

granted.”¹⁶⁶ However, as discussed above, the type of utility easements granted by the building owner do ordinarily contemplate that the utility will be permitted to apportion the easement to accommodate additional facilities and equipment.¹⁶⁷ Moreover, installation of additional facilities and equipment take into account technological and scientific developments without creating an added burden on the underlying property.¹⁶⁸ The *Report and Order* notes that the approach it adopts with respect to Section 224 avoids constitutional concerns because Section 224 only applies against utilities, not building owners.¹⁶⁹ The same is true of the approach proposed herein. By permitting competitors to access the complete set of the rights-of-way in MTEs possessed by utilities, the Commission would not materially increase the burden on the property rights of the property owner, just those of the utility, for which the utility would be compensated, if appropriate, by the requesting carrier.¹⁷⁰

SBC also states that a broad definition of rights-of-way is inconsistent with Section 224 because “[t]he fact that Section 224(e)(2) provides that the reasonable rates for use of . . . utility poles, ducts, conduit, and rights-of-way must be determined based on an allocation of space used makes clear that Congress intended these terms to be interpreted as spaces used by utilities, not any space anywhere within a building.”¹⁷¹ Presumably, SBC’s point is that it could be difficult to determine the proper amount of compensation due the utility if a requesting

¹⁶⁶ SBC Comments at 7; see also RAA Comments at 59; UTC/EEI Comments at 5.

¹⁶⁷ See Section V.C. supra.

¹⁶⁸ See Section V.D. supra.

¹⁶⁹ *Report and Order* at ¶ 89.

¹⁷⁰ See AT&T Comments at 48.

¹⁷¹ SBC Comments at 7.

telecommunications provider seeks to install facilities in an MTE in areas that are not being used by the utility. If the utility has the right to use these areas to install its own equipment, the telecommunications carrier should also be granted access and should be required to pay the utility no more than is reasonable and nondiscriminatory under Section 224, and should not be required to add to that amount any more than the utility would be required to pay in order to utilize the previously unoccupied area with its own facilities, which in many cases will be zero. Thus, the fact that the Commission's current formulas for determining compensation for use of space on utility poles are inapplicable is hardly sufficient to create serious constitutional concerns.

VI. THE ELIMINATION OF UNREASONABLE AND DISCRIMINATORY MTE ACCESS RESTRICTIONS WILL NOT NECESSITATE HEROIC EFFORTS BY THE COMMISSION.

Commenters opposed to the *Ambassador* approach (indeed, to nondiscriminatory access rules altogether) allege that implementation will be unwieldy and unworkable, and will unduly strain the Commission's resources. For example, BBO maintains that "[t]he inability to predict each and every potential building access scenario in order to craft a consistent standard for "unreasonable" discrimination makes development of such a standard a difficult, and ultimately futile, effort."¹⁷² As a result, it claims, "the Commission would become entangled in an endless morass of complaints in which it would be required to conduct complicated examinations of the minutiae of specific building access negotiations."¹⁷³

Determinations of reasonableness are neither futile nor destined to paralyze the Commission. To the contrary, the Commission quite frequently fulfills its statutory obligation of

¹⁷² BBO Comments at 7. BBO reiterates this concept by noting that "it is not possible to create a standard for reasonable discrimination that fits the multitude of building access scenarios." *Id.* at 8.

¹⁷³ *Id.* at 9.

identifying, classifying, and prohibiting unreasonable discrimination without apparent harm to the agency's ability to operate efficiently.¹⁷⁴ These determinations inevitably involve consideration of different variables. Indeed, it is difficult to imagine an area of regulation in which the Commission was able to predict "each and every potential . . . scenario." Thankfully, the capacity for such prediction is not necessary to the creation of a workable reasonableness standard. Establishing a standard of reasonableness is a case-by-case exercise and predictive judgments concerning the same necessarily involve some measure of conjecture. The malleability of the reasonableness standard permits the consideration of extenuating factors and promotes the avoidance of harsh results from the application of a rule. This malleability also allows gradual modification of the rule in response to changed circumstances.¹⁷⁵ As evidenced by the Commission's impressive history of reasonableness determinations, the malleability of the standard does not render its operation "futile." Through application, a reasonableness standard becomes clearer, thereby increasingly guiding the behavior of market participants.

