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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	

REPLY COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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February 21, 2001

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SUMMARY

While industry efforts to resolve the building access problem are encouraging, it is crucial that the Commission maintain an active role in ensuring competitive access to MTEs and not rely solely on voluntary industry commitments. If industry commitments are to be successful, however, the building industry must -- at a minimum -- agree to the following:

- defined time periods for responding to requests for entry by carriers, as well as firm deadlines for negotiating the terms of access to MTEs; specifically, a 30-day negotiation period for access, with actual access to the premises ensured within 30 days after an agreement has been reached;
- development of a neutral, third party clearinghouse to facilitate compliance with industry commitments; and
- establishment of practices for informing tenants of telecommunications carrier choices in buildings.

In addition, the FCC must institute a time period by which exclusivity provisions in existing contracts between building owners and carriers sunset. The FCC has correctly determined that such arrangements restrain tenants' choices of telecommunications carriers, without any countervailing benefits. Moreover, the FCC should adopt a "fresh look" policy to provide tenants in MTEs who have entered into service contracts with carriers in "exclusive" buildings the ability to select a new carrier without being subject to termination liabilities or other costs.

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Winstar Communications, Inc. ("Winstar"), by its attorneys, hereby submits these Reply Comments in the above-captioned proceeding.[1]

I. WHILE INDUSTRY SOLUTIONS TO THE PROBLEM OF ACCESS TO MTEs ARE PROMISING, CONTINUED COMMISSION INVOLVEMENT IS CRUCIAL TO THE DEVELOPMENT OF A NATIONAL PROCESS FOR GIVING CONSUMERS ACCESS TO THE FACILITIES-BASED CARRIER OF THEIR CHOICE.

In its Comments, RAA provides a description of its proposed "best practices aimed at improving the speed of processing tenant and carrier generated requests for access to multi-tenanted manufactured housing, and multi-tenanted office, residential, and industrial buildings."[2] Indeed, competitive providers have been waiting for implementation of these commitments for facilitating entry by competitive carriers to MTEs since the RAA first announced its best practices guidelines in its September 6, 2000, letter to the Commission.[3] Winstar is hopeful that

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1 In re Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, 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, FCC 00-366 (rel. Oct. 25, 2000)("Report and Order and FNPRM").

2 RAA Comments at 25-28.

3 See Ex Parte Letter from RAA in WT Docket No. 99-217 (filed Sept. 6, 2000).

a draft containing these guidelines will be provided by RAA for review by competitive providers in the near future. However, until competitive carriers can review the details of such proposals and provide feedback to RAA on the processes for entry by competitors to MTEs, the efficacy of these guidelines remains uncertain. Moreover, even once the details of the proposed guidelines are enumerated in a written format that providers can review, these proposals are still only voluntary commitments by certain building owners. Other building owners apparently have not volunteered to comply with these guidelines, which could result in continued refusal of access to competitive providers. Moreover, even the building owners who have made the commitments would still be free to modify these guidelines to limit access by competitors in the future. Thus, it is crucial that the Commission continue to maintain an active role in ensuring competitive access to MTEs and to not rely solely on industry commitments.

However, for industry commitments to a procedure for competitive entry to have a real, pro-competitive effect, the building industry must agree to defined time periods for responding to requests for entry by carriers, as well as to firm deadlines for negotiating the terms of access. RAA has asserted that its "guidelines state that building owners will respond within 30 days with a yes or no answer to any written request for access that is generated by an office building tenant."[4] Also, RAA states that "[o]ffice building owners will proceed, in good faith, to accommodate requests from tenants . . . where . . . there is appropriate, uncommitted space available to accommodate the provider, and the provider indicates its intent to execute an access agreement that is substantially in the form of the model license being developed, including the provider's agreement to furnish service to any tenant in the building within a reasonable period

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[4] RAA Comments at 27.

of time."[5] RAA notes that "the guidelines state that property owners will respond within 30 days of receiving any provider-generated request for space . . . [including] a specific timetable governing their decisions to respond to such requests for space."[6]

Although encouraging, RAA's proposed guidelines currently are not sufficient to ensure the necessary access to MTEs by competitive providers. For instance, RAA's proposal lacks a definite time period for negotiating the terms of access. If the negotiations are lengthy, as is often the case, any beneficial effects the RAA and its members have had in trying to lead their industry in the adoption of reasonable processes for providing access may go unrealized. As a result, tenants will remain frustrated by the lengthy time periods they must wait before they are able to receive their preferred carrier's services. Instead, it is reasonable to hold carriers and MTE owners and managers to a 30-day negotiation period for access, with actual access to the premises ensured within 30 days after agreement has been reached. Also, MTE owners and managers should have an affirmative obligation to specify in writing the reasons for failure to permit access if an agreement cannot be reached by the end of the 30-day negotiating period.

