

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

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 1.40000 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 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
)	

REPLY COMMENTS OF VERIZON

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REPLY COMMENTS OF VERIZON¹

I. Introduction and Summary

The comments demonstrate that preferential marketing arrangements – as contrasted with access restrictions – promote competition and benefit tenants by ensuring that their needs will be met by at least one telecommunications service provider. The one party that advocates restrictions only for incumbents, AT&T, provides no valid support for its position and is

¹ The Verizon companies (“Verizon”) participating in this filing are the affiliates of Verizon Communications Inc. that are identified in Attachment A.

apparently simply attempting to constrain competition for its cable television, long distance, and local services.

A broad cross-section of commenters shows that there is no legal or policy basis for giving new entrants unrestricted access to locate their facilities anywhere in a building that they want. Incumbents have no right of way to place their facilities at will without landlord approval, and neither should their competitors.

II. AT&T's Proposed Anticompetitive Restrictions on Incumbents' Preferential Marketing Arrangements Should Be Rejected.

The Commission should deny AT&T's proposal to bar preferential or exclusive marketing arrangements involving incumbent local exchange carriers but not involving their competitors. *See* AT&T at 43-46. AT&T admits that there is "nothing inherently objectionable" about such arrangements and that "tenants can benefit" from them. *Id.* at 43. Yet it wants to seriously curtail incumbents' ability to market their services on the same basis as other carriers. It is apparent that the only motivation of AT&T, the largest cable television and long distance operator in the United States, is to constrain competition. It claims that incumbents can deny access to buildings, but cites only vague claims of that actually happening. For example, it alleges that Verizon, in a single state, failed to provide information about interconnection points in some isolated buildings "in a timely manner," without giving any specifics. *Id.* at n.7. It cites to its earlier comments in this proceeding for other examples, *id.* at n.5, but an examination of those comments shows that they contained only allegations of practices by building owners, not incumbent carriers. And even the Smart Buildings Policy Project ("Smart Buildings"), of which AT&T is listed as a member (*see* Smart Buildings at n.1) calls preferential marketing agreements "legitimate commercial partnerships that facilitate competition" and urges the Commission to

regulate only those arrangements that “interfere unreasonably with the ability of other carriers to obtain access to MTEs.” *Id.* at 45. In short, AT&T has not provided any valid reasons in support of its anticompetitive proposal to restrict incumbents’ marketing practices and fails to find support even from its own filing coalition.

Moreover, adoption of AT&T’s proposal would be unlawful and would affirmatively harm competition and tenants alike. As Verizon pointed out in its initial comments, restricting exclusive or preferential marketing arrangements would be unconstitutional, because it would restrict Verizon’s – and the landlords’ – rights to engage in commercial speech. *See Verizon* at 4-6 (and case authority cited therein). In addition, a marketing arrangement between a carrier and a landlord simply provides the tenants with an additional source of information regarding available services and should be encouraged, not restricted. *See id.* at 4-6. As the Real Access Alliance (“RAA”) demonstrates, regulation of such arrangements is a solution in search of a problem, because they benefit tenants, building owners, and service providers alike. *See RAA* at 66-67.² A competing provider of telecommunications services within multi-tenant buildings confirms that such arrangements enable the landlord to ensure that tenants receive needed services from a provider that will, if necessary, install any needed infrastructure inside the building to enable delivery of such services. *See Broadband Office Communications, Inc.* at 16-19. A group of tenants’ associations also confirms that such arrangements help ensure that tenants’ specific telecommunications needs are being met. *See Community Associations Institute* at 7.

² RAA appends to its comments a copy of its proposed Model License Agreement. RAA at Exh. G. While such a proposal is a step in the right direction, Verizon has previously submitted on an *ex parte* basis a letter to RAA that enumerated some of the shortcomings of RAA’s proposal. A copy of that *ex parte* appears in Attachment B.

Preferential or exclusive marketing arrangements invite robust competition, because they force other carriers who wish to serve tenants in the building to show those tenants that their services will better meet their needs, perhaps at a lower price. So long as the marketing arrangement contains no limitation on access to the tenant by multiple providers and no limit on other marketing avenues that other providers may use to offer their services to the tenants, there is no reason for the Commission to restrict such arrangements.

III. All Service Providers Should Be Barred From Exclusive Access Arrangements.

In contrast to marketing agreements, exclusive access arrangements restrict competition and should be prohibited. This restriction should not be limited to favor one set of competitors. In particular, the Commission should not prohibit exclusive access arrangements only for incumbents but then allow newer entrants to sign exclusive access contracts, as one competitor requests. *See Cypress Communications* at 3-9. Any service provider with exclusive access to tenants is dominant within that building, regardless of whether that provider is an incumbent or newer entrant, and any exclusive access arrangement favoring a single carrier prevents tenants from receiving service from their provider of choice. In addition, as SBC points out, such restrictive arrangements could well be inconsistent with the incumbent's carrier of last resort requirements in some jurisdictions if they prevent the incumbent from serving tenants upon request. *See SBC* at 2.³

³ Although RCN and its co-commenters claim generally that incumbent providers have entered into long-term exclusive access arrangements with building owners, their examples are limited to cable television companies. *See RCN Telecom Services, et al.* at 5-8. Verizon joins RCN in calling for an end to such arrangements.

