BEFORE THE

Department of Telecommunications and Energy

COMMONWEALTH OF MASSACHUSETTS

Department of Telecommunications and Energy)

Rulemaking to Establish Complaint and Enforcement)

Procedures to Ensure that Telecommunications)

Carriers and Cable Systems Operators Have) D.T.E. 98-36

Non-Discriminatory Access to Utility Poles, Ducts,)

Conduits, and Rights-of-Way as Required by Section 224)

of the Telecommunications Act of 1996)

Comments of Teligent, Inc.

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Dated: September 17, 1999

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Teligent, Inc. ("Teligent"), by its attorneys, hereby files comments in the above-captioned proceeding.

The Federal Communications Commission has tentatively concluded that Section 224's access provisions extend to utility conduits and rights-of-way that run through multi-tenant environments.(1) Teligent strongly supports this conclusion and urges its adoption by the DTE. Historically, utilities obtained their rights-of-way as a function of incumbency and monopoly. Through initial enactment of Section 224 and its extension in 1996 to telecommunications carriers, Congress sought to grant access to the rights-of-way that utilities enjoy as an advantage of incumbency. A broad perspective of the 1996 Act reveals a strategy designed to promote the development of telecommunications competition on the basis of service and rates rather than on advantages gained through monopoly control over facilities essential to the provision of service. Section 224, and the access to rights-of-way that it provides, assumes an important role in that design.(2)

It is important for the DTE to recognize the essential facility nature of utilities' rights-of-way. The historic monopoly status of the utilities allowed them to exercise the power, either unilaterally or through statutorily-granted eminent domain authority, to obtain rights-of-way over land and through buildings. Competitive telecommunications carriers, by definition, do not enjoy such "abilities." Their ability to duplicate the incumbents' rights-of-way is rendered impotent not only by the economics of the venture (a venture which the monopolist financed largely under rate-of-return regulation), but also by the plain refusal of individual building owners to admit the facilities of a subsequent carrier (or, as is also commonly encountered, by raising the cost of entry to levels so high that it

makes entry an uneconomic enterprise). Because access to rights-of-way are a critical component of providing competitive service and because they cannot be duplicated, rights-of-way constitute an essential facility.(3)

Regulatory oversight traditionally has imposed broad duties to deal upon regulated utilities which operate concurrent with antitrust laws to enforce general antitrust principles. In these efforts, regulators seek to prevent monopolists from leveraging monopoly power over essential facilities in one market, albeit lawfully derived, to foreclose competitive entry in other markets.(4)

Section 224 represents a statutory method of achieving this goal. In its efforts to minimize the prospective operation of historic monopoly power over essential facilities, Congress required the provision to telecommunications carriers of access to, *inter alia*, rights-of-way under utilities' ownership or control. The intent, when viewed through the lens of even a rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the DTE to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. Interpreting Section 224 to include utility rights-of-way and conduit within multi-tenant buildings will facilitate the process of dismantling monopoly control over tenants in multi-tenant buildings, a result fully consistent with the stated goal of the 1996 Telecommunications Act.

Disputes over access rights to utility rights-of-way within multi-tenant buildings are affecting the ability of Massachusetts consumers in these buildings to take service from competitive telecommunications carriers. Notwithstanding building owner claims to the contrary, Bell Atlantic contends that it owns the risers that travel vertically from floor to floor in multi-tenant buildings. It seeks to prohibit telecommunications carriers from installing their own facilities in those building risers. Clearly, such a policy would potentially have a severe effect on the ability of consumers in multi-tenant buildings to take telecommunications service from competitive facilities-based carriers. Whether the building owner or Bell Atlantic owns or controls multi-tenant building risers is its own issue demanding resolution. Regardless, Bell Atlantic cannot be permitted to assert ownership as a means of preventing facilities-based competition within multi-tenant buildings. Application of Section 224 to intra-building conduits and rights-of-way would prevent Bell Atlantic from engaging further in this strategy.

