

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Promotion of Competitive Networks in Local)
 Telecommunications Markets)
)
 Wireless Communications Association)
 International, Inc. Petition for Rulemaking to)
 Amend Section 1.40000 of the Commission's Rules)
 to Preempt Restrictions on Subscriber Premises)
 Reception of 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

CC Docket No. 96-98

COMMENTS OF BELL ATLANTIC

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COMMENTS OF BELL ATLANTIC¹

I. Introduction and Summary

Any rules the Commission adopts here to provide non-discriminatory access to in-

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

building wiring and rooftop space² in multi-tenant buildings should apply equally to all competing providers, including incumbent and competing telecommunications carriers, cable companies, and other video service providers. While Bell Atlantic already provides access to in-building wiring that it owns or controls, competitors frequently do not. In addition, competing providers often enter into exclusive contracts with building owners or managers that prevent tenants from obtaining access to competing services from Bell Atlantic and other competitors. As a result, any rules adopted here should apply to all competing providers and should include a rebuttable presumption that exclusive contracts are unreasonable in these limited circumstances.

The Commission should not, however, attempt to achieve its objective by defining in-building wiring and rooftop space as “network elements” subject to section 251 of the 1996 Act. From a policy perspective, this would not advance the Commission’s objective, because not all competing providers are subject to the Act’s unbundling requirements. From a legal perspective, moreover, in-building wiring on the customer’s side of the demarcation point is not part of the network but is unregulated inside wire that is not subject to the unbundling requirements of the Act in any event. In contrast, imposing a non-discriminatory access obligation on all providers that are subject to the Commission’s jurisdiction would solve the problem.

Likewise, the Commission should not apply the pole attachment requirements of section 224 of the Act to in-building wiring. Again, from a policy perspective, these requirements do not apply to all providers and would not achieve the Commission’s objectives. And from a legal perspective, section 224 applies only to poles and conduits on public rights of way and is inapplicable to in-building wiring.

² In-building wiring includes both unregulated inside wire and regulated house and riser cable. Rooftop space includes space on which a service provider is authorized to erect a radio antenna.

II. Competition Will Be Promoted By Requiring All Service Providers to Afford Non-Discriminatory Access to Wiring They Own Or Control and Not By Attempting to Define In-Building Wiring and Rooftop Space As Network Elements.

According to the Commission, “[a]ccess by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications markets.”³ The Commission can reach that goal by adopting a very simple policy. It should find that all service providers under its jurisdiction – incumbent and competing carriers, cable companies, and other video service providers alike – must provide non-discriminatory access to in-building wiring that they own or control, and to rooftop space where a service provider erects a radio antenna, where such access is technically and operationally feasible.⁴ Naturally, the provider that owns or controls such wiring has the right to reasonable compensation for its use, in order to recover its investment and expenses. But, subject to this *caveat*, the amount of requested compensation must not be so far in excess of that amount that it acts as a *de facto* access restriction.

While Bell Atlantic, as a matter of company policy, provides access to the in-building wiring that it owns or controls (subject to technical and operational constraints, including capacity limitations), many of its competitors attempt to prevent such access. In those instances, tenants are unable to receive services that they want from Bell Atlantic, or from other service

³ *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Notice of Proposed Rulemaking in CC Docket No. 96-98, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141, ¶ 29 (rel. July 7, 1999) (“Notice”).*

⁴ Such access would not be feasible, for example, if the existing capacity of the facility is already exhausted, if access cannot be attained without damage to the building or its contents, if the type of wiring used (e.g., coaxial cable) cannot accommodate multiple providers, or if the type of service the other provider proposes would produce unacceptable interference with other services in the riser or conduit.

providers. Requiring access to in-building wiring and rooftop space will give tenants the choice of providers and services that the policies of the Commission – and of Congress – give them.

The Commission has authority to require such access, without attempting to regulate the actions of building owners or managers. It can find that it is inconsistent with public policy for a carrier or cable/video provider to deny other providers access to in-building wiring or rooftop space.

