

RECEIVED

MAR 26 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking)	
To Amend Section 1.4000 of the)	
Commission's Rules to Preempt)	
Restrictions on Subscriber Premises)	
Reception or Transmission Antennas)	
Designed to Provide Fixed Wireless)	
Services)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rulemaking and)	
Amendment of the Commission's Rules)	
To Preempt State and Local Imposition of)	
Discriminatory and/or Excessive Taxes)	
And Assessments)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	
)	

REPLY OF THE REAL ACCESS ALLIANCE
TO OPPOSITIONS TO ITS PETITION
FOR RECONSIDERATION

The Real Access Alliance¹ hereby replies to the Oppositions of Smart Buildings Policy Project ("SBPP"), Satellite Broadcasting and Communications Association jointly with Satellite

¹ The members of the Real Access Alliance are: the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and The Real Estate Roundtable.

No. of Copies rec'd 1411
List ABCDE

Industry Association (“SBCA/SIA”), AT&T and Starband to the Real Access Alliance Petition for Reconsideration filed February 12, 2001 in the captioned proceeding. (“RAA Petition”) We submitted on March 14, 2001 our own Opposition to Petitions for Reconsideration of SBPP and SBCA/SIA, among others.

I. THE OPPOSITIONS CONFIRM THE UNRELIABILITY OF THE RECORD.

The RAA Petition faulted the Commission’s Orders, released October 25, 2000, as lacking in demonstrable evidence and legal framework. (RAA Petition, 3-10) After conceding the unverifiable state of the anonymous record of competitive carrier complaints against building owners, but excusing the deficiency as “fear of reprisal,” SBPP then misuses one of the few cases with names attached to it. (SBPP Opposition, 2-3, n.4) Contrary to the one-sided representation by SBPP, E.V. Bishoff, a Pittsburgh property owner, did not force a tenant to switch to a carrier preferred by Bishoff. The owner’s letter of September 7, 2000, responding to an SBPP filing of two days earlier, stated in part:

SBPP claims that the tenant in question is being "denied a choice of local providers." Again, nothing could be further from the truth. Every tenant of E.V. Bishoff is free to make a choice of provider when executing his or her lease. If they choose to use North Pittsburgh Systems, we have that decision incorporated into the lease as part of the contractual relationship we establish with North Pittsburgh to pre-wire our buildings and offer all of our tenants broadband services within 48 hours of their moving in. . . .

We assume that the Commission does not intend in its jurisdiction to now tell landlords that we may not rely upon a lease term our tenants have volunt[arily] entered into prior to moving in. We would also point out that while the clause is enforceable, we have never sought damages against any tenant for failing to meet their contractual obligation for use of the telecommunications service of their choice.²

² Letter of David W. Bishoff, for E.V. Bishoff Company, to FCC Chairman Kennard, dated and filed September 7, 2000 by Nicholas P. Miller of Miller & Van Eaton, P.L.L.C.

In the same vein, SBPP refers to competitive carrier criticism of an early BOMA study without mentioning a second analysis, based on a more comprehensive and detailed survey of building owners. The second survey had a return rate more than two times that of the initial questionnaire. In addition, the second analysis considered the responses of a survey of building tenants.³

Despite AT&T's conflation (Opposition, 13) of the Real Access Alliance's separate views of incumbent local exchange carrier ("ILEC") and building owner power in telecommunications markets, the Commission should resist the confusion.⁴ It is perfectly consistent for owners to accept discretion in moving the demarcation point while disclaiming both motive and opportunity to exclude ILEC competitors. ILEC market power does not translate into building owner market power. SBPP attempts to make the equation work by alleging anti-competitive behavior by owners with interests in communications providers. (Opposition, 6) But the Commission's finding of market power was not based on any such special case. It took the form of a universal assertion that control of building access could lead to "market power over telecommunications access," and the proposed remedy are rules of general applicability. That result, again, is not supported by the factual record or the law.

