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VIA HAND DELIVERY

**EX PARTE**

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August 21, 2000

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

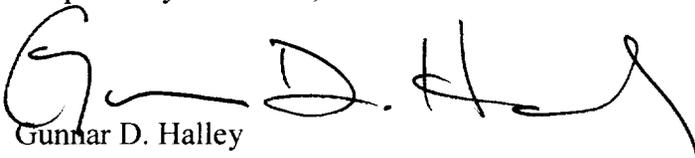
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from Thomas Cohen, on behalf of the Smart Buildings Policy Project, to Chairman Kennard, Commissioner Ness, Commissioner Furchtgott-Roth, Commissioner Powell, and 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,



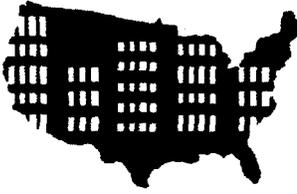
Counsel for the  
SMART BUILDINGS POLICY PROJECT

- |     |                        |                         |                              |
|-----|------------------------|-------------------------|------------------------------|
| cc: | Chairman Kennard       | Commissioner Ness       | Commissioner Furchtgott-Roth |
|     | Commissioner Powell    | Commissioner Tristani   | Kathryn Brown                |
|     | Clint Odom             | Mark Schneider          | Helgi Walker                 |
|     | Peter Tenhula          | Adam Krinsky            | Thomas Sugrue (WTB)          |
|     | Jim Schlichting (WTB)  | Jeffrey Steinberg (WTB) | Joel D. Taubenblatt (WTB)    |
|     | Lauren Van Wazer (WTB) | Leon Jackler (WTB)      | Eloise Gore (CSB)            |
|     | Cheryl King (CSB)      | Wilbert Nixon (WTB)     | Paul Noone (WTB)             |
|     | Mark Rubin (WTB)       | David Furth (WTB)       | Richard Arsenault (WTB)      |

Enclosure

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## Smart Buildings Policy Project

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VIA HAND DELIVERY

August 21, 2000

**EX PARTE**

The Honorable William Kennard, Chairman  
The Honorable Susan Ness, Commissioner  
The Honorable Harold Furchtgott-Roth, Commissioner  
The Honorable Michael Powell, Commissioner  
The Honorable Gloria Tristani, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W.  
Washington, DC 20554

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

Dear Mr. Chairman and Commissioners:

In regard to efforts to develop policies and practices to ensure that people living or working in multi-tenant environments have access to their telecommunications carriers of choice, the Real Access Alliance ("RAA") recently has discussed entering into negotiations with the Smart Buildings Policy Project ("SBPP"). It has also made, on August 14th, tentative "commitments" to the Federal Communications Commission. While the SBPP welcomes efforts to further telecommunications competition for tenants, the RAA negotiation proposals and commitments to the FCC are inadequate to resolve the problems that impair or prevent consumer choice, particularly in light of the notable absence of any legally binding obligations or enforcement mechanisms in relation to the proposals. As noted below, the RAA proposals further demonstrate that without decisive Commission action, many residential and commercial tenants will continue to be left without a choice in telecommunications options, rendering the 1996 Telecommunications Act a nullity for too many Americans.

### **RAA Negotiation Proposals**

On August 8, 2000, at the invitation of the SBPP, Kathy Wallman and Brett Tarnutzer, attended a meeting on behalf of the RAA to discuss negotiating with the telecommunications industry for model terms and conditions governing telecommunications carrier access to multi-tenant buildings. During the course of that meeting, it became apparent that the RAA is unwilling to negotiate on the core issues in the above-referenced proceeding. That is, Ms. Wallman stated unequivocally and on multiple occasions that the RAA would not voluntarily

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submit itself to the FCC's enforcement jurisdiction. Accordingly, it refuses to negotiate any compromise that includes a legally binding obligation (with an executable enforcement mechanism) on the part of building owners to permit reasonable and nondiscriminatory telecommunications carrier access to their buildings enabling tenants to exercise their individual preferences in telecommunications carriers. Indeed, even if the RAA was willing to commit to such practices, because its membership does not comprise the universe of building owners, it would be impossible to ensure all tenants access to the carrier of their choice in the absence of a legally binding requirement. Moreover, voluntary opt-ins to voluntary arrangements leave tenants and carriers in a precarious position because compliance with model terms without a corresponding mandatory obligation to comply remains unenforceable. Carriers and tenants would continue to be in precisely the same position as they are today — with no power or reasonable recourse available to address unreasonable building owner behavior. The SBPP appreciates Ms. Wallman's efforts at dialogue and initially was encouraged by overtures of potential compromise, but the offers that her client authorizes her to make are woefully inadequate to remedy the problem and fall far short of representing any progress toward resolution of this issue — one that has slowed the deployment of competitive broadband telecommunications for over four years. Indeed, as discussed in greater detail below, the measures offered by the RAA would serve to interject the building owner between the tenant and its desired telecommunications provider to an even greater degree than exists today.

### **RAA Commitments to the FCC**

On August 14, 2000, the RAA submitted to the Commission a written explanation of the voluntary commitments to which it referred in its July 13, 2000 letter to Chairman Kennard. Unfortunately, the commitments contained therein are largely meaningless and, in some instances, represent a disturbing attempt by the RAA to gain regulatory sanction to further exploit the bottleneck they currently control.

