COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way	DTE 98-36

SUPPLEMENTAL COMMENTS OF AT&T COMMUNICATIONS

OF NEW ENGLAND, INC. ON PROPOSED

CHANGES TO 220 CMR 45.00 *et seq*.

AT&T Communications of New England, Inc. ("AT&T") hereby files supplemental comments pursuant to the August 27, 1999 Request For Further Comments issued by the Department of Telecommunications and Energy ("Department"). Pursuant to the Department's August 27, 1999 Request, these comments are limited to the issue of non-discriminatory access to poles, ducts, conduits, and rights-of-way (collectively "Pathways") inside and on commercial and residential buildings. With regard to all other issues in this proceeding, AT&T refers the Department to AT&T's initial comments filed in January.[(1)]

Introduction

AT&T applauds the Department's recognition of this issue as a particularly important one for the development of local exchange competition. Without the ability to make the final connection to multi-tenant buildings, competitive local exchange carriers ("CLECs") and wireless carriers seeking to provide fixed local services will never be able to compete successfully against the incumbent local exchange carrier ("ILEC") whose facilities are already connected. Moreover, the inability of

CLECs and other telecommunications service providers to offer their services to the tenants of multi-tenant buildings would deprive those end-users of the benefits of competition.

Comments

I. THE PROBLEM.

ILECs have physical space and access within multi-dwelling units and commercial buildings to provide service to customers within those privately owned buildings. New entrants that seek to provide local services to customers have encountered barriers as landlords either deny them the right to physically run their lines and/or demand unreasonable payments to do so. Unfortunately, some building owners have seen the interest of CLECs in gaining access to their tenants as a revenue-generating opportunity. In their January comments filed with the Department, the Association for Local Telecommunications Services ("ALTS") and Winstar Communications ("Winstar") provided several examples of what landlords have done in an effort to use their "mini-monopoly" control over tenant access to obtain what are effectively monopoly profits. *See, Comments Of The Association For Local Telecommunications Services And Winstar Communications, Inc.* at 8-9.

II. THE SOLUTIONS PURSUED IN OTHER JURISDICTIONS.

Cities and states have begun to recognize that the lack of access by CLECs to privately owned buildings will impede local competition. In 1997, Connecticut passed legislation in an attempt to address this concern. The legislation requires owners of buildings to permit wiring to provide telecommunications services by telecommunications providers. Conn. Gen. Stat. § 16-2471. The legislation forbids building owners from demanding payment from telecommunications providers in exchange for such providers having the right to access tenants in their buildings. *Id*. It also forbids landlord discrimination between tenants in rental charges or the provision of service based on their telecommunications provider. *Id*. According to ALTS and Winstar's January comments, Ohio, Texas and California have also enacted legislation or adopted regulations governing access of tenants in multi-tenant buildings to the telecommunications provider of their choice. *Comments Of The Association For Local Telecommunications Services And Winstar Communications, Inc*. at 7.

Moreover, state commissions have recently begun taking the initiative in this area. The Nebraska Public Service Commission recently found that "a statewide policy regarding CLEC access to residential [multi-dwelling units "MDUs"] is necessary to protect the rights of MDU residents." Nebraska Public Service Commission, *Order Establishing Statewide Policy for MDU Access*, Application No. C-1878/PI-23 (March 2, 1999). The Nebraska Commission gave the following basis for its decision to implement a statewide policy:

The intent behind the Telecommunications Act of 1996 was to open up the telecommunications market for competition. However, residents of MDUs have generally been unable to reap the benefits of this industry transformation.

It is true that competition has brought many desirable changes to the telecommunications industry. However, the benefits of competition have not come without a certain amount of additional costs. MDU residents must be given the opportunity to take advantage of competition if they are to be expected to bear any increased costs associated therewith. As such, the Commission believes that residential MDU properties must be opened up to competition.

Among other things, the Nebraska Commission's statewide policy requires the ILEC to provide to a CLEC a "minimum point of entry" ("MPOE") as close to the property line of the multi-unit building as possible and forbids telecommunications companies from entering into exclusionary contracts and marketing agreements with landlords.

III. AT&T'S RECOMMENDED SOLUTION IN MASSACHUSETTS.

AT&T recognizes that the Department's jurisdiction may not extend to the regulation of property owners in many of the situations involving the right of the tenants in their buildings to obtain access to the services of CLECs and wireless carriers seeking to provide local services. The Department does, however, have jurisdiction over electric, gas and telephone companies with Pathways into and on private buildings. and can make clear in its regulations that such companies' obligation to provide non-discriminatory access to their Pathways extends to their Pathways in and on privately owned buildings. The Department can - and should - do what the Nebraska Commission has done, therefore, and establish requirements for the placement of the MPOE and forbid exclusionary contracts and marketing agreements between telecommunications companies and landlords.

In addition, the Department should open a generic investigation to determine the legislative changes that may be required in order to provide it with jurisdiction to enforce the rights of tenants in multi-unit buildings to obtain access to the telecommunications provider of their choice. The Department conducted such an investigation in D.P.U. 96-100 when it considered and proposed the legislative changes required for implementation of the conditions necessary for the development of competition in the electric industry. Competition in the telecommunications industry is no less important; indeed, furthering telecommunications competition has

been a policy in Massachusetts since the Department of Public Utilities issued its 1985 decision in D.P.U. 1731. Only when tenants can vindicate their rights to obtain access to the telecommunications provider of their choice will the benefits of competition in telecommunications become a reality for all end-users and not just the end users who occupy single unit dwellings.(2)

When the Department proceeds with such an investigation, AT&T recommends that it be guided by the following principles:

Tenants, and owners of cooperative or condominium units, have a right to access any telecommunications provider able to serve them.

