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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 22 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

ORIGINAL

CC Docket No. 96-98

CC Docket No. 88-57

**MOTION OF
CYPRESS COMMUNICATIONS, INC.
FOR LEAVE TO FILE REPLY COMMENTS ONE DAY LATE**

Cypress Communications, Inc. ("Cypress") hereby requests leave to file the enclosed reply comments in the above captioned proceeding one day late. Reply comments were due on February 21, 2001. Outside counsel miscalculated the filing deadline as February 22, 2000 and so advised Cypress. Cypress has not reviewed the reply comments that were filed yesterday. Accordingly, no party should be prejudiced by this late filing.

No. of Copies rec'd 074
List A B C D E

We are serving copies of this motion on all parties who filed initial comments in this proceeding.

Respectfully submitted,
CYPRESS COMMUNICATIONS, INC.

By: Chip Parker
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Dated: February 22, 2001

CERTIFICATE OF SERVICE

I, Merri Jo Outland, hereby certify that on February 22, 2001, I caused a copy of the foregoing Motion of Cypress Communications Inc. for Leave to File Reply Comments One Day Late to be sent by hand delivery or U.S. mail, first class, postage pre-paid (as indicated below) to the following:

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**REPLY COMMENTS OF
CYPRESS COMMUNICATIONS, INC.**

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**REPLY COMMENTS OF
CYPRESS COMMUNICATIONS, INC.**

Cypress Communications, Inc. ("Cypress") hereby submits its reply to the comments filed by other parties who responded to the Commission's October 25, 2000 Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, 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 (rel. October 25, 2000), 66 Fed. Reg. 2,322 (2001) (to be codified at 47 C.F.R. pt. 1, 64 and 68)

I. Introduction and Summary

Cypress, in its initial comments, argued that incumbent local exchange carriers (“ILECs”), because they possess market power, enjoy discriminatory access fee arrangements with owners of multi-tenant environments (“MTEs”) and that the Commission should adopt a rule barring ILECs from such arrangements. Cypress further argued that a nondiscrimination requirement is unnecessary vis-à-vis competitive local exchange carriers (“CLECs”) because these carriers lack market power and building owners do not have a significant incentive to discriminate on CLECs’ behalf. Cypress also urged the Commission not to regulate preferential arrangements because such regulation is both undesirable and unworkable.

Cypress, in its reply comments, continues to urge the Commission to adopt a nondiscrimination requirement that will level the playing field between ILECs and CLECs. The nondiscrimination requirement should require ILECs to pay access fees equal to those paid by CLECs. Such a requirement is justified and necessary because ILECs currently escape paying access fees not because of their superior service or negotiating skills but because of their historic status as a monopoly provider and their continued dominance in the local exchange market. Requiring ILECs to pay the same access fees as CLECs may have the result of reducing the amount that CLECs pay for access because the cost to the building owner of providing access can be spread over more carriers.

The Commission should not impose a nondiscrimination requirement on CLECs or building local exchange carriers (“BLECs”). Theories advanced by the Smart Buildings Policy Project that building owners have an incentive to discriminate in favor of BLECs are not persuasive and are not advanced by other parties filing initial comments in this proceeding. Moreover, Cypress’s and other commenters’ experience is that owners, as a practical matter, do not discriminate in favor of BLECs.

II. ILECs Should Pay Same Access Fees as CLECs

Cypress, like Cox Communications, Inc. (“Cox”), urges the Commission to adopt a nondiscrimination requirement that applies to building owners’ dealings with ILECs. Cypress at 4-5; Cox at 3. The nondiscrimination requirement should provide that ILECs pay building owners access fees equal to those paid by CLECs. The Commission should adopt this requirement for the following reasons:

- First, economic efficiency is diminished when ILECs are permitted to pay building owners lower access fees than CLECs pay. Providing ILECs this undeserved competitive advantage means that even if a CLEC has lower costs than its ILEC rival for comparable service, the ILEC might wind up serving the building’s tenants.² Resources are wasted and economic efficiency reduced when competition is rigged, as it is in this case, when service providers have an undeserved competitive advantage against their rivals.

- Second, the price differential in access fees paid by ILECs and CLECs is probably the most common form of discrimination in building access.³ In their comments, many CLECs, including Cypress, acknowledge paying a significant percentage of revenues as an access fee. *See, e.g.*, AT&T at 12; Cox at 6; Cypress at 8. On the other hand, ILECs such as Verizon and BellSouth, confess that they do not pay access fees at all. In a jointly filed *ex parte*, “Verizon and BellSouth assert that they do not pay rent or license fees for the right to serve tenants in office buildings . . .” Verizon and BellSouth *ex parte* at 2.⁴

² CLECs’ competitive disadvantage is exacerbated by the fact that access fees are typically based on gross revenues not profits. *See* AT&T at 12; Cox at 6; Cypress at 4.

