

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking)	
to Amend Section 1.40000 of the)	
Commission's Rules to Preempt Restrictions))	
on Subscriber Premises Reception or)	
Transmission Antennas Designed to)	
Provide Fixed Wireless Services)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	
Review of Sections 68.104, and 68.213 of)	CC Docket No. 88-57
the Commission's Rules Concerning)	
Connection of Simple Inside Wiring to the)	
Telephone Network)	

COMMENTS OF VERIZON

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TABLE OF CONTENTS

I. Introduction and Summary. 3
II. Exclusive Access Arrangements Are Anti-Competitive and Should Be Barred; Exclusive Marketing Arrangements Are Pro-Competitive and Should Be Permitted, and Prohibiting Them Would Amount to An Unconstitutional Bar on Commercial Speech. 4
III. Tenants Should Not Suffer Because of a Landlord’s Exclusionary Policies. 9
IV. Rights of Way Should Not Be Extended To Entire Buildings. 10
V. Conclusion. 12

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COMMENTS OF VERIZON¹

I. Introduction and Summary

Exclusive *access* arrangements in a multi-tenant environment (“MTE”) constrain competition and reduce the services available to both commercial and residential tenants. Not so with exclusive or preferential *marketing* arrangements, which are pro-competitive, because those

¹ The Verizon companies ("Verizon") participating in this filing are the affiliates of Verizon Communications Inc. that are identified in the attached list.

arrangements afford customers an additional source of information on the availability of services and products and an additional sales outlet, without any reduction in the many outlets they already have. Moreover, restricting the landlord's ability to disseminate the advertising of a single carrier constitutes an unconstitutional restriction on commercial speech. For these reasons, the Commission should extend to multi-tenant residential buildings and campuses the same prohibition on exclusive *access* that it adopted in commercial MTEs, but it should not restrict those *marketing* arrangements that contain no restrictions on access by other service providers.

The Commission should not deprive tenants of access to all telecommunications services if their landlord engages in exclusionary practices, as it proposes. The Commission can take action against a carrier that aids and abets such practices, but the public interest would not be served by forcing the tenants to go without service. There is also no legal or practical justification for allowing carriers to ride roughshod over private property by placing their facilities anywhere they want in a building in which another carrier has located facilities in a conduit or duct that qualifies as a right of way.

II. Exclusive Access Arrangements Are Anti-Competitive and Should Be Barred; Exclusive Marketing Arrangements Are Pro-Competitive and Should Be Permitted, and Prohibiting Them Would Amount to An Unconstitutional Bar on Commercial Speech.

The Commission asks whether to prohibit carriers from entering into exclusive access arrangements in residential MTEs. *See* Order and Further Notice at §§ 161-62.² It should.

Exclusive access arrangements reduce or eliminate tenants' ability to obtain products and

² *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 (rel. Oct. 25, 2000) ("Order and Further Notice").*

services offered by their choice of service providers. This lack of competitive choice is the same whether the tenants are businesses or consumers, so the Commission should extend to residential MTEs the prohibition that it adopted for commercial MTEs on carriers entering into arrangements that preclude access by other service providers. *See id.* at & 71. Residential customers should be no less able than commercial ones to obtain the products and services that a variety of providers offer, and an arrangement between a service provider and a building owner or manager that deprives the customer of this choice is unreasonable and should be barred.

By contrast, exclusive or preferential marketing arrangements differ both conceptually and from a policy perspective from exclusive access arrangements, because they give customers *additional* service choices and an *additional* outlet for obtaining those services without restricting their available choices of providers or services. As a result, it would be inconsistent with the Commission's policy of encouraging competition to restrict marketing arrangements that contain no access exclusions for other carriers within an MTE. *See id.* at && 165-68.

Such a ban would also violate the First Amendment, because it would constitute a regulation of commercial speech of the carrier, the landlord, or both without an overriding government interest. Truthful commercial speech is protected by the first amendment and can be regulated only when such regulation is narrowly-focused to that which is needed to directly advance achievement of a substantial, overriding government interest. *See Central Hudson Gas & Elec. Corp. v. Pub. Ser. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

Under the Commission's proposal, a landlord who wishes to market a single carrier's service would be compelled to market the services of other carriers as well, even though the landlord had no desire to market those services or recommend them. The Supreme Court has found that such government compulsion to communicate involuntarily a commercial message is

constitutionally barred in the absence of a showing that the ban is necessary to achieve a substantial government interest. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (A state may not compel citizens to carry the state’s slogan on their license plates); *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986) (The state may not require a utility to include in its billing envelopes a message with which it disagrees).

