the Commission’s three-part test, the Commission bends over backwards to avoid the straightforward interpretation that the plain language of Section 207 compels.¹⁶ As shown below, when properly analyzed, even the factors considered by the Commission support extension of the Section 207 rules to all viewers, including tenants in multiple dwelling units with no access to a patio or balcony.

A. The Commission’s Construction of Section 207 to Prohibit Requiring Affirmative Action by Landlords Misconstrues the Meaning of the Statute.

In discussing its authority under Section 207, the Commission concluded that it did not have authority to require affirmative actions by landlords:

“Section 207 authorizes the Commission to remove restrictions; Section 207 does not authorize the Commission to impose independent affirmative obligations on a property owner or a third party to enable the viewer to use a Section 207 device. Interpreting Section 207 to grant viewers a right of access to possess common or restricted access property for the installation of the viewer’s Section 207 device would impose on the landlord or community association a duty to relinquish possession of property.” *Second R&O*, at ¶35.

Because the extension of Section 207 to common and restricted areas would entail allowing the placement of antennas in areas outside the “control” of tenants, the Commission reasons that this is inconsistent with the mandate of Section 207 to (only) *prohibit* restrictions. In other words, the Commission concludes it has authority to “prohibit” but not to require affirmative action by third parties, including landlords.

This reading is a hyper-technical parsing of Section 207 which cannot be sustained. While the Commission is, of course, correct that Section 207 does not explicitly authorize the Commission to require action by third parties, Section 207 does require the Commission to “prohibit restrictions” wherever they may be found. In the face of this clear legislative direction, there is no basis for the Commission to refuse to carry out the directive under the guise of an “affirmative obligations” test of its own making.

Moreover, as a matter of regulatory drafting, it is clear that the Commission could adopt a rule which prohibits all restrictions without mandating any specific action on the part of multiple dwelling unit owners, other than to obey the law.¹⁷ In the end, however, it is clear that the Commission’s concern with mandating “affirmative obligations” by third parties conflates into its “takings” analysis. The Commission

¹⁶*See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 717 (1984) (where the meaning of a statute is clear on its face, there is no need to divine the legislative intent from secondary sources and the agency is bound to follow the interpretation); *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985) (“[w]e cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question”) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933)).

¹⁷Depending on how one characterizes the effect of a particular regulation, all regulation could be construed as requiring affirmative action by a third party by, for example, complying with the regulation. This dissolves into a matter of semantics and characterization which must give way to the clear intent of the statute.

concludes that the extension of Section 207 to all tenants would cause landlords to “relinquish possession” of common and restricted property, which, under the Commission’s analysis, would present a takings issue. As discussed below, the Commission misconstrues controlling precedent in its consideration of the takings issue. In any event, the Commission plainly errs by introducing a quasi-takings analysis in its discussion of its authority to impose “affirmative obligations” on third parties.

No matter how one slices the issue of “affirmative obligations,” the Commission simply erred in misconstruing the mandate of Section 207. Section 207, properly construed, directs the Commission to adopt rules that prohibit all restrictions, without distinguishing between classes of viewers or the authors of such restrictions. The Commission clearly erred in applying an “affirmative obligations” test and in concluding that this test precluded extension of Section 207 to all restrictions impairing access to over-the-air video programming.

B. The Commission Erred in Concluding that Extension of Section 207 to Common and Restricted Areas Implicates the Takings Clause

The Commission committed plain and obvious error by concluding that the *per se* takings analysis of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), would be implicated by extending the Section 207 rules to all tenants. The Commission found:

“If we were to extend our Section 207 rules to permit a tenant to have exclusive possession of a portion of the common or restricted access property where a lease has not invited a tenant to do so, the tenant would possess that property as an “interloper with a government license” thereby presenting facts analogous to those presented in *Loretto* . . .

Under these circumstances, we agree with those commenters that argue that the permanent physical occupation found to constitute a *per se* taking in *Loretto* appears comparable to the physical occupation of the common and restricted access areas at issue here.” *Second R&O*, at ¶¶39-40 (footnotes omitted).

This conclusion is untenable in the face of the very narrow grounds upon which *Loretto* was decided. Indeed, the facts of the present proceeding—involving the prohibition of restrictions on the installation of over-the-air antennas on common and restricted property by or on behalf of tenants—were expressly reserved by the *Loretto* court.

In *Loretto*, a state law provided that a landlord could not interfere with the installation on his property of cable television facilities by a cable operator. Significantly, the state statute at issue did not give the tenant any enforceable property rights with respect to the cable television installation; instead, the cable company, *not the tenant*, owned the installation. This fact was deemed dispositive by the *Loretto* court. The court expressly declined to opine concerning the respective property rights of landlords versus tenants, which is the precise issue presented here. In determining whether the statute at issue constituted a permanent physical occupation of the landlord’s building by a third party, the court noted:

“If [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation . . . The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.” *Loretto*, at 440 n. 19.

In considering and purporting to distinguish this language, the Commission engages in a classic example of circular reasoning. Observing that the assumption of the hypothetical contained in note 19 was that the “landlord would own the installation,” the Commission concluded that so long as the tenant owned the reception device placed in a common or restricted area “the landlord’s or association’s property would be subjected to an uninvited permanent physical occupation.” *Second R&O*, at ¶43. This reasoning completely begs the real question. The determinative fact in the *Loretto* hypothetical was not that the landowner would own the installation but that the cable operator would *not own* the installation. In other words, the determinative fact in *Loretto* was that a third party to the landlord/tenant relationship—the cable operator—would own and control the installation.

The *Loretto* court expressly affirmed the “State’s power to require landlords to comply with building codes and *provide utility connections*, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of the building.” *Id.* at 440 (emphasis added). In this regard, the extension of Section 207 preemption to common and restricted areas of apartment buildings involves the regulatory modification of the relative rights between landlords and tenants. *See Loretto*, 458 U.S. at 441 (“We do not . . . question . . . the authority upholding a State’s broad power to im-

pose appropriate restrictions upon an owner's *use* of his property."). It is completely inaccurate to assume that tenants stand in the same shoes as third parties with respect to their rights in common and restricted areas. For example, absent an express provision to the contrary, tenants have the implicit right to access and use certain building common areas, as a way of necessity between their "landlocked" unit and the street outside. *See* 49 Am. Jur. 29 *Landlord and Tenant* §§ 628 (1995) ("Where property is leased to different tenants and the landlord retains control of passageways, hallways, stairs, etc., for the common use of the different tenants, each tenant has the right to make reasonable use of the portion of the premises retained for the common use of the tenants."); *see id.* at § 651 ("The landlord's interference with the tenant's right of access and exist... may constitute a constructive eviction, especially in case of the lease of rooms or apartments in a building."). Tenants are also entitled to an implied right of necessity for the use of conduits and pipes through a building for utility services, even if it includes some enlargement. *Id.*, at § 632.

Similarly, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Supreme Court considered a rent control ordinance that prohibited mobile home parks from terminating tenancies under certain circumstances. Despite the fact that the effect of the challenged ordinance was that tenants were allowed to occupy their landlord's property over the landlord's objections, the Court found that the ordinance did not constitute a compelled physical occupation of land. The Court noted that the statute "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant." *Id.* at 528 (emphasis in original). The Court went on to explain: "When a landowner decides to rent his land to tenants, the government may... require the landowner to accept tenants he does not like without automatically having to pay compensation. *Id.* at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

Here, the extension of the Section 207 rules to all tenants would only constitute a regulatory modification of the rights as between landlords and tenants, which clearly does not fall within the *per se* takings analysis. The extension of the Section 207 rules in this context no more constitutes a taking than does the requirement that landlords install fire detectors, fire sprinklers or mailboxes. Such regulatory intrusions on the property of a landlords are consistent with the regulated nature of the relationship and are permissible exercised of Governmental authority.

C. The Commission Erred In Placing Reliance On What It Termed "Practical Problems" Of Implementing Section 207 Preemption

In rejecting the extension of the Section 207 rules to common and restricted property in MDUs, the Commission placed great weight on so-called "practical" implementation problems with such a rule. With respect to its authority to consider implementation issues, the Commission concluded: "Congress gave the Commission the discretion to devise rules that would not create serious practical problems in their implementation." *Second R&O*, ¶7. The Commission based this conclusion on Section 207's directive to promulgate regulations "pursuant to Section 303 of the Communications Act of 1934." Section 303, in turn, authorizes the Commission to promulgate regulations "as public convenience, interest or necessity requires." Communications Act, § 303, 47 U.S.C. § 303.

In so holding, the Commission erred in concluding that its discretionary authority extended to overriding explicit Congressional directive. Section 207 directs the Commission to adopt rules "prohibiting restrictions" that impair the reception of over-the-air video programming signals. The Commission, however, erroneously interpreted this command as if it read, "if you think it's a good idea and will not create practical implementation problems, adopt rules prohibiting restrictions."

In truth, the Commission has identified practical problems with extending preemption to common and restricted areas. However, these problems can be solved by MDU owners themselves quite easily if the Commission authorizes the installation of a common antenna, as proposed by NAB in its original comments and as approved by Commission in its *Order on Reconsideration* in this proceeding with respect to landlords that voluntarily undertake to install a common antenna. In any event, the fact that multiple dwelling unit owners may be inconvenienced by the extension of the Section 207 rules, or that such owners may have to make new arrangements with their tenants concerning the use of common and restricted areas, in no way diminishes the explicit Congressional directive to establish rules to "prohibit restrictions" which impair a viewer's ability to receive over-the-air signals.

VI. THE COMMISSION IS WITHOUT AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF SECTION 207 OF THE 1996 ACT

As acknowledged by the Commission in its order accompanying the *FNPR*,¹⁸ Section 207 of the 1996 Act is mandatory. Section 207 provides that the Commission “shall” promulgate regulations to prohibit restrictions which the ability of citizens to use antennae to receive over-the-air signals. The language of the statute and the legislative intent indicate that Congress did not envision exceptions for specific classes of residents. Nothing in the legislative history suggests that Congress’ concern extended only to those citizens who own their own single-family, detached dwelling. To the contrary, the Conference Report makes clear that the Commission is required to apply Section 207 to restrictions which “inhibit” reception of over-the-air television signals.¹⁹ Private contracts, leases and homeowner’s association rules which restrict the ability of a lessee or unit owner are impressible under Section 207. Any attempt to draw a distinction between whether a citizen possesses a direct or indirect ownership in a residence as a basis for determining whether the citizen may use an antenna to receive over-the-air television service is without support in the statute or legislative history.

The Commission is without authority to declare the Congressional mandate to be unconstitutional.²⁰ To the extent that policy judgments must be made concerning the scope of the regulation, Congress has already made those judgments. Thus, the Commission must implement the will of Congress in such a way as to ensure that all citizens who choose to do so may avail themselves of access to the nation’s free, over-the-air television system. It is hornbook law that one who leases real property from another possesses a non-freehold estate in the land itself.²¹ This is true whether the lease runs for a term of years, from year to year, from month to month, or from day to day.²² Thus, the Commission’s focus on whether a citizen has a direct or indirect ownership in his residence as a basis for drawing a legal distinction in his right to use an antenna to receive over-the-air television signals is conceptually flawed. Section 207 requires the Commission to ensure that all citizens—whether they own or rent—are free to use an antenna to secure access to the over-the-air television service.

VII. THERE IS NO “TAKING” CREATED BY THE EXTENSION OF THE ANTENNA PREEMPTION RULES TO MULTIPLE DWELLING UNITS

The “Takings Clause” of the Fifth Amendment to the United States Constitution requires the government to compensate a property owner if it “takes” the owner’s property. A taking may involve either the direct appropriation of property or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation. A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party or “denies all economically beneficial or productive use of land.”²³ It is well settled that if a regulation does not result in a *per se* taking, courts will engage in an “ad hoc” inquiry to examine “the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”²⁴ When properly analyzed, the regulation proposed here does not constitute a “taking” by the Commission.

A. *Loretto And Bell Atlantic Are Not Dispositive*

The Commission requested comment on the application of *Loretto v. Teleprompter Manhattan CATV Corp.*²⁵ and *Bell Atlantic Telephone Companies v. FCC*²⁶ to Section 207.

As noted by the Court in *Loretto* as well as in subsequent Supreme Court decisions, that case was decided on narrow grounds and is limited to the specific facts

¹⁸ See *FNPR* at ¶ 43 (“the statute requires that we prohibit restrictions that impair viewers’ ability to receive the signals in question . . .”).

¹⁹ *H.R. Rep. No. 485, 104th Cong. 2d Sess., p. 166 (1996)*.

²⁰ *FNPR*, at ¶ 43 (citing *GTE California, Inc. v. FCC*, 39 F.3d 940, 946 (9th Cir. 1994) and *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

²¹ See Smith & Boyer, *Survey of the Law of Property*, 2d ed. 1971, West, p. 16.

²² *Id.*

²³ *Penn Central Transp. Comp. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, reh. den., 99 S.Ct. 226, 58 L.Ed.2d 198 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992).

²⁴ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

²⁵ 458 U.S. 419 (1982).

²⁶ 24 F.3d 1441 (D.C. Cir 1994) (“Bell Atlantic”).

of the case.²⁷ In *Loretto*, a state law provided that a landlord could not “interfere” with the installation on his property of cable television facilities by a cable operator. Significantly, the state statute at issue in *Loretto* did not give the tenant any enforceable property rights with respect to the cable television installation; instead, the cable company, *not the tenant*, owned the installation.²⁸ This fact was deemed dispositive in *Loretto*; the Court expressly declined to opine concerning the respective property rights of landlords versus tenants, which, of course, is the precise issue here.²⁹ The Court in *Loretto* went on to note:

If [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. . . . The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.³⁰

Moreover, the holding in *Loretto* was premised on the Court’s finding that the state law at issue constituted a permanent physical occupation and deprivation of the owner’s property by a third party with no legal interest in the property. In contrast, the regulation at issue here involves only a temporary physical occupation by one who has a property right in the real estate. As noted above, a lease is an estate in land.³¹ The Court in *Loretto* affirmed the broad public power of states to regulate housing conditions in general and the landlord-tenant relationship in particular without necessarily being required to pay compensation for all economic effects that such regulation may entail. The Court concluded:

Consequently, our holding today in no way alters the analysis governing the State’s power to require landlords to comply with building codes and *provide utility connections*, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of the building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.³²

The regulation proposed by NAB is, indeed, a permissible regulation of the landlord-tenant relationship. Moreover, if states have latitude to regulate property rented by landlords, then there can be no question but that Congress may, as it has done in enacting Section 207, impose such restrictions on the use of property as it deems appropriate to ensure the availability to all citizens of the nation’s system of television broadcasting.³³

The decision of the D.C. Circuit Court of Appeals in *Bell Atlantic* is also irrelevant to the takings issue. In *Bell Atlantic*, the court struck down two Commission orders requiring Local Exchange Companies (“LECs”) to set aside a certain portion of their central offices for occupation and use (“co-location”) by competitive access providers (“CAPs”). The sole question before the court was whether the Commission’s order compelling LECs to provide co-location orders for CAPs was authorized by statute.³⁴ Of course, no such question arises here because Congress, in Section 207 of the 1996 Act, has explicitly directed the Commission to promulgate the regulation in question. Because the FCC had no such authorization in *Bell Atlantic*, the court construed the FCC’s power narrowly.³⁵ Such construction was necessary, the court concluded, because the co-location orders raised “substantial” constitutional questions under the Takings Clause in light of the Supreme Court’s holding in *Loretto*. Again, the regulation under consideration in this proceeding is distinguishable from the *Bell Atlantic* and *Loretto* facts because (1) no “stranger” to the owner is granted rights with respect to an owner’s property, and (2) the regulation does not authorize a permanent interference with the owner’s property interests. In *Bell Atlantic*, the CAPs had no ownership or contractual interest in the land used by the LECs for

²⁷ See 458 U.S. at 441, 73 L.Ed.2d at 886 (“Our holding today is very narrow.”); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 94 L.Ed.2d 282, 289 (1987) (Acknowledging, “We characterized our holding in *Loretto* as “very narrow.”).

²⁸ *Id.* At 339.

²⁹ *Id.*

³⁰ *Id.* At 440 n. 19.

³¹ *Smith & Boyer, supra*

³² *Id.* At 440 (emphasis added).

