DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
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 or 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	)	CC Docket No. 96-98

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

Robert G. Berger
Joseph M. Sandri, Jr.
Russell C. Merbeth

WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W., Suite 200
Washington, D.C. 20036
Tel. (202) 833-5678

Of Counsel

Philip L. Verveer
Angie Kronenberg
Sophie J. Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

September 27, 1999

No. of Copies rec'd 0+6
List ABCDE

1. The Per Se Takings Analysis In Loretto v. Teleprompter Is Inapplicable. 32

2. A Nondiscriminatory Access Requirement Is Not A Regulatory Taking. 36

3. Because A Nondiscriminatory Access Requirement Would Not Result In A "Takings," Bell Atlantic Telephone Companies v. FCC Is Inapposite. 37

VI. THE COMMISSION MUST FULLY IMPLEMENT SECTION 224 AND REQUIRE UTILITIES TO PROVIDE ACCESS TO THEIR RIGHTS-OF-WAY AND CONDUIT IN MTEs. 42

A. Section 224 Benefits All Telecommunications Carriers. 42

B. All Utility Rights To Use Or Pass Over Property Are Subject To Section 224. 44

1. Section 224 Includes Both Private And Public Property. 45

2. The Commission Must Define "Rights-Of-Way" To Include All Rights To Pass Over Or Occupy Property For Purposes of Distributing Utility Service. 49

3. Section 224 Includes Rights-Of-Way On A Utility's Own Property It Uses To Distribute Its Services. 54

C. Safety Concerns Should Not Preclude The Commission From Fully Implementing Section 224. 55

D. Section 224 Does Not Violate The Fifth Amendment Takings Clause. 57

VII. THE COMMISSION SHOULD REQUIRE THAT THE DEMARCATION POINT BE LOCATED AT THE MINIMUM POINT OF ENTRY IN ALL MTEs. 60

VIII. THE COMMISSION SHOULD IDENTIFY INTRA-MTE WIRE AS AN UNBUNDLED ELEMENT. 64

IX. THE COMMISSION MUST EXPAND THE SCOPE OF SECTION 1.4000 OF ITS RULES TO ENCOMPASS ALL FIXED WIRELESS ANTENNAS. 67

X. CONCLUSION 70

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

A. The Telecommunications Act of 1996 Evidences Congress' Desire For Immediate Competition. 1

B. MTE Owners Act As Gatekeepers; In Some Cases They Are Telecommunications Carriers; And They Have Market Power Over Competitive Carriers That Seek Access To Their Tenants. 2

II. IN ORDER FOR TELECOMMUNICATIONS COMPETITION TO BE EFFECTIVE, TENANTS IN MTEs MUST HAVE THE ABILITY TO USE THEIR TELECOMMUNICATIONS PROVIDER OF CHOICE. 6

III. THE EVIDENCE PRESENTED BY COMMENTERS DEMONSTRATES THAT THE COMMISSION MUST INTERVENE AND PROVIDE A MEANS FOR COMPETITORS TO ACCESS BUILDINGS ON A NONDISCRIMINATORY BASIS. 12

A. Competitors Have Provided Substantial Evidence That Commission Intervention Is Necessary. 12

B. The Real Estate Industry's Survey Demonstrates That Access Is NOT Readily Available To Competitors. 13

C. The Real Estate Market Will Not Discipline MTE Owner Attempts To Exclude Telecommunications Competitors. 16

IV. A NONDISCRIMINATORY MTE ACCESS REQUIREMENT WILL OPERATE TO PREVENT MTE OWNERS FROM OBTAINING WINDFALLS DUE TO THEIR GATEKEEPER FUNCTION. 19

V. THE COMMISSION HAS THE JURISDICTION AND AUTHORITY TO GRANT CLECs ACCESS TO MTEs. 26

A. The FCC Has Jurisdiction Over MTE Owners And Managers And Intra-Building Telecommunications Facilities. 26

B. Several Provisions Of The Act Provide The Commission Ancillary Authority To Adopt A Nondiscriminatory Access Provision. 28

C. The Commission Is Not Prohibited By The Fifth Amendment To Institute A Nondiscriminatory Access Provision. 31

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
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 or 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	)	CC Docket No. 96-98

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby submits these Reply Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

A. The Telecommunications Act of 1996 Evidences Congress' Desire For Immediate Competition.

The question is: Does Congress want consumers to swiftly receive choices in telecommunications carriers and services? The answer is resoundingly "yes." The timely implementation of facilities-based networks is the only solution for meeting the promise of the 1996 Act -- to bring real competitive choice for less expensive communication services in the

local exchange to all consumers. Fixed wireless providers, like WinStar, have the ability to deploy their systems in an efficient and cost-effective way; these providers are able to offer facilities-based competition to consumers quickly.[1] However, as the Notice acknowledges, if a significant portion of consumers are not accessible to competitors, such as the fixed wireless industry, telecommunications competition to all Americans will be hampered.[2]

The issue is not complicated. If Congress intended for the 1996 Act to bring the benefits of competitive communications to all consumers, it also must have intended the Commission to have the necessary authority to eliminate unreasonable impediments and restrictions that negatively impact such competition, including the delays, denials, unreasonable conditions, and high access prices that numerous MTE owners and managers impose upon competitive carriers seeking access to consumers in MTEs.

