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1401 H Street NW  
Suite 600  
Washington DC  
20005-2164

Tel (202) 326-7300  
Fax (202) 326-7333  
www.usta.org

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April 21, 2000

Lawrence Strickling  
Chief, Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 5-C450  
Washington, D.C. 20554

RECEIVED  
APR 21 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Larry:

**Re: USTA Response to ALTS April 4, 2000 Letter on Collocation  
CC Docket No. 98-147**

On April 4, 2000, the Association for Local Telecommunications Services ("ALTS") filed a letter commenting on the remand of the Commission's collocation Order. In their letter, ALTS urges the Commission to establish a "rapid response team" to ensure that ILECs continue to provide collocation of competitors' equipment on ILEC premises consistent with the now vacated Commission regulations. ALTS specifically requests that the Commission require ILECs to provide cage to cage cross-connects and collocation of multi-function equipment in ILEC central offices.<sup>1</sup> According to ALTS, the Commission must act because its members "have reported" that ILECs are delaying collocation requests from competitors and to ensure deployment by CLECs of broadband services to all Americans, particularly in rural areas. ALTS argues that "CLECs need not only the right to keep existing equipment in place, but also the right to continue to collocate new equipment in accordance with the FCC's collocation rules."<sup>2</sup>

The ALTS letter ignores the current legal and regulatory state of affairs. The Commission's collocation regulations, which govern the regulatory relief sought by ALTS, have, in part, been vacated. On March 17, 2000, the United States Court of Appeals for the District of Columbia issued an opinion which vacated certain of the Commission's collocation regulations.<sup>3</sup> ALTS acknowledges that the Commission's collocation regulations have been vacated: "ALTS is confident that the Commission's collocation rules will be reinstated following completion of the

<sup>1</sup> ALTS Letter at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *GTE v. FCC*, No. 99-1201, slip opinion (D.C. Cir. March 17, 2000)

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remand proceeding.”<sup>4</sup> This statement ends any further debate over the relief ALTS seeks. When a federal appeals court vacates an agency Order, and remands the case to the agency for further review, the administrative agency is prohibited from enforcing regulations which have been vacated.<sup>5</sup> ALTS fails to cite any legal basis to support the unprecedented relief it seeks. Moreover, because the federal court of appeals has vacated certain Commission collocation regulations, state regulators are under no obligation to implement such regulations.

The federal appeals court opinion held that enforcement of the Commission’s vacated regulations advocated by ALTS would grant relief to CLECs that would amount to an impermissible takings of ILEC property. In vacating the Commission’s collocation regulations that defined the term necessary beyond the Supreme Court’s decision in *Iowa Utilities*, the federal appeals court concluded that “a broader construction of necessary under Section 251(c)(6) might result in an unnecessary taking of [ILEC] private property.”<sup>6</sup> The federal appeals court also determined that paragraph 42 of the Commission’s collocation Order permitted CLECs unprecedented authority to pick and choose where to collocate their equipment on ILEC property. In vacating this regulation, the federal appeals court stated that the Commission had failed to explain “why a competitor, as opposed to the LEC, should choose where to establish collocation on LEC property,” and that the sweeping language appeared to once again “favor the LECs’ competitors in ways that exceed what is necessary to achieve reasonable physical collocation and in ways that may result in unnecessary takings of LEC property.”<sup>7</sup>

Enforcement by the Commission of vacated collocation regulations that allowed CLECs to collocate multi-function equipment and cross-connects on ILEC premises, during the pendency of the Commission’s remand proceeding, would be inconsistent with the federal appeals court opinion. The federal appeals court opinion also rejected the ALTS’ argument that collocating equipment not required by Section 251(c)(6) was necessary because of alleged cost savings.<sup>8</sup>

ALTS also makes vague and unsupported assertions that ILECs are delaying access by CLECs to collocation arrangements. CLECs are permitted to negotiate agreements with ILECs that allow collocation of CLEC equipment on ILEC property “that is directly related to and thus necessary, required, or indispensable to interconnection or access to unbundled network

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<sup>4</sup> ALTS Letter at 2.

<sup>5</sup> See, e.g., *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Iowa Utilities Board v. FCC*, 135 F.3d 535, 541-543 (8<sup>th</sup> Cir. 1998).

<sup>6</sup> *GTE v. FCC*, slip opinion at 8.

<sup>7</sup> *Id.* slip opinion at 11.

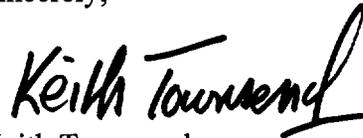
<sup>8</sup> *Id.* slip opinion at 8-9.

elements.”<sup>9</sup> ALTS provides no evidence that CLECs are being denied such access consistent with the opinion of the federal appeals court. Similarly, ALTS provides no evidence that deployment of broadband facilities by CLECs to rural areas is impeded.

The ALTS letter is little more than an attempted end-run around a federal court of appeals opinion which vacated the very Commission regulations which ALTS seeks to have unilaterally reinstated. USTA urges the Commission to support efforts by well-intentioned parties to negotiate collocation agreements that are consistent with the requirements of the 1996 Act and the March 17 opinion of the federal court of appeals. The Commission has received letters from several ILECs expressing their intent to work with CLECs to facilitate fair and reasonable collocation arrangements, while the Commission expedites its review. Nevertheless, the relief sought by ALTS in its April 4 letter goes beyond what the Commission may order, is unnecessary, and should be denied. Accordingly, USTA urges the Commission to refrain from issuing any interim collocation order that would be at odds with the collocation decision of the federal court of appeals.

Please contact me should you have any questions regarding this matter.

Sincerely,

A handwritten signature in black ink that reads "Keith Townsend". The signature is written in a cursive, slightly slanted style.

Keith Townsend  
Director Legal & Regulatory Affairs  
& Senior Counsel

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<sup>9</sup> *Id.* slip opinion at 9.

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Harold W. Furchtgott-Roth  
Commissioner Michael K. Powell  
Commissioner Gloria Tristani  
Kathy Brown  
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Michele Carey, Chief, CCB/Policy  
Jake Jennings, Deputy Chief CCB/Policy  
Magalie Roman Salas, Secretary, FCC  
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