

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Promotion of Competitive Networks) WT Docket No. 99-217
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 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) CC Docket No. 96-98
Provisions in the Telecommunications Act)
of 1996)

COMMENTS OF AMERITECH

Ameritech respectfully submits the following comments in response to the Commission's recent Notice of Proposed Rulemaking in the above-captioned matter.¹ In these comments, Ameritech shows (i) that state law should determine whether a utility "owns or controls" access to conduit, risers, and rooftops in multiple tenant environments (MTEs"); (ii) that there has been no showing that intrabuilding wiring satisfies the "necessary" and "impair" standards required of mandatory network elements; (iii) that

¹ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, etc.*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking, etc., FCC 99-141 (released July 7, 1999)("NPRM").

there would be potentially significant costs associated with any mandatory relocation of the “demarcation point”; and (iv) that it would be arbitrary and anticompetitive for the Commission to apply a prohibition against contracts for exclusive building access only to carriers with “market power”.

I. “Ownership or Control” for Purposes of the Application of Section 224 to Utility Rights in MTEs Should be Defined by State Law.

In the NPRM, the Commission tentatively concludes that the obligations of Section 224² extend to riser space³ and rooftops⁴ of publicly or privately owned multi-tenant buildings “owned or controlled” by utilities. The Commission seeks comment on the meaning of “own or control” in Section 224 as applied to utility rights in privately owned multi-tenant buildings and the extent of such rights⁵.

The purpose of Section 224 is to permit cable television systems and providers of telecommunications services to “ ‘piggyback’ along distribution networks owned or controlled by utilities”⁶ by attaching to the poles, ducts, conduits and rights-of-ways of utilities. In constructing the distribution systems to which Section 224 applies, utilities place poles, ducts and conduits on publicly controlled rights-of-way, such as streets and highways or publicly dedicated utility easements, or on privately owned property.

A utility’s right to use public property is created and defined by state statutes, municipal ordinances and/or franchises. A utility’s rights with respect to its use of private property for its distribution systems is created and defined by its arrangement with the property owner. This latter may be in some form of written agreement providing a property right, such as an easement, lease or license; or an obligation of the property

² 47 U.S.C. sec. 224.

³ NPRM at ¶44.

⁴ *Id.* at ¶42.

⁵ *Id.* at ¶45-46.

owner to provide access to its property as a condition of obtaining service under the utility's tariffs; or a mere permission granted by the property owner. In any event, these rights are created pursuant to state law and are enforceable under state law. As the Commission has noted, "(t)he scope of a utility's ownership and control of an easement or right-of-way is a matter of state law."⁷

To be useful to cable television systems and providers of telecommunications services for "piggybacking" of their distribution systems, the "ownership and control" that a utility possesses over its poles, ducts, conduits and rights-of-way must be such that the utility has a legally enforceable right to permit use of its pole, duct, conduit, or right-of-way by the attaching party. Whether the utility has such a right depends upon the precise nature of the legal interest by which the utility possesses the right to maintain its poles, ducts, conduits or rights-of-way on public or private property and by the particular law of the state in question.⁸

Absent a clear legal right on the part of the utility to authorize use of its right-of-way without the consent of the underlying private property owner or public authority, any attempt by an attaching party to use the utility's right without first obtaining such consent may well be a trespass on the part of the attaching party and/or a breach of the agreement

⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, (Local Competition First Report and Order), at ¶1185.

⁷ Local Competition First Report and Order, at ¶1179.

⁸ For instance, most utility easements on private property are "easements in gross", that is, easements not appurtenant to a property owned by the utility. Absent express language in the easement permitting the utility to license use of or subassign the easement, the right of the utility to permit use of the easement by an attaching party will be defined by the common law of the state with respect to easements. In some states the common law principle is that easements in gross are not assignable or apportionable; in others, easements in gross are apportionable and subassignable. In the former, the utility has no ability to provide use of the easement to an attaching party absent consent of the underlying property owner; in the later, the utility may provide access without such consent. Similarly, utilities cannot authorize a competitive provider or cable system to occupy a public right-of-way, even if the utility has poles, ducts or conduits in that public right-of-way. Authorization by the municipality will be necessary in order for the carrier or cable system to attach to the utility's facilities in the public right-of-way.

or right on the part of the utility, subjecting both to objection and potential litigation by the underlying property owner and, potentially, loss of the right by the utility.

