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

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY in WT Docket No. 99-217, and THIRD FURTHER NOTICE OF PROPOSED RULEMAKING in CC Docket No. 96-98

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By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell concurring and issuing a statement.

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I. INTRODUCTION AND SUMMARY

1. This item represents another step in our ongoing efforts to foster competition in local telecommunications markets. We believe competitive telecommunications networks will provide alternatives to local services provided by the incumbent wireline local exchange carriers (LECs) and provide new services to the public. This item initiates a rulemaking proceeding to consider certain actions to facilitate the development of competitive telecommunications networks, and commences an inquiry into certain other issues related to this goal. In particular, we consider actions to help ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments. We also initiate an inquiry in order to compile a record on how State and local policies regarding telecommunications service providers' access to public rights-of-way and

taxation of telecommunications providers and services may be affecting competition. While focusing on these particular issues in this proceeding, we do not mean to imply that we view these issues as the principal impediments to facilities-based competition in local telecommunications markets. Rather, our consideration of these issues here is part of our ongoing effort to examine various possible impediments to such competition that come to our attention.

2. In the Telecommunications Act of 1996,[1] Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2] In particular, among other things, Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry.[3] Competition in the local exchange market is desirable not only because of the benefits competition will bring to consumers of local services, but also because competition will eventually eliminate the incumbent LECs' control of bottleneck local facilities and thereby permit freer competition in other telecommunications services that must interconnect with the local exchange.[4]

3. Moreover, competition to the incumbent LECs will not be limited to traditional, voice-grade telephone service. To the contrary, consumers are increasingly demanding high-speed data services and other advanced features in order to enhance their ability to access the vast amounts of information, electronic commerce, and entertainment that are rapidly becoming available through the Internet and other

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

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (1996 Conference Report). *See also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1 (1996) (noting that the 1996 Act "fundamentally change[d] telecommunications regulation" by replacing protection of monopolies with encouragement of efficient competition) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999) (*Iowa Utilities Board*), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed*, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr.16, 1999) (*UNE Further NPRM*).

[3] *See Local Competition First Report and Order*, 11 FCC Rcd. at 15505-06, ¶ 3. Thus, in section 251 of the Communications Act, Congress imposed special duties on LECs and incumbent LECs to take actions, including making their facilities and services available to competitors on reasonable terms, that would promote competition. 47 U.S.C. § 251. In section 271, Congress required the former Bell operating companies to meet a competitive checklist, and to demonstrate either the existence of facilities-based competition in the local exchange or the absence of a request for access and interconnection to provide local exchange service, before they are allowed to provide in-region interLATA service. 47 U.S.C. § 271.

[4] *See Local Competition First Report and Order*, 11 FCC Rcd. at 15506, ¶ 4.

advanced networks, as well as to improve communications with their friends, families, and colleagues. In the 1996 Act, Congress directed the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans, and directed us regularly to inquire into the progress of such deployment.[5] We have recently completed our initial inquiry under this provision.[6] We believe the ability of competitive providers to offer accessible, affordable, advanced capabilities to consumers will be crucial to these providers' efforts to compete with, and offer different services from, the incumbent LECs.

4. In the 1996 Act, Congress included provisions intended to facilitate competition to the incumbent LECs by competitors who use their own end-to-end facilities, providers offering service using unbundled elements of the incumbent's network, and resellers of the incumbent's service.[7] The Commission adopted regulations implementing these provisions in the *Local Competition First Report and Order*.[8] We continue to believe that carriers who provide service by all of these means have the potential to bring many of the benefits of competition to local exchange markets, and we further observe that some carriers may use resale and unbundled network elements as entry strategies before they have finished constructing their own facilities.[9] Thus, we remain committed to remove obstacles to competitive entry by any of these means.[10] As discussed more fully below, however, we believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.[11]

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[5] 1996 Act, § 706.

[6] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Report*, 14 FCC Rcd. 2398 (1999) (*Section 706 Report*).

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

[8] *Local Competition First Report and Order*, 11 FCC Rcd. 15499.

[9] *See id.* at 15509, ¶ 12.

[10] *See, e.g., UNE Further NPRM* (requesting further comment on implementation of requirement that incumbent LECs permit unbundled access to certain network elements in light of Supreme Court decision striking down Commission rules implementing this requirement).

[11] *See* paras. 20-23, *infra*.

5. Because of the unique benefits that facilities-based competition can confer upon the public, we seek to eliminate barriers to the development of competitive networks. Although facilities-based local competition in this country is still in its incipient stages, there is reason to believe that such competition on a broad basis is both technically and economically feasible. As discussed below, the prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent LECs' costly wireline networks, either by using wireless technology or by using existing facilities to customer locations.[12]

6. We also believe it is important to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. In the 1996 Act, Congress emphasized its intent to bring these benefits "to all Americans."[13] To the extent that any class of consumers is unnecessarily disabled from choosing among competing telecommunications service providers, the achievement of this Congressional goal is placed in jeopardy. Moreover, the fullest benefits of competition, including the widespread availability of advanced and innovative services at reasonable prices, cannot be achieved unless the incumbent carriers are, to the extent feasible, subject to competition in all sectors of their markets.

7. We begin this item with a brief background section discussing the current status of facilities-based competition and reviewing certain actions we have taken or are taking to promote this form of competition. Following that, we address problems of access to multiple tenant environments, such as apartment and office buildings, office parks, shopping centers, and manufactured housing communities. Specifically, we initiate a notice of proposed rulemaking regarding: section 224 of the Communications Act[14] and its application to riser conduit and privately granted rights-of-way in multiple tenant environments that utilities "own or control;" Section 251's[15] unbundled access requirements in the context of riser cable or wiring that the incumbent LEC owns or controls in these environments; and certain other issues related to facilitating competitive access to these locations. Next, we initiate a notice of inquiry concerning: reasonable and nondiscriminatory State and local public rights-of-way and tax policies and their relationship to facilities-based competition; and other means of promoting the development of competitive facilities-based networks.

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[12] *See* para. 19, *infra.*

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

[14] 47 U.S.C. § 224.

[15] 47 U.S.C. § 251.

II. BACKGROUND

8. Traditionally, local telecommunications services in the United States have been provided almost exclusively by a single carrier in any given geographic area. Although the Commission made some efforts prior to 1996 to introduce facilities-based competition to the incumbent LECs, the Commission then had few tools available to it. For example, the Commission promulgated rules requiring incumbent LECs to permit other carriers on reasonable and nondiscriminatory terms and conditions to collocate their equipment at incumbent LECs' facilities, but the courts held that the Commission's authority at that time did not encompass the power to order such physical collocation.[16] While some carriers did begin to offer competition to the incumbent LECs -- for example, competitive access providers (CAPs) offering services to certain large businesses -- that competition was quite modest during this period.

9. Under the 1996 Act, we have been able to act far more effectively to promote the development of competition in local telecommunications markets. For example, in addition to our actions in the *Local Competition First Report and Order* implementing the interconnection, unbundling, and resale provisions of the 1996 Act, we promulgated rules in the *Local Competition Second Report and Order* governing toll and local dialing parity; nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings; disclosure of network information; and numbering administration.[17] In addition, we have in several instances forborne under section 10 of the Act from enforcing against competitive service providers statutory provisions and regulations that could unnecessarily inhibit their ability to compete.[18]

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[16] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, *First Report and Order*, 7 FCC Rcd. 7369 (1992), *vacated in part and remanded sub nom.* Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, *Second Report and Order*, 8 FCC Rcd. 7374 (1993), *vacated in part and remanded sub nom.* Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); *see also* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, *Memorandum Opinion and Order*, 9 FCC Rcd. 5154 (1994) (on remand, requiring affected LECs to offer virtual collocation pursuant to tariff unless they chose to offer physical collocation), *remanded for consideration of 1996 Act sub nom.* Pacific Bell v. FCC, 81 F.3d 1147 (D.C. Cir. 1996). The 1996 Act expressly requires incumbent LECs to offer physical collocation under just, reasonable, and nondiscriminatory rates, terms, and conditions unless they demonstrate that physical collocation is not practical for technical reasons or because of space limitations. 47 U.S.C. § 251(c)(6); *see also Local Competition First Report and Order*, 11 FCC Rcd. at 15787, ¶ 565 (applying requirements previously adopted for physical and virtual collocation to physical collocation under the 1996 Act, with some modifications).

[17] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd. 19392 (1996) (*Local Competition Second Report and Order*), *rev'd in part sub nom.* People of the State of California v. FCC, 124 F.3d 934 (8th Cir. 1997), *rev'd in part sub nom.* Iowa Utilities Board v. FCC, 119 S.Ct. 721 (1999).

[18] *See, e.g.*, Cellular Telecommunications Industry Association's Petition for Forbearance from Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability, WT Docket No. 98-229, *Memorandum Opinion and Order*, FCC 99-19 (rel. Feb. 9, 1999) (forbearing from requiring CMRS providers to supply service provider number portability in the top 100 Metropolitan Statistical Areas until November 24, 2002);

10. Both before and since the 1996 Act, we have also taken several actions that specifically promote the ability of service providers using wireless technology to compete with the incumbent LECs. Thus, we have made spectrum in several frequency bands available in a form that is usable for offerings that can compete with wireline local service,[19] we have permitted new partnering arrangements between Instructional Television Fixed Service (ITFS) and Multichannel Multipoint Distribution Service (MMDS) licensees to offer two-way services,[20] and we have increased CMRS licensees' flexibility to use spectrum for competitive purposes by allowing them to offer fixed services on a co-primary basis with mobile services.[21] We have also made spectrum more usable, and promoted opportunities for additional competitors, by permitting licensees in many services to transfer portions of their spectrum authorizations to other parties, with Commission approval, by partitioning their service areas and disaggregating their

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Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134, ¶¶ 55-88 (rel. July 2, 1998) (*PCIA Forbearance Order*) (forbearing from applying to CMRS providers certain international tariffing requirements and certain provisions of the Telephone Operator Consumer Services Improvement Act), *recon. pending*; Hyperion Telecommunications, Inc., Petition Requesting Forbearance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 8596 (1997) (forbearing from applying tariffing requirements to providers of interstate exchange access services other than incumbent LECs).

[19] *See, e.g.*, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd. 7700 (1993), *modified on recon.*, 9 FCC Rcd. 4957 (1994); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd. 1463 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd. 19079 (1997) (*800 MHz Second Report and Order*); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd. 19005 (1996); Rulemaking to Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545 (1997) (*LMDS Second Report and Order*); Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd. 18600 (1997) (*39 GHz Report and Order and Second NPRM*).

[20] Amendment of Parts 1, 21, and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmission, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd. 19112 (1998), *petitions for recon. pending*.

[21] Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965 (1996).

spectrum.[22] In addition, even before we were granted broadly applicable forbearance authority under section 10, we forbore from applying to CMRS providers under section 332(c)(1) of the Act several provisions of Title II that we found unnecessary and contrary to the public interest as applied to those services.[23]

11. The changes wrought by the 1996 Act have helped engender significant progress toward meaningful competition in local telecommunications markets, including markets for advanced services. Competitive LECs are rapidly building customer base and gaining market share, although they still account for less than five percent of local market revenues.[24] Competitive LECs are deploying fiber in their networks at a faster rate than incumbent LECs and are rapidly acquiring numbering resources necessary to provide switched telephone services over their own facilities.[25] Moreover, we have recently concluded that new broadband technologies may be capable of creating competition for incumbent LECs in the narrowband telephone market that incumbent LECs dominate today.[26]

12. Incipient and potential challenges to the incumbent LECs may come from several sources. For example, CMRS providers are increasingly marketing their services as substitutes for wireline second lines, in many instances by offering pricing plans that, for an affordable flat price, include large numbers of minutes for calls placed anywhere in the country or unlimited minutes for calls within the subscriber's immediate home area.[27] Fixed wireless telephony services are also being offered by providers using cellular and PCS frequencies,[28] frequencies between 2 GHz and 4 GHz,[29] and upper frequency bands between 24

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[22] *See, e.g.*, Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21831 (1996); *800 MHz Second Report and Order*, 12 FCC Rcd. at 19127-53, ¶¶ 138-227; *39 GHz Report and Order and Second NPRM*, 12 FCC Rcd. at 18634-36, ¶¶ 70-74; *LMDS Second Report and Order*, 12 FCC Rcd. at 12606-08, ¶¶ 140-145.

[23] *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd. 1411, 1463-93, ¶¶ 124-219 (1994) (*CMRS Second Report and Order*), *recon. pending*.

[24] *See* Local Competition Report, Common Carrier Bureau, Industry Analysis Division, December, 1998, http://www.fcc.gov/ccb/stats/lcomp98.pdf at 1 (*CCB Local Competition Report*).

[25] *Id.* at 2.

[26] *Section 706 Report*, 14 FCC Rcd. at 2425, ¶ 51.

[27] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourth Report*, FCC 99-136 at 11-15 (rel. June 24, 1999) (*Fourth CMRS Competition Report*).

[28] *See id.*, Appendix F at F-2 to F-4.

[29] *See id.*, Appendix F at F-4 to F-8.

GHz and 39 GHz.[30] We further recently observed that, in addition to these providers using terrestrial wireless technology, companies offering or planning to offer two-way broadband services to residential consumers include cable television companies using "cable modems," public utilities within their utility service territories, wireline competitive LECs, and satellite-based service providers.[31] We note that Congress apparently contemplated this variety when it included provisions in the 1996 Act to promote competition to the incumbent LECs from entities that have not traditionally offered telecommunications services.[32]

13. While we are encouraged by certain progress that has been made toward local competition, however, we recognize that these initial steps have thus far had little practical impact in terms of providing most customers with choices of service providers or reducing the incumbent LECs' market power. We are also concerned that the growth of competition has been uneven and appears to be directly benefitting only certain classes of telecommunications service users, for example, business customers in more urbanized areas.[33] The substitution of CMRS for wireline local exchange service similarly appears at present to be only a limited phenomenon.[34] In the *Section 706 Report*, we emphasized that, despite our finding of reasonable and timely deployment of advanced telecommunications capability, we would continue to monitor closely the deployment of broadband capability by providers using all technologies.[35] We believe that a similar posture of vigilance, and of readiness to take action where necessary to remove barriers to competition, is appropriate with respect to the local telecommunications market generally.

14. Consistent with this view, we are considering issues relevant to the development of local competition in several ongoing proceedings. One major set of issues centers around ensuring that Federal and State universal service support is provided in a manner that does not impede the ability of competitive telecommunications carriers to seek customers, especially in rural areas. For example, the provision of

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[30] *See id.*, Appendix F at F-8 to F-11.

[31] *Section 706 Report*, 14 FCC Rcd. at 2426-30, ¶¶ 54-61.

[32] *See, e.g.*, 47 U.S.C. § 621(b)(3) (limiting authority of local franchising authorities to reach or limit the provision of telecommunications services by cable operators or their affiliates); 15 U.S.C. § 79z-5c (authorizing Commission to exempt providers of telecommunications and information services from certain requirements of the Public Utility Holding Company Act of 1935).

[33] *See CCB Local Competition Report* at 2, 5, 6.

[34] *See* Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, *Memorandum Opinion and Order*, 13 FCC Rcd. 6245, 6290, ¶ 73 (1998); Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, *Memorandum Opinion and Order*, FCC 98-271, ¶ 25 (rel. Oct. 13, 1998) (holding that BellSouth had not shown that "broadband PCS service currently competes with the wireline telephone exchange service offered by BellSouth in Louisiana").

