

# WILLKIE FARR & GALLAGHER

VIA HAND DELIVERY

## EX PARTE

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September 7, 2000

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

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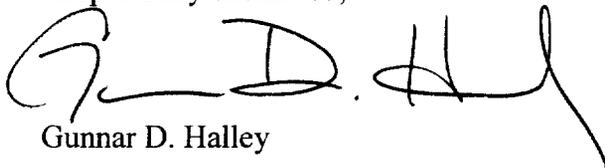
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

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,



Gunnar D. Halley

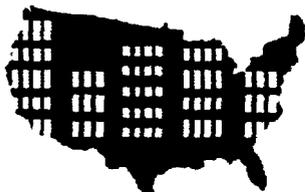
Counsel for the  
SMART BUILDINGS POLICY PROJECT

- |                        |                         |                              |
|------------------------|-------------------------|------------------------------|
| cc: Chairman Kennard   | Commissioner Ness       | Commissioner Furchtgott-Roth |
| Commissioner Powell    | Commissioner Tristani   | Kathryn Brown                |
| Clint Odum             | Mark Schneider          | Helgi Walker                 |
| Peter Tenhula          | Adam Krinsky            | Thomas Sugrue (WTB)          |
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| Lauren Van Wazer (WTB) | Leon Jackler (WTB)      | Eloise Gore (CSB)            |
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Enclosure

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## Smart Buildings Policy Project

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September 7, 2000

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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:

Yesterday, the Real Access Alliance (“RAA” or “Alliance”) submitted its strategy for implementing its building access commitments. Although the Alliance claims to represent over one million owners and operators of real estate nationwide, it was only able to obtain commitments — as ineffective as such commitments are — from twelve owners and operators of real estate. That leaves the vast majority of RAA member owners and operators of real estate without having agreed to any commitments (and, of course, there presumably are more owners and operators of real estate who are not even members of the Alliance). This underscores the need for an enforcement mechanism that will ensure that tenants in the buildings owned by the RAA member owners and operators of real estate who have not agreed to commitments are not denied the benefits of competition, and to ensure that the twelve members who *have* made commitments will not engage in unreasonable practices.

### REAL ACCESS ALLIANCE COMMITMENT LETTER

The Smart Building Policy Project’s (“SBPP”) objections to the RAA’s “commitments” were explained in some detail in a letter submitted to the Commission in the above-referenced dockets on August 21<sup>st</sup>. In its submission to the Commission yesterday, the RAA completely ignored the SBPP’s very serious and legitimate concerns. Without restating all of the shortcomings in the “commitments” of the 12 RAA members, it is worth emphasizing that the commitments fall far short of permitting any meaningful opportunity for the proper functioning of a competitive telecommunications marketplace in multi-tenant buildings.

**SBPP/ALTS**  
**Suite 900**  
**888 17th Street NW**  
**Washington, DC 20006**  
**Tel: 202-969-2587**  
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The Honorable William Kennard, Chairman  
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The Honorable Michael Powell, Commissioner  
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- **Exclusive contracts**: The “commitments” only go to telecommunications carrier-solicited exclusives. They permit the building owner to demand exclusions from the carrier in exchange for exclusives. Again, by limiting the “commitments” to commercial buildings, they also fail to even address exclusive arrangements in residential buildings.
- **Burden on tenants**: The “commitments” place an inordinate burden on tenants in even attempting to secure the services of a new competitive telecommunications carrier. The Alliance “commitments” not only preserve the current anticompetitive gatekeeping function of the building owners, they actually enhance this role by retaining the outrageous requirement that a tenant prove to the landlord that the tenant’s choice of telecommunications carrier is superior to existing alternatives.
- **Speed of processing**: Again, the “speed of processing commitments” are not speedy. They vaguely commit *only* to a “yes” or “no” answer within thirty days and *only* if several conditions are first satisfied by the carrier. Of course, this allows an indefinite period of time for delay in reaching a final agreement before the carrier can begin installation. This process is all supposed to occur while the tenant patiently waits for service. If tenants are routinely subjected to this lengthy provisioning delay process, it would be no surprise if tenants were left unimpressed with the “so-called” benefits of competition.

#### DEBATES BEFORE COMMISSIONER TRISTANI AND COMMISSIONER NESS

During the course of the SBPP/RAA debate before Commissioner Ness yesterday, it became increasingly apparent that building owners seek to appropriate the benefits of competition that are intended to go to telecommunications consumers. Broadband Office explained that its strategy of giving landlords an interest in its company was necessary to obtain access to multi-tenant buildings. That demonstrates the market power of building owners, and it represents the misappropriation of the benefits of competition that the Communications Act and the Commission’s policies have directed to consumers. The financial benefits accruing to the landlords with an interest in Broadband Office are competitive benefits that consumers in those buildings will not realize. This is an unacceptable paradigm for the future of telecommunications and completely at odds with the federal goal of using competition for the benefit of telecommunications consumers.

