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OFFICE OF THE SECRETARY

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 1.4000 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 in the Telecommunications Act of 1996	)	CC Docket No. 96-98

SMART BUILDINGS POLICY PROJECT
REPLY COMMENTS IN RESPONSE TO OPPOSITION TO
THE SBPP PETITION FOR LIMITED RECONSIDERATION

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Dated: March 28, 2001

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The Smart Buildings Policy Project ("SBPP")[1] hereby submits its Reply Comments in Response to Opposition to the SBPP Petition for Limited Reconsideration of the *Competitive*

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[1] The Smart Buildings Policy Project is a coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T, Comcast Business Communications, Commercial Internet eXchange Association, Competition Policy Institute, Competitive Telecommunications Association, DMC Stratex Networks, Focal Communications Corporation, The Harris Corporation, Highspeed.com, Information Technology Association of America, Lucent Technologies,

Networks First Report and Order in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

The Real Access Alliance ("RAA") Opposition fails to provide a sound basis for denying SBPP's Petition. To the contrary, its flaws underscore the strength of the legal and policy principles that counsel the limited reconsideration advocated in the SBPP Petition. Specifically, the FCC should not permit the owners of servient estates to prevent telecommunications carrier access to rights-of-way owned or controlled by utilities. The FCC also should avoid reliance on the varied State laws concerning rights-of-way in implementing Section 224. Rather, the FCC itself should define, in a uniform manner, the utility's "ownership or control" of rights-of-way for purposes of interpreting, implementing, and enforcing Section 224 so as to provide a clear understanding of those circumstances in which a telecommunications carrier is entitled to access.

II. PROVIDING MTE OWNERS WITH VETO POWER OVER OPERATION OF A FEDERAL STATUTE IS ILLOGICAL.

A. The 1978 Legislative History Fails to Provide the Guidance for the Implementation of the 1996 Amendments that the RAA Advocates.

The RAA is unable to provide statutory or case law support for its proposition that Congress intended to require telecommunications carriers to obtain the permission of servient estate owners prior to procuring access to utility-owned or -controlled poles, ducts, conduits, or rights-of-way. Instead, the RAA relies heavily on a tenuous reference to a portion of the legislative history from a previous iteration of the relevant statutory provision that is over two decades old. Yet, reliance on even this meager hint of support is misplaced.

NetVoice Technologies, Inc., Network Telephone Corporation, Nokia Inc., International Communications Association, P-Com, Inc., Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications, Inc., Wireless Communications Association International, WorldCom, and XO Communications, Inc. The SBPP website can be viewed at <www.buildingconnections.org>.

[2] Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order*, 22 CR (P&F) 1 (2000)("*Competitive Networks First Report and Order*").

Out of respect for the balancing inherent in the legislative process, judges and scholars understand the need "to treat cautiously the material that falls under the broad category 'legislative history.'"[3] The Supreme Court has refused to afford weight to "contrary indications" in the legislative history when the statutory text itself offers sufficient guidance,[4] recognizing that drawing inferences from legislative history is "problematic" and explaining that "[i]t is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes."[5]

Even if resort to legislative history were proper in this instance, use of legislative history from the 1978 legislation is not appropriate for the purposes advocated by the RAA. The 1978 legislative history may be used to illuminate notionally the underlying motivation for congressional action at that time. However, it is not properly used as a guide for the practical application of that statute today, particularly given the radical alterations visited upon that provision nearly twenty years later by the 1996 amendments.

In some ways, the 1978 legislation was quite modest, granting the FCC authority over the rates, terms, and conditions pertaining only to existing access arrangements. Sensibly, then, the legislative history echoes a modest legislative effort. Through its imposition of an affirmative obligation on a utility to provide access on a nondiscriminatory basis to any pole, duct, conduit, or right-of-way owned or controlled by it, the 1996 Act radically alters the statutory provision.[6] The new right of access is sufficiently material that it transformed a statutory provision that

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3 Louis Fisher, *Symposium on Statutory Interpretation: Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L. Rev. 49, 78 (2000).

