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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
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	)	
Implementation of The Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98
Review of Sections 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

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ERRATUM

On January 22, 2001, BellSouth Corporation, by counsel ("BellSouth"), filed Comments with the Commission regarding the above-referenced proceedings. Afterward, BellSouth discovered several typographical errors in its Comments. With this Erratum, BellSouth corrects the typographical errors and requests that the Commission substitute these Comments for the original Comments BellSouth filed on January 22, 2001.

The following are the typographical errors that have been corrected:

1. Page 2, paragraph 1, line 10 – "facility" has been changed to "facilities";

2. Page 5, paragraph 2, line3 – "itself" has been changed to "themselves";

3. Page 6, paragraph 2, line 3 – "draconian" has been capitalized as "Draconian";

4. Page 7, paragraph 1, line 3 – "the" in front of "end-user customers" has been deleted and "shall" has been changed to "should";

5. Page 7, paragraph 1, line 4 – "in" has been changed to "it";

6. Page 7, paragraph 2, 2nd line from bottom – "of" has been changed to "or"; and

7. Page 8, paragraph 1, line 12 – "it has" has been changed to "they have".

Respectfully submitted,

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Date: January 31, 2001

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BELLSOUTH'S COMMENTS
(CORRECTED VERSION)

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SUMMARY

BellSouth recommends that the Commission not enact any additional building access regulation; supports extending the current ban on commercial MTE exclusive telecommunications contracts to residential MTEs; proposes a voluntary MTE owner/FCC open access certification/attestation program, and opposes any further expansion of the definition of the term "right-of-way."

The record established thus far establishes competition in the MTE marketplace. The Commission has enacted effective regulation in this and other proceedings that effectively limit an incumbent local exchange carrier's incentive or ability to impede competitive access to MTEs. Rather than establish new regulation, the Commission should monitor developments in the MTE marketplace and assess the success of its recently enacted building access requirements.

The Commission's proposal to prohibit LECs from providing service to customers located in MTE properties whose owners refuse to deal with other LECs on a non-discriminatory basis is unnecessary and ill-considered. The rule is constitutionally suspect from both a "takings" and "non-impairment" perspective. The rule is unlawful because it does not reach any affirmative practice of a LEC, but rather the independent actions of building owners, over whom the Commission has no jurisdiction. The rule is unnecessary because the record demonstrates the presence of competition and the Commission has established sufficient regulatory controls on all LECs to discourage impediments to competitive entry. The rule is too severe in consequence in that it affects the very health, safety and livelihood of innocent LEC customers.

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BELLSOUTH'S COMMENTS

BellSouth Corporation, by counsel ("BellSouth"), recommends that the Commission not enact any additional building access regulation; supports extending the current ban on commercial MTE exclusive telecommunications contracts to residential MTEs; proposes a voluntary MTE owner/FCC open access certification/attestation program; and opposes any further expansion of the definition of the term "right-of-way."

I. THE COMMISSION HAS ESTABLISHED SUFFICIENT REGULATION IN THE COMPETITIVE MARKET FOR MTE CUSTOMERS

The Commission's goal in this proceeding is to ensure that competing telecommunications providers are able to provide service to customers in multiple tenant environments ("MTEs").[1] The Commission has identified three potential obstacles to competitive service access within MTEs: MTE owners, the incumbent local exchange carrier ("ILEC") within the telephone exchange in which the MTE is located, and the entrenched MTE telecommunications service provider, whether an ILEC or a competitive local exchange carrier ("CLEC"). The Commission is concerned that MTE owners, who are not subject to direct Commission regulation, have the ability to deny entry to competing telecommunications service providers ("TSPs") both directly and indirectly through combinations with one or more TSPs. The Commission is concerned that ILECs might control their facilities in a way that frustrates competitive entry by CLECs. The Commission is also concerned that CLECs can enter into relationships with MTE owners whereby they become an exclusive, or semi-exclusive, MTE service provider.

