

ORIGINAL

EX PARTE OR LATE FILED

MILLER & VAN EATON

P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI†
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN*
MITSUKO R. HERRERA†
WILLIAM L. LOWERY

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

WILLIAM R. MALONE
NICHOLAS P. MILLER
HOLLY L. SAURER
JOSEPH VAN EATON

*Admitted to Practice in
Virginia Only
†Admitted to Practice in
California Only

MILLER & VAN EATON, L.L.P.
400 MONTGOMERY STREET
SUITE 501
SAN FRANCISCO, CALIFORNIA 94104-1215
TELEPHONE (415) 477-3650
FAX (415) 477-3652
WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
GERARD L. LEDERER**
JOHN F. NOBLE
**Admitted to Practice in
New Jersey Only

Incorporating the Practice of
Miller & Holbrooke

RECEIVED

NOV 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 15, 2001

Via Hand Delivery

Deliver to:

9300 East Hampton Drive
Capitol Heights, Maryland 20743

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

Re: Ex Parte Presentation in CS Docket No. 95-184

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance submits this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceedings. On November 14, 2001, the following individuals met with representatives of the Cable Bureau:

- | | |
|-----------------|---|
| Jim Arbury | National Multi Housing Council |
| Megan Booth | Institute of Real Estate Mangement |
| Rob Cohen | National Association of Real Estate Investment Trusts |
| Bruce Lundegren | National Association of Home Builders |
| Doug Miller | National Association of Realtors |
| Roger Platt | Real Estate Roundtable |
| Matt Ames | Miller & Van Eaton |

11-15-01
071

MILLER & VAN EATON, P.L.L.C.

- 2 -

The Commission staff members present were: Holly Berland, Eloise Gore, Cheryl Kornegay, John Norton, Royce Sherlock, and Sarah Whitesell.

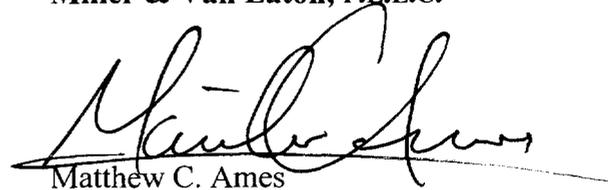
In addition to the matters addressed in the enclosed written ex parte materials, the Real Access Alliance representatives discussed the possibility and potential methods of gathering additional information regarding the number of apartment buildings that are subject to exclusive and perpetual contracts. Participants also discussed the RAA's concerns regarding the Commission's statutory authority to regulate such contracts, as addressed in the RAA's further comments and further reply comments in WT Docket No. 99-217; excerpts from those filings setting forth those concerns are also attached.

Please contact me with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By


Matthew C. Ames

cc: Holly Berland
Eloise Gore
Cheryl Kornegay
John Norton
Royce Sherlock
Sarah Whitesell

7379\82\MCA00863.DOC

**THE REAL ESTATE INDUSTRY STILL URGES THE COMMISSION
NOT TO REGULATE RELATIONSHIPS BETWEEN PROPERTY OWNERS
AND VIDEO PROGRAMMING PROVIDERS**

- The Real Access Alliance (the "RAA") represents the full spectrum of the rental real estate industry, including owners, managers, developers, and others. The members of the RAA are: the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Real Estate Investment Trusts, the National Association of Realtors, the National Multi Housing Council, and the Real Estate Roundtable.
- The real estate industry is highly competitive and sensitive to market forces. The industry believes that the freedom to negotiate contracts is essential to the working of the competitive marketplace. Accordingly, for over five years the real estate industry has consistently urged the Commission to avoid intervening in the terms of any private contracts for access to or the use of real property.
- The RAA also has urged the Commission to respect the limitations imposed by the Fifth Amendment, not only with respect to the real estate industry, but with respect to owners of any kind of property.
- With respect to the issues raised in the cable inside wiring proceeding, Docket No. 95-184, the RAA believes that exclusive contracts between providers of video programming and building owners should not be prohibited, both because in many cases they promote competition, and because of the RAA's desire to respect contract and property rights. The RAA believes that "perpetual" contracts, on other hand, do not promote competition, but out of respect for contract rights has not called for Commission regulation of such agreements.
- The RAA's position has been consistent throughout this proceeding, and has not changed. Attached as illustrations are copies of ex parte materials submitted on May 11, 1999, and May 24, 2000, dealing with exclusive and perpetual contracts.