Building owners/managers may not deny tenants or owners of cooperative or condominium units this right by denying a telecommunications service provider the ability to connect its telecommunications facilities to a potential customer in the building's common space (telecommunications "closet" or rooftop space). This practice creates a "mini-monopoly" which is not sanctioned by law.

Building owners/managers may not impair this right by extracting financial concessions from some competitive telecommunications service providers in exchange for access to the physical facilities used to connect to building occupants, while allowing other telecommunications service providers free access to all building occupants. This practice discriminates against building occupants by denying them choice.

If a building owner or manager charges any telecommunications service provider a fee to access the physical facilities used to connect to building occupants, an equivalent fee must be charged all telecommunications service providers that have access to building occupants, including the incumbent local exchange carrier. Only nondiscriminatory charges are consistent with building occupants' right to choice.

Building owners should not make profits on the space required for telecommunications facilities used to access building occupants because the excess costs imposed on the telecommunications service providers will be reflected in higher telecommunications prices to building occupants. Any fee charged, whether rent, a percentage of revenues, or a one-time entrance fee, must reflect no more than the actual cost of providing access to the space required to install the telecommunications facilities needed by the occupants requesting service from a particular telecommunications service provider.

A competitive local exchange carrier should not have to endure protracted negotiations with a building owner or manager to exercise its right to obtain nondiscriminatory access to the facilities necessary to connect to occupants of the building. If a building owner or manager denies access to the telecommunications "closet" to a competitive local exchange carrier, that carrier should, upon a showing that a building occupant has requested service from the carrier, be able to enforce its right to access through an expedited condemnation process.

Utilities must make attachment space available on a technology-neutral basis when a competitor requires a different configuration of facilities. For example, if AT&T or another competitor wants to provide local loop services to an MDU with fixed wireless technology, the competitor must be provided access to riser space, conduit, rooftops, and other areas necessary to offer telecommunications services to the building. The incumbent and building owner should not be permitted to deny access for the necessary rooftop rights-of-way simply because the incumbent does not use the rooftop to offer existing services.

IV. CONCLUSION

For the reasons stated above and in its initial comments, AT&T respectfully requests that the Department:

1. Consider the proposed rules in Exhibit A attached to initial comments,

Require utilities to submit standard form license agreements similar to the one attached to its initial comments as Exhibit B,

Either expressly construe the Massachusetts pole attachment statue to cover wireless carriers and their attachments, or clarify that wireless attachments are subject only to the federal statute and rules,

Make clear that utilities' obligations relating to their Pathways extend to Pathways running inside and on privately owned buildings,

Prohibit exclusionary and/or discriminatory agreements between utilities and landlords,

Adopt rules that require the ILEC to provide to a competing provider a MPOE as close to the property line of the multi-unit building as possible,

Open a generic investigation to determine the legislative changes that may be required in order to provide the Department with jurisdiction to enforce the rights of tenants in multi-unit buildings to obtain access to the telecommunications provider of their choice.

Respectfully submitted,

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1. 1 AT&T notes that no party participating in this proceeding disagrees with AT&T's proposal that the DTE either make it clear that wireless carriers have the same rights of non-discriminatory access as wireline carriers or disclaim any attempt to assume jurisdiction over wireless attachments *See, Comments of AT&T* at 2-6. As AT&T pointed out in its initial comments, the proposed amendments to the Department's rules leave some doubt as to the attachment rights of wireless telecommunications carriers in Massachusetts. *Id*. Federal law as well as the need of both utilities and wireless carriers for regulatory certainty require the Department to resolve this doubt by clearly defining the scope of pole attachment obligations under Massachusetts law. The Department can accomplish this objective either by expressly construing the Massachusetts pole attachment statute to cover wireless carriers and their attachments - a position that reflects the explicit language of the Federal Pole Attachment Act and the FCC's *Pole Attachment Order*, and which has not been challenged by any commenter in this proceeding -- or by clarifying that wireless attachments are subject only to the federal statute and rules. (While the Massachusetts statute could be read to cover only wireline carriers, its language is broad enough to reach wireless attachments if the DTE chooses to assert jurisdiction over all telecommunications carriers. *See, Comments of AT&T* at 4-5.) If the DTE believes the Massachusetts statute does not authorize it to regulate wireless attachments, then it should expressly disclaim jurisdiction over wireless attachments and let wireless carriers take advantage of their attachment rights under federal law.

2. 2 The Legislature in Massachusetts has already adopted laws that protect the rights of occupants to cable providers of their choice. G.L. c. 166A, § 22 states in part: "No person owning, leasing, controlling or managing a multiple dwelling unit or units, or a manufactured housing community, as defined in section thirty-two F of chapter one hundred and forty, shall prohibit or otherwise prevent an operator from entering such buildings or manufactured homes for the purpose of constructing, installing or servicing CATV system facilities if one or more tenants or occupants of a multiple dwelling unit or units, or one or more owners or occupants of a manufactured home or homes, have requested such CATV services."