[35] *Section 706 Report*, 14 FCC Rcd. at 2402, ¶ 8.

implicit universal service support through geographically averaged incumbent LEC rates artificially lowers the revenues available to competitors who might seek to serve rural areas, and thereby discourages them from serving these areas. We are currently in the process of transitioning from implicit to explicit high cost universal service support.[36] We have also sought comment on the types of services and local calling plans that carriers must offer to qualify for universal service funding.[37]

15. In areas other than universal service, we recently sought comment on the definition and identification of network elements to which incumbent LECs must afford unbundled access in light of the Supreme Court's order vacating and remanding our prior decision on this issue.[38] With respect to wireless service providers in particular, we are considering whether we can and should take actions to facilitate CMRS carriers' offering of "Calling Party Pays" service options[39] and whether to allocate spectrum at 3650-3700 MHz to non-Government radiocommunications service between fixed points.[40] We also will be adopting service rules and auctioning licenses in the 24 GHZ band[41] and the 39 GHz band,[42] which together with the recently completed reauction of licenses in Local Multipoint Distribution Service (LMDS)[43] should promote the development of fixed wireless networks as competitive alternatives to the incumbent LECs'

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[36] *See* Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 8801 (1997), as corrected by *Errata*, CC Docket No. 96-45 (rel. June 4, 1997), *appeal pending sub nom.* Texas Office of Pub. Util. Counsel v. FCC, No. 97-60421 (5th Cir. argued Dec. 1, 1998). We recently reaffirmed our commitment to explicit support and set the framework to have non-rural carriers receive universal service support based on forward-looking economic cost starting January 1, 2000. *See* Federal-State Joint Board on Universal Service, Access Charge Reform, *Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking*, FCC 99-119 (rel. May 28, 1999). *See also* Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 97-160, *Further Notice of Proposed Rulemaking*, FCC 99-120 (rel. May 28, 1999) (seeking comment on proposed input values for forward-looking economic cost model).

[37] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 21252 (1998).

[38] *UNE Further NPRM*, FCC 99-70.

[39] Calling Party Pays Service Option in the Commercial Mobile Radio Services, WT Docket No. 97-207, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 99-137 (adopted June 10, 1999).

[40] Amendment of the Commission's Rules with Regard to the 3650-3700 MHz Government Transfer Band, ET Docket No. 98-237, *Notice of Proposed Rule Making and Order*, 14 FCC Rcd. 1295 (1998).

[41] *See* Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, ET Docket No. 97-99, *Order*, 12 FCC Rcd 3471 (1997), as corrected by Erratum, 12 FCC Rcd 4990 (1997).

[42] *See 39 GHz Report and Order and Second NPRM*, 12 FCC Rcd. 18600; 39 GHz Fact Sheet, Wireless Telecommunications Bureau, <http://www.fcc.gov/wtb/auctions/39ghz/39ghfact.html>.

[43] *See* Local Multipoint Distribution Service Auction Closes, *Public Notice*, DA 99-927 (rel. May 14, 1999).

networks.

16. Another issue arises out of our rules for access to unbundled elements of the incumbent LECs' networks. In the *Local Competition First Report and Order*, we decided to apply the Total Element Long Run Incremental Cost (TELRIC) methodology to the pricing of both interconnection and access to unbundled network elements.[44] We also determined that a carrier may provide telephone service entirely through the use of leased elements of an incumbent's network.[45] We believe that these decisions promote competition by increasing a competitor's options for obtaining the facilities that it needs to provide service under reasonable and nondiscriminatory rates, terms, and conditions. At the same time, however, these rules in combination arguably reduce the incentives for competitors to make the investments and take the other business risks necessary to provide service using their own facilities. Although we do not address this issue here, it is one that we must continue to consider in our ongoing review of how our rules impact the development of competition.

17. In this proceeding, we seek comment and make inquiry in several specific areas relating to the development of competitive networks. Specifically, in a notice of proposed rulemaking, we make proposals and seek comment on issues relating to competitive providers' access to multiple tenant environments, and in a notice of inquiry we explore issues related to access to public rights-of-way and State and local taxation. This effort is complementary to our past actions and other ongoing proceedings described above.

III. DISCUSSION

A. The Competitive Networks of the Future.

18. The most immediate beneficial effect of the introduction of competition into local telecommunications markets, even on a small scale, is to make competitive alternatives available to individual subscribers. As noted above, this goal can be achieved in a number of ways: through resale, leasing of unbundled network elements, or use of a new entrant's own facilities. To date, our efforts to facilitate local competition have generally encompassed all three of these means of entry, both separately and in combination.[46] These efforts have helped eliminate many of the economic inefficiencies that previously characterized local telecommunications markets and have contributed to the early growth of competition in those markets, and we intend to continue enforcing our rules and taking other necessary

[44] *Local Competition First Report and Order*, 11 FCC Rcd. at 15816, ¶¶ 628-629; *see also Iowa Utilities Board*, 119 S.Ct. at 729-33 (upholding Commission's authority to prescribe a pricing methodology).

[45] *Local Competition First Report and Order*, 11 FCC Rcd. at 15666-71, ¶¶ 328-340; *see also Iowa Utilities Board*, 119 S.Ct. at 736 (upholding this decision).

[46] *See Local Competition First Report and Order*, 11 FCC Rcd. 15499; *see also, e.g.*, "Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition," CCBPol 97-9, *Public Notice*, 12 FCC Rcd. 10343 (1997) (seeking comment generally on actions the Commission should take to promote rapid and efficient entry into local exchange markets).

actions to ensure that all three means of entry are available on economically efficient terms.[47] Nonetheless, as discussed above, our broadly directed efforts to date have resulted in only relatively limited competition in many market sectors.[48]

19. In this proceeding, we focus specifically on eliminating certain barriers to facilities-based competition. The major economic obstacle to the development of competitive facilities-based networks, at least if pursued through a traditional wireline model, is the extensive investment necessary to duplicate the existing wireline networks.[49] The incumbent LECs' networks have been built over the course of many years, generally under a regime of rate of return regulation,[50] and have been supported by an elaborate system of explicit and implicit subsidies.[51] Nonetheless, some facilities-based entry strategies show promise of surmounting the competitive advantages inherent in the incumbent LECs' control of in-place facilities by avoiding the need to construct new, costly wireline networks. In particular, fixed wireless systems can often be constructed in less time, at lower cost, and in smaller increments than wireline networks, especially in areas where the costs of wireline links may be especially high.[52] Use of existing facilities that already reach customer premises, such as those controlled by cable television or electric utility companies, may also be an alternative to constructing new wireline networks from scratch. With the exception of access to certain utility facilities under section 224, however, we do not address in this proceeding issues of whether, and the conditions under which, owners of existing networks other than LECs should be required to make access to those networks available to third parties.[53]

20. By focusing in this proceeding on certain actions that can promote facilities-based competition, we believe we can accelerate the development of much broader and more effective competition in local telecommunications markets than exists today. Indeed, a whole system of competitive networks may eventually develop, in which today's incumbent LEC in a given geographic area will become only one of

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[47] *See, e.g., UNE Further NPRM*, FCC 99-70.

[48] *See* para. 13, *supra*.

[49] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 14171, 14175-76, ¶ 7 (1996).

[50] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd. 2873, 2889, ¶ 30 (1989) (noting "[t]he distorted incentives created by rate of return regulation").

[51] *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *First Report and Order*, 12 FCC Rcd. 8776, 8783-85, ¶¶ 9-12 (1997).

[52] *See Fourth CMRS Competition Report*, Appendix F at F-12 to F-14.

[53] *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 98-178, *Memorandum Opinion and Order*, FCC 99-24, ¶¶ 24-30, 60-96 (rel. Feb. 18, 1999) (*AT&T/TCI Order*) (declining to impose open access conditions on merger of TCI into AT&T).

several competitors. This development will not only bring competition for local services, but will fundamentally change the nature of our telecommunications system.

21. The dominant paradigm for the provision of telephone service in the United States today is the connection of every call through the incumbent LECs. Some industry observers believe that competitive LECs today serve less than 3 percent of nationwide switched access lines, and that only about a quarter of these are served through the competitive LEC's own facilities.[54] Because incumbent LECs still serve the vast majority of customers and originate or terminate the vast majority of telephone calls, most competing carriers obtain interconnection to the public switched telephone network through the incumbent LECs. Moreover, when two competitive carriers need to transmit calls between each other, they frequently do so by interconnecting indirectly through the incumbent LECs. Thus, as a practical matter, the incumbent LECs exert bottleneck control over interconnection, an essential input to the carriage of telecommunications.

22. In order for competitive networks to develop, the incumbent LECs' bottleneck control over interconnection must dissipate. As the market matures and the carriers providing services in competition with the incumbent LECs' local exchange offerings grow, we believe these carriers may establish direct routing arrangements with one another, forming a network of networks around the current system. In time, it is likely that the incumbent LECs will cease to be viewed as the presumptive primary providers of interconnection, and indeed they will begin to seek interconnection and other arrangements with their challengers. These circumstances would strengthen the case for substantial deregulation of the incumbent LECs.[55]

23. The current dependence of most carriers on the incumbent LECs for interconnection, and in many instances for other inputs as well, may also be limiting the extent of publicly beneficial innovation for two reasons. First, the incumbent LECs' networks may be technically unable to support certain innovative and advanced service offerings. Competitive networks may have the potential to bring these benefits to American homes and businesses more quickly and more efficiently than can the existing arrangements built around the incumbent LECs.[56] More fundamentally, however, in the absence of facilities-based competition the incumbents may lack incentives to rapidly develop and introduce innovative products. Thus, the growth of competitive networks will not only lead to innovation by the new competitors, but should also spur the incumbent providers to upgrade their systems and offer a broader array of desired

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[54] *See CCB Competition Report* at 19.

[55] We do not here decide specifically what market conditions, or other factors, would establish grounds for any degree of deregulation. For example, even in a competitive market for interconnection, the incumbent LECs might exercise market power over termination that would necessitate some form of regulation. We simply observe that the case for substantial deregulation is stronger to the extent that the market for interconnection becomes competitive.

[56] For example, under some conditions wireless systems in the upper frequency bands, including 24 GHz, 39 GHz, and LMDS spectrum, can be relatively easily used to provide high-speed data services at low cost and to bundle a variety of services into one package. *See Third CMRS Competition Report*, Appendix F at F-11 to F-12.

service options to meet customers' demands. For example, many observers believe that the introduction of fiber rings by CAPs in the 1980s was a central factor in causing the incumbent LECs to adopt this network architecture.

24. In order for competitive facilities-based networks to develop and flourish, several conditions are necessary. First, competitive service providers must have the ability to access their potential customers. If only a limited class of consumers can be accessed by competitive facilities-based providers, then it is unlikely that competition will grow to the point where it will effectively eliminate the incumbent LECs' market power.

25. Second, competitive providers must be free to provide services in the manner that will enable them most efficiently to offer the services, or combinations of services, that consumers desire. We anticipate that the most successful future networks may be those that are most highly functional and flexible. Achieving this functionality and flexibility may involve the use of a variety of transmission technologies. For example, carriers may want to use terrestrial wireless technology in lower spectrum bands or satellite technology to offer customers mobility, but use higher-band terrestrial wireless service or wireline technology for other features, such as broadband interconnectivity, or for transport and termination between cell sites and the public switched network. In order to combine technologies in the most efficient fashion, carriers may seek to acquire different technological capabilities, either through merger and acquisition or through internal development. Thus, some recent mergers have been touted as promoting the incorporation of multiple technologies into particular carriers' network capabilities.[57] Alternatively, independent network providers with different technological specialties may establish cooperative arrangements among themselves. For example, CMRS and upper frequency band fixed wireless service providers could enter into productive relationships not only with each other, but with other alternative providers, including wireline competitive LECs, cable television providers, and public utilities.

26. Many different potential approaches exist to providing services and developing network architectures to serve the local telecommunications market. Demand for high-speed access to the Internet, which was only dimly foreseen when the 1996 Act was passed, may drive many of the competitive offerings. Some competitors may focus only on this market segment, perhaps by providing data-only services using unbundled wireline loops or unlicensed spectrum. Other competitors may choose to offer full service offerings over an integrated Internet Protocol (IP) network. Incumbents may offer new services through overlay networks that share facilities with their existing networks, as Asymmetric Digital Subscriber Line (ADSL) technology is deployed. In order for competitive networks to flourish and convey the greatest benefits to consumers, competitors must be free to introduce different service, architectural, and technological approaches, and the market should determine which of these approaches succeed for different purposes.

[57] *See, e.g., AT&T/TCI Order*, ¶¶ 145-148 (finding that merger of TCI into AT&T would promote public interest by creating entity with greater ability and incentive to compete with incumbent LECs and to deploy advanced services); *Wireless Cable Selling Spectrum to IXCs*, COMMUNICATIONS DAILY, Apr. 30, 1999 at 2-3 (discussing purchases of wireless cable operators by telecommunications service providers).

27. Our intent, broadly stated, is to implement policies that will best facilitate the efficient development of competitive networks. In addition to ensuring that our own rules and practices do not unnecessarily inhibit carriers from developing competitive networks, facilitating competitive networks may in some circumstances require us to take proactive measures to relieve barriers to competition created by third parties. In this item, we make proposals and seek comment on several possible actions, and initiate an inquiry into other issues, all of which are related to achieving our procompetitive goals.

B. Access to Buildings and Rooftops.

28. In this section, we address issues that bear specifically on the availability of facilities-based telecommunications competition to customers in multiple tenant environments, including, for example, apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities. We begin with an overview of the problem of access to multiple tenant environments generally. We then propose that, under section 224 of the Communications Act, utilities must permit access to rooftop and similar rights-of-way and riser conduit that they "own or control" in multiple tenant environments, and we request comment on issues relating to the implementation of this requirement, including the circumstances under which utility ownership or control might be found to exist. We also ask whether we should require incumbent LECs to make available unbundled access to riser cable and wiring that they control within multiple tenant environments pursuant to section 251(c)(3) of the Act. Finally, we request comment on other building access issues, including the legal and policy issues raised by a possible requirement that building owners who allow any telecommunications carrier access to facilities that they control make comparable access available to other carriers on a nondiscriminatory basis.

1. Overview.

29. Access by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications markets. As of 1990, approximately 28 percent of all housing units nationwide were located in multiple dwelling units, and that percentage is likely growing.[58] In addition, many businesses, especially small businesses, are located in multiple tenant environments. If a significant portion of these housing units and businesses is not accessible to competing providers, that fact could seriously detract from local competition in general and from the availability of competitive services to "all Americans."[59]

30. In order to serve customers in multiple tenant environments, telecommunications carriers typically require a means of transporting signals across facilities located within the building or on the landowner's premises to individual units. In the case of a reseller, these signals are typically transported

[58] Telecommunications Services Inside Wiring, CS Docket No. 95-184, Implementation of The Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 3659 at 3679, ¶ 36, 3778-82, ¶¶ 258-271 (1997) (*Inside Wiring Report and Order and Second Further NPRM*), *recon. pending, appeal docketed sub nom.* Charter Communications, Inc. v. FCC, No. 97-4120 (8th Cir. 1997).

[59] *See Section 706 Report*, 14 FCC Rcd. at 2450-51, ¶ 104.

across the underlying carrier's facilities as part of the resale arrangement. Similarly, a carrier that utilizes the incumbent LEC's local loop and network interface device (NID) as unbundled network elements will obtain access to in-building facilities pursuant to its agreement with the underlying carrier and the underlying carrier's arrangement with the building owner. A carrier that transports signals to multiple tenant premises by means of its own facilities, however, must then either install its own equipment on the premises or obtain access to existing facilities in order to transport signals to individual customers' units.[60] 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 LEC, the building owner, or both.[61]

31. In several proceedings before the Commission, a number of parties have argued that both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises. For example, WinStar's Vice President for Real Estate has stated in an affidavit that "many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other" charges that are not based on their costs and are not imposed on incumbent carriers.[62] WinStar cites as an example a building manager who demanded a rooftop access fee of $1000 per month and a $100 per month fee for each hookup in the building, which fees in combination would amount to over $100,000 per year for a competitive provider seeking to serve the building.[63] OpTel

[60] We note that signals could, in theory, be transported within multiple tenant environments by means of wireless technology, perhaps using unlicensed spectrum. We are not aware, however, that such wireless transport is in fact occurring on a significant scale. Furthermore, even wireless in-building transport would presumably require the installation of some facilities.

