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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

SEP 27 1999

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 THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

- An interpretation of Section 224 that would provide nondiscriminatory telecommunications carrier access to utility conduit and rights-of-way within and on top of MTEs would provide constitutionally adequate compensation to the utility.
- An interpretation of Section 224 that would provide nondiscriminatory telecommunications carrier access to utility conduit and rights-of-way within and on top of MTEs would not effect a taking of an MTE owner's property given that the property interest at issue has already been granted by the MTE owner to the utility.
- The real estate industry comments confirm that MTE owners are engaging in "wire communication" as that term is literally defined in the Communications Act, thereby providing the basis for the imposition of Commission authority over the discriminatory access practices of MTE owners.
- The poor member response rate to the Real Access Alliance Survey suggests that the real estate industry is not overly concerned by the prospect of nondiscriminatory telecommunications carrier access to MTEs. It also invalidates the integrity of the survey results such that they cannot be relied upon as credible evidence of MTE owners sufficiently providing nondiscriminatory access to MTEs.

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REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby submits its reply comments on the MTE access issues raised in the above-captioned proceeding.[1]

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[1] 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;

I. INTRODUCTION

The tone of utility and real estate industry comments emphasizes the need for Commission intervention to secure nondiscriminatory telecommunications carrier access to MTEs. Generally, the utility and real estate comments do not suggest ways to promote competition within MTEs, but rather focus on ways to prevent telecommunications carriers from serving consumers therein.[2] It is hardly surprising, then, to find that, in the field, telecommunications carriers are encountering substantial difficulties obtaining MTE access.

The notion that the marketplace will take care of the problem should have been abandoned long ago. Several commenters, including ALTS, provided a considerable number of egregious

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *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*, FCC 99-141 (rel. July 7, 1999)("Notice").

2 In its comments, ALTS provided examples of MTE owner trade association attempts to prevent CLECs from advocating the need for nondiscriminatory MTE access before regulatory authorities. See Comments of ALTS at 18. In fact, through its lobbying newsletter to members, BOMA discussed the possibility of members' boycotting those CLECs who had been most vocal to regulators and legislators about the need for nondiscriminatory MTE access. In essence, certain carriers would be denied MTE access because of the regulatory position they had taken. Ultimately, and fortunately, BOMA did not pursue this approach, although some individual Chapter newsletters also repeated the information that a boycott was under consideration. This, along with other examples provided by others are a reflection that, at times, BOMA and some others in the real estate industry have, at the least, aggressively sought to intimidate CLECs and discourage the pursuit of nondiscriminatory MTE access.

examples whereby the market had failed, MTE owners were acting contrary to the express wishes of their tenants, and competitive telecommunications alternatives remained unavailable in MTEs.[3] In light of the empirical evidence and legal bases provided to the Commission by the comments, there is no longer any reasonable justification to forbear from action. Consistent with its public interest obligation to protect consumers and promote telecommunications competition, the Commission must intervene to achieve nondiscriminatory telecommunications carrier access to consumers in MTEs.

II. THE COMMISSION'S NONDISCRIMINATORY MTE ACCESS PROPOSALS DO NOT RAISE CONSTITUTIONAL CONCERNS.

Those commenters opposed to telecommunications competition in MTEs claim that the vehicles for obtaining nondiscriminatory access proposed by the Commission will amount to an unconstitutional taking.[4] ALTS has already explained that the Commission's proposals are constitutionally sound.

With respect to Section 224, the property interests at issue -- conduits and rights-of-way -- by definition are owned or controlled by utilities.[5] The action proposed by the Commission

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3 See ALTS Comments at 6-18; Competitive Telecommunications Association Comments at 5-6; Fixed Wireless Association Comments at 5-6; The Competition Policy Institute Comments at 18.

4 See Electric Utilities Coalition Comments at 12-14; The United Telecommunications Counsel and Edison Electric Institute Comments at 14-15; Arden Realty, Inc. Comments at 6; Community Association Institute Comments at 13; Real Access Alliance Comments at 37-39.

5 47 U.S.C. § 224(f)(1).

would merely clarify that the utility property interests do not end at the entrance to an MTE, but extend therein.[6] The Eleventh Circuit recently confirmed that Section 224 is constitutionally sound.[7] Nothing in that decision suggests that the court's conclusion would have differed had it been expressly considering access to intra-MTE utility conduit and rights-of-way.

To the extent that the statute operates as a taking of utility property, it also provides a constitutionally sound mechanism for providing just compensation to the utility for the taking.[8] The Commission's proposal to clarify that utility conduit and rights-of-way within MTEs are covered by the access requirements of Section 224 ensures that the same constitutionally sound compensation mechanism would be available to utilities for telecommunications carrier access to these facilities.

ALTS encourages a broad interpretation of a utility right-of-way. Given that utilities often have obtained access to MTEs without the benefit of a written agreement, the specific rights of the utility are vague. Moreover, the evolution of

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6 The Commission is fully justified in -- indeed, compelled to -- give effect to a term in the Communications Act that is otherwise undefined therein. Courts traditionally afford federal agencies considerable discretion in reasonably interpreting the terms of their organic statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984).