¹⁷⁴ See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 (1998)(establishing presumptions for just, reasonable, and nondiscriminatory pole attachment rates); see also *Local Competition First Report and Order* at ¶¶ 1119 - 1240 (establishing presumptions for just, reasonable, and nondiscriminatory rates and conditions for attachments to utility poles, ducts, conduits, and rights-of-way); Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, *Report and Order*, 14 FCC Rcd. 15550 at ¶ 92 (1999)(establishing basis for determining reasonable subscriber list information rates); see also, "Commission Adopts Open Video Systems Order Enhancing Competition in the Video Marketplace," Statement of Commissioner Chong, CS Docket No. 96-46, *Action in Docket Case*, Report No. DC 96-48 (June 3, 1996)(expressing a belief that the Commission's OVS rules would ensure fair and nondiscriminatory access to the OVS platform by unaffiliated video programming providers, and stating a preference for *increasing* the ways in which OVS operators could meet the presumption that their carriage rates were just and reasonable so as to minimize the number of complaint cases). In addition to the Commission determinations of reasonableness in the context of rulemakings, the Commission also routinely makes reasonableness and discrimination determinations in the Section 208 context.

¹⁷⁵ See Storer Broadcasting Co., 351 U.S. at 205("If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.")(quoting National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943)).

Nor is the Commission wandering without a compass. In its initial comments, the SBPP identified several potential regulatory models -- State models as well as FCC models -- that could be used in fashioning a scheme for ensuring nondiscriminatory telecommunications carrier access to consumers in MTEs.¹⁷⁶ The degree of advance specificity with which the Commission approaches implementation and enforcement of nondiscriminatory access requirements no doubt will relate to the level of comfort the agency possesses. Whether the Commission adopts detailed rules¹⁷⁷ or implements the *Ambassador* model (which does not require a scheme, but may proceed on a case-by-case adjudicatory basis), action is imperative.

The tactics of foreshadowing a suffocating volume of access complaints and overstating the complexities of a regulatory program are classic devices employed in an effort to maintain the status quo. A fear of change (or even of making the wrong decision) may create the incentive to lean toward the erroneously perceived safety of doing nothing -- of maintaining the status quo. This is false security; the status quo is not static. The success or failure of competitive telecommunications models today determines the amount of financing available for constructing competitive networks tomorrow. The passage of time without progress does not freeze competition, it harms it. The Commission must reject the alarmist strategies designed to frighten it from implementing the policy most likely to realize the goals of the 1996 Act.

¹⁷⁶ See SBPP Comments at 35-41.

¹⁷⁷ If the Commission adopts detailed rules, the SBPP encourages the Commission to permit nondiscriminatory carrier access upon submission of a request by a telecommunications carrier to a building owner. As a commercial matter, consumers will be subject to unnecessary delay in provisioning if the access negotiation process and, subsequently, equipment installation cannot even begin until a tenant requests service from the carrier. Indeed, the REIT-owned BLEC, BBO, recognizes this commercial reality and, itself, frequently "invests substantial sums of money in order to pre-wire each building for advanced communications and data services - *often without a single customer in the particular building.*" BBO Comments at 18, n.36 (emphasis in original). Similarly, incumbents typically are permitted to install their telephone facilities in a building prior to obtaining a subscriber therein.

