

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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In the Matter of)	
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ClickQuick II, LLC,)	
San Marina at Laguna Lakes, L.L.C.)	WC Docket No. 03-112
a/k/a Bear Lakes Associates, Ltd. and)	
Villa Del Sol, L.L.C. a/k/a VDS)	
Associates, Ltd.)	
)	
Petition for Declaratory Ruling)	
)	
)	

**REPLY COMMENTS OF AT&T CORP. AND
SMART BUILDINGS POLICY PROJECT**

Pursuant to Section 1.415 of the Commission’s rules, 47 C.F.R. § 1.415, AT&T Corp. (“AT&T”) and the Smart Buildings Policy Project¹ respectfully submit these reply comments in response to the Commission’s *Notice* on ClickQuick II, LLC, San Marina at Laguna Lakes, L.L.C. a/k/a Bear Lakes Associates, Ltd., and Villa Del Sol, L.L.C. a/k/a VDS Associates Ltd. (“Petitioners”) *Petition to Preempt the Florida Public Service*

¹The Smart Buildings Policy Project (“SBPP”) is a coalition of telecommunications carriers, equipment manufacturers and other firms and organizations that support nondiscriminatory telecommunications carrier access to multi-tenant environments. The SBPP’s members include: Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T Corp., Comcast Business Communications, Competitive Telecommunications Association, Cox Communications, Inc., Focal Communications Corporation, The Harris Corporation, Information Technology Association of America, Lucent Technologies, MCI, Network Telephone Corporation, Nokia Inc., International Communications Association, Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications LLC, and XO Communications, Inc.

Commission's Multi-tenant Environment ("MTE") Demarcation Rules ("Petition").²

The reply comments address two specific issues raised by BellSouth Telecommunications, Inc. ("BellSouth") and the Florida Public Service Commission ("PSC"): (1) their assertion that because the Commission determined six years ago that it need not preempt state MTE demarcation rules, including the Florida rules in the instant proceeding, it should not preempt those rules now, and (2) their contention that the PSC's waiver mechanism provides sufficient recourse to address the clear conflict between the Commission's and the PSC's demarcation rules.

I. The Commission's 1997 Decision To Permit State Demarcation Rules That Differ from the Commission's Rules Does Not Foreclose the Commission from Preempting State Rules that Prohibit Competitive Entry.

BellSouth and the Florida PSC assert that because the Florida PSC's demarcation rules have not changed since the Federal Communications Commission ("Commission") declined to preempt those same rules six years ago, the Commission need not do so now.³ BellSouth and the Florida PSC seem to believe that the Commission may preempt only if the PSC revises its existing rules. They are wrong. The Commission elected not to preempt local rules in 1997 based on the record before it at that time. In its *1997 Demarcation Order*, which permitted building owners to relocate the demarcation point to the minimum point of entry ("MPOE"),⁴ the Commission expressly stated that "[t]he

² Comment Request on Petition for Declaratory Ruling that the Location of the Demarcation Point Pursuant to § 47 C.F.R. § 68.105(d)(2) Preempts the Location of the Demarcation Point Pursuant To § 25-4.0345(1)(B)(2) of the Florida Administrative Code, *Public Notice*, DA 03-1511, WC Docket No. 03-112 (rel. May 5, 2003) ("*Notice*").

³ See BellSouth Comments at 4-5; Florida PSC Comments at 1-2.

⁴ The MPOE is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.105(b).

record *at this point* reveals no specific local policies that must be preempted.”⁵ Thus, even in 1997 the Commission contemplated that there may be circumstances *in the future* that would require preemption of state rules. Such circumstances clearly encompass state rules that circumvent the Commission’s goal to promote competition in the installation and maintenance of intra-building facilities.⁶

Moreover, the Commission also stated that “[t]o the extent that local inside wiring policies would negate federal policies, the Commission will review the need to preempt at that time.”⁷ Thus, the Commission contemplated that there may be instances in the future where state demarcation rules “negate federal policies.” In this particular instance, Petitioners claim that the building owners are prevented from exercising their right to implement the Commission’s well-defined procedures for moving the demarcation point to the MPOE.⁸

Petitioners assert that the Florida PSC’s demarcation rule – which states that the demarcation point for single line/multi-customer buildings must be “[w]ithin the

⁵ Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 11897, 11919 (1997) (“*1997 Demarcation Order*”) (*emphasis added*).

