

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

RECEIVED

SEP 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Promotion of Competitive Networks in)
Local Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for)
Rulemaking to Amend Section 1.4000 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)

WT Docket No. 99-217

CC Docket No. 96-98

REPLY COMMENTS OF
SHARED COMMUNICATIONS SERVICES, INC.

Donald N. David, Esq.
Fischbein Badillo Wagner Harding
909 Third Avenue
New York, NY 10022
(212) 453-3750

Attorney for Shared Communications
Services, Inc.

September 27, 1999

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....	1
II. COMMISSION ACTION TO REGULATE BUILDING ACCESS SHOULD BE LIMITED TO CURBING ABUSES STEMMING FROM ILEC MARKET POWER.....	3
A. The comments confirm that ILECs have and are abusing their market power to obtain favorable arrangements for building access.....	3
B. Commission action should be aimed solely at curbing the ILECs' market power.....	5
1. Even parties urging regulation of all building access recognize the real problem stems from the ILECs' market power.....	6
2. The Commission only need regulate ILEC access to buildings, not exclusive arrangements with non-dominant providers.....	7
3. The Commission need not prescribe building access fees.....	10
III. ARRANGEMENTS FOR CENTRAL MANAGEMENT OF BUILDING WIRE INFRASTRUCTURE SERVE THE PUBLIC INTEREST, AS DOES THE CURRENT DEFINITION OF THE DEMARCATION POINT.....	10
A. Centralized management of building wire infrastructure is an important option for building owners.....	11
B. The Commission need not establish a uniform demarcation point, but if it does so, it should establish the demarcation point at the MPOE.....	14
IV. CONCLUSION.....	14

**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
SHARED COMMUNICATIONS SERVICES, INC.**

I. INTRODUCTION AND SUMMARY.

In its initial comments, Shared Communications Services, Inc. ("SCS") demonstrated that the market for building access, as a general matter, is highly competitive, functioning well and providing tenants with a wide variety of telecommunications options from which to choose. SCS observed that the one significant defect in the market is the

ability of incumbent local exchange carriers (“ILECs”) to abuse their market power to extract favored treatment from building owners.

Many of the parties filing comments in this proceeding share SCS’s view that the ILECs’ favored treatment, created not by the market but rather by their historical monopoly, is the principal defect in the current building access market. Like SCS, such parties urge the Commission to tailor any action it takes to correct this defect and not to encroach on that portion of the market that is functioning well.

Other parties, however, urge a broader, more intrusive approach in which the Commission would impose access obligations and restrictions on and override private contract rights -- including restrictions on exclusive arrangements -- of all providers and building owners regardless of whether such providers and owners exercise market power or whether their arrangements are themselves the manifestation of market responses to competition. These parties include certain ILECs who assert, in the name of competition, that all exclusive arrangements should be barred while knowing full well that such a ban will deprive their competitors of an important vehicle for attracting current ILEC customers. As SCS shows below, the Commission should refrain from undue interference with the competitive marketplace that the Commission, and recent legislation, has mandated. Specifically, the Commission should be careful to avoid regulatory overkill and should allow the market -- not Commission rules -- to regulate contractual arrangements between building owners and service providers without market power.

In its initial comments, SCS also addressed the issue of control of the wiring infrastructure inside a building. SCS demonstrated that there are sound reasons for allowing building owners the option of central management of the wiring infrastructure as

long as service providers are allowed nondiscriminatory access to such infrastructure.¹ Several other parties filing comments take a different view and urge the Commission to confer a right on every provider to enter a building to install and maintain their own wiring infrastructure. SCS shows below that such parties' views are misplaced, and if adopted, would increase the risk of service disruptions for end users, and place an unnecessary and undue administrative burden on building owners.

Despite the contrary views of many commenters, SCS continues to believe there is no need to revise the inside wiring rules that establish the demarcation point. However, should the Commission decide to revise its rules, it should establish the demarcation point at the MPOE.²

II. COMMISSION ACTION TO REGULATE BUILDING ACCESS SHOULD BE LIMITED TO CURBING ABUSES STEMMING FROM ILEC MARKET POWER.

A. The comments confirm that ILECs have and are abusing their market power to obtain favorable arrangements for building access.

