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JUL 14 1999

Federal Communications Commission

FCC 99-141

DISC 37 JUL 1999

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

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. <u>99-217</u>
in Local Telecommunications Markets)	
)	
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)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	

**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**

Adopted: June 10, 1999

Released: July 7, 1999

Comment Date: August 13, 1999
Reply Comment Date: September 3, 1999

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

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.

information, electronic commerce, and entertainment that are rapidly becoming available through the Internet and other 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

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).

development, packaging, and pricing.¹¹

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 Act¹⁴ and its application to riser conduit and privately granted rights-of-way in multiple tenant environments that utilities "own or control;" Section 251's¹⁵ 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.

¹¹ See paras. 20-23, *infra*.

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 forbore under section 10 of the Act from enforcing against competitive service providers statutory provisions and

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).

regulations that could unnecessarily inhibit their ability to compete.¹⁸

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

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); 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*.

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 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

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).

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.

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 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

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.

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").

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 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 options³⁹ and whether to allocate spectrum at 3650-3700 MHz to non-Government radiocommunications service between fixed points.⁴⁰

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

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).

We also will be adopting service rules and auctioning licenses in the 24 GHz band⁴¹ 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' 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

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).

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).

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 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

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).

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.

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 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

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).

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.

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 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.

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.

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).

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.

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 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

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.

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*.

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 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

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 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).

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 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

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).

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 forbore 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).

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 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.

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.

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.

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 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

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, 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").

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 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

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

⁸¹ *Id.* at 16085, ¶ 1185.

⁸² *Id.* at 16084, ¶ 1185.

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).

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 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

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).

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).

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 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.

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).

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.

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 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

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.

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.

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 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 multichannel 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

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

¹⁰⁴ *Id.* at 16082, ¶ 1179.

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*.

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 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,

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.

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).

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 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

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).

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).

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 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

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).

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.

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

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

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.*

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.

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 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

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.

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).

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 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

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).

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.

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 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

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*).

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.

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 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

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.

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*.

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 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

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

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).

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 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

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/P1-23, *Order Establishing Statewide Policy for MDU Access* at 6 (March 2, 1999) (*Nebraska MDU Order*).

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, 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

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.

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 building 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