B. MTE Owners Act As Gatekeepers; In Some Cases They Are Telecommunications Carriers; And They Have Market Power Over Competitive Carriers That Seek Access To Their Tenants.

The comments in this proceeding demonstrate that many consumers in MTEs are denied competitive telecommunications choice because MTE owners and managers have become gatekeepers and timekeepers to telecommunications competition. Numerous MTE owners deny, delay, or ignore requests for competitive local exchange carrier ("CLEC") access or impose such

---

1 See Notice, at ¶ 19. Indeed, "fixed wireless systems can often be constructed in less time, at lower cost, and in smaller increments than wireline networks, especially in areas where the costs of wireline links may be especially high" due to the need to lay wire under streets in business districts. Id.

2 As stated by the Commission, if competitors can only reach a subset of consumers, "it is unlikely that competition will grow to the point where it will effectively eliminate the incumbent LECs' market power." Id. at ¶ 24.

unreasonable conditions or demand such high rates for access that providing timely competitive telecommunications service to consumers in their buildings is rendered impossible or uneconomic.

MTE owners in almost every instance already have provided access to the incumbent local exchange carrier ("ILEC"). Hence, it is troubling that state-certificated, facilities-based CLECs that seek similar access are being denied such access or face interminable delays when access is requested. Even more alarming is the fact that some MTE owners are, or are seeking to become, telecommunications carriers acting in their own capacity or as venture partners in telecommunications affiliates. Analysts have identified three different venture groups with real estate industry investors that are planning to offer telecommunications services to their tenants.[3] When MTE owners provide telecommunications services to their tenants, they have even less incentive to allow CLECs access to their properties.

MTE owners claim that real estate market is competitive; therefore, tenants will move if they are dissatisfied with the lack of competitive telecommunications access. However, an "Economic Analysis of the Market for Building Access," prepared by John B. Hayes of Charles River Associates, Inc., attached hereto as Exhibit 1, (hereinafter "CRA Analysis") demonstrates that the real estate market will not discipline those MTE owners that do not provide access to competitive telecommunications providers. The terms of leases alone, typically five to ten years for commercial tenants, restrain consumers from moving to obtain competitive telecommunications services. Moreover, the high costs to move (as well as the time for consumers to find new space and related inconveniences) typically outweigh the savings

---

[3] See Merrill Lynch Bulletin, "Mixing Real Estate and Telecom" (June 28, 1999), attached hereto as Exhibit 2 ("Merrill Lynch Bulletin").

consumers would receive from switching telecommunications providers. The result is that MTE owners have market power over competitive telecommunications providers seeking access, and consumers in MTEs are limited to the providers that MTE owners and managers choose for them.

Of course, it is in the interest of tenants that CLECs be able to join those that already have access to MTEs -- such as the ILECs and electric utilities -- to serve tenants in MTEs. However, the ILECs and electric utilities expend much effort in this proceeding to ensure that they do not have competition from CLECs in MTEs. The Commission must disregard their attempts to prevent CLECs from accessing consumers in MTEs. For the 1996 Act to accomplish the facilities-based competition Congress intended, consumers in MTEs must be able to use their telecommunications provider of choice.[4] Their choices should not be made for them by MTE owners and managers.

A nondiscriminatory access rule would require MTE owners to allow access to competitive telecommunications providers on a nondiscriminatory basis if they provide access to at least one telecommunications carrier. An MTE owner or manager still would negotiate an access agreement with each telecommunications carrier that requests access; however, the terms of such access would be provided on a nondiscriminatory basis. Thus, MTE owners and managers could not exclude competitive carriers, unless it could be reasonably determined that there is no physical room in that building for an additional telecommunications carrier.

In the event that an MTE owner and a competitive telecommunications provider cannot negotiate an agreement within a reasonable period of time, the Commission also should establish the minimum compensation whereby the provider may obtain timely access to the MTE until the

---

[4] See GTE Comments, at 13.

parties have been able to come to an agreement or have resolved their differences through an FCC complaint proceeding. The imposition of this presumption will ensure that MTE owners and managers do not use delay as a tactic to avoid providing access.