**Non-Exclusivity in Office Building Contracts:** The non-exclusivity commitment would not apply to the residences of *one-third of all Americans* given that it fails to proscribe exclusivity in residential environments. The apparent unwillingness to invalidate existing exclusive agreements is also troubling. In fact, the Building Owners and Managers Association ("BOMA") made the recommendation against exclusive contracts to its members and has been doing so for years — notably, with little success. This commitment is nothing new and there is



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no reason to believe the RAA's promotion of limited, prospective, non-exclusivity alone will enjoy more success than BOMA's past efforts. Moreover, exclusivity is not the only form of discriminatory behavior that must be corrected. Preferential treatment contracts should not be allowed to give, for example, a telecommunications carrier that is a subsidiary of a building owner preferential treatment over other carriers who are not so affiliated.

**Quantitative Study:** The proposal to conduct a quantitative study is a classic method of delaying or terminating the prospect of government action. Moreover, this proposal erroneously presupposes that the telecommunications industry has no need to complain — that the substantial resources expended by the telecommunications industry on this effort are for no real purpose. The record of thousands of pages filed in this proceeding since its inception over a year ago is evidence to the contrary. Many carriers and, most significantly, the Association for Local Telecommunications Services, filed with the Commission many specific examples and general trends of the unreasonable building owner practices that are occurring in the absence of an FCC rule. The RAA's own data demonstrates that negotiations with telecommunications carriers often fail, and that when they *do* succeed, building access contracts take longer to negotiate than typical landlord/tenant lease agreements. Further quantitative data is not necessary to demonstrate unequivocally that a problem exists. Of course, after government action occurs, it would be instructive to review studies by the RAA and other elements representing consumers and service providers to ascertain the rate at which consumer choice improves.

**Clearinghouse for Information and Complaints:** This proposal recognizes that recourse is important, but the procedure it offers is ineffective and establishes an unnecessary bureaucracy. Only the threat of regulatory action will minimize incentives for unreasonable behavior among all building owners and managers.

**Speed of Processing:** The SBPP is pleased that the RAA has recognized how critical the speed of processing building access requests is to consumers, to carriers and, more generally, to the proper functioning of a competitive marketplace. After over a year of doing nothing, though, the RAA still fails to commit to action. The vagueness of the "proposal" is underscored by the frequent use of tentative "might" language. For example, the effort "*might* include deciding to establish and promote a practice of timely responses." The practice "*might* be to respond within 30 days with a yes or no answer" and "there *might* then be a further commitment that *office* building owners use their *best good faith efforts* to accommodate the tenant requests." The



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RAA's refusal to commit firmly and unequivocally that, absent safety or space constraints, telecommunications carriers will not only have a yes answer, but will also gain access to the building pursuant to a completed agreement within thirty days of a request demonstrates the futility of these discussion efforts.

Material Advantages Offered by Another Provider: The most disturbing component of the RAA proposal is the recommendation that:

in buildings where there are multiple competitive providers already serving the building, the tenant should be informed of the availability of the existing alternatives. The tenant, in turn, should indicate to the building owner whether there are material advantages offered by another provider whose services the tenant is seeking.

This is a shockingly anti-competitive proposal. The initial carriers seeking access to a building will have an incentive to pay higher access prices, offer revenue sharing, or give an equity interest to the building owner — benefits having nothing to do with the quality of service offered to tenants in the building — in exchange for a functioning oligopoly with an effective right of first refusal within the building. This arrangement is particularly egregious where the building owner maintains a financial interest in one of the existing carriers in the building. In such a case, the building owner will be able to inform its affiliate of the deals offered by competitive carriers and provide its affiliate the ability to match any competing offers for the tenant in question (whether on the basis of service, rates, billing practices, etc.) *before* the competitor is even given an *opportunity* to serve. This proposal is ripe for monopolist pricing, extraction of consumer welfare by certain carriers and the building owner, selectively offered competitive benefits, and discriminatory treatment of consumers within the building. It represents an incredible effort to enlist the Commission to give credibility to gouging competitors and protecting affiliates without regard for the interest of the consumer through exercise of the bottleneck, gatekeeping function that is at the source of the problem in this proceeding. Moreover, it substantially increases the burden of choosing a competitive carrier by requiring the tenant to justify its choice of a new carrier against other carriers — none of which are likely to have an existing relationship with the tenant.

In sum, the RAA suggests that its proposals reflect a consideration of the issues by the leaders of the individual members, albeit over a year after the issue was raised by the Commission. Still, at this late date, they adamantly refuse to embrace a nondiscriminatory access environment with enforcement conditions and fail to voluntarily commit to anything meaningful,

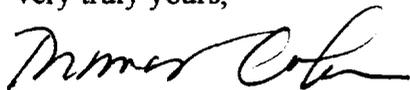


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concrete, or effective as an alternative. As a result, their proposals underscore the need for Commission action to stop the one-sided game playing by building owners that, in the end, is designed to preserve their unfettered ability to exclude or discriminate among telecommunications carriers from whom their tenants have requested service.

The SBPP re-emphasizes the critical importance of enforceable Commission action that will require building owners to give effect to consumer telecommunications preferences in their buildings. A competitive telecommunications model is wholly dependent upon the expression of consumer preferences. Lacking the ability for consumers to express those preferences (due to restrictions on choice caused by unreasonable building owner behavior), the competitive telecommunications model simply will not function properly. If it seeks to promote competitive markets and the interests of consumers, the Commission is obligated to act. The Commission must not be under the mistaken illusion that the RAA's long overdue and sorely inadequate overtures are capable of resolving this problem.

Very truly yours,



Thomas Cohen

cc:	Clint Odom	Mark Schneider	Helgi Walker
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	Thomas Sugrue (WTB)	Jim Schlichting (WTB)	Jeffrey Steinberg (WTB)
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