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OF COUNSEL:
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May 10, 2000

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 CC Docket No. 96-98

Dear Ms. Salas:

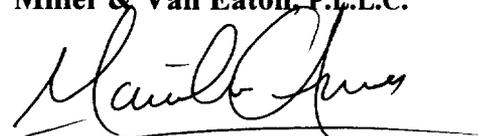
Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding. On May 9, 2000, I met with Jeffrey Steinberg, Joel Taubenblatt Lauren Van Wazer, Paul Noone and Leon Jackler of the Wireless Telecommunications Bureau and Eloise Gore of the Cable Services Bureau. We discussed the matters addressed in the attached written ex parte presentation.

Please contact the undersigned with any questions.

Very truly yours,

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

By


Matthew C. Ames

cc: Jeffrey Steinberg, Esq.

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Lauren Van Wazer, Esq.
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SECTION 224 DOES NOT AUTHORIZE THE COMMISSION TO REGULATE THE TERMS OF ACCESS TO PRIVATE BUILDINGS

- **The Commission Cannot Adopt Nondiscriminatory Access Rules Because It 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). 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 narrow grant of authority contained in Section 224 confirms that additional authority from Congress would be needed to bring building owners within the Commission’s regulatory reach. Like electric utilities, building owners are not engaged in communications by wire or radio. *See California Water and Tel. Co.*, 40 R.R.2d 419 (1977). Under the logic of *Gulf Power v. FCC*, ___ F.3d ___, No. 98-6222 (11th Cir., Apr. 11, 2000), the Commission cannot adopt general nondiscriminatory access requirements binding on building owners without express action by Congress.
 - 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.
- **Section 224 Does Not Apply to Building Access Rights.**
 - Section 224 was never intended to include access to buildings, and has never been interpreted to do so. The legislative history of Section 224 specifically rejects any claim that Section 224 was intended “to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire or . . . access and rents for antenna sites.” S. Rep. 95-580, 95th Cong. 1st Sess. (1977) at p. 16. This language demonstrates first that Congress did not intend to alter underlying property rights and second that Congress was not thinking of access inside buildings.
 - 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.
- **Even if Section 224 Applied to Building Access Rights, Under *Gulf Power* Section 224 Does Not Apply to Wireless Facilities.**
 - Although the attachments addressed in *Gulf Power* primarily benefit PCS and cellular carriers, the holding of the case – that Section 224 does not require utilities to permit attachments for wireless facilities – applies to fixed wireless providers as well.
 - The Commission therefore cannot rely on Section 224 as a general tool for giving CLECs access to buildings, because wireless CLECs would be unable to benefit from any regulations adopted under Section 224.

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