Many of the parties participating in this proceeding support the concern expressed by SCS in its comments (p. 9) that ILECs are not paying the same level of fees building owners are assessing competitive carriers. For example, Adelphia Business Solutions argues (Comments, pp. 2-3) that while it must pay fees for building access “the ILEC enjoys

¹ In its orders deregulating inside wiring the Commission anticipated that the market would provide various competitive solutions to the “problem” of managing inside wiring once the demarcation point was established at the MPOE in a multi-tenanted building. The Commission’s belief has been vindicated with the marketplace providing several models for such management as noted in SCS’s initial comments.

² In its initial comments, SCS did not address the issues relating to the pole attachment and unbundled network element provisions of the Communications Act of 1934, as amended, and it does not address those issues herein.

access at no cost and continues to maintain its monopoly over MTE end-users.” In an affidavit attached to the comments of McLeodUSA, the affiant states that “[t]he incumbent, whose facilities and [*sic.*] already in place and which are viewed as mandated by most landlords, are not asked to pay any access fee, placing competitive LEC’s at tremendous competitive disadvantage.”³

Most tellingly, building owners and their representatives confirm that ILECs are using their market power to obtain favored treatment. In the Joint Comments of Cornerstone Properties, *et al.*, the Joint Commenters describe the ILECs’ market power as follows:

Building owners have not had the ability to curtail unfair ILEC practices. ILECs demand access to buildings, but refuse to sign agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by TSPs [Telecommunications Service Providers], often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand for their service, an owner can do little in these circumstances but give in to their demands.

Joint Comments, p. 13.

Apex Site Management, Inc., which provides consulting services for building owners in negotiating access agreements with service providers, echoes this view (Comments, p. 8):

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 believes most owners would be willing to propose [nondiscriminatory] 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.

³ Affidavit of Kent J. Van Metre, Director of Marketing for Advanced Telecommunications Services, for McLeodUSA.

Similarly, the Real Access Alliance, whose participants include the Building Owners and Managers Association International, observed that “[t]he perception of discrimination [against CLECs] arises because in many cases the owner is hamstrung by existing rights of the ILEC.” Comments, p. 46. “If those rights could be readily altered,” the Alliance continues, “owners would be able to deal with ILECs on a level playing field, just as they do now with CLECs and all other people seeking access to their properties.” *Id.*

These statements substantiate the concern expressed by SCS in its initial comments that “[i]f an ILEC can refuse to pay [access] fees and remain in the building, it reflects the ILEC’s market power and a failure of the market.” SCS Comments, p. 9. Thus, to the extent that it exists, “market failure” is not the product of a flaw in the restrictions imposed by the marketplace, but rather of the immunity the ILECs enjoy from such marketplace restrictions and forces.

B. Commission action should be aimed solely at curbing the ILECs’ market power.

The Commission has a variety of options to deal with the core problem of ILEC market power. In its initial comments, SCS offered two such options. First, as a condition to a grant of InterLATA authority, the Commission could require a showing by an incumbent Bell Company LEC that it is neither demanding nor receiving preferred treatment from building owners. Second, assuming it has jurisdiction, the Commission could impose on building owners a nondiscrimination requirement designed to ensure that ILECs pay the same building access fees as other providers. SCS Comments, p. 10. Other parties, such as the Real Access Alliance, suggest that no action is necessary, and that over time, the “ILECs will be forced to abandon past practices.” Alliance Comments, p. 47.

Whatever option the Commission decides to adopt to deal with the problem of ILEC market power, it should take care not to disturb arrangements in place between

building owners and service providers that lack market power. In particular, the Commission should not bar exclusive arrangements, except for those involving ILECs, and it should not attempt to prescribe the fees for building access.

1. Even parties urging regulation of all building access recognize the real problem stems from the ILECs' market power.

Many of the parties filing comments in the proceeding urge the Commission to adopt a blanket ban on all exclusive arrangements, including abrogation of existing agreements, without regard to whether the parties possess market power. For the most part, these parties urge such action with little, if any, supporting analysis. See, for example, comments submitted by Level 3 Communications (page 6), Metromedia Fiber Network Services (p. 5), Personal Communications Industry Association (p. 11), Sprint (p. 20) and Teligent (pp. 18-19). But even parties otherwise urging such a ban recognize that the ILECs are the main problem. For example, WinStar and Global Crossing both urge a blanket ban on exclusive contracts by any provider, but in explaining why, they focus primarily on their concern that “exclusivity typically promotes the incumbent provider’s entrenched position”/ “it is the incumbents who generally take advantage of exclusive arrangements” (Comments of WinStar, p. 25/Comments of Global Crossing, p. 4).