³³ 47 U.S.C. § 151.

³⁴ *Id.* at 1444 n.1 (“The only question we consider is whether the order under review here indeed duly authorized by law.”).

³⁵ The *Bell Atlantic* court did not rest its decision on a Takings Clause analysis. *Id.* at 1444, n.1 (“The only question we consider is whether the orders under review were indeed duly authorized by law.”)

their central offices. Thus, a different takings analysis applies to the facts of this regulation.

B. When The Proper Standard Is Applied, It Is Evident That No “Taking” Is Created By The Application Of The Proposed Rule To Third-Party Property Owners

The Takings Clause issue is properly analyzed under the standard set forth in the Supreme Court’s decision in *Penn Central Transp. Comp. v. City of New York*.³⁶ In that case, the Court conceded that it has “been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government...”³⁷ Whether a taking has occurred depends largely “upon the particular circumstances [in a] case,” and the process of analysis is essentially an “ad hoc, factual” inquiry.³⁸ Nonetheless, the Court has identified the following factors which inform and guide the analysis:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.³⁹

As recognized by the Commission in its Order accompanying the *FNPR*, Congress has the power to change contractual relationships between private parties through the exercise of its constitutional powers. In *Connolly v. Pension Benefit Guaranty Corp.*⁴⁰, the Court stated:

Contracts, however, express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions when the reach of dominant constitutional power by making contracts about them... [T]he fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.⁴¹

Regulation of landlord-tenant relationships is an everyday fact of life. Federal, state and local governments place numerous requirements and regulations on landlords concerning the terms under which property may be rented. Many of these requirements (i.e., provision of heat, smoke detectors, utility hookups) require a landlord to do things or to permit tenants to do things which affect, in some way, the property owned by the landlord. These regulatory requirements are not “takings” in the constitutional sense because of the incidental nature of the intrusion on the owner’s property interests in relation to the public interest goal sought to be achieved by the government.

The nature of the regulation required by Section 207 is analogous to conventional regulations governing the landlord-tenant relationship. Any intrusion into the owner’s property is minimal. The right created by Section 207 is a right given to individuals and not, as did the state law struck down in *Loretto*, a right given to the video program provider. Instead, the regulation required by Section 207 will only give tenants and unit owners the right to install antennae to receive video services. For an owner of a unit in a condominium or townhouse, the ability to use such an antenna is likewise incident to the ownership interest possessed by the resident. It is important to note that the person for whose benefit the regulation is adopted would not be a “stranger”⁴² to the owner. Instead, the regulation is for tenants who are in direct contractual relationship (i.e., privity) with the landlord/owner and with respect to property in which the citizen has a leasehold right or, in the case of condominiums and other common ownership forms, by one with an ownership stake in the property. Although persons residing in MDUs do not generally own common areas such as rooftops, they clearly do have interests in these areas to the extent provided in the rental agreement, other contractual declaration, or applicable state law.

The regulation is simply a minimal and temporary intrusion of the kind which has been allowed by the Supreme Court. See *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879) (no taking where city constructed a temporary dam in river to permit construction of a tunnel, even though plaintiffs were thereby denied access

³⁶ 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh. den.* 99 S. Ct. 226, 58 L.Ed.2d 198 (1978).

³⁷ *Id.* at 124, 57 L.Ed.2d at 648 (quotations omitted).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 475 U.S. 211 (1986).

⁴¹ *Id.* at 223-24 (quotations and citations omitted).

⁴² *Cf. Loretto* (“an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property.”)

to their premises, because the obstruction only impaired the use of plaintiffs' property). In *PruneYard Shopping Center v. Robins*, 447 U.S. (1980), the Court considered a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property to which they had already invited the general public. In concluding that this requirement did not involve and unconstitutional taking, the Court found determinative that the invasion was "temporary and limited in nature" and that the owner "had not exhibited an interest in excluding all persons from his property." The Court noted: "The fact that [the solicitors] may have physically invaded [the owners'] property cannot be viewed as determinative." *Id.* at 84. As was the case in *PruneYard*, the use allowed by the regulation required by Congress here is not inconsistent with uses allowed by the owner. MDU owners are under affirmative duties to allow the installation of and interconnection with utility services such as electricity and telephone. The addition of facilities to receive over-the-air television programming is no different in nature from these types of utility services.

What is really at issue with respect to the proposed regulation is the purported "right" of landlords to exercise control over the means by which tenants gain access to video programming. MDU owners would like to have the ability to control their tenants' access to video programming so that tenants will be channeled to "approved" video programming sources. Not surprisingly, landlords are using their leverage to extract additional revenues from their tenants while at the same time excluding competing video service providers from access to tenants in MDUs. In so doing, the owners of MDUs may frustrate the ability of citizens to access the video programming of their choice. If the Commission's commitment to competition and consumer choice is to have real substance, then tenants in MDUs must have the ability to choose the video services they desire. Landlords do not have a property right to inhibit competition in video program delivery. Simply put, neither Congress' elimination of this leverage from landlords, nor the Commission's rule to implement Section 207, implicate the Takings Clause. As the Court noted in *Andrus v. Allard*, regulations affecting an owner's future profits do not constitute a taking:

[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.⁴³

In sum, the rule required by Congress is a government regulation of the sort recognized by the Court as permissible in *Loretto*. Viewed in the context of the important governmental interests at stake and the very limited impact on the property rights of affected owners, the regulation simply does not implicate the Takings Clause of the United States Constitution.

Thank you for providing us with the opportunity to appear today.

Mr. TAUZIN. Let me disagree with you. The Chair recognizes himself and then I will recognize other members. I think it is more complicated than that. Let me kind of, maybe, set the stage. I want to ask Mr. SUGRUE, first of all, how many inquiries of rulemakings are going on at the FCC right now, in this area?

Mr. SUGRUE. Well, we have a rulemaking addressing the utility rights of way under section 224. We have got unbundled network elements.

Mr. TAUZIN. Yes. That is two.

Mr. SUGRUE. That is two. Cable inside wiring.

Mr. TAUZIN. That is three.

Mr. SUGRUE. Section 207, over-the-air receptive devices.

Mr. TAUZIN. Four.

Mr. SUGRUE. I think that is it.

Mr. TAUZIN. I think you are making my case for FCC reform, to begin with but let me make the point.

We have got four proceedings going on, all in different areas of communications services to multi-dwelling or multi-commercial tenant buildings. Is that correct?

Mr. SUGRUE. We have four proceedings—

Mr. TAUZIN. Four proceedings.

⁴³ 441 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210, 233 (1979)

Mr. SUGRUE. [continuing] implementing four different parts of the Communications Act. That is right. Yes.

Mr. TAUZIN. Right. Yes. And what is so complex is that communications are merging and converging into a single stream of ones and ohs. Someone told me at a meeting the other day, relax, it is just ones and ohs.

But all this stuff is going to be coming down to us from satellites, from over-the-air, wireless, from wires into the building. Master antennas might work for, you know, in some cases, cable service is fine but what if the tenant wants to get DBS service and receive a local broadcast over an antennae and the DBS cable programming from a direct broadcast satellite? What about that case? Where the tenant really wants that, but there is no provision for that in the bill.

It gets really complicated. Let me take where we have been to where we have to get and I think everybody will see the complexity. In a monopoly provision of communication services system, in the old telephone system where there was one telephone company, it was kind of easy to understand. The telephone company had an obligation to serve, therefore there was no real deal to be cut, no sharing of revenues with the building owner, the wires, technically, I guess, belonged to the telephone company who had a right to put them in and, in fact, an obligation to put them in when he was called upon to do so.

Cable companies, emerging in this country to help avoid the necessary of antennas or bad reception in some areas, now delivering the broadcast channels under compulsory license, very often under exclusive cable agreements with the franchising authority, sort of a monopoly de facto, if nothing else, was delivering video services through the wire end of the home. And so the cable company owned the wire, I guess, in many of these cases, at least to the building and perhaps even in the building.

And all of a sudden we have the explosion of new wireless services. As the computer merges with the wireless industry and cellular is born and wireless video is born, satellites go up. Now we get new satellite services. It is getting complex all of a sudden. And then we pass an Act that says, you know, we kind of like that. We kind of like the idea of a lot of different people serving the customers of America and consumers having a lot of different choices. So we passed an Act and we said we are going to get away from these monopoly driven services. We are going try to give cable some competition so that they are no longer exclusively providing the video services to people. We are going to give the telephone companies competition so they are no longer the telephone company, exclusively delivering the services.

And now we have got to think of a new system that works for the building owners, for the tenants, and for the providers. And it is complex. It is extremely complex right now. For example, Mr. Bitz makes the point, in this new world, is it fair to say that communications providers have a right to deliver their services into a building, but they don't have the obligation to do so when tenants want these services? Is it right for the building owners to decide which of those services are going to come in by which companies? And then is it up to the consumers to choose which building they

want to be in? Suppose you have got to be in that building for a lot of other good reasons but you don't have any choice except what your building owner wants to give you?

Is it right to pass forced entry? And where do you stop there? Do you say everybody has a right? Does everybody have a right to that wire? Or does everybody have to run their own wire, put up their own antennae? And how many are you going to have? It gets real complicated. And it gets real tough for government to end up making all of these decisions as we go from a monopoly driven system to a competitive system where literally everything is merging very quickly into a single stream of high-bandwidth that is going to deliver video, telephony, and data services all in the same package. And that is the picture. That is the picture.

And out of it I will let you I am going to have just a limited time, but I want you all to comment. As many of you as want to out of it comes a bunch of questions. Should the Federal Government make the rules? Should the States, individual States? You made a case, some of you, a compelling argument for a national rule. Some of you made the argument that these are things States ought to work out. We see States trying to work it out. Connecticut and Texas have passed laws. Florida has just tried and ran out of time on an agreement reached by the building owners, the property owners interest and the communications company.

Is it okay from where we sit, having been responsible for the 1996 Act, for us to leave it to people to agree or not agree on whether consumers in America are going to have competitive choices or do we have a responsibility to help make sure that happens? You know, I kind of think we can't just sit back and just hope it happens. You have got to maybe help make it happen. And, if we do, if we get engaged, do we write instructions to the FCC, as Mr. Sugrue has suggested? Guidance instructions, clear authority, perhaps in the reform of the FCC, putting all of this under a single place instead of in four different bureaus?

Or do we write a national law right now that defines the rights of the consumers in America and the rights of building owners and the rights of telecom companies who want to get to those consumers? It gets real complicated, Mr. Prak. I have got a limited time, but I want you all, you sat through anything that I have had to say, any of you want to react? And then I will turn it over to Mr. Markey.

Mr. PRAK. Mr. Chairman, I would like to just react. I guess I was attempting to say, my piece of it doesn't have to be complicated.

I wouldn't begin to want to get into what you were describing because the truth is my focus is much more narrow than that. And I don't believe my piece has to be complicated, unless you make it so.

Mr. TAUZIN. I understand. And let me also clarify something. What I was telling Ms. Case was that I was just did a PSA with Kermit the Frog yesterday and I pointed out to Kermit that it must be pretty cool to have a girlfriend who likes to mud wrestle. And he said, I have got to use that. That is cool.

But this shouldn't be a mud wrestle. I mean, it really shouldn't be. We ought to be able to conceive of some framework in which this works. Is the framework just prohibiting exclusive agreements

in a competitive marketplace? Without necessarily defining who can come and saying you can't say nobody can come except the person I want. Is that the right remedy? Come back to me. Mr. Bitz wanted to go first. I guess you are next, Mr. Heatwole.

Mr. BITZ. Mr. Chairman, it seems to me that we are looking at a situation where I didn't bring any props, so if you will allow me to be a little impromptu the question is whether the cup is half empty or half full. In 1996, from a competition point of view, there was none. The cup was empty. But it seems to me that what has occurred over the last few years is that the cup has been filling up and maybe we are about here.

Mr. TAUZIN. But what if you are real thirsty and live at the top of the cup?

Ms. CASE. It has got some rocks in it though.

Mr. BITZ. That is right. But by no means has it made the progress that you, representing our country might like, but that the direction is clear, is that the companies that are sitting here with me are doing deals. It is getting into more and more buildings across the country every day. That the progress in your direction is quite correct and we don't need to have more regulation to tie us up when we are already heading where the Congress wanted us to go in 1996.

Mr. TAUZIN. Mr. Rouhana wants to respond to that, but I promised Mr. Heatwole first.

Mr. HEATWOLE. Here's my point, regarding—

Mr. TAUZIN. Grab the mike, Mr. Heatwole.

Mr. HEATWOLE. Excuse me. A couple of quick points.

Mr. TAUZIN. You have to have access to us. Shared access.

Mr. HEATWOLE. Regarding Mr. Prak, in 2 of the systems that we own where we own the entire cable TV distribution system and 1, which is a seniors property, a 205-unit property, we provide free, off-air access, costs them nothing. In a family property for off-air access, we charge I think \$12 a month for that cable system.

Mr. TAUZIN. Let me quickly ask you, in the contract you were presented, you read to us, what was your quid pro quo? What would you get? Nothing?

Mr. HEATWOLE. Nothing. Zero.

Mr. TAUZIN. So there was no offer: We will pay you something—

Mr. HEATWOLE. Nothing.

Mr. TAUZIN. [continuing] to take over all this rights of entry and—

Mr. HEATWOLE. It was zero.

Mr. TAUZIN. Zero. How about was there an agreement to pay any damages?

Mr. HEATWOLE. Well, it theoretically. Yes.

Mr. TAUZIN. But there was no quid pro quo, no offer to share anything?

Mr. HEATWOLE. No. We have looked at those agreements.

Mr. TAUZIN. Yes.

Mr. HEATWOLE. But in that particular agreement, there was nothing that—

Mr. TAUZIN. Quickly, what is the difference between that agreement, a telecom provider, and the pizza delivery man? He drives

across your driveway. He parks in your parking lots and delivers pizzas to your customers. Can you say to the pizza delivery community in your town, only one of you can come? Do they all have a right to come? They are using shared facilities to provide services and sell products to your customers. What is the difference?

Mr. HEATWOLE. Well, No. 1, they leave.

Mr. TAUZIN. They leave. Very good.

They leave something good behind, too.

Mr. HEATWOLE. Hopefully. No. 2, theoretically, I assume that we could ban, you know, all pizza delivery drivers, you know, to the property. You have some areas where the pizza delivery people won't deliver, you know, because of—

Mr. TAUZIN. So there are some analogies there. We need to think about that. Mr. Rouhana. And then I will recognize my well, Mr. Sugrue and then Mr. Markey.

Mr. ROUHANA. I was going to try and address, actually, the first question you asked. As you were making your statement, Mr. Chairman, I was thinking, be careful what you wish for, because you may get it.

Mr. TAUZIN. That is right.

Mr. ROUHANA. In the Telecom Act, I believe what you wished for was competition.

Mr. TAUZIN. Yes.

Mr. ROUHANA. And people are trying to deliver it. And we have run into a road block and so we are back saying, there is a road block. You have asked whether this is a local or a national issue and I think I have tried to make the point that it really needs to be addressed on a national level because this is a national problem. This is not something that is happening just in one State; it is happening across the country and the fact is that the telecommunication infrastructure of this country is a national infrastructure and it just needs to be there and it needs to be upgraded.

I listened very carefully during all of the presentations by the folks representing the real estate community because I do believe a solution to all of these problems can be crafted and that it is possible for people to sit down, talk about these issues, and find the right balance for legislation that would protect both the real estate interests and ensure that an impediment to competition is removed.

I don't think there is any doubt that that can be done. It has been done in two States. It has certainly been done over and over again in other utility situations. We are not inventing something here, we are repeating a process that has happened again and again with regard to buildings. All we are trying to do is make sure that we deal with it rather than let it drift. We are sitting in a very difficult position where our infrastructure outstrips the ability of people to deliver it today because of this building access impediment issue, so—

Mr. TAUZIN. Mr. Sugrue, when are going to have it decided?

Mr. SUGRUE. Well, first I just want to endorse your vision of how complex this world is and that, for your job and mine, we were a lot easy in monopoly days. So competition is great except living through it until we get there.

