Before the

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Department of Telecommunications and)

Energy Rulemaking to Establish Complaint)

and Enforcement Procedures to Ensure that)

Telecommunications Carriers and Cable) D.T.E. 98-36

Systems Operators Have Non-Discriminatory)

Access to Utility Poles, Ducts, Conduits,)

and Rights-of-Ways as Required by Section 224)

of the Telecommunications Act of 1996)

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES AND WINSTAR COMMUNICATIONS, INC.

The Association for Local Telecommunications Services ("ALTS")[(1)] and WinStar Communications, Inc. ("WinStar") (together "Commenters"), by its undersigned counsel, submit these comments on the proposed modifications to 220 CMR 45.00 *et seq*.[(2)] According to its Order, the Department is modifying Section 45.00 *et seq*. to ensure that telecommunications carriers and cable providers have nondiscriminatory access to utility poles, ducts, conduits and rights-of-way (collectively "rights-of-way"). Commenters applaud the Department's efforts to align existing Department regulations with Section

224 of the federal Telecommunications Act of 1996 ("Act") and to promote non-discriminatory access to utility rights-of-way.[3] To ensure this stated objective is met, ALTS and WinStar recommend that the Department clarify that its proposed rules will apply to *all* utility rights-of-way, including rights-of-way located in multiple dwellings units ("MDUs"). Commenters also recommend that the Department expand its investigation to adopt rules to govern building access between telecommunications carriers and property owners.

I. INTRODUCTION

The success of new entrants in penetrating the local exchange market to compete with incumbent LECs is directly impacted by their ability to access existing rights-of-way that are either owned or controlled by utilities. For example, fixed point-to-point wireless carriers need to place microwave transmission facilities on buildings rooftops, among other structures. Traditional wireline carriers must lay their fiber optic cable across existing rights-of-way in order to create more efficient (and, correspondingly, more competitive) cost structures independent of the incumbent LEC. In the absence of a regulatory framework to make the current infrastructure available to new entrants, pro-competitive activities will be stalled, perhaps indefinitely.

With good reason, Congress amended the Communications Act of 1934 to provide new entrants nondiscriminatory access to utility rights-of-way. In conformance with this mandate, the Department is now amending its regulations to ensure that new entrants have nondiscriminatory access to utility rights-of-way in Massachusetts. To ensure that the amendment is truly effective and to avoid unnecessary disputes, the Department should clarify that *all* rights-of-way owned or controlled by, or available to, a utility will be made available to new entrants.

II. THE DEPARTMENT SHOULD CLARIFY THAT UTILITY RIGHTS-OF-WAY INCLUDE RIGHTS-OF-WAY IN MULTIPLE TENANT ENVIRONMENTS

One significant amendment to the Massachusetts rules requires a utility to provide a licensee[4] with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled, or available to, by the utility.[5] Commenters believe that the Department should clarify that a utility must provide access to all rights-of-way, including those in MDUs.

A. Facilities Within MDUs

In the past, the Department's regulation of access to rights-of-way has focused principally on so-called "outside plant," such as cable attachments to poles and conduits in public streets. In expanding its rules to cover competitive telecommunications services, however, the Department should recognize that utility networks do not end at the walls of an MDU. Rather, to provide service to individual tenants in a MDU, a utility must extend its network into and throughout the building. Historically, the incumbent LEC normally installed, owned and operated its own distribution facilities inside MDUs, including building entrance facilities (the connection of incumbent LEC outside plant to the "minimum point of entry," or MPOE, within the building), a common block where the building entrance facilities can be cross-connected to interior wiring, vertical riser cables to upper floors of the building, horizontal distribution wires connecting the risers to individual tenants' premises, and internal wiring closets and connector blocks (these facilities collectively are referred to below as "interior pathways"). Because it was in the landlord's own interest to provide access to telephone services within the MDU, the incumbent LEC often was permitted to enter the building and install these facilities without any written easement, license, or other agreement. Nonetheless, the incumbent LEC necessarily had the express or implied permission of the property owner to install and operate these facilities.

