

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)
In Local Telecommunications Markets)
)
Wireless Communications Association)
Petition for Rulemaking to Amend)
Section 1.4000 of the Commission's Rules)
)
Cellular Telecommunications Industry)
Association Petition for Rulemaking)
and Amendment of the Commission's)
Rules to Preempt State and Local)
Imposition of Discriminatory 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 APEX
SITE MANAGEMENT, INC.

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SUMMARY

Apex Site Management, Inc. (“Apex”) is a full-service real estate management and consulting company that specializes in negotiating telecommunications access agreements between property owners and telecommunications companies. It has completed nearly 900 agreements with 25 telecommunications companies embracing some 1900 sites.

Far from creating obstacles to access by competitive providers, Apex’s building owners have executed occupancy agreements at a rate that far outpaces the carriers’ ability to install and operate the sites. The property owners are themselves in a competitive business. Owners therefore recognize that alternative telecommunications providers offer services that are important to building tenants. Apex advises its clients not to grant exclusives, which in the case of telecommunications most often are proposed by the prospective lessees rather than the building owners.

The prudential approach taken by the FCC immediately prior to the adoption of Section 224 in 1977 remains sound today. None of the amendments to the Communications Act since then operates to bring owners of private non-utility property – as distinguished from carriers or governments – within the Commission’s jurisdiction. Testimony at recent Congressional hearings on competitive telecommunications access to multi-tenant buildings suggests that the record of abuse is sparse and that state solutions may suffice in the absence of a national mandate.

Apex urges the Commission to allow the natural mechanisms of the multi-tenant realty market to continue working toward affordable and nondiscriminatory access for telecommunications competitors without subtracting from the asset values that owners are charged to maintain and enhance.

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**COMMENTS OF APEX
SITE MANAGEMENT, INC.**

Apex Site Management, Inc. ("Apex") hereby comments on the captioned Notice of Proposed Rulemaking ("Notice"), FCC 99-141, released July 7, 1999. Apex opposes the adoption of rules mandating non-discriminatory access to multi-tenanted commercial buildings. Based on Apex's extensive experience in this area, Apex believes that (i) market forces have developed a system that generally creates incentives for owners to permit telecommunications carriers to access their properties on a fair and non-discriminatory basis; (ii) the vast majority of building owners do not prevent telecommunications carriers from providing services to building occupants, rather the

number of buildings subject to access agreements far exceeds the number of installed and operational sites; and (iii) the terms and conditions of the governing access agreements are not more onerous or aggressive than those of any other occupancy agreement at the property. Moreover, any rules that are established will not prevent the parties from having to address the issues that are typically negotiated in these types of transactions.

APEX'S BUSINESS

Apex is a full-service real estate management and consulting company that specializes in negotiating telecommunication access agreements between property owners and telecommunications companies. Apex assembles clusters of high-quality real estate in major metropolitan markets. Apex has delivered over 1,900 sites to the telecommunications industry, through leases on behalf of its owners, and has amassed over 12,000 properties under exclusive management agreements in the United States and Canada. The site portfolio is comprised of all types of real estate: high rise office and residential buildings, retail centers, office and industrial parks, raw land, existing telecommunications tower sites, smoke stacks and water tanks. As of July 1, 1999, the greater-than-12,000-site portfolio includes over 1785 commercial office buildings, 1478 industrial or "flex" office space and 1416 hotel and hospitality properties. Apex includes as its clients many of the largest office and hotel REIT's based on market capitalization. Many of the largest office buildings in the major Central Business Districts ("CBDs") across the county are managed by Apex. Apex's team is comprised of real estate professionals with system operating experience in all aspects of telecommunications.

CARRIER RELATIONSHIPS

Apex is one of the country's largest providers of sites to competitive local carriers, both wireline and wireless. Apex has completed over 877 agreements with 25 telecommunications companies requesting building access in order to provide telecommunications services to businesses. Each of these transactions represents a fully-negotiated agreement providing for market-rate terms and conditions whereby the real estate owner has permitted the telecommunications provider to access the property in order to provide service.

APEX'S EXPERIENCE WITH ACCESS AGREEMENTS

If a competitive LEC is interested in accessing an Apex client's property, Apex will propose the business terms of the relationship and suggest the use of a license agreement or lease to govern the terms and conditions of such occupancy. The following sets forth the typical terms and conditions of the access agreements that Apex has negotiated on behalf of its clients. Generally speaking, for all clients that own a large portfolio of properties (more than 10 buildings), Apex has recommended that the transactions be structured on a portfolio basis. Therefore, the competitive LEC will identify initial properties it desires to access, pursuant to an option agreement granting the competitive LEC the right to operate from additional properties during the agreement's term, as future needs arise.