[61] *See* 47 C.F.R. § 68.3 (defining several different options by which the demarcation point between telephone company facilities and subscriber facilities may be determined). The rules for determining control over telephone wiring are to be distinguished from the cable inside wiring rules, which are used to determine the disposition of cable inside wiring when a provider no longer has a legally enforceable right to remain in a building, and which are based on different definitions and principles. *See* para. 68, *infra.*

[62] Telecommunications Services Inside Wiring, CS Docket No. 95-184, Comments of WinStar Communications, Inc. at Exhibit III (filed Aug. 5, 1997) (WinStar *Inside Wiring* Comments) (attaching chart detailing practices encountered in various geographic markets); *see also, e.g.,* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146 (Section 706 Inquiry), Comments of the Association for Local Telecommunications Services at 19 (filed Sept. 14, 1998) (building owners often "insist upon very high non-recurring fees or some sort of free reduced service to [Themselves]"); Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCBPol 97-9, Comments of Teligent, L.L.C. at 10 (filed Aug. 11, 1997) (Teligent CCB Inquiry Comments) (describing riser management company's brochure promoting riser as a source of revenue) .

[63] Section 706 Inquiry, Comments of WinStar Communications, Inc. at 12-13 (filed Sept. 14, 1998) (citing comments filed by Teligent, Inc., with Florida PSC); *see also* U.S. House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer Protection, Hearing on Access to Buildings and Facilities by Telecommunications Providers, May 13, 1999 (May 13, 1999 House

states that it has "lodged numerous complaints" regarding the slowness of the incumbent LEC in Houston and Dallas, Texas, to establish demarcation points.[64] At the same time, we are aware that competitive telecommunications carriers have successfully negotiated building access agreements in many instances,[65] and we recognize that building owners may have an incentive to offer high quality telecommunications services and choices of providers in order to attract tenants. On the other hand, long-term tenant leases and high relocation costs may prevent the market from effectively conveying tenants' preferences to building owners.[66] We request parties, including competing carriers, building owners, incumbent LECs, and customers, to provide additional evidence of their experiences regarding the provision of telecommunications services in multiple tenant environments.[67]

32. The Commission has a long history of concern that all customers have access to their choice of communications service providers in competitive markets. For example, in the 1980s we imposed equal access obligations on LECs, including presubscription and dial-around requirements, in order to ensure consumer choice of interexchange service providers.[68] Congress subsequently extended the principle of equal access to operator services, requiring that every aggregator of operator services allow consumers to

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Telecommunications Subcommittee Hearing), Written Testimony of John D. Windhausen, Jr., President, Association for Local Telecommunications Services at 2-4 (Windhausen House Telecommunications Subcommittee Hearing Testimony) (citing several examples of charges and practices ALTS considers unreasonable); May 13, 1999 House Telecommunications Subcommittee Hearing, Written Testimony of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc. at 2-3 (Rouhana House Telecommunications Subcommittee Hearing Testimony ($50,000 charge upon signing of access contract plus $1200 per month).

[64] Section 706 Inquiry, Comments of OpTel, Inc. at 3 (filed Sept. 14, 1998) (OpTel Section 706 Inquiry Comments); *see also id*. at 4-6 (alleging that demarcation point practices of other incumbent LECs unnecessarily complicate access); Section 706 Inquiry, Comments of Allegiance Telecom, Inc. at 8 (filed Sept. 14, 1998) (discussing formal and informal exclusive access arrangements); Section 706 Inquiry, Reply Comments of KMC Telecom, Inc. at 4-5 (filed Oct. 8, 1998) (similar).

[65] *See, e.g.*, Rouhana House Telecommunications Subcommittee Hearing Testimony at 2 (noting that WinStar has negotiated access rights to 4800 buildings nationwide).

[66] *Cf.* Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 474-76 (1992) (recognizing "lock-in" effect created when customers encounter high costs to switch suppliers).

[67] We note our previous conclusion that the record in the *Inside Wiring* proceeding did not provide a sufficient basis to address issues of access requirements for either video or telephony service providers. *Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3742-43, ¶ 178. We believe, based on the comments discussed above, that it is now appropriate to initiate a proceeding that will establish a more complete factual record regarding the current building access situation in the telecommunications marketplace and provide a basis for us to take appropriate action, if any is shown to be necessary.

[68] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, *Report and Order*, 100 FCC2d 860, 865-80, ¶¶ 14-65 (1983).

access the operator services provider of their choice at no additional charge.[69] In areas other than telecommunications, we have established rules for the disposition of cable inside wiring that enhance subscribers' ability to choose alternative providers of video service.[70] In addition, we have preempted zoning and similar regulations that materially limit transmission or reception by satellite earth station antennas, or impose more than minimal costs on users of such antennas, unless a regulation is demonstrated to be reasonable.[71]

33. Several provisions of the 1996 Act evince a similar Congressional concern that customers have the ability to choose from among competing providers of communications services. For example, the interconnection, unbundled access, and resale obligations of section 251, as well as the provisions for access to pole attachments in section 224, are intended to ensure that incumbent LECs will not be able to obstruct their potential competitors from offering service to customers.[72] Section 207 of the 1996 Act directs the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through over-the-air reception devices, and we have implemented that provision by issuing regulations that apply to all entities, including homeowner associations and landlords.[73] Section 706 establishes a policy and directs the Commission to undertake actions to ensure that advanced telecommunications capability is deployed on a reasonable and timely basis to all Americans. In addition, section 332(c)(7) of the Communications Act shields providers of personal wireless services from prohibitory or unreasonably discriminatory regulation of the construction and placement of their service facilities, thereby promoting the ability of all such carriers to serve customers at all locations.[74] This concern is generally reflected in the preamble to the 1996 Act, which emphasizes that the purpose of the 1996 Act is to accelerate the competitive deployment of advanced services "to all Americans."[75] We further note that on May 13, 1999, the Subcommittee on Telecommunications, Trade, and Consumer

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[69] 47 U.S.C. § 226(c)(1)(B),(C); *see also* 47 C.F.R. §§ 64.703(b), 64.705(b). We have since forborne from enforcing these requirements against aggregators of CMRS operator services. *See PCIA Forbearance Order*, ¶¶ 76-80.

[70] 47 C.F.R. §§ 76.800-76.806.

[71] 47 C.F.R. § 25.104.

[72] 47 U.S.C. § 251(c)(2)-(4); *see also* 47 U.S.C. § 251(b) (imposing resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation obligations on all LECs).

[73] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 19276 (1996); Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd. 23874 (1998) (*OTARD Second Report and Order*), *recon. pending, appeal pending sub nom.* Building Owners and Managers Association International v. FCC, No. 98-1610 (D.C. Cir. docketed Dec. 23, 1998).

[74] 47 U.S.C. § 332(c)(7).

[75] 1996 Conference Report at 1.

Protection of the United States House of Representatives Committee on Commerce held an oversight hearing specifically to address issues regarding access to buildings and facilities by telecommunications service providers.

34. The types of access that a competing telecommunications carrier needs in order to provide telecommunications service within multiple tenant environments may depend in part upon the technology a provider uses, the design of its network, and the nature of its service offerings. In general, incumbent LECs provide service to multiple-unit buildings by connecting their networks to a NID, which is typically located in the basement or on the ground floor. Signals are transported from the NID to locations on each story of the building by means of riser cable, and to individual units by inside wire. In order to reach individual units, competing carriers typically need access either to the existing riser cable and inside wiring, or to riser conduit and other building space in which to place their own facilities, or both. Although use of existing cable and inside wiring is typically less expensive and less disruptive, the existing facilities in many buildings may be technically inadequate to support some providers' services. In addition, providers using wireless technology may need access to rooftops on which to place their antennas, and to conduit for laying cable to carry signals from the antenna either to the NID or directly to individual units.[76] We seek comment generally both on competing providers' preferred engineering arrangements within multiple tenant environments and on the types of arrangements that they can feasibly employ, as well as on the access requirements attendant upon each form of engineering arrangement. We further seek comment on whether different engineering issues are implicated in accessing multiple tenant environments that are not contained within a single structure, such as campuses and manufactured housing communities.

35. In order best to accommodate the varying access needs of different competing telecommunications service providers, we address herein several potential requirements to ensure that incumbent LECs and property owners do not unreasonably obstruct the availability of facilities-based competitive telecommunications services to customers located in multiple tenant environments. We ask commenters to address specifically how each potential requirement meets or fails to meet the access needs of different competing providers.

2. Access Under Section 224.

36. Pursuant to section 224 of the Communications Act, utilities, including LECs, must provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control.[77] In addition, section 224 requires the Commission to

[76] According to at least one provider of fixed wireless services, existing inside wire in the top floors of a building is typically too thin for high capacity traffic to be carried directly from a rooftop antenna to facilities located on the upper floors through that wiring. *See* WinStar *Inside Wiring* Comments at 7.

[77] 47 U.S.C. § 224(f)(1). A "utility" is defined as any person who is a LEC or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications, except that the term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State. 47 U.S.C. § 224(a)(1). An electric utility is permitted to deny access to its facilities on a nondiscriminatory basis for reasons of insufficient capacity,

regulate the rates, terms, and conditions for attachments to poles, ducts, conduits, or rights-of-way to ensure that such rates, terms, and conditions are just and reasonable, except where such matters are regulated by a State.[78] The right of access granted under section 224 includes access for facilities used to provide wireless telecommunications services.[79] The rights and obligations created under section 224 run between utilities, on the one hand, and cable television systems and telecommunications carriers, on the other hand.

37. In the *Local Competition First Report and Order*, we held that section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under section 251(c)(6).[80] In this regard, we observed that Congressional intent was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, not to grant access to every piece of equipment or real property owned or controlled by the utility.[81] We further observed that an overly broad interpretation of section 224 could impact the owners and managers of small buildings, as well as small incumbent LECs, by requiring additional resources to effectively control and monitor rights-of-way located on their properties.[82]

38. WinStar petitioned for clarification or reconsideration of this holding, requesting a ruling that a LEC must allow telecommunications carriers access pursuant to section 224 to rooftop facilities and

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safety, reliability, and general engineering purposes. 47 U.S.C. § 224(f)(2). *See also* 47 U.S.C. § 251(b)(4) (requiring LECs to comply with section 224); 47 U.S.C. § 271(c)(2)(B)(iii) (requiring Bell Operating Companies to comply with section 224 as condition for obtaining authorization to provide interLATA services).

[78] 47 U.S.C. § 224(b),(c). The principles governing the Commission's rate regulation of pole attachments utilized to provide telecommunications services beginning on February 8, 2001, are set out in section 224(e). Separate pricing principles to be used for both cable and telecommunications services until February 8, 2001, and to be used thereafter for pole attachments utilized by a cable television system not providing telecommunications service, are set out in section 224(d).

[79] Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777, 6798-99, ¶¶ 39-42 (1998) (*Telecommunications Pole Attachment Pricing Report and Order*), *recon. pending*; *see also Local Competition First Report and Order*, 11 FCC Rcd. at 16085, ¶ 1186 ("[t]he statute does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated").

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

[81] *Id.* at 16085, ¶ 1185.

[82] *Id*. at 16084, ¶ 1185.

related riser conduits that the LEC owns or controls.[83] In particular, WinStar argues that for wireless local exchange carriers, "access to roofs and risers *by definition* is access to *the* critical rights-of-way," and therefore that failure to afford such access would amount to unreasonable discrimination against providers using alternative technologies.[84] WinStar further argues that because some incumbent LECs rely on microwave transmission facilities as an integral part of their transmission and distribution networks, failure to grant relief would enable these incumbents to favor their own services in a blatantly discriminatory fashion.[85] Six parties filed oppositions or comments addressing the WinStar Petition, and three parties filed replies.[86]

39. Based on the WinStar Petition and the record compiled in response to that Petition, it appears that the obligations of utilities under section 224 encompass access to rights-of-way, conduit, and risers on private property, including end user premises in multiple tenant environments, that utilities own or control. Similarly, section 224 appears to include locations on a utility's own property that are used by the utility in the manner of a right-of-way in connection with the utility's distribution network. Depending on the definition of "ownership" or "control," however, these interpretations may raise practical and constitutional concerns that are not fully addressed in the record. We therefore seek further comment on the issues raised in the WinStar Petition.

40. Much of the opposition to the WinStar petition is directed at refuting the proposition that section 224 encompasses a right of access to all real property owned or controlled by a utility. These commenters argue that the simple fact that a provider may find it convenient to utilize a piece of utility property in constructing its network does not justify broadening the scope of section 224 to include that property.[87] By its terms, section 224 governs attachments to "pole[s], duct[s], conduit[s], or right[s]-of-way."[88] Unless utility property falls within this definition, therefore, it is not within the plain language of

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[83] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996) (WinStar Petition).

[84] *Id.* at 6-7.

[85] *Id.* at 8.

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

[87] *See, e.g.*, Duquesne Opposition at 3-6; EEI/UTC Comments at 2-3; Sprint Opposition at 22-23; USTA Opposition at 42-44*; see also* AEPSC *et al.* Reply at 19 (contending that WinStar's argument, if taken to its logical conclusion, "would permit a telecommunications carrier to site its facilities in the lobby of a utility's headquarters").

[88] 47 U.S.C. § 224(a)(4).

section 224. Thus, we held in the *Local Competition First Report and Order* that section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a transmission tower.[89] Nothing in the present record persuades us to reexamine this holding.[90] Thus, we tentatively conclude that we should not reconsider our prior determination that section 224 does not confer a general right of access to utility property, and we seek comment on this tentative conclusion.

41. At the same time, it appears that where a rooftop or other location does constitute a right-of-way owned or controlled by a utility, section 224 requires the utility to permit cable television systems and telecommunications service providers nondiscriminatory access to such rights-of-way under just and reasonable rates, terms, and conditions. This situation may occur, for example, where a utility has obtained the right to place an antenna or other facility on a roof, including the roof of an end user's premises in a multiple tenant environment, in connection with its distribution of telecommunications or utility services, and the utility exercises the requisite ownership or control. Contrary to the arguments of some commenters,[91] section 224 does not on its face limit the definition of "right-of-way" to property used for cabling or similar equipment. Similarly, unlike section 253, nothing in section 224 limits its application to "public" rights-of-way.[92] Indeed, the inclusion within section 224 of rights-of-way that a utility "controls," as well as "owns," suggests that rights-of-way over private property owned by a third party were intended to be included. Thus, so long as a utility uses any pole, duct, conduit, or right-of-way for wire communications, we tentatively conclude that all rights-of-way that it owns or controls, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used, are subject to section 224.[93]

42. We tentatively conclude that the definition of "right-of-way" as including a publicly or privately granted right to place a transmit or receive antenna on public or private premises is consistent with the common usage of the term. A right-of-way over another party's property has been understood in the case law as equivalent to an easement; that is, a right to use or pass over property of another.[94] We

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

[90] Indeed, WinStar expressly disclaims that it is seeking "access to every piece of equipment or real property owned or controlled by the utility." WinStar Opposition at 9.

[91] *See* AEPSC *et al.* Opposition at 8; Ameritech Opposition at 43; Duquesne Opposition at 5; Duquesne Reply at 2-3.

[92] *Compare* 47 U.S.C. § 253(c) (governing State or local management of public rights-of-way).

[93] *See Local Competition First Report and Order*, 11 FCC Rcd. at 16080, ¶ 1173 ("use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications").