B. Access to Facilities Within MDUs

Section 224 of the Telecommunications Act requires a utility to provide access to "*any* pole, duct, conduit, or right-of-way owned or controlled" by it (emphasis added). A right to install wires, riser ducts, conduits, and other facilities into or within an MDU (regardless of the side of the demarcation point on which they may fall) is a "right-of-way" within the ambit of this statute. Therefore, to the extent that any easement, license, or agreement (written or unwritten) grants an incumbent LEC or other utility the right to place telecommunications facilities into or within an MDU, the incumbent LEC or utility in turn is required by Section 224 of the federal Act to allow other carriers to "piggyback" on those rights, so that the other carriers may place their facilities within any pathways, ducts, or conduits, including rooftops and riser conduits, subject to the conditions of Section 224 and the Department's regulations implementing it.

Commenters believe that the rules proposed by the Department for adoption in this proceeding would, by their terms, require utilities to provide access to interior pathways. A utility is defined in these rules as "any person, firm, corporation or municipal lighting plant that ***owns or controls or shares*** ownership or control of poles, duct, conduits, or rights-of-way ***used or useful, in whole or in part,*** for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television . . . ." 220 CMR 45.02 (emphasis added).[(6)] The rights-of-way used by a utility in an MDU clearly fall within this definition. The utility controls, or at the very least "shares control" with the property owner. Since the incumbent LEC or utility uses or previously used the right-of-way to transmit telecommunications to tenants in the building, the right-of-way is used

or useful for supporting or enclosing wires for the transmission of telecommunications. Thus, pursuant to the federal Act and the Massachusetts amendment, any pathway, inside wire, house riser cable, and common spaces under the ownership or control of the utility that is used, or may be used, for transmission of communications must be made available to a CLEC.

Nonetheless, in order to avoid potential confusion and future disputes, the Department should clarify explicitly that the amended rules will apply to interior pathways controlled by utilities within MDUs, in addition to poles, conduits, and other "outside plant" rights-of-way. Commenters believe that this clarification by the Department will eliminate a very significant barrier to making the benefits of competition a reality for Massachusetts consumers.

III. THE DEPARTMENT SHOULD EXPAND ITS INVESTIGATION TO ADOPT REGULATIONS THAT WILL ENSURE CONSUMER CHOICE AND PROMOTE THE DISSEMINATION OF ADVANCED TELECOMMUNICATIONS TECHNOLOGY TO ALL CONSUMERS

While the Department's amendment, as written, represents a "step in the right direction" towards a truly competitive telecommunications environment, Commenters nonetheless remain concerned that this proposal does not go far enough to permit facilities-based carriers to overcome significant hurdles that they face in deploying telecommunications services and providing consumers with a full range of choices in local telephone service providers. Currently, a significant sector of the public cannot access competitive telecommunications services due to a "100 foot bottleneck." This bottleneck is a result of anticompetitive actions by incumbent LECs and/or property owners who prevent access to building rooftops, risers (horizontal and vertical), inside wiring and related facilities. Commenters urge the Department to address this critical barrier to competition and to adopt building access regulations. Until such access is mandated and nondiscriminatory guidelines are set, Massachusetts consumers will be denied the benefits of competitive telecommunications services.

Pursuant to Section 224(c)(2)(B) of the federal Act, the Department is required to consider the interest of subscribers when regulating utility rights-of-way.[(7)] Subscribers living or working in MDUs are being denied competitive telecommunications services. As discussed in Section II.A of these comments, Section 224(f) requires that utilities provide access to interior pathways that they control within MDUs; however, this section says nothing about access in those instances where necessary interior pathways are controlled directly by the building owner rather than a utility, or where the building owner attempts to impede access to interior pathways, even where the incumbent LEC or other utility has otherwise been granted access.[(8)] Accordingly, several state commissions have recognized that Section 224 is simply not enough to ensure that these consumers have competitive choice among telecommunications providers. At least four states have

adopted legislation and/or administrative regulations ensuring building access for MDUs, and other states are currently investigating the issue. The Ohio Public Utilities Department, in exercising its general jurisdiction over intrastate telecommunications, has prohibited any "person owning, leasing, controlling, or managing a multi-tenant building [to] forbid or unreasonably restrict any occupant, tenant, lessee, of such building from receiving telecommunications services from any provider of its choice . . . ."[(9)] The Public Utility Commission of Texas also has issued an enforcement policy implementing state statutory provisions prohibiting property owners form restricting tenants' access to certificated telephone companies.[(10)] The Connecticut Legislature enacted a law that requires building owners to allow a telecommunications provider to wire the building and provide service so long as a tenant requests services from the provider.[(11)] Finally, the California Public Utilities Commission adopted specific rules governing access to poles, ducts, conduits, and rights-of-way, and prohibiting telecommunications carriers from entering into exclusive or discriminatory access arrangements with building and other private property owners.[(12)] These state commissions and others have recognized that without regulations requiring property owners to allow CLECs access to their buildings, consumers will be denied the benefits of telecommunications competition.

