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

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition. Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection Of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

COMMENTS OF SPRINT CORP.

Norina Moy
Craig T. Smith
401 9th St., NW, 4th Floor
Washington, DC 20004
(202) 585-1915

January 22, 2001

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COMMENTS

Sprint Corporation hereby respectfully submits its comments in the above-captioned proceeding in response to the Further Notice of Proposed Rulemaking (FNPRM) released October 25, 2000 (FCC 00-366).

I. INTRODUCTION AND SUMMARY.

In the companion order in this proceeding, the Commission adopted a new rule (Section 64.2300) which prohibits carriers from entering into "any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises." In the FNPRM, the Commission has sought comment on additional issues related to the imposition of a nondiscriminatory access requirement, including

- whether the Commission has statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE (para. 132), and whether such a prohibition presents a constitutional takings issue (para. 144);

- whether to extend Section 64.2300 to residential MTEs (para. 160);
- whether preferential marketing agreements and other preferential arrangements should be regulated by the Commission (para. 168).

As discussed below, Sprint believes that the Commission does have statutory authority to prohibit LECs from providing service to MTEs who refuse to allow nondiscriminatory access; that the prohibition on exclusive access arrangements should be extended to residential MTEs; and that preferential marketing arrangements are legitimate and should not be regulated or proscribed by the Commission.

II. NON-DISCRIMINATORY ACCESS REQUIREMENT

In paragraph 132 of the FNPRM, the Commission states that "there is a strong case that the Commission has the statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE." In support thereof, the Commission cites its authority under Section 201(b) to ensure provision of Title II services on a just and reasonable basis, and its obligation under Section 151 to promote an efficient communications system that provides good service at reasonable prices to all Americans (paras. 134-5). The Commission has sought comment on its analysis of its statutory authority, and whether the proposed prohibition on LEC provision of service constitutes an unconstitutional taking under the Fifth Amendment.

Sprint believes that the Commission's analysis in the FNPRM, and its reliance on the Ambassador[1] decision, support its tentative conclusion as to its statutory authority to prohibit LECs from providing service to MTEs whose owners refuse to allow non-exclusive access to competing carriers.

[1] Ambassador, Inc. et al. v. United States et al., 325 U.S. 317 (1945).

Ambassador involves the telephone services that hotels purchase from their telephone companies and then, in turn, provide to their room guests at a charge. The Commission held that services the hotels provide, and thus the charges associated with those services, constitute interstate and foreign telecommunications and as such, are within the Commission's jurisdiction. The Commission treated the hotels as the agent of the underlying telephone companies and ordered the telephone companies to either include the charges in their tariffs or file a tariff which specified the conditions under which such interstate and foreign service would be furnished to the hotels. In response to the Commission's findings, the telephone companies filed tariffs which prohibited the hotels from charging room guests for the services; these tariffs were then challenged by hotels.

First the District Court[2] and then the Supreme Court sustained the validity of the tariffs after deciding that the hotels were not the agents of the telephone companies, but rather subscribing customers. The Supreme Court found that Section 201(b) expressly authorizes the Commission's authority over regulated companies' "charges, practices, classification, and regulations for and in connection with such communication service" and that this authority clearly encompasses regulations that are binding, not just on the regulated companies, but also on the subscribers to the services as to the permissible use of the communications facilities. In the Ambassador case, the Court agreed that the Commission's authority in this regard "authorize[s] the [telephone] companies to promulgate rules binding on PBX subscribers [the hotels] as to the terms upon which the use of the facilities may be extended to others not themselves subscribers [hotel guests]."[3]

[2] The opinion was rendered orally and not reported. Subsequent reference to the "Court" mean the Supreme Court.
[3] Ambassador at 323.