Any “control” a utility exerts over a right-of-way by virtue of placing a cable in a building with the agreement of the owner will be of little practical use to an attaching party if the utility does not have an enforceable legal right to permit the attaching party to use the path it supposedly “controls”. Particularly in multi-tenant buildings, as a practical matter, utilities do not have unfettered access to the common areas of the buildings or the equipment rooms or closets or riser shafts even for the utility itself, much less an ability to provide such access to attaching parties. Access to the building is both practically and legally controlled by the building owner, who has the authority of state property law at his or her call to prohibit non-consensual access to the building.

A broad reading of the term “control” in Section 224 will not have the effect of making access to multi-tenant buildings by competitive service providers any easier, because in almost all instances, the utility does not have a legal right to permit the access to the service provider. Accordingly, the Commission should refrain from extending its interpretation of “control” for purposes of Section 224 beyond its prior recitation that “ownership and control” is a matter of state law.

II. Intrabuilding Wiring Should Not Be Considered a National Unbundled Network Element.

The Commission has requested comment on the potential treatment of incumbent LEC-owned in-building cable and wiring as a network element subject to mandatory unbundling under §251(c)(3).⁹ The Commission noted that, as a result of the Supreme

⁹ NPRM at ¶51. In the UNE Further Notice of Proposed Rulemaking, the Commission has already solicited comment on whether unbundling should be required of ILEC-owned wire on the customer’s side of the demarcation point. *Id.* at note 123.

Court's decision in *Iowa Utilities Board*,¹⁰ it will establish criteria for applying the "impair" and "necessary" standards of §251(d)(2) and apply those standards to its previously-identified minimum set of network elements.¹¹ Although the Commission makes no mention of it, those standards would apply to the analysis of any in-building cable and wire as well.

The Commission notes that:

[F]acilities-based competitive LECs have advanced arguments that, in many cases, it is difficult for them to provide service without access to these facilities.¹²

However, no case has yet been made that these facilities pass the "impair" test and that they do so in such a vast number and high percentage of cases that they can be included on the national uniform list of network elements.

First, with respect to incumbent LEC-owned wire located on the customer's side of the demarcation point,¹³ a requirement that incumbent LECs make it available as a UNE to any CLEC either is unnecessary or would conflict with the Commission's prior rulings on "inside wire" (technically, wire on the customer's side of the demarcation point). It is unnecessary because the Commission has already ruled that, with respect to wire whose cost was recovered in the rates for regulated services, the customer has most of the beneficial incidents of ownership already. The customer may use the wire as it sees fit.¹⁴ So, if the CLEC wants to use inside wire to serve the customer, all the CLEC has to do is get its customer's consent; and, therefore, it is unnecessary to include the facilities on the national list of network elements. However, if the CLEC wants to use

¹⁰ *Iowa Utilities Board v. FCC*, 119 S. Ct. 721 (1999).

¹¹ NPRM at ¶51.

¹² *Id.*

¹³ Although Ameritech already addressed this issue in its Reply Comments in the UNE FNPRM proceeding, it repeats its argument here for convenience.

¹⁴ *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, FCC 86-513, 1 FCC Rcd. 1190 (released November 21, 1986) at ¶35.

that wire without the customer's consent, Ameritech suggests that the Commission should decline to facilitate the CLEC's efforts since that would directly conflict with what the Commission has already done in giving control over inside wire to the customer. Moreover, there is no public interest that is furthered by giving a CLEC the right to override its potential customer's wishes.

With respect to incumbent LEC-owned wiring between the minimum point of entry ("MPOE") and the demarcation point,¹⁵ claims of CLEC "need" for the facilities have been made in general, conclusory terms that in no way demonstrate that the "impair" test has been met. For example, in its comments in response to the UNE FNPRM, WinStar said:

In many buildings, it is difficult if not impossible for a CLEC to serve individual tenants without access to the house and riser cables and conduit owned by the ILEC...¹⁶ (Emphasis added.)