Winstar also encourages the RAA to continue its efforts to develop a neutral, third-party clearinghouse to facilitate compliance with any industry commitments.[7] The FCC should be involved in the design of such a clearinghouse, which will be used to develop, implement, and encourage standards of reasonable behavior by property owners. If designed and implemented properly, it could serve building owners, telecommunications carriers, and tenants as a forum for publication and consideration of allegations of practices inconsistent with the real estate

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5 Id.

6 Id.

7 See id. at 28; see also Ex Parte Letter from RAA in WT Docket No. 99-217 (filed Sept. 6, 2000).

industry's commitments. In addition, a clearinghouse should be utilized to collect and disseminate information regarding MTE customer access so that such information is readily accessible to tenants, the real estate industry, telecommunications carriers, state public service commissions, and the FCC. RAA anticipates that the clearinghouse "would not exist to dictate the resolution of specific complaints, but would function on the model of a 'better business bureau.'"[8] Winstar agrees and also encourages the RAA and the real estate industry to develop appropriate standards for informing tenants on a periodic basis about all telecommunications carrier choices existing in the building. For example, the names of the telecommunications carriers to whom the building owner has allowed access can be conveyed to tenants by permanently posting current information in the building and including it in regular written communications to the building's tenants.

II. THE FCC SHOULD SUBJECT EXCLUSIVE OR DE FACTO EXCLUSIVE ARRANGEMENTS TO A SUNSET PROVISION, AND THE FCC SHOULD IMPOSE A "FRESH LOOK" POLICY FOR CUSTOMERS IN MTEs WHO DID NOT HAVE A CHOICE OF COMPETITIVE PROVIDERS.

The Commission acknowledges in the Report and Order and FNPRM that it has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest, and asks whether it should exercise that authority to prohibit carriers from enforcing exclusive access provisions in existing contracts.[9] In response, several commenters assert that the Commission indeed has authority to void exclusive provisions in

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8 RAA Comments at 28.

9 See Report and Order and FNPRM ¶¶ 163-64.

contracts between building owners and carriers and urge the Commission to do so.[10] Winstar agrees. The D.C. Circuit has confirmed that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest."[11] The public interest undeniably is harmed when customers are forced to accept limited or no access to the choices and benefits of competitive prices and services that come from a competitive environment. As several commenters point out, the existence of exclusive contracts substantially impedes competition by essentially creating a barrier to new entrants.[12] More important, such contracts diminish the ability of customers in MTEs to have full access to choice among telecommunications providers.

Winstar agrees with AT&T that the Commission should not concern itself with the investment interests of building owners and carriers that have entered into exclusive contracts, but instead should reject their efforts to play a substantial role in perpetuating anti-competitive behavior at the expense of the public.[13] In United Gas Pipeline Company v. Mobile Gas Service, the Supreme Court, while acknowledging that contracts promote the stability of supply arrangements in the natural gas industry, noted that those same contracts remained subject to modification by the Federal Power Commission when necessary in the public interest. Thus, under Mobile Gas, when weighing the conflicting interest of contracting private parties and public regulation, the interest of the public is paramount. Similarly here, the interest of

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10 See, e.g., AT&T Comments at 41-42, Cox Communications Comments at 3-4; SBC Comments at 1, 3-4; see also BellSouth Comments at 9-10 (arguing that existing exclusive contracts should be adjudicated as complaints).

11 See Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (citing FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353-55 (1956) and United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 344 (1956)).