VII. EXCLUSIVE ACCESS PROHIBITIONS SHOULD EXTEND TO RESIDENTIAL ENVIRONMENTS AND EXISTING COMMERCIAL ARRANGEMENTS.

The comments on exclusivity present one of those rare opportunities to observe incumbents and competitors advocating the same policy.¹⁷⁸ Verizon confirms that “exclusive access arrangements in a multi-tenant environment constrain competition and reduce the services available to both commercial and residential tenants.”¹⁷⁹ It encourages the Commission to extend the exclusive access prohibition to residential environments.¹⁸⁰ Similarly, SBC “supports the Commission’s prohibition on carrier exclusive access contracts in commercial MTEs and urges the Commission to extend that ban to residential MTEs so that consumers may have their choice of providers.”¹⁸¹ In addition to the SBPP, competitors such as AT&T, RCN, and Sprint as well as government agencies such as the Florida Public Service Commission and the Nebraska Public Service Commission also urge the Commission to extend the exclusive access prohibition

¹⁷⁸ BellSouth supports the Commission’s decision to apply its exclusive access ban to all LECs. It then recommends that “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.” BellSouth Comments at 3. The SBPP fully supports application of nondiscriminatory access requirements to the access arrangements of all LECs, incumbents, CLECs, and BLECs, alike so that consumers will be able to choose their facilities-based telecommunications carrier. Although the SBPP members do not feel it is necessary to impose unbundling requirements on CLECs, BellSouth’s proposal to do so is far too ambitious for consideration in this proceeding. To the extent that the Commission, BellSouth, or any other party seeks to consider this proposition, SBPP strongly suggests that the matter be divorced from the instant proceeding so that it may receive a full and fair opportunity for notice and comment, and will not eclipse the pressing matters being considered more directly in this rulemaking.

¹⁷⁹ Verizon Comments at 3.

¹⁸⁰ Id. at 4.

¹⁸¹ SBC Comments at 1.

to residential environments and encourage the Commission to proscribe enforcement of existing exclusive access agreements.¹⁸²

Although there is little carrier support for exclusives, at least one BLEC supports exclusive access agreements for residential environments. It claims that it “must justify the substantial facilities investment required to serve a residential MTE with some assurance of steady revenue production.”¹⁸³ The CAI and RAA encourage residential exclusives for similar reasons.¹⁸⁴ The Commission must reject these BLEC-welfare proposals as offering no benefits for consumers. Inherent in the operation of any competitive market is the risk that revenue production will not surpass investment. Every facilities-based carrier member of the SBPP invested heavily in its network with absolutely no assurance of steady revenue production. It is understandable that BLECs would like to retain their exclusive access to MTEs, for such exclusivity blunts the carrier’s motivation to be responsive to consumers and diminishes the incentives for efficiency. But, the BLEC-welfare policies reward inefficient market participants at the expense of consumer choice.¹⁸⁵ The Commission should proceed with its pro-consumer understanding that the Act is designed to protect “competition, not competitors.”¹⁸⁶

¹⁸² AT&T Comments at 41; RCN Comments at 17; Sprint Comments at 9; Florida Public Service Commission Comments at 2; Nebraska Public Service Commission Comments at 1-2.

¹⁸³ Coserv/Multitechnology Services Comments at 3-4.

¹⁸⁴ RAA Comments at 64; CAI Comments at 7-8 (“CAI’s members prefer to retain the freedom of contract to negotiate an exclusive or non-exclusive arrangement with one or more providers.”).

¹⁸⁵ That exclusive access arrangements harm consumers is evident from the Skokan declaration attached to the RAA Comments. See RAA Comments, Skokan Decl. at 2 (explaining that the failure of the exclusive video provider to install facilities left tenants without cable for over 45 days. Had multiple providers been granted access up front, there would have been no need for tenants to go without service.)

¹⁸⁶ Bell Atlantic Mobile Systems and NYNEX Mobile Communications Company, File Nos. 00762-CL-AL-95, et seq., *Memorandum Opinion and Order*, 12 FCC Rcd 22280 at ¶ 16 (1997).

Because MTE owners can unilaterally maintain exclusive carrier access arrangements, exclusive access prohibitions that apply only to carriers will not prevent exclusive access arrangements. The CAI expresses an intention for building owners to unilaterally maintain exclusivity for a chosen carrier:

[W]hile the FCC may be able to prohibit providers from enforcing exclusive access provisions in existing residential contracts, it should be beyond question that the FCC is not empowered to prohibit community associations and owners from enforcing exclusive access provisions that are to their benefit.¹⁸⁷

AT&T observes that “[e]ven if the [model] proposal does not, by its terms, provide ‘exclusive’ access to any one telecommunications carrier, the MTE owner may achieve the same practical result simply by discriminating among telecommunications providers with respect to other critical terms that would equally block access to MTEs by competing LECs.”¹⁸⁸ Moreover, it will be difficult if not impossible to determine whether exclusive access arises pursuant to the informal request of a carrier or results from the unilateral action of the building owner.