I just wanted to note two things. One, the Bureau is recommending to the Commission that it shortly initiate a proceeding that pulls together threads of these different proceedings as they affect telecommunications service providers and addresses them in a more comprehensive manner. And the Wireless Bureau assuming the Commission adopts it, because I don't want to get ahead of them; we propose, they dispose but assuming it is adopted, we will be addressing issues as they affect telecom providers like Winstar and others in terms—

Mr. TAUZIN. So you have got to pull all of these proceedings together, if they agree to do that. Then you try to settle them. And how long does all that take?

Mr. SUGRUE. The notice initiating that proceeding should hopefully be out next month and then, by the end of year I would hope or early next year, have an order out resolving it. And I just wanted to note that, while there are four proceedings, you are really talking about two bureaus and you have them both here before you, so we will try to—

Mr. TAUZIN. There are four proceedings, but two bureaus involved.

Anyone else before I turn it over to Mr. Markey? Mr. Windhausen.

Mr. WINDHAUSEN. Mr. Chairman, you asked what your responsibility is now at this stage. And I think there is a responsibility for Congress to clarify this situation. Perhaps the best way I could the best language I have used or I have heard used is by an editor for the Baton Rouge Advocate that I met with just a couple of days ago.

Mr. TAUZIN. Careful now.

Mr. WINDHAUSEN. And his suggestion was: So what you guys are really looking for is to nudge the market along. And I think that is exactly right. With regard to this building access problem, the statutory language just doesn't clarify, doesn't go far enough to really deal with it for certain. And if we could just have legislative language that would establish the tenant's right to choose the provider that they want, then the CLECs will go and we will negotiate a deal with the landlord. We are not looking for free entry, forced access that was referred to earlier. We just want to be able to have the right to provide service and then we will work something out.

There has been discussion as well about the number about residential competition in Congress and why don't we have more residential competition. I think it is important to point out that 30 percent of residential consumers live in apartment buildings. If we don't take some action to deal with this problem that you could well be writing off those 30 percent of the public and saying, sorry, you don't get the choices that everybody else gets. That is why it is very critical for residential competition as well.

Mr. TAUZIN. I want to recognize Mr. Markey. You just put on the table the question: If we should provide legislative instructions that consumers have a right to multiple choices, does that abrogate existing contracts, exclusivity contracts? Do we have a right to do that? Is there a problem under whatever that Act Mr. Dingell always talks about where the government gets sued—Tucker. The Tucker Act. Are we going to get sued? Mr. Markey.

Mr. MARKEY. Okay. Thank you. Mr. Bitz, does your association believe that exclusive access deals are okay?

Mr. BITZ. No. We do not support exclusive access. Our industry association has repeatedly stated we believe in a competitive marketplace. That implies multiple providers in any circumstances, Mr. Markey.

Mr. MARKEY. Okay. Do you agree with that Mr. Heatwole?

Mr. HEATWOLE. I'll speak individually.

Mr. MARKEY. Yes. You are speaking for the whole association, is that correct, Mr. Bitz?

Mr. BITZ. Yes.

Mr. HEATWOLE. They don't know what I am going to say, so I will speak individually. If it is okay, then they will well done. In a perfect world, you would certainly want free and open access by anyone. From a very practical standpoint, as we pointed out, if you have a small local provider who may have the best of the Internet connection, the phone connection, and the cable TV connection, they may not be able to borrow the money to put in the system or the distribution system onsite required if the bank knows that they don't have 1-year, 2-year, 3-year, whatever the period is, contract. In that instance, what you have done is you have, de facto, opted to the large incumbent provider. Second—

Mr. MARKEY. Well, Andy, no. We have said to the smaller guy, find a way of being able to compete.

Mr. HEATWOLE. But he may be able to.

Mr. MARKEY. See we look at it, Mr. Heatwole, from the perspective of the tenant, okay. Our goal is to make sure that your tenants have the lowest possible Internet, cable, telephone long distance price. That is our objective. So if there is only one person in, then, obviously, that person is not going to be under the pressure to lower the price on all of those other services.

Mr. HEATWOLE. My point is that the one person with the lowest price may be the small provider who, without an exclusive contract, does not have the capital that many of these other larger companies have and, consequently, he is excluded from providing the lower price and you have, de facto—

Mr. MARKEY. I understand that, Mr. Heatwole.

Mr. HEATWOLE. And, second—

Mr. MARKEY. I have just got to move on. I apologize, Mr. Heatwole. The big point that we are trying to make here is that we want the marketplace to determine what the lowest price is, not a predetermined exclusive contract to determine that. Because we are not sure that that deal, over a period of time, winds up with the lowest price because of the innovation and the change. And that is why we like your association's perspective on this, okay. And so we will just stick with this because it seems to be something that we can work with. And it is only that I have limited time that I have to move on and I apologize to you, sir.

In Massachusetts, Mr. Burnside, what has happened where you are able to compete, to cable rights, to other rights?

Mr. BURNSIDE. Well, a couple of interesting things, Mr. Markey, have happened. One example in Massachusetts, in 1998, when Time Warner announced a 12 to 15 percent price increase across the board, they exempted one community, the first community that

RCN had actually established service in, and said that that community would not have a price increase because Time Warner faced a competitive situation. So it is pretty clear. And we could look to other examples in New York where we have seen bulk discounts, perfectly acceptable from the market standpoint, bulk discounts offered in MDUs where RCN has been able to build its service. So, clearly, prices do come down.

And I might add that it has been our experience that, in addition to prices coming down, the pie tends to get larger. We heard that 67 percent of the homes passed take cable service. We have experience in markets where in fact, there is one in particular in eastern Pennsylvania where we own a cable system that is completely overbuilt by a competitor. And there the penetration rates exceed 90 percent. So the pie gets bigger, keeping the local licensing authorities whole.

Mr. MARKEY. Okay. So when we in Congress preempted all of the exclusive contracts that municipalities had granted to the incumbents, it made it possible for RCN to come in, then, and begin to match or lower the price that was being offered by the incumbent cable company for the benefit of consumers across the company.

Mr. BURNSIDE. That is it exactly. Exactly.

Mr. MARKEY. So, Mr. Sugrue, do we have to legislate it all? Are there any changes you think we have to make in order to give you the authority you need in order to, you know, get to the point where you can have the power that these companies can offer the integrated telecommunications services that are scattered now throughout the Telecommunications Act?

Mr. SUGRUE. I think on the question of building access, the issue we have been principally debating today, legislation would be helpful. The Commission hasn't ruled really one way or the other with respect to telecom services whether it has the jurisdiction under the present law. But it is at least, as you can tell from the debate—and I have gotten white papers and constitutional scholars coming in on each side of this—that it is open for debate right now.

Mr. MARKEY. And, finally, has a tenant ever been denied, Mr. Bitz, service from the telecom or cable provider of their choice, to your experience?

Mr. BITZ. Well, I can only speak for the company that I work for, sir. We have never had a situation that I am aware of where, as a result of the landlord's business decisions, the tenant has been denied their choice of telecommunications provider. In many cases, the tenants actually go direct to telecommunication service provider, independent of us. And I can't speak as to whether or not they have been turned down, although I would suspect that is the case because we have many small tenants who would not be necessarily attractive business targets for the telecommunications industry and smaller buildings that I know where we have tried to encourage the telecommunications industry to actually provide service and we have been turned down by various companies.

Mr. MARKEY. Finally, Mr. Rouhana, have you ever been denied access to customers in MDUs that would want access to your service?

Mr. ROUHANA. Rarely, but it happens. It does happen.

Mr. MARKEY. And what is the reason why you are denied?

Mr. ROUHANA. I have never really been able to tell. I mean, the fact is that when you are dealing with a landlord, you are dealing with an absolute authority. So they don't have to tell you. They have no responsibility to respond even. So, in the cases where we have not gotten into the buildings, it has been because we have gotten little or no response from the people in charge.

The problem is there are so many landlords. If they were all like the people at this table, we wouldn't have a problem. They would all already have us in there. So that is really the issue. There are so many of them.

Mr. MARKEY. Let me ask Mr. Windhausen to finish up on the question.

Mr. WINDHAUSEN. Thank you, Mr. Markey. Yes we do have several examples where customers sought to receive service from a particular CLEC and were told by the building owner, no, I am sorry. The building owner said I have an exclusive deal with one provider. That is your only choice. And we have those examples from wireless companies and wire-line companies who tried to provide service and the building owner has said no.

Mr. MARKEY. Okay. Thank you, Mr. Windhausen.

Mr. TAUZIN. Thank you, Mr. Markey. I wanted to welcome the vice chairman of the committee, Mr. Oxley, to the hearings and recognize for a round of questions the gentlelady Ms. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. I am from Wyoming and recently held a community hearing on placing towers for cellular telephones and the biggest thing, the biggest issue was private property rights. And I want to tell you that private property rights in Wyoming means something different than they do in Washington, DC. And when you are talking about placing a tower somewhere, it is a lot more personal when you are talking about requiring someone on the place where they live, the landlord, it seems like it is much more of a violation to the private property rights of someone in Wyoming.

And I would like to ask you, Mr. Rouhana, on the issue of private property rights, you suggest that the issue of access should be addressed at the national level. Now is that exclusively to provide some companies with—well, companies like yours—with a seamless business plan?

Mr. ROUHANA. Well, I think I will just have to go back to the very beginning. It seems to me that what we are trying to do is to create competition and the issue that is preventing us from getting to the buildings, which is where the customers are, is this access issue. Now this is in a multiple dwelling environment, not in a single family home, so certainly we are not advocating that.

Mrs. CUBIN. We have those.

Mr. ROUHANA. I know you do. And we are certainly not advocating that. And private property rights—I mean, what is there that is more important, frankly, than that? But this is, as I said, I think over and over again, not the first time this has happened. What we are talking about is a situation where people have congregated. They are in buildings that are owned by others. And those others are standing between the people in the buildings and those who they want service from and they are preventing that from happening. So, clearly, there has got to be a balance of these interests.

Our proposal, I think, tries to take that account and, in particular, has all kinds of safeguards built even in that case to make sure that this is not an abusive process. We don't want to take anything. We want to give something. We want to give the services that these tenants have been asking for, that they need. I don't want their buildings. I just want to give the tenants the service. And we are even willing to pay for it, so it is not even a question of asking for access for free. We are more than willing to pay a commercially reasonable rate.

Mrs. CUBIN. Well, what this reminds me of, if you will forgive me, is the Endangered Species Act, you know, where you lose the ability to use your land because there is potentially an endangered species on there. They are not taking your land away, but you can't use it. So, you know, there are certain rights that go along with owning property.

I wanted to ask you, too, you are talking about the person that stands in between, the landlord, getting the residents what they want and the providers providing it. Are any of you aware of any circumstance where a building owner or a building manager actually has been paid to prevent someone else from coming in? Because I can see that that would be a problem. Anyone who wants to answer that.

Mr. WINDHAUSEN. There are many examples of landlords and building owners granting exclusive contracts to one single provider.

Mrs. CUBIN. Right.

Mr. WINDHAUSEN. And, as a part of that agreement, the landlord agrees to be paid by that exclusive provider and the agreement is that the landlord will then prevent any other competitor from serving that building. I mean that is part of an exclusive contract.

Mrs. CUBIN. Right. But what I mean is that if someone else wanted to negotiate the same kind of contract with that landowner or that landlord, are there instances that anyone of you know of that that wasn't allowed or they just weren't interested or—any?

Mr. WINDHAUSEN. That is exactly what happens with an exclusive contract. Another CLEC will come in and say I just want the same deal that the other guy is getting and the landlord has said no.

Mrs. CUBIN. Mr. Rouhana—or anyone who wants to answer this I really think, as a general rule, that situations that have problems are better addressed at the State level. And I am sure you have reasons to think that they should be addressed at the national level rather than the State level. Could you tell me what they are?

When I came in here, I was—you know, I just thought we have to protect private property rights. Well, now I am confused. Now I honestly know that there is something in between here. I am just trying to find what it is and I am not going to find it out here today. It will take a lot of time and work.

Mr. ROUHANA. Well, I would say there are really two big reasons that I think it is appropriate to try to do this nationally. First of all is just the Telecom Act itself, you know, is a national Act and the entire imperative behind it is to try and create for the country an infrastructure that will be equally distributed across the country and will be available across the country. So I think solving the problem nationally will at least ensure that, to the maximum ex-

tent possible for money and dollars will flow evenly across the country to the extent it can.

Second, our experience has been that where State Acts exist and we attempt to use and we are dealing with a national landlord, they can sometime take it out on us in another State without similar kinds of rights. So we can find that is a way to sort of freeze the effectiveness of the State law by, you know, making it clear that if you try to use the State law in this State, we will make it hard for you in another place where they don't have this law. And so it is a little more complicated than just a State-by-State analysis.

Obviously, we will continue to work with the States we have. And, frankly, we will continue to do this one building at a time because we have to. But I think it would be better in terms of the attempt to get a complete infrastructure out there that is competitive, if we had a national solution. I think it would happen more quickly for everyone that way.

Mrs. CUBIN. Thank you, Mr. Rouhana.

Mr. TAUZIN. Thank you. Go ahead, Ms. Case.

Ms. CASE. I see absolutely no—

Mr. TAUZIN. Pull the microphone to you.

Ms. CASE. I have never needed a microphone. Exclusivity—as a property owner, there is nothing wrong with exclusivity. I am providing—you already know so I can—I am providing you with your home. If I engage into a contract that provides that provider an exclusive right, then I am taking the risk, if I get paid or if I don't get paid. I can tell you that we don't have, currently, any contracts that are exclusive for service. But I will allow our managers to exclusively market a provider. Now if a resident is dissatisfied with that provider, I lose. My contract needs to have customer service obligations in there.

I am the one who loses the resident. If I get paid money up front, if I get paid on an ongoing basis, I will lose. There is no amount of money that could bring our company to higher levels than rent. And that is what we are in the business to do.

Mrs. CUBIN. Well, while I generally agree with that, in Wyoming it is not just so simple as okay I am going to move out of your building into somebody else's.

Mr. TAUZIN. Unless you get a tent.

Mrs. CUBIN. Yes.

So, you know, in theory I agree, but—

Mr. TAUZIN. Thank you, Ms. Cubin. I think Mr. Prak—you have got a few who want to comment before I move on.

Mr. PRAK. I was just going to respond from the perspective of over-the-air, free, over-the-air television, that there is a national interest and that I would think that you could harmonize your views with respect to privately owned property, as I have, and in the same way that the Supreme Court has, by looking at some of these regulations as akin to local laws and Federal laws that require access to utility connections, mail boxes, smoke detectors, fire extinguishers, all of these things that are required. A mail box is required by Federal law.

At one level, one could look at them as some kind of infringement upon private property rights. Our Supreme Court has interpreted the Constitution otherwise.

Mrs. CUBIN. I just want to make one more statement now. You know, I am really torn here because we were talking about local-to-local TV with some industry broadcasters and they said, well, they will only be serving in the next few years the top 70 markets. Well, the largest market in Wyoming is 196 and the next one is 199. So I am thinking, well, okay, if we are going to across-the-country, nationally provide or make provisions that everyone can have access, then maybe every single citizen in the country deserves the right to have everything that everybody else has, so maybe we shouldn't be looking at Wyoming at 196 and 199. Maybe we should just say, okay, industry, build it.

Everybody is entitled to mail a letter for the same price. Everybody is entitled to telephone service. Everybody is entitled to electricity. Get them the telecommunications services, too.

Mr. PRAK. I guess what I would say in response, Congresswoman, is that the folks I represent are in the process of trying to do that right now. We are in Wyoming and, by golly, we are going to cover it all with a digital signal.

Mr. TAUZIN. Don't mess with Wyoming, any of you. I am telling you.

Mr. PRAK. That is right.

Mr. TAUZIN. Thank you. If you have other responses I will have to move on—maybe you can get your points in with other members. Let me recognize the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, for holding this hearing. It is fascinating. As I have listened to not only everyone at the table offering their testimony, but members asking questions I leaned over to my distinguished colleague from Pennsylvania and said, I think that we are national referees sometimes. So we have got to come up with a solution on this. But first I want to start with Mr. Burnside. I just can't resist this. Do people tell you that you look like Robin Williams?

Especially when you smile. Look at that. And he does wear glasses sometimes.

Mr. BURNSIDE. You are not the first.

Ms. ESHOO. Okay. Okay. Great. Well, I had to get that in. A little levity. For those that haven't seen his face, if you can turn around now.