These access agreements typically provide for a fixed term of occupancy, generally three to five years, with a right to renew for additional one or two-term periods. The agreements further provide for a fixed rental amount, typically \$300 to \$500 a month, but such amounts may be significantly increased depending upon the size of the

installation, the number of antennas or electrical cabinets and other occupancy-related factors. The agreements also contain typical terms and conditions associated with the occupancy of the owner's property. Issues such as insurance, access restrictions, repair and maintenance, indemnity, default, liability, subordination and regulatory compliance are all addressed.

It is important to note that the terms and conditions of the occupancy agreements with the telecommunications carrier with respect to these issues are similar to, if not exactly like, the requirements that the building owner imposes on other occupants of the property. The owner's fundamental interests of property ownership and asset value preservation are the basis underlying these provisions. The monetary compensation for the owner, on an individual deal basis, is relatively minor. However, these amounts are derived from two factors: (1) the competitive forces in the market place, and (2) the requisite compensation to which the owner is entitled for the use of the real estate, the oversight and administrative issues involved with the transaction and the inherent risk associated with third party occupancy.

While the economic issues associated with the transaction are important, they typically are not the basis for involved and lengthy negotiation. The issues associated with the competitive LEC's occupancy of the property are much more contentious. Building owners are very concerned whenever third parties occupy their property and require each occupant to agree to certain terms and conditions. Irrespective of whether competitive LEC's obtain non-discriminatory access to real estate at something less than market price, the owner will still require the carrier to adhere to certain rules and regulations regarding occupancy. The owner should not be expected to assume the risks

associated with having equipment placed on the property and with employees or agents of the competitive LEC accessing the property. The right of the owner to require certain terms and conditions of occupancy will not be lessened merely by the adoption of some form of mandated access.

APEX'S VIEW OF THE CURRENT MARKET SITUATION

As previously noted, Apex has provided a significant number of sites to the competitive LEC industry. It has not been Apex's experience that building owners create undue obstacles for the competitive LEC provider. As a matter of fact, the opposite is more likely to be true.

Apex finds that many competitive LEC's have been so successful in accessing properties, that the amount of executed occupancy agreements far outpaces the telecommunication carriers' ability to install and operate sites. For example, one carrier has completed over 500 access agreements with Apex clients, but only 50% of these are actually installed. Another carrier has over 220 executed agreements and only 30% installed sites. Moreover, Apex has negotiated option agreements between owners and telecommunication carriers covering approximately 1,050 buildings. However, only 286 buildings have actually been the subject of license agreements, leaving approximately 764 buildings available for the carriers immediately.

It is important to note that building owners are in a competitive business. They are always faced with the challenge of providing additional amenities to their properties in order to increase occupancy rates. Regardless of the relative strength of a particular market, the property owner continues to strive to improve its product. Property owners are extremely sensitive to the fact that a market may turn negative and it would be

economically detrimental for an owner not to keep its building in a state-of-the-art condition in the event a depressed market occurred.

Most real estate owners have a strong desire for tenants to renew their leases because the economic return on a renewal is so significant. In a typical lease transaction, the owner spends money to fit out the tenant and make the space comport to the tenant's needs and desires. The rent structure is devised to provide the owner with a return on both the tenant's occupancy of the space and the cost of the build-out. If the tenant renews, generally speaking, the owner is not obligated to provide a significant build-out allowance. If the rent remains similar to that of the first term, the owner's economic return is substantial because the rent is not a means to repay the cost of improvements.

Therefore, the owner wants to provide the tenant with the proper incentives to renew its lease. Toward that end, owners recognize that alternative telecommunication providers offer services that are important to building tenants. An absence of these services may prompt a tenant to change locations, thereby preventing the owner from achieving the economic returns that are associated with renewal tenants. It is Apex's experience that the owners recognize this fact and want to bring alternative services to the building. The owners understand the value that these providers create and they do not want to create barriers to entry. The owners require a fair and equitable return for their increased costs and risks and want terms and conditions that preserve the value of the real estate.