A. Some Building Owners Interfere with the Consumer's Ability To Enjoy the Benefits of Telecommunications Competition

Two entities stand between the tenant wishing to receive the benefits of competitive services and the carrier eager and able to provide such services: the incumbent LEC and/or other utility and the building owner. Many building owners have found that the lack of rules requiring building owners to permit access to their premises creates a windfall in their favor. Building owners treat access by CLECs and alternative video providers as a significant new revenue generating opportunity by presenting CLECs with discriminatory rate treatment or outright rejection. This turn of events is not fair to tenants, the intended beneficiaries of the federal Act.

Numerous cases of abuse by building owners have been cited by CLECs attempting to gain access to serve tenants. Teligent, Inc. (a fixed wireless CLEC, using spectrum in the 24 GHz band), in comments filed with the Florida Public Service Commission, described a situation in which "a manager of one Florida property demanded from Teligent a rooftop access fee of $1,000 per month and a $100 per month fee for each hook up in the building."[(13)] Teligent estimated that the fee for accessing this building alone would exceed $100,000 per year.[(14)] Similarly, in response to a request for access, a building owner in Philadelphia, Pennsylvania sent a letter to WinStar in August 1998 demanding a $50,000 up-front payment plus a minimum $1,200 per month revenue guarantee before the building owner would speak with WinStar. This type of abuse creates a deadlock

between the competitive carrier and the building owner with the obvious loser being the tenant.[(15)] Surely, the goals of the federal Act were to increase consumer choice and access to innovative technology, and not to provide property owners with a windfall.[(16)] Ultimately, the deployment of alternative and advanced broadband technology will be left to the whim of each building owner, absent Department action.

Building owners must not be permitted to unilaterally mandate a tenant's telecommunications carrier. The choice of a telecommunications carrier belongs to each American as mandated by the federal Act. The Department should adopt regulations to prevent continued abuses and to ensure that Massachusetts consumers receive the benefits of competition.

B. The Department Must Act Affirmatively To Remove The Access Bottleneck

If the Department intends to bring the promise of local competition to Massachusetts consumers in the foreseeable future, it must take action to assure that residential tenants in multiple dwelling unit developments and commercial tenants in multi-tenant commercial properties have access to the telecommunications service provider of their choice. The history of the telecommunications industry demonstrates that competition brings about technical advancements that improve the way we live and communicate. History also demonstrates that in order to open a market mired in monopoly, regulatory agencies must affirmatively establish fair rules and guidelines to ensure the development and survival of competitors. The long distance industry provides an excellent example. Competition in the long distance industry has resulted in enhanced and ubiquitous long distance service, lower and flat rates, universal access, the development of debit cards and competitive wireless services, and countless other advancements that benefit consumers. All of these advances resulted directly from, and would not have developed but for, the necessary changes in laws and regulations that released the long distance industry from the grip of monopoly and resulted in the deployment of multiple long distance facilities-based networks.

Today, unequal building access is a primary obstacle to true local competition. Opening the bottleneck requires the Department, among other things, to prohibit all exclusive building access arrangements and to mandate access to the last 100 feet. As discussed above, CLECs are effectively prohibited today from serving many MDU tenants that they are technically capable of reaching because of restrictions on building access or inside wire imposed by incumbent LECs, landlords, or both. In this section, Commenters propose a number of concrete steps the Department can take immediately to ensure that tenants can obtain service from the carrier of their choice, without interference from property owners or incumbent LECs. The Department must ensure that:

1. Competitive Carriers Have Access to Risers and Rooftops

The Department should act promptly to implement provisions that assure tenants in MDUs can obtain access to the services offered by fixed wireless and wireline carriers over their own facilities. These rules should encompass (1) placement of antennas on

MDU rooftops for provisioning of the local loop, (2) access to riser conduits or other pathways connecting the rooftop antenna to the "common block," typically in the basement, at which outside telecommunications facilities are cross-connected to interior wiring, and (3) direct access to the end user where good engineering practices so dictate.