⁶ BellSouth also claims that Petitioners seek “to obtain the use of state of the art network equipment owned and recently installed by BellSouth without compensation to BellSouth in order to market and provide information services for profit.” BellSouth Comments at 21. However, the Commission long ago decided to preclude telephone companies from requiring that such wiring be purchased and imposing a charge for the use of such wiring. Detariffing the Installation and Maintenance of Inside Wiring, *Memorandum Opinion and Order* 1 FCC Rcd 1190, ¶ 35 (1986). Over ten years later, the Commission reaffirmed that moving the demarcation point does not transfer ownership and that carriers may retain ownership over carrier-installed inside wiring. The Commission held that “[c]arriers may not use claims of ownership as a basis for imposing restrictions on the customer’s or building owner’s removal, rearrangement, replacement or maintenance of such wiring. Because there are already procedures under which carriers recover the costs of inside wiring that was originally installed or maintained under tariff, carriers are not entitled to additional compensation for such wiring.” *1997 Demarcation Order* at 11917-18.

⁷ *Id.*

⁸ Petition at 2.

customer's premises at a point easily accessed by the customer"⁹ – permits BellSouth to deny interconnection at the “66 block” located in the utilities room of each building.¹⁰

This prohibition (1) allows incumbent LECs to use their control over on-premises wiring to frustrate competitive access to MTEs, (2) denies building owners their right to relocate the demarcation point to the MPOE, and (3) prevents customers from choosing alternative providers of their services -- problems that the Commission's demarcation rules are directly intended to alleviate.¹¹ Each of these anticompetitive results provides the Commission adequate grounds to preempt the Florida demarcation rules to the extent that they prohibit a building owner from exercising its right under federal rules to move the demarcation point to the MPOE.¹²

II. The Florida PSC's Exception Process Provides No Basis for Denying Preemption.

⁹ 25 FL ADC 25-4.0345(1)(b)(2). For multi-line systems, however, the Florida rules appear to require that the demarcation point be located at a single point in the common area. Rule 25-4.0345(1)(b)(3) states that the demarcation point must be “within the same room and within 25 feet of the FCC registered terminal equipment or cross connect field.” 25 FL ADC 25-4.0345(1)(b)(3). BellSouth and Petitioners differ on whether the buildings in question are single line or multi-line buildings. Petition at 4.

¹⁰ Petition at 4.

¹¹ For example, in its order detariffing inside wiring, the Commission stated “[c]ustomers' ability to obtain inside wiring installation and maintenance from sources of their own choosing could be inhibited if a telephone company were to use a claim of ownership as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. Detariffing the Installation and Maintenance of Inside Wiring, *Memorandum Opinion and Order*, 1 FCC Rcd 1190, 1195 (1986). See also AT&T Comments at 2-4 describing a series of Commission building access decisions intended to promote competition in the provision in intra-building facilities; Real Access Alliance Comments at 3-4.

¹² The Florida PSC also contends that its demarcation rule is merely a stricter version of the FCC's rule; it states that the FCC rule serves as a floor or minimum set of requirements and the state rule is a ceiling or more stringent set of requirements. Florida PSC Comments at 2-4. This argument, however, ignores the very real and current impact of the Florida rule – entities, including competitive LECs may only deal with their competitors, the incumbents, for access to certain on-premises facilities. Petitioner's claim that this prohibition has prevented the building owners from moving the demarcation point to the MPOE. Therefore, regardless of whether the PSC rules are more restrictive, according to Petitioners, they are preventing ClickQuick from gaining access to on-premises facilities that the building owners have a right to control. The PSC's rules, therefore, clearly negate federal policy. See *NARUC v. FCC*, 80 F.2d 422 (D.C. Cir. 1989) (FCC may preempt state regulation of inside wiring if state regulation interferes with federal policy of promoting competition.).