4 See Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994).

5 Circuit City Stores, Inc. v. Adams, No. 99-1379, 2001 U.S. LEXIS 2459 at *26-27 (U.S., Mar. 21, 2001).

6 47 U.S.C. § 224(f)(1).

heretofore had not implicated the Constitution[7] into one that has been held to effect a taking, albeit one that is constitutionally sound.[8] Given this dramatic change, the modesty of the 1978 legislative history with respect to the rights granted to attachers is wholly inappropriate for application to the 1996 amendments. Had Congress intended to limit this critical and central amendment to the statute by allowing a landlord discretion to eviscerate it, it most assuredly would have provided for such within the statute. Congress did not do so.

Additional amendments to Section 224 support the proposition that the amended provision presents a much more comprehensive and aggressive scheme than its forbears, limiting the opportunity for reliance on the legislative explanation of previous enactments. For example, where the benefits of Section 224 previously applied only to cable television systems, the 1996 Act extended the benefits to non-ILEC telecommunications carriers in order to advance the Act's goal of promoting competition for telecommunications services.[9] The expanded scope of Section 224 contemplates a greater number of attachers in or on any single pole, duct, conduit, or right-of-way than the single cable system operator model of the pre-1996 version. Congress added new rate structures to the provision,[10] created notice requirement and modification requirements,[11] and imposed additional State certification requirements which increased the hurdle for preempting federal authority.[12]

Because these new requirements reveal an intention to develop a more comprehensive

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7 See FCC v. Florida Power, 480 U.S. 245 (1987)(holding that the pre-1996 version of Section 224 did not operate as a taking of utility property).

8 See Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999)(holding that the post-1996 version of Section 224 operates as a taking of utility property but remains facially constitutional because it provides for just compensation in exchange for the property taken).

9 See 47 U.S.C. § 224(f)(1).

10 47 U.S.C. § 224(e).

11 47 U.S.C. §§ 224(h) and (i).

12 47 U.S.C. § 224(c).

scheme of federal regulation, involving increased utility requirements and an expanded pool of beneficiaries, reversion to a 1978 explanation is sorely misplaced. Moreover, the amendments must be read in the context of a statutory regime that seeks to promote the federal preference for competition in local telecommunications. Although the RAA refers back to 1978, this "explanation of legislative intent" precedes the AT&T divestiture by four years.[13] Long distance competition was sufficiently novel; local telecommunications competition was most certainly an unthinkable concept for Congress at the time. The driving purpose of Section 224 has changed so substantially that it strains credulity to derive from the 1978 legislative history a specific meaning for present-day implementation of the provision.

B. The Limited Reconsideration Urged by the SBPP Would Not Render Superfluous Section 621(a)(2) of the Cable Act.

The RAA contends that "[h]ad Congress meant . . . never to require the separate approval of a third-party private owner, Section 621(a)(2) would have been superfluous."[14] The RAA's contention implies that every statutory provision must possess a base from which it operates that is independent from the motivating force of other statutory provisions and that each provision must maintain its own distinct territorial sweep. Of course, this premise is incorrect as statutory provisions can and do often overlap or provide alternative mechanisms to accomplish the same goal. Were the RAA's principle to be accepted, it would suggest that Section 251(a)(4) (a provision enacted concurrently with the amendments to Section 224) is invalid because it is encompassed by Section 224. It would not be problematic to interpret Section 621(a)(2) and Section 224 to address similar or identical circumstances. Strangely, the RAA suggests that an interpretation of Section 224 that is harmonized with the lack of obligation for obtaining the

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13 See United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982).

14 RAA Opposition at 4.

servient estate owner's consent in Section 621(a)(2) is not a permissible or desirable outcome.

Nevertheless, Section 621(a)(2) and Section 224 are not congruent even under the interpretation of Section 224 that SBPP has demonstrated is compelled. For example, even if a particular State preempted the FCC's enforcement and interpretation of Section 224, a cable operator's rights under Section 621(a)(2) would remain in force. Moreover, while Section 224, by its terms, does not apply to a host of entities,[15] Section 621(a)(2)'s application is not similarly limited. Hence, even if Section 621(a)(2) and Section 224 were both interpreted in a manner that would make the servient estate owner's consent unnecessary, neither statutory provision would be rendered superfluous.

