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FCC MAIL ROOM

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, D.C. 20554

Re: 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

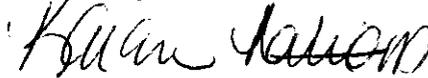
Dear Ms. Salas:

On behalf of Metromedia Fiber Network Services, Inc., enclosed is an original and seven (7) copies of its comments in the above captioned matter.

Please file the original and six (6) copies.

Please return the additional copy to us in the enclosed self-addressed stamped envelope marked "filed."

Sincerely,


Karen Nations

cc: International Transcription Services, Inc.

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Metromedia Fiber Network Services, Inc.

Legal Department, One Meadowlands Plaza, East Rutherford, NJ 07073-2137

SUMMARY

Metromedia Fiber Network Services, Inc. ("MFNS") submits its comments on access to rights-of-way, pole attachments, and building access as requested by the Commission.

As a carriers' carrier, MFNS has the critical need to have ready access to all ILEC central offices, utility pole attachments and rights-of-way, and other buildings in order to build its high-bandwidth, fiber optic communications infrastructure. This competitive network will enhance the public interest by providing competitive local exchange carriers with a modern, sophisticated network in which to offer services to end-user customers.

The Commission must ensure that competitive carriers and facilities providers have access to all utility rights-of-way and pole attachments. The Commission must make it clear to incumbent LECs and incumbent utilities that it will not stand for stonewalling and misuse of an incumbent's market power to stall the progress of competition or to assist its telecommunications affiliate.

Building owners have a similar obligation to facilitate competition and provide nondiscriminatory access to their buildings and the Commission must ensure this obligation is met.

MFNS urges the Commission to use its rulemaking authority to impose fines for utilities that fail to provide access to its rights-of-way and pole attachments, require incumbent local exchange carriers to offer Competitive Alternate Transport Terminal ("CATT"), and protect facilities providers and end-user customers from unjust and unreasonable demands from building owners.

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**Comments of
Metromedia Fiber Network Services, Inc.**

Introduction

Metromedia Fiber Network Services, Inc. ("MFNS") is a competitive provider of optical local, exchange access, and interexchange private line facilities throughout the nation. MFNS' business is focused on providing high-bandwidth, fiber optic communications infrastructure to communications carriers and corporate/government customers. MFNS currently provides high-bandwidth fiber optic communications facilities in New York, Philadelphia, Washington, D.C., Chicago, and Dallas. Within the next two years MFNS plans to complete expansion into additional markets. Upon completion, MFNS expects that its domestic intra-city networks will encompass approximately 810,000 fiber miles covering approximately 1,896 route miles.

MFNS, often called a carriers' carrier, leases dark fiber to carriers for the carriers to provide telecommunications services to end-user customers. MFNS also competes directly with incumbent local exchange carriers ("ILECs") in the provision of interoffice transport to competitive local exchange carriers ("CLECs") and others. Providing dark fiber and interoffice transport requires that MFNS have ready access to all ILEC central offices, utility pole attachments¹ and rights-of-way, and other buildings. Such access has not always been easy or even as contemplated by the Telecommunications Act of 1996 ("The Act"). Requests for access are often wrongfully denied or simply ignored.

¹ Section 224 of the Telecommunications Act defines pole attachments as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224. MFNS' comments use this definition.

As a facilities provider, MFNS is in a unique position to facilitate and speed telecommunications competition by providing state-of-the-art facilities to telecommunications carriers anxious to serve end-user customers but unable to build their networks fast enough without help from facilities providers such as MFNS. MFNS suggests that its comments, suggestions, and practical examples will assist the Commission in setting the appropriate rules for competition to advance swiftly and succeed.

MFNS has not commented on each point the Commission is seeking comment. This in no way should be considered agreement with the Commission's tentative conclusions. MFNS reserves the right to provide reply comments on issues not covered in these comments or in future proceedings the Commission may initiate. At this time, MFNS chooses to address the issues currently facing it and preventing it from deploying facilities.

I. SECTION 224 OF THE ACT REQUIRES UTILITIES TO PROVIDE ACCESS TO ALL ITS RIGHTS-OF-WAY – WHETHER PUBLICLY OR PRIVATELY GRANTED.