12 See supra note 11.

13 See AT&T Comments at 42.

customers in MTEs in competition outweighs the interest of building owners and carriers to exercise competitive advantage through exclusive arrangements. Therefore, there is a sufficient basis for the Commission to promulgate a ban on exclusive provisions in existing contracts. The Commission should act on what it has already acknowledged. Taking timely and immediate steps to ban all exclusive agreements would remove an existing barrier that restricts competitive access to MTEs. Such a move, instituted by identifying a date certain under which such agreements are subject to a sunset, would protect the public interest rights of customers in MTEs to select the service provider that best meets their needs.

In addition, the FCC should adopt a "fresh look" policy to provide tenants in MTEs who have entered into service contracts with carriers in an environment that was less than fully competitive (i.e., where a carrier had an "exclusive" arrangement with a building owner) the ability to select a new carrier without being subject to termination liabilities or other contractual penalties. Providing an opportunity to "captive" customers to terminate their contracts with the then-exclusive service provider in an MTE is consistent with Commission precedent in opening monopolized markets to competition. For example, in establishing an air-ground radiotelephone service, including an open-entry licensing policy to facilitate the entry of new air-ground providers, the Commission noted that GTE had entered into contracts with many airlines pursuant to its experimental license when it had a de facto monopoly in the air-ground service.[14] Accordingly, to allow competition to develop fully in the air-ground market, the Commission conditioned GTE's license on its refraining from enforcing conditions binding airlines to exclusive contracts with termination dates exceeding the term of GTE's experimental license or

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[14] In re Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, GEN Docket No. 88-96, Mem. Op. and Order, 6 FCC Rcd. 4582, 4583 ¶ 7 (1991).

requiring airlines to pay early termination penalties.[15] Similarly, in adopting symmetrical reciprocal compensation rates following the enactment of the Telecommunications Act of 1996, the Commission adopted a fresh look requirement for CMRS providers to renegotiate their preexisting arrangements with ILECs.[16]

A fresh look opportunity for tenants in MTEs with carriers who had exclusive arrangements with building owners would serve the public interest; it would allow these customers whose choices were severely and improperly limited to take advantage of competitive purchasing opportunities. Without a fresh look, these customers would not have the ability to seek a new competitive carrier without breaking their existing service contracts, which they might be unwilling or unable to do, especially if they are subject to early termination liabilities or penalties. By permitting these customers to choose among a variety of competitive providers, as opposed to just the provider who initially negotiated an exclusive arrangement with the building owner or manager, the Commission would increase competitive choices for telecommunications services for many consumers, one of the central goals of the 1996 Act. Thus, a fresh look

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15 Id. at 4583 ¶ 8.

16 In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16044-45 ¶ 1095 (1996), partially vacated on other grounds, Iowa Utils. Brd. v. FCC, 120 F.3d 753 (8th Cir. 1997), partially reinstated, AT&T Corp. v. Iowa Utils. Brd., 525 U.S. 366 (1999); see also In re Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Mem. Op. and Order, 9 FCC Rcd. 5154, 5207 ¶ 197 (1994) (adopting a fresh look policy limiting the charges a LEC may impose on certain customers who want to terminate long-term LEC special access arrangements for a period of 180 days following the date that the first special access expanded interconnection arrangement becomes operational in a central office); In re Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd. 5880, 5906 ¶ 151 (1991) (adopting a fresh look policy to permit AT&T customers to terminate their 800 services with AT&T without being contractually liable for such termination for a period of ninety days after implementation of number portability), order on recon., 7 FCC Rcd. 2677 (1992).

requirement is necessary because competitive carriers must have the opportunity to offer their service to customers who were not given a choice of providers when they signed up for service.

III. CONCLUSION.

Winstar respectfully requests that the Commission (i) continue to take an active role in ensuring that real estate industry commitments to effectuate competitive access to MTEs are credible and effective, and truly result in a tangible, national process for achieving customer choice, and (ii) institute both a sunset provision for abrogating all exclusive arrangements and a fresh look policy to permit customers who did not have competitive choice due to an exclusive arrangement in the building to choose a new competitive provider.

Respectfully submitted,

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February 21, 2001

CERTIFICATE OF SERVICE

I, Sophie Keefer, do hereby certify that on this 21st day of February, 2001, copies of the foregoing Reply Comments of Winstar Communications, Inc. were delivered by hand to the following parties:

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