[94] *See, e.g.*, Great Northern Ry. Co. v. United States, 315 U.S. 262, 276-79 (1942) (construing rights-of-way granted by the 1875 Right of Way Act to constitute easements); Joy v. City of Saint Louis, 138 U.S. 1, 44 (1890) (*Joy*); Board of County Supervisors of Prince William County v. United States, 48 F.3d 520, 527 (Fed. Cir.) ("'Rights-of-way' are another term for easements"), *cert. denied*, 116 S.Ct. 61 (1995).

believe that a right to place an antenna on private property fits comfortably within this definition. We seek comment on this analysis.

43. We also tentatively conclude that section 224 encompasses a utility's obligation to provide cable television systems and telecommunications service providers with access to property that it owns which it uses as part of its distribution network. In interpreting section 224(f), an arbitration panel of the Michigan Public Service Commission has held that land used for distribution facilities would be considered a "right-of-way" even if it were held by the utility in fee simple absolute.[95] We believe this holding is consistent with the common use of the term "right-of-way" to denote land that is used for a right-of-way.[96] Although a "right-of-way" can be understood in some contexts as limited to a right to use property belonging to another,[97] we tentatively conclude that the broader definition, which is equally consistent with common usage, better effectuates the procompetitive intent of this provision. We further tentatively conclude that this definition is more consistent with the language of section 224, which encompasses rights-of-way that a utility "owns" as well as "controls." Thus, where a utility uses its own property in a manner equivalent to that for which it might obtain a right-of-way from a private landowner, we tentatively conclude that it should be considered to own or control a right-of-way within the meaning of section 224. We seek comment on this tentative conclusion, as well as on the test for determining when a utility is using its own property in a manner equivalent to a right-of-way.

44. In addition, we tentatively conclude that the obligations of utilities under section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility. First, we believe that riser conduit used by a utility could reasonably be interpreted as a right-of-way. In addition, section 224 on its face provides broadly for a right of access to "conduit," without any limitation on the term. Although legislative history dating from 1978, when the Pole Attachments Act was originally enacted, suggests that conduit consists of "underground reinforced passages,"[98] we are not currently persuaded that this legislative history legally limits the plain language of the statute.[99] Moreover, even if, as has been argued, electric utilities rarely own or control riser,[100] this fact does not necessarily limit the application of section 224 to any situations where a utility does exercise such ownership or control. We request comment on this analysis. In addition, we note that section 1.1402(i) of our rules currently defines

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[95] AT&T Communications of Michigan, Inc., Case No. U-11151, *Decision of Arbitration Panel* at 50-52 (Mich. P.S.C. Oct. 28, 1996); *see also* AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Inter-Connection Rates, Terms and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio, Case No. 96-752-TP-ARB, *Arbitration Panel Report* at 52-53).

[96] *See Joy*, 138 U.S. at 44; Black's Law Dictionary at 1326 (6th ed. 1990).

[97] *See* Ameritech Opposition at 42-43; AEPSC *et al.* Reply at 18.

[98] *See* AEPSC *et al.* Opposition at 7, *citing* S.Rep. No. 580, 95th Cong., 1st Sess. at 26.

[99] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., *et al*., 467 U.S. 837 (1984).

[100] *See* EEI/UTC Comments at 3.

conduit as consisting of pipe "placed in the ground."[101] We seek comment regarding whether this definition should be amended.

45. At the same time, we are aware that an interpretation of section 224 as including rights-of-way and conduits on end user premises may raise difficult issues of implementation. In particular, although section 224 on its face imposes obligations only on utilities, we believe it is important to consider whether application of that provision would have an impact on underlying property owners. We therefore seek comment on several issues relating to the implementation of our interpretation of section 224. First, we seek comment regarding the circumstances under which a utility may be considered to own or control a right-of-way or conduit within the meaning of section 224. For example, a utility might be considered to "control" a right-of-way when it has actually placed a distribution facility on a piece of property with the agreement of the owner, when it has obtained a right from the owner to use a portion of its property in that manner, or when it has taken other action to secure the right to place distribution facilities, such as by exercising the power of eminent domain. WinStar further argues that a utility might own or control a right-of-way, and thus may be required to permit access, even where it has chosen not to use that right-of-way for distribution facilities.[102] Alternatively, utility control might be construed more narrowly, for example by requiring some specific cession of rights by the underlying property owner. We seek comment on these and other possible conditions for establishing utility ownership or control of a right-of-way, as well as on how such ownership or control may be ascertained by a competitive service provider. Similarly, we seek comment regarding what circumstances would establish utility ownership or control of riser conduit for purposes of section 224.

46. Commenters should also consider how to measure the extent of the right-of-way that a utility might be considered to own or control under specific circumstances. For instance, assuming a utility leases a defined amount of space on a roof under circumstances that establish ownership or control, and its antenna structure entirely fills that space, we seek comment regarding the extent of the utility's obligations. Alternatively, we seek comment regarding a utility's obligations if it simply contracts for the right to place a facility on a roof, without any defined space. We also request comment on the scope of any ownership or control a utility may establish by, for example, running cable through riser conduit. In this regard, we note that a utility is required to exercise its authority of eminent domain where necessary to expand an existing right-of-way in order to accommodate a request for access.[103] We request comment as to whether any similar principle applies where a utility has obtained a right-of-way by agreement with the property owner, rather than by the exercise of eminent domain.

47. With regard to these questions generally, we note an earlier holding that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."[104] Commenters

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[101] 47 C.F.R. § 1.1402(i).

[102] WinStar Petition at 8 n.5; *see also* WinStar Opposition at 6 n.7, 7-8.

[103] *Local Competition First Report and Order*, 11 FCC Rcd. at 16083, ¶ 1181.

[104] *Id.* at 16082, ¶ 1179.

should consider whether, in light of this principle, it is useful or appropriate for us to offer any guidance regarding the existence and scope of ownership or control under particular circumstances, or whether we should defer entirely to state law. Commenters should also consider whether any interpretation of utility ownership or control might result in the taking of a building owner's property without just compensation within the meaning of the Fifth Amendment to the United States Constitution,[105] and whether any such construction should therefore be avoided.[106] Similarly, commenters should consider whether an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners, including small building owners, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties. In addition, commenters should consider whether any construction would effectively limit the ability of property owners to enter into exclusive service contracts with telecommunications service providers or multichanel video programming distributors (MVPDs), and, if so, whether this result is appropriate.[107] We also note that our rules governing the disposition of cable home run wiring apply only where the incumbent MVPD no longer has a legally enforceable right to remain on the premises.[108] We seek comment on whether and how our proposed interpretation of section 224, under any definition of "own" or "control", might affect the application of the rules governing home run wiring by expanding a cable television system's ability to remain on multiple unit premises, and on what action we should take to account for any such effects.

48. Finally, section 224(c) of the Act provides that the Commission shall not have jurisdiction with respect to rates, terms, and conditions of access to pole attachments if a State regulates such matters and certifies to the Commission that it does so and that it meets certain conditions.[109] We request comment as to whether any additional certification or other Commission action is necessary to ascertain whether a

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[105] U.S. Const., Amendment V.

[106] *Cf.* Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992) (narrowly construing section 621(a)(2) of the Communications Act, which grants cable companies access to dedicated easements, in order to avoid constitutional questions), *cert. denied*, 506 U.S. 862 (1992); *see also, e.g.*, TCI of North Dakota v. Schriock Holding Company, 11 F.3d 812, 814-15 (8th Cir. 1993) (similar); Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993) (similar); Cable Investments Inc. v. Woolley, 867 F.2d 151, 159-60 (3rd Cir. 1989) (similar). We note that in an analogous situation, we have held that the Fifth Amendment did not prevent us from requiring a building owner to allow a tenant to place an antenna on property that the tenant controls. *See OTARD Second Report and Order*, 13 FCC Rcd. at 23882-85, ¶¶ 19-23.

[107] *See* para.61, *infra*.

[108] *See* 47 C.F.R. § 76.804.

[109] Specifically, a State must certify that in regulating pole attachments it "has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services." 47 U.S.C. § 224(c)(2)(B). We have determined that under section 224(c), a State need not make any certification to the Commission in order to assert exclusive jurisdiction over access to pole attachments, as opposed to the rates, terms, and conditions of such access. *See Local Competition First Report and Order*, 11 FCC Rcd. at 16107, ¶ 1240.

State is regulating the rates, terms, and conditions of access to facilities and rights-of-way on multiple unit premises within the meaning of this provision.[110]

3. Access to Unbundled Network Elements.

49. Pursuant to section 251(c)(3) of the Communications Act, an incumbent LEC must make available to any requesting carrier nondiscriminatory access to network elements on an unbundled basis at any technically feasible point under just, reasonable, and nondiscriminatory rates, terms, and conditions.[111] In determining what network elements should be made available under this provision, the Commission is directed to consider, at a minimum, (a) whether access to such network elements as are proprietary in nature is necessary, and (b) whether the failure to provide access would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[112] In the *Local Competition First Report and Order*, we required incumbent LECs to make available pursuant to these provisions unbundled access to the NID in multi-tenant buildings, finding that a competitor that deploys its own loops must have access to this facility in order to provide service and that such access is technically feasible.[113] This decision, however, did not mandate unbundled access to subloop facilities located on multiple tenant premises.

50. The Supreme Court in *Iowa Utilities Board* vacated our rule identifying the minimum set of network elements that incumbent LECs must make available on an unbundled basis, holding that we had

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[110] In addition to requiring nondiscriminatory access and directing the Commission to ensure by regulation that the rates, terms, and conditions for pole attachments are just and reasonable, section 224 directs the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers when the parties fail to resolve a dispute over such charges. 47 U.S.C. § 224(e). In the *Telecommunications Pole Attachment Pricing Report and Order*, we determined that the record did not permit us to establish detailed standards for the pricing of access to rights-of-way, and accordingly that we would consider allegations of unjust, unreasonable, or discriminatory rates, terms, and conditions or denials of access on a case-by-case basis. *Telecommunications Pole Attachment Pricing Report and Order*, 13 FCC Rcd. at 6832, ¶¶ 120-121. Teligent has petitioned for reconsideration of this decision, requesting that specific guidelines be developed. Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, Petition for Reconsideration and Clarification of Teligent, Inc. (filed Apr. 13, 1998). We do not request comments on this issue here. Similarly, we do not here request comment regarding any formula for determining the pricing of access to riser conduit. *See Telecommunications Pole Attachment Pricing Report and Order*, 13 FCC Rcd. at 6830, ¶ 116 (establishing formula for determining maximum price for access to conduit under section 224(e)).

[111] 47 U.S.C. § 251(c)(3); *see also* 47 U.S.C. § 252(d)(1) (establishing basis for State commissions to determine just and reasonable rates in arbitration proceedings).

[112] 47 U.S.C. § 251(d)(2).

[113] *Local Competition First Report and Order*, 11 FCC Rcd. at 15697-99, ¶¶ 392-396; *see* 47 C.F.R. § 51.319(b) (1997).

not adequately considered the "necessary" and "impair" standards of section 251(d)(2).[114] Following this decision, we requested further public comment regarding how sections 251(c)(3) and 251(d)(2) should be applied.[115] In addition to requesting comment on how the "necessary" and "impair" standards should be interpreted in light of the Supreme Court's decision,[116] we also asked commenters to apply their proposed criteria to the seven network elements that had previously been identified in the rule that the Supreme Court had vacated, as well as to any other network elements they contended should be unbundled.[117] We specifically suggested that commenters might want to address whether we should require unbundling of facilities owned by the incumbent LEC on the end user's side of the demarcation point, as well as sub-loop unbundling at the remote terminal or at other points within the incumbent LEC's network.[118]

51. We seek comment on the potential treatment of in-building cable and wiring owned or controlled by an incumbent LEC as an unbundled network element under section 251(c)(3). We will establish criteria for applying the "impair" and "necessary" standards of section 251(d)(2), and apply those criteria to the previously identified minimum set of network elements, including the NID, based on the record compiled in response to our recent Further Notice of Proposed Rulemaking. We request comment on whether unbundled access to riser cable and wiring within multiple tenant environments is technically feasible.[119] We note that facilities-based competitive LECs have advanced arguments that, in many instances, it is difficult for them to provide service without access to these facilities,[120] and that at least one State commission has required incumbent LECs to unbundle house and riser cable within multiple tenant environments.[121] We seek comment, in particular, from a technical standpoint, on whether sharing of wire may lead to problems due to insufficient power or electromagnetic incompatibility. Commenters should address whether any obligation to allow unbundled access to cable and wiring should be limited, or whether

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[114] *Iowa Utilities Board*, 119 S.Ct. at 734-36.

[115] *UNE Further NPRM*, FCC 99-70.

[116] *Id.* at ¶¶ 17-28.

[117] *Id.* at ¶ 33.

[118] *Id.* We note that prior to the Supreme Court's decision, we requested comment on whether incumbent LECs should be required under section 251(c) to provide sub-loop unbundling and permit collocation at the remote terminal, and we tentatively concluded that such requirements should be imposed. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012, 24086-88, ¶¶ 173-176 (1998).

[119] *Cf. Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3781-82, ¶¶ 270-271 (seeking comment on technical feasibility of sharing wire between two video service providers).

[120] *See, e.g.*, Teligent CCB Inquiry Comments at 22-24; Section 706 Inquiry, Reply Comments of WinStar Communications, Inc. at 9-10 (filed Oct. 8, 1998) (WinStar Section 706 Inquiry Reply Comments).

[121] *See* Joint Complaint of AT&T Communications of New York, Case 95-C-0657, *Opinion and Order in Phase 2*, Opinion No. 97-19, 1997 N.Y. PUC LEXIS 709 at *107-26 (N.Y.P.S.C. Dec. 22, 1997).

any additional rules should be adopted, to avoid these problems.[122] We also seek comment regarding how this network element should be defined, whether any other facilities controlled by incumbent LECs within multiple tenant environments should be included, whether and to what extent these facilities must be unbundled from each other, and any other issues relating to the implementation of this potential requirement. For example, commenters may wish to address whether, in addition to or instead of the network unbundling obligation discussed above, we should require incumbent LECs to permit unbundled access to a remote terminal or other point outside the walls of a multiple tenant building. Commenters should consider to what extent alternative proposals would satisfy the needs of all classes of competing providers.[123]

4. Nondiscriminatory Access to Facilities Controlled by the Premises Owner.

52. The potential actions discussed above under sections 224 and 251(c)(3) would help ensure that utilities, including LECs, provide competitive telecommunications carriers with reasonable and nondiscriminatory access to rights-of-way and facilities in multiple tenant premises that they own or control. These provisions, however, do not provide access to areas or facilities controlled by the premises owner.[124] In the *Inside Wiring Report and Order and Second Further NPRM*, we observed that nondiscriminatory access to facilities for video and telephony service providers would enhance competition.[125] We declined, however, to adopt a Federal mandatory access requirement, finding that the record in that proceeding did not provide a sufficient basis for addressing the issues.[126]

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[122] If radiofrequency signals are applied to the wiring, the systems must comply with the standards contained in Part 15 of the Commission's rules. See 47 C.F.R. Part 15, esp. §§ 15.107 and 15.109(e).

[123] We note that the issue of whether to unbundle facilities owned by the incumbent LEC on the end user's side of the network demarcation point under section 251(c)(3) is pending in the *UNE Further NPRM*, FCC 99-70. To the extent commenters have previously addressed the unbundling of in-building cable and wiring in their Comments and Reply Comments on the *UNE Further NPRM*, they may incorporate those pleadings by reference in this proceeding. Commenters should supplement these pleadings as appropriate to address the more specific questions posed herein. We note that the issue of whether to unbundle facilities owned by the incumbent LEC on the end user's side of the network demarcation point under section 251(c)(3) is pending in the *UNE Further NPRM*, FCC 99-70.

