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Statement of Thomas Sugrue

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Before the

Subcommittee on Telecommunications, Trade, and Consumer Protection
Committee on Commerce
United States House of Representatives

On

Access to Buildings and Facilities by Telecommunications Providers

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Mr. Chairman, Ranking Member, and Members of the Subcommittee:

INTRODUCTION

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

IMPORTANCE OF FACILITIES-BASED COMPETITION

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

Facilities-based competition is important not only for the efficient and ubiquitous provision of basic telecommunications services, but also for the availability of advanced and innovative

services. In a competitive local telecommunications market, competitors will have the incentive to provide advanced features, such as broadband access, and innovative service packages in order to attract customers to their offerings. This pro-consumer result will be achieved in a timely and efficient manner, however, only in the context of full facilities-based competition by service providers using all delivery technologies.

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

NATURE AND IMPACT OF THE MDU PROBLEM

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

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

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

COMMISSION ACTIONS AND PLANS

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

- In its August 1996 *Local Competition First Report and Order*, the Commission promulgated rules implementing amended Section 224 of the Communications Act. Section 224 requires public utilities, including LECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access under just and reasonable rates, terms, and conditions to poles, ducts, conduits, and rights-of-way that they own or control. Petitions for reconsideration of this portion of the *Local Competition First Report and Order* are pending. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16058-16107 (1996).
- Section 251(c)(3) of the Communications Act requires incumbent LECs to provide other telecommunications carriers with nondiscriminatory access to network elements on an unbundled basis under just, reasonable, and nondiscriminatory rates, terms, and conditions. The United States Supreme Court recently vacated, and remanded for further consideration under the prescribed statutory standards, the Commission's rules identifying which network elements must be made available under this provision. In a Notice of Proposed Rulemaking (NPRM) implementing the Supreme Court's remand, the Commission specifically requested comments regarding whether incumbent LECs should be required to unbundle facilities located at end users' premises. Comments are due on May 26, and reply comments are due on June 10. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, 64 Fed. Reg. 20238 (April 26, 1999).
- In October 1997, the Commission adopted a Report and Order amending its cable inside wiring rules to enhance competition in the video distribution marketplace. At the same time, the Commission adopted an NPRM requesting comment on other issues affecting competitive video service providers' access to MDUs, including whether restrictions should be placed on exclusive contracts between building owners and multichannel video programming distributors. *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997).
- In November 1998, the Commission adopted rules under Section 207 of the 1996 Act restricting building owners' authority to impose restrictions on the placement of devices for the reception of over-the-air video programming in areas that are within a tenant's exclusive use. However, the Commission held that it could not adopt similar rules governing the placement of antennas in common or restricted access areas under Section 207 because Section 207 did not give it the express authority to do so. *Implementation of Section 207 of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 23874 (1998).
- In March 1996, the Commission amended its rule governing preemption of state and local regulation of satellite earth stations so as to make it consistent, to the extent appropriate, with the rules applicable to smaller receiver antennas. *Preemption of*

Local Zoning Regulation of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996).

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

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

POTENTIAL OBSTACLES TO EFFECTIVE ACTION

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

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

CONCLUSION

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

Last Reviewed/Updated on 08/27/2001