

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)
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)
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)
_____)

WT Docket No. 99-217 /

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

I. INTRODUCTION

Pursuant to 1.415 of the Federal Communications Commission's rules,¹ the United States Telecom Association (USTA)² hereby submits its reply comments in the above-captioned

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¹ 47 C.F.R. § 1.1415 (1998).

² For more than 100 years, USTA has been representing the interests of the small, mid-size and large companies of the nation's local exchange carrier industry. The Association represents more than 800 companies worldwide that provide local exchange, long distance, wireless, Internet, and cable services.

USTA filed comments (Aug. 27, 1999; (USTA Comments)) and reply comments (Sept. 27, 1999; (USTA Reply I)) *In re Promotion of Competitive Networks 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, Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, Implementation of the local Competition Provisions of the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98. See also, *in re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (USTA comments filed before the FCC on May 16, 1996; and USTA Reply Comments, May 30, 1996; USTA Comments on Dialing Parity/Number Administration Technical Changes/Access to

proceeding in response to the Commission's *Further Notice*.³ Specifically, USTA asserts that the Commission should not expand the definition of "right-of-way" to extend to the entire building within a Multiple Tenant Environment (MTE).⁴ USTA also replies to the Real Access Alliance's comments on the issue as to whether carriers should be precluded from providing service to a building where the premises owner discriminates or limits carrier access.⁵

II. DISCUSSION

A. USTA Supports The Position That The Commission Should Not Expand the Definition of "Right-of-Way" To Extend To The Entire Building Within a Multiple Tenant Environment (MTE).

BellSouth Corporation (BellSouth), SBC Communications Inc. (SBC) and The Verizon Companies (Verizon) each filed comments opposing the Commission's proposal to expand the Commission's definition of right of way to cover the entire MTE building.⁶ USTA, like

Right of Way" (May 20, 1996); *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (USTA Comments, June 27, 1997; and Reply Comments, Aug. 11, 1997); and [USTA Comments in the UNE Remand Proceeding]. USTA, respectfully, requests that its previous comments be incorporated in this proceeding, by reference.

³ 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, *In re Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* [Competition Docket], *Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 2000 FCC LEXIS 5672 (rel. Oct. 25, 2000)*(*Further Notice*), Order Extending Pleading Cycle, In Re Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217 (adopted, Dec. 1, 2000; rel., Dec. 4, 2000).

⁴ See, Comments of BellSouth Corporation, SBC Communications, Inc., and Verizon.

⁵ See, "Further Comments of the Real Access Alliance", WT Docket No. 99-271 and CC Dkt. Nos. 96-98 and 88-57 (Jan. 22, 2001)(Real Access Alliance Comments).

⁶ BellSouth "Erratum" filed in WT Dkt No. 99-217, CC Dkt Nos. 96-98 and 88-57 (Jan. 31, 2001) at 10-11 of the corrected comments;; Comments of SBC Communications Inc. in WT Dkt. No. 99-217 (Jan. 22, 2001) at 6-7; and Comments of Verizon in WT Dkt. No. 99-217, and CC Dkt. Nos. 96-98 and 88-57 (Jan. 22, 2001) at 10-11.

BellSouth and Verizon,⁷ questions the Commission's authority to declare private in-building space to constitute public-right-of-way.⁸ It is both bad policy and contrary to law for the Commission to attempt to expand its definition of right-of-way in MTEs to cover the entire building. USTA agrees with SBC's assertion that a broad definition of "right-of-way" is inconsistent with Section 224.⁹ USTA further agrees with both BellSouth and Verizon that there is no basis in the record for enacting any broader interpretation at the present time.¹⁰

⁷ BellSouth at 10; and Verizon at 11.

⁸ USTA is not retreating from its earlier comments challenging the FCC's extension of Section 224 authority in private buildings. *See* USTA Comments at 3, 6-10. *Inter alia* USTA opines that, "Section 224 of the 1996 Act is a specific provision that requires utilities, including ILECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control. Section 224 does not contemplate access to conduits or premises owned by any other persons. Moreover, conduit has traditionally referred to underground conduit, but has never referred to in-building conduit or riser conduit. *See* FCC rule 32.2241(a) (conduit systems): "This account [under Part 32 concerning uniform system of accounts for telecommunications companies] shall include the original cost of conduit, whether underground, in tunnels or on bridges, which is reusable in place. It shall also include the cost of opening trenches and of any repaving necessary in the construction of conduit plant." 47 C.F.R., Ch. 1, § 32.2441(a) . . . Section 224 governs non-discriminatory access to public, **but not private**, rights-of-way . . .

Basically, USTA believes the FCC previously reached the appropriate result when it declared that:

Access to inside wiring through the incumbent LEC's NID does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled, for example, by the premises owner. [*In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185), Order on Reconsideration (FCC 96-394)*](adopted and released, Sept. 27, 1996) at n.853.] .

See also, USTA's First Reply Comments at 3: "Private in-building facilities do not exist in or on public rights-of-way. USTA submits that areas within private buildings do not constitute, and never have been deemed, public-rights-of-way."

⁹ SBC at 7.

¹⁰ BellSouth at 10; and Verizon at 11.

B. Attempts At Indirect Regulation Of Building Owners Is As Problematic As Attempts At Direct Regulation Of Building Owners.

In response to the Commission's proposal about precluding carriers from serving a building where the premises owner grants exclusive carrier access, the Real Access Alliance opines that:

The Commission cannot circumvent the Constitution and the limits on its jurisdiction by directing telecommunications providers to refuse to provide service in a building if the building owner "unreasonably prevents competing carriers from gaining access to potential customers located within" the building. . . any such regulatory approach would be impermissible, because an agency cannot do indirectly what it cannot do directly."¹¹

As stated in previous USTA comments concerning Commission assertion of jurisdiction over the private property of non-common carriers, such action by the FCC has Constitutional implications and is best left to the Congress to address in light of the obvious tension that exists in this context, between competitive telecommunications policy and private property rights.

Moreover, the Commission should heed SBC's caveat that if the Commission does adopt a rule prohibiting LECs from providing service to MTEs that have discriminatory access policies, that ILECs could be caught between complying with federal rules forbidding the provision of service and state rules requiring ILECs to serve customers on request.¹² ILECs should not be subjected to inconsistent federal and state requirements.¹³ Further, as a basic matter, the Commission should also avoid placing the burden on carriers to determine whether a building owner's practices are discriminatory.¹⁴

Depriving a carrier of the opportunity to serve a MTE because of a dispute between a building owner and the tenants of the building is a counter-productive exercise. The Commission is attempting to do indirectly what it lacks jurisdiction to do directly -- compel a

11 Real Access Alliance at v, 35-37.

12 SBC at 2.

13 See, e.g., SBC at 2 and n.3.

14 *Id.*

building owner to make certain choices as to telecommunications vendors with respect to the building owner's property. It is a transparent proposal. If the FCC has no jurisdiction to prescribe building owner conduct directly, it lacks jurisdiction to prescribe the same conduct indirectly.

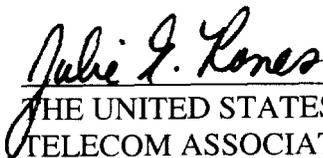
Consequently, USTA urges the Commission against such action.

III. CONCLUSION

USTA, respectfully, urges that the Commission take action consistent with USTA's comments in this matter.

Respectfully submitted,

By:



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February 21, 2001

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on February 21, 2001, a copy of *Reply Comments of the United States Telecom Association*, CC Docket No. 99-217, was either hand-delivered or deposited in the U.S. Mail, first-class, postage prepaid, to the persons on the attached service list.



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