Opponents of a federal rule mandating nondiscriminatory access claim that the Commission lacks authority to impose such a requirement. However, as demonstrated herein and in WinStar's Comments, the Commission has ample jurisdiction and authority to provide a national solution to the obstacles competitors face. In addition to its subject matter jurisdiction, the Commission also has in personam jurisdiction over MTE owners and managers due to their control over "instrumentalities" of interstate and foreign wire communications. Moreover, imposition of a nondiscriminatory MTE access requirement is reasonably ancillary to accomplish several provisions of the 1996 Act, including Sections 224, 706, and 207.

Opponents of nondiscriminatory MTE access also assert that such a requirement would impose an unconstitutional "takings" on property owners. These assertions are legally incorrect. First, because a nondiscriminatory access requirement would only apply once a building owner has permitted the first telecommunications provider (i.e., the ILEC) to access its building, a per se takings would not occur. Building owners and other opponents of open access have simply misconstrued the import of cases concerning takings, foremost of which is Loretto v. Teleprompter Manhattan CATV Corporation.[5] Furthermore, a nondiscriminatory access requirement would not constitute a regulatory taking. Nevertheless, even if a nondiscriminatory access requirement were erroneously held to constitute a taking, it would not be unconstitutional

---

[5] 458 U.S. 419 (1982).

because building owners would receive just compensation for the economic value of the rented space.

WinStar also urges the Commission to fully implement Section 224 and permit telecommunications providers to use the rights-of-way of utilities on public and private property. Utilities and MTE owners attempt to limit the scope of Section 224. The Commission must reject their claims and adopt rules that permit telecommunications carriers to use Section 224 to its full extent. In addition, the Commission should revise its rules in Part 68 and establish that the demarcation point should be at the minimum point of entry ("MPOE") for all MTEs wired after August 13, 1990 and for all remaining MTEs at the request of the MTE owner, a tenant, or a CLEC. The Commission also should require ILECs to provide intra-MTE wire as a UNE. Finally, the Commission should modify Section 1.4000 of its rules to include all fixed wireless devices.[6]

II. IN ORDER FOR TELECOMMUNICATIONS COMPETITION TO BE EFFECTIVE, TENANTS IN MTEs MUST HAVE THE ABILITY TO USE THEIR TELECOMMUNICATIONS PROVIDER OF CHOICE.

Throughout their comments, it is evident that MTE owners seek to maintain their gatekeeper function -- to determine which telecommunications providers will be permitted to offer services to their tenants. MTE owners claim that they want what is best for their tenants[7] and that they can best determine what is good service for their tenants and buildings.[8] They even go so far

---

6 WinStar also requests that the Commission grant the outstanding Joint Petition for Reconsideration of the Commission's Second Report and Order in the over-the-air reception devices ("OTARD") proceeding. See WinStar Comments, at 70-73.

7 See, e.g., Real Access Alliance Comments, at 9 (hereinafter "RAA Comments").

8 See, e.g., Cornerstone Properties et al. Comments, at 17-20.

to say that without MTE owners' intervention, tenants cannot get good deals from CLECs.[9] They claim that tenants need the collective bargaining power of MTE owners to achieve better telecommunications services and rates.[10] This claim is incorrect. In fact, tenants benefit most when they have choice.

Of course, the other commenters holding MTE access rights granted in the monopoly-era -- especially RBOCs, ILECs, and electric utilities -- have joined the MTE owner chorus to keep CLECs out of MTEs.[11] These monopoly-era responses are predictable and directly contravene the word and spirit of the 1996 Act. The Commission should reject these comments because they are anti-consumer and anti-competitive.

The gatekeeper function that MTE owners have asserted is contrary to the goals of the 1996 Act -- to promote competition for all Americans -- and is not in tenants' best interests. Because MTE owners and managers prevent carriers from accessing tenants in their MTEs, the marketplace is skewed. Competitors are prevented from competing fully. Telecommunications

---

9 See, e.g., JP Realty Inc. Comments; RAA Comments, at 17 (claiming that timely service from CLECs can be obtained by MTE owners on behalf of tenants); Urstadt Biddle Properties, Inc. Comments, at 1 ("Tenants alone would not have the bargaining power to negotiate with telecommunications companies"); and Corporate Office Properties Trust Comments, at 2 ("Building owners like us use their bargaining power to negotiate better telecommunications services for tenants.")

10 It is interesting to note that WinStar seldom sees this argument in practice, as the landlord typically focuses primarily on the amount that it will receive and the terms and conditions it wishes to impose to protect its interest as an owner/manager of the building.