Refusal to provide access would be an unreasonable practice under title II of the Act in the case of common carriers. In the case of cable companies and other video providers, title I of the Act provides ample authority to adopt a similar policy. Title I grants the Commission general authority over “all interstate and foreign communications by wire or radio...and...all persons engaged within the United States in such communication.” 47 U.S.C. § 152(a). This authority extends to any regulation that is “reasonably ancillary to the effective performance of [the Commission’s] various responsibilities” under another title of the Act.⁵

The Commission should not, however, attempt to define in-building wiring or rooftop space provided to erect antennas as network elements under section 251. *See* Notice at ¶ 51. First, because only incumbent local exchange carriers are required to provide access to network elements, such an approach would do nothing to afford access to wiring and space owned or controlled by other service providers, such as non-incumbent telecommunications providers, cable companies, or other video service providers. Second, the Act gives access to network elements only to telecommunications carriers, so that this approach does nothing to promote

⁵ *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). *See also, United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (the Commission has “ancillary” authority to regulate cable television “with a view not merely to protect but to promote the objectives for which [it] had been assigned jurisdiction over broadcasting”).

access by competing video providers. Third, attempting to define wiring as a network element would re-regulate the currently-deregulated charges for such wiring and would, for the first time, result in regulation of rooftop space used to erect an antenna. Such action would be inconsistent with the deregulatory thrust of the 1996 Act. Finally, the Commission could not define as a network element inside wiring that is not part of the network, such as inside wiring on the customer's side of the rate demarcation point, even in instances where a service provider owns or controls it. The Commission should promote competitive access by tenants of multi-tenant buildings by focusing on the practices of all service providers rather than by regulating currently deregulated activities.

III. Contracts Giving Exclusive Access to In-Building Wiring To a Single Provider Should Be Treated As Presumptively Unreasonable.

By the same token, all service providers under the Commission's jurisdiction – including video providers and competing local exchange providers – should be prohibited from entering into exclusive contracts to serve tenants in multi-tenant buildings. *See* Notice at ¶¶ 53, 61 and 64. By definition, giving exclusive access to a single provider – such as AT&T/TCI or another incumbent cable operator – to serve tenants in a multi-tenant building prevents other providers from offering competing services to those tenants. A single service provider with access to a building is “dominant” within that building and can prevent other providers from offering their services to customers. Therefore, regardless of whether a provider is considered “dominant” or non-dominant” generally, the Commission should preclude any single provider from foreclosing access to competitors by entering into an exclusive contract to serve all tenants in a multi-tenant building.

The Commission has sufficient authority to prohibit service providers from entering into such exclusive contracts.⁶ In the case of telecommunications carriers, the Commission can adopt a rebuttable presumption that entering into exclusive contracts to serve tenants in a multi-tenant building constitutes an unreasonable practice, because such contracts would restrict competition within the building.⁷ Such contracts, therefore, would be presumed to violate the Commission's competitive policies, which this proceeding is designed to implement. In the case of non-carriers, such as cable operators and other video service providers, the Commission can adopt the same approach under its title I authority, as discussed above.

Such a prohibition would also be consistent with the Commission's approach in other contexts in which it has restricted communications providers from entering into exclusive contracts when necessary to increase competition and enhance consumer choice in a communications market.⁸ Accordingly, the Commission should adopt a rebuttable presumption that exclusive contracts between service providers and building owners and managers that exclude access to others are anticompetitive and null and void.

⁶ By restricting the right of service providers to enter into exclusive contracts, the Commission need not address whether or not it has the authority to reach the contractual rights of building owners or managers.

⁷ This presumption can be rebutted, for example, by a showing that the failure to allow an exclusive contract for a period of time would deprive tenants of needed telecommunications services. However, any period of exclusivity should be strictly limited.

⁸ See *Implementation of the Cable Television Consumer Protection Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993) (prohibiting exclusive retransmission consent arrangements between cable operators and broadcasters); *Implementation of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993) (prohibiting exclusive contracts between cable operators and satellite programmers); 47 C.F.R. § 63.14 (prohibiting carriers authorized to provide international communications service from entering into exclusive affiliation agreements with foreign carriers or administrations); 47 C.F.R. §§ 73.132, 73.232 (prohibiting exclusive arrangements between broadcast station licensees and network organizations in a particular territory).

IV. Section 224's Pole Attachment Provisions Are Not Applicable to In-Building Wiring.

The Commission should not try to define as “rights of way” or “pole attachments” under section 224 either in-building wiring or the conduits that contain such wiring, as it proposes. *See* Notice at ¶¶ 44-47.

