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LAW OFFICES OF
MILLER & VAN EATON, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY CORPORATION
1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4306

MATTHEW C. AMES
FREDERICK E. ELLROD III
STEPHEN J. GUZZETTA
WILLIAM L. LOWERY

INCORPORATING THE PRACTICE OF
MILLER & HOLBROOKE

WILLIAM R. MALONE
NICHOLAS P. MILLER
MARIA F. SILVEIRA
JOSEPH VAN EATON

WWW.MILLERVANEATON.COM
TELEPHONE (202) 785-0600
FAX (202) 785-1234

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 10, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket 98-146

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multi Housing Council, and the National Realty Committee (jointly, the "Real Estate Associations"), through undersigned counsel, submit this original and one copy of a letter disclosing an oral and writtten ex parte presentation in the above-captioned proceeding.

On November 10, 1998, Matthew C. Ames of Miller & Van Eaton, P.L.L.C., on behalf of the Real Estate Associations, met with John Berresford of the Common Carrier Bureau and Doug Sicker of the Office of Engineering and Technology. The attached written ex parte presentation, which was given to both Mr. Berresford and Mr. Sicker, summarizes the matters that were discussed in the meeting. The oral presentation also addressed the provisions of the Commission's cable home wiring rules and the role of exclusive contracts. In addition, Mr. Berresford was given a compilation of comments submitted by the Real Estate Associations in Commission dockets addressing related issues. The table of contents of the compilation is attached.

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Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By Matthew C. Ames

cc: John Berresford, Esquire
Mr. Doug Sicker

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PROVIDING ADVANCED TELECOMMUNICATIONS CAPABILITY OVER THE "LAST HUNDRED FEET" DOES NOT REQUIRE FCC REGULATION OF THE REAL ESTATE INDUSTRY

The real estate market is highly competitive and responsive to customer demands, and is already in the process of meeting customer demand for advanced telecommunications services. Since early 1996, a coalition representing the owners and managers of multi-tenant residential and commercial properties[1] (the "Coalition") has been representing the interests of owners and managers of leased property before the Commission. The Coalition has informed the Commission of developments in the real estate industry and demonstrated that Commission regulation of the industry is unnecessary and would prove counterproductive.

The Coalition has participated in the following rulemaking proceedings:

- *Telecommunications Inside Wiring (Docket No. 95-184).*
- *Cable Home Wiring (Docket No. 92-260).*
- *Local Competition (Docket No. 96-98).*
- *Over-the-Air Receiving Devices (Docket Nos. 95-59 and 96-83).*

The Coalition opposes Commission regulation of relationships between building owners and telecommunications providers or tenants for the following reasons:

- **Commission action would unnecessarily interfere with the existing free market.** The real estate industry is highly fragmented, dynamic and competitive. This high level of fragmentation means that no individual real estate owner has any significant degree of market power. The resulting competition forces building operators to respond to the needs of tenants and residents by accommodating requests for service. The Commission has recognized the procompetitive incentives facing building owners in *Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184, 13 FCC Rcd 3659 (1997), at ¶ 61.

  The record already before the Commission contains examples of the ways in the real estate industry is providing new services to tenants. The members of the Coalition are also actively assisting their member companies. For example, NMHC has held two technology conferences in 1998. These conferences were very well-attended, and featured speakers on such topics as "Wired Apartment Communities," "Telephony Service Overview," and "The Added Value of Providing Phone Service." The second conference concluded with a tour of a new apartment building that offers high speed Internet access, remote environmental control, built-in connections to support home offices, and other amenities.

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[1] Represented by the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi Housing Council ("NHMC"), and the National Realty Committee ("NRC").

- **There are sound policy reasons for preserving the control of building operators over their property**. A property owner must have the right to enter into a contract with any person who has access to the building. This is the only way to manage the asset rationally and to protect the persons and property of all involved. If tenants and service providers can place antennas and run wires at will, the property owner cannot protect itself, tenants or third parties from potential injury -- and might face liability itself.

- **The Commission has no inherent authority to take private property, and Congress did not authorize it to do so**. Installation of wiring, antennas, and related facilities is clearly and unavoidably a physical invasion of property, and therefore any regulation authorizing such installations without the owner's consent is a taking under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994*); GTE Northwest, Inc. v. Public Utility Commission of Oregon,* 321 Or. 458 (1995). The "power to exclude [is] one of the most treasured strands in an owner's bundle of property rights." *Loretto* at 435-36. Congress has not directed the FCC to take the property of building owners, nor has it appropriated funds for that purpose.

- **The FCC has no authority over building owners as such.** *Illinois Citizens Committee for Broadcasting, et al. v. Sears, Roebuck & Co.,* 35 FCC 2d 237, *aff'd*, 467 F.2d 1397 (7th Cir. 1972) (FCC had no jurisdiction to address concerns raised by construction of Sears Tower). Therefore, the FCC cannot order building owners to provide services or facilities to their tenants, or make their property available to service providers.

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COMMENTS OF THE REAL ESTATE INDUSTRY FILED WITH THE FEDERAL COMMUNICATIONS COMMISSION IN CS DOCKET NO. 95-184, MM DOCKET NO. 92-260, CC DOCKET NO. 96-98, IB DOCKET NO. 95-59, AND CS DOCKET NO. 96-83

BUILDING OWNERS AND MANAGERS ASSOCIATION,
INTERNATIONAL INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL
NATIONAL REALTY COMMITTEE

Miller & Van Eaton, P.L.L.C.

November, 1998

TABLE OF CONTENTS

	Tab
CS Docket No. 95-184 - Inside Wiring	
Joint Comments	1
Joint Reply Comments	2
Joint Request for Official Notice	3
Opposition to Petitions for Reconsideration	4
MM Docket No. 92-260 - Cable Home Wiring	
Joint Comments	5
Joint Reply Comments	6
Further Joint Comments regarding Home Wiring	7
Further Joint Reply Comments	8
Joint Surreply Comments regarding Exclusive Contracts	9
CC Docket No. 96-98 - Local Competition	
Joint Reply Comments	10
IB Docket No. 95-59 - Preemption of Local Zoning Regulation of Satellite Earth Stations	
Joint Comments	11
Joint Reply Comments	12
Joint Comments in Response to Further Notice of Proposed Rulemaking	13
Joint Reply Comments in Response to Further Notice of Proposed Rulemaking	14

CS Docket No. 96-83 - Restrictions on
Over-the-Air Reception Devices

Joint Comments 15

Joint Reply Comments 16