11 See generally Ameritech Comments; Bell Atlantic Comments; GTE Comments; BellSouth Corp. Comments; Cincinnati Bell Comments; SBC Comments; USTA Comments; The United Telecom Council and Edison Electric Institute Comments; The Electric Utilities Coalition Comments; Entergy Services, Inc. Comments; Florida Power & Light Company Comments; American Electric Power Service Corp. et al. Comments; Cinergy Corp. Comments; Minnesota Power, Inc. Comments; Kansas City Power & Light Co. Comments; and Avista Corp. Comments.

competitors should not succeed or fail in the market based upon choices made by MTE owners and managers, but upon their service quality and rates provided to end users.[12] In order for telecommunications competition to be effective, tenants in MTEs must have the ability to use their telecommunications provider of choice. Clearly, this is the intent of the 1996 Act.

Contrary to the claims of MTE owners, tenants do not need MTE owners to take on a paternalistic role for them to obtain competitive, reliable, technologically advanced telecommunications services. CLECs are providing new, competitive services at lower rates than incumbents. For example, WinStar offers its customers a variety of services, including local and long distance, data, voice and video services, as well as high speed Internet and information services. In fact, WinStar's Wireless Fiber℠ service can provide fiber-quality transmission at speeds more than 350 times faster than ISDN, the fastest service currently in general use on incumbent networks. In addition, WinStar offers many incentives for consumers to switch to its service. For example, WinStar recently launched a marketing program by which it offered one year of free long distance service to customers in certain markets who sign multi-year commitments. CLECs must provide reliable, technologically advanced services at prices competitive with ILECs. Otherwise, they cannot convince tenants to switch from their incumbent providers.

---

12 For this reason, the Commission should prohibit exclusive access agreements as suggested by most commenters. See, e.g., GTE Comments, at 16; Bell Atlantic Comments, at 5; NextLink Comments, at 11; Central Texas Communications, Inc. Comments, at 2; and Apex Site Management, Inc. Comments, at 6. Contrary to GTE's Comments, WinStar's policy is not to enter into exclusive access agreements with MTE owners and managers. See GTE Comments, at 19.

Consumers are better able to choose which provider offers the telecommunications services and prices they want. If MTE owners make this choice instead of tenants, it will be the MTE owners that determine which telecommunications competitors succeed in the market, not consumers. The role MTE owners have in choosing telecommunications providers for their tenants is especially troubling when they or their affiliated entities also are providing telecommunications services to their tenants. These MTE owners have even less interest in seeing that their tenants have access to the services provided by other carriers. Thus, they are fatally compromised in ensuring that their tenants have access to the telecommunications provider that is best for them.

Indeed, WinStar has observed an increasing trend of MTE owners offering telecommunications services to their tenants. A June 28, 1999 Merrill Lynch Bulletin states that office Real Estate Investment Trusts ("REITs") are "currently seeking ways to exploit the exponential growth of high speed [I]nternet access as well as the ability to offer 'bundled' telecom services to their existing tenants."[13] Merrill Lynch identifies three separate entities that have real estate industry investors that are planning to offer telecommunications services to commercial MTEs. One of those groups is rumored to have the backing of a very successful venture capital firm. When MTE owners are providing telecommunications services either directly or through a venture to their tenants, they have even less incentive to negotiate with CLECs for access to their properties. Hence, in these situations, it is even more critical that the Commission properly balance MTE owners' incentives.

---

[13] See Merrill Lynch Bulletin.

Moreover, consumers in MTEs must be able to switch to their telecommunications provider of choice in a timely manner. Telecommunications competitors have experienced extensive, undue delay during the negotiation process with MTE owners and managers for access to their properties.[14] WinStar believes this delay occurs because many MTE owners and managers are not focused on providing competitive telecommunications services in their properties. WinStar experiences unreasonable delay by MTE owners and managers in the negotiation process even when it already has a tenant that has signed up for its service. As stated in its Comments, WinStar has 169 employees throughout the U.S. who deal with MTE access negotiations. The compensation arrangements with these employees are such that they have financial incentives to negotiate access with MTE owners and managers on an expedited basis. The undue delays in the negotiation process occur due to the MTE owner or manager, not WinStar.

It is WinStar's experience that negotiations typically take between nine months and two years. Such delay is unacceptable and thwarts the Congressional goal of fostering available facilities-based competition. At its current pace of negotiations, it will take WinStar many generations to be able to negotiate access to all 750,000 commercial MTEs that are in the U.S. today.

Three months is cited by the real estate industry as the typical time it takes to negotiate a tenant lease;[15] therefore, the Commission should require that MTE owners negotiate access agreements with competitors within three months. In the event that an MTE owner and a

---

[14] See NextLink Comments, at 4; AT&T Comments, at 7.

[15] RAA Comments, at 10.

competitive telecommunications provider cannot negotiate an agreement within three months, the Commission should establish the minimum compensation whereby the provider may obtain access to the MTE until the parties have been able to come to an agreement or have resolved their differences through an FCC complaint proceeding.[16] The imposition of this presumption will ensure that MTE owners and managers do not use delay as a tactic to avoid providing access.