[124] We note that we are considering in another proceeding certain issues relating to the determination of the demarcation point between facilities controlled by the telephone company and by the property owner under Part 68, and that we request comment below regarding how the definition of the demarcation point affects competitive access and whether we should take action to address any such impact. *See* paras. 65-67, *infra*. For purposes of this section, we assume that control over facilities will be determined according to existing law, and we seek comment on whether building owners should be subject to obligations regarding whatever facilities they may control on any particular premises under such law.

[125] *Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3742, ¶ 178.

[126] *Id.*

53. Consistent with our statement in the *Inside Wiring Report and Order and Second Further NPRM*, we now seek comment on whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions. In light of the information discussed above that a number of building owners may be imposing unreasonable and discriminatory charges on competitive carriers,[127] we seek comment on whether adoption of this principle may be necessary to ensure that consumers in multiple tenant environments have the ability to access the service provider of their choice. We also seek comment on whether there are circumstances in which exclusive contracts may promote competition and serve the public interest (*e.g.*, where the service provider lacks market power or when the period of exclusivity is reasonably related to the time needed for the provider to recoup its investment in the property).[128]

54. We note that several States have enacted legislation or taken regulatory action to prevent building owners from discriminating or demanding unreasonable payments or conditions with respect to access by telecommunications service providers.[129] Furthermore, the National Association of Regulatory Utility Commissioners (NARUC) has resolved that it "supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications providers in multi-tenant buildings," and that it "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider."[130] We seek comment on the effectiveness of existing State statutes and regulations governing building access. Furthermore, we note that the Building Owners and Managers Association, International (BOMA) has stated that it offers its members model license agreements that do not discriminate between incumbent and competitive providers.[131]

55. In addition to continuing to work with State and local governments, industry, and building owners, we seek comment here on the necessity and prospects for adopting a national nondiscriminatory access requirement. If we were to consider such a national requirement, we seek comment on how it could

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[127] *See* para. 31, *supra.*

[128] *See* para. 61, *infra*.

[129] *See* Conn. Gen. Stats. § 16-2471; Tex. Util. Code § 54.259; Commission'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 (Pub. Util. Comm. of Ohio Sept. 29, 1994). A number of other States have similar rules for providers of video services. *See Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3744, ¶ 182.

[130] "Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers" (adopted July 29, 1998).

[131] May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Brent W. Bitz, Executive Vice President, Charles E. Smith Commercial Realty L.P. at 10.

be tailored to ensure that consumers in all parts of the country will in fact have a choice of competitive service providers without infringing on the rights of property owners and the authority of other regulating jurisdictions.

56. Specifically, we seek comment on whether the imposition of a nondiscrimination requirement on building owners would be within our statutory authority. First, we seek comment on whether the use of in-building facilities to provide interstate and foreign communication is within our subject matter jurisdiction to regulate under Title I of the Communications Act. Sections 1 and 2(a) of the Act, read together, give the Commission jurisdiction to enforce the Act with respect to "all interstate and foreign communication by wire or radio. . . ."[132] Pursuant to section 3, "radio communication" and "wire communication" are defined to include "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication.[133] We seek comment on whether or not the use of inside wire for interstate and foreign communication may be feasibly severable from its use for intrastate communication for purposes of carrier access, and whether the partial intrastate usage of these facilities would obstruct our jurisdiction.[134] Thus, for example, in connection with the Commission's decision to detariff the LECs' provision of inside wiring, the Commission also preempted the States from tariffing this service, and the Commission found that such preemption was consistent with its statutory authority under Title I.[135] We seek comment on whether our subject matter jurisdiction for purposes of imposing a nondiscriminatory access requirement is subject to a similar analysis, and whether any other grants of authority are applicable.

57. To the extent that in-building facilities are within our subject matter jurisdiction, we further seek comment on whether we have authority to impose a nondiscriminatory access requirement on building owners pursuant to the provisions of the Communications Act and the doctrine of ancillary jurisdiction. Section 4(i) of the Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[136] Section 303(r) of the Act authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary

[132] 47 U.S.C. §§ 1, 2(a).

[133] 47 U.S.C. § 3(33), 3(51).

[134] *See* Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986); *see also, e.g.,* People of the State of California v. FCC, 39 F.3d 919, 933 (9th Cir. 1994), *cert. denied,* 115 S.Ct. 1497 (1995); Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989).

[135] Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order,* 1 FCC Rcd. 1190, 1192-93, ¶¶ 13-18 (1986).

[136] 47 U.S.C. § 154(i).

to carry out the provisions of this Act . . . ."[137] These provisions, among others,[138] have been understood to give the Commission broad flexibility to promulgate regulations that may not fall strictly within any particularly enumerated statutory power where necessary to carry out the purposes and provisions of the Act.[139] Indeed the Supreme Court held that the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities. . . ."[140] As discussed above, several provisions of the Communications Act, as amended by the 1996 Act, are designed to promote consumers' ability to choose from among competing providers of communications services.[141] We seek comment on whether the addition of a nondiscrimination requirement with respect to access to facilities used to provide interstate and foreign telecommunications services owned or controlled by premises owners is sufficiently closely related to the regulation of those services under Title II as to confer jurisdiction. Would such an exercise of Commission authority be sufficiently necessary to carry out the provisions and intent of the 1996 Act to promote competition and consumer choice?[142] In addition, we seek comment on any other potential sources of or conflicts with Commission jurisdiction.

58. We also ask for comment on whether there would be any constitutional impediment to our adoption and enforcement of a nondiscrimination requirement. Under the Fifth Amendment to the United States Constitution, government may not effect a taking of private property without just compensation.[143] In the *Loretto* case, the United States Supreme Court considered a challenge to a New York statute that required building owners to permit cable television service providers to install facilities on their premises in exchange for compensation determined by a State regulatory commission to be reasonable.[144] The Court

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[137] 47 U.S.C. § 303(r).

[138] *See, e.g.*, 47 U.S.C. § 201(b) (authorizing the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act").

[139] *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); United Video, Inc. v. FCC, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting).

[140] *Southwestern Cable*, 392 U.S. at 178; *see also Iowa Utilities Board*, 119 S.Ct. at 731 (noting that "'ancillary' jurisdiction . . . could exist even where the Act does not 'apply'").

[141] *See, e.g.*, 47 U.S.C. §§ 224, 251, 332(c)(7); 1996 Act, §§ 207, 706.

[142] *See* 1996 Conference Report at 1 (purpose of the 1996 Act is to accelerate the competitive deployment of services to all Americans).

[143] U.S. Const., Amendment V.

[144] Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982) (*Loretto*).

held that because the installation of these facilities constituted a permanent physical occupation of the landlord's property, it amounted to a *per se* taking for which just compensation is constitutionally required, regardless of the minimal extent of the occupation or the importance of the public interest served.[145] The Court therefore remanded the matter to State court to determine whether the nominal compensation prescribed by regulation was just.[146] In *Bell Atlantic*, the United States Court of Appeals for the D.C. Circuit narrowly construed the Commission's pre-1996 statutory authority to overturn a requirement that LECs offer physical collocation to competing telecommunications carriers.[147] The Court held that because the Commission's order created an identifiable class of cases in which application of the regulation would necessarily constitute a taking, it could not be sustained in the absence of express statutory authority.[148]

59. We recently applied *Loretto* and *Bell Atlantic* in the *OTARD Second Report and Order*, where we considered our authority under section 207 of the 1996 Act to require building owners to allow devices for the reception of over-the-air video signals to be placed on their premises. We concluded that section 207 authorizes the Commission to prohibit restrictions on the placement of such antennas in areas within a tenant's exclusive use and control,[149] and that such a prohibition does not constitute a *per se* taking of private property within the meaning of the Fifth Amendment because it does not result in a new physical occupation of the landowner's property, but only affects the use of areas that the landlord has voluntarily allowed the tenant to occupy.[150] We further concluded, upon balancing the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations, that such regulation does not effect a regulatory taking.[151] With respect to common and restricted access areas, however, we were concerned that a prohibition on restrictions on the placement of antennas would constitute a *per se* taking because it would authorize a permanent physical occupation of the landlord's property.[152] In addition, we found that section 207 did not explicitly authorize us to permit a tenant to install a device on common or restricted access property, over which the tenant did not otherwise have exclusive use or control, over the property owner's objection.[153] Under these circumstances, and in light of case law indicating that an agency's authority is construed narrowly not to authorize a *per se* taking unless

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[145] *Id*. at 426, 436-37.

[146] *Id*. at 441.

[147] Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*).

[148] *Id*. at 336-39.

[149] *OTARD Second Report and Order*, 13 FCC Rcd. at 23880-81, ¶¶ 12-15.

[150] *Id.* at 23882-85, ¶¶ 19-23, distinguishing *Loretto* and FCC v. Florida Power Corp., 480 U.S. 245 (1987).

[151] *Id.* at 23886-88, ¶¶ 24-28, applying Pennsylvania Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[152] *Id.* at 23894-96, ¶¶ 39-43.

[153] *Id.* at 23893, ¶ 35.

such authority is expressly granted or must necessarily be implied in order not to defeat a grant of substantive authority to the agency,[154] we declined to extend our rules implementing section 207 to cover the placement of antennas in common and restricted access areas.[155]

60. We seek comment on the extent to which a nondiscrimination requirement on private property owners can be sustained consistent with *Loretto* and *Bell Atlantic*, and with the application of those decisions in the *OTARD Second Report and Order*. For example, would constitutional problems be mitigated if a requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property, if it enabled a property owner to obtain from a new entrant the same compensation that it has voluntarily agreed to accept from an incumbent LEC, or if a property owner could satisfy a nondiscrimination obligation in many instances simply by allowing transport of a competing carrier's signals over existing wire that the building owner owns and controls? Under the last of these circumstances, the competing carrier would not physically occupy the building owner's property. We therefore seek comment on whether either a *per se* or regulatory taking would be involved under any of these situations, or any combination of these situations. We further request comment regarding whether such arrangements will be sufficient to allow competing providers to offer telecommunications service, and on whether providers utilizing such arrangements will also require additional access to premises facilities, such as physical connection to the existing wire.

61. If we decide to adopt any nondiscrimination requirement, we seek additional comment on how that requirement should be structured to achieve our procompetitive objectives. In particular, commenters should consider whether it is sound policy, and would promote competition, to permit exclusive contracts between property owners and service providers under some circumstances. On the one hand, an exclusive contract prevents carriers from competing to serve customers on the covered premises during the period that the contract is in effect. On the other hand, it has been argued that new entrants often need exclusive contracts for a limited period of time in order to recoup their investment, and that if exclusive contracts are not permitted incumbents might face no competition at all.[156] We seek comment on the extent to which, and under what circumstances, the ability to enter into exclusive contracts materially advances the ability of competitive carriers to serve customers in multiple tenant environments. We also seek comment on whether end users may benefit from a property owner's ability to enter into an exclusive contract, for example by negotiating a discount with the carrier. Commenters that favor permitting exclusive contracts should

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[154] *Id.* at 23882, ¶ 17, citing *Bell Atlantic*.

[155] *Id.* at 23897, ¶ 44. We note that two petitions are pending asking us to reconsider our decision not to extend the section 207 rules to placement of antennas in common and restricted access areas. Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, Petition for Reconsideration of the Personal Communications Industry Association, *et al*. (filed Jan. 22, 1999); Petition for Reconsideration of the Association for Maximum Service Television and National Association of Broadcasters (filed Jan. 22, 1999). Nothing herein is intended to prejudice our consideration of these petitions or any other petitions relating to the *OTARD Second Report and Order*.

[156] *See, e.g.*, May 13, 1999 House Telecommunications Subcommittee Hearing, Testimony of Jodi Case, Manager of Ancillary Services, AvalonBay Communities, Inc. at 5.

address the circumstances under which such contracts should be allowed. For example, a rule might permit only exclusive contracts that are limited to some defined period of time, or contracts between building owners and carriers that do not exercise market power. Commenters should also consider whether any rule should be applied in a manner that abrogates existing contracts, and whether doing so would raise constitutional concerns. For example, commenters should consider whether any unfairness might arise, and whether the effectiveness of any rule might be compromised, if the compensation provided for in a contract that contemplated exclusivity were to become the nondiscriminatory standard for non-exclusive contracts.

62. In addition, we invite commenters to address whether we should establish any special mechanism for enforcing any nondiscrimination obligation on private premises owners. We also invite comment on whether, and under what circumstances, we should preempt any State regulation of access that may be inconsistent with any regulations that we may adopt, or whether our regulations should apply only in States that do not enforce their own nondiscriminatory access rules.[157] In addition, commenters should consider whether we should limit the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners.[158] For example, both the Texas and Connecticut nondiscriminatory access statutes require a property owner to afford nondiscriminatory access to a carrier only after a customer has requested that carrier's service.[159] In addition, a rule could exempt buildings that house fewer than a certain number of tenants or are under a certain size.

63. Finally, we request comment on any practical issues that a nondiscrimination requirement may engender. For example, we request comment on any technical issues that may be raised by requiring nondiscriminatory access to existing wire, such as power or electromagnetic compatibility problems, and what rules, if any, we should adopt to address those issues. Commenters should particularly consider any different issues that may arise depending on whether a building is wired by means of dedicated facilities to each unit or shared media. We further request comment on how any rule should address situations in which space constraints may prevent the addition of new facilities. Commenters should further consider safety questions, insurance and liability issues, and any other relevant factors.

5. Other Building Access Issues.

64. In addition to the proposals discussed above, we seek comment on several other potential actions that might help to ensure that customers located in multiple tenant environments have access to their choice of telecommunications service providers. First, if we do not adopt a nondiscrimination requirement, or adopt a nondiscrimination rule that applies only under some circumstances, we request comment on whether, as an alternative, we should forbid telecommunications service providers, under some

[157] *See, e.g.*, 47 U.S.C. § 224(c).

[158] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[159] *See* Conn. Gen. Stats. § 16-2471(c); Tex. Util. Code § 54.259(a)(1),(2).

or all circumstances, from entering into exclusive contracts with building owners.[160] We also request comment on whether we should adopt any such rule in addition to any building owner nondiscriminatory access requirement. We seek comment on whether we have the authority to forbid common carriers from entering into exclusive contracts with building owners or managers under section 201 of the Communications Act, which prohibits unjust and unreasonable practices. In addition, we request comment on the appropriate scope of any rule against exclusive contracts, and how such a rule should be implemented. Commenters should particularly address whether a ban on exclusive contracts would be an effective means of securing nondiscriminatory access, and whether such a rule should apply to all telecommunications carriers and contracts or only in some situations, such as unreasonably long contracts or contracts involving carriers with market power.[161] We also request comment on the legal and policy issues and practical implications of either abrogating existing exclusive contracts or allowing them to remain in force, including any constitutional issues.[162]

65. Second, we request comment on how our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the property owner on multiple unit premises under Part 68 of our rules impact competitive provider access, and whether any modification or clarification of those rules is appropriate to promote access.[163] In 1984 and 1986, in order to foster competition in the market for telecommunications inside wiring, the Commission acted to detariff the provision of inside wiring by the LECs and permit subscribers and premises owners to install and connect their own inside wiring.[164] The "demarcation point" establishes the division, for purposes of these rules,

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[160] We have previously requested comment on a similar proposal in the context of MVPDs. *Inside Wiring Report and Order and Second Further NPRM*, 13 FCC Rcd. 3778-80, ¶¶ 258-266.

[161] *See* para. 61, *supra*.

[162] *Id.* We note that the Nebraska Public Service Commission has prohibited exclusive contracts and marketing agreements between telecommunications companies and property owners, except for contracts and agreements involving condominiums, cooperatives, and homeowners' associations. Commission 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 Statewide Policy for MDU Access* at 6 (March 2, 1999) *(Nebraska MDU Order*).