The Supreme Court stated that the Commission's authority is not unlimited in this regard; rather:

> The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. **But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships.** Such a regulation is not invalid *per se* merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.[4]

As the Commission states in the instant NPRM (para. 141), the question from Ambassador to be answered with regard to the Commission's proposed nondiscrimination prohibition on LECs' dealings with MTE owners is "whether a LEC's provision of service to MTEs is sufficiently closely related to an MTE owner's unreasonable discrimination that we can and should exercise jurisdiction over the LEC's practice." Sprint believes the answer is clearly yes, even though such regulation will "necessarily affect ... its third party relationships" -- the LEC and the MTE owner, the MTE owner and the tenants, and the LEC and the tenants.

While the MTE owner is not, as the hotel was in Ambassador, the subscriber to the LEC's service, the MTE owner has the ability to not just affect the LEC's relationship with the subscriber (tenants), but to control that relationship. As the Commission states, the MTE owner's ability "to unilaterally and unreasonably discriminate among competing telecommunications service providers remains an obstacle to competition and consumer choice."[5] If allowed to

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[4] Id., at 323-4. *See also,* Puerto Rico Telephone Company v. Federal Communications Commission et al, 553 F.2d 694 (1st Cir. 1977) ("PRTC"). The Court affirmed an FCC decision that Puerto Rico Telephone ("PRTC") violated its tariffs when it refused to allow the connection of privately supplied PBX equipment with the PRTC telephone system. In doing so the Court relied Ambassador for the proposition that the FCC has the authority to adopt regulations notwithstanding that such regulations will directly impact, in essence regulate, the PBX subscribers of the regulated telephone company. According to the Court' such regulation is within the FCC's statutory authority because the FCC's jurisdiction under § 201 extends to "interstate wire communications from its inception to its completion and that wire communications within the meaning of the Communications Act [does not end] at the PBX board" PRTC at 699.

[5] *Id.* at para. 126.

discriminate, the MTE owner can and will, in essence, step into the shoes of the subscribers by controlling the subscriber's choice of provider. This control can also extend to what services are available to the subscriber because the MTE owner's ability to control which providers can access the MTE will also govern the facilities and equipment placed in the MTE and thus limit the services that may be available. Given this level of control, the LEC's provision of service to MTEs is sufficiently closely related to an MTE owner's unreasonable discrimination that the Commission can and should exercise jurisdiction over the LEC's practices.

In the FNPRM, the Commission also seeks comment on whether a prohibition on LECs' dealing with MTE owners that unreasonably discriminate raises any Fifth Amendment concerns. As the Commission correctly points out (para. 144), such a prohibition certainly creates no taking as to the LEC because there would be no use or occupation of LEC property. However, the Commission, citing Cable Holdings,[6] questions whether such a prohibition may influence MTE owners to act in a manner similar to what direct regulation of the MTE owner would cause, and whether the prohibition is thus an unconstitutional taking of the MTE owner's property.

Cable Holdings is not controlling, or even particularly applicable, to the proposed regulation at issue here. In the first place, as the Commission points out, the discussion of the Fifth Amendment taking claim in Cable Holdings was merely *dicta*. The 11th Circuit never reached the Fifth Amendment issue because it found narrower, nonconstitutional grounds to decide the case. More importantly, Cable Holding involved a direct permanent physical taking of the MTE owner's property by requiring the MTE owner to allow Smyrna Cable (the appellee)

[6] Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., et al., 953 F.2d 600 (11th Cir. 1992).

access to the interior of the MTE for the placement of cable facilities.[7] The Commission's proposal in the instant FNPRM raises no such issue.