Likewise, the Commission should establish procedures whereby a competitive provider may bring a complaint to the FCC and have its complaint resolved on an expedited basis -- not more than 90 days from the filing of the complaint -- when it encounters bad faith negotiations on the part of the MTE owner or discrimination from an MTE owner. The Commission should look to its pole attachment complaint procedures for guidance.[17] Those procedures provide for a streamlined, paper proceeding which easily could be tailored to the building access context.[18] Such an approach will promote the goal of providing consumers in MTEs timely competitive choice, as intended by the 1996 Act.

---

16 The building access statute in Connecticut provides a similar approach by providing that a schedule or schedules of compensation be pre-determined. See Conn. Gen. Stat. Ann. § 16-2471(f)(4).

17 See 47 C.F.R. §§ 1.1401-1.1418.

18 When a CLEC files a complaint with the FCC, an MTE owner or manager should be required to respond within 30 days. In turn, a CLEC should have an opportunity of 20 days to file a reply. Evidence of the discrimination and the rebuttal of such evidence should be submitted to the FCC through the complaint, response, and reply; however, the Commission should maintain the option to request additional information from the parties, as well as the option to meet with the parties to attempt to settle the dispute. Nevertheless, the Commission should attempt to conclude the complaint proceeding on an expedited basis.

III. THE EVIDENCE PRESENTED BY COMMENTERS DEMONSTRATES THAT THE COMMISSION MUST INTERVENE AND PROVIDE A MEANS FOR COMPETITORS TO ACCESS BUILDINGS ON A NONDISCRIMINATORY BASIS.

A. Competitors Have Provided Substantial Evidence That Commission Intervention Is Necessary.

Commenters have demonstrated the need for FCC action. WinStar's, NextLink's and ALTS' Comments, inter alia, provide detailed accounts of problems competitors have encountered when trying to obtain access to MTEs.[19] Adelphia Business Solutions states that a building owner in Louisiana requested $25,000 upfront and a $2,000 per month access fee to its building.[20] In Florida, a building owner threatened to remove equipment unless Adelphia agreed to share its revenues with the owner.[21] In addition, on behalf of competitive carriers, ALTS provides an extensive list of the MTE access problems competitors have faced.[22] The "Real Access Alliance" states that the typical rate for building access is $300 to $500 per month.[23] However, the specific problems relayed by competitors confirm that a number of MTE owners are requesting

---

19 See WinStar Comments, at 17-18; NextLink Comments, at 2; and ALTS Comments, at 6-18.

20 Adelphia Business Solutions Comments, at 3.

21 Id.

22 ALTS Comments, at 6-18.

23 RAA Comments, at 8. At the May 13, 1999 hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the Committee on Commerce in the U.S. House of Representatives, one MTE owner stated that individually negotiated rates range from $100 to $500. See Access to Buildings and Facilities by Telecommunications Providers: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the Committee on Commerce in the U.S. House of Representatives, 106th Cong., at 79 (1999) (attached as Exhibit A to WinStar' Comments).

unreasonable fees from competitors. These accounts reveal the market power each MTE owner has with respect to the requesting competitive carriers on its property.[24]

Moreover, in their comments, CLECs consistently call for FCC action to provide nondiscriminatory competitive access to MTEs. NextLink states that some current state laws (such as Texas) are inadequate because they do not have enforcement mechanisms.[25] Furthermore, state laws in general are problematic because CLECs could face retaliation in those states without access requirements if they attempt to enforce the laws in those states with access requirements.[26] It is quite evident that Commission intervention is necessary and appropriate to alleviate these problems on a national basis.

B. The Real Estate Industry's Survey Demonstrates That Access Is NOT Readily Available To Competitors.

MTE owners claim that there is not an access problem. Specifically, the "Real Access Alliance" points to the Charlton Research Company survey it submits and claims that it demonstrates MTE access is available to competitive telecommunications providers.[27] Moreover, MTE owners claim that they have the incentive to give consumers competitive telecommunications services because the real estate market is competitive and their tenants would go elsewhere if competitors were denied access to MTEs.[28]

---

24 See also CRA Analysis, at 6-8.

25 NextLink Comments, at 6; see also AT&T Comments, at 6 (building access problems occur even in those states that have granted competitors a legal right of entry.).

26 NextLink Comments, at 6.

27 RAA Comments, at 9.

28 Id. at 5; Cornerstone Properties et al. Comments, at 5.

Reliance upon the Charlton Research Company survey submitted by the "Real Access Alliance" is questionable. Only 316 of 6,211 members surveyed -- approximately 5 percent of the members -- actually responded.[29] Moreover, the manner in which the "Real Access Alliance" presented the survey and requested their members to complete it was biased and may have caused MTE owners to alter their responses in a more favorable fashion. The bias may have been caused by the surveyors stating in the cover letter that a nondiscriminatory access requirement could "easily cost the real estate industry billions of dollars annually in both lost revenues as well as additional safety, security and liability expenses."[30] Given the probability that the survey is biased, it is even more surprising that the survey supports the claims raised by competitive carriers in this proceeding.