2. Exclusive Arrangements Are Prohibited

The Department should issue a declaratory ruling prohibiting "preferred provider" and/or exclusive contracts between building owners and incumbent LECs. Preferred provider and exclusive contracts are unlawful and completely contradict the competitive mandate of the federal Act, and must be banned.

Section 224(c)(2)(B) of the federal Act[(17)] directs the state to consider the interests of subscribers of utility services. Exclusive contracts discriminate against other carriers and prevent those subscribers from having access to more advantageous pricing, technology and services. Exclusive contracts between ILECs and building owners have been in use since before the federal Act was passed, and often contain burdensome penalties for canceling the contract. Moreover, in the post-Telecommunications Act environment, LECs have been aggressively using preferred provider and/or exclusive contracts anti-competitively. An incumbent LEC, utility or other carrier with an exclusive contract to serve an MDU has a captive audience and little or no incentive to provide competitive, advanced services. Exclusive contracts are contrary to the public interest and to the goals of the 1996 Act, and the Department should expressly declare them unlawful and prohibit any party from attempting to enforce any such agreement.

3. The Demarcation Point Is Established To Eliminate Incumbent LEC Abuse And To Facilitate Technical Access To End Users

Incumbent LECs continue to maintain their stranglehold on MDUs by making access difficult or impossible for competitive carriers who have been asked by tenants to provide their service within a multiple tenant building. The Department rules should require incumbent LECs to reconfigure MDU wiring to establish a *single* demarcation point at the *minimum point of entry*, which should typically be the closest practical point to where the telephone company's wire crosses the property line, within a prescribed maximum provisioning time frame. Such reconfiguration will also enable competitive carriers to efficiently connect their equipment to the inside wiring via a cross connection at the network interface device (NID).

A clear and concise placement of a single demarcation point at the minimum point of entry in every MDU would facilitate the existence of true end-to-end facilities-based

competition. A single demarcation point would ensure that all carriers, incumbent LEC and CLECs, understand the characteristics of an multiple tenant building. A single demarcation point would also stop incumbent

LEC actions from thwarting CLEC attempts to interconnect at the NID.[(18)] Furthermore, such a configuration should assist all carriers in technically connecting individuals in an MDU.[(19)]

Without access to the inside wiring that connects the carrier to the customer, CLECs will never be true end-to-end competitors unless they are willing to and capable of undertaking the extraordinary expense and burden of rewiring every building they wish to serve. Moreover, if more than one CLEC wishes to provide its own local loop to a given building, multiple, duplicative rewiring of the entire building has to occur, as is frequently the case today. This outcome is not desirable for the new entrant nor for the property owner, and is economically wasteful. Establishment of a single demarcation point at the minimum point of entry for all MDUs would be consistent with the goals of the federal Act by facilitating competitive access to individual consumers in an MDU and ensuring the existence of true end-to-end alternative providers.

4. ILEC-Owned Facilities Within MDUs Are "Network Elements"

Section 251(c)(3) of the federal Act requires incumbent LECs to offer "nondiscriminatory access to network elements on an unbundled basis" to competitive providers. The purpose of this requirement is to "permit new entrants to offer competing local services by purchasing from incumbents, at cost-based prices, access to elements which they do not already possess . . . ."[(20)] This purpose is being frustrated by incumbent LECs' refusal to offer access to facilities within MDUs on a meaningful, unbundled basis. CLECs cannot serve individual tenants without access to the house and riser cables owned by the incumbent LEC, even if the CLEC can provide its own facilities up to the entrance of the building.

As noted above, the incumbent LEC typically owns and operates a variety of facilities within an MDU used to distribute telecommunications services to tenants within the building. Depending on the age of the building and the practices of the particular incumbent LEC, some of these facilities are on the customer side of the demarcation point.[(21)] However, these facilities are still owned and maintained by the incumbent LEC on a deregulated basis, and are used to provide telecommunications services to the tenants. These functions therefore fall within the definition of "network element" in Section 3(29) of the federal Act.