SBPP's citation to the *GAMCO* case is inapposite. (Opposition, 7, n.20) There, the court found that a single building on a rail line, designed and built to house wholesalers of produce, was "substantially advantageous" for that food business, with shipping facilities "the best in

³ The Real Access Alliance also updated statistical findings on the state of the market with an attachment to its Reply Comments of February 21, 2001.

⁴ AT&T repeats the conflation gambit at 15, note 12, by referring to the "conduct of building owners and incumbent LECs" as if coordinated. We simply don't find the "credible evidence" AT&T points to.

Providence.”⁵ Under that set of facts, the ouster of one wholesaler by competitors controlling the building was found to be anti-competitive for failure of the building owner to “justify the exclusion of a competitor from a market which he controls.” 194 F.2d at 488. So impressed was the court with the business location that it cited for analogy to the source of the “essential facilities” doctrine in anti-trust law, *United States v. Terminal Railroad Ass’n of St. Louis*, 224 U.S. 383.

The *GAMCO* facts, clearly, are at some distance from the record here. Most building owners are not competing carriers. They have not designed and built their residence and office structures for the conduct of telecommunications business. As Real Access Alliance has shown, these multi-tenant environments, even in combination under one owner, are part of an unconcentrated, workably competitive marketplace. (RAA Petition, 5, citing to earlier Comments)

It is no answer for SBPP to declare (Opposition, 8) that a market power finding is “not required for regulatory action by the FCC,” whose authority lies in the Communications Act. In fact, action by any federal agency under its organic statute is limited by the Administrative Procedure Act, 5 U.S.C. §551 et seq., which calls for decisions to be factually supported and consistent – or, if not consistent, rationally distinguished. Here, the FCC’s evidence is lacking and its approach to market power analysis inconsistent and unexplained.

⁵ *GAMCO, Inc. v. Providence Fruit and Produce Bldg. Inc.*, 194 F.2d 484, 486 (1st Cir. 1952) Contrary to SBPP’s characterization, the produce building itself was not “the market,” but was so advantageously situated as to affect the produce market in Providence, Rhode Island and environs.

II. **“RIGHTS-OF-WAY” CANNOT BE BOTH FACIALLY CLEAR AND AMBIGUOUS.**

AT&T and SBPP meet themselves coming and going in the discussing the meaning of “rights-of-way” under Section 224 of the Communications Act. The Real Access Alliance, of course, has argued steadily that the term first used in 1978 was never meant to apply to utility access to building interiors. (RAA Petition, 16-23)

AT&T accuses us of employing “snippets from the legislative history” (Opposition, 7, n.3) improperly when, supposedly, Section 224 is clear on its face. SBPP does not see the words quite so plainly: “Given that Congress did not define “right-of-way,” the meaning of that term remains ambiguous for purposes of implementing Section 224.” (Opposition, 12) So ambiguous, in fact, that the Commission called for further comment on the point in its pending Further Notice of Proposed Rulemaking in this proceeding. (Orders, ¶¶ 169-70) This uncertainty is only increased by the Commission’s acknowledgment (Orders, ¶ 87) that state law must control the determinative question of whether a utility “owns or controls” a right-of-way, however defined in general.

Thus, Real Access Alliance believes that resort to legislative history is perfectly proper to determine Congressional intent in using “rights-of-way” in Section 224 nearly a quarter-century ago. We invite AT&T and other doubters to read all the text surrounding the quotations from legislative history employed in the RAA Petition and other documents. Readers will find nothing to enlarge the term beyond occupancy of land associated geographically with poles, ducts and conduits and the communication lines mounted on or in these structures.

III. THE OVER-EXTENSION OF THE OTARD RULE BEARS REPEATING.

The Oppositions to the RAA Petition which discuss the OTARD rule are uniformly unhappy with what they characterize as redundant and unavailing arguments. As the Real Access Alliance has said many times – and will continue to say because it is important – the last two amendments to the regulation assert direct jurisdiction over building owners which is beyond the Commission’s statutory authority and unconstitutional. (Petition, 10-16)

In applying the rule to leaseholds, the Commission assumed that the unqualified word, “viewers,” must be interpreted to include tenants even if that meant over-riding the authority of landlords. It thus took Section 207 of the Telecommunications Act of 1996 as a new source of authority. *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, Second Report and Order, 13 FCC Rcd. 23874 (1998).⁶ Later, in expanding the rule from one-way video to two-way fixed wireless services, the Commission necessarily departed from the “viewers” limitation of Section 207 and resorted to the “ancillary authority” which it detects in Section 303 and other parts of the Communications Act. The Commission cannot have its cake and eat it, too.