Regardless of the identity of the architect of an exclusive access arrangement, the result for consumers in the MTE remains the same -- they will be denied a choice of competitive facilities-based alternatives. Absent the Commission’s implementation of an *Ambassador*-like mechanism or direct regulation of MTE owner access practices, circumventing the ban on exclusive access will be a simple exercise.

¹⁸⁷ CAI Comments at 7-8.

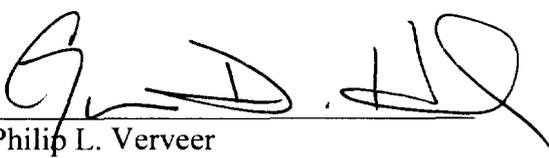
¹⁸⁸ AT&T Comments at 14.

VIII. CONCLUSION.

For the foregoing reasons, the Smart Buildings Policy Project respectfully urges the Commission to adopt quickly mechanisms that will ensure nondiscriminatory telecommunications carrier access to multi-tenant environments consistent with the recommendations made herein.

Respectfully submitted,

SMART BUILDINGS POLICY PROJECT

By: 

Philip L. Verveer
Gunnar D. Halley
Angie W. Kronenberg
Sophie J. Keefer
Jeneba Jalloh Ghatt

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for the
SMART BUILDINGS POLICY PROJECT

Dated: February 21, 2001

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 21st day of February, 2001, copies of the foregoing Reply Comments of The Smart Buildings Policy Project, were delivered by hand to the following parties:

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8B115
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A302
Washington, DC 20554

Mark Schneider
Senior Legal Advisor
To Commissioner Ness
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8B115
Washington, DC 20554

Chairman Michael Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8B201
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8C302
Washington, DC 20554

Peter Tenhula
Senior Legal Advisor
To Chairman Powell
Federal Communications Commission
The Portals
445 12th Street, S.W., Suite 8B201
Washington, DC 20554

Adam Krinsky
Legal Advisor To
Commissioner Tristani
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8C302
Washington, DC 20554

Helgi Walker
Senior Legal Advisor And
Chief Of Staff To Commissioner
Harold Furchtgott-Roth
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A302
Washington, DC 20554

Jonathan Nuechterlein
Deputy General Counsel
Office Of The General Counsel
Federal Communications Commission
445 12th Street, S.W.
8th Floor (OGC)
Washington, DC 20554

Eloise Gore
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Richard Arsenault
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jim Schlichting
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 3C-252
Washington, DC 20554

Jane Mago
Acting General Counsel
Office Of The General Counsel
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby
Washington, DC 20554

Joel D. Taubenblatt, Esq.
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W., Room 4-A260
Washington, DC 20554

Paul Noone
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Joel Kaufman
Deputy Chief
Administrative Law Division
Office Of The General Counsel
Federal Communications Commission
445 12th Street, S.W., Room 8-A668
Washington, DC 20554

Lauren Van Wazer
Senior Attorney
Policy & Rules Branch
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A223
Washington, DC 20554

Cheryl King
Cable Services Bureau
Federal Communications
Commission
445 12th Street, S.W.
Washington, DC 20554

Thomas Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W., Suite 3C-252
Washington, DC 20554

Jeffrey S. Steinberg
Deputy Chief
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W., Room 4-C236
Washington, DC 20554

Wilbert Nixon
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20037

Mark Rubin
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

David Horowitz
Attorney - Advisor
Office Of The General Counsel
Federal Communications
Commission
445 12th Street, S.W., Room 8-A636
Washington, DC 20554

Leon Jackler
Attorney
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W., 4-A207
Washington, DC 20554

David Furth
Commercial Wireless Division
Federal Communications
Commission
445 12th Street, S.W.
Washington, DC 20554


Rosalyn Bethke