The Commission requested comments on the limits, if any, section 224 places on access to rights-of-way owned or controlled by utilities, tentatively concluding that all rights-of-way owned or controlled by a utility are subject to section 224. ¶ 22. As the Commission recognized in its Notice of Proposed Rulemaking (NPRM), “the most successful networks may be those that are highly functional and flexible.” ¶ 25. MFNS is building such a network to lease to telecommunications carriers. MFNS cannot, however, build such a network without access to utility pole attachments and rights-of-way to lay its fiber cables. Negotiating such agreements is difficult as utilities some times attempt to

stall, delay, and deny access to alternate providers such as MFNS. Utilities should not determine architectural and technological approaches by preventing access – the market should. ¶ 26. But given some of the current situations MFNS faces, it appears the utilities are attempting to determine such things. Establishing new rules as the Commission proposes in its NPRM will lead to more equal access to utility rights-of-way and pole attachments than is available today and will serve the public interest.

Congress passed the Act “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”² This purpose alone demonstrates that Congress could not have intended any exceptions within section 224 without plainly stating them.

Specifically, 47 C.F.R. § 1.1403, promulgated pursuant to section 224, confers a duty on all utilities (including electric, gas, water, steam or other public utility) to provide “nondiscriminatory access to any pole, duct, conduit, or right-of way owned or controlled by it.” This regulation leaves no doubt that privately granted rights-of-way are included in this duty as a right-of-way controlled by the utility. Utilities must provide such access. To conclude otherwise would permit utilities to obtain private rights-of-way in strategic locations in order to gouge the other facilities providers such as MFNS for the access to the private right-of-way or set up their own telecommunications entities to make sweetheart

² S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996).

deals to the exclusion or detriment of other providers. Such actions frustrate the intent of The Act. CLECs and facilities providers would be unable to build competitive networks.

MFNS agrees with the Commission's tentative conclusion that all rights-of-way owned or controlled by a utility – whether publicly or privately granted – are subject to section 224 and urges it to enact rules that will provide such access to providers such as MFNS.

II. SECTION 224 OF THE ACT REQUIRES UTILITIES TO PROVIDE ACCESS TO UTILITY-OWNED PROPERTY USED AS A RIGHT-OF-WAY.

The Commission requested comments on whether utilities must provide access to property that it owns which it uses as part of its distribution network. The Commission tentatively concluded that where a utility uses its own property in a manner equivalent to that for which it might obtain a right-of-way, the utility is considered to own or control that right-of-way within the meaning of section 224. ¶ 43.

As discussed in section I above, reading section 224 of The Act in any way that allows utilities to deny access to property owned by it would allow utilities, especially ILECs, to thwart the letter and spirit of The Act and prevent or delay competition. Although the utility might only need a right-of-way, it is conceivable for a utility to purchase property knowing that it does not have to provide access because it is not a right-of-way. By purchasing the property the utility prevents other providers from having access to a right-of-way because the utility owns the property in fee simple absolute and does not control a right-of-way. Again, the utility would be permitted to frustrate the intent of The Act.

This result could not possibly have been a contemplated consequence of The Act. MFNS heartily endorses the Commission's tentative conclusion that, where a utility uses its own property in a manner equivalent to that for which it might obtain a right-of-way, the utility is considered to own or control a right-of-way within the meaning of section 224 and must provide nondiscriminatory access to it.

III. BUILDING OWNERS MUST MAKE BUILDING ACCESS AVAILABLE TO ALL PROVIDERS ON EQUAL TERMS.

The Commission requested comments on access to facilities controlled by premise owners to ensure that providers have reasonable and nondiscriminatory access to buildings.

¶ 53. As a general matter, MFNS has found that many times building owners attempt to charge all providers exorbitant fees for building access discriminating against new providers that do not already have access to the building and to their tenants that will not have access to new telecommunications services.

A. Exclusive agreements within buildings are contrary to the goals of The Act and must be prohibited.

Again, the goals of establishing a pro-competitive marketplace for telecommunications services dictates that access to buildings – especially multi-tenant buildings – requires that providers have equal access to buildings.

MFNS can offer the Commission no situation or example where competition is promoted and the public interest is served because a service provider is given exclusive access to a building. The Commission must resist the urge to allow such agreements.

B. The Commission has the authority to impose a nondiscriminatory access requirement on building owners.

Without Commission authority to impose nondiscriminatory access requirements on building owners, customers will not receive more choices and innovation for their telecommunications services. Given Congress' stated purpose of The Act, this result would not make sense.

In our effort to serve customers in the best way we know how, MFNS has entered into a myriad of agreements with building owners some with difficulty.

The Commission requested comments on its own authority to order nondiscriminatory access balanced with possible takings claims owners might make considering *Lorretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Among other protections, the Fifth Amendment of the United States Constitution requires just compensation for private property taken for public use. Both cited cases involve the Court finding a taking of property in violation of the takings clause of the U.S. Constitution. In *Lorretto* the Supreme Court remanded to State Court to determine just compensation for building owners that had been wired for cable television. In *Bell Atlantic* the Commission's order ordering physical collocation was vacated as the Commission was not authorized to order physical collocation.