Mr. TAUZIN. You ought to hear the number of people who ask Robin Williams if he looks like Mr. Burnside. It is amazing.

Ms. ESHOO. Right. Yes. Let me start out with Mr. Bitz. In your testimony, you pointed out that your residencies are providing competitive options for tenants and it has been mentioned before that BOMA supported a bill that nearly passed in the Florida legislature. Do you consider that a model? And, if so, would you support a federally modeled bill from that piece of legislation that is pending in the Florida legislature?

Mr. BITZ. Well, perhaps, like many families, we don't always agree within our family and, at a national level, BOMA disagreed with what the local chapter entered into.

Ms. ESHOO. And what was your disagreement?

Mr. BITZ. Our position is that we are not in favor of any mandated access, even on a negotiated basis.

Ms. ESHOO. But once you get beyond that. I mean, that is like the developer going in and saying 1,000 homes and then when they have to sit down and negotiate with the planning department, then the powers to be they will say, okay, we will do 720 units. So, you know, what is your next position?

Mr. BITZ. You heard my next position, which was this goes to the heart of, in our opinion, of owning real estate because private property rights are very important to us and we believe we are meeting the Nation's telecommunications objective as an industry. I, in a somewhat humorous fashion, used my glass of water to point out that progress has been made, dramatic progress has been made, about the number of service providers. We believe that that will continue. It is a very positive trend. We support that.

But we don't want the government forcing us to have to deal with people that we may or may not otherwise deal with in a free-market environment. We support the free-market environment and we support the competitive environment that we are in. We believe that works for our tenants.

Ms. ESHOO. Do you charge people to have access to the services?

Mr. BITZ. Yes.

Ms. ESHOO. And, if so, do you have—

Mr. BITZ. The agreements we have, including with my colleague next to me—

Ms. ESHOO. Do you have fixed rates? Or does the association help set them?

Mr. BITZ. No, these are individually negotiated between individual companies and telecommunications service providers.

Ms. ESHOO. What is the range? What is the range that you charge?

Mr. BITZ. Well, I would say it would vary from like \$100 to \$500 a month for a site. It depends on the size of the building. I mean, a small building, obviously, is worth less than a much larger one. We do not, in my company, have really huge buildings. We are here in Washington. They are of medium size. So I can't speak for, you know, major buildings in New York. But that is our company's experience.

Ms. ESHOO. So it is anywhere from \$500 a month on up.

Mr. BITZ. On down.

Ms. ESHOO. Oh.

Mr. BITZ. It is not a lot of money from our perspective, Ma'am.

Ms. ESHOO. So a provider would pay anywhere from \$500 on up or down for—

Mr. BITZ. Down.

Ms. ESHOO. Down. The high is \$500 a month?

Mr. BITZ. That is correct. That is right.

Ms. ESHOO. And what is your cost for charging that \$500 a month?

Mr. BITZ. It is impossible to identify a separate cost. It is like, when we build a building—

Ms. ESHOO. It is just the cost of—

Mr. BITZ. It is just we are you know, these things are multi-billion-dollar properties.

Ms. ESHOO. [continuing] providing a space.

Mr. BITZ. That is correct, Ma'am.

Ms. ESHOO. In your association, how many players are there? I am just trying to get a handle on how much is involved here. I have a sense that it is a lot.

Mr. BITZ. Well, the commercial office building industry, we have 17,000 members who are in our association. I don't know—

Ms. ESHOO. So of the 17,000 how many people would be—

Mr. BITZ. There would be hundreds of companies.

Ms. ESHOO. There would be hundreds.

Mr. BITZ. Hundreds of companies.

Ms. ESHOO. And are the 17,000 buildings? 17,000 members.

Mr. BITZ. 17,000 members.

Ms. ESHOO. How many buildings do you think there are?

Mr. BITZ. If there is not pushing 1 million office buildings in the United States of every description, I would be surprised.

Ms. ESHOO. So 1 million and how many do you think are in the \$500 range a month?

Mr. BITZ. I couldn't answer that question, Ma'am. I have never seen any statistics.

Ms. ESHOO. Anyone have any idea? Yes, Mr. Windhausen.

Mr. WINDHAUSEN. Well, I am sorry, I don't have the answer to that specific question, but I would like to say that, in my testimony, that we have a number of examples of building owners charging thousands of dollars per month, up to and exceeding \$10,000 per month. So not all the companies are as farsighted as Mr. Bitz in only charging \$500. It is really a much bigger problem.

Ms. ESHOO. Mr. Chairman, I think there is something in my background legislatively where we developed—you know, we worked together on this and you were key in the passage of it of uniform standards across the country in another area. There is no question in my mind that there are private property rights that come in and around this, that we bump up against our magnificent Constitution.

But it seems to me that it is an area that does cry out for some kind of fair—of course, that is in the eyes of the beholder—something reasonable that—because this is all over the map. I mean, it is catch-as-catch-can. I think that people that live in the buildings, use the buildings, I know people in my district are still acting where is the competition of the Telecom Act that you touted in working on that. So I do think that this is an area that we are going to have to look at some kind of legislative solution. Obviously, we are not going to come up with it today, but in listening to people, this is—I think that we are going to be faced with it.

It is complex, obviously. But unless the parties come together and say we have a solution—and I would encourage that. It doesn't sound like there is. But if there isn't. If you don't get together, I think that the Congress may very well step in and I have said to people before do you really want the Congress in this? Well, we will see. But if you can't come up with—I think that you can even though you didn't want to state what a solution might be, I think that is good for openers.

I would urge you to try and come together to draw up something voluntarily. But, if not, then I guess we will jump into it.

Mr. MARKEY. Will the gentlelady yield?

Ms. ESHOO. Sure. I would be glad to.

Mr. MARKEY. I thank the gentlelady for yielding. You know, most of the telecommunications legislation that has moved through Congress is driven by the personal experiences of members as well. And, you know, the gentleman from North Carolina here, Mr. Prak, he is right. Which apartment owner was saying in the 1950's and 1960's and 1970's and 1980's, I am not going to have an antennae on the top of my apartment building and I am not charging my tenants anything, so it wasn't any big deal to have an antennae on top of the roof, obviously.

And then a new phenomenon occurred, as we know, and there is nothing that frosts me more than to be in a hotel room of a hotel that never—that you used to make phone calls from that used to cost, if you made a local call, .30, .50. And all of a sudden to find out that the ten local calls you make now cost you \$1 just to access the phone and then still only .30 to the phone company, right?

Ms. ESHOO. The tax is cheaper than that, than the local call.

Mr. MARKEY. No, it is not just the tax—

Ms. ESHOO. No, the bed tax.

Mr. MARKEY. It is the hotel break up, okay. It is the sharing of this profit that, you know, they now get .75 or .50 for every phone call, Ookay? Now that is fine, okay? You are a captive, you know. But now you have got one-third of all Americans in apartment buildings. So the higher this fee is that an apartment owner can charge is the higher the rates have to be that the competitor has to charge in order to provide these services. So there is a balance that has to be struck here because, obviously, everyone is in an apartment building as a captive.

So, yes, we have moved from this old Mr. Prak area where people said, yes, we are going to provide it or the old Bell system, the old era to this new era where now it is a profit center, you know? And we are also trying at the same time to drive telecommunications revolution into every room that people in our country live in as well. So it is a balance and we just have to strike it but it is our own personal experience that helps to animate the debate.

Ms. ESHOO. Can I reclaim my time now?

Mr. TAUZIN. The gentlelady—now let me explain how this works. The gentlelady controls the time. I have been generous with time because I was pretty generous with myself. And the gentlelady controls it. If you want to address these comments, the gentlelady recognizes you and you can address them. The gentlelady has the time.

Ms. ESHOO. Thank you very much, Mr. Chairman. And I thank our ranking member for making the points that he made too. I love to tease him, but he is a brilliant and witty mind here and we can't do without him.

Mr. TAUZIN. Well, don't go too far.

Ms. ESHOO. And you too, Mr. Chairman. You, too, absolutely. There has been testimony, and legitimately so, relating to businesses and what they receive, what they should receive, how they receive it, the competition, all of that. What about the residential buildings? I mean, if Congress were to provide access, what assur-

ances are you prepared to give us that the residential customers will be served as well?

Mr. HEATWOLE. In Virginia, you are barred by the Virginia Residential Landlord Tenant Act from charging an access fee simply to get on the property. You cannot charge \$500 or \$1,000 or \$10,000. You can, if there is a quid pro quo. I have paid to put the lines inside the building. What will you pay me to rent the lines? I am providing space and a building for a distribution system. My staff is providing advertising and actually signing up your customers. For providing those services, we can negotiate a reasonable fee for those services. But as far as simple access, give me \$1,000 or you can't come on my property, in Virginia, on residential properties, we cannot do that and we don't do that.

Ms. ESHOO. Thank you very much. Mr. Rouhana and Mr. Burnside, maybe.

Mr. BURNSIDE. Well, obviously, our business, our marketplace is the residential communities and I would just make the point that throughout the 1996 Act, you consistently use the word "competitively neutral," "nondiscriminatory." And I cannot see anything in exclusive contracts or mandatory access laws when used to claim exclusive ownership of wire otherwise inaccessible in that last mile that could be possibly described as competitively neutral in any way, shape, or form.

So I think you certainly have—

Ms. ESHOO. You are saying the words of the Act support the question or the answer to the question I just posed?

Mr. BURNSIDE. Words of the Act in sections of the Act where those words are used reflect the spirit of the Act.

Ms. ESHOO. So is the spirit catching, though? I mean, do you think this would—

Mr. BURNSIDE. I would agree that it is catching on.

Ms. ESHOO. Okay.

Mr. BURNSIDE. But we still have some "I"s to dot and some "T"s to cross in some corrective legislation, I believe.

Ms. ESHOO. You really do look like him.

When you smile, it really gets—

Mr. Rouhana.

Mr. ROUHANA. How do you follow Robin Williams? That is my question.

Ms. ESHOO. I know. We are going to find someone that you look like.

Mr. ROUHANA. All right, well, let us not go there.

I may not like what you do. The answer to your question is we are primarily focused on the business community, but as we build out our network, we are going to end up with line-of-sight from our hub sites to literally thousands of multiple dwelling units. The easier it is for us to get into the commercial marketplace, the faster we are getting to the local marketplace. It is that simple. It is a simple equation. If it is harder for us to go and it takes us decades to get to the commercial marketplace, we can't go to the residential marketplace until we get there because the economics don't allow us to do it. RCN is primarily focused on residential.

But what I am saying about Winstar is true about all competitive carriers. The faster we get established and have the critical mass

to be able to service customers, the faster we are bringing this service to people. We didn't go into business to be small. We went into business to be big, to serve as many people as we possibly can.

The impediment to getting there fast is this building access issue. I have said it over and over again. And you were quite right when you said there is something big going on here. We have a million negotiations to do to get into the commercial buildings. How can we do this in less than a decade or two without some kind of framework? It won't happen any other way.

Ms. ESHOO. I think you have made excellent points. Thank you to you all. I just wonder when several industries are going to have more women at the top. This is really interesting. Well, I guess it is great that there are women on this side of the table.

Mr. TAUZIN. Absolutely. It is a good balance, I think over here you have got going. Let me thank the gentlelady.

Ms. ESHOO. Thank you.

Mr. TAUZIN. One of the things that—as I go to Mr. Pickering—I will probably want to submit in the form of written questions: How much disclosure occurs where there are—you know, to tenants? How much disclosure occurs to the tenant that you only have these services, you don't have a right to choose other services? And what is being charged for access? And whether disclosure—you don't have to answer that now. I just want to put it on the table because it is a question that other members have whispered to me.

The gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman. And I want to commend you for having this hearing. This is a very important hearing. As someone who worked on the other side on Senate staff then, as I have said before, lost my influence when I became a member, but did work for too many days and too many years and too many hours on the Telecom Act, knowing the various debates.

Mr. TAUZIN. Mr. Pickering, you might tell them who you worked for on the Senate side.

Mr. PICKERING. I worked for Senator Lott on the Senate side.

Mr. TAUZIN. Imagine what a come-down that was.

Mr. PICKERING. But I have worked with Mr. Windhausen very closely as he worked with Senator Hollings at that time. And it is clear that our intent and the spirit of the Act was to have a competitive policy and competitive access. This is a classic case where we have to balance the property rights, the constitutional property rights, with individual rights of access to information and technology.

We are going from a one-wire world and model to a multiple network, multiple technology, from wireless to other wire lines, whether it is electric utilities or cable companies or traditional telephone company.

The access question, especially when you put it in the context of one-third of the U.S. population is in a multi-tenant building, this is something that we have to address and hopefully we can resolve. I was hoping that maybe Florida came up with an appropriate balance. I understand your position today, but I think, Mr. Chairman, that is something that we may want to look at.

Let me go quickly, though, to FCC authority, Mr. Sugrue. Because some would argue that you have existing authority to ad-

dress this question and I just want to we gave you broad authority under the Act to eliminate all barriers to competition. If you look in section 224, access to utilities right of way for the provision of telecommunications services; section 706, to promote the deployment of advanced services; section 207, prohibits restrictions on devices designed for over-the-air reception of video programming, which—any restrictions that could appear under that section.

Do you believe that you have additional authority or the general authority to address this issue? If so, what are your plans for addressing it? And does the Wireless Bureau have a proposal or are they in the process of putting a proposal forward on this issue?

Mr. SUGRUE. To start with the last question first, and I am just going to work back, the Bureau is, as I indicated earlier, proposing that the Commission initiate a proceeding to address these issues: building access, both building access with respect to conduit and wire control by the utility and those issues that are the focus of today's discussion, which is principally access to those parts that building and wiring controlled by the building owner.

Again, assuming that the Commission adopts the Bureau's proposal, we would launch that probably in June. We are targeting the June meeting on that.

Mr. PICKERING. Since you are doing a proposal, is the correct interpretation in your view that the FCC has the authority to address building access?

Mr. SUGRUE. Not necessarily. One of the principal issues to be discussed is just the scope and extent of the Commission's authority. The Communications Act does not, even with the amendments in the 1996 Act, does not explicitly address this. There is long-standing Supreme Court law of supporting the Commission's exercise of what the court has called ancillary jurisdiction, jurisdiction that derives from the purposes of the Act and—

Mr. PICKERING. The intent.

Mr. SUGRUE. We sort of put it together from different parts. The parts that you cited, undoubtedly, would be the parts we would cite were we to proceed on that. As to whether we need legislation, it would save a lot of time, effort, and sleepless nights for us if the Congress were so inclined to tell us: FCC, go this far. Don't go any further than this. And just what the standards would be. Because, from the debate here today, what you heard today is really almost a microcosm of what we have heard and are going to hear, I am sure, in the next few months.

Mr. PICKERING. Mr. Sugrue, I would appreciate it if, as you move forward within the FCC, that you would also provide recommendations to Congress of what we need to do that would be helpful in bringing about the objectives of the Act.

Mr. SUGRUE. Thank you.

Mr. PRAK. Yes, Mr. Pickering, if I may, I just wanted to respond by saying, at some point, Congress may need to provide encouragement to the Commission to exercise the authority it already has. I don't know if you were here for my testimony on the 207 issue regarding over-the-air broadcasters, but it strikes me that when Congress passed the Telecommunications Act which contained section 207, it made a judgment about that Act's provisions' constitutionality and its harmony with the Fifth Amendment. And now

when we go before the agency in a rulemaking proceeding and we are revisiting Fifth Amendment issues that had been addressed by the Congress or we would contend had been addressed by the Congress, that, at some point, before it is litigated, somebody has got to go ahead, belly up to the bar, and move on.

Mr. PICKERING. Let me just add, Mr. Sugrue. In the structure of the bill, the Telecommunications Act, we tried to provide you with the flexibility to achieve the objectives of the Act. And we gave you pretty broad authority. Sometimes we wish we could take that back.

Mr. TAUZIN. Oh, yes.

Mr. PICKERING. But I do think that we gave you the broad authority and the flexibility to address these issues.

Mr. SUGRUE. Thank you. I appreciate that.

Mr. TAUZIN. Thank you, Mr. Pickering. At this point in the record, I want to note that we have received testimony from the Public Utility Commission of the State of Texas, which is State that has passed legislation. And, without objection, they have asked that we make it part of our record. It is so ordered.