[163] We note that the definition of the demarcation point for telephone company communications facilities is not identical to the demarcation point definition for cable television facilities for purposes of the cable inside wiring rules. 47 C.F.R. § 76.6(mm); *see* para. 68, *infra*. In 1997, we declined to establish the same rules to govern the demarcation point for cable and telephone service providers. *See Inside Wire Report and Order and Second Further NPRM*, 13 FCC Rcd. at 3719-30, ¶¶ 129-151.

[164] Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems, and Protective Apparatus to the Telephone Network, CC Docket No. 81-216, *Report and Order*, 97 F.C.C.2d 527 (1984), *stay denied*, FCC 84-5684 (rel. Nov. 20, 1984), *recon. granted in part*, 50 Fed. Reg. 29384 (1985); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Second Report and Order*, 51 Fed. Reg. 8498 (1986), *recon. granted in part*, 1 FCC Rcd. 1190 (1986); *see* 47 C.F.R. §§ 68.213, 68.215.

between wiring and other equipment that is under the control and responsibility of the carrier and that which is under the control and responsibility of the subscriber or premises owner. Under our current rules, the demarcation point in multiple unit premises may be established at any number of places depending on the date the inside wiring was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Specifically, in multiple unit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and nondiscriminatory standard operating practices as of August 13, 1990.[165] In multiple unit premises in which wiring is installed, or major additions or rearrangements of wiring are made, after August 13, 1990, the telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry,[166] or, if the telephone company does not establish such a practice, the premises owner shall establish one or more demarcation points.[167]

66. In various recent pleadings, several parties have argued that modification of our Part 68 rule governing determination of the demarcation point would facilitate competitive access to multiple tenant environments. For example, it has been argued that fixing the demarcation point in all multiple unit premises at the minimum point of entry, in combination with a nondiscriminatory access obligation on building owners, would constitute an effective alternative to requiring access to inside wiring as an unbundled network element.[168] Other parties advocate a uniform demarcation point independent of this issue in order to prevent incumbent LECs from obstructing competition by designating demarcation points that are inconvenient to access or difficult to determine.[169]

67. We seek comment on how the definition of the demarcation point under Part 68 affects access to multiple tenant environments by competitive telecommunications service providers, and whether any

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[165] 47 C.F.R. § 68.3 (definition of "demarcation point" at (b)(1)); *see also* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 11897, 11914-15, ¶ 26 (1997) (*1997 Telephone Inside Wiring Order*).

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

[167] *Id.* (definition of demarcation point at (b)(2)). Under all circumstances, if there are multiple demarcation points within a multiunit premises, the demarcation point for a customer shall not be further inside the customer's premises than a point 12 inches from where the wiring enters the customer's premises, or as close thereto as practical. *Id.* at (b)(1) and (b)(2).

[168] *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Joint Reply Comments of Teligent, Inc. and Net2000 Group, Inc. at 8-9 (filed Oct. 16, 1998).

[169] *See, e.g.,* Optel Section 706 Inquiry Comments at 3-7; WinStar Section 706 Inquiry Reply Comments at 6-9. We note that Nebraska, while declining to require a uniform demarcation point, has required incumbent LECs, upon request, to establish a minimum point of entry at the property line and permit access at that location at a specified rate. *Nebraska MDU Order* at 3-5.

Commission action is appropriate.[170] First, we request comment, accompanied by specific evidence, regarding whether, and how, the definition of the demarcation point is in fact affecting competitive providers' access. To the extent there is a deleterious effect, we further request commenters to consider what actions can be taken to remedy the situation. For example, commenters may consider whether the person who controls wire and related facilities for purposes of installation and maintenance must necessarily be the same person who exercises control for purposes of competitive access, and, if not, whether we should apply different standards for each of these purposes. Commenters may also consider whether, as suggested in the comments described above, they believe we should adopt a uniform demarcation point for purposes of competitive access, either at the minimum point of entry or at some other point, for all or some class of multiple-unit premises owners. Among other things, commenters should address the need for and benefits of any regime that they propose, any costs for incumbent providers and building owners, any effects on the competitive installation and maintenance of inside wiring, and how any rule should be drafted and implemented.

68. Third, we ask commenters to consider whether our rules governing access to cable inside wiring for MVPDs[171] should be extended so as to afford similar access to providers of telecommunications services. Section 76.804 of our rules sets forth procedures governing the disposition of home run wiring (*i.e.*, the wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop) owned by an MVPD when the MVPD ceases to provide service to a building, and governing access to that wiring by other MVPDs after its disposition.[172] In order to take advantage of these procedures, however, a provider must offer multichannel video programming services.[173] Commenters in other proceedings have argued that this rule offers benefits to providers of video services that are not currently available to telecommunications service providers, and that this distinction not only is arbitrary but creates uneconomic incentives for providers to incorporate video services into their offerings simply to take advantage of the more favorable rules.[174] Indeed, in a world increasingly marked by technological convergence and interchangeable services, we believe a strong argument can be made for

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[170] We note that certain issues regarding the existing definition of the demarcation point are currently pending, and we do not seek additional comment on those issues herein. *See 1997 Telephone Inside Wiring Order*, 12 FCC Rcd. at 11925-27, ¶¶ 49-52 (requesting further comment on applying a single definition of the demarcation point to simple and complex wiring and on whether the demarcation point may be located away from a building); *see also* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, Petition for Clarification and Reconsideration of BellSouth (filed Aug. 7, 1997); Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, Petition for Clarification or Partial Reconsideration of Bell Atlantic and NYNEX (filed Aug. 7, 1997).

[171] 47 C.F.R. §§ 76.800-76.806.

[172] 47 C.F.R. § 76.804.

[173] *See* 47 U.S.C. § 522(13); 47 C.F.R. § 76.800(c) (defining "MVPD").

[174] *See* Section 706 Inquiry, Comments of the Wireless Communications Association International, Inc. at 27-29 (filed Sept. 14, 1998); WinStar Section 706 Inquiry Reply Comments at 15-17.

applying uniform rules governing access to inside wiring regardless of a provider's service technology or the form of its authorization. Commenters should accordingly address the advantages and disadvantages of extending the MVPD home run wiring rule to benefit telecommunications service providers. In particular, commenters should consider whether extension of the rule in this manner would present practical difficulties for administration, for example, if a telecommunications service provider and an MVPD both seek to use the same wire. We further request comment on whether other of our cable inside wiring rules should also be extended to benefit telecommunications service providers.[175]

69. Finally, we request comment on whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act that would protect the ability to place antennas to transmit and receive telecommunications signals and other fixed wireless signals that are not covered by section 207. Section 1.4000 of our rules prohibits, with limited exceptions, any State or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.[176] Section 1.4000 was adopted pursuant to section 207 of the 1996 Act, which applies only to certain video programming services.[177] The Wireless Communications Association International, Inc. (WCAI) has very recently filed a Petition for Rulemaking asking us to extend the principles embodied in section 1.4000 to the placement of antennas used for any fixed wireless service.[178] Although section 1.4000 applies only to antennas used to receive certain video programming services pursuant to section 207, we believe we may have the authority to adopt similar rules pertaining to telecommunications services, services delivered via telecommunications, and other fixed wireless services pursuant to section 4(i) and other provisions, including sections 201(b) and 303(r), granting us general authority to effectuate the provisions and purposes of the Communications Act. We seek comment on whether it is necessary to apply any or all of the principles embodied in section 1.4000 to the placement of antennas for receiving and transmitting telecommunications signals and other fixed wireless signals that are not encompassed within section 207. We seek comment on the nature and extent of any video services that are not included within section 1.4000 or section 207,[179] and how the exclusion of these services can best be addressed. We also seek comment on whether the Commission's authority to promulgate rules that preempt governmental and nongovernmental restrictions on antennas used for

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[175] *See* 47 C.F.R. § 76.802 (disposition of cable home wiring); 47 C.F.R. § 76.805 (access to molding).

[176] 47 C.F.R. § 1.4000.

[177] *See* 1996 Act, § 207.

[178] Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service (filed May 26, 1999).

[179] Specifically, WCAI asserts that Wireless Communications Service ("WCS"), Digital Electronic Message Service ("DEMS"), and services using the 38 GHz band provide video services but are not covered by section 1.4000. *Id.* at 2 and note 28.

telecommunications and video services is limited to those antennas and services specified in section 207, or whether the Commission has authority pursuant to other sections of the Act, including sections 4(i), 201(b), 253(d), 303(r), 705, and 706(a), to preempt State, local, community association and lease restrictions on such antennas. We note that section 207 by its terms directs the Commission to promulgate regulations "pursuant to section 303 of the Communications Act of 1934."[180] We further seek comment on whether rules similar to section 1.4000 but applying to services that are not within the scope of section 207 would be constitutional, consistent with the analysis in the *OTARD Second Report and Order*.[181] In addition, to the extent commenters advocate restrictions on State or local regulation of the placement on end user premises of antennas used to receive and transmit personal wireless services, they should address whether our adoption of such rules would be consistent with section 332(c)(7).[182]

C. Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.

70. In order to serve any customers, whether they are in a fixed location or mobile, a telecommunications service provider must have a means of transporting signals between calling and called parties' locations. This transport of signals may be accomplished using either wireline or wireless technology. Where wireline technology is used, it is often most efficient to place the necessary facilities within the public rights-of-way. The incumbent LECs have long been granted authority to use public rights-of-way for this purpose, and they have extensive facilities in place.

71. Full and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals. For competitive carriers using wireline technology, this may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way. Providers of wireless telecommunications services, by contrast, do not need access to public rights-of-way to transport signals between their transmitting and receiving facilities and their customers' locations. However, wireless service providers do need to connect their antenna facilities to each other and to central switches, and these connections are often most efficiently accomplished by means of wireline facilities that traverse the public rights-of-way. Often, wireless carriers lease capacity on facilities owned by other communications providers, but in some instances they install their own cables. Thus, providers of wireless telecommunications services sometimes require access to public rights-of-way in connection with

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[180] 1996 Act, § 207. We note that we have previously invoked similar authority to preempt certain State and local government restrictions on the placement of satellite earth station antennas. *See* Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, *Report and Order*, 51 Fed. Reg. 5119 (Feb. 14, 1986); *see also* Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, IB Docket No. 195-59, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 5809, 5812, ¶ 16 (1996) (section 207 does not limit Commission's preexisting authority in this area).

[181] *See OTARD Second Report and Order*, 13 FCC Rcd. at 23883-88, ¶¶ 19-28.

[182] 47 U.S.C. § 332(c)(7) (providing that, except as provided in section 332(c)(7), nothing in the Communications Act shall limit or affect the authority of a State or local government over decisions regarding the placement, construction, or modification of personal wireless service facilities).

the provision of service. These carriers will, however, typically impose far less burden on public rights-of-way than carriers that offer service primarily by means of wireline technology.

72. Public rights-of-way generally are controlled and managed by local governments and, to a lesser extent, State governments. These governments are responsible for, among other things, ensuring that the rights-of-way are used in a manner that benefits the public and, in particular, that neither threatens public safety, unnecessarily inconveniences the public, nor imposes uncompensated costs. One challenge for State and local governments in the era of competitive telecommunications service is to administer the public rights-of-way in a manner that serves these ends and at the same time does not unfairly favor incumbent carriers or obstruct other providers' ability to compete effectively in the provision of service. We are confident that the majority of State and local governments recognize the advantages to their citizens of encouraging new telecommunications competitors and that they are managing their rights-of-way in a competitively neutral way. Nevertheless, we are aware of claims that this is not the case in all jurisdictions, as well as of arguments by State and local governments that carriers are making unreasonable and unfounded complaints. In this section, we initiate an inquiry into the management of public rights-of-way as it relates to the development of facilities-based competition. We begin by reviewing the principal provisions of the Communications Act that are relevant to management of the public rights-of-way, as well as Commission and judicial precedent interpreting those provisions. We then seek comment regarding carriers' and governments' experiences with respect to rights-of-way management. Our aim is to compile a record on the basis of which we, together with representatives of State and local governments and the affected industry, can evaluate whether, and in what form, further action is appropriate.

73. *Statutory Background.* Section 253 of the Communications Act addresses State and local government authority to manage the public rights-of-way. Section 253(a), considered alone, generally proscribes State and local governments from imposing legal requirements that either directly prohibit the ability of any entity to provide any interstate or intrastate telecommunications service or have the effect of prohibiting any entity's ability to provide such service.[183] Sections 253(b) and 253(c), however, permit State and local governments to take certain actions that meet the requirements of those subsections notwithstanding section 253(a). Specifically, section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[184] Under section 253(d), the Commission is directed, after notice and an opportunity for public comment, to preempt the enforcement of any statute, regulation, or legal requirement that "violates subsection (a) or (b)," to the extent necessary to

[183] 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service)."

[184] 47 U.S.C. § 253(c). Section 253(b) permits States to impose competitively neutral requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C. § 253(b).

correct such violation or inconsistency.[185] Section 253(d) does not, however, on its face grant the Commission any direct authority over section 253(c).

74. Where a CMRS provider seeks to use public rights-of-way for its facilities, the permissible exercise of State and local authority may also be affected by section 332(c)(3). Under section 332(c)(3), in general, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[186] However, section 332(c)(3) does not "prohibit a State from regulating the other terms and conditions of commercial mobile services."[187] Thus, a State or local rights-of-way management procedure or requirement, as applied to CMRS providers, is permissible under section 332(c)(3) if it constitutes regulation of terms and conditions of service other than rates or entry. Any requirement that functions as an entry regulation, however, is not permissible as applied to CMRS providers.

75. *Commission and Judicial Precedent.* During the period since the 1996 Act became law, the Commission and the courts have discussed or applied section 253(c) on several occasions. These decisions recognize that State and local governments have an important interest in managing the public rights-of-way to promote the public good, and in obtaining fair and nondiscriminatory compensation for use of the rights-of-way. Thus, for example, we have stated that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage . . . facilities" in the rights-of-way, including such activities as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[188] At the same time, the cases consistently

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[185] 47 U.S.C. § 253(d). Thus, when presented with a petition to preempt under section 253(d), the Commission first asks whether the regulation or requirement in question violates the terms of section 253(a) standing alone. If so, we then ask whether it is permissible under section 253(b). We will preempt enforcement of a regulation or legal requirement only if it is impermissible under subsection (a) and does not satisfy the requirements of subsection (b). *See* Public Utility Commission of Texas, *et al*., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, *Memorandum Opinion and Order*, 13 FCC Rcd. 3460, 3480 at ¶ 42 (1997), *recon. pending, aff'd sub nom.* City of Abilene v. FCC, 164 F.3d 49 (D.C. Cir. 1999).

[186] 47 U.S.C. § 332(c)(3). Section 332(c)(3) permits a State to regulate CMRS rates, but not entry, if the State demonstrates in a petition to the Commission that certain conditions are met. *Id.* To date, the Commission has not granted any State's petition under section 332(c)(3). *See, e.g.*, Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995), *aff'd sub nom.* Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

[187] 47 U.S.C. § 332(c)(3).