Under the proposal here, if the landlord does not wish to market the services of additional carriers, it is prohibited from marketing those of the single carrier which it wants to engage in a sales agency relationship. Courts have allowed such compulsion in a public forum, such as a shopping center. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). However this is not the situation here. Unlike a shopping center, which is “a business establishment that is open to the public to come and go as they please,” *id.* at 87, MTEs are private residences or offices that are not generally open to the public. And, unlike the *Pruneyard* scenario in which “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition will not likely be identified with those of the owners,” *id.*, a landlord which markets a carrier’s services will be seen as advocating that carrier’s wares.

Commission regulation or prohibition of exclusive marketing arrangements amounts not only to a prohibition on the landlord’s right to disseminate the commercial messages of the single carrier, but it also bars that carrier from engaging the landlord as a unique channel for its commercial speech. These prohibitions would be permissible only to achieve an overriding government interest. *See, e.g., Central Hudson*, 447 U.S. at 564, 569-71.

Here, however, the interest the Commission is advancing is the promotion of competition for telecommunications services within the MTE. An arrangement that impedes such competition by restricting access to tenants runs afoul of that interest, but that is not the case

here. Allowing a carrier to sign an exclusive sales agency contract with the landlord does not limit access by other carriers, nor does it prevent those carriers from marketing their services to the tenants using existing marketing and sales channels. So long as the arrangement between the carrier and the landlord allows those other marketing channels to remain open, and so long as access is not restricted, there is no overriding government interest which would permit the Commission to impose restrictions on the landlord's or the carrier's commercial speech.

The pro-competitive nature of exclusive marketing arrangements can be shown in connection with the types of contractual arrangements that OnePoint Communications Corporation ("OnePoint") has with its customers. OnePoint, a telecommunications service provider within residential MTEs that Verizon has recently acquired,³ enters into contracts with building owners and managers that give it the exclusive right to *market* telecommunications services to residents and prospective residents of the property. Under those arrangements, the landlord becomes a sales agent for OnePoint and acts as OnePoint's on-site representative. The landlord makes OnePoint's marketing materials available to tenants or prospective tenants and offers to take orders for OnePoint's services. In return, the landlord, like any sales agent, receives a commission on any sales.

Under these arrangements, the tenants have the unrestricted right and ability to take service from any provider they choose. They are not in any way limited in their access to information on other providers' wares. They may continue to receive and act upon advertising from other service providers over a wide range of sales and marketing media – television, radio, newspapers, magazines, billboards, direct mail, telemarketing, kiosks in stores and shopping centers, etc. The landlord just becomes one *additional* sales channel for the tenants. OnePoint's

³ Following acquisition, Verizon is renaming this affiliate Verizon Avenue.

agreement with the landlord places no limitation on the tenants' choice of services and providers nor deprives any other service provider of the ability to deliver service to any tenant. OnePoint makes no representation to either the landlord or to any tenant that any exclusivity exists in provision of any telecommunications service.

Those arrangements have given OnePoint a share of the telecommunications market within the MTEs in which it operates, but it by no means has obtained a dominant position within those buildings. Over the two and one-half years prior to acquisition, it entered into nearly 1,000 marketing arrangements with landlords in MTEs that comprise about 300,000 units. Its experience is that, on average, 10%-20% of the tenants chose to take some or all of their services from OnePoint under these landlord marketing arrangements. This demonstrates that exclusive marketing arrangements which impose no restrictions on access by other carriers do not limit competition and there is no reason for the Commission to take action to restrict such arrangements.

Instead, they should be encouraged, because they provide tenants with clear benefits. First, as part of the contract with the landlord, OnePoint frequently agrees to upgrade the wiring and/or install additional equipment in the MTE to support more robust services. This gives tenants access to higher-quality service and the opportunity to obtain more technologically-advanced offerings than would have been available over the pre-existing wiring. Second, where permitted by state law, OnePoint offers tenants packages of services at reduced rates. This not only saves tenants money, but it encourages other providers to offer their own discounted service packages as well, resulting in a healthy competitive market.

In short, exclusive *marketing* (as opposed to *access*) arrangements benefit tenants as well as landlords. They promote competition and upgraded services, while saving tenants money and earning sales commissions for the landlords. Such arrangements should not be regulated.