The "Real Access Alliance" asserts that the Charlton Research Company survey demonstrates that 65 percent of the requests for access were either successful or negotiations were continuing.[31] The CRA Analysis states:

> This statistic should, on its face, raise concerns for the Commission. Based on the survey data, we know that at least 35 percent of requests for access fail. In addition, we know that this fraction understates the true proportion of requests that fail, because some of the requests still in negotiations will ultimately fail.[32]

After compensating for incomplete negotiations, the CRA Analysis estimates that only 45 percent of CLECs' access requests are successful.[33] Hence, 55 percent of competitive access requests are

---

29 RAA Comments, Charlton Research Co. Attachment, at 4.

30 See E-mail survey distributed to BOMA members attached hereto, as Exhibit 3.

31 RAA Comments, at 10.

32 CRA Analysis, at 5.

33 Id.

ultimately unsuccessful. This figure is alarmingly high and demonstrates the need for Commission intervention.[34]

In addition to its survey, the "Real Access Alliance" claims there is not an access problem because WinStar and other competitors have been able to get into a large number of buildings.[35] The fact is, however, that it would take decades for WinStar to get into every building that its network is currently designed to reach at the negotiation timeframes that WinStar is experiencing -- typically nine months to two years. The negotiations take this long because MTE owners do not have the incentive to reach access agreements with competitors in a timely manner. In fact, other competitors have experienced the same unreasonable delays as WinStar when negotiating with MTE owners.[36]

The "Real Access Alliance" claims, however, that building access agreements take less than five months.[37] It argues that it only takes approximately two additional months for CLECs and MTE owners and managers to negotiate access agreements compared to the time it takes for MTE owners and managers to negotiate a tenant lease.[38] Even if it is the case that access negotiations take, on average, less than five months, it is unreasonable, especially when a competitor has a customer in the building who wants service as soon as possible. In fact, the "Real Access Alliance's" analogy to the negotiations for commercial tenant leases is not an

---

34 See id. at 5-6.

35 RAA Comments, at 11.

36 NextLink Comments, at 4; AT&T Comments, at 7.

37 RAA Comments, at 10. The Charlton Research Survey calculates that the average time for CLECs and MTE owners and managers to negotiate an access agreement is 4.7 months.

38 Id.

appropriate comparison. Instead, the Commission should review how long it takes incumbent telecommunications providers to gain additional access to MTEs to modify or add new services. WinStar does not believe that incumbents have to wait approximately five months to gain access to MTEs to add additional lines or make modifications for new services when they are requested by MTE tenants.

C. The Real Estate Market Will Not Discipline MTE Owner Attempts To Exclude Telecommunications Competitors.

The MTE owners claim that they are in the business of pleasing their tenants and that if their tenants are not happy with the telecommunications service in the building, they will move to another building where their telecommunications provider of choice can provide them service.[39] In support of this argument, MTE owners point to the duration of leases, claiming that the average length of commercial leases is, on average, only three to five years.[40] Moreover, the "Real Access Alliance" submits an economic analysis, arguing that tenants have the freedom to move and that due to the competitiveness of the real estate market, tenants have numerous buildings in which to lease space.[41] This alone is a surprising comment in light of the tight real estate markets of the last several years.[42]

It has been WinStar's experience that commercial leases are typically five to 10 years. Indeed, the President of the National Association of Real Estate Investment Trusts, a member of the "Real Access Alliance," stated in March of this year that on average, commercial leases last

---

39 RAA Comments, at 6.

40 Id. at 7.

41 See id., Strategic Policy Research Attachment, at 4-5.

42 See CRA Analysis, at 2 n.1.

ten years.[43] Moreover, the National Association of Industrial and Office Properties, also a member of the "Real Access Alliance," recently issued a press release stating that the average length of commercial leases is 5 to 10 years.[44] It is unreasonable to expect tenants to wait five to ten years to obtain services from their telecommunications provider of choice. Even if the "Real Access Alliance's" estimate is correct that a commercial lease runs three to five years, requiring consumers to wait three years to obtain telecommunications service from their provider of choice is unreasonable. Of course, if tenants in fact have to wait five or ten years, this situation ensures that the goal of the 1996 Act will never be realized.