[The prepared statement of the Public Utility Commission of Texas follows:]

PUBLIC UTILITY COMMISSION OF TEXAS
AUSTIN, TEXAS 78711-3326
May 11, 1999

THE HONORABLE W.J. "BILLY" TAUZIN
*Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection
Committee on Commerce
U.S. House of Representatives
Room 2125, Rayburn House Office Building
Washington DC 20515-6115*

DEAR REPRESENTATIVE TAUZIN: I am sorry that I am unable to join you for the May 13 hearing on building access issues for facilities-based local telecommunications service providers. I hope you will allow me to share a few brief thoughts on how these issues have been handled here in Texas.

While incumbent local exchange companies have had access to multi-tenant buildings for years, facilities-based competitive local exchange companies (CLECs) trying to compete for those customers do not always had the same level of access. Without building access on the same terms and conditions as the incumbent local telephone company, new competitors face a significant competitive disadvantage to serve building tenants and the goal of a competitive market is stalled.

To further competition in the local telecommunications market, the Texas Legislature amended the Public Utility Regulatory Act of Texas ("PURA") in 1995 to add two sections on building access:

- Section 54.259 prohibits a property owner from preventing or interfering with a telecommunications utility's installation of a service requested by a building tenant, discriminating against a telecommunications utility with respect to installation, terms or compensation issues, and requiring unreasonable payments in exchange for access to the property. These provisions assure that building access and rental charges are assessed equally on all telecommunications service providers.
- Section 54.260 allows a property owner to charge reasonable compensation, limits and impose necessary conditions on a utility seeking access, to protect the property and its owner.

These statutory provisions are attached (Attachment A).

After addressing several examples of discriminatory building access, the Texas Commission staff developed an enforcement policy to implement PURA's building access provisions and facilitate negotiated building access arrangements between building owners and telecommunications utilities. This policy (see Attachment B, Public Utility Commission of Texas memo of October 29, 1997) attempts to balance the rights of service providers and building owners and reduce the need for formal enforcement actions by the PUC. The policy specifies that the basis for a compensa-

tion mechanism should be to compensate the property owner for the space used (i.e., through a square foot rental rate as with market-based building lease rates), regardless of the number of customers served or the revenues generated by the telecommunications provider. To assure non-discriminatory treatment of multiple telecommunications providers, the PUC's policy requires that when a competitive carrier enters a multi-tenant building, the owner must modify the terms of its arrangement with the incumbent carrier to give it the same fees, terms, limits and conditions as the CLEC.

Congress and federal and state regulators have worked hard to assure that effective local service competition is not hindered by access to the local loop. But if the loop is the "last mile", building access is the "last yard" for many customers and CLECs. The National Association of Regulatory Utility Commissioners approved a resolution on this topic at its summer, 1998 meetings (Attachment C).

I hope this information is useful to the Subcommittee as it deliberates this important market opening issue. If I can provide any additional information, please let me know.

Best wishes,

PAT WOOD, III

cc: Representative Thomas Bliley

ATTACHMENT A

TEXAS UTILITIES CODE

PUBLIC UTILITY REGULATORY ACT OF TEXAS

Sec. 54.259. DISCRIMINATION BY PROPERTY OWNER PROHIBITED.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

- (1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;
- (2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;
- (3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;
- (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or
- (5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

- (1) an institution of higher education as defined by Section 61.003, Education Code; or
- (2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(e), (e), (g).)

Sec. 54.260. PROPERTY OWNERS CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

- (1) impose a condition on the utility that is reasonably necessary to protect:
 - (A) the safety, security, appearance, and condition of the property; and
 - (B) the safety and convenience of other persons;
- (2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;
- (3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;
- (4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;
- (5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-O, Secs. 3.2555(d), (e).)

ATTACHMENT B

PUBLIC UTILITY COMMISSION OF TEXAS

MEMORANDUM

TO: Chairman Pat Wood, III
Commissioner Judy Walsh
Commissioner Patricia Curran

FROM: Ann M. Coffin
Assistant Director
Office of Customer Protection
Bill Magness
Director
Office of Customer Protection

DATE: October 29, 1997

RE: On Agenda for November 4, 1997 Open Meeting
Project No. 18000: Informal Dispute Resolution

Office of Customer Protection Enforcement Policy regarding Rights of Telecommunications Utilities and Property Owners under PURA Building Access Provisions.

The Public Utility Commission of Texas (Commission) has recently been asked to address implementation and compliance issues concerning the "building access" provisions of the Public Utility Regulatory Act (PURA) §§ 54.259 and 54.260. The building access provisions of PURA were adopted during the 1995 legislative session in an effort to guarantee telecommunications utilities access to public and privately owned property for the provision of competitive telecommunications services. To date, the Commission has not addressed compliance issues associated with the building access provisions of PURA. As competition becomes a reality, telecommunications utilities have begun to raise concerns regarding their ability to access multi-tenant buildings in order to provide telecommunications services to the building's tenants. Specifically, the telecommunications utilities are concerned that property owners may be placing unreasonable terms and conditions on building access to the detriment of the developing competitive telecommunications market.

In order to quickly respond to these concerns and provide both telecommunications utilities and property owners the benefit of our interpretation of the provisions set forth in PURA §§ 54.259 and 54.260, the Office of Customer Protection (OCP) has developed the following enforcement policy. In no way is this policy intended to affect shared tenant service (STS) providers' right of entry contracts with property owners. Rather, OCP seeks to facilitate negotiated building access arrangements between incumbent local exchange carriers, new entrants, and building owners by providing parties with OCP's position on these complex issues. Although the policy paper is intended to reduce the need for formal enforcement actions, in the event that parties allege violations of PURA §§ 54.259 and 54.260, OCP intends to use this policy to guide its determination of whether enforcement actions against parties should be initiated.

OVERVIEW OF PURA, SECTIONS 54.259 AND 54.260

In 1995, the Texas Legislature passed legislation that introduced sweeping changes in the way in which telecommunications utilities may operate and the way they are regulated in Texas. Specifically, the legislation encouraged competitive entry into the Texas local exchange telecommunications market. Since that time, the Commission has actively undertaken its responsibility to introduce competition into the local telecommunications marketplace. Inevitably, the statutory mandate to "open up" the telecommunications marketplace has caused an increase in the number of telecommunications utilities seeking access to multi-tenant buildings in order to provide, install, maintain, and operate facilities necessary for the provision of service to the buildings' tenants. This demand for access has raised a fundamental question regarding a telecommunications utility's "right" to access commercial build-

ings in order to install facilities to serve tenants of the building. In adopting PURA § 54.259, the state legislature answered this question by creating a right of access by the telecommunications utility to public and private property. In exchange for allowing the telecommunications utility access to the building, the state legislature adopted PURA § 54.260, which allows the property owner to charge reasonable compensation for the access privilege.

The provisions of PURA § 54.259 govern the right of a telecommunications utility to access public and private property by mandating access, on a nondiscriminatory basis, to any telecommunications utility whose services are requested by a tenant. Sections 54.259(a)(4) and (5) prohibit discrimination against a tenant or in favor of another tenant based on their selection of a telecommunications utility and prohibit a demand for payment from a tenant for allowing their chosen provider access to the building. These provisions protect tenants who exercise their “right” to choose among service providers from being subjected to actions such as increased rental charges or surcharge assessments that may occur as a result of requiring the building to give access to multiple providers. Similarly, Sections 54.259(a)(1-4) protect the telecommunications utility, whose services are requested by a tenant, against discriminatory actions by the property owner. These provisions prohibit the property owner from preventing or interfering with a telecommunications utility’s installation of a service requested by a building tenant; discriminating against the telecommunications utility in regard to installation, terms, or compensation issues; and requiring “unreasonable payments” in exchange for access to the property. The principle underlying these provisions is that a property owner may not treat similarly situated tenants or utilities on a different basis and that access and rental charges must be assessed on an equal basis among telecommunications service providers.

In recognition that property owners have the right to impose reasonable conditions and/or limitations on a telecommunications utility’s ability to access the property owners property, the state legislature enacted PURA § 54.260. Specifically, PURA § 54.260(a) (1)-(2) authorizes the imposition of conditions or limitations that are “reasonably necessary” to protect the security, appearance, and condition of the property and the safety of the property and persons on it, as well as the imposition of “reasonable” limitations on times available for installation. In addition, PURA § 54.260(a)(3)-(S) permits the property owner to limit the number of telecommunications utilities that may access the owners property if space constraints dictate such a limitation; require indemnification for certain costs, and; require the tenant or utility to bear the entire cost of installing, operating, or removing any facilities. Most significant, however, is PURA § 54.260(a)(6), which allows the property owner to require the utility to pay compensation that is “reasonable and nondiscriminatory” among telecommunications companies.

PUC JURISDICTION

A number of parties that filed comments in this project raised the issue of whether the Commission has jurisdiction over matters involving building access. Specifically, parties challenge the constitutionality of the provisions, as well as the Commission’s authority to enforce PURA §§ 54.259 and 54.260 against property owners.

Pursuant to PURA §§ 15.021, 15.023, and 54.260, the Commission is clearly vested with jurisdiction to enforce the building access provisions of PURA. Specifically, PURA § 54.260(b) states that “[n]otwithstanding any other law, the commission has jurisdiction to enforce this section.” (emphasis added). Without question, the Commission has jurisdiction over the operations and services of telecommunications utilities operating in Texas. In light of the statutory language in PURA § 54.260(b) and the telecommunications expertise that the Commission brings to resolving building access issues, the Commission can reasonably conclude that it has primary jurisdiction over building access issues involving disputes between telecommunications utilities and property owners. Thus, any remedial relief or administrative penalty action ordered by the Commission would extend to property owners on issues which involve the rights of telecommunications utilities in building access situations.

ENFORCEMENT POLICY

In enacting PURA § 54.259, the Legislature sought to encourage competition in the local telecommunications market by facilitating competitive provider access to customers in privately owned multi-tenant buildings. It is with this in mind that OCP has crafted an enforcement policy on the building access issue that attempts to balance the rights of both service providers and property owners. OCP emphasizes that this enforcement policy does not constitute a rule or order of the Commission. Rather, the policy seeks to establish the parameters for interpreting PURA §§ 54.259 and 54.260 and guide compliance efforts in this area.

The positions of the parties affected by this issue are diverse. The primary areas of conflict center around the parties' positions regarding the limits of the "discrimination" and "unreasonable payment" terms in PURA §§ 54.259 and 54.260, respectively. Specifically, the telecommunications utilities argue that absent some regulatory limits on the compensation issue, property owners have an incentive to extract monopoly rents for access. The utilities argue that competitive telecommunications options enhance the market value of the building and that any compensation to property owners must be minimal and take into consideration the building enhancement that results from the provision of competitive telecommunications services. Representatives of property owners, on the other hand, argue that the free market must be allowed to dictate terms, conditions, and compensation for access to a building's risers and conduits. These parties also argue that simply looking at the quantity of space to be used by the telecommunications utility does not take into account the value of the property, the nature of the improvements, its location, or the quality or size of the "market" created by the property owner for the telecommunications utility.

I. BASIS FOR DETERMINING REASONABLE COMPENSATION

Given the complexity of the issue, it is unlikely that a single compensation method can be found for each type of space requirement. The basic underlying principle, however, for any cost methodology related to building compensation issues is that property managers must impose the same costs, methodology, and rates on any telecommunications utility which gains access to the building. This approach ensures that competitive telecommunications services are available to tenants without the imposition of reasonable building restrictions by property owners. Granting building tenants access to competitive carriers is central to achieving PURA's goal of making competitive telecommunications service alternatives available for all Texans and their businesses, regardless of whether they live and work in a single family home or a multi-tenant building. Although the real estate industry, in general, is controlled by the free market, building access is a market segment that is not subject to free market forces. Rather, the property owner, by virtue of his ability to control access to the tenant acts as a gatekeeper through whom telecommunications utilities must gain passage. The exercise of this control enables the property owner to dictate terms and conditions of the building access arrangement that may grant access to one telecommunications utility, but deny access to another. In addition, the telecommunications utility cannot freely "walk away" from the terms and conditions placed by the building owner on the access arrangement, because the utility must have access to that particular building in order to provide service to its customer who is a tenant in that building. In order to address the absence of free market control over building access issues, the Legislature established compensation requirements for property owners. Specifically, the Legislature required that compensation for access be reasonable and nondiscriminatory.

The ability of the property owner to charge compensation which is reasonable and nondiscriminatory does not, however, imply that every telecommunications utility must be treated identically. Rather, it requires that a telecommunications utility be offered the same terms, conditions, and compensation arrangement as its similarly situated counterpart. This interpretation preserves not only the right of the parties to freely engage in commercial transactions wherein a service provider seeks access to private property, but also ensures that the property owner does not exert control over the building access arrangement in a manner that is unreasonable or discriminatory to the telecommunications utility.

In establishing the parameters applicable to the term "reasonable" compensation, it is important to distinguish between buildings in which the property owner has moved to a single minimum point of entry (MPOE), and thus owns all wiring inside the point of demarcation where the main line enters the building. In such instances, the telecommunications utilities must compensate the property owner for the use of cable distribution facilities. In multi-tenant buildings where telecommunications utilities maintain ownership of their wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), telecommunications utilities must compensate the property owner for use of building space.

A. Basis for determining reasonable compensation in a single demarcation point system.

In instances in which the property owner has assumed responsibility and ownership of wiring beyond the MPOE, the telecommunications utility may decide to utilize the building's existing cable distribution facilities. A property owner may charge for use of distribution facilities on the owners side of the demarcation point in a number of different ways. For instance, the property owner may base compensation

on a per pair, per circuit or per conduit or sheath basis. Without question, the charge for use of distribution facilities on the owner's side of the demarcation point may take into consideration the type of facilities used by the property owner in providing telecommunication services. In negotiating compensation terms for the use of the property owner's distribution facilities, parties may consider factors such as the amount of facilities investment, the useful life of the facilities, tax and a reasonable rate of return.

A property owner may also seek compensation for the physical space used by the utility in the building's equipment room and any actual costs associated with the utility's use of the building. The property owner, by controlling building access, manages an essential element in the delivery of telecommunications to the tenants in that building. As such, the price of equipment room space leased to utilities to provide service to tenants in that building should be based on the actual economic cost of the space and not on the number of tenants served or the revenues generated by the carrier for the provision of telecommunications services to the building's tenants. Compensation in this manner is reasonable because it ensures similar terms and conditions for all providers.

B. Basis for determining reasonable compensation in a multiple demarcation point system.

In multi-tenant buildings, where the telecommunications utility maintains ownership of the wiring and other facilities to the point of contact with the individual tenants (multiple demarcation points), the property owner may receive compensation for the telecommunications utility's use of the rental space in the equipment room, use of the building's conduit facilities, and any actual costs associated with the utility's use of the building. Compensation for rental floor space, as well as the use of the building conduit facilities should be based on the rental value in the marketplace of the property used by the provider, not on the type of facilities used, the revenues generated, or the number of customers served.

Compensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space.

The basis of any compensation mechanism should be to compensate the property owner for the space used, regardless of the number of end use customers served or the revenues generated by the telecommunications carrier. For this reason, use of the square foot rental rate for use of the basement and riser space is a reasonable basis of compensation in buildings with multiple demarcation systems. Lease rates for commercial property are an appropriate guide for determining compensation for access to the building because commercial leases not only reflect the variation in rental rates depending on the location and desirability of a particular building, but indicate what tenants are willing to pay for the amount of square footage being used by the tenant in the same marketplace and for the same type of space. This method of compensation ensures that the property owner is paid the fair market value for the use of the space and also recognizes that space in the basement of an office is not as valuable as retail space in a section of the building open to the public, or a corner office on the top floor of an office building.

II. APPLICABILITY OF THE DISCRIMINATION PROVISION IN PURA § 54.259 TO EXISTING SERVICE ARRANGEMENTS WITH INCUMBENT LOCAL EXCHANGE CARRIERS

PURA § 54.259 specifically prohibits a property owner from discriminating in favor of or against a tenant or telecommunications utility in any manner. This prohibition against discriminatory treatment is consistent with the overall terms of PURA which sought to advance the public welfare by promoting competition in the provision of telecommunications services in Texas. *See* PURA § 51.001 (a)-(c). While recognizing that many existing access arrangements were made prior to competitive entry, it is OCP's position that prior contractual agreements which provide for exclusivity or preferential terms for the incumbent telecommunications utility disserve the goals of PURA specifically and telecommunications competition generally. Accordingly, OCP interprets the PURA § 54.259 nondiscrimination provision to be applicable to pre-September 1, 1995 business arrangements between incumbent local exchange carriers and property owners.