[188] TCI Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, FCC 97-331 at ¶ 105 (rel. Sept. 19, 1997) (*TCI*), *recon. denied*, FCC 98-216 (rel. Sept. 4, 1998); *see also, e.g.*, Classic Telephone, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13104 at ¶ 39 (1996) (*Classic*) (citing 141 Cong. Rec.

recognize that certain types of practices are inimical to competition and are not consistent with section 253. For one thing, section 253(c) plainly requires that compensation requirements for use of the public rights-of-way must be imposed "on a competitively neutral and nondiscriminatory basis." Thus, we have made clear that we are troubled by any rights-of-way regulations that, either explicitly or in practical effect, favor incumbent LECs over competing carriers.[189]

76. We have also expressed concern about requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage. Thus, where the record was "inadequate to establish that the Cities' actions reflect[ed] an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way," we have held that the cities' actions did "not trigger section 253(c)."[190] Furthermore, we have expressed concern that local regulation should not "reach[ ] beyond traditional rights-of-way matters and seek[ ] to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public."[191] In particular, while recognizing local governments' continued authority to manage the public rights-of-way, we noted that regulation of matters such as interconnection, fees, and provision of services would be "difficult to justify under section 253(c)."[192] In addition, the United States District Court for the Northern District of Texas has held that although a municipality may require a provider of local telephone service to obtain a franchise in order to use its rights-of-way, the franchise may not be conditioned on anything other than the carrier's agreement to comply with the city's reasonable regulations of its rights-of-way and the fees for use of those rights-of-way.[193] Thus, the court held, the carrier may not be required to complete a wide-ranging franchise application including matters unrelated to use of the rights-of-way, or to comply with conditions that are unrelated to its use of the rights-of-way.[194] Similarly, the United States District Court for the District of Maryland has struck down a franchise ordinance that required a franchise applicant to supply broad-ranging information that was not directly related to the county's right-of-way management, including undefined "financial information" and information about "technical standards," and

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S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein), *petition for emergency relief, sanction and investigation denied*, 12 FCC Rcd. 16577 (1997); Bell Atlantic-Maryland v. Prince George's County, 1999 WL 343646 at *9 (D.Md. May 24, 1999) (*Prince George's County*).

[189] *See TCI*, FCC 97-331 at ¶ 107.

[190] *Classic*, 11 FCC Rcd. at 13104, ¶42.

[191] *TCI*, FCC 97-331 at ¶105.

[192] *Id.*

[193] AT&T Communications of the Southwest, Inc. v. City of Dallas, 1999 WL 324668 at *5 (N.D. Tex. May 17, 1999) (*Dallas III*); AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp.2d 582, 592-93 (N.D. Tex. 1998) (*Dallas I*).

[194] *Dallas III*, 1999 WL 324668 at *5-6; *Dallas I*, 8 F.Supp.2d at 593.

that conferred on the franchising authority complete discretion to grant or deny a franchise application, including authority to consider such factors as managerial, technical, financial, and legal qualifications and the public interest.[195]

77. The courts have also held that local governments may not impose fees, conditions, and franchise requirements on service providers, such as resellers, purchasers of unbundled network elements, and wireless service providers, that do not use any public rights-of-way for their own facilities.[196] In *Dallas II*, in particular, the court specifically rejected arguments that the city had jurisdiction over the carrier because calls made over the carrier's network would traverse the city's rights-of-way after being transferred to other carriers' networks or because some calls on the carrier's network might travel in part over wireline facilities in the rights-of-way leased from other carriers, holding that local authority to manage the rights-of-way extends only to regulation of physical facilities located in the rights-of-way.[197] In addition, the court held that the principle of competitive neutrality did not require that carriers that use the rights-of-way differently, or do not use the rights-of-way at all, be charged the same fees; indeed, the court noted that charging usage fees to a carrier that leases facilities in the rights-of-way from another carrier would amount to discrimination against that carrier, because it would likely have to pay both its own fees directly to the city and the underlying carrier's fees passed on through its rates.[198]

78. Also, some courts have struck down compensation schemes that they found were not reasonably related to a carrier's rights-of-way usage and the costs that use imposes on the local government and its citizens. Thus, for example, the court in *Dallas I* held that the city could not require a carrier to pay four percent of its revenues from all services provided with the city.[199] Similarly, the *Prince George's County* court held that rights-of-way fees must be based on a government's cost of maintaining and improving the rights-of-way and on a provider's rights-of-way use, not on the "value" of the "privilege" of using the rights-of-way, and it therefore struck down a fee of three percent of gross revenues, broadly defined.[200]

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[195] *Prince George's County*, 1999 WL 343646 at *9-10; *see also* BellSouth Telecommunications, Inc. v. City of Coral Springs, 1999 WL 149769 at *3-4 (S.D. Fla. Jan. 25, 1999) (similar).

[196] *See Prince George's County*, 1999 WL 343646 at *12-13 (carriers that use facilities owned, installed, and maintained by others); *Dallas III*, 1999 WL 324668 at *6-9; AT&T Communications of the Southwest, Inc. v. City of Dallas, 1998 WL 386168 (N.D. Tex. July 7, 1998) (*Dallas II*) (wireless service provider); AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F.Supp. 928 (W.D. Tex. 1997) (carrier that provided service only by means of resale and use of unbundled network elements).

[197] *Dallas II*, 1998 WL 386186 at *4-5.

[198] *Id*. at *5 & n.22.

[199] *Dallas I*, 8 F.Supp 2d at 593; *see also Dallas II*, 1998 WL 386186 at *5 and n.22; *Dallas III*, 1999 WL 324668 at *5.

[200] *Prince George's County*, 1999 WL 343646 at *10-11; *but see* TCG Detroit v. City of Dearborn, 1998 WL 493128 (E.D. Mich. Aug. 14, 1998) (holding that franchise fee of 4 percent of gross revenues did not violate

79. Inquiry. Notwithstanding the case law discussed above, several carriers and their associations have alleged that many State and local governments continue to engage in rights-of-way management and compensation practices that the carriers believe are unreasonable, anticompetitive, and contrary to federal law. While these carriers state that they have generally been successful in challenging such regulations in court, they believe Commission action could help reduce the incidence of those regulations and the need for litigation. At the same time, State and local governments assert that the carriers' complaints are unreasonable, unfounded, and merely designed to impede local jurisdictions' legitimate exercise of their public rights-of-way authority. We note that the rights-of-way regulations that have been brought to our attention, either formally or informally, cover only a relatively small number of communities, and we believe most communities and carriers have arrived at solutions that both protect State and local governments' authority to manage the public rights-of-way and avoid imposing unreasonable or discriminatory burdens on competitive service providers. Nonetheless, in light of the persistent assertions of concern expressed in this area, we believe it is appropriate to compile a record regarding local rights-of-way management as it affects telecommunications service providers. We therefore seek comment from both service providers and State and local governments regarding their rights-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experience. In addition, we note that several States have enacted guidelines to govern the requirements that local governments may impose on telecommunications rights-of-way users.[201] We seek comment on the success or failure of these efforts.

80. We particularly welcome the participation in this process of our Local and State Government Advisory Committee (Advisory Committee). The Advisory Committee has been an important vehicle for facilitating constructive cooperation among the Commission, carriers, and State and local governments. For example, in August 1998, following an extensive period of discussions, the Advisory Committee and several trade associations entered into an agreement on voluntary, non-binding guidelines and informal dispute resolution procedures for disputes involving local government moratoria on personal wireless services facilities siting.[202] The Advisory Committee has expressed a consistent interest in rights-of-way issues and a willingness to participate in finding appropriate solutions.[203] Through the participation of the Advisory Committee as well as industry representatives, one outcome of this inquiry could be a greater agreement on principles that could be broadly accepted both by carriers and by State and local governments.

D. Notice of Inquiry on State and Local Taxes.

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requirement that fees be fair and reasonable).

[201] *See, e.g.*, Fla. Stats. § 337.401; Ill. Stats. ch. 35, §§ 635/25, 635/30; La. Rev. Stats. title 48, § 381.2; Minn. Stats. § 237.163.

[202] *See* Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, http://www.fcc.gov/statelocal/agreement.

[203] *See* FCC Local and State Government Advisory Committee Advisory Recommendation No. 1, "Policy Statement on State and Local Rights-of-Way and Telecommunications Service Competition" (June 27, 1997).

81. The assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments' other functions. Virtually all businesses are subject to a wide array of State and local taxes, and there is no reason that telecommunications businesses should be any exception. At the same time, State and local tax policies that impose excessive or unequal burdens on competitive service providers have the potential to inhibit the development of competitive facilities-based networks in local telecommunications markets. In this section, we commence an inquiry concerning these issues.

82. We believe that State and local governments share our goal of ensuring that tax burdens on telecommunications providers are imposed fairly so as not to impede competition. Carriers have alleged, however, that some State and local taxes are excessive or are applied in a discriminatory manner. For example, in July 1996, Western PCS I Corporation (Western) filed a petition seeking preemption under sections 253 and 332(c)(3) of the Communications Act of the State of Oregon's assessment of property tax on Western.[204] Western alleged that Oregon had calculated the value of Western's property by including the amount Western had paid at auction for its license to serve the Portland Major Trading Area, and that this method of assessment resulted in Western's bearing a substantially higher tax burden than other telecommunications service providers that had not purchased licenses at auction. Subsequently, Western and the Oregon Department of Revenue reached a settlement of most of the issues that were the subject of Western's petition, and Western moved to dismiss its petition without prejudice.[205] We granted Western's motion on January 20, 1999.[206]

83. Other allegations of unfair State and local taxes surfaced in a petition for rulemaking filed by the Cellular Telecommunications Industry Association (CTIA).[207] The CTIA Petition asks the Commission to preempt State and local governments from imposing discriminatory or excessive taxes or similar burdens on CMRS providers and services and other telecommunications providers and services. By way of example of the taxes that CTIA finds objectionable, the petition cites the Oregon tax challenged by Western PCS and other property taxes in West Virginia and Kentucky,[208] as well as an excise tax imposed on

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[204] *See* "Commission Seeks Comment on Petition for Preemption and Motion for Declaratory Ruling filed by Western PCS I Corporation," *Public Notice*, DA 96-1211 (July 30, 1996).

[205] Western PCS I Corporation Request for Dismissal Without Prejudice, File No. WTB/POL 96-3 (dated Dec. 9, 1997).

[206] Western PCS I Corporation Petition for Preemption of the Oregon Department of Revenue Notice of Proposed Assessment and Request for Declaratory Ruling, File No. WTB/POL 96-3, *Order*, DA 99-203 (CWD rel. Jan. 20, 1999).

[207] Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments, Petition for Rule Making of the Cellular Telecommunications Industry Association (filed Sept. 26, 1996) (CTIA Petition).

[208] *Id.*, Attachment at 2-3.

mobile telephone use by Montgomery County, Maryland.[209] The Personal Communications Industry Association also has recently filed with us a study detailing what it considers to be the excessive cumulative burden of Federal, State, and local taxes and fees on wireless telecommunications service providers.[210]

84. In recognition of the limits on our expertise and out of respect for principles of federalism, we conclude that it is not appropriate for us to initiate a rulemaking proceeding at this time, and we therefore deny CTIA's petition. Indeed, we note that our legal authority to preempt State and local tax policies is extremely limited. In particular, section 601(c)(2) of the 1996 Act provides, with limited exceptions, that "nothing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation."[211] Nonetheless, we are concerned about the potential discriminatory and anticompetitive effects of certain State and local tax policies, and we are therefore initiating an inquiry on this issue. We seek comment generally on the nature and prevalence of unreasonable or discriminatory tax burdens on competitive telecommunications service providers, whether most tax schemes have successfully avoided these shortcomings, and what tax regimes have best promoted the interests of all parties. We also seek comment regarding the availability of State remedies to correct any harmful inequities. We are eager to work closely with those State and local government bodies that are most responsible for the formulation of tax policy, such as the Multistate Tax Commission and the Federation of Tax Administrators, on these issues.

E. Other Means of Promoting Competitive Networks.

85. We also, through means of a notice of inquiry, seek comment regarding any other actions that we should take to facilitate the development of competitive networks not already being considered in another proceeding. As discussed above, the rapid development of competition requires that competing carriers be free to innovate, enter into business arrangements, and offer the services of their choice through the means of their choice without incurring unnecessary costs. In this item and in other proceedings, we have identified and requested comment regarding several potential obstacles to this freedom, including obstacles that may arise both from our own rules and from the actions of third parties. However, there may be additional extraneous factors impeding the development of competition that we have not identified. We ask commenters to identify any such impediments with as much specificity as possible, discuss with particularity the nature and extent of the impediment, and suggest specific remedial actions.

IV. CONCLUSION

[209] *Id.*, Attachment at 2 n.2.

[210] M. Katz and J. Hayes, "Unintended Consequences: Public Policy and Wireless Competition" (Oct. 1, 1998), filed as an Attachment to Letter from Mary McDermott, Chief of Staff and Senior Vice President, Government Relations, Personal Communications Industry Association to John Berresford, Industry Analysis Division, Common Carrier Bureau in CC Docket No. 98-146 (dated Nov. 12, 1998).

[211] 1996 Act, § 602(c)(2), published as a note to 47 U.S.C. § 152.

86. Over the last several years, legal and market developments have come a long way toward bringing competition to all United States communications markets. In the 1996 Act, Congress established a national policy in favor of competition and made legal changes that are essential to achieving this policy goal. Nonetheless, much remains to be achieved. In particular, most local telecommunications markets have not yet experienced the type of facilities-based competition that will bring innovative services and service choices to all Americans, and will eliminate the market power of the incumbent LECs. We believe that the proposals we explore and the inquiry we initiate here are a useful step towards promoting the rapid and efficient development of competitive networks in local telecommunications markets. In this way, we hope to advance the goals of the 1996 Act and advance the public interest in competitive telecommunications.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act.

87. As required by the Regulatory Flexibility Act (RFA),[212] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking. The IRFA is set forth in the attached Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, as set forth in Section V.C *infra*, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.[213] In addition, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA (or summaries thereof), will be published in the Federal Register.[214]

B. *Ex Parte* Rules.

88. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking initiate and constitute a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[215] Persons making oral *ex parte* presentations relating to the Notice of Proposed Rulemaking and

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

[213] *See* 5 U.S.C. § 603(a).

[214] *See id.*

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

Third Further Notice of Proposed Rulemaking are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[216] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve International Transcription Services (ITS) with copies of any written *ex parte* presentations or summaries of oral *ex parte* presentations in these proceedings in the manner specified below for filing comments.

89. This Notice of Inquiry commences an exempt proceeding in accordance with the Commission's *ex parte* rules.[217]

C. Filing Procedures.

90. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before August 13, 1999, and reply comments on or before September 3, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

91. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

92. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325; Washington, D.C. 20554.

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

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1.1204(b)(1) (1997).

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

[217] *See* 47 C.F.R. § 1.1204(b)(1).

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

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

D. Further Information.

95. For further information about this proceeding, contact Jeffrey Steinberg at 202-418-0896, jsteinbe@fcc.gov, or Joel Taubenblatt at 202-418-1513, jtaubenb@fcc.gov.

VI. ORDERING CLAUSES

96. Accordingly, IT IS ORDERED, pursuant to sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), 332, and 403, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412, this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking is ADOPTED.

97. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Wireless Communications Association International, Inc. on May 26, 1999, is GRANTED.

98. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 253, and 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 253, and 332(c)(3), and section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), that the Petition for Rulemaking filed by the Cellular Telecommunications Industry Association on September 26, 1996, is DENIED.

99. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),[218] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, as set forth in Section V.C *supra*, and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.[219] In addition, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, including the IRFA (or summaries thereof), will be published in the Federal Register.[220]

I. Need for and Objectives of the Proposed Rules

2. We are issuing this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking to seek comment on proposals to facilitate competition to the incumbent local exchange carriers (LECs) by competitors who use their own end-to-end facilities. Extensive facilities-based competition will provide consumers with a choice of telecommunications providers that will compete to offer traditional, voice-grade telephone service, as well as high-speed data and other advanced services, at reasonable prices and conditions -- a major goal of the Telecommunications Act of 1996. We particularly expect this proceeding to further the availability of competition to the many consumers and businesses that are located in multiple tenant environments, such as apartment and office buildings.