If the Commission's proposal that LECs be prohibited from dealing with MTE owners that discriminate raises any takings concerns at all, those concerns are more appropriately reviewed in light of the Supreme Court's decision in Yee.[8] This case involved a California law that set rents that could be charged by mobile home park owners to mobile home owners and that barred mobile park owners from disapproving of the transfer of a mobile home from one tenant to the next provided the purchaser has the ability to pay. It is this latter provision that closely relates to the Commission's instant proposal; both instances deal with the government's authority to regulate who a property owner has to allow onto the property.[9]

The Supreme Court distinguished between a physical occupation of property, for which the Fifth Amendment generally requires compensation, from a mere regulation of the "use of property," where compensation is required "only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[10] The Court determined that the California rent control ordinance in question in Yee was a regulation of the use of the mobile park owner's land. This was not a case where the government "requires the landowner to submit to the physical

[7] Additionally, it should be pointed that Cable Holdings involved construction of § 621(a)(2) of the Cable Act, which provides for certain instances when a cable company can require the property owner to allow access, but does not provide any express means for compensating the property owner. As discussed in the *Further Notice,* and as later discussed in these comments, if the Commission has concerns about a takings claim, it can remedy the situation by providing a means for the MTE owner to seek just compensation in a Commission proceeding, which would then be judicially reviewable. Also, Cable Holdings was a February 12, 1992 11th Circuit decision. The Yee case, which is also cited by the Commission (and is discussed further by Sprint below) as the better precedent for the Commission's instant proposal, was an April 1, 1992 decision.

[8] Yee et al. v. City of Escondido, California, 503 U.S. 419 (1992).

[9] Nonetheless, Sprint would point out that Yee, far more than the Commission's instant proposal, involved a direct regulation on the property owner, not the indirect regulation under consideration here. Accordingly, Sprint believes that even considering the "taking" test set up in Yee goes beyond what the Commission needs to do.

occupation of his land."[11] The mobile park owner, having voluntarily rented its land to mobile home owners, was not required under the disputed ordinance to continue to rent to mobile home owners; indeed, on 6 to 12 months' notice, the mobile park owner could evict all of the mobile home owners and cease to rent to anyone. Thus, there was no government-required physical invasion, but rather a use regulation which became effective once that owner (voluntarily) invited tenants to enter the premises.[12]

Clearly then, if any taking issue arises at all, it would be at most a "use" or regulatory taking under Yee. Under no construction could it be considered a "required physical occupation" and thus is not a *per se* taking. The Commission's proposal would not require any occupation at all, but would at most indirectly cause the MTE owner, once such owner decided to invite tenants and invite at least one telecommunications carrier to serve those tenants, to allow other telecommunications carriers to access the property and serve the tenants on a nondiscriminatory basis with the invited carrier. As Yee makes clear, if this indirect regulation constitutes a "use" regulation, then the test for compensation is, considering the state interest, whether the property owner is deprived of the use of its property or was unfairly singled out. Neither would seem to be the case here; if anything, the value of the property is enhanced because of its increased attractiveness to current and potential tenants due to the wider choice of telecommunications service providers.

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[10] Yee at 522-3.
[11] Id. at 527.
[12] Id. at 528. *See also,* Greystone Hotel Co. v. The City of New York, et al., 1999 U.S. App. LEXIS 14960 (2nd Cir. 1999). This case involved a New York rent stabilization law that regulated rents charged in hotels. Against a claim of an unconstitutional takings, the Court held that Yee controls, and that there was no physical taking of plaintiff's property because the tenants were initially sought by plaintiff and the plaintiff could, under the right circumstance, evict tenants. Again, this was a "use," not a taking *per se,* and the Court found that no compensation was due because the plaintiff's property was not rendered valueless and there was a legitimate state interest in coping with a housing shortage.

Finally, to the extent that the Commission concludes that there is a taking issue, indirect or direct, *per se* or regulatory, such concern can be addressed by establishing a process under which the Commission can determine whether the compensation to the MTE owner was just (FNPRM, para. 145). This process is, in turn, subject to judicial review. Nonetheless, it would seem difficult for an MTE to demonstrate that it had not received just compensation, since the level of compensation would presumably be based on the arrangement (voluntarily) entered into by the MTE owner and the initial telecommunications service provider.

III. NON-DISCRIMINATORY ACCESS TO RESIDENTIAL MTEs

In adopting Section 64.2300, the Commission correctly concluded that exclusive contracts between telecommunications carriers and commercial MTE building owners limit the telecommunications choices of tenants in MTEs and impede the development of competition in the local services market (paras. 28-29). Sprint believes that the same rationale and legal authority justifies extension of Section 64.2300 to residential MTEs.