These comments recognize the problem, viz. ILECs’ immunity from market forces, but propose a solution which, at best, only tangentially deals with that problem. This analysis is flawed logically by its failure to address the specific problem that exists, instead suggesting a generic solution without regard for market dominance.

The Competition Policy Institute (“Institute”) argues that exclusive contracts “would dampen competition, particularly in the short run where the local

telecommunications market has not yet matured to the point that both MTE owners and end users have multiple competing carriers and are completely aware of their competitive choices”. Institute Comments, p. 17⁴.

Once again, however, the flaw in the Institute’s argument is that it seeks to justify over-reaching action by referring to a limited problem. As the Institute itself states, its “most immediate concern” with exclusive contracts is that “incumbent carriers may be in a position to lock up markets before the CLEC industry is ready to compete fully.” *Id.*

2. The Commission only need regulate ILEC access to buildings, not exclusive arrangements with non-dominant providers.

As noted above, SCS shares the concern with ILEC abuse of market power in obtaining building access. However, the solution to that concern is not to ban all such contracts, but rather to address the specific problem and bar ILECs from entering exclusive contracts with building owners.

SCS does not share the concern with owners entering exclusive arrangements with providers that lack market power and no party offers persuasive arguments in support of a ban that goes beyond the ILECs. For example, the Institute, which properly examines the issue from the perspective of tenant end users, believes that “MTE owners are today in a position to extract and keep any benefits they receive from any exclusive long-term contracts while freezing their tenants out of future competitive choices.” Institute

⁴ The Institute carves out an exception to its proposed ban on exclusive contracts in the very narrow instance “where tenants and an MTE owner’s interests are in complete alignment, e.g., in cooperative housing or office condominium arrangements.” Institute Comments, p. 17.

Comments, p. 18. The Institute views tenants as pawns constrained by the costs of moving to a new building (the so-called “lock-in” effect) and by their lack of information about the developing competitive local telecommunications market. Institute Comments, p. 18.

This view is misguided. As SCS demonstrated in its comments (pp. 7-9), the “lock-in” effect is illusory. Tenants with long term leases, especially commercial tenants, have a high degree of mobility through subleases, buyouts and other arrangements. The market is such a competitive one that owners must stay attuned to the telecommunications needs of tenants.⁵ Even if a building owner were able to ignore the interests of an existing tenant with a long term lease, the owner must be concerned with the needs of prospective tenants and tenants whose leases are about to expire, and such concern will inure to the benefit of tenants with long term leases as well. Moreover, given the explosive and highly publicized growth of the internet and data communications, SCS believes the Institute is plain wrong in arguing that tenants in today’s market lack sufficient information to protect their telecommunications services interests when shopping for space to lease.

The Institute also argues that “long-term exclusive contracts run counter to the intent of the 1996 Act’s goal of bringing choice to end users.” Institute Comments, p. 19.

⁵ As the Joint Commenters for Cornerstone *et. al.* explain (Joint Comments, p. 9):

Markets will punish shortsighted owners who fail to accommodate their tenants’ needs – tenants will move out, the building’s rents will fall, the building will become vacant, and the building owner will be out of business. Building owners know that their success lies in providing increased value for tenants. When tenants demand access to today’s advanced telecommunications from competitive TSPs, owners listen and respond. The market leaves them no other viable choice; building owners must bring advanced telecommunications competition into their buildings.

This argument overlooks that a bar to all exclusive contracts may, in fact, deny end users the choice of certain types of providers. In the case of a shared tenant service (“STS”) provider, such as SCS, arrangements that allow only one such provider in a building⁶ may be necessary to induce the provider to make the investment required to bring a building’s tenants the benefits of STS. Comments, pp. 12-13.⁷

It will come as no surprise that ILEC parties argue that if they are to be barred from exclusive arrangements so too should their competitors.⁸ In their arguments, the ILECs ignore their dominance in the overall local exchange marketplace, and the fact that they currently continue to serve virtually all of their competitors’ prospective customers. A competitor simply cannot attract an incumbent’s customers by matching the incumbent’s rates and levels of service, but must offer lower rates and/or better service. Otherwise, the immutable laws of customer inertia will dictate that the customer continue to take service from the incumbent. Absent the tool of exclusivity, competitors would be more limited in their ability to offer building owners and tenants attractive pricing and service options than they otherwise could, a result that would most directly benefit the incumbents who currently serve the vast majority of such tenants.