The current record demonstrates competition among TSPs in MTEs. The Commission has noted voluntary efforts on the part of MTE owners to promote open access policies, and is encouraged by market developments. The Commission declined to adopt rules directly

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[1] *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; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217 and CC Docket Nos. 96-98 and 88-57, *First Report and Order and Further Notice of Proposed Rulemaking* in WT Docket 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.

regulating MTE owners. In a separate proceeding, the Commission required ILECs to make available to CLECs on an unbundled basis any portion of the local loop as a subloop element, including facilities between the MTE property line and the demarcation point within, wherever located.[2]

The Commission's rules permit all LECs to locate their network demarcation points at a single, minimum point of entry ("MPOE") or at multiple locations within the MTE.[3] Essentially equating the MPOE with a single point of interconnection ("SPOI"), the Commission proposed mandating an MPOE network demarcation for all TSPs. For a number of reasons the Commission chose not to mandate an MPOE demarcation point, but clarified a LEC's obligations with respect to identifying and changing existing demarcation points. These requirements, together with the subloop unbundling requirements established in the *UNE Remand Order*, effectively regulate ILECs in a manner that negates any incentive or ability to impede competitive entry.[4]

88-57, FCC 00-366, released October 25, 2000, ¶ 1 ("*Competitive Networks Order*" or "*FNPRM*").

2 *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"). *See also*, *Competitive Networks Order* ¶ 48.

3 47 C.F.R. §§ 68.3(b).

4 Although the Commission uses the term "incumbent LEC" to refer to the incumbent for the exchange area in which the MTE is located, BellSouth believes that when a CLEC becomes the entrenched LEC within an MTE, the CLEC may share characteristics of an ILEC within the MTE and that all competing telecommunications service providers for MTE tenant customers, including the ILEC for the local exchange, are effectively CLECS. The Commission correctly chose to make its ban on exclusive contracts applicable to all LECs for reasons of competitive neutrality. The Commission should follow through with these principles whenever it enacts building network infrastructure access requirements. Thus, when a CLEC becomes the entrenched service provider within an MTE, and circumstances warrant, the Commission must be prepared to impose upon the entrenched CLEC the obligation to make available to all competing carriers on an unbundled basis the necessary intra-building subloop elements up to the CLEC network demarcation point; the obligation to abide by the Commission's rules relating to the location and identification of network demarcation points, and any other requirement that would otherwise apply to ILECs.

The Commission enacted a prospective ban on exclusive contracts between TSPs (ILEC and CLEC alike) and commercial MTE owners, thus indirectly regulating MTE owners through its statutory jurisdiction over carriers. The Commission indicated that TSPs that are adversely affected by the contracting practices of other TSPs might file a section 208 complaint against an offending carrier.

Despite the record evidence of increasing competitive entry within MTEs, the Commission's establishment of facilities access requirements on ILECs, and the prospective ban on exclusive contracts applicable to all LECs within MTE settings, the Commission seeks comment on additional measures it could take to ensure competitive entry. These efforts are, for the most part, unnecessary and could very well result in harming the very parties, end user-tenants, which the Commission seeks to protect. Moreover, most of the additional proposed regulations rest on shaky legal foundation. The Commission's resources are best spent in monitoring the development of competition within MTEs, and enforcing, where necessary, the requirements it has already adopted.

II. THE COMMISSION SHOULD NOT ADOPT RULES THAT CUT OFF SERVICE TO TENANT END USERS

The Commission apparently concedes that it cannot directly regulate MTE owners that are not also carriers and therefore under the Commission's statutory jurisdiction.[5] In order to reach these private parties indirectly, the Commission seeks comment on whether it has the statutory authority to prohibit LECs from providing service to customers in MTEs where the owners of the MTE maintain policies that unreasonably prevent CLECs from gaining access to those same customers. Whether or not the precedents cited by the Commission provide an

[5] *Competitive Networks Order* ¶ 136 ("While we have asked questions in this proceeding about our statutory authority to regulate MTE owners directly, it does not appear that the same issues would arise from a direct carrier regulation that has indirect effects on the MTE owners.")

adequate legal foundation for the proposed rule, a service prohibition is severe, unwarranted, would punish innocent tenants and place existing commercial relationships in turmoil.

There is a significant difference between the Commission's new proposal and its recent prospective ban on exclusive contracts between LECs and MTE owners. The Commission's current ban reaches affirmative carrier conduct - an oral or written participation with MTE owners in an alleged vertical restraint against competitive entry into MTEs. The rule is at least arguably within the Commission's "broad authority to regulate the practices of LECs in connection with their provision of interstate communications services"[6] because it involves some LEC action - the provisioning of service on terms that the Commission has found unreasonable and unlawful. However, the Commission's new proposal does not reach a LEC practice or affirmative carrier conduct, but rather penalizes an innocent LEC and its customers for the independent actions of an MTE owner not within the Commission's jurisdiction.

