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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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August 9, 2000

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

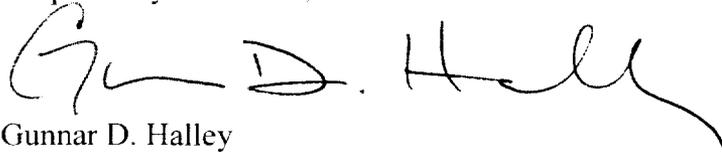
Re: Ex Parte Presentation in WT Docket No. 99-217/and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from Philip Verveer and the undersigned, on behalf of the Smart Buildings Policy Project to Adam Krinsky, Legal Advisor to Commissioner Tristani delivered today that concerns the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation.

Respectfully submitted,



Gunnar D. Halley

Counsel for
SMART BUILDINGS POLICY PROJECT

cc: Adam Krinsky

Enclosure

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August 9, 2000

Mr. Adam Krinsky
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Krinsky:

During the course of our August 7th meeting, we discussed the Supreme Court's *Ambassador* decision¹ and the Commission's ability to adopt a similar approach in the context of the *Competitive Networks* rulemaking. That approach relies, in part, upon the Commission's statutory authority to join and issue orders against non-carrier parties to an enforcement proceeding who would be affected by or have an interest in the practice under investigation.² You inquired as to whether the Commission had used or discussed use of Section 411(a) of the Communications Act in prior decisions.

The history of the Commission's rules governing the use of recording devices presents a scenario quite similar to the one underlying the *Ambassador* case and the enforcement of those rules is premised partly upon an appropriate reading of Section 411(a). The Commission prescribed telephone company tariff provisions permitting the use of customer-provided telephone recording devices, and mandated a beep tone to ensure that parties to a telephone conversation were aware they were being recorded. In commenting upon the effect of these tariff provisions, Commissioner Kenneth Cox explained:

The tariffs filed by the carriers with this Commission require, as a condition of service covered by those tariffs, that no subscriber may use recording device in connection with telephone service without the 'beep' tone. It is the scheme and intent of the provisions of the Communications Act that the carriers have the basic responsibility to render service in accordance with the terms and conditions of their tariffs and to insure that their customers comply with such terms and conditions. These tariffs, so long as they are in effect, have the force of law as to both the telephone users and the carriers. Failure on the part of users to comply with the terms of the tariff in this respect subjects them to possible loss of service,

¹ *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945).

² 47 U.S.C. § 411(a).

Washington, DC
New York
Paris
London

Mr. Adam Krinsky

August 9, 2000

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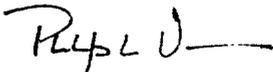
and to injunctive action pursuant to Sections 401(b) and 411(a) of the Communications Act.³

The Commission has used its Section 411(a) authority on many occasions to join to a proceeding parties who are interested in or affected by the matter at issue, typically above the objections of the joined parties.⁴ In the FCC decisions citing Section 411(a), the Commission uniformly interprets the provision broadly as enabling joinder of the relevant parties. As a Common Carrier Bureau Order states,

Section 411 of the Communications Act grants broad authority to the Commission as to parties who may be brought before it in any proceeding. . . . The Commission has required the inclusion of parties based on factors such as ownership and control of other essential parties, or where the party to be joined would be interested in or affected by a rule or other matter under scrutiny.⁵

The Commission's historic use of Section 411(a), in conjunction with the unanimous Supreme Court decision approving of the use of that provision to enjoin non-carriers from certain practices, demonstrates that it would be wholly appropriate for the Commission to employ the provision to accomplish nondiscriminatory telecommunications carrier access to MTEs.

Respectfully submitted,



Philip L. Verveer
Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

³ Amendment of Part 64 of the Commission's Rules Relating to Use of Recording Devices by Telephone Companies, Docket No. 17152, *Notice of Proposed Rulemaking*, 6 FCC2d 587 (1967)(concurring statement of Commissioner Kenneth A. Cox).

⁴ See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co., Docket No. 17441 et. al, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969); Armstrong Utilities v. General Telephone Company of Pennsylvania, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970); Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, Docket Nos. 19151, 19152 P-C-7655 P-C-7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971); Comark Cable Fund III v. Northwestern Indiana Telephone Co., File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985); Continental Cablevision of New Hampshire, Inc., Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d 89 at ¶ 6 (1974).

⁵ General Services Administration v. American Tel. & Tel. Co., File No. E-81-36, *Order*, 2 FCC Rcd at n.20 (CCB, 1987).