The Florida PSC and BellSouth maintain that the PSC may grant an exception to the PSC's demarcation rules "for good cause shown," and Petitioners should seek such exception before requesting that the Commission preempt the Florida rules.¹³ The effect, however, would be to delay competitive entry and increase the costs to competitors, inhibiting a competitor's ability to provide alternative services to residents in MTEs. As the Real Access Alliance points out, not only will competitors be delayed in offering services to customers in MTEs, but competitors' costs would increase because they are "forced to install a parallel set of wires on the premises."¹⁴ These additional costs and delays may make it impractical for a competitor to serve tenants within certain MTEs. Moreover, allowing incumbent carriers effectively to preclude the connection of inside wiring to a competitor's facilities conflicts with the Commission's goal of encouraging the development of facilities-based competition through implementation of its MPOE requirement, which prevents an incumbent carrier from denying a premises owner's request to move the demarcation point to the property line.

Further, as BellSouth candidly notes, the Commission in the past has preempted conflicting state law despite the ability of the state commission to waive the inconsistent requirements.¹⁵ In the *Texas Preemption Order*, to which BellSouth cites, the Commission preempted a Texas Public Utilities Commission ("PUC") requirement that restricted the means by which competitive local exchange carriers ("CLECs") could offer

¹³ BellSouth Comments at 13; Florida PSC Comments at 2.

¹⁴ Real Access Alliance Comments at 4.

¹⁵ BellSouth Comments at 13, n. 24, citing Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order* (1997) ("*Texas Preemption Order*").

resale services, even though a waiver process existed.¹⁶ The Texas rule mandated that CLECs provide facilities-based services, not resale services, to specified portions of their service areas. BellSouth attempts to distinguish the *Texas Preemption Order* on the basis that the Texas PUC had granted certain waivers of its build-out requirements, and, therefore, the Commission's subsequent preemption merely "made permanent" the Texas waivers.¹⁷

In fact, the Commission preempted the Texas PUC build-out requirements because they restricted the means or facilities through which a party is permitted to provide service and imposed a financial burden that has the effect of prohibiting the provision of services.¹⁸ Petitioner's claims raise these exact same concerns. Further, the Commission reasoned that it must preempt the Texas PUC because "it is necessary to remove the regulatory uncertainty concerning future application of the [Texas PUC] build-out requirements."¹⁹ Forcing entities to go through the time-consuming process of seeking waivers (which the Florida PSC may reject) each and every time an entity wishes to move the demarcation point raises the same "regulatory uncertainty" that the Commission found problematic in the *Texas Preemption Order*.

The PSC's exemption process, therefore, does not provide adequate assurance that the Florida demarcation rules will not prevent building owners from moving the demarcation point, nor is the Commission's decision in the *Texas Preemption Order* distinguishable from the issues presented by the Petitioners.

¹⁶ *Texas Preemption Order* at 3471.

¹⁷ BellSouth Comments at 13, n. 24.

¹⁸ *Texas Preemption Order* at 3466.

¹⁹ *Texas Preemption Order* at 3505.

Conclusion

For the reasons set forth herein, AT&T and SBPP urge the Commission to preempt the Florida PSC rule requiring that the demarcation point be located at the customer premises.

Respectfully submitted,

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Certificate of Service

I, Theresa Donatiello Neidich, do hereby certify that I caused one copy of the foregoing Reply Comments of AT&T Corp. and the Smart Buildings Policy Project to be served by U.S. first class mail on the parties on the attached service list on this 19th day of June, 2003.

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