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December 10, 1999

The Secretary
Federal Communications Commission
1919 M. Street N.W.
Washington, D.C. 20554

Attn: Cable Services Bureau -
Comcast Cable Communications Inc.

Dear Sir:

I am enclosing Reply Comments of Cities of Fraser and Sterling Heights, Michigan, Regarding Notice of Proposed Rule Making and Notice of Inquiry in WT Docket Number 99-217, and Third Further Notice of Proposed Rule Making in CC Docket Number 99-98.

Thank you for your attention in this matter.

Very truly yours,

Ralph Colasuonno

RC/ams
Enclosure
cc:enc: Neil J. Lehto, Esq.

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

In the Matter of	
Promotion of Competitive Networks in Local Telecommunications	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket no: 96-98

REPLY COMMENTS OF CITIES OF FRASER AND STERLING HEIGHTS, MICHIGAN, REGARDING NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY IN WT DOCKET NUMBER 99-217, AND THIRD FURTHER NOTICE OF PROPOSED RULE MAKING IN CC DOCKET NUMBER 96-98

INTRODUCTION

In its Notice of Proposed Rule Making ("NPRM") adopted June 10, 1999 regarding the promotion of competitive networks and local telecommunications markets, the Federal Communications Commission (FCC) said it was seeking comment from interested parties regarding building access issues including the legal and policy issues raised by a possible

requirement that building owners who allow any telecommunications carrier access to facilities they control must make comparable access available to other carriers on a non-discriminatory basis. The cities of Fraser and Sterling Heights, Michigan, respectfully submit these reply comments to discuss the issues facing local governments raised by the FCC's Notice of Proposed Rule Making. These comments will focus on the issue of whether to institute "non-discriminatory access" rules on local government owners of multi-tenant buildings.

I. The Perceived Problem of Telecom Companies Being Denied Access To Multi-Tenant Buildings By Landlords.

According to the NPRM, the FCC is considering regulations which would force owners who have already granted space to one local exchange carrier (LEC) to give access to all other competing local exchange carriers (CLEC). There is a perceived battle between LECs and landlords of multi-tenant buildings in which the CLECs argue that without forced access, the purpose of the 1996 Telecommunications Act which is to promote and encourage competition in local telecommunication markets, will not be realized. As one source states, "at stake is the ability to reach of millions of customers in the nation's 750,000 office buildings. Also, the one third of the population who live in apartments." [1]

Since the purpose of the 1996 Telecommunications Act is to accelerate the competitive development of advanced telecommunications services to all Americans, the FCC proposed rules which include the drastic solution of mandating regulation forcing building owners to give access to all CLECs. Although promoting competition is a worthy endeavor, the FCC must take care not to create more problems than it intends to solve. This fact is recognized by several of the FCC Commissioners. In her separate statement attached to the NPRM, Commissioner Susan Ness recognizes that while the FCC's intent

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[1]Martinez, Barbara, The Wall Street Journal, Wednesday, September 1, 1999.

"reflect[s] the pro-competitive spirit imbued in the Telecommunications Act of 1996," the proposed rules can be characterized as perhaps too "aggressive." [2] The concern shared by Ms. Ness, and no doubt by many interested parties across the nation, is that the FCC's proposals translate into regulation for a class of persons not otherwise regulated by the FCC - building owners. Included in this class are municipalities which will clearly be affected as owners/operators of multiple tenant building such as youth homes, senior citizen homes, and jails, among other things.

II. The Proposed "Non-Discriminatory Access" Rule is Unnecessary

A complete survey of building owners across the country would be beyond the scope of these comments. In this regard, we concur with the findings of the "Real Access Alliance" that "the real estate industry is competitive and adapts daily to market-place signals and customer demand."[3] We agree that, to remain competitive, building owners will adapt and comply with tenant demands for competitive services offered by CLECs. This, in turn, will promote competition between CLECs and incumbent Local exchange carriers (ILECs), without the need to resort to "nondiscriminatory access" regulation.