3. Specifically, this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking seeks comment on the following issues: (1) the tentative conclusion that, to the extent that LECs or other utilities own or control rooftop and other rights-of-way or riser conduit in multiple tenant environments, section 224 of the Communications Act, 47 U.S.C. § 224, requires that they permit competing providers access to such rights-of-way or conduit under just, reasonable and nondiscriminatory rates, terms, and conditions; (2) whether we should require incumbent LECs to make available to any requesting telecommunications carrier unbundled access to riser cable and wiring that they control within multiple tenant environments, subject to the Commission's future interpretation of the "necessary" and

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

[219] *See* 5 U.S.C. § 603(a).

[220] *See id.*

"impair" standards of section 251, 47 U.S.C. § 251; (3) whether we should require building owners who allow access to their premises to any telecommunications provider to make comparable access available to all such providers on a nondiscriminatory basis; (4) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; (5) whether we should modify our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the landowner on multiple unit premises;[221] (6) whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services;[222] and (7) whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act[223] protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207.

II. Legal Basis

4. The potential actions on which comment is sought in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking would be authorized under sections 1, 2(a), 4(i), 4(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 224, 251(c)(3), 251(d), 253, 303(r), and 332, and sections 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.411 and 1.412.

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

5. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[224] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[225] In addition, the term "small business" has the same meaning as the term

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[221] *See* 47 C.F.R. § 68.3.

[222] *See* 47 C.F.R. §§ 76.800-76.806.

[223] *See* Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000, which prohibits, with limited exceptions, any State or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.

[224] 5 U.S.C. § 605(b).

[225] 5 U.S.C. § 601(6).

"small business concern" under the Small Business Act.[226] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[227] For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

6. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking could result in rule changes that, if adopted, would impose requirements on local exchange carriers and other utilities, building owners and managers, multichannel video program distributors, neighborhood associations, and small governmental jurisdictions. To assist the Commission in analyzing the total number of potentially affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking.

a. Local Exchange Carriers

7. Many of the potential rules on which comment is sought in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, if adopted, would affect small LECs. Neither the Commission nor the SBA has developed a small business definition specifically for small LECs. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[228] The SBA has defined establishments engaged in providing "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[229] According to November, 1997 Telecommunications Industry Revenue data, 1,371 carriers reported that they were engaged in the provision of local exchange services.[230] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service

[226] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

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

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

[229] 13 C.F.R. § 121.201. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987) (*1987 SIC Manual*).

[230] FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (Telecommunications Industry Revenue).

are small entities or small incumbent LECs that may be affected by the potential actions discussed in this Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking, if adopted.

8. Above, we have included smaller incumbent LECs in our analysis. Although some incumbent LECs may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."[231]

b. Other Utilities

9. The proposal in this Third Further Notice of Proposed Rulemaking with respect to Section 224 of the Communications Act, 47 U.S.C. § 224, if adopted, would affect utilities other than LECs. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The Commission anticipates that, to the extent its section 224 proposal affects non-LEC utilities, the effect would be concentrated on electric utilities.

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

10. Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.[232] The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues do not exceed five million dollars.[233] The Census Bureau reports that 447 of the 1,379 firms listed had total revenues below five million dollars in 1992.[234]

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[231] *See* 13 C.F.R. § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such incumbent LECs.

[232] *1987 SIC Manual.*

[233] 13 C.F.R. § 121.201.

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

11. Electric and Other Services Combined (SIC 4931). The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[235] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[236] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars in 1992.[237]

12. Combination Utilities, Not Elsewhere Classified (SIC 4939). The SBA defines this type of utility as providing a combination of electric, gas, and other services which are not otherwise classified.[238] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues do not exceed five million dollars.[239] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars in 1992.[240]

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

13. Natural Gas Transmission (SIC 4922). The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[241] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues do not exceed five million dollars.[242] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars in 1992.[243]

14. Natural Gas Transmission and Distribution (SIC 4923). The SBA has classified this type of entity as a utility that transmits and distributes natural gas for sale.[244] The Census Bureau reports that a

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[235] *1987 SIC Manual*.

[236] 13 C.F.R. § 121.201.

[237] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[238] *1987 SIC Manual*.

[239] 13 C.F.R. § 121.201.

[240] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[241] *1987 SIC Manual*.

[242] 13 C.F.R. § 121.201.

[243] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[244] *1987 SIC Manual*.

total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributer is a firm whose gross revenues do not exceed five million dollars.[245] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.[246]

15. Natural Gas Distribution (SIC 4924). The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[247] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.[248] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.[249]

16. Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925). The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.[250] These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.[251] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.[252]

17. Gas and Other Services Combined (SIC 4932). The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[253] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[254] The Census Bureau reported that 24 of the 43 firms listed had total revenues below

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[245] 13 C.F.R. § 121.201.

[246] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[247] *1987 SIC Manual*.

[248] 13 C.F.R. § 121.201.

[249] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[250] *1987 SIC Manual*.

[251] 13 C.F.R. § 121.201.

[252] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[253] *1987 SIC Manual*.

[254] 13 C.F.R. § 121.201.

five million dollars in 1992.[255]

(3) Water Supply (SIC 4941)

18. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[256] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues do not exceed five million dollars.[257] The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars in 1992.[258]

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

19. Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[259] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[260] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars in 1992.[261]

20. Refuse Systems (SIC 4953). The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[262] The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues do not exceed six million dollars.[263] The Census Bureau reported that 1,908 of the 2,287 firms listed had total

[255] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[256] *1987 SIC Manual*.

[257] 13 C.F.R. § 121.201.

[258] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[259] *1987 SIC Manual*.

[260] 13 C.F.R. § 121.201.

[261] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[262] *1987 SIC Manual*.

[263] 13 C.F.R. § 121.201.

revenues below six million dollars in 1992.[264]

21. Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.[265] The Census Bureau reports that a total of 1,214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.[266] The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.[267]

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

22. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[268] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.[269] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.[270]

(6) Irrigation Systems (SIC 4971)

23. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[271] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues do not exceed five million dollars.[272] The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars in 1992.[273]

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[264] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[265] *1987 SIC Manual*.

[266] 13 C.F.R. § 121.201.

[267] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[268] *1987 SIC Manual*.

[269] 13 C.F.R. § 121.201.

[270] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[271] *1987 SIC Manual*.

[272] 13 C.F.R. § 121.201.

[273] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

c. Building Owners and Managers

24. Several of our inquiries in this Notice of Proposed Rulemaking would affect multiple dwelling unit operators and real estate agents and managers, if such inquiries lead to adopted rules. Such inquiries include the following issues: whether we should require building owners who allow access to their premises to any telecommunications provider to make comparable access available to all such providers on a nondiscriminatory basis; whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; and whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that were not covered under section 207.

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

25. The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating $5 million or less in revenue annually.[274] According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[275] Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[276] The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

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

26. The SBA defines real estate agents and managers as establishments primarily engaged in renting, buying, selling, managing, and appraising real estate for others.[277] According to SBA's definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.[278]

d. Multichannel Video Program Distributors (SIC 4841)

27. Our inquiry in this Notice of Proposed Rulemaking regarding whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services would affect operators of cable and other pay television services, if such inquiry leads to the adoption of rules. The SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts.[279] This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 such cable and other pay

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[274] 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

[275] 1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration) (*1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*).

[276] *1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*, Table 4, SIC 6513.

[277] *1987 SIC Manual*.

[278] 13 C.F.R. § 121.201.

[279] 13 C.F.R. § 121.201 (SIC 4841).

television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.280

e. Neighborhood Associations

28. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207 would affect neighborhood associations, if such inquiry leads to the adoption of rules. Section 601(4) of the Regulatory Flexibility Act, 5 U.S.C. § 601(4), defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 such associations in 1993.281

f. Municipalities

29. Our inquiry in this Notice of Proposed Rulemaking regarding whether we should adopt rules similar to those adopted in the video context under section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under section 207 may affect municipalities, if such inquiry leads to the adoption of rules. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."282 As of 1992, there were approximately 85,006 governmental entities in the United States.283 This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566, or 96%, have populations of fewer than 50,000.284 The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,606 (96%) are small entities.

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

30. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking proposes no additional reporting, recordkeeping or other compliance measures.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

31. This Notice of Proposed Rulemaking and Third Further Notice of Proposed Rulemaking seeks comment on how the proposals and inquiries set forth could impact regulated entities, including small entities. For example, with respect to our Section 224 proposal, we seek comment on whether an overly broad construction of utility ownership or control would impose unreasonable burdens on building owners, including small building owners, or compromise their ability to ensure the safe use of rights-of-way or conduit, or engender other practical difficulties.285 In addition, with respect to our inquiry into building owner obligations, we seek comment on whether we should limit the scope of any building owner obligation in order to avoid imposing unreasonable regulatory burdens on building owners, and we suggest that a potential rule could exempt buildings that house fewer than a certain number of tenants or are under a certain size.286 Commenters are invited to address the economic impact of all of our proposals on small entities and offer any alternatives.

VI. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

32. None.

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[280] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC 4841.

[281] *See* Community Associations Institute Comments in Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276, 19337 (1996).

[282] 5 U.S.C. § 601(5).

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

[284] *Id.*

[285] *See* Section III.B.2 *supra*.

[286] *See* Section III.D *supra*.

June 10, 1999

Separate Statement
of
Commissioner Susan Ness

Re: *Promotion of Competitive Networks in Local Telecommunications Markets; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Wireless Communications Association International, Inc. Petition For Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission antennas Designed to Provide Fixed Wireless Services*

This Notice grapples with a critical component of the competitive landscape -- the ability of wireless carriers to gain access to essential communications facilities to serve tenants in multi-dwelling buildings. Multi-dwelling customers represent a substantial portion of the residential and business population. Access to these customers, therefore, is a pivotal part of the business plan of many competitive carriers.

The proposals in this Notice are aggressive, but reflect the pro-competitive spirit imbued in the Telecommunications Act of 1996, and I am pleased to support this initiative. I write separately, however, to voice my concern over one proposal: imposing a nondiscrimination building access requirement on building owners. Under this proposal, once a building owner allows a telecommunications provider access to its premises, the building owner must make comparable access available to all other telecommunications carriers under nondiscriminatory rates, terms and conditions.

While well intended, the concept would impose a new regulation on building owners -- a class of persons not otherwise regulated by the Commission. Less than a year ago, the Commission considered a similar issue. In the *OTARD Second Report & Order*, the Commission declined to impose an affirmative obligation on building owners to allow a tenant access to building common and rooftop areas for the placement of over the air video reception devices. In that proceeding, the Commission expressed its reluctance to use its *express* authority under Section 207 of the Telecommunications Act of 1996, which was limited to prohibiting regulations that impair a viewer's ability to receive video programming through devices designed for over the air reception as a basis for imposing obligations on how building owners should use their private property. I have difficulty distinguishing that precedent from the instant case.

Moreover, where constitutional rights are at stake, judicial precedent informs us that the courts do not favor the imposition of obligations by a federal administrative agency which relies on ancillary jurisdiction. Rather, this may be one area that is better served by a legislative solution. Notwithstanding these reservations, I enthusiastically support this Notice, and look forward to a spirited debate on the issue of the Commission's authority to impose nondiscrimination obligations on building owners.

**Statement of Commissioner Harold Furchtgott-Roth,
Concurring in Part and Dissenting in Part**

In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets (WT Docket No. 99-217); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments

Today's decision initiating a proceeding to promote the establishment of competitive networks in local telecommunications networks has a number of laudable aspects. In particular, I applaud our efforts to develop a record to assist us in determining the precise contours of Section 224 of the Act, 47 U.S.C. § 224, which requires that utilities owning or controlling poles, ducts, conduits and rights of way provide access on reasonable and non-discriminatory terms to cable television systems and telecommunications carriers (other than incumbent local exchange carriers). I urge this Commission to take prompt action on this issue so that fixed wireless and other providers attempting to enter the local market have certainty as to the boundaries of that provision.

I am deeply troubled, however, by two aspects of this proceeding. First, the Commission decides today to seek comment on whether building owners permitting access to any telecommunications provider must make comparable access available to all such providers under nondiscriminatory terms and conditions. As authority for such action, today's decision posits that most slender of reeds: the Commission's ancillary jurisdiction under Sections 4(i) and Sections 303(r) of the Act, 47 U.S.C. §§ 154(i), 303(r). But as *Bell Atlantic v. FCC*, 24 F.3rd 1441 (D.C. Cir. 1994) instructs, this Commission must be vigilant in overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority -- regardless of whether such regulation constitutes commendable public policy. I fear that today's proposal, if ultimately adopted by the Commission, may stray outside this agency's jurisdictional boundaries.

The second area which causes me great concern is the Commission's apparent inclination to deal piecemeal with the Supreme Court's recent remand of our rules implementing Section 251 of the Act, 47 U.S.C. § 251. The Commission recently issued a further notice of proposed rulemaking to deal with the issues raised by the remand. Yet, in this proceeding, the Commission requests comment on whether unbundled access to riser cable and wiring within multiple tenant environments meets the requirements of Section 251. Although we do state that we will apply our decisions in the remand proceeding to the issue of riser cable and wiring in multiple tenant environments presented here, the better course of action in my judgment would be to consider all issues pertaining to unbundled network elements in one proceeding.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

Re: *Promotion of Competitive Networks in Local Telecommunications Markets; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; and Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments (CC Docket No. 96-98)*

I whole-heartedly support taking all appropriate steps to promote local competition. And, I commend the Wireless Bureau staff for their initiative in identifying the specific issues in this item and commencing this proceeding to examine them further. I do, however, have grave concerns about a couple components in this item.

First, under judicial precedent, this agency should not move toward rules that would effectuate a *per se* taking without specific authority to do so. *See Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Here, it seems that we propose to do just that. We have no specific statutory provision that directs, or "empowers," us to assert regulatory authority over owners of private property. Instead, this item proposes to rely solely on "ancillary" jurisdiction. Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf.

Moreover, this proposed rulemaking stands in stark contrast to our recent consideration of the limits of our authority when the rights of property owners are involved. Specifically, we refused to go beyond the language of Section 207 of the Telecommunications Act of 1996 regarding the placement of over-the-air reception devices on common and restricted access property because of constitutional and statutory authority concerns. *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874, 23894-97, ¶¶ 39-45 (1998) (OTARD proceeding) ("because there is a strong argument that modifying our Section 207 rules to cover common and prohibited access property would create an identifiable class of *per se* takings, and there is no compensation mechanism authorized by the statute, we conclude that Section 207 does not authorize us to make such a modification" (relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982))). Yet here, we lack a provision analogous to Section 207, but nevertheless contemplate requiring "nondiscriminatory access" to privately owned rooftops and other areas—a seemingly greater intrusion into the rights of property owners than we could stomach in the OTARD proceeding. In the context of a likely takings under the Fifth Amendment, this is not an area where we should be pushing the envelope of our "ancillary" statutory authority without, at least, being certain we have exhausted other alternatives.

Even though my mind remains open to what commenters present, the door is open only a sliver. We may eventually win an "ancillary jurisdiction" argument in court against the building owners and landlords, but it does not seem like good policy to propose a new regulatory dictate on these entities before other measures to evaluate the problem or pursue other non-regulatory initiatives prove inadequate. Nevertheless, I will concur with asking the questions we do in this item, anticipating an end result – based on the record – that is consistent with the law.

My second area of concern is the proposal to consider requiring incumbent LECs to make available "unbundled access" to riser cable and wiring they control within multiple tenant environments pursuant to section 251(c)(3) of the 1996 Act. I feel strongly about our duty to faithfully and quickly implement the Supreme Court's remand of the Commission's unbundled network element rule (the so-called Rule 319). I am therefore concerned about adding yet another possible "network element" to a list that the Supreme Court struck down without the thorough and thoughtful interpretation and application of the "necessary" and "impair" standards of section 251(d)(2).

I will not object to the inclusion of this issue in this item since it basically defers to the UNE remand proceeding, but I am troubled by the growing list of UNEs that we put out for comment before we implement the limiting principle as Congress and the Court required.