It is important to realize most carriers and providers are willing to pay building owners just compensation for access to buildings. "The Takings Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for

redress,³ generally no constitutional question arises and the judicial policy of avoiding such questions may not be applied.” *Bell Atlantic* at 1445 (citations omitted). If the Commission enacts rules that ensure just compensation so owners are justly compensated for the use of their property, there is no taking and a takings analysis is not necessary.

The difficulty for MFNS comes when a building owner wants *unjust* compensation to allow access to their buildings or denies access all together. Building access by multiple service providers is a new phenomenon that essentially began when The Act was passed. Establishing policies and processes for these situations is still at an embryonic stage. Many of the new issues facing providers have to be worked out one building at a time. Some building owners are beginning to seek a portion of a carrier’s revenue earned within the building for its compensation. Some owners are accustomed to this type of an arrangement because other providers before MFNS, anxious for quick access to a building, offered to pay as much as 10% of revenue to get access to a building. Other reimbursement methods (e.g., monthly flat fee, monthly fee per customer, etc.) are also being tested. MFNS urges the Commission to set some guidelines for building access so providers will be in a position to build their networks faster and efficiently, do not waste valuable time negotiating agreements building by building, and are not stuck with unreasonable compensation methods because other carriers made poor decisions before them.

Given that these issues are still evolving, MFNS recommends a low-key approach from the Commission to let the industry work out suitable answers. MFNS does suggest some regulations be established that gives providers and customers protections from

³ The Tucker Act remedy is presumed available unless Congress has explicitly foreclosed it by another enactment and nothing in the Communications Act does so.

building owners so that all can realize maximum benefits from an open marketplace. Regulations and policies should be considered that prohibit exclusive access by one provider to a building, require building owners to publish a rate sheet and provide it upon request, prohibit unjust and unreasonable terms and conditions for building access and an opportunity for Commission involvement if a just and reasonable agreement cannot be made.

Many building owners have as yet failed to realize the competitive advantage they will have if they permit access by multiple providers to their building. An office building that is capable of offering the most modern and powerful telecommunications services is attractive to prospective tenants. By setting fair and reasonable terms and conditions, building owners can benefit from high occupancy rates in their buildings. Once building owners recognize this advantage then unreasonable rates and conditions might stop but until that time the Commission should promulgate rules that ensure nondiscriminatory access to buildings at fair and reasonable term, conditions and rates.

With the Commission establishing regulations to ensure just compensation and to prevent gouging by owners, there would be no violation of the takings clause. In addition, the Commission will help further the goals of The Act by ensuring access to buildings so that carriers can serve customers.

To illustrate how building owners can thwart competition and make ridiculous demands, MFNS provides the following real-life example of its efforts to obtain access to buildings.

Carrier Hotel

As explained in the introduction, MFNS is a dark fiber provider. As a carriers' carrier, many of our customers are CLECs. It is necessary for MFNS to bring our fiber optic cable to the CLEC's equipment to complete the CLEC's network. In one particular situation, MFNS has four (4) customers located in a carrier hotel.⁴ MFNS needs a 10' x 10' presence in the building (100 square feet) and the right to make a small cut into the building's foundation to run the cable into the building and to the CLEC's equipment. In this particular situation, the building owner was attempting to price connectivity in a different method than a standard method of square feet that resulted in a price that exceeded a reasonable market price. With this unreasonable result, the landlord demanded that MFNS to pay \$5,000 per month for its first customer. MFNS was not told what the monthly rate would be for its other customers in the building. This is in addition to the rent MFNS' CLEC customers are paying. At this time, MFNS is still attempting to negotiate a reasonable solution with the landlord in order to serve our customers located in the building. As a carriers' carrier, MFNS is unable to provide facilities to CLEC customers thereby preventing completion of their networks to provide competitive service to customers that are anxious for a choice of carriers and services. MFNS certainly agrees that landlords are entitled to fair and reasonable compensation for access to their buildings but only fair and reasonable compensation.

⁴ A carrier hotel is a location where multiple carriers (including one or more ILEC, CLEC, ISP, ASP,...) have located their Points of Presence (e.g., POPs).

IV. THE COMMISSION SHOULD USE ITS RULEMAKING AUTHORITY TO REQUIRE COMPETITIVE ALTERNATE TRANSPORT TERMINAL (CATT).

It is in the public interest for all carriers and providers to be as efficient and cost-effective as possible. MFNS urges the Commission to use its rulemaking authority to ensure carriers such as ILECs do not impose policies and practices that impede competition. For example, most ILECs require MFNS to pull fiber into a central office strand-by-strand as customers request service. Individual fiber pulls are expensive and inefficient for customers looking for choices for their telecommunications needs. MFNS has developed a cost-efficient alternative.