7 See Gulf Power Co. v. United States, No. 98-2403, slip op. (11th Cir., Sept. 9, 1999).

8 Id. at 18.

distribution technologies must be accommodated by the Commission's interpretation of the statute. Therefore, ALTS concurs with Teligent and recommends that the Commission conclude that a utility owns or controls a right-of-way within an MTE such that it would be permitted to occupy any space within or on top of MTEs to which access would be reasonably necessary in order to provide service using any one of the variety of distribution technologies available now or in the future.[9]

The constitutional rights of MTE owners are not implicated by the Commission's interpretation of Section 224. By definition, the property interest at issue is already one that the MTE owner has conveyed to the utility. Moreover, neither the MTE owner nor the utility should be permitted to craft a utility access agreement in such a manner as to prevent the operation of a federal statute. Hence, any claims that existing utility access agreements prohibit the use of intra-MTE rights-of-way by other parties should be void as contrary to federal law.

Several real estate industry commenters claim that nondiscriminatory MTE access requirements would amount to an unconstitutional taking of their property.[10] ALTS has already explained to the Commission that the imposition of nondiscriminatory MTE access obligations directly on MTE owners

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9 See Teligent Comments at 32-33.

10 Arden Realty, Inc. Comments at 3-6; Community Association Institute Comments at 11, 13; Cooperative Housing Coalition Comments at 4; Real Access Alliance Comments at 37-42.

does not amount to a taking.[11] The issue is properly considered pursuant to the regulatory takings analysis set forth in the Penn Central decision. As several commenters have demonstrated, application of this analysis yields the conclusion that nondiscriminatory MTE access requirements do not amount to a taking of private property.[12] The real estate industry unnecessarily complicates the analysis leading to erroneous conclusions as to the constitutional nature of the actions proposed by the Commission. Because the takings concerns raised by the real estate industry are invalid, they should not deter the Commission from requiring nondiscriminatory telecommunications carrier access to MTEs.

III. THE COMMISSION RETAINS JURISDICTION OVER MTE OWNERS AS PERSONS ENGAGED IN WIRE COMMUNICATION.

The Commission clearly retains the authority to create and enforce nondiscriminatory MTE access requirements. Several commenters have noted that the Commission already places restrictions on the actions of MTE owners and other persons not otherwise regulated by the Commission.[13] Many MTE owners are charging carriers for traversing intra-MTE telephone facilities. Others are using their control over a portion of the telephone network to limit or eliminate competitive telecommunications

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11 See ALTS Comments at 21.

12 See Teligent Comments at 59-60; see also Sprint Corporation Comments at 19.

13 Level 3 Communications Comments at 10; PCIA Comments at 18-19; Teligent Comments at 49-50.

choices for their tenants.[14] Others are actually operating telecommunications networks themselves and deciding which carriers may interconnect with those networks.[15]

The Commission's authority extends "to all persons engaged within the United States in [interstate and foreign communication by wire or radio]."[16] Wire communication is a concept broadly defined by the Act. Of course, the term encompasses transmission. But, it also includes "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."[17] This term encompasses the MTE facilities -- facilities that cannot be duplicated -- necessary or otherwise incidental to the provision of wire and radio communications to consumers in MTEs. Although the Communications Act may not contain an express requirement of MTE owners to permit nondiscriminatory telecommunications carrier access, it certainly contains the grant of Commission authority to accomplish that goal.

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14 See MCI WorldCom Comments at 21; Fixed Wireless Communications Coalition Comments at 5-6; McLeodUSA Comments at 3.

15 Real Access Alliance Comments at 9, 18, 22. see also, Constitutional Analysis attached to the Comments of Real Access Alliance at 35 ("Building owners now often seek to provide a comprehensive bundle of services to their 'customers,' including, at least in some instances, the provision of telecommunications services").

16 47 U.S.C. § 2(a).

17 47 U.S.C. § 153(51) (emphasis added).

IV. THE FLAWS IN THE REAL ACCESS ALLIANCE SURVEY INVALIDATE ITS CONCLUSIONS.

The Real Access Alliance arguments, allegations, and conclusions are premised upon the results of a survey of its members. The manner in which the survey questions are presented and the wording of the possible responses render the survey sufficiently unscientific as to be invalid. Moreover, the survey represents the views and experiences of less than 5 percent of the Alliance's members.[18] Given the vehemence with which the Real Access Alliance attacks the Commission's nondiscriminatory access proposals, one would have thought that the outpouring of concern from its members would have been extraordinary. Yet, only 5 percent bothered to respond. The paltry response levels strongly suggest that nondiscriminatory MTE access will not encounter substantial opposition from the vast majority of MTE owners.

The insubstantial response rate also calls into question the validity of the survey's findings. Because the survey results admittedly represent only 5 percent of the Alliance members, they cannot be considered representative of the real estate industry experiences as a whole. The participation of the remaining 95 percent of the Alliance members could profoundly alter the survey's figures such that the results reported are meaningless. Consequently, ALTS urges the Commission to attach very little

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[18] Real Access Alliance Comments, Survey at 5-6.

significance to the Real Access Alliance survey and the positions that are based upon its conclusions.

V. CONCLUSION

For the foregoing reasons, ALTS respectfully urges the Commission to adopt rules that require MTE owners to provide nondiscriminatory telecommunications carrier access to consumers in MTEs and that restrict the ability of ILECs to delay or raise the cost of competitive entry into MTEs, consistent with its comments and these reply comments.

Respectfully submitted,

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September 27, 1999

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 27th day of September 1999, copies of the foregoing Reply Comments of The Association for Local Telecommunications Services filed today with the FCC in WT Docket No. 99-217/CC Dkt No. 96-98 were served by hand delivery on the following parties:

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