Although the term "right-of-way" is not defined in the Communications Act, easements and rights-of-way have generally been accorded synonymous meanings. Congress is not unfamiliar with the term in the context of common carriers as evidenced by other statutes. These statutes, and the cases interpreting them, reveal that rights-of-way are not rarely encountered. Rather, they comprise a legal interest, often less than a fee, to use or pass over another entity's property.(5) Regardless of the particulars, rights-of-way encompass a broad conceptual spectrum of property interests and the DTE need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.(6)

Incumbent utilities are likely to claim that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These assertions are not only erroneous, but also threaten to undermine the considered goals of Section 224 by denying access to telecommunications carriers when rights-of-way pass over private property. The DTE should define the scope of a utility right-of-way *for purposes of Section 224* in such a manner as to permit use of such rights-of-way by competitive telecommunications carriers. This definition need not otherwise alter Massachusetts property law. Massachusetts property law definitions of the scope of easements would remain unchanged, except in cases of applying the federally designed obligations in Section 224.

When viewed together, the cases demonstrate that the design manifested in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 may be promoted in the manner recommended by Teligent. These cases recognize that statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for negotiations with, approval of, and compensation to the owner of the servient property.

It is a long-standing principle of Massachusetts law that expansion of an existing utility right-of-way over private property to accommodate technological advances is deemed to be within the scope of the original easement and does not require additional compensation to the underlying property owner.(7) Satisfaction of congressionally-mandated access requirements reasonably may be deemed substantially compatible with existing utility easements and should not require that any additional compensation be paid to the underlying property owner.

In a proceeding before the FCC, the New York State Investor Owned Electric Utilities noted that the leading New York case held that "utility company easements are apportionable to cable operators even though the scope of the easement may not specifically include CATV."(8) They went on to state that:

[a]pportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.(9)

Indeed, electric utilities may *already* use their electric easements for purposes other than the transmission of electricity. The Wall Street Journal has reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses.(10) Electric utility research of this sort suggests that electric utilities themselves view their electric easements as compatible with the provision of telecommunications services. The DTE should affirm that utilities' private rights-of-way are accessible by carriers offering different services and using similar facilities. This affirmance should not exempt particular agreements that limit the use of a right-of-way for a specific purpose (*i.e.*, transmission of electricity) since such an exception would permit utilities to contract away their federal obligations.

Similarly, confusion is likely to arise concerning the scope of expressly undefined rights-of-way. In many instances, the scope of a utility's ownership or control of an easement will be difficult to ascertain because its rights have not been reduced to writing. It is important to note that many utilities, including ILECs, have installed conduit and use rights-of-way within a multi-tenant building without having entered into a written agreement with the building owner defining the rights granted to the utility. The natural propensity toward this type of arrangement is best understood when it is remembered that many of these arrangements developed in monopoly environments. The prospect of additional providers requiring access to the premises typically was not contemplated. Thus, it is important for the DTE to offer guidance on the scope of otherwise undefined utility rights-of-way within multi-tenant buildings for purposes of Section 224.

If the utility does not occupy or have rights to occupy any specifically defined space, it would be reasonable to presume that the utility would have rights to occupy any spaces to which access would be reasonably necessary in order to provide its service using any one of the variety of distribution technologies available now or in the future. For example, unless the building owner has affirmatively prohibited the utility from placing facilities on the rooftop or in a certain space within the multi-tenant building, it should be assumed that such access is permitted.(11) Even where a utility has chosen not to use the right-of-way for distribution facilities, it should be required to permit CLEC access to such right-of-way for the distribution facilities of the CLEC.

In this regard, it is important to note that many utilities, including ILECs, presently maintain antennas on building rooftops to transmit telecommunications and/or video signals.(12) If ILECs and other utilities are securing rooftop access derived from their utility status, CLECs must be given the same opportunity.

The absence of any qualifier in Section 224 as to public and private rights-of-way must be interpreted to mean that access to utility easements over private property (private rights-of-way) are covered as well as those over public property (public rights-of-way). This

interpretation is particularly sound given that Section 253 -- a provision adopted simultaneously with the amendments to Section 224 -- *does* contain a qualifier. Established principles of statutory interpretation dictate that the absence of such a qualifier in Section 224 is meaningful.(13) If "private" right-of-way is to mean anything, the term must refer to rights-of-way secured over private property (as distinct from public property such as streets and other thoroughfares).(14)

The "owned or controlled" language of Section 224 indicates that utility ownership of conduit or rights-of-way is not necessary to trigger the Section 224 access requirements. Mere utility control is sufficient. This further supports the reading of rights-of-way to include private rights that are not secured in fee simple. Moreover, use of the term "controlled" suggests that even where a building owner owns the intra-building conduit, if the ILEC maintains control over that conduit (i.e., pursuant to a maintenance agreement), that conduit is a Section 224 conduit or right-of-way to which the competitive telecommunications carrier should also have access.