³ *See* Cox at 5 (“The most common terms that favor incumbents over CLECs are monetary demands from building owners for new providers to obtain access to their tenants.”).

⁴ Verizon and BellSouth *ex parte* in *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 (January 12, 2001).

Accordingly, by addressing the problem of price differentials in access fees, the Commission would go a long way towards ensuring that discrimination is minimized and that all LECs compete on a level playing field.

- Third, ILECs escape paying access fees because they possess market power, not because of their superior negotiating skills or because it cost building owners less to provide ILECs access than it does to provide CLECs access. Cypress at 4-6. There is no justifiable reason to allow ILECs to continue to maintain a significant competitive advantage in the marketplace when that advantage is solely due to their historic status as a monopoly provider.⁵

Not surprisingly, the ILECs have argued that they are entitled to a cost advantage. Verizon and BellSouth, in their jointly filed *ex parte*, assert two reasons why they, as opposed to CLECs, should not pay access fees to building owners. First, they argue that “[w]hile a CLEC, which can pick and choose the buildings it serves, might decide to pay a landlord for access, an ILEC like Verizon or BellSouth, which is the ‘provider of last resort’ and serves thousands of buildings, cannot establish a precedent of paying landlords for access to commercial office buildings.” Verizon and BellSouth *ex parte* at 2. Second, Verizon and BellSouth assert that an access fee is simply a transfer payment from the LEC to the building owner and therefore is not legitimate. *Id.*

Neither of these rationales holds water. With respect to Verizon and BellSouth’s first argument, they appear to be saying that since they may be required to serve tenants in all buildings, they should not be required to pay access fees to owners of any buildings. To begin with, it is not at all clear that all, or any, states actually require ILECs to offer

⁵ ILECs should pay for access with respect to existing as well as new facilities. The fact that ILECs escaped paying access fees in the past does not mean they should forever remain free from paying access fees.

service to all tenants in all buildings in their service areas. Verizon and BellSouth do not support their contention that they are carriers of last resort in their service areas with citations to statutes or regulations in each of the states they serve. Moreover, even assuming such statutes or regulations exist, Verizon and BellSouth have not demonstrated that they cannot obtain relief from carrier of last resort obligations by filing petitions with the appropriate state utility commissions seeking authority to discontinue service to a building or buildings on the grounds that the building owner is demanding an excessive fee.

Furthermore, payment of fees by ILECs for access to buildings where owners charge CLECs for access is not a precedent for payment of fees by ILECs for access to all buildings. Since Verizon and BellSouth currently possess the market power to refuse to pay access fees to any building owner, including those who charge CLECs for access, surely they will have the ability to continue to refuse to pay for access to buildings except for those buildings subject to the nondiscrimination rule proposed by Cypress (*i.e.*, buildings served by CLECs required to pay access fees).

Verizon's and BellSouth's assertion that they should not pay access fees because such fees are a transfer payment is misplaced. Building owners incur legal, administrative and other costs when LECs access their buildings. Building owners should be permitted to recover those costs. Moreover, building owners have little incentive to view access fees as a profit center because access fees generate such a small percentage of a building owner's revenues overall. Instead, as noted by the Real Access Alliance, building owners primarily view telecommunication services as an important feature for attracting and retaining their principal source of revenue -- tenants. Real Access Alliance at 34.

Ironically, requiring ILECs to pay the same access fees as CLECs may reduce the amount of the so-called “transfer payments” because the cost to the building owner of providing LECs access can be spread over more carriers. It is even possible that faced with the prospect of paying access fees, ILECs will put pressure on building owners to charge CLECs lower fees for access. Reducing access fees and bringing them more in line with costs will spur competitive entry into commercial buildings and improve economic efficiency.

- Fourth, focusing a nondiscrimination requirement on the access fees charged ILECs, addresses concerns voiced by commenters such as Broadband Office (“BBO”) and the Real Access Alliance. BBO and the Real Access Alliance oppose a rule banning discrimination on the grounds that such a rule cannot be implemented as a practical matter. The Real Access Alliance asserts that “[t]o ask a carrier to detect and judge the existence of unreasonable discrimination is far more complex than the examples recited in the FNPRM.” Real Access Alliance at 52. Similarly, BBO argues “that it is not possible to establish a standard to determine what is ‘unreasonable’ discrimination.” BBO at 7. This is not a concern if the nondiscrimination requirement is limited to access fees paid by ILECs because the Commission only has to compare numbers to determine whether there is unreasonable discrimination. Thus, while BBO’s and the Real Access Alliance’s concerns are legitimate with respect to a broadly applied nondiscrimination requirement, they are not legitimate where a nondiscrimination requirement is narrowly tailored, as Cypress proposes.

