

**Before the
Federal Communications Commission
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)
)
Wireless Communications Association)
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 TIME WARNER CABLE

Time Warner Cable ("Time Warner") hereby respectfully submits these reply comments in response to comments submitted in response the above captioned 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 ("NPRM") released by the Federal Communications Commission ("Commission") on July 7, 1999. Time Warner Cable, a division of Time Warner Entertainment Company, L.P., owns and operates cable television systems across the nation.

Many of these systems provide service to residents within Multiple Dwelling Unit or Multiple Tenant Environment buildings (hereinafter “MTEs”). As such, Time Warner is directly interested in proposals put forth by the Commission in the NPRM, as well as by commenters in this proceeding.

The sum of the comments confirm the Commission’s proclamation in the NPRM that the focus of this proceeding should be on promoting facilities-based competition within MTEs.¹ In enacting the 1996 Act, Congress unequivocally stated its intention “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 Congress wisely recognized that competition and consumer benefit are best enhanced if all consumers, including MTE residents, are empowered to mix and match their service choices from a wide selection of competing providers’ facilities. Thus, the Commission here must explore means by which to bring the benefits of facilities-based competition to MTE residents.

Unfortunately, the comments also reveal that many providers have a vested interest in denying MTE residents the benefits of competition and choice. As detailed in the comments of certain SMATV interests, an entire MVPD industry is built around contracting with landlords to exclusively serve MTEs.³ Indeed, in the video context it is a common practice for a landlord to allow access only to the video provider, most commonly a non-franchised SMATV, offering them

¹NPRM at ¶¶ 3-17.

²H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996).

³See Comments of ICTA and Optel.

the largest share of revenues extracted from the MTE's resident subscribers. The resultant proliferation of exclusivity and the denial of choice to MTE residents is no doubt harmful to the public interest, not to mention antithetical to Congress expressed desire to promote facilities-based competition.

As described repeatedly in the various comments submitted by CLECs⁴, this situation could be rectified with a nationwide mandatory access to premises rule whereby multiple telecommunications and video providers would be guaranteed non-discriminatory access to construct facilities and provide service within MTE buildings.⁵ But in their comments, ICTA and Optel argue that any mandatory access to premises rule in the video context would undermine SMATV operators' ability to do business.⁶ They baldly assert that SMATVs must be able to obtain exclusivity in MTEs in order to enjoy the profits necessary to justify initiating video service in a particular building. They argue that a mandatory access to premises rule would prevent them from gaining such exclusivity, thereby putting them out of business. Optel even has the gall to argue that such exclusivity assists MTE residents by allowing them to exercise their "collective buying power" in order to improve service choices.⁷

⁴See, e.g., Comments of Nextlink, MCI Worldcom, Sprint, Level 3 Communications and Teligent.

⁵Despite the differences expressed herein as to the merits of such a policy, Time Warner agrees with BOMA *et al.*, ICTA and Optel that the Commission does not have sufficient jurisdiction to adopt a nationwide mandatory access rule. As such, while a proposal to require access to MTEs may indeed be sound public policy, the most that can be undertaken at this time by the Commission is a detailed analysis of the problem, with a recommendation to Congress.

⁶Comments of ICTA at 6 and Optel at 16.

⁷Comments of Optel at 16.

Their arguments are non-sensical. Competition is not enhanced by allowing landlords to restrict the ability of potential competitors to provide service to their residents. Competition is best enhanced by allowing as many competitors as possible to access and market their unique mix of services to potential MTE subscribers. While the economic fortunes of the SMATVs and landlords may be enhanced by grants of exclusivity, MTE residents are ultimately harmed by being denied the ability to decide for themselves which particular service provider or providers, rather than just the service provider dictated by their landlord, best serve their own interests. ICTA's and Optel's assertions as to the importance of exclusivity are also flatly contradicted by RCN, which breaks ranks with its SMATV brethren in calling for a nationwide mandatory access to premises rule that applies to all providers and all services.⁸ The rule RCN champions would prohibit precisely the exclusivity that ICTA and Optel describe as so essential to any SMATV's economic survival. As to Optel's self-serving argument that exclusive arrangements benefit subscribers by allowing them to exercise their "collective buying power," the best way to ensure consumers can act to improve service choices is by empowering each individual MTE resident to choose from among multiple competing facilities-based providers.

Time Warner agrees with RCN that a nationwide access to premises rule would be good policy, but only if such a rule is carefully crafted to pass constitutional muster and to insure that facilities based competition will in fact be promoted. In this regard, three protective conditions are necessary at bare minimum. First, such a rule must include a non-discriminatory mechanism to

⁸Comments of RCN at 11-21.

compensate landlords so as to not run afoul of the Takings clause.⁹ Second, such a rule should have universal applicability in that it should apply regardless of the service being provided, regardless of the regulatory classification of a service provider, and regardless of whether a service provider is an incumbent or a new entrant. Finally, in keeping in line with Congress' goal of promoting facilities-based competition, such a rule should only apply to allow service providers access to buildings so they can construct their own competing facilities, and not to allow one competitor to seize wiring or other facilities that are the lawful property of another service provider.

Therefore, the Commission must reject RCN's proposed rule to the extent it is more than just an access to premises rule and is also a sweeping wiring seizure rule that would additionally require landlords and incumbent providers to allow new providers to free ride on existing wiring owned by the incumbent. While an access to premises rule would be a pro-competitive way to guarantee that MTE residents have access to the services and providers of their choice, a wiring seizure rule as proposed by RCN would foreclose MTE subscriber choice by allowing only a single provider to serve a particular MTE at any given time, would be antithetical to Congress' goal of promoting the construction of overlapping and competing facilities within MTEs, and would destroy the ability of incumbents to market multiple services, especially new services such as broadband Internet access, within MTEs.

⁹In the NPRM, the Commission acknowledged the seriousness of the Takings issues raised by such a proposal. NPRM at ¶¶ 58-63. See also Separate Statement of Comm. Ness, Separate Statement of Comm. Furchtgott-Roth and Separate Statement of Comm. Powell.

Conclusion

Accordingly, any Commission's rules and policies adopted in this proceeding should conform to the principles set forth in the foregoing reply comments.

Respectfully submitted,

TIME WARNER CABLE



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Date: September 27, 1999
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