As a purely legal matter, Section 224 is designed to ensure that cable companies are afforded access at reasonable rates to poles, conduits, ducts, and similar structures in public rights of way and not on private property. In addition, creating a right of physical access by multiple providers to install their own in-building wiring on private property would raise serious – and apparently insurmountable – taking problems. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

From a policy perspective, applying section 224 to such wiring would not achieve the Commission's objective. First, section 224 applies only to “utilities,” and cable operators and other video providers are not included in that definition. Applying section 224 would not afford access to in-building wiring owned or controlled by such providers and would not promote competition. Second, as explained above, the Commission's goal can be better accomplished by requiring all service providers to afford non-discriminatory access to existing wiring (if technically and operationally feasible). This would not impinge on the landlord's property rights, because there would be no new wiring or conduit installed that is not authorized by existing agreements between the incumbent service provider and the building owner. Instead, the incumbent would simply give others access to the wiring that it owns or controls. For example, Bell Atlantic routinely installs wiring within a building through agreement with the building owner or manager. This is true whether the wiring is defined as house and riser cable,

i.e., part of Bell Atlantic's regulated service, or whether it is unregulated inside wire beyond the rate demarcation point. In both instances, Bell Atlantic currently provides access to other service providers, including competing local exchange carriers, where such access is technically and operationally feasible, and will continue to do so.⁹

Even aside from the fact that section 224 does not apply to in-building wiring, section 224(c) deprives the Commission of jurisdiction to regulate pole attachments or conduits where a state certifies that it has adopted regulations under that section. And the Commission should not undermine Congressional intent by requiring states to submit more than the certification specified in section 224(c)(2) in order to determine whether states are actually regulating pole attachments. On the contrary, the Act is clear that where the state provides the necessary certification, the Commission is divested of jurisdiction. Accordingly, the Commission must accept the state certifications, and it cannot step in absent a conclusive showing that a state is not meeting the requirements of section 224.

The Commission also suggests that incumbent local exchange carriers might be required to use eminent domain authority to condemn property in order to secure access to in-building wiring for others. Notice at ¶ 46. The Commission cannot and should not adopt this proposal, for three reasons. First, the Commission simply has no authority to require a local carrier to exercise a locally-granted right to condemn property to provide local exchange telephone service. This authority is under exclusive state or local jurisdiction, depending on the law of each state. Second, any eminent domain authority granted to a utility is generally restricted so it may condemn property needed for that utility to provide service to its own customers, and not to

⁹ Where the building owner or manager has taken full control over the unregulated inside wire, Bell Atlantic no longer "owns or controls" the wiring. Therefore, Bell Atlantic would have no obligation (or ability) to provide access to others.

allow a utility to condemn private property on behalf of other companies. Third, condemnation under eminent domain is an often contentious judicial proceeding that should be used only as a last resort, not adopted as a routine regulatory requirement. Condemning an easement for wiring within a building would be especially difficult and expensive due to the need to develop, under eminent domain laws, a map or legal description of the specific three dimensional area to be taken within the building. For this reason, Bell Atlantic rarely if ever uses eminent domain authority and has never used it within a privately-owned building. Instead, Bell Atlantic seeks to negotiate mutually-agreeable access arrangements for installation of its facilities.¹⁰

V. The Rate Demarcation Point Rules Should Not Be Changed.

Finally, the Commission should not adopt a uniform rate demarcation point (“RDP”) rule. Notice at ¶¶ 65-68. So long as the Commission requires all providers to afford access to in-building wiring they own or control, regardless of the side of the RDP on which it may be located, competitive access will have been preserved and the goals of this proceeding met without revising the RDP rules. The location of the RDP will still help determine the responsibility for maintenance and the ownership of the wiring, but it will not prevent tenants from receiving service from the providers of their choice.

It took a number of years to implement the existing RDP rules, and changing them again would be highly disruptive and expensive. Moving the RDP for existing wiring entails resolving complex issues of cost recovery, access, and responsibility for maintenance. And attempting to

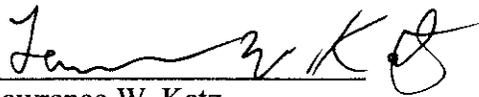
¹⁰ The reach of eminent domain authority varies widely depending on state law. For example, Bell Atlantic does not have eminent domain powers in all of the jurisdictions in which it operates. In some jurisdictions, newly-authorized local exchange carriers may have eminent domain powers but in other jurisdictions they may not. Therefore, the Commission could not adopt a nationwide regulation that would be equally applicable in all states.

maintain RDPs at different locations for existing buildings and for new ones, as would be the case if new RDP rules had prospective effect, creates significant operational problems. For example, technicians must be aware of which rule applies to a particular building, and that may not always be clear from the telephone company's electronic or paper records. The records may not show the precise date when a building was constructed or the wiring renovated. Or parts of an existing building may have been substantially renovated, or a new section added, while leaving some of the old wiring in place. In that case, part of the wiring may fall under one rule and part under another.

VI. Conclusion

Accordingly, the Commission should adopt rules consistent with the foregoing that apply equally to all providers.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1999, copies of the forgoing
"Comments" were sent by first class mail, postage prepaid, to the parties on the attached list.



Jennifer L. Hoh

* Via hand delivery.

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