BellSouth and other LECs might refuse to enter into any kind of exclusive arrangement with an MTE owner, might make their facilities open for interconnection with competing LECs, might in every way comport themselves in a way consistent with the Commission's rules, and still not have any control over the independent actions of an MTE owner, who might have the legal right to control her property in a way that all interested parties regret. Where the LEC is in complete compliance with applicable rules relating to open MTE access, but the MTE owner independently refuses to deal with certain LECs, the LEC cannot be said to be providing "service to an MTE on terms that place its competitors at an unfair competitive disadvantage."[7] The terms on which the compliant LEC is providing service are not the discriminatory access policies

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6 *FNPRM* ¶ 134.

7 *FNPRM* ¶ 135.

of the MTE owner, but the non-discriminatory common carrier obligations that apply under state and federal law.

The proposal is as impractical as it is unnecessary. Because the Commission has enacted effective regulations described above, ILECs have neither the ability nor the incentive to deny reasonable access to facilities to competing carriers wishing to access tenants in MTEs. ILECs are simply not in a position to lawfully deny a request for competitive access, as posited by the Commission, for any illegitimate reason.[8] At the very least, the Commission should allow the market to operate for a period of time under its new subloop unbundling and network demarcation identification rules before it undertakes costly additional regulation. BellSouth is confident that the record in this proceeding will continue to encourage the Commission to believe that competition is growing in MTEs and that its policy of ensuring tenant choice among service providers is being effected by a combination of competitively neutral effective regulation and market controls. Where this is not the case, it could not possibly be for a lack of adequate regulatory supervision over carriers.

The Commission would require carriers such as BellSouth to cut off service to its end user customers if the owner of the MTE where the customer rents space does not have in place a policy of open access to competing telecommunications providers. This Draconian government intervention comes notwithstanding the fact that BellSouth must: (1) comply with the subloop unbundling and interconnection requirements of the *UNE Remand Order*; (2) fully and timely disclose the locations of all network demarcation points to CLECs; and (3) avoid any relationship with an MTE owner that has the effect of denying entry to competing carriers. BellSouth may be punished if it violates any of the foregoing. Now, notwithstanding BellSouth's

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[8] *FNPRM* ¶ 129.

compliance with these regulations, BellSouth's customers may be punished by the most severe penalty of all - service interruption - if an MTE owner unilaterally acts in a manner inconsistent with the Commission's preferences.

BellSouth provides service to customers in MTEs subject to service levels that may be established in tariff and other authorized agreements. These service levels reflect the criticality of the service provided to the livelihood of end-user customers, and the Commission should not interfere with these users. Moreover, it is not in the public interest to establish a rule that would result in emergency notification services, such as 911 calls, from not being able to be put through because the Commission ordered BellSouth to disconnect service because the landlord had not adopted a non-discriminatory policy of competitive access. Interrupting service simply punishes the very Americans for whom the Commission finds a statutory obligation of protection.

The Commission's attempt to fashion a rule to regulate indirectly those that are not directly under its jurisdiction, and then to justify the rule constitutionally from the standpoint of the affected parties that are not directly under its jurisdiction, is unwarranted. Despite the Commission's legal research, BellSouth believes there are constitutional implications of the Commission's proposed abridgment of the contractual relationships between BellSouth and its end-user customers. Both the takings and non-impairment of contracts clause in the U. S. Constitution are at least implicated by the proposal put forth by the Commission. The Commission finds no "taking" because there is no "use or occupation of LEC property"[9] – yet governmental interference with intangible property rights - money, revenue streams and similar

[9] *FNPRM* ¶ 144.

assets - is braked by the same Constitutional protections as governmental trespass and seizure of real property.