According to a Yankee Group study,[13] an estimated 20% of all US households – approximately 20 million households – reside in multidwelling units, and only 5% of this market is currently served by integrated service (voice, data and video) providers. This sizable market would appear to be fertile grounds for promoting the availability of an array of broadband and advanced service from multiple providers, at competitive rates and superior service levels. Nonetheless, because the potential revenues to be earned from residential MTEs are generally lower than is the case for commercial MTEs (at least on a per unit basis), Sprint believes that it is likely that competitive LECs will be relatively more reluctant to invest their resources in attempting to gain access to residential MTEs if the barriers to entry to that market remain as

[13] *"Residential MDUs: A Market Yet to Be Tapped?"* Yankee Group Report, *Consumer Market Convergence*, Vol. 16, No. 19, November 1999.

high as they are today. If the Commission wishes to extend the benefit of local competition to the residential market, it should take the necessary steps to ensure, to the extent possible, a level playing field in terms of non-exclusive access to residential MTEs. As was true with commercial MTEs, if alternative service providers are denied access to a residential MTE completely, or if they are forced to pay exorbitant rates for access or are subjected to unreasonable conditions (para. 17), it is unlikely that competition will flourish in that market, to the detriment of the tenants of that MTE.

The Commission notes that residential MTE tenants' lease terms tend to be significantly shorter than those of commercial MTE tenants (para. 162), and therefore, residential MTE tenants can more readily move if they are not satisfied with their lack of choice in telecommunications service providers. However, it is not at all clear that tenants would choose to move from their homes simply or largely because they are limited in their selection of telecommunications service providers. Thus, it may well be the case that residential MTE tenants have relatively little leverage in this regard against a building owner who refuses to allow alternative service providers access to the MTE. In order to encourage the development of local competition in the residential MTE market, the Commission should prohibit carriers from entering into exclusive access arrangements with residential MTE building owners, despite tenants' shorter lease terms.

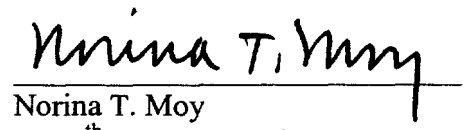
IV. PREFERENTIAL MARKETING AGREEMENTS

The Commission has made it clear that "any arrangement [that] effectively restricts a premises owner from providing access to other telecommunications service providers...is prohibited" (para. 168). Preferential marketing agreements would not appear to pose the kind of access restrictions which the Commission has found to be contrary to the public interest. Rather,

such agreements -- which may include commissions to the building owners, lower rates or additional services to the tenants, or infrastructure subsidies -- may simply reflect the value the telecommunications service provider ascribes to the role of the building owner in interacting with the MTE tenants. So long as all telecommunications service providers have a reasonable opportunity to offer a preferential marketing agreement to the building owner, the carrier and the building owner should be allowed the opportunity to negotiate and enter into a mutually acceptable marketing arrangement. Further, although it would presumably be clear to the tenants that such a preferential arrangement exists between a particular service provider and the building owner (it is not clear what other reason a building owner would have to encourage a tenant to select that service provider), Sprint does not oppose a rule that would require the disclosure of a preferential marketing agreement to MTE tenants (para. 166).

Respectfully submitted,

SPRINT CORPORATION



Norina T. Moy
401 9th St., N.W., Suite 400
Washington, D.C. 20004
(202) 585-1915

Craig Smith
7301 College
Overland Park, KS 66210
(913) 681-1085

January 22, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT CORPORATION** was sent by hand on this the 22nd day of January, 2001 to the below-listed parties:

Christine Jackson

Christine Jackson

January 22, 2001

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Thomas Sugrue, Chief
Wireless Telecom Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

International Transcription Service
445 12th Street, SW
Washington, DC 20554