Adopting rules which would, in essence, force building owners to grant access to CLECs raise two serious issues. First, there is the problem of regulating without specific authority to do so. As FCC commissioner Harold Furchtgott-Roth points out, "[the] Commission must be vigilant in [not] overstepping its authority where private property rights are implicated, being careful not to regulate where it does not have specific statutory authority – regardless of whether such regulation constitutes commendable public policy."[4]

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[2]Separate statement of Commissioner Susan Ness, June 10, 1999, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket Number 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket Number 96-98, Page 61.

[3]Joint Comments of Building Owners and Managers Association, *et al.*, a/k/a the Real Access Alliance, September 27, 1999, page i.

[4]Statement of Commissioner Harold Furchtgott-Roth, June 10, 1999, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket Number 99-217, and Third

Commissioner Michael K. Powell goes even further and states that the FCC has "no specific statutory provision that directs, or 'empowers' [the FCC] to assert regulatory authority over owners of private property."[5] The FCC's proposal triggers constitutional issues concerning the Fifth Amendment and the taking of private property without just compensation.

Second, there is the problem of regulating building owners who exist and operate outside of the sphere of authority granted to the FCC. If the whole purpose of the Telecommunications Act of 1996 was to "help create an open marketplace where competition and innovation can move as quick as light," [6] then attempting to open one marketplace by regulating another does not make sense. The goal of the Telecommunications Act was to deregulate, not impose more regulations. Why seek problems when the more simpler route would be to leave the choice, as it is now, with building owners ? This would eliminate the constitutional concern of the taking private property without just compensation. If a building owner, for example, voluntarily offers conduit space to a CLEC within a building where a ILEC is already operating, no governmental taking of private property occurs.

III. Recommendations Regarding Exclusive Contracts

An area where the proposed rules can assist owners of multi-tenant buildings would be a situation where a building owner wishes to offer conduit space to one company in a

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Further Notice of Proposed Rulemaking in CC Docket Number 96-98, Page 62.

[5]Statement of Commissioner Michael Powell, June 10,1999, 1999,Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket Number 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket Number 96-98, Page 63.

[6]Bruning, Deonne L., The Telecommunications Act of 1996: The Challenge of Competition, 30 Creighton L. Rev. 1255 (1997) (Citing President William J. Clinton, Remarks by the President at the signing Ceremony for the Telecommunications Act, available at: http://www.whitehouse.gov/WH/eop/op/telecom/release.html).

building where the owner previously made an exclusive contract with another company. For example, the Cities of Fraser and Sterling Heights, Michigan, have entered into exclusive contracts with Comcast, giving Comcast exclusive right to use conduit space in Senior Citizens apartment buildings. These contracts were executed prior to the enactment of the Telecommunications Act of 1996.

As building owners, the Cities would like to facilitate competition by allowing another cable company access to the conduit space. However, at the same time the two Cities do not want to violate the earlier agreements. The FCC should consider pre-empting exclusive contracts between building owners, cable television operators and telecommunications companies.

An arrangement which could accommodate incumbent cable companies as well as competing companies would further the goals of the Telecommunications Act by giving more Americans access to video service and information at a competitive cost. Any such arrangements must obviously keep the interests of incumbent cable operators in mind. The competition will, as the FCC points out, "unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing."[7]

CONCLUSION

As FCC Commissioner Ness has stated, "[c]ompetition isn't like carrots or tomatoes. To prepare the soil, plant the seeds, let them sprout, grow and flower takes years, not weeks...[t]he soil has been carefully prepared, the seeds have been planted, and the first sprouts are appearing. If we continue to cultivate the right environment, the harvest will

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[7] Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket Number 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket Number 96-98, page 4.

be bountiful."[8] To further Commissioner Ness' analogy, we must be careful not to over-fertilize the garden of competition with "non-discriminatory access" regulation. For then, the thorny weeds of constitutional issues would sprout, threatening to choke out any progress which is being made.

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By: _____
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Attorney for Cities of Fraser and
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Date: December 10, 1999

[8]Bruning, Deonne L., The Telecommunications Act of 1996: The Challenge of Competition, 30 Creighton L. Rev. 1255 (1997) (Citing FCC commissioner Susan Ness, Speech to the Atlanta Chapter of the Federal Communications Bar Association, February 4, 1997)), p.1285.