Moreover, the CRA Analysis illustrates that under current commercial real estate market conditions, MTE owners may feel little pressure to provide tenants access to their telecommunications provider of choice.[45] This is because vacancy rates have been declining for the past five years, from approximately 16 percent in 1994 to approximately 7 percent in 1998.[46] In addition, "rents have steadily increased over this period as well, reflecting the tightening market for space."[47] The CRA Analysis notes that it does not appear that new construction will soon provide a solution to the lack of supply in the real estate market.[48]

---

43 Eric Avidon, "REIT Group Backs Bill Requiring Periodic Rehab," National Mortgage News (March 22, 1999).

44 "NAIOP Applauds the Senate Introduction of Leasehold Improvement Legislation," PR Newswire (April 27, 1999).

45 CRA Analysis, at 2 n.1.

46 Id. (citing BOMA's 1999 Experience Exchange Report).

47 Id.

48 Id.

Furthermore, the CRA Analysis demonstrates that the economic analysis submitted by the "Real Access Alliance" is not complete. Contrary to the "Real Access Alliance's" claims, it is not enough that the real estate market is competitive. The real test is whether the savings from switching telecommunications providers are large enough for tenants to incur the costs to relocate.[49] The CRA Analysis identifies the costs that tenants would incur to relocate to MTEs that would allow them to use their telecommunications provider of choice.[50] These costs include direct moving costs, lost productivity due to the move, and loss of existing customers.[51] It is estimated that the total costs to move can equal an entire year's rent.[52] The CRA Analysis confirms that it is highly unlikely that the savings tenants would receive by switching telecommunications providers are large enough for tenants to incur the costs to relocate.[53]

The fact that relocation costs can slow the development of telecommunications competition should not be surprising. In 1995, the Commission observed a similar phenomenon.[54] Consumers were wary of switching telecommunications providers if it meant they had to switch telephone numbers. The Commission noted in particular that business customers would incur administrative and marketing costs.[55] The Commission concluded that "[t]hese costs, and the potential loss of customers, may inhibit businesses from selecting new services or new

---

49 Id. at 9-10.

50 Id. at 10.

51 Id.

52 Id.

53 Id. at 11.

54 See In re Telephone Number Portability, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, at ¶ 2 (1995).

55 Id.

providers."[56] Certainly, the costs to relocate are much greater than the costs contemplated by the Commission for switching telephone numbers. The likelihood that tenants will incur the costs of relocating to access their telecommunications provider of choice is considerably less than the likelihood that customers will change phone numbers to access a competitive provider.[57] Therefore, even though tenants may be able to move, it is not likely that they will in order to obtain competitive telecommunications services. Consequently, the "competitiveness" of the real estate market does not discipline the behavior of MTE owners.

IV. A NONDISCRIMINATORY MTE ACCESS REQUIREMENT WILL OPERATE TO PREVENT MTE OWNERS FROM OBTAINING WINDFALLS DUE TO THEIR GATEKEEPER FUNCTION.

The MTE owners fear that a nondiscriminatory access requirement will shift costs from competitors to the real estate industry and that the FCC, not the marketplace, will determine the value of MTE access.[58] However, these fears are not credible. A nondiscriminatory access requirement merely ensures that MTE owners will do what they claim the real estate market ensures -- give tenants access to their telecommunications providers of choice.[59] It also prevents

---

56 Id. It should be noted that Congress also believed that the inability for customers to retain their telephone numbers when switching carriers presented a large impediment to local competition, and it imposed number portability on local exchange carriers in the 1996 Act. See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 (1995) ("The ability to change service providers is only meaningful if a customer can retain his or her local telephone number."); see also 47 U.S.C. § 251(b)(2).

57 CRA Analysis, at 8-9.

58 RAA Comments, at 24-25.

59 Fixed wireless antennas used to provide service in a building are not part of the same market as cellular and PCS antennas; thus, a nondiscriminatory access requirement will not distort the current market for rooftop access. See RAA Comments, at 26. WinStar's antenna actually provides advanced services to the tenants in the building and, therefore, increases the value of the building for the owner and directly benefits the tenants in the building. To the contrary, cellular and PCS antennas do not directly benefit the tenants in

windfalls to MTE owners who have the incentive to extract monopoly rents (or excessive telephony profits when they have the dual role of MTE owner and telecommunications provider). The fact of the matter is that telecommunications competitors merely request an equal opportunity to compete against the incumbent telecommunications provider. A nondiscriminatory MTE access agreement will give competitors that opportunity.

