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EX PARTE OR LATE FILED

November 23, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in WT Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding.

On November 22, 1999, I met with Helgi Walker of Commissioner Furchtgott-Roth's office. The meeting addressed access to buildings by telecommunications providers. The attached written ex parte presentation was given to Ms. Walker at the meeting.

Very truly yours,
Miller & Van Eaton, P.L.L.C.

By


Matthew C. Ames

cc: Helgi Walker, Esq.
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REGULATION OF BUILDING ACCESS IS UNNECESSARY AND THE COMMISSION HAS NO AUTHORITY TO ADOPT SUCH REGULATIONS

- **Regulation Is Unnecessary Because the Market Is Working.**
 - The CLECs themselves admit that they are rarely denied access, and have not identified building access as a material risk factor in their securities filings.
 - The CLEC industry has grown enormously in a short time without regulation of building access.
 - Real estate is a highly competitive market: owners grant access because they recognize value of providing tenants with telecommunications options. CLEC anecdotes are not evidence of market failure, but of the market working.
 - Based on the record before the Commission, it would be an abuse of the Commission's discretion to regulate access to buildings. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).
 - Why extend regulation to an unregulated sector of the economy?

- **The Commission Has No Jurisdiction or Authority Over Building Owners.**
 - The Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity or might have an incidental effect on a regulated activity. *See Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).
 - Building owners as such are not engaged in communications by wire or radio.
 - Even if the Commission has jurisdiction over wiring owned by building owners, it has no authority to act against building owners because no provision of the Act confers such authority. The Commission has acknowledged that building owners are not subject to its "regulatory scrutiny." *Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network*, CC Docket No. 81-216, *First Report and Order*, 97 FCC 2d 527 (1986) at ¶ 14.
 - The Commission's ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973); *Illinois Citizens Committee*, 467 F.2d at 1400.

- **The Commission Has No Authority To Impose Public Utility Style Regulation of Building Access, Even if such Regulation Were Justified.**
 - The Commission is not empowered to enforce the antitrust laws, except with relation to Title III licensees. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); Communications Act, §§ 313, 314.
 - The Federal Trade Commission has recognized that building owners are not monopolists. *Premerger Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (March 28, 1996). Building owners compete directly for tenants with other owners and must meet their needs to succeed.

- Tenants are not “locked in.” Every year, approximately 20% of office tenants and over a third of apartment residents move.
- **Section 224 Does Not Apply to Facilities Located Inside Buildings.**
 - Section 224 was never intended to include access to buildings, and has never been interpreted to do so.
 - Building owners, and not utilities, own and control ducts and conduits inside their buildings.
 - Utility access rights inside buildings are not rights-of-way because they typically take the form of licenses and leases. Although easements may sometimes constitute rights-of-way, licenses and leases do not.
 - In any event, utility access rights are defined by state law, and the Commission cannot alter existing property rights.
 - Because of the enormous variety in the terms of access rights, the Commission cannot effectively use Section 224 to achieve its policy goal.
- **Any Attempt To Impose an Access Requirement Would Violate the Fifth Amendment.**
 - Any nondiscriminatory access requirement effects a *per se* physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Gulf Power Co. v. United States*, No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999).
 - The Commission cannot adopt a rule that effects a taking without express authority from Congress. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not given the Commission general authority to effect takings, nor has it authorized the Commission to establish a mechanism to compensate building owners for property occupied by CLECs.
 - The Commission cannot expand utility access rights under Section 224 without effecting a taking in a large number of cases.
 - Even the CLECs acknowledge that in certain cases a forced access requirement may constitute a regulatory taking, because owners have investment-backed expectations.
- **The Commission Cannot Extend the OTARD Rules to Common Areas and Nonvideo Services.**
 - The current OTARD rules are invalid because Section 207 was merely a directive to use existing authority to preempt certain governmental and quasi-governmental restrictions, and the Commission has no authority over building owners. For the same reason, the Commission cannot extend the rules to nonvideo services.
 - The Commission has correctly recognized that to extend the rules to common areas and restricted use areas would violate the Fifth Amendment.