The connection between the two enlargements of the OTARD rule must be emphasized. In the second and most recent step, the Commission does not read Section 207 as a new source of authority but simply as an instruction to use existing powers. Orders, FCC 00-366, ¶ 106. To be consistent, the first step should be underpinned in the same way. That is, the extension of the OTARD rule to tenancies was simply an assertion, at Congressional direction, of existing FCC authority. Meaning that the agency must always have possessed the power to intrude upon

⁶ For example, ¶¶ 1 and 5 speak in terms of what Section 207 does or does not “authorize.”

landlord-tenant relations by ordering the unobstructed placement of small video receivers. But if that were the case, the pre-1996 versions of the OTARD rule need not have been confined to owner-occupied property.⁷

Beside this fundamental legal confusion, other quarrels pale. Section 7 of the Communications Act, invoked by AT&T (Opposition, 19), need not detain us. By no stretch of the imagination is the Real Access Alliance “opposing a new technology or service.” Our members have signed more leases permitting the installation of fixed wireless facilities than the lessees have been able to fulfill by construction. To advocate a view about lawful and unlawful ways to implement a new technology or service is not the kind of obstruction that Section 7 has in mind.

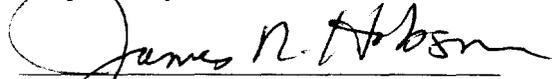
AT&T, SBCA/SIA and Starband also argue for clarifying the “safety exception” so that it would apply in the same fashion to two-way fixed wireless services as it does to one-way, receive-only video services. The Real Access Alliance has objected to such a clarification (Opposition of March 14th, 6-7) and will not repeat the objections here. Suffice it to say that the safety concerns, by the Commission’s own reasoning, are far greater in the fixed wireless case and justify disparate treatment.

⁷ See, e.g., Report and Order, IB Docket 95-59, CS Docket 96-83, 11 FCC Rcd 19276, ¶ 5, and in the same document, Further Notice of Proposed Rulemaking, ¶¶ 63 and 64.

CONCLUSION

For the reasons discussed above, the Commission should reconsider and revise its enlargements of Section 224 and the OTARD rule as they apply to forced access to multi-tenant environments.

Respectfully submitted,



Matthew C. Ames
James R. Hobson
Marci L. Frischkorn
Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-0600
Attorneys for the Real Access Alliance

Of Counsel:

Gerard Lavery Lederer
Vice President - Industry and
Government Affairs
Building Owners and Manager
Association International
Suite 300
1201 New York Avenue, N.W.
Washington, D.C. 20005

Roger Platt
Vice President and Counsel
Real Estate Roundtable
Suite 1100
1420 New York Avenue, N.W.
Washington, D.C. 20005

Bruce Lundegren
National Association of Home Builders
1201 15th Street N.W.
Washington, DC 20005

Reba Raffaelli
Vice President & General Counsel
National Association of Industrial &
Office Properties
2201 Cooperative Way
Herndon, VA 20171

Tony Edwards
General Counsel
National Association of Real Estate
Investment Trusts
1875 Eye Street, N.W., Suite 600
Washington, D.C. 20006

Clarine Nardi Riddle
General Counsel
National Multi Housing Council
Suite 540
1850 M Street, N.W.
Washington, DC 20036

March 26, 2001

CERTIFICATE OF SERVICE

The foregoing "Reply of the Real Access Alliance to Oppositions to its Petition for Reconsideration" was mailed March 26, 2001 to:

Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

Norman P. Leventhal
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, DC 20006

Margaret L. Tobey
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, NW
Suite 5500
Washington, DC 20006

Mark C. Rosenblum
AT&T Corp
295 North Maple Avenue
Basking Ridge, NJ 07920


Lisa McKnight