III. THE COMMISSION SHOULD CONSIDER A VOLUNTARY MTE OWNER SELF-CERTIFICATION/COMMISSION ATTESTATION PROGRAM

Constitutional and statutory issues aside, the plethora of questions in the Further Notice of Proposed Rulemaking reveals the problematic extent of a mandatory non-discriminatory access rule, whether applied directly to property owners or indirectly to property owners through additional carrier regulation. As an alternative, the FCC might consider allowing property owners to voluntarily attest to the Commission that they have in effect a non-discriminatory access policy. At a minimum, this policy would encompass the "best practices" developed by the real estate industry, which the Commission has acknowledged is a step in the right direction, and a certification that the property owner has in place no exclusive access agreements with TSPs.[10] Property owners must remain free, of course, to control access to their property under reasonable, competitively neutral circumstances.[11] The FCC could consider allowing an analog to its historic Part 68 equipment labeling practice – such as the use by property owners of a symbol or device indicating to tenants and competing TSPs that they have in place a non-discriminatory access policy that meets FCC minimum standards to ensure tenant choice in telecommunications service options. Building owners that self-certify and participate in the voluntary attestation program would voluntarily submit to the Commission's enforcement authority to ensure compliance with their self-certification. Finally, the Commission should

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10 *Competitive Networks Order* ¶ 2.

11 These might include denying access to individuals or entities that pose a threat to the safety or security of the property or its tenants; denying access in accordance with applicable state and local law and tenant or homeowner covenants, and where access is technically infeasible due to space or property constraints.

recommend in the strongest terms that the real estate industry should follow standards and methods, such as those published by BICSI and ANSI/TIA/EIA, in the construction and rehabilitation of MTE properties in order to encourage the structural accommodation of multiple facilities based TSPs. An MTE owner's certification that it does so should be a part of any attestation program.

IV. THERE IS NO REASON TO DISTINGUISH BETWEEN COMMERCIAL AND RESIDENTIAL MTES IN THE ESTABLISHMENT OF COMPETITIVELY NEUTRAL BUILDING ACCESS REGULATION

The Commission seeks comment both on whether today's prohibition on exclusive telecommunications access contracts in commercial MTEs should be extended to residential MTEs, and whether any new regulation should apply equally to commercial and residential MTEs. Moreover, the Commission asks whether it should prohibit carriers from enforcing exclusive access provisions in existing contracts in either setting. BellSouth sees no reason to distinguish between residential and commercial MTEs for the purpose of establishing building access regulation. The Commission's attempts to deal with mixed-use campuses based on "predominant use" will not always be clear in the field.[12] To the extent the Commission's reasons for not extending the prohibition to residential MTEs are sustained by the supplementation of the record in this proceeding, however, there is even less justification to enact additional regulation directed toward property owners or ILECs.

As exclusive telecommunications contracts for commercial MTE access are now unreasonable under the Communications Act, the Commission should adjudicate complaints that carriers are violating this rule, whether through existing or new contracts. Whether or not the Commission has the legal authority to specifically prohibit carriers from enforcing exclusivity

[12] *Competitive Networks Order* ¶ 38.

provisions in existing contracts, the Commission should be prepared to apply any clearly available statutory penalty or remedy for carriers proven to engage in unreasonable practices by enforcing, after the effective date of the Commission's rules, exclusivity provisions in any contract. Exclusivity provisions in existing contracts may already be unenforceable and of no effect under the express terms of contracts in existence today; severability clauses are routine in commercial contracts for this reason. Rather than engage in further rulemaking, the Commission should address individual cases as they may arise in the context of Section 208 complaints brought by other carriers.

V. THE COMMISSION SHOULD NOT ADOPT A BROADER DEFINITION OF "RIGHT OF WAY" WITHIN MTEs

BellSouth continues to believe that the term "right-of-way" as used in the Pole Attachments Act does not encompass anything broader than the rights-of-way traditionally granted by public franchising authorities; these were to be made available by utilities to cable television systems in order that these service providers could reach end-user customers. The Commission's solicitation of comments relating to a broader interpretation than that adopted in the *Competitive Networks Order* reveals the problems of potentially granting carriers unbounded rights to place facilities anywhere in buildings. The definition adopted by the Commission in the *Competitive Networks Order* represents, even if it survives appeal and reconsideration, the theoretical outer limits of a constitutionally and statutorily sustainable interpretation of the term. There is no basis in the record for enacting any broader interpretation at the present time.

CONCLUSION

The Commission should not enact any further building access regulation, other than to apply the existing obligations of ILECs on a competitively neutral basis to all LECs, including CLECs.

Respectfully submitted,

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Date: January 22, 2001

CERTIFICATE OF SERVICE

I do hereby certify that I have this 31st day of January 2001 served the following parties to this action with a copy of the foregoing **ERRATUM** by hand delivery, or by placing a copy of same in the United States Mail, addressed to the parties listed on the attached service list.

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Juanita H. Lee

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