⁶ Such arrangements do not preclude other providers from serving tenants in a building on a non-STS basis.

⁷ See also Joint Comments of Cornerstone *et al.*, p 33, which state:

[M]ost buildings may not be able to support multiple STS providers. Therefore, in order to give tenants the option of selecting an STS provider, the owner may need to grant that provider exclusive rights.

⁸ See, e.g., Comments of Ameritech, pp. 9-11; Comments of Bell Atlantic, pp. 5-6.

As SCS showed in its initial comments, exclusive or partially exclusive arrangements between building owners and service providers without market power are simply one of a variety of pro-competitive tools and is an appropriate response to market demand. Many of the parties filing comments support SCS's view. See, for example, comments of AT&T, (pp. 25-29), First Regional Telecom (pp. 6-9), Independent Cable & Telecommunications Association (pp. 6-7), OpTel (p. 18) and Real Access Alliance (pp. 69-71).

3. The Commission need not prescribe building access fees.

SCS shares the view of the parties filing comments that the Commission need not prescribe building access fees if service providers are afforded access on the same basis as the ILECs.¹⁰ Because owners are unlikely to risk ILECs withdrawing service from their buildings, they can be expected to set building access fees that are reasonably related to their costs in providing access. Even apart from the protection afforded by access on a par with ILECs, SCS believes that market forces would discipline building owners who seek "excessive" fees. SCS Comments, pp. 6-9.

III. ARRANGEMENTS FOR CENTRAL MANAGEMENT OF BUILDING WIRE INFRASTRUCTURE SERVE THE PUBLIC INTEREST, AS DOES THE CURRENT DEFINITION OF THE DEMARCATION POINT.

¹⁰ See, e.g., comments of the Competition Policy Institute (p. 11), Competitive Telecommunications Association (p. 7), Teligent (p. 59) and WinStar Communications (pp. 23-24). At least one CLEC party, Adelphia Business Solutions, recommends in its comments (p. 5) that "[b]uilding access rates must be related to the cost of access and must not be inflated by the building owner. The Association for Local Telecommunications Services ("ALTS") suggests a similar approach at pp. 12 -13 of the attachment to its comments, as does Level 3 Communications at p. 7 of its comments.

As a preliminary matter, it is important to appreciate the distinction between access to a building's MPOE and access to the building's wiring infrastructure (risers, telephone closets, etc.) between the MPOE and the tenant's premises. While a building owner may be willing to allow multiple providers to construct facilities leading to the MPOE, access to the wiring infrastructure between the MPOE and the tenants' premises may be a different matter.

A. Centralized management of building wire infrastructure is an important option for building owners.

In its initial comments, SCS explained why centrally managed building wire infrastructure serves the public interest, and why private contracts for such arrangements should not be disturbed. SCS Comments, pp. 15-16. Several commenters argue that they require the right to use their own technicians to install and maintain the wiring from the building entrance to the customer's premises. Comments of CAIS (p. 13), Level 3 Communications (pp. 4-6) and MCI WorldCom (pp. 4-5). These parties argue that a centrally managed system takes "the provision and maintenance of a crucial piece of a CLEC's service out of its control,"¹¹ and that certain technologies require "unique installation which could be hampered by forced reliance on [another entity's] technicians."¹² Other arguments include "increased time and complexity of service installation and repair," "capacity, system and design conflicts between each CLEC and the building owner," and "liability issues for the building owners in case of service failure." Comments of MCI WorldCom, p. 5.

¹¹ Comments of MCI WorldCom, p. 5.

¹² Comments of CAIS, p. 13.

These arguments do not withstand scrutiny. To begin with, a centrally managed system will have technicians at the site who are thoroughly familiar with the building's wiring infrastructure. Such technicians can install and maintain the wiring within the building more efficiently and more reliably than a CLEC's technicians working at the site for the first time or on a sporadic basis. If the CLEC has installation requirements that the building's technicians cannot handle -- which, in SCS's experience, is a rare event -- the CLEC can use its own technicians accompanied by a building technician. Centrally managed wiring may require a level of added coordination between the building technician and the CLEC's technician for installation and repair work, but the security and other benefits of a centrally managed system (enumerated below) outweigh any disadvantages of coordination requirements. As to capacity, system and design conflicts, such conflicts may arise in any building environment and, in SCS's view, would be easier to resolve in a centrally managed arrangement.¹³

As for liability issues, that is one of the principal reasons many building owners opt for a centrally managed system. Centralized management and control of the wiring infrastructure within the building is a necessity for several liability-related reasons. Among those reasons are: (1) preventing loss of service through negligence; (2) preventing sabotage; and (3) protecting customer security and privacy.