Although the nondiscrimination provisions of PURA § 54.259 are applicable to pre-September 1, 1995 service arrangements, the non-discrimination provisions are triggered only at the time a competitive carrier seeks access to the building served by the incumbent telecommunications carrier. Therefore, service arrangements made prior to September 1, 1995, should be allowed to stay in place until a second carrier invokes the nondiscrimination requirement. Once a competitive carrier seeks access to the building, the nondiscrimination provisions are triggered, and the property owner must either treat all carriers the same as the incumbent “in relation to the installation, terms, conditions, and compensation of telecommunications services facilities to a tenant on the owners property”¹, or re-negotiate with the incumbent to treat it the same as all other carriers seeking access.

Because the legislative intent behind PURA §§ 54.259 and 54.260 is to foster competition, not provide protected status to the incumbent, compensation arrangements for building access that apply only to new entrant telecommunications utilities or new customers of an incumbent telecommunications utility are not reasonable. Every provider of telecommunications service must charge rates that recover its costs. At the same time, every provider’s prices are nonstrained by the prices of its competitors. If the incumbent is paying no fee for building access, it certainly will have a cost advantage over its new entrant competitors that are paying such a fee. Exempting incumbents from paying for building access inevitably impacts competitors adversely because of the comparative cost advantage the incumbent gains as a result. Accordingly, when a new provider enters a commercial property, the treatment of the incumbent must be revised to match that accorded to the new provider. Thus, if private property owners require new providers to pay a fee, the incumbent should begin to pay a fee calculated in the same manner and on the same basis.

III. PROSPECTIVE CUSTOMERS AS A CONDITION OF ACCESS

As more and more telecommunications utilities seek access to a building to provide service to the building’s tenants, space limitations associated with access will inevitably arise. PURA § 54.260 authorizes a property owner to reasonably limit the number of utilities that have access to the property if the owner can demonstrate that space constraints justify such a situation. OCP is concerned however, that some carriers may attempt to preemptively “reserve” space in the building to the exclusion of subsequent carriers who may have the intention of serving the building on a more immediate basis. OCP will interpret such behavior on the part of the telecommunications utility to be anticompetitive. In addition, any restrictions on building access that impose unreasonable delays on a competitive carriers provision of telecommunications service to a customer will be considered discriminatory on the part of the property owner. OCP believes that the appropriate remedial course for either activity is enforcement action by the Commission.

IV. CARRIER OF LAST RESORT OBLIGATION AND BUILDING ACCESS

Several parties commented regarding a telecommunications utility’s carrier of last resort (COLR) obligation in the context of the building access issue. Specifically, parties sought clarification on whether a telecommunications utility with COLR obligations may refuse to serve a building if a property owner seeks compensation for access. Because the implications associated with the COLR obligations extend beyond the building access, OCP declines to address the issue in this enforcement policy.

V. CONCLUSION

In enacting PURA §§ 54.259 and 54.260, the legislature sought to facilitate the development of local competition by ensuring that new entrants receive access to tenants on the property based on reasonable compensation and equal, non-discriminatory terms. Under these conditions, will residential and business customers in multi-tenant buildings experience the benefits of competition in the form of lower rates and expanded choices for products and services. OCP encourages telecommunications utilities and property owners to negotiate late building access arrangements that will enable utilities to compete for business on the basis of price and the provision of expeditious service. These types of access arrangements will benefit not only telecommunications utilities and property owners, but customers as well.

Although OCP’s enforcement policy regarding building access issues is intended to facilitate building access arrangements between parties and reduce the necessity for formal enforcement actions, parties should be aware that the policy statements

¹See PURA § 54.259(a)(3).

and proposals for resolving disputes developed in Project No. 18000 do not constitute commission rules and resolving disputes developed in Project No. 18000 do not constitute commission rules and orders, and do not deprive parties of rights under PURA or the Administrative Procedure Act. Project No. 18000 represents the Commission's effort to expedite settlement of business disputes in the increasingly competitive markets for telecommunications and electric services.

Please contact Ann Coffin (6-7144) or Bill Magness (6-7145) if you would like additional information on this matter.

Attachment

cc: Adib, Pwviz; Laakso, John; Bellon, Paul; Mueller, Paula; Bertin, Suzanne; Prior, Dianne; Davis, Stephen; Sapperstein, Scott; Dempsey, Roni; Silverstein, Alison; Featherston, David; Slocum, Bret; Hamilton, Kathy; Srinivasa, Nara; Jenkins, Brenda; Whittington, Pam; Kjellstrand, Leslie; Wilson, Martin; Kyle, Sandra; Vogel, Carole.

ATTACHMENT C

NARUC—SUMMER 1998

RESOLUTION REGARDING NONDISCRIMINATORY ACCESS TO BUILDINGS FOR TELECOMMUNICATIONS CARRIERS

WHEREAS, Historically, local telephone service was provided by only one carrier in any given region; and

WHEREAS, In the historic one-carrier environment, owners of multi-unit buildings typically needed the local telephone company to provide telephone service throughout their buildings; and

WHEREAS, Historically, owners of multi-unit buildings granted the one local telephone company access to their buildings for the purpose of installing and maintaining facilities for the provision of local telephone service; and

WHEREAS, Competitive facilities-based providers of telecommunications services offer substantial benefits for consumers; and

WHEREAS, In order to serve tenants in multi-unit buildings, competitive facilities-based providers of telecommunications services require access to internal building facilities such as inside wiring, riser cables, telephone closets, and rooftops; and

WHEREAS, Facilities-based competitive local exchange carriers, including wireline and fixed wireless providers, have reported concerns regarding their ability to obtain access to multi-unit buildings at nondiscriminatory terms, conditions, and rates that would enable consumers within those buildings to enjoy many of the benefits of telecommunications competition that would otherwise be available; and

WHEREAS, All States and Territories, as well as the Federal Government, have embraced competition in the provision of local exchange and other telecommunications services as the preferred communications policy; and

WHEREAS, Connecticut, Ohio, and Texas already utilize statutes and rules that prohibit building owners from denying tenants in multi-unit buildings access to their telecommunications carrier of choice; and

WHEREAS, The President of NARUC testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition that "[f]or competition to develop, competitors have to have equal access. They have to be able to reach their customers and building access is one of the things that state commissions are looking at all across the country."; and

WHEREAS, The attributes of incumbent carriers such as free and easy building access should not determine the relative competitive positions of telecommunications carriers; and

WHEREAS, The property rights of building owners must be honored without fostering discrimination and unequal access; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, urges State and Territory regulators to closely evaluate the building access issues in their states and territories, because successful resolution of these issues is important to the development of local telecommunications competition; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscrim-

inatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider.

Sponsored by the Committee on Communications

Adopted July 29, 1998

Mr. TAUZIN. The Chair is now pleased to recognize the gentleman from Pennsylvania, himself an experienced hand in the communications world. Mr. Klink.

Mr. KLINK. That is true. A recovering broadcaster.

Let me just, first of all, I was kind of stricken as we sit here at the hearing, at the position that many of us are in, including Chairman Tauzin. I think the chairman, if you will recall back, and one of the first issues that you and I talked about in depth was private property rights and we worked, all of us, so hard on coming up with competitiveness in the Telecom Act. So we find two things that we feel very passionately about clashing before us here today. And the answers are not easy.

I just wanted to go back. I have got the older version of the Telecom Act, but I think this is the section 207, although it was different. And I want to just read from it, "Directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewers' ability to receive video programming from over-the-air broadcast station or direct broadcast satellite service. The committee intends this section to preempt enforcement of State or local statutes or regulations or State or local legal requirements, restrictive covenants, or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or satellite receivers designed for reception of DBS service. Existing regulations including but not limited to zoning laws, ordinances, restrictive covenants, or homeowners associations' rules shall be unenforceable to the extent contrary to this section."

So what we have said to the building owners and to the realtors and to the people who manage property, we are going to give you an exemption so all those here comes the big Federal Government that is usually thought of as being a pain in everybody's posterior, we are going to give you an exemption to all these local problems that you could have and now you are sitting here before us today telling us you don't want to work with us to get that service the last couple of hundred of feet to the consumers out there that may desire this. And it gives me a little bit of a problem.

As I said, chairman, myself, others, we don't want to get into takings. We don't get into—private property means a lot to us. I own—I owned. I have sold it since I have been here to support my bad habits of being a Congressman. It costs you a lot to be down here—I mean, I was a property owner, a commercial property, rental properties. I know what you go through.

On the other hand, you know, we have got some exciting possibilities here and that bottleneck exists just maybe 100 or 200 feet away from the people that we wanted to serve, the people designed to benefit by this Act, that is the American people, being able to engage in purchasing as another option these competitive services. So I would ask for a reaction to that.

Mr. HEATWOLE. Well, I am going to speak to residential, multi-family. Your first comment and from what I understand of the section you read was dealing with off-air signals and, as I had spoken

earlier, in the properties where we actually own the cable TV system, we either give it away—the off-air signal or we sell it for \$12 a month. The chairman asked, you know, what do you tell residents what is available? Well, in our area, if we don't do it, build a system as a landlord, you have the incumbent provider. Those are the two things that are available as far as television is concerned.

You know, I don't know the answer to all these questions, but generally, as we have stated, competition in the marketplace of residential units and commercial units requires that you provide certain services. Theoretically, we wouldn't have to have telephone service in any of our units, but I doubt that we would have very many residents because most people want telephone service. Most people want television service, either off-air or cable TV. To be competitive in a marketplace, we simply cannot deny that service.

And, in Virginia, as far as residents are concerned and I will read from the Landlord Tenant Act "Access of tenant to cable, satellite, or other television facilities" and it goes on to any provider, it says "No landlord shall demand or accept payment of any fee, charge, or other thing of value from any provider of all these things in exchange for giving the tenants of such landlord access to such services and no landlord shall demand or accept any such payment from any tenants in exchange thereof unless landlord is itself the provider of the service."

Mr. KLINK. Mr. Heatwole, first of all, I am not here to defend what they have done in Virginia. We have got 49 other States and Commonwealths that we have to deal with.

Mr. HEATWOLE. Maybe it is the solution.

Mr. KLINK. Well, it may or may not be. But the point here is—and I think, as my distinguished colleague, Ms. Eshoo, said a few moments ago in her questioning—if we have thousands of people out there and perhaps tens of thousands of people who own buildings. And perhaps now if you are getting into residential, it is millions. I don't even know the number and I don't think anybody here knows the number.

If this industry, which is booming and which really could bring, I think, great competition—I think broad-band technology has great possibilities that probably none of us in this room has ever thought of—if we are going to bring that to the American people, which is one of the things that we—we didn't have broad-band in mind when we did the Telecom Law, but we want to see new technologies. We want to see things happen. We want to see industries develop. We are in a communications era, an informational era. I think we all agree with that.

If they have to go building-by-building and sometimes in these negotiations, I think we all know, can take a year or more to just kind of, you know, it is an attorneys relief act which there are probably some people in this room that would like that idea. There are probably a lot that wouldn't.

The point is that if we in this committee and in this Congress said to the building owners and the people, as we did as I read that section: We are willing to wave as much of a wand as we have here in the Federal Government to relieve you from all of the problems that you could have with zoning laws and other limiting laws by

the local governments in an effort to get the communications into your building, whether it is direct, off-the-air, I mean the intention is clear. We want to get the service, whatever it is, to the people.

And you remember, when we wrote this law in 1996, we were replacing a law that was written in 1934 before television was even invented. And so we realized as we were doing this that we are writing a law that deals with technologies that we haven't even dreamed of, haven't been invented yet, but we have to be able—and we had long, long discussions—how do we get these technologies that we don't even know about as we write this law—to the people?

Now we come here today and we take all of your objections very seriously, but how do we get that last few hundred feet? And we asking you to go with us and there doesn't seem to be a willingness because, again, Ms. Eshoo asked about could we use the Florida law, which we understand has not been enacted, that we understand, though, at least in Florida, there was agreement between the realtors and their building owners—I think Mr. Bitz said it was a disagreement within the family. How can we get to where we need to be? How can we give Mr. Sugrue the direction that the FCC needs to get somewhere that is not going to be onerous to you but, at the same time, allows us to see that this technology is out there as a viable option for the consumers across this Nation and the next technology that we have a year from now or 10 years from now.

Mr. Bitz.

Mr. BITZ. Earlier in my presentation, I stated that I was not aware in our company at least—and I can only speak for my own business experience—of any tenant in our commercial office buildings who is not satisfied with their telecommunications service. The voice that is missing at this table is you have competing industries at the moment, but you don't have anyone speaking for the consumer directly and I can only reflect the anecdotal experience that I have with over 2,000 tenants. I—in my experience. And I speak quite directly—is that I am not aware of any of our commercial tenants who are not well-served by the existing amount of telecommunications competition they already have. I can't speak for residential or the commercial industry. In my experience, that is certainly the case and while not every company can get into every building, that is not the issue. The question is are the tenants adequately served. And, in my perspective, they certainly do appear to be served.

On our end, think of the problems there would be if we were forced to have to deal with every single competitive provider. This gentleman indicated there are now 72 of them. Trying to deal with 72 companies to deal with the same service again and again and again in small-and medium-sized buildings would not serve the public interest, which, at that point, would already have been well taken care of by having 4 or 5 or 3 or 6 providers already in a building. So what we are saying is that we believe the competition is already there in the commercial business.

Mr. KLINK. Mr. Rouhana.

Mr. ROUHANA. What Brent says is true. He is one of the enlightened landlords that does allow people to have access. The problem

is there are a million of them. But what he also illustrates is how good negotiators landlords are. Because when asked the question: Do you have any compromise at all? He says, no. And the truth is that is the process we have. And we will offer any number of compromises: Connecticut, Texas, Florida, a brand-new one. We are trying to reach a compromise. That is the whole point of this from our point of view. And there are ways to protect every single issue that has been raised here and we are more than willing to work through those. We do need a solution though. And it needs to be a national one.

And now just one last thing about the FCC. Two years ago at the FCC, these issues that we have been talking about today were raised in rulemaking proceedings and they haven't been answered. And the primary reason is the Commission, rightfully I believe, is unclear about its ability to act. They legitimately feel they don't have a clear mandate. We think they do have a clear mandate, but they believe they don't. So somebody needs to clarify it and I don't know who you go to when a regulatory authority doesn't believe they do, except to the legislative. So we are here and we are going to need either some kind of a clear direction or a law.

Mr. KLINK. Mr. Windhausen.

Mr. WINDHAUSEN. If I could just add in response to a couple of things that Mr. Bitz also said, we do have examples of consumers who sought the right to receive service from an individual CLEC and they were denied that right so we do know of many unhappy consumers, tenants. It is also that Mr. Bitz mentioned that we are looking for the right for 72 different companies to get into each building. That is not what we are looking for. For the most part, what happens is the economics work out that once you have two or three or perhaps four CLECs into a building, no other CLEC is going to seek access because it is just not economic for them.

We are only seeking access where there is space available. If the landlord can demonstrate that there is no space anymore to accommodate anyone else, that is fine. That is a legitimate reason for him to say, no, I am sorry. I can't take in any more CLECs. And that is a reason that we will understand and we are very happy if that would be written into the legislation.

Mr. KLINK. I thank you very much. Mr. Chairman, you have been very kind with the time. I just want to—and the hour is getting late. If nothing else comes out of my line of questioning, I just think it is important that we recognize that we have not come to the business community or those who are investing and putting up buildings and own and manage buildings and saying we want you to give and you haven't got any. We have actually—and I think you know this and the other members of the committee know it because they were here—we took their interests into consideration, very high consideration, when this legislation was written, when it was passed and we are just asking for them to come to the table.

And the intransigence that I hear. I hope that that is just for a day. Maybe you weren't prepared for the question. I hope that there is an ability, really, to be able to work together so we can get through this. We are not looking for a steamroller to come over the top of you, but, on the other hand, we want to get this technology out to the public. Thank you, Mr. Chairman, for your time.