The "Real Access Alliance" claims that fixed wireless providers are not capable of keeping up with current demand for their services; therefore, there is no need for the Commission to adopt a nondiscriminatory access rule because CLECs could not provide immediate services to all MTEs.[60] WinStar disputes the further assertion that it is not capable of providing services to those MTEs where it has access.[61] It certainly is the case that WinStar is prevented from building out its network and providing services to tenants in MTEs where it does not have access rights. It will take time for CLECs to build out their networks and serve all MTEs; however, they cannot make large strides in doing so without Commission intervention to counter the gatekeeper position of individual MTE owners. While a nondiscriminatory MTE access requirement will not result in immediate competition in all MTEs, it will greatly improve the time in which CLECs will

---

the building because they are used to serve a large area surrounding the building. In addition, cellular and PCS antennas do not have to be located on one particular building to serve its consumers. Rather, cellular and PCS providers have more building choices for rooftop space. WinStar, on the other hand, must locate its antenna on the building where its customers are located.

60 RAA Comments, at 27-28.

61 WinStar also takes issue with the claim that it only seeks access to properties to assist the value of its stock. See Cornerstone Properties et al. Comments, at 23. Investors and analysts are sophisticated. They know that access alone will not provide revenues. The provision of service to customers/tenants is critical.

be able to offer more robust competition to MTE tenants, which will advance competition for all consumers.[62]

Some MTE owners have expressed concern that a nondiscriminatory access requirement would eliminate the MTE owners' control of access to the building.[63] They claim that a nondiscriminatory access requirement is "forced access" which would cause them to lose control of their properties, including their ability to negotiate conditions to access for security,

---

62 MTE owners also assert that a nondiscriminatory access rule should not apply to MTE owners and managers because CLECs may freely discriminate among buildings. See, e.g., RAA Comments, at 44. Furthermore, they claim that it is not unreasonably discriminatory for MTE owners to treat ILECs and CLECs differently because (1) ILECs have an obligation to serve, while CLECs do not; (2) MTE owners accept different risks with CLEC access; and (3) ILECs must provide universal service support and offer averaged rates to consumers. RAA Comments, Strategic Policy Research Attachment, at 19-20. The Commission should reject all of these claims for the following reasons.

CLECs, as common carriers, are obligated to provide their services upon a reasonable request. See 47 U.S.C. § 201(a). In addition, they are not permitted to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, for or in connection with like communications service." 47 U.S.C. § 202(a). Thus, CLECs are prohibited from engaging in discrimination and have an obligation to serve upon a reasonable request. While ILECs may be the carrier of last resort, this still does not explain MTE owners requiring CLECs to pay for access when the ILEC does not pay.

In addition, CLECs must contribute to the Universal Service Fund at both the state and federal levels. In fact, CLECs are eligible to receive universal service support if they meet the criteria under section 214(e)(1) of the Communications Act. In re Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, at ¶ 145 (1997) ("[A]ny telecommunications carrier using any technology, including wireless technology, is eligible to receive universal support if it meets the criteria under Section 214(e)(1).").

Finally, the risk that MTE owners incur due to providing access to CLECs may be attenuated through requirements for indemnification and insurance; higher access rates are not necessary.

63 RAA Comments, at 47.

installation, and maintenance issues.[64] Specifically, the "Real Access Alliance" states that MTE owners must maintain control of their buildings due to fire and building codes and the safety of their tenants.[65] They want to ensure that telecommunications providers install equipment in an appropriate and safe manner. MTE owners also express concern about the number of CLECs that will seek access to their properties and the burdens related to such requests, including space constraints and amount of time negotiating with carriers.[66]

WinStar does not dispute the MTE owners' needs to protect their buildings and tenants. As stated in WinStar's Comments, a nondiscriminatory access requirement would not replace an access agreement that is negotiated between the MTE owner and competitor.[67] A nondiscriminatory requirement simply would mandate that MTE owners must negotiate such access agreements with competitors on a timely and nondiscriminatory basis. This would allow an MTE owner the opportunity to ensure that its property is accessed in a secure and safe manner by

---

64 Cornerstone Properties et al. Comments, at 18-19. The Commission should note that only 2 percent of those responding to the "Real Access Alliance's" survey said they had denied a competitor access due to "maintain control/building security." RAA Comments, Strategic Policy Research Attachment, at 6.

65 RAA Comments, at 61. Commenters also assert that the terms and conditions of access agreements that were established when incumbents offered the only choice for telecommunications services should not apply in a competitive marketplace. See, e.g., Letter from Wallick Properties, Inc. to Magalie Roman Salas, Secretary of the FCC, at 2 (filed Aug. 2, 1999). In effect, these commenters are asserting that MTE owners should be permitted to treat competitive carriers differently and use their gatekeeper position to extract excessive rents. The Commission should reject this argument outright as contrary to the 1996 Act and the promotion of a competitive marketplace.

66 RAA Comments, at 66-67. RAA states that fixed wireless providers need 25 square feet on the rooftop for their antennas and 40-50 square feet of floor space inside the building. WinStar only needs four square feet on the roof for its antenna and approximately 20 square feet for its electronic cabinet.

67 WinStar Comments, at 26.