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VIA HAND DELIVERY

September 7, 2000

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Dear Ms. Salas:

Commissioner Ness held a debate yesterday afternoon between members of the Smart Buildings Policy Project and members of the Real Access Alliance concerning matters at issue in the above-referenced proceeding. The participants to the debate discussed the problems that carriers are facing in gaining access to customers in multi-tenant buildings. Senior executives from several telecommunications carriers explained the severity and magnitude of the problem, and provided specific examples whereby building owners have held equipment hostage, threatened to cut off service to tenants, and engaged in other unreasonable practices unless carriers agreed to outrageous fees or unreasonable conditions. These senior executives also explained that the building owners were not being cooperative, were not voluntarily permitting reasonable telecommunications carrier access, precluded competitive telecommunications service to tenants, and presented an enormous barrier to the development of their competitive infrastructure.

The SBPP likened the current scenario to one the Commission has already confronted in the international settlements area. Where there is an unregulated monopolist on one side of negotiations with multiple competing entities on the other side, whipsawing can occur. Moreover, in the international settlements arena, voluntary commitments failed to provide adequate protection for telecommunications consumers. The SBPP recommended that the Commission adopt a similar mechanisms for controlling unreasonable building owner practices through non-discrimination requirements imposed on telecommunications carriers themselves. Although the real estate industry claimed that the FCC cannot do indirectly what it cannot do directly, this proposition was flatly rejected by the U.S. Court of Appeals for the D.C. Circuit in Cable & Wireless v. FCC, 166 F.3d 1224 (D.C. Cir. 1999), where the court approved the FCC's establishment of benchmark rates that U.S. carriers pay foreign carriers for the termination of calls in foreign countries.

The real estate industry claimed to possess market incentives to permit carrier access. On behalf of the SBPP, Mr. Verveer reminded Commissioner Ness that the same argument had been made by some hotels. The hotels had explained that they had every incentive to serve the needs of their guests and that their primary income was room rentals, not telecommunications revenue, so that they would not engage in gouging of customers for telecommunications services. Mr. Verveer explained that the hotels' premise turned out to be untrue in practice and that regulation became necessary to protect consumers.

In response to claims that the real estate industry had already provided access to many rooftops for cellular and PCS antennas, the SBPP made clear that these mobile wireless carriers were in a substantially different position than fixed wireless carriers. Mobile wireless carriers can choose from

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many different buildings or can even build their own tower to serve a geographic area -- their facilities are not building-specific. By contrast, the facilities of fixed wireless carriers must be located on the building whose tenants they seek to serve. Denial of a fixed wireless carrier's access to a building eliminates the possibility of providing facilities-based service by the carrier to that building.

The participants to the debate also discussed the constitutional and jurisdictional issues related to this rulemaking. The SBPP noted that no constitutional doubts were presented by the contemplated action, particularly given the compensation mechanisms being considered. The SBPP also explained the inapplicability of the avoidance canon as expressed in *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), particularly in light of subsequent decisions such as, *inter alia*, *Transmission Access Policy Study Group v. FERC*, - F.3d - , 2000 WL 762706 (D.C. Cir., June 30, 2000) that clearly narrow the *Bell Atlantic* holding. Finally, the SBPP explained that the Communications Act gives the Commission jurisdiction and affirmative authority over all interstate communication by wire or radio and emphasized that the definition of "wire communication" in the Act extends from the point of origin to the point of reception of the transmission and includes "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(52).

Mark Schneider, Commissioner Ness' Senior Legal Advisor, also participated. Mr. Philip Verveer and Professor Viet Dinh represented the Smart Buildings Policy Project. In addition to myself, the following SBPP members were present at the debate: Philip Verveer of Willkie Farr & Gallagher, Professor Viet Dinh of Georgetown University Law Center, Larissa Herda, Kelsi Reeves, and Chuck Boto of Time Warner Telecom, Laurence Harris and David Turetsky of Teligent, Inc., Frank Simone of AT&T, William Rouhana and Joseph Sandri of Winstar Communications, Inc., Jonathan Askin of the Association for Local Telecommunications Services, Debra Berlyn of the Competition Policy Institute, Ben Wilson and Brad Stillman of WorldCom, and Thomas Cohen of Davis & Cohen.

Because these topics concern a pending rulemaking at the Commission, 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 ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

cc: Commissioner Ness
Mark Schneider