

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

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| _____                                      | ) |                      |
| In the Matter of                           | ) |                      |
|  | ) |                      |
| Promotion of Competitive Networks in Local | ) |                      |
| Telecommunications Markets                 | ) | WT Docket No. 99-217 |
|  | ) |                      |
| Implementation of the Local Competition    | ) |                      |
| Provisions in the Telecommunications       | ) | CC Docket No. 96-98  |
| Act of 1996                                | ) |                      |
| _____                                      | ) |                      |

**REPLY COMMENTS OF THE REAL ACCESS ALLIANCE**

The Real Access Alliance (the “RAA”) urges the Commission to terminate this proceeding. None of the comments submitted in response to the Commission’s Public Notice released March 28, 2007 (the “Public Notice”), contain any information that would justify any further regulation of agreements governing access by telecommunications providers to private buildings. The handful of comments submitted essentially confirm the RAA’s view, as stated in our opening comments, that there have been no changes in the marketplace that would warrant any Commission action, even if the Commission had the legal authority to act. If anything, as Comcast observes, those changes in the marketplace that have occurred are further proof that Commission action is not required.

The Public Notice requested “new information or arguments” relevant to the issues raised earlier in this docket. The parties have provided little in this regard beyond the usual handful of anecdotes. Only the RAA offered any quantitative data actually aimed at showing the level of

competition that exists in commercial buildings. Because that data shows clearly that competitive providers are able to obtain access to buildings, and that any limitations on access are the result of the underlying structure of the telecommunications business rather than the actions of building owners, further regulation is unwarranted. We also think it bears noting that the growth of new technologies — including wireless, broadband-over-powerline, and IP-based services -- reduces the importance of traditional wireline access to buildings.

Only four parties – COMPTTEL, Embarq, Qwest and Verizon – have suggested that further action in this docket should be considered.<sup>1</sup> We will address their comments briefly, in turn.

**A. COMPTTEL.**

COMPTTEL calls for regulation, but it is unclear what regulation COMPTTEL actually wants. At one point, COMPTTEL asks the Commission to “prohibit incumbent LECs from entering into building access agreements with MTE owners that favor the ILEC over other telecommunications providers.” COMPTTEL Comments at 2. Although we disagree with the suggestion that the Commission can regulate building owners indirectly, we are nonetheless gratified that COMPTTEL recognizes that there are limits on the Commission’s authority to regulate building owners. *Id.* at 4. Nevertheless, COMPTTEL later suggests that direct regulation of building owners is necessary, complaining about “the ability of premises owners to act

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<sup>1</sup> Comcast urges the Commission to proceed cautiously and avoid unintended consequences; ACUTA asks for special treatment for student housing, should the Commission act; and XO Communications raises complaints unrelated to this proceeding about AT&T’s refusal to grant XO access to buildings owned by AT&T.

unilaterally and unreasonably . . . .” *Id.* at 6.<sup>2</sup> In either case, COMPTTEL fails to explain the legal basis for any such action by the Commission.

COMPTTEL offers no new data beyond an “informal survey,” which apparently did not involve gathering quantitative information. This is the same sort of vague, unsubstantiated claim that the competitive local exchange carrier (“CLEC”) industry relied on so heavily earlier in this docket, and it is no more persuasive now.<sup>3</sup>

The RAA does sympathize with COMPTTEL’s concerns in certain respects. As discussed in our Comments in MB Docket No. 07-51, property owners are well aware of the power the incumbent local exchange carriers (“ILECs”) wield merely by virtue of their incumbency. The presence of the ILECs is ubiquitous and they may have obtained favorable access rights either by agreement or by prescription in many buildings over the course of the past century. It may be difficult for CLECs to compete in this environment. But trampling on existing property rights – whether the property in question belongs to a building owner or an ILEC -- is not a solution. Nor

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<sup>2</sup> And of course, this merely proves our point about ostensible “indirect” regulation of building owners: The very fact that COMPTTEL wants to reach the behavior of building owners proves that the true subject of any rules adopted at COMPTTEL’s behest would in fact be the real estate industry, thus placing any such regulations outside the scope of the Commission’s authority.

<sup>3</sup> COMPTTEL cites the recent report of the Government Accountability Office (“GAO”), United States Government Accountability Office, *FCC Needs To Improve Its Ability To Monitor and Determine the Extent of Competition In Dedicated Access Services*, GAO-07-80 (Nov. 2006), to support its argument, claiming that GAO “cited limited access to buildings as a barrier to entry . . . .” COMPTTEL Comments at n. 4. This is a typical example of COMPTTEL’s misplaced emphasis on the real estate industry. The GAO report mentioned issues related to building access only in passing, and GAO made no effort to survey building owners or their tenants in conducting the study. GAO based its conclusions regarding the level of competition in the market entirely on estimates derived from models. Furthermore, as COMPTTEL is well aware, the GAO placed its greatest emphasis on the consequences of changes in the FCC’s unbundled network element rules. Finally, GAO also noted – as we have repeatedly – that “[c]onstructing a local telecommunications network can be extremely capital intensive.” *Id.* at 26. The GAO report goes on to say that if a provider cannot generate sufficient revenues from serving a particular location, it will not build out its network to serve that location. In sum, the GAO report does not support any argument for regulation of building owners.

is it appropriate to interfere with the freedom of contract for the use of property with respect to prospective agreements. The solution is for CLECs to work with building owners to achieve their goals.