Similarly, Teligent claimed:

[I]n most customer installations, especially in multi-unit dwellings, competitive LECs will not be able to provide service if they must essentially rewire the building in whole or in part in order to provide service.¹⁷ (Emphasis added.)

And MCI argued:

[I]t often is infeasible for CLECs to replicate intrabuilding network cable in multi-tenant buildings or on campuses. Even if it were economically feasible to do so, and space existed in the ducts, landlords rarely will agree to provide the necessary access because of the disruption associated with installing redundant parallel cable pairs.¹⁸ (Emphasis added.)

Even if these claims are taken at face value, they imply that, in some (perhaps many) buildings and perhaps in many customer installations, it is neither difficult nor impossible

¹⁵ Because the Commission's definition of demarcation point puts it close to the MPOE for individual customers, the wiring between the MPOE and the demarcation point being discussed in this context is "house and riser" cable in MTEs.

¹⁶ WinStar comments at 5.

¹⁷ Teligent comments at 26.

¹⁸ MCI comments at 47.

for the CLEC to provide its own intrabuilding wiring and that in some cases landlords will agree to provide CLECs with the necessary access to do so.

While Ameritech does not contend that the “impair” test for access to incumbent LEC owned intra-MTE wire would never be met, the CLECs simply have not shown that it would be met in such a high percentage of cases that incumbent LEC-owned intra-MTE wiring should be included on the national uniform list of network elements. While it might cost CLECs more to construct their own intrabuilding wiring than it would to obtain it as a UNE,¹⁹ the Supreme Court noted specifically that an assumption that any increase in cost satisfies the “impair” standard is not consonant with “the ordinary and fair” interpretation of the statutory requirement.²⁰ Similarly, while there might be cases in which CLECs have difficulty with gaining access from uncooperative landlords, there is no evidence before the Commission that those problems are so unmanageable and so widespread that these facilities must be considered a pre-determined network element in all cases.

Moreover, to the extent that mandating access to these facilities would be a version of subloop unbundling, there has yet been a demonstration that the associated technical, administrative and operational and network reliability issues identified by the Commission in 1996 have been resolved.²¹ In the Local Competition First Report and Order, the Commission declined to identify components of the loop as individual network elements because it concluded that “proponents of subloop unbundling [had] not

¹⁹ In an incredible display of wanting to “have its cake and eat it, too,” Level 3 (in its comments in response to the UNE FNPRM) claimed that TELRIC would not be the appropriate basis for charges for this requested UNE. It insists “that there should generally be no charge for access to customer premises wiring as a UNE because in most cases incumbent LECs have already fully depreciated it.” Although pricing standards are not in issue in this proceeding, this “TELRIC-or-embedded-cost,-whichever-is-cheaper” position must be rejected as completely arbitrary.

²⁰ *Iowa Utilities Board*, 119 S. Ct. at 736.

²¹ Local Competition First Report and Order, 11 FCC Rcd at 15696.

address[ed] certain technical issues raised by incumbent LECs concerning subloop unbundling.”²² In that proceeding, Ameritech and others developed in detail the technical, administrative, operational and network reliability issues associated with subloop unbundling. Ameritech further demonstrated that the necessary technical standards, specification and operational procedures had not yet been developed. Moreover, Ameritech pointed out that, for certain loop types, subloop unbundling is not feasible at all and that in many locations there is not sufficient space to permit interconnection.²³ Many of these same concerns arise regarding intrabuilding cable and wire, and there is no record established that unbundled access to these facilities is technically feasible on a national basis.

III. The Commission Should Carefully Consider the Costs Associated with Any Plan to Relocate the Demarcation Point in MTEs.

The Commission has suggested that commenters may consider whether the Commission should adopt a uniform demarcation point for all or some class of MTEs.²⁴ The Commission should be aware that relocating the demarcation point to the minimum point of entry in existing MTEs would involve significant costs, for both customers and LECs, that must be considered.