Perhaps the most important reason is to avoid inadvertent interference with other tenants' service, either through negligence or carelessness, that seems to naturally occur with multiple parties accessing the telephone closets. In one instance, in a building

¹³ One can imagine the result of "competition" for scarce building resources in an environment without central management. In one building in central Philadelphia a provider "stole" 900 wire pairs that had been installed by SCS to service its own customers. The result was that SCS faced a shortage of wire when it needed to make an installation.

serviced by SCS, a technician hung his coat on an intermediate distribution frame – and promptly short-circuited a number of customers putting them out of service.

Another concern is deliberate sabotage or vandalism by competitors or individuals with ready access to telephone closets and other elements of the building wire infrastructure. During one two-week period in one building in downtown Philadelphia, SCS experienced nine separate acts of sabotage. Wires were randomly cut, riser cables were hacksawed and wire pairs were lifted and then switched disrupting customers' services. These were hardly innocent acts. In one instance, the cables in one closet had been cut, putting all tenants on the floor out of service. The very next day, in a different closet on a different floor, over twenty telephone lines were disconnected, numerous circuit packs were destroyed and many customers lost their communications. A week later nine cross-connects were lifted, putting a major law firm out of business.

Finally, there is a concern about security and privacy. Many of the customers in buildings where SCS manages the wiring infrastructure are law firms, employing hundreds of attorneys. The concept that someone could enter into the telephone closets and tap into their conversations is totally abhorrent. Moreover, in at least one instance, a tenant is involved in a “politically sensitive” situation where it would be especially detrimental if his telephone were available to anyone choosing to wander into the closets. Similarly, SCS manages the wiring infrastructure in buildings whose tenants include numerous financial organizations to whom telecommunications is a life-line. The concept that their data could be intercepted or that their databases might be open for scrutiny by outsiders is of tremendous concern to those organizations.

For many buildings, these concerns may best be addressed by a centralized management and control of the building wire infrastructure and facilities, and the

Commission should not take any action that would preclude the availability of this option.¹⁴

B. The Commission need not establish a uniform demarcation point, but if it does so, it should establish the demarcation point at the MPOE.

A number of parties urge the Commission to establish a uniform demarcation point. See, for example, Comments of AT&T(pp 36-37); ALTS (p. 22); Independent Cable & Telecommunications Association (p. 7); Sprint (pp. 21-23); and Teligent(pp. 76-84). Most of these parties assert that the uniform demarcation point should be established at the MPOE. Others, such as AT&T, do not specify a designated point, but assert only that whatever point is designated apply to all buildings.

As SCS observed in its initial comments (pp. 14-15), it believes the market is functioning well and that a change in the demarcation point would only introduce needless disruption. SCS still is of that view, but if the Commission decides to establish a single demarcation point, SCS urges that it be at the MPOE. To establish the point at or nearer the tenant's premises would convert what is now deregulated inside wiring owned and/or controlled in large part by building owners to telephone plant with all the attendant regulation and disruption that would entail.

IV. CONCLUSION.

To the extent the Commission determines it needs to intrude into the building access market to curb the ILECs' market power, it should carefully tailor its actions so as

¹⁴ The Real Access Alliance identifies a number of similar and additional concerns (safety considerations, code compliance, occupant security, effective coordination and management and physical and electrical interference) that may be addressed better via a centrally managed arrangement than by allowing the technicians of multiple providers unsupervised access to the building wire infrastructure. Comments, pp. 61-69.

not to interfere with relationships in the marketplace between building owners and service providers without market power. The market will function well in that arena without Commission intervention.

Respectfully submitted,

SHARED COMMUNICATIONS SERVICES, INC.

By: Donald David
Donald N. David, Esq.
Fischbein Badillo Wagner Harding
909 Third Avenue
New York, NY 10022
(212) 453-3750

Attorney for Shared Communications Services,
Inc.

September 27, 1999