Consistent with the FCC's *Local Competition Order*, if a multi-tenant building owner seeks to prohibit a utility from allowing a telecommunications carrier access to the rooftop notwithstanding a Section 224 request, the utility should be required to exercise its authority of eminent domain. As the *Local Competition Order* indicated, such a requirement is a function of the nondiscrimination requirement of Section 224(f)(1) since utilities reasonably could be expected to exercise this authority for the installation of their own facilities and, consequently, should be required to do the same for requesting telecommunications carriers.(15) The DTE should adopt this position. Similarly, if a utility does, in fact, lease a defined amount of space on a rooftop under circumstances that establish ownership or control, and its antenna structure entirely fills that space, the utility should be required to exercise its authority of eminent domain to make space available for a reasonably-sized CLEC antenna.(16)

For the foregoing reasons, Teligent strongly urges the DTE to adopt rules that recognize the application of Section 224 to intra-building ducts, conduits, and rights-of-way.

Respectfully submitted,

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1. 1 Promotion of Competitive Networks 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 Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 at ¶ 44 (FCC rel. July 7, 1999).

2. 2 See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").

3. 3 See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-1133 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983). The court described the four elements necessary to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

4. 4 See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 787c1 (1996)(noting that "the 'essential facility' doctrine may have some relevance in regulated monopolies where it serves to limit the monopolist's power to expand its monopoly into 'adjacent' unregulated (or less regulated) markets. . . . Although antitrust is not concerned with rates as such, it becomes concerned when the utility's attempt to enlarge profits eliminates competition in a collateral market capable of being competitive").

5. 5 See Black's Law Dictionary 1326 (6th ed. 1990) (defining a right-of-way as the "[t]erm used to describe a right belonging to a party to pass over land of another").

6. 6 A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes. 47 U.S.C. § 224(f)(1)(emphasis added).

7. 7 See Labounty v. Vickers, 352 Mass. 337, 345, 225 N.E.2d 333, 339 (1967)(right-of-way is not necessarily confined to the purposes for which the dominant estate was used at the time of the grant, but is a right-of-way for every reasonable use to which the

dominant estate may be devoted); Rajewski v. McBean, 273 Mass. 1, 6, 172 N.E. 882, 883 (1930)(right-of-way conveyed is not necessarily confined to purpose for which dominant estate was used at the time of the grant); Swensen v. Marino, 306 Mass. 582, 585-86, 29 N.E.2d 15, 17 (1940)(when a right-of-way arises by grant and not by prescription, and is not limited by the terms of the grant, it is available for reasonable uses to which dominant estate may be devoted).

8. 8 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Comments of New York State Investor Owned Electric Utilities* at 25 (FCC Sep. 26, 1997).

9. 9 Id.

10. 10 See Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall Street Journal at B6 (Oct. 7, 1997).

11. 11 Utilities should be prohibited from permitting such exclusionary provisions in any right-of-way agreements as contrary to their obligations under the federal Communications Act.

12. 12 See, e.g., "Bell Atlantic Debuts Satellite Television Service," Communications Today, (September 18, 1999)("Using a single rooftop dish, Bell Atlantic can supply digital signals to every residence in a building. [Bell Atlantic] engineers and technicians also will equip each building with an appropriate rooftop antenna capable of receiving local digital television broadcasts . . . ").

13. 13 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)(noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 209 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

14. 14 Moreover, Section 224 requires the provision of nondiscriminatory access to "any pole, duct, conduit, or right-of-way" owned or controlled by a utility. 47 U.S.C. § 224(f)(1) (emphasis added). The word "any" cannot reasonably be interpreted as a term of limitation.

15. 15 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1181 (1996).

16. 16 Of course, the CLEC must reimburse the utility for the compensation paid to the building owner, consistent with the Section 224 modification cost rules.