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OFFICE OF THE SECRETARY

May 3, 2000

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Via Hand Delivery

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

Re: Ex Parte Presentation in CC 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 a written ex parte presentation in the above-captioned proceeding. On May 3, 2000, the enclosed letter was delivered to Chairman Kennard, with copies to each of the other Commissioners, and the following members of the Commission staff:

Office of General Counsel: Christopher Wright, Joel Kaufmann and Jane Halprin
Wireless Telecommunications Bureau: Thomas Sugrue, Jeffrey Steinberg and Joel Taubenblatt
Common Carrier Bureau: Lawrence Strickling
Cable Services Bureau: Deborah Lathen

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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: Hon. William Kennard
Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael Powell
Hon. Gloria Tristani
Christopher Wright, Esq.
Lawrence Strickling, Esq.
Thomas Sugrue, Esq.
Deborah Lathen, Esq.
Jeffrey Steinberg, Esq.
Joel Taubenblatt, Esq.
Joel Kaufmann, Esq.
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May 3, 2000

BY HAND

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 and CC Docket No. 96-98

Dear Chairman Kennard:

On behalf of the Real Access Alliance,[1] I wish to bring to your attention certain statements regarding the scope of the Commission's authority that were made by the Court of Appeals for the Eleventh Circuit in *Gulf Power v. FCC*, ___ F.3d ___, No. 98-6222 (11th Cir.,

[1] The Real Access Alliance was formed to encourage free market competition among telecommunications companies in providing quality services to tenants in commercial and residential buildings and to safeguard the constitutional private property rights of America's real estate owners. The Alliance consists of the following organizations: the Building Owners and Managers Association, International; the Institute of Real Estate Management; the International Council of Shopping Centers; the Manufactured Housing Institute; the National Apartment Association; the National Association of Home Builders; the National Association of Industrial and Office Properties; the National Association of Real Estate Investment Trusts; the National Association of Realtors; the National Multi Housing Council; and the Real Estate Roundtable.

Apr. 11, 2000). This decision reinforces the Alliance's arguments against the proposals for forced building access being considered in the above-captioned proceeding.

As you know, the Notice of Proposed Rulemaking (the "NPRM") requested comment on the Commission's authority to adopt regulations granting competitive local exchange carriers ("CLECs") the right to enter and install their facilities in office buildings, apartment buildings, and other multitenant environments. The NPRM proposed various theories under which the Commission might have such authority, including rules requiring building owners to adhere to nondiscriminatory access regulations, primarily under the authority of Section 4(i), and rules requiring incumbent local exchange carriers and other utilities to make their access rights inside buildings available to CLECs, under the authority of Section 224. In comments and reply comments, the Real Access Alliance has pointed out that the Commission cannot implement those proposals because the statutory provisions in question simply do not confer the necessary authority.

The recent *Gulf Power* decision confirms the Alliance's position. Among other issues, the court addressed the Commission's decision to extend the benefits of Section 224 to wireless telecommunications providers. The Commission had determined that the amendments to Section 224 made by the Telecommunications Act of 1996 authorized the Commission to require electric power companies and telecommunications carriers to make their poles, ducts, conduits and rights-of-way available to wireless telecommunications providers on nondiscriminatory terms and conditions.

Citing the legislative history of the Pole Attachment Act and quoting the Commission's own decision in *California Water and Tel. Co., et al.*, 40 R.R.2d 419 (1977), in which the Commission ruled that the leasing of poles and conduits did not constitute communications by wire or radio, the court confirmed that prior to the enactment of the Pole Attachment Act in 1978, the Commission had no authority to regulate any aspect of the electric power industry. The court noted that the FCC's "narrow authority" over electric utilities extends only to the regulation of pole attachments. The court then went on to find that under Section 224(a)(1), the Commission's authority over electric utilities is even narrower because it applies only to facilities used for "wire communications." Because Congress did not include facilities that could be used for *wireless* communications within the scope of Section 224, the court held that the Commission cannot regulate attachments to be used for wireless communications.

The *Gulf Power* decision thus highlights the flaws in the two principal theories for forced building access proposed in the NPRM. First, the Commission cannot adopt general nondiscriminatory access requirements binding on building owners, because, like electric utilities, building owners cannot be brought within the scope of the Communications Act without express action by Congress. If the Commission's authority did not extend to electric utilities that own ducts, poles, conduits and rights-of-way without amending the Act, then neither does the Commission have the authority to regulate access to office buildings, apartment buildings, or other real estate that is not owned by a regulated carrier without further amendment of the Act.

We understand that there is substantial controversy with respect to the validity of other aspects of the 11th Circuit's decision, specifically whether Internet service is a cable service, a telecommunications service, or some other kind of service. Our point does not turn on the validity of these determinations, however, but instead is a much simpler one: given the limitations on its jurisdiction, the Commission cannot assert authority over property merely because it is useful to a potential cable or telecommunications service provider. Indeed, in *California Water and Tel. Co.*, as the *Gulf Power* court noted, the Commission stated:

> The fact that cable operators had found in-place facilities convenient or even necessary for their businesses was not sufficient basis for finding that the leasing of those facilities was wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

California Water and Tel. Co. at 426.

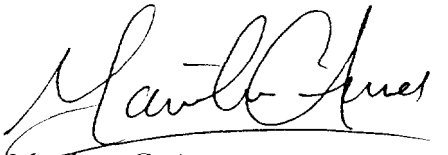
The 1996 Act's amendments to Section 224 do nothing to alter this analysis.

Second, the *Gulf Power* decision means that the Commission cannot rely on Section 224 as a general tool for giving CLECs access to buildings. Even if Section 224 applied to building access rights, which we have strongly disputed in our submissions to the Commission, wireless CLECs would be unable to rely on any regulations adopted under that purported authority. Not only does this mean that the prime movers behind the proposals in the NPRM cannot benefit from any effort to extend Section 224 to building access rights, but it means that the Commission cannot adopt competitively neutral and nondiscriminatory rules that confer the same rights on wireline and wireless carriers alike.

Accordingly, we again urge the Commission to close this proceeding immediately and without further action. The Commission does not have the power to adopt forced building access rules of any kind. Furthermore, the record amply demonstrates that the purported problem to be solved by the proposals in the NPRM does not exist: building owners are granting access to CLECs on fair terms, and the CLEC industry is growing at an enormous rate. The best thing the Commission can do is simply to allow the market to continue to work.

Very truly yours,

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

By 

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