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JUL 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 20, 2000

Via Hand Delivery

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

ORIGINAL

Re: Ex Parte Presentations in WT Docket No. 99-217 and 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 three copies of a letter disclosing oral and written ex parte presentations in the above-captioned proceedings.

On July 19, 2000, the following representatives of the Real Access Alliance conducted a series of meetings with members of the Commission and Commission staff:

Professor Lawrence Tribe
Jonathan Massey

James Arbury
Gerard Lavery Lederer
Roger Platt

National MultiHousing Council and National Apartment Association
Building Owners and Managers Association, International
Real Estate Roundtable

Matthew C. Ames
Steven Rosenthal
Kathleen Wallman

Miller & Van Eaton, P.L.L.C.
Cooper Carvin & Rosenthal, P.L.L.C.
Wallman Strategic Consulting, L.L.C.

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The Real Access Alliance members met with the following offices and individuals:

Office of the General Counsel and Wireless Telecommunications Bureau

Chris Wright	Jeff Steinberg
David Horowitz	Joel Taubenblatt
Joel Kaufmann	Lauren Van Wazer
Jonathan Nuechterlein	
Chris Babbitt	

Office of Commissioner Ness

Commissioner Ness
Mark Schneider
Daniel Mah
Kevin Scott

Office of Commissioner Tristani

Adam Krinsky
Sarah Whitesell
Kathryn Arnold
Sonia Williams

Office of Commissioner Powell

Commissioner Powell
Peter Tenhula
Kyle Dixon
McLean Sieverling
Patrick Sullivan

Office of Chairman Kennard

Chairman Kennard
Clint Odom
Thomas Sugrue
Chris Wright

Office of Commissioner Furchtgott-Roth

Commissioner Furchtgott-Roth
Helgi Walker
Nathan Alexander

In all of the meetings, Professor Tribe presented his views on the constitutionality of the proposals for building access contained in the Notice of Proposed Rulemaking. Professor Tribe stated that any rule that would require a building owner to admit a telecommunications service provider to a building would constitute a *per se* taking under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979). The right to exclude is a fundamental element of a property right and the *per se* taking rule is a “bright line” test. For this reason, attempts at regulating other entities in an effort to influence building owners’ decisions in any way other than encouraging negotiations raises the takings issue. Similarly, a nondiscriminatory access requirement is also taking, because it abrogates the right to exclude. The right to exclude includes the right to exercise it selectively, or it is meaningless. The fact that the government may have the authority to regulate the relationship between the owner and an occupant once the owner has allowed the person to come in does not mean that the government can tell the owner who must be allowed entry.

Although it would be possible to develop a constitutionally valid scheme that provided for proper compensation, it would be a complicated matter, and the Commission’s ancillary authority is insufficient to accomplish that goal.

Professor Tribe also noted that under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), not only must the authority to take property be expressly conferred by Congress, but the compensation mechanism must be established or authorized by Congress. For an agency to take property without such express authorization would commit the Treasury to pay compensation without a directive from Congress to raise the necessary revenue and appropriate the necessary funds, as required by the Constitution. Even a rule requiring private parties to pay compensation would violate these requirements, because such a rule would be the equivalent of imposing a tax on the persons providing the compensation.

Commission staff were given copies of *Critical Connections*, a recent publication of BOMA, which incorporates the results of a survey of building owners, managers and tenants regarding telecommunications issues. A copy of the executive summary of *Critical Connections* is attached, and copies of the complete report are available upon request. In addition, Professor Tribe will prepare a written summary of his views on the Constitutional issues raised by the proceeding, which will be submitted for the record.

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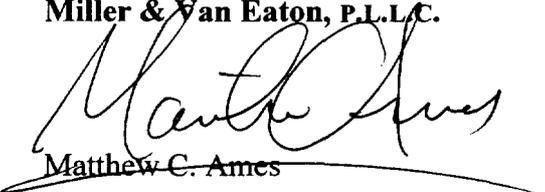
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Please contact the undersigned with any questions.

Very truly yours,

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

By


Matthew C. Ames

cc:

Hon. William Kennard
Hon. Harold Furchtgott-Roth
Hon. Susan Ness
Hon. Michael Powell
Nathan Alexander
Kathryn Arnold
Chris Babbitt
Kyle Dixon
David Horowitz

Joel Kaufmann
Adam Krinsky
Daniel Mah
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