A. Competitive Alternate Transport Terminal is a collocation “best practice” and should be declared such.

MFNS and Bell Atlantic negotiated an industry-first agreement that enables MFNS to extend its dark fiber directly to a universally accessible distribution point in all Bell Atlantic central offices, including those that have exhausted its physical space. This new form of central office access, called Competitive Alternate Transport Terminal (“CATT”) connectivity, allows MFNS to use its fiber distribution points to provide CLECs a competitive choice of interoffice transport providers throughout the Bell Atlantic region.

MFNS provided the Commission with detailed comments on CATT in the SBC-Ameritech merger proceeding urging the Commission to make CATT a merger requirement.⁵ MFNS will not repeat those comments here but to say that CATT offers unlimited bandwidth alternatives to CLECs while making efficient use of the incumbent

⁵ In the Matter of Applications for Consent to the Transfer of Control of licenses and Section 214 Authorization from Ameritech Corporation, Transferor, to SBC Communications, Inc., Transferee, CC Docket No. 98-141.

LEC's physical plant and personnel. This efficiency is realized by provisioning fiber once per location thus minimizing use of conduit approaching and entering central offices, manhole congestion, as well as house riser cables resources. More choice is what The Act is all about and unlimited bandwidth is now available for the first time throughout the Bell Atlantic region from MFNS.

MFNS has attempted to negotiate CATT agreements with other ILECs with little success. In order to provide faster deployment of competitive services and to give customers choices, the Commission should require all ILECs to provide CATT connectivity and declare it a collocation "best practice" which applies equally to sections 251(a)(1) and 251(c)(2) interconnection.

MFNS and Bell Atlantic created CATT connectivity in order to facilitate the provision of competitive interoffice transport from all central offices, including those that serve primarily residential and small business customers. With CATT, MFNS has the ability to build fiber rings that pass through Bell Atlantic central offices without requiring MFNS to physically collocate optical-electrical conversion equipment in the central offices served. During fiber ring construction, the CATT arrangement permits MFNS to pull up to 432 fibers into a central office via a specified manhole.⁶ This fiber can then be distributed on an as-needed basis to collocated CLECs as a competitive alternative to Bell Atlantic interoffice transport. By eliminating the need for multiple fiber pulls, the CATT agreement dramatically reduces MFNS' cost of accessing the central office and MFN is able to reduce the price of its offering to its CLEC customers accordingly.

⁶ Other ILECs require MFNS to pull fiber into the central office as individual orders are made requiring as many as 432 separate fiber pulls.

B. The Commission should use its price methodology rulemaking authority to set rules for pole attachments price methodology.

The Commission has jurisdiction to design pricing methodologies. *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 733 (1999). MFNS urges the Commission to use this rulemaking authority to set rules for pricing methodology to promote efficient use of pole attachments.

It is not in the public interest to allow ILECs to impose terms and conditions on alternate providers when those conditions raise costs and delay service availability. By establishing pricing rules that encourage efficiency and innovation, the public interest *is* served.

Under most LEC procedures, MFNS has been required to make multiple, separate fiber pulls from our backbone network, using unnecessary LEC conduit, manhole and house riser to connect with our customer central office collocation nodes in the same end office. MFNS perceives this to be an artificial barrier to entry and not an efficient use of the company's time, facilities, or money.

With CATT, MFNS brings all fibers into an end office at the same time thereby saving MFNS and its customers as well as the incumbent LEC time and money. In addition, CATT simplifies virtual collocations thereby helping to facilitate competition within central offices that have no more space for CLEC physical collocation.

CATT is a best practice that the Commission should embrace and establish pricing methodology rules that encourage its use in all central offices as well as other efficient methods for providing competitive services.

V. PENALTIES FOR UTILITIES THAT REFUSE TO PROVIDE ACCESS TO POLE ATTACHMENTS SHOULD BE ESTABLISHED.

The Commission requested comments on other actions it should take to facilitate the development of competitive networks. ¶ 85. MFNS offers two suggestions that the Commission should consider.

A. Many utilities refuse to respond to valid requests for pole attachments.

MFNS has made many pole attachment requests to electric utilities. As required by 47 C.F.R. § 1.1403(b) these requests were made in writing. Despite the requirement that a utility must deny an access request within 45 days, many requests go unanswered.