The Department should clearly mandate that all incumbent LEC owned or controlled inside wire, including house riser (both vertical and horizontal), riser conduit, and connector blocks, are immediately available as unbundled elements. At least one state commission has already implemented this level of unbundling, providing a model for other states to emulate.[22] In New York, New York Telephone is required by the New York Public Service Commission to offer house and riser cable in multi-tenant buildings on an unbundled basis. This enables a CLEC to provide its own link to the entrance of a multi-tenant building and to purchase house and riser cable within the building.[23]

5. Non-discriminatory Access Is Paramount

Rules based on the principle of nondiscrimination will encourage competition and reward carriers for quality services, innovate offerings, and competitive rates, rather than rewarding a carrier for getting access. Moreover, the ability of all carriers to obtain nondiscriminatory access will guarantee that tenants have access to their telecommunications carrier of choice. Discriminatory terms, conditions and costs for installation of facilities will result in a de facto choice for tenants and, therefore, discriminatory *rules* that disadvantage one carrier over another will reduce the choices of available CLECs to tenants. For example, if the rules burden a wireless carrier from gaining reasonable access, then tenants are deprived of choosing a CLEC offering that type of innovative technology and the accompanying advanced services. Furthermore, if the rules permit a building owner to discriminate on compensation, many new entrants without financial resources may be prohibited from accessing the building and, therefore, the tenant is deprived of choosing that CLEC which may offer services that meet that tenant's needs. Therefore, to ensure that tenants realize the significant right to choose a CLEC, the Department should design its rules to require access on a nondiscriminatory basis.

CONCLUSION

WHEREFORE, the Association for Local Telecommunications Services and WinStar Communications, Inc. respectfully request the Department to adopt the modifications proposed herein.

Respectfully submitted,

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1. ALTS is a national trade association that works to promote the opening of the local telecommunications market to full and fair facilities-based competition.

2. *Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure that Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way*, D.T.E. 98-36 (Dec. 9, 1998) ("Order").

3. *Id.* at 2-3.

4. "Licensee is defined as any person, firm, or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and access the public ways." 220 CMR 45.02.

5. 220 CMR 45.03(1).

6. The definition of "utility" found in the Telecommunications Act varies slightly from the definition found in the Department's regulations. "[U]tility means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. 224(a)(1).

7. 47 U.S.C. 224(c)(2)(B).

8. Several states have adopted nondiscriminatory statutes for cable access. *See e.g.* Mass. Gen. Laws Ann. ch. 166A, § 22 (West 1998); Conn. Gen. Stat. § 16-333a (1997); N.Y. Pub. Serv. Law § 228 (1998); Va. Code Ann. § 55-248.13:2 (Michie 1998).

9. *See Department's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, 1994 Ohio PUC LEXIS 778 (1994).

10. *See* Public Utility Code § 54.259.

11. *See* Conn. Gen. Stat. § 16-2471.

12. *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision, D.98-10-058 (CA PUC, Oct. 26, 1998).

13. *Access by Telecommunications Companies to Customers in Multi-Tenant Environments*, Comments of Teligent, Inc., Special Project No. 980000B-SP, at 12 (Fla. PSC, July 29, 1998).

14. *Id.*

15. The position that any tenant living in a building not accessible to competitive telecommunications carriers could simply move is a fallacy. First, many tenants are

confined by a lease, sometimes for several years, and may be subject to significant financial penalties if the lease is breached. Other conditions such as customer familiarity to a location, investment in advertisements, letterhead and other publications using the location address prevent consumers from moving out of a multiple tenant building. For many small businesses in multiple tenant buildings, these expenses cannot be overlooked. Furthermore, moving a business to a new location incurs other significant expenses (ie. moving costs, moving notices to customers, etc.).

16. Once a building owner permits access to one carrier, the only remaining issue is one of potential discrimination against later entrants. *Yee v. City of Escondido*, 503 U.S. 519 (1992).

17. 47 U.S.C. § 224(c)(2)(b).

18. In comments filed in a recent FCC proceeding, Optel attributes the "obstruction and foot-dragging" of ILECs to the limited deployment of CLEC facilities, and describes incidents where the ILEC delayed establishment of MDU demarcation points or refused to reconfigure the ILEC network to accommodate new entrants. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket 98-147, Optel Comments at 3-4 (F.C.C., Sept. 14, 1998).

19. A single demarcation point at the minimum point of entry and a CLEC's access to the NID will enable an occupant in the building to obtain access to any service provider through a single cross-connect at the NID.

20. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, at para. 231 (rel. Aug. 8, 1996).

21. *See* Section III.B.2, above.

22. *See Joint Complaint of AT&T Communications of New York, Inc., et al. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Opinion and Order in Phase 2, Case 95-C-0657, Opinion No. 97-19 (N.Y.P.S.C. Dec. 22, 1997).

23. *Id.*