IV. Rights of Way Should Be Narrowly Defined.

The parties that want the Commission to extend the definition of rights of way to include an entire building misunderstand both the concept of rights of way and the arrangements the incumbents have with the landlords. *See, e.g.* Smart Buildings at 21-26, AT&T at 46. Those parties suggest that the incumbents have the right to place their facilities anywhere they wish within, or on the roof of, a multi-tenant building and ask for the same right. Their major premise, however, is in error. Verizon, for example, generally has no contractual or other legal right to place its wiring anywhere it wants but is confined to specific locations that will be unobtrusive and will not inconvenience either the landlord or tenants. Even if that restriction is not memorialized in a written contract, Verizon places its equipment and wiring in a location that is mutually-agreed upon between Verizon and the landlord and that is consistent with the National Electrical Code, National Electrical Safety Code and other applicable federal, state or local regulations. As a result, wiring is usually confined to riser and lateral conduits and equipment boxes that the landlord either has constructed or has authorized Verizon to construct for that purpose.

Verizon simply does not have the broad right of access to place its facilities anywhere it wants either within a building or on the rooftop, without the landlord's permission, as Smart Buildings claims. *See* Smart Buildings at 21. A new entrant and Verizon would have the right to attempt to negotiate expanded access and should have the same obligation to ensure that its facilities comply with the landlord's wishes and with applicable law. Therefore, there is no justification for giving any carrier the unlimited right to locate its facilities at whim within or on the roof of the building. Moreover, by arguing that the landlord should not have a veto power over where the competitor places facilities, Smart Buildings would give carriers the unlimited

ability to disrupt building operations and inconvenience tenants. There is no public interest justification supporting that proposal, and the Commission should reject it.

The Commission should not attempt to expand the definition of right of way beyond its traditional common law meaning. As several parties point out, Congress, by not defining right of way in section 224, intended to rely on the settled legal definition. *See, e.g., Commonwealth Edison Company and Duke Energy Corp. at 2* (“Electric Utilities”), citing *Morissette v. United States*, 342 U.S. 246 (1952). The common law meaning of right of way is “the right to pass over the land of another” which is limited to a specified space defined in the right of way grant. *Electric Utilities at 3 and n.4.*⁴ And, as RAA points out (at 59), “the concept of a right-of-way *demand*s a defined space,” (emphasis in original) so that it cannot be extended to an entire building. *See, also United Telecom Council and Edison Electric Institute at 4* (“utility occupation at some defined point does not trigger Section 224 access rights regarding some other area not occupied by the utility”); *Community Associations Institute at 3* (“Unless the consent of the community association or owner is also required, the requirement [to give carriers unrestricted access] effects an expansion of the ILEC’s or utility’s easement rights without the consent of the owners, without compensation to the owners and without a corresponding benefit to the owners”).

Applying that reasoning here, there is no basis for a Commission finding that, because a landlord might sometime in the future permit a carrier to place facilities at some additional location in a building, that carrier has a present right of way in the entire building. Any right of

⁴ As two parties point out, there is some question as to whether, under this definition, it is possible to have a right of way within a building at all. *See Electric Utilities at 3 and n.4, RAA at 57.*

way the incumbent has is limited to the specific portion of the building over which its facilities actually pass, *e.g.*, the conduit in which the wiring resides.

Moreover, as one party points out, the Commission has already found that what constitutes a right of way in a given jurisdiction is a matter for each state to determine. *See Florida Power and Light* at 7, citing the *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 00-366 at ¶ 85 (rel. Oct. 25, 2000) (“First R&O”) and *Local Competition, First Report and Order*, 11 FCC Rcd 15499, ¶ 1179 (1996). Therefore, the Commission has already found that the existence and confines of a utility’s right of way in a building must be resolved on a case-by-case basis by the states, and there is no rulemaking issue for the Commission to decide here. At most, the Commission should simply find that, where a state finds that a utility possesses a right of way in a particular space in a building, such as in a conduit, such space should be made available to other carriers where capacity allows.

V. A Carrier Should Be Reimbursed For Moving the Demarcation Point Or Preparing Wiring For Competitive Access.

GSA addresses the cost of moving the demarcation point from upper floors to the minimum point of entry, claiming that some carriers charge excessively to relocate that point upon landlord request. General Services Administration (“GSA”) at 4-5. Verizon’s policy when requested to relocate the demarcation is to charge the requestor for the book value, net of accrued depreciation, of the wiring that will now be on the customer’s side of the demarcation point, plus the out-of-pocket costs that Verizon incurs in effecting the move.⁵ It would be an unlawful

⁵ Typically, the cabling in an existing high-rise building consists of a combination of older plant with a relatively low book value and cabling with a higher book value that has been installed more recently to replace retired plant or augment existing facilities.

taking of Verizon's property not to allow it to recover, at a minimum, the value of the cabling and associated equipment on the company's books, plus its actual expenses, and the Commission cannot lawfully require a reduced payment. *See, e.g., Bluefield Water Works & Improvement Co. v. Pub. Ser. Comm'n*, 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary"); *see, also Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (utilities may set rates to recover their legitimate costs of providing service).

RCN *et al.* want the Commission to require incumbent local exchange carriers to subsidize their competitors by paying all of the costs of modifying in-building wiring to enable that wiring to be accessible to competitors. RCN *et al.* at 28. Contrary to RCN's claim, those modifications benefit only the competitors – not the incumbent – because it is needed only to allow competitors to interconnect with the in-building facilities at an upper floor of the building. There is no legal or policy justification for requiring the incumbent to foot the bill. Accordingly, the Commission should deny RCN's request to require the incumbent, which receives no benefit, from incurring the costs that benefit only another carrier that wishes to interconnect.

VI. Conclusion

The Commission should not restrict preferential marketing arrangements and should not attempt to expand the definition of rights of way for the reasons discussed above.

Respectfully submitted,

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ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

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

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
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.

ATTACHMENT B

Verizon and BellSouth January 12, 2001 Ex Parte transmitting joint comments to the Real Access Alliance on its model Telecommunications License Agreement for Multi-Tenant Office Buildings, *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.