Mr. TAUZIN. Thank you, Mr. Klink. I may point out to you, Mr. Rouhana, that generally when the FCC has trouble finding, you know, authority to do something, it is generally because they are reluctant to do something because when they want to do something they generally find authority to do something.

Mr. ROUHANA. Well said.

Mr. TAUZIN. But I understand the argument. The gentlelady from Missouri, the Show Me State. By the way, Karen, it is the common practice in Federal court when you go there to argue a case, the court will often ask you how are you here? I mean, what authority, what jurisdiction do we have over your case? A cajun lawyer once said, now, I came by the bus.

But the Commission is asking how are we are? What authority do they have? And it is a good question. Ms. McCarthy.

Ms. MCCARTHY. And I can appreciate, Mr. Chairman, that they would like us to address the answer and make it easier for them. But I come out of a background of State government feel pretty strongly if States like Connecticut and Ohio and Nebraska and Texas and even Florida are in the process or have addressed this issue, that probably the question for this committee today is, you know, if there were to be Federal legislation, what should be in it? How is it working out there in the States? Is there some model for us?

And in any of these States, have we got reciprocity going so that if a building owner is required to provide access on demand, are they also required to request service on demand? Is that in any of the State models? Mr. Rouhana, you made begin, but anyone who would like to weigh in. I would like to know your thoughts on what is out there and working. What would be ideal, if anything, for us to do.

Mr. ROUHANA. Well, I think that both Connecticut and Texas have a rather balanced approach to this and I think either one of them is particularly good. Personally, I think the Connecticut Act is the better of the two because it deals with the time problem that I have been talking about today more directly. Happily, in neither of those States has anything bad happened to the real estate market because of the passage of the Act. We haven't had, you know, assaults of thousands of telecom companies on people and there hasn't been a—I don't think there has been any diminution of the value of the real estate. And certainly wouldn't want to see that happen.

Mr. TAUZIN. Would the gentlelady yield? I think she has raised a good question. Do any of those statutes provide an obligation to serve?

Mr. ROUHANA. I don't know of any that does.

Mr. TAUZIN. Balanced with the right to be served?

I thank the gentlelady.

Ms. CASE. Communities that are entrenched within these forced access communities and there is no competition in these communities because of the forced access, because they have a legal and enforceable right to be there, being the local incumbent. So you are less likely to have choice and competition. We have zero choice and competition right now for two new development deals in Connecticut and in New Jersey. And the one community that I referenced

that was in New York was serviced, there were no customer service issues. They didn't even have an obligation to provide service within 90 days of a resident moving in.

Ms. MCCARTHY. Mr. Chairman, I apologize to the panel. Why I was late was I sit on the Energy Power Subcommittee and we are grappling with a similar principle there that we are talking about here in telecom—and the full committee and all these members will deal with eventually—of this reciprocity, as we deregulate how energy is delivered into the home and the wiring that is in place now to address these telecom issues will be critical to many of the issues that we are grappling with in another subcommittee.

So, Mr. Chairman, I would really like to hear more thought on this reciprocity idea and the rights that go both ways if you wouldn't mind a moment more of discussion by—

Mr. TAUZIN. Absolutely. The gentlelady controls the time. If any of you wants to discuss this with her. How does it work in a competitive—we understand a monopoly market. You have got a service. You have the right to put the wires in in service. But you also have the service if you want your service. How does that work in a competitive market? Ms. McCarthy has, I think, raised an excellent question.

Mr. PESTANA. In New York State, the cable operators, such as Time Warner, have to provide service to everybody. All residents that want cable get service, regardless of how much it costs us. The competition, RCN in New York, obviously they just pick the right buildings or the ones that have the right financial solutions for them. So they compete unit-by-unit in some locations and they compete on a bulk basis sometimes where we basically get excluded because we have the equipment there, but the landlord signs an agreement where everybody has to hook up to RCN. So we have those kinds of situations. But we are required to serve everybody.

Ms. MCCARTHY. Mr. Rouhana, do you want to speak to this please?

Mr. TAUZIN. Yes, address the gentlelady. She controls the time.

Mr. ROUHANA. Yes, I think that there is a physical issue involved here which is literally the number of places that network infrastructure has to be created physically in order to deliver service to everyone. So what we have been talking about today is one of the impediments to actually going to as many places as possible which is building access. And I said a little bit earlier that we have got to get as many commercial places as we can so we can build the infrastructure, then start to go to the residential markets. And that you can't physically get there any faster than you can get there, but slowing us down is not going to get us there faster. So, by making it harder for us to get into buildings, we won't speed up the process of getting to everyone.

So I don't know quite how to answer the question except to say physically we have to create the network. That is a one building at a time thing. There are a million buildings to build it to. We have got to get access first to build to them. That is just commercial. Then there is is it 30 million homes some much bigger number of multiple dwelling units and then homes that have to be eventually reached. And it is going to take a combined effort of multiple carriers doing that to get an alternative infrastructure built across

the country. And it is going to be cable providers and competitive carriers, using a variety of technologies, that ultimately get us an alternative infrastructure in all of the facilities we want. But, clearly, that access, we don't have a shot at that.

Ms. MCCARTHY. Have you ever refused service when requested by a building owner?

Mr. ROUHANA. By a building owner?

Ms. MCCARTHY. Yes.

Mr. ROUHANA. Building owners don't ask us for service, tenants do. If we get an order from a tenant we try to serve them, if our network can get to them. It is a physical question. If we can get our network to a tenant, we want to serve them. We would like to serve everybody.

Ms. MCCARTHY. Mr. Bitz.

Mr. BITZ. With due respect to my colleague next to me, we have been turned down. We have contracts with the firm that Mr. Rouhana represents. We also have buildings where because I assume they are not attractive, they have elected not to sign up on those buildings. We have 102 in the Mid-Atlantic area.

So the issue of reciprocity is very important because right now we have many buildings where we would like to have service where we can't because maybe they are too small or the tenant mix is not desirable from a telecommunications service providers' perspective. So that is an issue of concern to our industry, because, I have mentioned before, the real point that we are looking to is to have happy tenants. The amount of revenue that we get out of this is really very small. I think it is .8 cents per square foot compared to \$19 per square foot for rent. So it is infinitesimal relative to our overall business model.

Ms. MCCARTHY. Mr. Rouhana.

Mr. ROUHANA. I just need to respond to that because if there is a place we haven't gone it is because we physically can't get there. I am back to my same issue. The process of constructing a network across the entire Nation takes a period of time. Time is the No. 1 impediment to having competition as quickly as possible. I mean, you want to have it as fast as you can have it. Building access is a key impediment to getting there. So we could get into a circular discussion about which came first, but the fact is, if we can't build the network to places, we can't get to the next place.

Ms. MCCARTHY. Well, my original question that I posed and directed to you was about the fact that if Federal legislation is needed or created what should be in it? And this question of reciprocity is one that I believe the subcommittee would entertain as a component of that, if we go down that path. And so that is why I was seeking thoughts on whether the question of reciprocity should be in it. Let me hear from—what is your name? I am sorry—Mr. Windhausen.

Mr. WINDHAUSEN. That's right. Thank you. Earlier there was reference made to Connecticut and Texas State statutes on these issues. They do not contain a reciprocity requirement, I imagine because they found it wasn't necessary. These companies are common carriers. They already have an obligation under the law to serve and to serve in a nondiscriminatory basis. I think the way the economics work out is once you are in a building and once you are

wired, your incentive then, as the CLEC, as the competitor, is to put as much traffic onto those facilities as possible. So it only makes sense for you to serve as many consumers in that building as want service. So there is no need for that kind of legislative requirement for reciprocity because it will happen anyway, once the access to the building is granted.

Mr. PRAK. If I might, Ms. McCarthy, on the question of obligation to serve, I represent the over-the-air television industry, KNBC, Kansas City, for example. We have been told by the Congress and by the FCC to build out digital television facilities to serve everyone. Our concern in this is that we don't want landlords standing in the way of folks who reside in their buildings being able to receive free, over-the-air television service, however they may receive it, whether they receive it with an over-the-air antennae or through cable or shortly, I guess, there will be the opportunity to receive it through DBS.

Ms. MCCARTHY. Mr. Chairman, I am not sure there is any other individual who wishes to speak. Mr. Sugrue?

Mr. TAUZIN. Any other want to respond?

Mr. BURNSIDE. Yes, Mr. Chairman, Ms. McCarthy, I would just like to return, for a moment, to direct your focus to the cable competition side, with respect to your core question. When you passed the 1996 Telecommunications Act, part of it was to create a concept called "OVS" or open video systems. And one of the things that the cable industry has hard time with since you passed that Act is the fact that, as an OVS operator, it is not required to adhere to the franchising licensing build out under the same terms and conditions that the existing cable operator is required to build out.

However, I think you recognized when you did that part of the Act, that it was absolutely impossible to expect a new competitor, a new entrant, coming into a marketplace, to overbuild an existing market which basically is a monopoly, even though 67 percent of the customers homes take it. You could not simply ask a new entrant to build out all of New York City at the same time and under the same conditions in which the new entrant 17 or 15 or 25 years ago did.

So I think it is a bit disingenuous for that industry to expect new entrants on the cable side to be held to the same standards as opposed to what I think you tried to achieve, and that was to give a new entrant competition and opportunity to get started and then extend its market, extend its network, as it was financially and physically possible.

Ms. MCCARTHY. Mr. Sugrue.

Mr. SUGRUE. If I could just respond. Because I don't want to leave the subcommittee confused about the Commission's attitude toward its own jurisdiction in this area. The Commission has never said aye or nay with respect to telecommunications services and Winstar, for example. Part of that is the focus has been on video because, in part, the law was sort of shaped a little bit with video in mind. Part because Winstar really wasn't doing much when the law passed and was being debated 4 years ago in 1995 and 1996.

Mr. TAUZIN. It is already an old law.

Mr. SUGRUE. In a way it is. We also have a Commission with four new commissioners since the law passed and a new Wireless

Bureau chief and we tend to take a fresh look, shall we say, at these issues.

Mr. TAUZIN. Don't use that term.

Mr. SUGRUE. I know. I was deliberately provocative. But so I don't want to mislead people. We want to look at this issue hard and my endorsement of some clarification is just to make our job easier, frankly, if we had some.

Ms. MCCARTHY. Mr. Chairman, thank you both for this hearing and for the time you have given me to explore this question. I really would be curious to have staff look into the States and how it is working out there and appreciate the opportunity to be a part of this.

Mr. TAUZIN. Thank you very much and thank we have a lot of information that we will share with you on those State laws and at least as much background as we have gathered and, perhaps, the witnesses who are experiencing real world, as you said, in the mud operations can give us some insight as to their specific observations on how well those State laws are working.

The Chair will recognize the ranking minority member, Mr. Markey for as much time as you shall require.

Mr. MARKEY. Thank you, Mr. Chairman, very much. I just want to thank you for holding this hearing and for the excellent testimony that we received from the witnesses today. I think we pretty much had the issue framed for us today. We have voice and video and data industry that wants to provide competition, lower prices, better service to the one-third of Americans that live in apartment buildings and to businesses that operate in large structures across the country. And, on the other hand, we have legitimate concerns on the part of the real estate industry: the tenant safety, constitutional property right issues, compensation issues that all legitimately are being raised by the other side.

I think that our task is now very well framed for us. I think it is important for us to get it and get it resolved. And I would hope that this would be the kick-off of our effort to find some common-sense solution that legitimately deals with the issues raised by all parties, but toward the goal of ensuring that there is low-priced competition available for every tenant in America. And I thank you for holding the hearing.

Mr. TAUZIN. I thank my friend. The Chair recognizes himself. Let me, at this point, mention that PCIA has also submitted testimony for the record. Without objection, that testimony will be made as part of the record.

[The prepared statement of PCIA follows:]

May 12, 1999

THE HONORABLE W.J. (BILLY) TAUZIN
*United States House of Representatives
 Chairman, Subcommittee on Telecommunications, Trade & Consumer Protection
 2183 Rayburn HOB
 Washington, DC 20515*

DEAR CHAIRMAN TAUZIN: I want to commend you and the Telecommunications Subcommittee for conducting this week's hearing on the issue of access to multi-tenant buildings by competitive telecommunications providers. PCIA, on behalf of its Wireless Broadband Alliance members, looks forward to working with the Subcommittee as it explores means of promoting wireless broadband alternatives for the millions of small businesses and residential customers that live and work in multi-tenant buildings. As you move forward with your consideration of this issue, I hope

you will take into consideration the basic principles that I have outlined below. I respectfully request that you include this letter in the record of your hearing.

Consumers must have a choice of "last mile" broadband access providers if Congress' vision of a competitive telecommunications market is to be realized. Wireless broadband providers offer a real alternative to phone companies' DSL services and to cable modems. However, if these new wireless services are to achieve their potential, it is crucial for these wireless companies to have non-discriminatory access to buildings where incumbents now provide service.

Wireless broadband licensees are more than capable of offering the full array of broadband telecommunications services. The most established of these companies, WinStar and Teligent, are deploying service across the country today. Yet there are hundreds of companies recently licensed by the FCC who are prepared to offer high-speed voice, data, video-on-demand and Internet access to small businesses and residential consumers. These potential customers, who by and large have not had the opportunity to experience true broadband technologies, are often located in multi-tenant buildings under the control of a landlord or condominium association. For wireless broadband operators to offer these extraordinary services to these consumers, they must first have access to the buildings. This requires the consent of third parties (e.g., landlords or management agents) who often have made exclusive arrangements with the incumbent telephone company or cable company to serve the tenants in a building.

Some states have recognized the importance of mandating access for alternative telecommunications services in a multi-tenant environment. For example, Connecticut and Texas require, by statute, non-discriminatory access to buildings while the Ohio and Nebraska public utility commissions have mandated access. Last year, the National Association of State Regulatory Commissioners (NARUC) adopted a resolution supporting the rights of consumers in multi-tenant buildings to have a choice of telecommunications providers. Finally, this spring the State of Florida almost adopted legislation that would mandate access to buildings with reasonable compensation to building owners. Notably, this legislation garnered the support of the Building Owners and Managers Association (BOMA). Unfortunately, however, most states have yet to address this issue.

PCIA believes that the resolution of building access concerns demands a federal solution. Otherwise, wireless operators will face piece-meal and conflicting obstacles to their deployments across the country. Congress previously rejected the state-by-state approach to opening local markets to telecommunications competition through its adoption of the Telecommunications Act of 1996. It should do the same here through either express legislation or by directing the Federal Communications Commission to fashion access rules.

As you consider means of offering consumers a real choice in their broadband telecommunications providers, I urge you to keep several principles in mind. These principles will ensure that new telecommunications services are made available to all Americans while protecting the legitimate private property rights of building owners.

- *Non-discriminatory access to buildings:* The terms, conditions, and compensation for the installation of telecommunications facilities in multi-tenant buildings must not disadvantage one new entrant vis-a-vis another new entrant or new entrants vis-a-vis incumbent providers. Telecommunications carriers should compete to serve consumers on the basis of service quality and rates and should not succeed or fail in the market because of discrimination that tilts the playing field or prevents choice altogether.
- *Carrier assumption of installation and damage costs:* Installing carriers must assume the costs of installation as well as the responsibility for repairs and payments for damages to buildings. Building owners and the tenants occupying their buildings should be assured that the cost of any repairs for damages caused by facility installation should be assumed by the installing carrier.
- *No exclusivity:* Building owners should be prohibited from granting exclusive access to telecommunications carriers. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications service.
- *No charges to tenants for exercising choice:* Under no circumstances should a building owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.
- *Both commercial and residential multi-tenant environments should be included within a nondiscriminatory building access requirement.* As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As

a practical matter, in many urban areas it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of customers difficult. Small and medium-sized business tenants are often denied a choice of communications providers and do not have the clout in a building to compel the landlord to honor their choice of provider.