Also during the course of yesterday’s debates, the Alliance claimed that because carriers were not serving every building for which they had obtained access agreements, the problem of a lack of competitive choice for tenants in multi-tenant buildings was borne of telecommunications carrier strategies — not of unreasonable building owner practices. This invalid suggestion warrants prompt correction. Some telecommunications carriers engage in a strategy of seeking access to buildings prior to engaging in efforts to attract customers in those buildings precisely because of those unreasonable building owner practices that cause excessive delays in serving customers that have



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already signed up for service. The substantial possibility that carriers will be unable to gain access to a building — and the likelihood of delay of a year or more even if an access agreement is reached — makes it unwise in the view of these carriers to risk their reputation with customers on the willingness of the building owners to permit access. Access is often obtained first so that provisioning can then occur and occur quickly once a customer signs up for service. Were building owners more reasonable and subject to timely access obligations, these practices would not be so necessary. It is also worth mentioning that building owners and carriers often enter into portfolio agreements. That is, if a carrier seeks access to a building owner's property, negotiations will cover access to all of the properties that the landlord owns — even if the buildings fall outside the carrier's licensed service territory or otherwise extend far beyond the area of the carrier's immediate construction schedule. This leads to the inevitable result that some buildings will be left without service from the competitive carrier until the carrier's construction schedule (and, in the case of wireless carriers, licensed service areas) reaches those buildings.

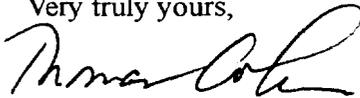
Finally, during the course of both debates yesterday, the RAA repeatedly referred to its "empirical study" as evidence for the proposition that telecommunications carriers are not, in fact, having any material difficulties obtaining access to multi-tenant buildings. Senior executives from several telecommunications carriers including WorldCom, Time Warner Telecom, Teligent, and Winstar, explained in great detail to Commissioner Ness during the course of yesterday's debate the severity and magnitude of the access problem for facilities-based carriers. Moreover, the RAA study is flawed and statistically useless, and the Commission should not rely upon it as anything more than anecdote (although it even lacks the specifics of anecdotal evidence). Winstar's reply comments in this docket include the analysis of the RAA study by economist Dr. John Hayes. Dr. Hayes shows that only 5 percent of surveyed members actually responded to the survey and that the manner in which the survey was presented and by which RAA members were requested to respond was biased and may have caused building owners to alter their responses in fashion more favorable to the RAA regulatory position. Moreover, even facially, the RAA analysis raises serious concerns. As Dr. Hayes explains, "[b]ased on the survey data, we know that at least 35 percent of requests for access fail. In addition, we know that this fraction understates the true proportion of requests that fail, because some of the requests still in negotiations will ultimately fail." After compensating for incomplete negotiations, even using the flawed numbers of the RAA survey, Dr. Hayes concludes that 55 percent of competitive access requests are ultimately unsuccessful — an alarmingly high figure demonstrating the need for Commission action.



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The Commission has had this issue before it for over ten years, more than four dealing with this precise issue, without acting, although it has more than an adequate basis for action. In over a year of just this rulemaking, over 1150 electronic submissions have been made available on the Commission's ECFS system. No further empirical evidence is necessary to substantiate the magnitude of the problem. The access barriers that carriers face nationwide are worsening and the ineffective "commitments" of twelve building owners are woefully insufficient to correct the problem. Of course, the SBPP members would prefer to reach agreements through voluntary negotiations, and they do so where possible. However, because of continued flaws in the market, many building owners lack the incentive to enter into fruitful negotiations particularly when they retain a financial or ownership interest in a carrier themselves. Nevertheless, with an assertion of FCC jurisdiction and action in this rulemaking prohibiting discrimination, the possibility for successful access negotiations will increase. The Commission must act decisively and quickly to ensure that competitive telecommunications carriers are not subject to undue discrimination in their efforts to serve tenants in multi-tenant buildings.

Very truly yours,



Thomas Cohen

cc:	Clint Odom	Mark Schneider	Helgi Walker
	Peter Tenhula	Adam Krinsky	Kathy Brown
	Thomas Sugrue (WTB)	Dorothy Attwood (CCB)	Jim Schlichting (WTB)
	Jeffrey Steinberg (WTB)	Joel D. Taubenblatt (WTB)	Lauren Van Wazer (WTB)
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