In some situations where MFNS has begun to negotiate a pole attachment agreement MFNS will send the utility requested changes to the pole attachment agreement. Often there is no response from the utility. “Time is of the essence on access matters and dilatory cooperation is effective as denial.” *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas v. Kansas City Power & Light Co.*, DA 99-1376, (July 15, 1999) at ¶16.

“If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility’s denial of access shall be specific” 47 C.F.R. § 1.1403(b). In effect, when the utility does not respond, MFNS has received a “constructive denial.” How is MFNS to act on such a denial? Utilities cannot be allowed to ignore requests from providers without some quick, substantial action to follow. MFNS suggests that a timeframe of 45 or 60 days to finalize agreements and stiff fines be imposed when utilities fail to respond to pole attachment requests in the time the rules require. Setting deadlines for completing pole attachment agreements is similar to the

timeframes for negotiating, arbitrating and approving interconnection agreements.⁷ Despite possible difficulties in negotiating an interconnection agreement, parties know they will have an interconnection agreement in no more than one (1) year. Given the current rules, parties never know the maximum time it will take to obtain a pole attachment agreement especially if a utility refuses to respond timely to a pole attachment request. Requiring pole attachment agreements are completed within 45 or 60 days and establishing a penalty such as \$1,000 per day for a late response would be appropriate.

Since the Commission has set a timeframe for denying a pole attachment request (47 C.F.R. § 1.1403(b)), it follows that the Commission should set a timeframe to finalize an agreement. Under the current scheme without such a timeframe, MFNS must file some type of a complaint with the Commission to force the utility to respond. After the proceeding, the utility will most likely be ordered to provide the requested pole attachment. Likely, there will be no penalty imposed for delaying in responding to the requester and providing the pole attachment.⁸

With a Commission-defined penalty in place, MFNS might still have to file a complaint to compel the utility to provide the requested pole attachments but, if the utility

⁷ A CLEC may make a request to an ILEC for interconnection pursuant to section 251. The parties negotiate in good faith. During the 135 and 160 days after a party has made a request for interconnection, a party may petition a state commission for arbitration. The Commission must resolve all issues within nine (9) months of the ILEC receiving the interconnection request. Interconnection agreements must be submitted to the commission for approval. Negotiated agreements not acted on by the commission within 90 days are deemed approved. Arbitrated agreements not acted on within 30 days by the commission are deemed approved. 47 U.S.C. § 252. The timeframe can be reduced if a CLEC selects existing interconnection provisions pursuant to 47 U.S.C. § 252(i).

⁸ The Commission may impose a forfeiture pursuant to 47 U.S.C. § 503(b). 47 C.F.R. § 1.1413.

knows it will be subject to a penalty, the number of times it fails to timely respond to a request might be reduced. If not, then stronger rules may be required.

Many electric and gas utilities are setting up their own telecommunications subsidiaries. By causing delay in responding MFNS' requests, utilities probably benefit these affiliates and subsidiaries that are able to have constant access to pole attachments. Utilities are required to impute its cost and charge affiliates and subsidiaries the same amount it charges other companies for pole attachments. 47 C.F.R. § 1.1416(a). The utilities must also treat these affiliates and subsidiaries in a nondiscriminatory manner as other providers. There is no guarantee that the utility will not delay valid requests to "help" its affiliate or subsidiary by delaying competitors access to pole attachments. Since the utilities must provide non-discriminatory access to pole attachments, ignoring valid requests violate The Act and must be stopped in ways that utilities understand such as affecting their bottom lines.

B. Some ILECs refuse to lease duct space alleging they need the space for their own network expansions.

One ILEC, currently seeking merger approval from the Commission in the name of customer choice and competition, refuses to discuss providing access to its ducts indicating it needs the space for its own network expansion. An ILEC may deny a request for pole attachment where there is insufficient capacity but only on a *non-discriminatory basis*. 47 C.F.R. § 1.1403(a) (emphasis added). Non-discriminatory must mean that all carrier requests must be denied – including the ILEC – if there is not sufficient capacity. It is outrageous that a company publicly espousing the virtues of competition and promising to help bring competition to America – outside of its current service area – upon closing of its

merger is unwilling to provide space to competitors in its home territory as the law and regulations require.

Conclusion

Consistent with the discussion above, the Commission should: (1) promogate rules that require utilities to provide access to all of its rights-of-way it owns or controls (2) promogate rules that require utilities to provide access to utility-owned property used as a right-of-way (3) promogate rules that ensure nonidiscriminatory access to buildings with reasonable terms and conditions (4) require ILECs to offer CATT (5) establish penalties for utilities that refuse to respond to valid requests for pole attachments and (6) ensure that ILECs provide nondiscriminatory access to pole attachments to all carriers.

Respectfully submitted,



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Dated: August 27, 1999