III. Tenants Should Not Suffer Because of a Landlord's Exclusionary Policies.

The Commission asks whether it should prohibit local exchange carriers from providing telecommunications services to tenants within a building in which the landlord maintains an exclusionary policy. *See id.* at §§ 151-55. Such a policy would cause tenants to lose critical telecommunications services and should not be adopted.

As discussed above, carrier contracts that exclude other carriers from accessing tenants in an MTE are unreasonable, anti-competitive, inconsistent with the Commission's universal service goals, and should be barred. Landlords should be encouraged to give their tenants access to all telecommunications services from all carriers that desire to serve the MTE. However, if a landlord nonetheless chooses to exclude some carriers from access, the tenants, who are blameless, should not be forced to suffer the loss of their own telecommunications services. They have no ability simply to uproot their business or family and move to another building at whim. While over the long term the landlord may find it difficult to lease space to new tenants and will likely lose those it has, in the interim (which could be months or years), the result would be catastrophic to the tenants. Commercial tenants would lose access to their customers and would likely go out of business. Residential tenants would be unable to call emergency services and would lose their lifeline to family and friends. It would be the tenants, not the landlord, who would suffer in the short run for the landlord's exclusionary actions. No public policy would be served by depriving them of needed services to spite the landlord.

IV. Rights of Way Should Not Be Extended To Entire Buildings.

In this proceeding, the Commission defined rights of way for the purpose of section 224 to include ducts and conduits within a building that a utility is using or has the right to use, so long as the utility has the ability voluntarily to provide access to a third party and is entitled to compensation for doing so. *Id.* at ¶ 87. The Commission now asks whether rights of way should be extended to an entire building if a utility can place facilities in that building. *Id.* at ¶¶ 169-70.⁴ Such an extension would not be consistent with section 224 and could be very disruptive.

Section 224(f)(1) requires a utility to provide a cable system or telecommunications carrier access to poles, ducts, conduits, or rights of way that are “owned or controlled by it.” 47 U.S.C. § 224(f)(1). Here the utility does not “own or control” the entire MTE. At most, it controls only the specific space in the MTE in which it has the right to place its telecommunications facilities.⁵ Under the clear language of the Act, this is the only place within the MTE that could be considered the utility’s right of way. Unless the utility itself has been granted the unfettered right to place its facilities anywhere within the MTE, there is no statutory basis for defining the entire MTE as a right of way and for giving that right to other carriers.

⁴ The Commission cites three commenters as supporting this approach, *id.* at ¶ 169 and n.368, but those comments actually stop short of such a broad interpretation of rights of way. AT&T, for example, argues for an expansive definition of “ownership or control,” but it does not suggest that such ownership or control would give competitors access beyond the specific duct, conduit, or right of way in which the utility’s facilities are located. *See* AT&T Comments at 19-22. Teligent (at 34-35) simply argues that a “right of way” under section 224 can be secured over private, as well as public, property, while WinStar (at 55-56) asserts that, where a utility has the broad right to place its facilities anywhere it wants within an MTE, competitors should have the same right.

⁵ In most instances, the carrier simply has the landlord’s consent to place facilities in a conduit or duct owned and controlled by the landlord. In that event, the utility does not have a right of way and section 224 is inapplicable.

Even if there were a statutory justification for giving carriers the discretion to place their facilities anywhere they want within an MTE, which there is not, there is no policy support for such a finding. The location of existing telecommunications facilities is generally selected by mutual agreement between the utility and the landlord to be unobtrusive and avoid disruption to tenants while enabling the utility to serve its customers efficiently. Those same factors should apply to new entrants as well. They should not be permitted to disrupt building operations or inconvenience the tenants by allowing them total discretion on where to place new wiring. Instead, the new entrants should be subject to the same standards as utilities that are already in the building and should be required to work with the landlord to place their facilities in a mutually-acceptable location and in accordance with the National Electrical Code, National Electrical Safety Code and other applicable federal, state or local regulations. There is no reason the Commission should extend the definition of right of way to encompass an entire building.

V. Conclusion

Accordingly, the Commission should prohibit exclusive access arrangements, allow exclusive marketing arrangements, not penalize tenants for the exclusionary policies of their landlord, and not allow a right of way to extend to an entire building based on the mere existence of facilities in that building.

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ATTACHMENT

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Corp.. These are:

Contel of Minnesota, Inc. d/b/a Verizon Minnesota
Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Alaska Incorporated d/b/a Verizon Alaska
GTE Arkansas Incorporated d/b/a Verizon Arkansas
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon Avenue
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.