The problems COMPTTEL complains of seem to center not on the ability to obtain access to buildings, but on the use of property once they obtain access. Without a more specific proposal and clear-cut examples, it is difficult to assess COMPTTEL's concerns, but one underlying problem in many buildings is simply the lack of space available for additional providers. If there is no room at the minimum point of entry for a CLEC's equipment, for example, then a property owner simply has no choice but to require the CLEC to place electronic equipment at a customer's premises. In any event, this is not a fit subject for Commission regulation: The Commission has no power over issues related to access to and the use of space within private buildings.

Regulation of the ILECs in areas that relate solely to inter-carrier matters is another question entirely. For example, COMPTTEL states that "ILECs often will disclose demarc locations only to the building owner, not to a requesting CLEC." We see no reason why the Commission could not require an ILEC to make such information available to a CLEC without affecting the rights of building owners. Some form of regulation might in principle be possible to address such specific issues.

The RAA is particularly sensitive to calls for regulation from COMPTTEL because of the consequences to an RAA member, the Building Owners and Managers Association International ("BOMA") and a number of individual property owners arising out of the RAA's compliance with its voluntary commitments in this proceeding. In 2003, Winstar Communications, once a leading proponent of regulation of the terms of building access and a member of COMPTTEL,

initiated litigation against BOMA, BOMA's New Jersey affiliate, and a group of individual property owners, claiming these associations and property owners had committed numerous violations of state and federal antitrust law, and of the Communications Act, in addition to common law tort claims. *IDT Corp. et al. v. Building Owners and Managers Ass'n Int'l, et al.*, No. Civ. A. 03-4113, WL 3447615 (D.N.J., Dec. 15, 2005).<sup>4</sup> Winstar's claims were based in part on the model agreements, best practices, and other materials prepared by the RAA and distributed by BOMA in connection with this proceeding, *id.* at \*11, which Winstar's CEO had actually publicly endorsed at the time. The litigation was completely unfounded and was eventually dismissed, *id.* at \*15, but only after two years of litigation and at considerable expense to BOMA and its members. Winstar also sued BOMA and others in New York; that suit was also dismissed. *Winstar Comm'ns LLC v. Equity Office Properties, Inc.*, No. 04-3139 (S.D.N.Y. Jan. 24, 2005).

COMPTTEL is not responsible for Winstar's actions, but the Winstar litigation was an extension of the arguments promoted by competitive providers throughout this proceeding. The CLECs have always sought to convince the Commission to act against property owners, as if property owners were responsible for the historical structure of the telecommunications industry and regulation of property owners would alter the underlying economics of the telecommunications industry. Rather than work with property owners, competitive providers too often have seen property owners as adversaries. This perspective has not served CLECs or property owners well.

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<sup>4</sup> Incidentally, the court also addressed a number of legal arguments that were raised earlier in this proceeding regarding the potential applicability of Sections 201 and 202 of the Communications Act to building owners, and rejected them. *Id.* at \*12-14.

**B. Embarq.**

Embarq calls for a ban on all exclusive agreements, regardless of the type of service or property affected. Embarq offers no factual information to show that exclusive agreements actually create any significant problems in the marketplace, however, nor does Embarq make any effort to explain the legal basis for its proposal. We do agree with Embarq on one point: the Commission should not treat voice or video services in isolation. As discussed in our Comments in MB Docket No. 07-51, the ILECs have significant advantages in the video marketplace that are derived from their status as incumbent voice providers. These advantages are as relevant to this discussion as any other factor, and cannot be ignored.

**C. Qwest.**

Although Qwest admits that it has no relevant statistics and offers only a single five-year-old anecdote,<sup>5</sup> Qwest calls for banning exclusive agreements in residential as well as commercial buildings. This is simply an insufficient basis for justifying any regulation. Even if ILECs are sometimes denied access to residential properties, those occasions are rare, because, as discussed in our Comments in MB Docket 07-51, it is simply not in the business interests of property owners to refuse access to the incumbent local exchange carriers. Nor does Qwest offer any new legal arguments.

**D. Verizon.**

Finally, although Verizon does not call for any regulation, it says that access agreements for telecommunications services in residential properties “should not be more extensive than those imposed on such agreements for video services.” Verizon thus suggests that regulation along the lines of what it has proposed in MB Docket No. 07-51 would be appropriate or at least

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<sup>5</sup> Qwest Comments at 1-2. And even that one incident was resolved, apparently to Qwest’s satisfaction, since nothing is said about any adverse consequences.

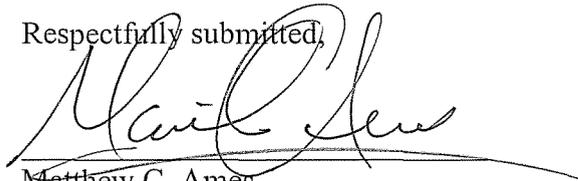
acceptable. The RAA disagrees with this notion, as Verizon's position is grounded in naked self-interest, and does not even pretend to be sound public policy. Verizon knows perfectly well that it has an advantage over its competitors in gaining access to residential buildings for purposes of telecommunications services. For that reason, it does not fear such agreements. Verizon simply wants the Commission's assistance in building its market share for video services.

We do agree with Verizon, however, that there is no evidence of "abuse" of access agreements for telecommunications services. We also agree that there should be no distinction between access agreements for telecommunications and video services, because regulation of access agreements for video services in apartment buildings is no more necessary nor lawful than regulation of such agreements in other contexts; consequently, no regulation is appropriate.

## CONCLUSION

The Commission should refrain from any further regulation of agreements between providers of telecommunications services and the owners of commercial buildings. The record does not support any need for such regulation, and Congress has not given the Commission the necessary authority. This proceeding should be terminated.

Respectfully submitted,



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