EXCLUSIVES

Apex takes the position that exclusive lease agreements with commercial service providers are not in the best interest of the real estate owner, and advises all of its clients

not to grant these to requesting telecommunication carriers. To date, of the 877 access agreements Apex has negotiated on behalf of its clients, none contains exclusive rights for the carrier. It is important to note that owners typically do not initiate the discussion of exclusive arrangements. Rather, the carriers themselves propose these as a means of preventing competition in the building. Therefore, it is curious that the telecommunications carriers that individually request exclusives from real estate owners, are, as an industry, asking the FCC to protect them from themselves by forbidding such arrangements.

Apex's finds that owners tend not to provide competitive LEC's with exclusives. This industry is relatively young and it is unclear which of the many new companies will survive in the new competitive environment. As noted above, the building owner has a significant interest in providing new services to its properties. If the owner were to grant an exclusive to a company that ultimately did not survive, the owner would be affecting the value of its core asset. Therefore, it is Apex's belief that owners prefer to provide access to all competing companies in order to maximize revenue and prevent the problem of supporting the wrong company.

As an alternative to exclusives, owners may designate certain companies as preferred providers. This is not an exclusive arrangement, but designates a particular provider as the provider that the owner recommends. Typically, a preferred provider is one that has been designated after a competitive process where all the providers present their services and the owner selects a winner. As a preferred provider, the owner engages in a joint marketing effort with the provider and the owner either shares revenues or is granted equity in the provider.

It is important to note that the designation is the result of a competitive process and not merely arbitrary. Moreover, even if an owner does in fact designate a preferred provider for that building, it does not preclude other telecommunication providers having access to the property--except perhaps within a short exclusionary period to recoup investment expenses.

INCUMBENT LECS

Apex acknowledges that the incumbent LECs currently enjoy an economic advantage over the competitive LECs because their occupancy often is free and not subject to a written agreement. Apex is advising the owners it represents that, upon competitive LECs obtaining market share penetration within a building, the incumbent LECs should be subject to the same rules and regulations as the competitive LEC, or any other building occupant for that matter. It is clear, from the statistics that Apex has provided, that this slight and transitory disadvantage has not prevented competitive LECs from accessing property.

Apex believes most owners would be willing to propose these restrictions on the incumbent LEC immediately. However, we fear that taking this course of action would risk the incumbent LEC pitting the building tenants against the owner. Therefore, the prudent approach for the owner is to delay imposing these restrictions until the competitive LEC can gain market penetration and offer competitive service.

SOME JURISDICTIONAL CAVEATS

The Commission has been properly prudent in approaching questions of its authority to mandate access to utility facilities on private property, much less to non-utility property. At ¶52 of the Notice, the agency recalls that the record of a previous

proceeding on federally-mandated access “did not provide a sufficient basis for addressing the issues.” Similarly, at ¶56, the FCC asks, without deciding even tentatively, “whether the imposition of a nondiscriminatory requirement would be within our statutory authority.” The historical record reinforces this caution.

In 1977, despite several years of importuning by the young cable television industry, the FCC nevertheless declined to assert jurisdiction over the rates, terms and conditions that utilities – both electric power and telephone companies – were imposing on cable operators for the attachment of their coaxial facilities to above-ground poles or their placement in underground conduits. Although moved by the nascent industry’s claim that pole and conduit rental charges were equal to or greater than cable TV profits, the Commission refused to extend its jurisdiction beyond what it felt was allowed by Section 2(a) of the Communications Act, 47 U.S.C. §152(a). The holding out of pole or conduit space by utilities – even by regulated telephone companies – could not be considered “communication by wire or radio.” Furthermore, there seemed to be no end to the enlargement of the FCC’s powers sought by the cable TV operators:

The reading of these sections urged by petitioners is overbroad, and would bring under the Act activities never intended by Congress to be regulated. The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for the use of public and private roads and rights of way essential for the laying of wire, or even access and rents for antenna sites.

California Water and Telephone Company, et al., 64 FCC 2d 753, 759 (1977). None of the amendments to the Communications Act since 1977 operates to bring owners of

private non-utility property – as opposed to carriers or governments – within the Commission’s jurisdiction.

The reference in the *California Water* decision to antenna sites was notably prescient, given the importance attached to rooftops by the competitor-movants in this proceeding and given Congress’ refusal, even in the significant legislative amendments of 1996, to take away from local authorities their paramount missions of planning and zoning. 47 U.S.C. §332(c)(7)(A).