BBO also raises the legitimate concern that to implement a nondiscrimination requirement “carriers would need to be made privy to all internal policies of the building owner concerning building access, and also of the proposed terms and conditions offered

by all other carriers competing for the same equipment space.” BBO at 12. However, once again, this is not a problem if the nondiscrimination requirement is limited to access fees paid by ILECs and if the Commission adopts a nondiscrimination requirement that is properly crafted. Specifically, to avoid the problems identified by BBO, the FCC could adopt a rule stating that ILECs are required to pay access fees equivalent to those paid by CLECs if the building owner or CLECs present the ILEC with evidence of the amount CLECs are paying for access. This proposed rule takes the burden of ascertaining the amount CLECs pay for access off the ILEC and places it onto CLECs and the building owner – the entities that know how much CLECs are paying for access and the beneficiaries of the nondiscrimination requirement.

The Real Access Alliance also suggests that it would not be practical for the Commission to adopt a nondiscrimination requirement with respect to access fees because if such discrimination arises, the Real Access Alliance asserts “what is the ILEC to do? Voluntarily exit the building and leave the market to the CLEC? This would never happen.” Real Access Alliance at 54. This is not a problem. Under the nondiscriminatory rule proposed by Cypress, the ILEC would be *required* to pay the access fee or leave the building. No voluntary behavior is required. Left with this choice, an ILEC is likely to pay the access fee so that it can continue to serve the building; if it is profitable for a CLEC to serve a building and pay the access fee, it will probably be profitable for the ILEC to do so. If it is not profitable for an ILEC to serve a building that charges an access fee, and it is profitable for a CLEC to do so, the CLEC is a lower-cost provider and society would be better off if the CLEC, rather than the ILEC, served the building. Thus, economic efficiency and consumer interests would not be harmed if an ILEC, faced with an access fee, decides not to serve the building.

III. **The FCC Should Not Impose a Nondiscrimination Requirement on CLECs/BLECs**

The Smart Building Policy Project argued that the Commission should impose a nondiscrimination requirement on BLECs because building owners have an incentive to discriminate in their favor. The Smart Building Policy Project explained that, “[i]ncreasingly, MTE owners are entering into revenue sharing agreements with, or making equity investments in, telecommunications providers. The resulting symbiotic financial relationship motivates the MTE owner to promote its affiliated BLEC within the building.” Smart Building Policy Project at 6. The Smart Building Policy Project’s concerns are misplaced for at least two reasons. First, as Cypress explained in its initial comments, building owners that have equity investments in BLECs do not have an incentive to discriminate in their favor because building owners generally do not have the ability to move BLECs’ stock price. Cypress at 7. Second, Cypress’s experience is that building owners do not discriminate in favor of BLECs. Cypress at 8. The Smart Building Policy Project has not introduced convincing factual evidence that suggests otherwise. The Commission should not rely on the Smart Building Policy Project’s theory that building owners have an incentive to discriminate in favor of BLECs to adopt a nondiscrimination requirement vis-à-vis CLECs, when the factual evidence suggests that building owners do not discriminate in their favor.⁶

IV. **Preferential Arrangements Should Not be Prohibited**

The large majority of LECs that commented on this issue oppose restrictions on preferential arrangements *See, e.g.*, BBO at 16, Sprint at 9-10. Cypress agrees with this

⁶ Dissent of then Commissioner Powell in *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Memorandum Opinion and Order, 2001 FCC LEXIS 434 (2001) (“theory is only predictive and must yield when the facts stubbornly belie that theory”).

sentiment. As Cypress explained in its initial comments, the Commission should not involve itself in the impossible task of ascertaining which preferential arrangements are reasonable and which are not. Cypress at 10-11. Accordingly, the FCC should not prohibit or restrict the use of preferential arrangements in any manner.

V. Conclusion

Comments submitted by the parties (and an *ex parte* filing by Verizon and BellSouth) confirm that CLECs are paying building access fees while ILECs are not. The Commission should level the playing field by barring ILECs from enjoying lower building access fees than their competitors. Leveling the playing field will improve economic efficiency and foster more competition. For CLECs that lack market power, there is no need for the Commission to impose a nondiscrimination requirement.

In addition, the Commission should not prohibit preferential arrangements. Any Commission rule banning such arrangements would be unworkable as a practical matter.

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Dated: February 22, 2001

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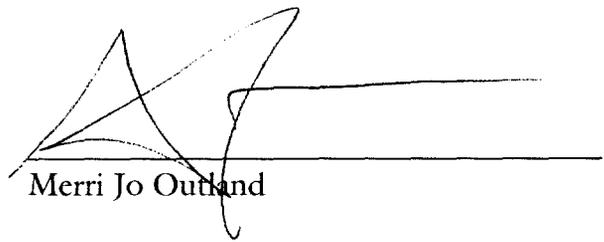
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