- *Reasonable accommodation of space limitations:* Space limitations in buildings most likely will not be an issue in practice. In the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building without serving commercial customers and requirements that carriers share certain facilities.
- Building owners should receive reasonable compensation for building access: Congress need not establish specific rates or rate formulae for access. Instead, Congress can establish a set of presumptions for the FCC or other government bodies to use to evaluate the reasonableness of a charge. This method allows parties to negotiate specific rates within the parameters defined by Congress. These parameters might include the following:
 - *Rates should not be based on revenues.* Congress should presume that a building owner's imposition of revenue sharing on a telecommunications carrier is *per se* unreasonable because it does not approximate cost-based pricing and suggests the extraction of monopoly rents.
 - *Rates must be nondiscriminatory.* Congress should require that rates for access to buildings be assessed on a nondiscriminatory basis. For example, if the ILEC does not pay for access to a multi-tenant building, neither should other telecommunications carriers. This would not bar the landlord from recovering reasonable out-of-pocket costs.
 - *Rates must be related to costs.* Building access rates must be related to the cost of access and must not be inflated by the building owner so as to render competitive telecommunications service within the building an uneconomic enterprise for more than one carrier.

The Telecommunications Act of 1996 clearly voices Congress's desire to promote facilities-based local exchange competition. Today, a new breed of facilities-based providers using wireless broadband technologies are ready to meet that goal. These companies will offer small businesses and residential customers the high-speed Internet access and other advanced services that are unavailable to them today. Customers deserve the right to choose the wireless alternative for receiving broadband access. Yet millions of potential customers will not have the opportunity to choose unless Congress adopts a building access regime that insures non-discriminatory access for all telecommunications providers.

Again, I thank you and the Committee for opening a dialogue on this important matter.

Best regards,

JAY KITCHEN
President,

Personal Communications Industry Association

cc: Chairman Bliley
Ranking Member Dingell
Members of Telecommunications Subcommittee

Mr. TAUZIN. Let me make a couple of comments. First of all, on section 207, I think it is interesting to note that one of the reasons why section 207 is there was to protect the right of the viewer to put up an antennae and receive the signal. The concern there was principally focused in on direct broadcast television—you are right—it was a video kind of concept.

But it was designed to make sure that, in fact, there wouldn't be a denial in State law, local laws, or property owners agreements that would restrict one of the property owners from, in fact, installing a DBS dish and, therefore, offering a competitive choice for the local incumbent cable. That was sort of the genesis, perhaps, of the section but it speaks of viewers, not owners, which is rather interesting. And I know the Commission is wrestling with that. What is the meaning of that term?

The Congress could well have said owners are not, you know, no restrictions shall be allowed to prevent owners, State laws, local laws, agreements among common owners, would prevent a single owner from putting up an antennae and receiving some of these services. But the law said viewers, not owners. Does that mean, then, that the owner of the property can't stand between the viewer, a tenant, and his right to have an antennae, whatever it takes to receive these signals.

While we were thinking video and while the Internet is mentioned twice in the 1996 Act, that is all the browser wasn't even invented until 1995. It was being invented at the same time we were trying to write a law about switch networks and we weren't even thinking about, you know, packet networks like the Internet. While all that is true, how does that law then, which was written with a video concept in mind, apply now to all sorts of wireless services and wired services, that will contain a lot more than video? That, indeed, could be integrated services and by all accounts will be integrated services. And those are interesting thoughts that I think we are going to take with us from this hearing.

In this testimony by PCIA, PCIA calls for a whole list of things they think would help. I would touch on them real quickly and just to give you an idea of how complex we view this task. They ask for nondiscriminatory access to buildings. Well, how many? How many people should have nondiscriminatory access to a single building? You mentioned how many members now in your association and that is growing. CLECs are growing. Companies are I mean, we have churned out all kinds of spectrums for all kinds of new users and providers out there. And they all want to get to our homes or our businesses.

How many would have nondiscriminatory access to the same building? Would they have it over a common wire? Common antennae? Or does everyone get to put their own system in? At what cost to the landowner, the property rights concerns? That is not easy to deal with.

PCIA mentions the carrier should assume the cost of insulation and damage cost. Well, did the monopoly incumbent telephone company have to pay for those costs? Did the owner have to pay for them? Is the new entrant going to be treated differently than the incumbent when it comes to cost and installation of those systems? How do you get parity there? Is everybody free or is everybody charged? And if you go everybody charged, who is going to set the charges? Is government going to be setting prices here? Determining whether it should be \$500 maximum and whether or not when I am in a hotel I should be charged that extra buck for a .10 call? You know, Mr. Markey raises that issue. Do we get into that? Do we dare go there?

No exclusivity. I notice the Florida statute, for example, touches that, but it says no exclusivity forward. So that there is no abrogating existing contracts. But what is a contract has a 25-year term? Take it or leave it. You want cable services, you can only have ours for the next 25 years. When cable was a monopoly and de facto legally then. And now all of a sudden we have got new competitors

who want to come in. Well, we have got an exclusive contract for 25 years and nobody should abrogate it. Not an easy little problem.

No charges to tenants for existing choice. Well, if the landowner has a lot of charges or the provider has additional charges to reach that tenant, you mean you can't pass that on the tenant? And who can? Under what circumstances? And how much? How much of an add-on can you make? Do we get into that? In a competitive marketplace where we are trying to deregulate, downsize the FCC's role, how much do you really want the FCC involved in all that, guys and gals?

And it goes on. I mean, they have got a whole list. For example, the reasonable compensation for the building owners' access, rates to be based on revenue. Well, again, are we going to get into all the criteria upon which rates are going to be based to compensate for the use of buildings or access to buildings to reach those viewers who now become not just viewers, but information service customers of the future?

The plate is full. I say it again. Thank you very much. You have enlightened us but you have also made our lives much more complex and for that we thank you because that means our jobs will continue.

The hearing stands adjourned.

[Whereupon, at 1 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:

STATEMENT OF THE COMMUNITY ASSOCIATIONS INSTITUTE

The Community Associations Institute (CAI)¹ appreciates the opportunity to address the Subcommittee on Telecommunications, Trade and Consumer Protection on behalf of the nation's condominium associations, cooperatives and planned communities to provide the following comments on the issue of access to buildings and facilities by telecommunications providers.

Community associations fully support a competitive telecommunications marketplace and are working diligently and effectively to secure the telecommunications services requested by residents while ensuring that the delivery of such services does not damage the substantial investment that homeowners have made in association property. Increasingly, community association residents are seeking newer, faster, and more sophisticated telecommunications capabilities. In response to such demands, resident boards of directors are looking to viable competition among telecommunications companies—and the advancements that such competition will produce—as means to provide more enhanced and affordable services to their communities. If certain telecommunications providers have not gained access to community associations, it is due to a lack of demand for their services, concern over potential damage to property, the scarcity or absence of available space, or other such legitimate concerns. It is not due to association intransigence.

¹Founded in 1973, CAI is the national voice for 42 million people who live in more than 205,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence through a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 57 local Chapters and 26 state Legislative Action Committees.

Understanding Community Associations

In order to understand the concerns of community association residents and their collective opposition to any proposal that would grant telecommunications providers a privilege to access and use common or private property without permission, it is important to grasp the legal basis and governance structure of community associations.

All community associations are comprised of property that is owned separately by an individual homeowner and property owned in common either by all owners jointly or the association.² There are three legal forms of community associations: condominiums, cooperatives, and planned communities, which differ as to the amount of property that is individually owned. In condominium associations, an individual owns a particular unit; the rest of the property is owned jointly by all unit owners. In cooperatives, the individual owns stock in a corporation that owns all property; the stock ownership gives the individual the right to a proprietary lease of a unit. In planned communities, an individual owns a lot; the association owns the rest of the property. Generally, an individual owns less property in a condominium than a planned community, while there is no individual property ownership in a cooperative. Therefore, while individuals do own or use property in community associations, they do not exclusively own all property in the association. Community associations either own or control association common property, using and maintaining this property for the benefit of all association residents.

By virtue of their property interest, association owners are members of the association's voting body. As such, they are responsible for electing a board of directors to govern the association. In this respect, residents govern themselves since community associations are operated by residents on *behalf of* residents. Owners in a community association who are not on the board may participate in governing sessions by attending board meetings and joining various committees. Directly or indirectly, owners have control over the activities that occur in their association and board members must regularly seek the votes of their neighbors to remain in office. As a result, community associations are particularly accustomed to considering the needs and desires of their residents when determining budgetary expenditures, the use of common property and the selection of association services and service providers.

Individuals choose to purchase homes in community associations subject to the covenants, rules and regulations that enable all residents to participate in the governance of the community and establish high levels of services and standards for all. Congress should recognize this self-determinate process and the role community associations lay in maintaining, protecting and preserving the common areas, the value of the community or building and all individually owned property within the development. To fulfill these duties, community associations must be able to control, manage and otherwise protect their common property.

In the context of telecommunications, this may mean that the association enables all residents to choose one or more of Services A, B and C but that Service D is not available to Resident X because the delivery of Service D would mean substantial cost to the association or would damage association property. Service D may also be unavailable because the provider sought to deliver the service in a manner that did not adequately protect the association or its property. The bottom line is that community associations have the appropriate right and responsibility to manage common property, and those that seek to use such property, for the maximum benefit and enjoyment of all residents. An association's charge to preserve, protect and manage common property will always dictate that any provider wishing to physically enter association property or use wiring on association property must satisfy association concerns about such things as security, liability and space limitations. This is absolutely appropriate and vital if the association is to fulfill its duty to the individuals who have purchased homes in the community.

Forced Entry Is Unnecessary, Inappropriate & Unfair

While proponents of forced entry proposals attempt to justify their arguments by irresponsibly portraying community associations and others as barriers to competition, the substantial growth of competitive telecommunications providers in recent years demonstrates nothing if not the effectiveness of the marketplace in meeting the growing demand for advanced and dependable services. The successful relation-

²In each type of community association, different terms apply to residents who have an ownership interest in the association: unit owner in a condominium, resident or apartment owner in a cooperative, and homeowner in a planned community. For convenience, all three types will be referred to as "owners." The term "resident" applies to owners and tenants collectively.

ship between competitive telecommunications providers and community associations across the country merits celebration—not legislative action.

It appears Congressional action is being solicited, however, because providers either fear the competition of an open marketplace or have simply concluded that they do not wish to address the legitimate concerns that community associations and others have in relation to effectively and professionally managing an environment where multiple telecommunications providers may be operating within a property.

CAI believes that it would be absolutely inappropriate for Congress or any other governmental entity to disregard the positive evolution of the competitive marketplace by granting any special legislative privilege for telecommunications providers to advance their business strategies and profit margins at the expense of the rights of others.

Forced Entry Dismisses Importance of Provider Knowledge, Expertise & Reputation

The telecommunications industry is growing rapidly and provider quality varies tremendously. To ensure that community association residents receive dependable services, association boards of directors must be able to weigh factors such as a provider's reputation when allocating limited space to telecommunications companies. This is essential if residents are to have a variety of dependable telecommunications options and confidence that the providers are committed to the community's long-term interests.

Community associations choose telecommunications services from alternative service providers that provide high quality, reasonably priced, flexible services that are demanded by association residents. Forced entry policies would deter the growth of the competitive marketplace, and instead, would create artificial markets by granting privileges to low quality telecommunications service providers that would otherwise be unable to compete based on the quality of and demand for their services. With any provider able to force installation of telecommunications equipment on association property, providers would not have to demonstrate service quality and competitive pricing or address any other legitimate concerns for the valuable and limited space they would require. Therefore, forced entry policies would impede the growth of quality competition and possibly prevent association residents from receiving better services from more professional providers.

Forced Entry Undermines Community Security, Safety & Association's Responsibility to Manage Common Property

Removing an association's prerogative to regulate the access of providers to building or community systems, as proponents of mandatory access/forced entry are requesting, would limit the association's ability to protect residents and their telecommunications service, the equipment of all providers, and the property itself. In such an environment, resident safety and security would be compromised and association risks and liabilities would escalate.

Forced entry proposals undermine every responsibility associations have to properly serve their owners and the properties. Equipment and wiring installation usually involves removing or drilling through roofs, walls, floors, and ceilings. This activity often causes damage, requiring additional expense to restore the property. With its authority to permit or deny access to its common property and to require that all providers negotiate a written agreement governing their conduct, an association can choose telecommunications providers that will not damage common and private property during equipment installation and maintenance, and insure that any damage is properly repaired and paid for by the provider causing the damage.

In a forced entry environment, all telecommunications providers could access an association regardless of how they treat the property and providers would have less of an incentive to prevent damage to common property because their lack of care could not be a basis for exclusion. The association and its owners, the telecommunications consumers, would be required to bear the financial burden of repairs.

With multiple service providers having the unrestricted right to enter an association, the potential for damage to common property and telecommunications equipment, or injury to association residents and personnel, would increase exponentially. Since multiple providers would often be using the same portions of common property, it is conceivable that such areas would be damaged, restored to some extent, then damaged again by another provider. It is also conceivable that a new provider would damage a previous provider's telecommunications equipment during installation.

If telecommunications providers damage property or injure association residents, it is likely that the association would be held liable since it has the responsibility to decide what companies and providers operate within the community. Yet, forced entry policies would negate the rights of associations to limit the risk of damage or

injury while minimizing the disruption to common property, telecommunications equipment, and association residents. Instead, it would labor associations with the expensive and burdensome task of trying to hold telecommunications providers liable for problems after the fact.

Forced Entry Ignores Space Limitations & Is Anti-Competitive

Real estate is a finite resource and common area space is always limited. It is simply not possible for community associations to accommodate an unlimited number of providers. It is this reality that seems to make forced entry so appealing to providers already in the marketplace. Not only do they see a prospect of advancing their immediate business plan, they also understand that a forced entry environment would enable them to preclude future competitors by installing equipment and wiring in as many buildings as possible so there would be no remaining space when new providers come to call.

Not only would such a rush to occupy space likely result in poor quality installations and increased damage to common property, the end consumer would also suffer in such a forced entry environment because competition would be limited. A new provider could be just what the residents desire but the association would be precluded from adding the services or substituting the new provider for an incumbent because providers and not the association controlled the space allocations. Community associations must maintain their rights and flexibility to select a balance of providers in order to respond to resident requirements and ensure a wide diversity of services within the property.

Forced Entry Raises Serious Property Rights Issues

CAI urges Congress to recognize that any requirement forcing a community association to permit access to property for the installation of telecommunications equipment or wiring, in the absence of just compensation, would violate the Fifth Amendment to the United States Constitution and would be the same as that invalidated by the United States Supreme Court in *Loretto v. Manhattan Teleprompter*.³ In *Loretto*, the New York statute required building owners to make their properties available for cable installation, providing only nominal compensation for the space occupied. The Supreme Court ruled that that installation amounted to a permanent physical occupation of the landlord's property and that even the slightest physical occupation of property, in the absence of compensation, is a taking.⁴ The Court further reasoned that permanent occupancy of space is still a taking of private property, regardless of whether it is done by the state or a third party authorized by the state.⁵

Conclusion

CAI eagerly anticipates the growth of additional competition among telecommunications providers and believes that such competition is best fostered through a free and open marketplace that operates with minimal governmental intrusion.

Increasingly, community associations, responding to the desires of their residents, are entering into contracts with multiple telecommunications providers to offer a variety of competitive services to residents. As more providers enter the marketplace to offer high quality, reasonably priced services, such competition will only increase.

Any forced entry policy would unnecessarily limit the rights of community associations and their residents simply to advance the business plans of various telecommunications providers and would be inappropriate for a free market grounded on competition and the respect for private property. Such a policy would hamper the development of a more competitive telecommunications environment and expose the nation's community association residents to undue risks, costs and chaos.

Community associations must retain control over common property, which they maintain and protect. Just as all dry cleaners or sandwich shops may not force their way onto common property to sell their services simply because an association has contracted with other such entities, neither should a telecommunications provider be allowed to take over property it does not own simply because other providers are already there.

A telecommunications providers access to community associations is now and should continue to be based on the quality of services it provides and the demand for those services. A reputable provider with a quality service will be competitive in this environment. Congress should encourage such competition rather than create artificial markets for providers seeking to avoid it.

³ 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).

⁴ *Loretto* at 427.

⁵ *Loretto* 458 U.S. at 432, n.9.

Finally, Congress should be aware that this issue has been previously considered and rejected by this body, by the Federal Communications Commission and by numerous states legislatures and regulatory bodies. It is time to put a stop to this endless trek of providers who travel from one governmental entity to another in search of someone to ignore the marketplace realities and public policy shortcomings that should always merit the demise of forced entry proposals. To do otherwise would be a disservice to the nation's 42 million community association homeowners.