The need for the FCC's reconsideration remains. The potential albeit unintended consequences of the FCC's conclusion on this point could result in disastrous consequences for the telecommunications and cable television industries.[16] To avoid this result, and to interpret Section 224 in a manner consistent with congressional intent, the FCC must give effect to the plain meaning of the statute itself which lists the appropriate bases for a utility's denial of telecommunications carrier access to its rights-of-way and notably does not include the absence of a servient estate owner's consent as one of those bases.[17] Section 224 was specifically designed to eliminate the need for telecommunications carriers to obtain separate rights-of-way from underlying fee owners.[18] Requiring telecommunications carriers to independently and redundantly obtain this authorization would eviscerate the effective operation of Section 224.

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15 See 47 U.S.C. § 224(a)(1)(exempting railroads, persons cooperatively organized, and persons owned by the Federal Government or any State).

16 See SBPP Petition for Limited Reconsideration at 6-7.

17 47 U.S.C. § 224(f)(2).

18 See Implementation of Section 703(3) 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 at ¶ 2 (1998).

III. ABDICATION OF FEDERAL GOVERNANCE TO STATE PROPERTY LAW WILL GREATLY IMPAIR THE EFFECTIVE AND EFFICIENT OPERATION OF SECTION 224.

In its Petition, the SBPP explains that the FCC's responsibilities under Section 224 compel a uniform federal response to the interpretation, implementation, and enforcement of that provision. By relinquishing authority to the various State laws over the determination of whether a utility owns or controls a right-of-way, the FCC's interpretation will greatly reduce the efficacy of Section 224. By contrast, the RAA supports the FCC's abdication to State law in determining whether a utility possesses "ownership or control" of conduits and rights-of-ways in MTEs.[19]

Congress amended Section 224 in the 1996 Act to provide telecommunications carrier access to consumers through existing utility poles, ducts, conduits, and rights-of-way owned or controlled by utilities. The FCC recognizes that Congress sought to prevent utilities from "creat[ing] a bottleneck for the delivery of telecommunications services"[20] by using their ownership and control of poles, ducts, conduits, and rights-of-way to extract monopoly rents from telecommunications carriers. Consequently, the Act requires utilities to provide access to telecommunications carriers at just and reasonable rates and eliminates the need for duplicate construction of utility poles, ducts, conduits, and rights-of-way.

The 1996 amendments to Section 224 are a piece of a comprehensive federal regulatory scheme to promote facilities-based competition. As explained above, the 1996 amendments vastly expanded utility requirements. If Congress intended to treat pole attachments as "essentially local in nature" and viewed federal oversight as "supplemental" in 1978, as the RAA contends, the creation of additional and material utility requirements, greater authority and guidance for the FCC, and the increased scope of the program strongly suggest that any notions

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19 RAA Opposition at 4-5.

20 *Competitive Networks First Report and Order* ¶ 71.

of a "local nature" or of the FCC's "supplemental" role were abandoned by the time Congress amended the provision in 1996. Indeed, the federalizing effect on Section 224 through operation of the 1996 Act is not surprising. The Supreme Court clarified that view:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.[21]

The SBPP's appeal for a federal definition of a utility's "ownership or control" of poles, ducts, conduits, and rights-of-way, is consistent with the federal scheme intended by the 1996 Act.

To reap the full benefits that Congress intended by increasing the scope and nature of Section 224, it is critical that the FCC determine the fundamentals, such as which utility facilities and rights are subject to the federal statutory scheme.[22] Indeed, the FCC seems to recognize the importance of this policymaking as it has defined pole attachment, conduit, and duct,[23] and as it has sought to define and refine the definition of "rights-of-way" in this proceeding.[24] It is equally crucial for the FCC to develop a uniform federal basis for ascertaining when a utility "owns or controls" facilities subject to Section 224.[25]

Reliance upon State law for the definition of "ownership or control" will cause delay and expense for telecommunications carriers -- the very delay that Section 224 seeks to avoid through the provision of access rights. Without a federal definition of "ownership and control,"

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21 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378, n.6 (1999). In response to the dissent's suggestion that the States should interpret the provisions of the federal Telecommunications Act of 1996, the Court noted that it was "aware of no similar instances in which federal policymaking has been turned over to state administrative agencies." Id. at 385, n.10.