In many cases, the LEC uses in-building electronics in an MTE to deliver services to customers on the various floors. In some of those cases, electronics include multiplexing. An MPOE demarcation point rule would require locating all of that equipment at the MPOE. There may not be enough room. In addition, because of the loss of in-building multiplexing, riser cables and associated conduit may have to be reinforced or replaced. Because of the change in electronics, the building’s electrical

²² *Id.*

²³ Ameritech Comments filed May 16, 1996 at 37-42.

service may have to be modified. Customers may have to purchase redundant electronics to get the service from the basement up to their floors. And all circuits involving the relocation of electronics would experience down time.

From the LEC's perspective, there are costs associated with redesigning high capacity circuits that would have a new termination point. Also, circuits would have to be retagged (marked) and other activity undertaken to terminate service at the new interface point. LECs would have to be able to recoup these costs.

Finally, the recovery of any remaining capital cost of the facilities must be considered. In the past, the Commission has permitted the cost to be recovered in regulated rates spread across all ratepayers. There may have been some logic in this if all of the customers using the wire remained customers of the LEC. However, there would be no such justification if the wire is used by a LEC's competitor and its customers. It would not be appropriate to require the LEC's customers to subsidize competitive providers by continuing to pay for a CLEC's use of the facilities.

IV. Any Rule Regarding Exclusive Contracts for Building Access Should Apply Uniformly to All Providers.

In considering whether to impose nondiscriminatory access obligations on building owners²⁵ or limitations on carriers in the absence of a nondiscriminatory access obligation,²⁶ the Commission seeks comment on whether it should prohibit exclusive contracts between building owners and carriers for building access, and, if so, whether the prohibition should extend only to carriers with "market power".²⁷

²⁴ NPRM at ¶67.

²⁵ *Id.* at ¶53.

²⁶ *Id.* at ¶64.

²⁷ *Id.*

While it is a virtual certainty that certain CLECs will argue that the Commission should adopt such a selective prohibition, if the Commission deems it necessary to prohibit exclusive contracts, it would be “arbitrary and capricious” if the Commission were to fail to do so uniformly for all carriers.

The Commission observed that:

[It] has a long history of concern that all customers have access to their choice of communications service providers in competitive markets.²⁸

The National Association of Regulatory Utility Commissioners has likewise adopted a resolution that supports customer choice of telecommunications providers in multi-tenant buildings.²⁹ And the Commission itself put the issue of exclusive contracts in context by noting:

[W]e 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.³⁰

If the Commission were to find that it was necessary to preclude exclusive contracts “to ensure that customers in multiple tenant environments have access to their choice of telecommunications service providers”, it would be nonsensical for the Commission to permit carriers without market power to enter into such contracts. Such an asymmetrical rule would preclude customers from being able to choose the incumbent LEC as their carrier. A rule that would foreclose customers from choosing one type of carrier, those with “market power”, would not further, but would frustrate, the objective of affording customers choice in telecommunications services providers. Accordingly, if the Commission adopts any rule prohibiting carriers from entering into exclusive

²⁸ *Id.* at ¶32.

²⁹ *Id.* at ¶54.

³⁰ *Id.* at ¶64.

contracts for building access, it must apply in a uniform and nondiscriminatory manner to all carriers.

V. Conclusion.

In light of the foregoing, the Commission should defer to state law for a determination of whether utilities – including incumbent LECs – “own or control” conduit, riser, or rooftop access in MTEs for the purpose of applying Section 224. Also, the Commission should refuse to include incumbent LEC-owned intrabuilding wiring on the list of pre-determined national UNEs at this time. In addition, the Commission should not mandate a uniform demarcation point for MTEs without considering and providing for the recovery of the costs associated with such a move. Finally, if the Commission decides that, in order to ensure that customers in MTEs have their choice of carriers, it is necessary to preclude carriers from entering into exclusive contracts for access to MTEs, then it must apply the rule to all carriers equally.

Respectfully submitted,

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