In comments submitted in earlier related proceedings, competitive LECs and their representatives have swept too far with the revisions to the Communications Act created by the Telecommunications Act of 1996 (“TA 96”). Winstar would read Section 704(c) of TA 96, which by its terms is limited to federal and state government public property, as somehow applicable to private property that happens to lie within a state.

Thus, because every building in every state is under that particular State’s jurisdiction, Congress clearly contemplated *that every building in the country* would have its inside wire reasonably available to providers of telecommunications services that are dependent upon the utilization of spectrum. (emphasis in original)¹

This is too much weight to place on an uncodified legislative request that the FCC “provide technical support to States to encourage them to make property, rights-of-way and easements under their jurisdiction available for such [radio siting] purposes.”

Teligent stretches TA 96 too far by arguing that a state which fails to forbid, through legislation, restrictions on telecommunications access to private property is somehow complicit in restraining competition.

Alternatively, the Commission can recognize that a State’s silence on this issue (and the building owners’ concomitant legal authority

¹ Comments, CC Docket 98-146, September 14, 1998, 9.

under State laws to restrict access) operates as a barrier effectively prohibiting competition which mandates Commission action under Section 253(a). (footnote omitted)²

Section 253(a) reads on state statutes, regulations and legal requirements. It does not and cannot speak to their absence.

The Association for Local Telecommunications Services (“ALTS”) takes a more realistic view, acknowledging that Section 224 of the Communications Act applies to utilities and not to private property owners. Nevertheless, ALTS succumbs to the temptation to find warrant in Section 207 of TA 96 for the kind of multi-tenant building access at issue here. Acknowledging that the section by its terms refers only to conventional, microwave and satellite distribution of TV signals, ALTS is left only with general sources of Communications Act authority that cannot alter the express words of Section 207. Finally, ALTS retreats to the suggestion that the FCC work with state commissions and other state authorities to encourage competitive telecommunications access to multi-tenant buildings.³ This is a far cry from a national mandatory access standard.

True enough, Congress eventually adopted Section 224 of the Communications Act in recognition of the bottleneck control over essential facilities exercised by pole and conduit owners in telecommunications and other industries. But it was Congress that made the decision, not the FCC. Significantly, the competitive LECs also have taken their latter-day complaints to Congress. At several points, the Notice refers to a hearing conducted by the House Telecommunications Subcommittee May 13, 1999.

² Comments, CCBPol97-9, August 11, 1997, 26.

³ Comments, CC Docket 98-146, September 14, 1998, 20-21.

To Apex, the paucity of the complaint record thus far is striking. Witnesses have seized on several examples of allegedly unreasonable access charges imposed by nameless building owners in the State of Florida. But, in the same hearing, Winstar's Chairman and Chief Executive Officer, William J. Rouhana, Jr., spoke optimistically of a legislative compromise reached in that state by building owners and competitive carriers. Although the bill did not pass, Mr. Rouhana declared that "the Florida experience is evidence that the interests of competitive carriers and real estate holders are complementary and that a win-win solution to the building access issue can be reached." Apex agrees. But the solution is not necessarily legislative or regulatory.

SUGGESTED APPROACH

Apex maintains that the market is working to provide non-discriminatory access to telecommunication providers. Further federal regulation beyond the existing implementation of the Communications Act is not needed. Contrary to claims made by the competitive LEC industry, Apex has not witnessed exclusionary tactics by property owners. Apex is at the forefront of providing sites to these entities and it is Apex's experience that the providers are not being kept out of properties. Owners have routinely executed fair and reasonable occupancy agreements with the carriers and the fact that many carriers cannot keep their installations on pace with their executed agreements is compelling testimony on the point.

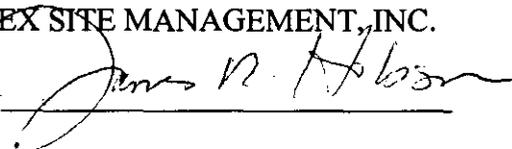
CONCLUSION

For the reasons outlined above, Apex urges the Commission to allow the natural inclinations of the present multi-tenant realty market to work toward affordable and non-discriminatory access for telecommunications competitors without subtracting from the asset values that owners are charged to maintain and enhance.

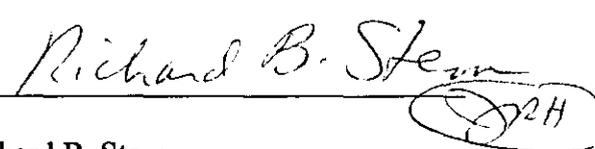
Respectfully submitted,

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