22 SBPP Petition for Limited Reconsideration at 8.

23 *See* 47 C.F.R. 1.1402.

24 *Competitive Networks First Report and Order* ¶¶ 82-84 & ¶¶ 169-170.

25 As discussed in SBPP's Petition, it is routine for federal agencies, including the FCC, to adopt definitions to govern federal regulatory practices even where States have adopted their own divergent definitions for State matters. *See* SBPP Petition for Limited Reconsideration at 9.

utilities inevitably will stall negotiations and seek to deny access routinely by requiring carriers to prove on a facility-by-facility basis in every State that the utility "owns or controls" the conduits, ducts, or rights-of-way in MTEs. Moreover, before a telecommunications carrier may bring a complaint to the FCC, it must seek a determination from the State that the utility owns or controls the conduits, ducts, or rights-of-way.[26] These barriers to the practical implementation of Section 224 will result in delays for, or the cancellation of, plans for the construction of competitive networks, and will cause needless expense for the telecommunications carriers constructing those networks. However, the FCC can avoid these negative consequences by providing a uniform standard enabling utilities and carriers to better ascertain whether a utility owns or controls ducts, conduits, and rights-of-way. Indeed, this simple step should reduce the number of complaints brought to the FCC and should lead to faster negotiations and lower transaction costs. The ultimate winners, of course, will be consumers who will have additional facilities-based telecommunications choices available to them in a shorter period of time.

On a broader level, the RAA is wrong to characterize this issue as one concerning "States' rights."[27] Section 224(c) provides for States to certify to the FCC that they regulate attachments to utility facilities and rights-of-way. When States meet the requirements of Section 224(c), then their regulations, including their definitions of "rights-of-way," "ownership," "control," and other terms preempt the FCC's regulations and definitions. However, until a State decides and proceeds through the federally-required process to assume that responsibility, the duty of implementation, enforcement, and interpretation of Section 224 remains with the FCC. Hence, relinquishing to the States the responsibility for implementing an integral component of

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[26] "[T]he extent of a utility's ownership or control of a duct, conduit, or right-of-way under state law must be resolved prior to a complaint being filed with the Commission regarding whether the rates, terms or conditions of access are reasonable." *Competitive Networks First Report and Order* ¶ 89.

[27] RAA Opposition at 5.

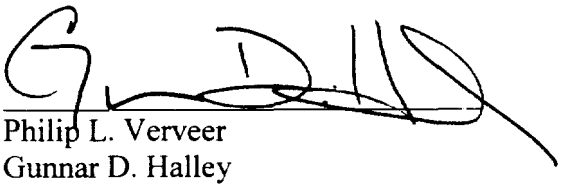
Section 224 is inconsistent with the structure and directive of Section 224. The SBPP urges the FCC to determine when, for federal purposes, a utility will be deemed to "own or control" ducts, conduits or rights-of-way.[28]

IV. CONCLUSION

For the foregoing reasons, the Smart Buildings Policy Project respectfully urges the FCC to reconsider the power it grants to servient estate owners to override federal access policies, and to apply a federal standard of right-of-way ownership or control for purposes of implementing Section 224 of the Communications Act.

Respectfully submitted,

SMART BUILDINGS POLICY PROJECT

By: 

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[28] On a more principled level, the RAA's suggestion is quite radical in that it suggests State supremacy over federal law. The Constitution provides for federal supremacy over State laws, not the converse. Consistent with this general design, it is entirely appropriate for the Commission to establish a federal standard governing the definition of "own or control" for purposes of implementing Section 224.

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 28th day of March, 2001, copies of the Smart Buildings Policy Project Reply Comments in Response to Opposition to the SBPP Petition for Limited Reconsideration were delivered by first-class mail, unless otherwise designated, to the following parties:

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