MILLER & VAN EATON
P. L. L. C.

MATTHEW C. AMES
FREDERICK E. ELLROD III
MARUCCI FRISCHKORN*
MITSUKO R. HERRERA†

*Admitted to Practice in
Virginia Only
†Admitted to Practice in
California Only

Incorporating the Practice of
Miller & Holbrooke

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4306
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
44 MONTGOMERY STREET
SUITE 3085
SAN FRANCISCO, CALIFORNIA 94104-4804
TELEPHONE (415) 477-3650
FAX (415) 398-2208

WWW.MILLERVANEATON.COM

WILLIAM L. LOWERY
WILLIAM R. MALONE
NICHOLAS P. MILLER
CHRISTIAN S. NA**
JOSEPH VAN EATON

**Admitted to Practice in
Massachusetts only

OF COUNSEL:
JOHN F. NOBLE

May 24, 2000

Via Hand Delivery

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

RECEIVED
MAY 24 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in CS Docket No. 95-184 and MM Docket No. 92-260

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and three copies of a letter disclosing an oral and written ex parte presentation in the above-captioned proceedings. On May 23, 2000, the following representatives of the Real Alliance met with members of the staff of the Cable Services Bureau:

Jim Arbury	National MultiHousing Council
	National Apartment Association
Tony Edwards	National Association of Real Estate Investment Trusts
Gerard Lavery Lederer	Building Owners and Managers Association, International
Roger Platt	Real Estate Roundtable
Nicholas P. Miller	Miller & Van Eaton, P.L.L.C.
Matthew C. Ames	Miller & Van Eaton, P.L.L.C.

MILLER & VAN EATON, P.L.L.C.

- 2 -

Bureau staff present at the meeting were John Norton, Royce Dickens, Eloise Gore, Carl Kandutsch and Cheryl Kornegay. In addition to the matters discussed in the attached written ex parte materials, the participants addressed the following issues:

- The Real Access Alliance representatives stated that they generally favor the proposals outlined in the Second Further Notice of Proposed Rulemaking.
- The discussion centered on exclusive contracts and the differences in the economics of serving residential subscribers in apartment buildings and business subscribers in office buildings. Although the data presented in the written materials demonstrates that the critical factor behind the need for exclusive contracts has to do with the differences in the revenue potential of providing residential video service as compared to office telecommunications service, the same analysis would probably apply to providing competitive telecommunications services in MDUs. There was also some discussion of changes in the marketplace arising from the provision of bundled services over a single network; it was the view of the Real Access Alliance representatives that this type of convergence is not yet a significant factor in the market and it is too early to tell what effects it will have.
- The participants briefly touched on the Real Access Alliance's concerns regarding regulations at the state or federal level that would give telecommunications providers or cable operators the right to install their facilities in buildings over the owners' objections. Any such rule would conflict with the current cable home run wiring rule and render it ineffective, in the same fashion as current state mandatory access statutes.
- The participants also discussed various approaches for making the current cable inside wiring rules more effective, such as requiring a cable operator to post a bond equal to the value of any wiring that it intends to remove, and the possibility of moving the cable home wiring demarcation point to a different location. The latter approach raised concerns among the Alliance representatives to the extent that it might give apartment residents the right to own facilities located in common areas.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By


Matthew C. Ames

MILLER & VAN EATON, P.L.L.C.

- 3 -

cc: John Norton, Esq.
Royce Dickens, Esq.
Carl Kandutsch, Esq.
Cheryl Komegay, Esq.
Eloise Gore, Esq.
Mr. Jim Arbury (by mail)
Tony Edwards, Esq. (by mail)
Gerry Lederer, Esq. (by mail)
Roger Platt, Esq. (by mail)

737970 MCA00549.DOC

**THE REAL ACCESS ALLIANCE SUPPORTS THE COMMISSION'S
CABLE INSIDE WIRING RULES AND THE PROPOSALS
IN THE FURTHER NOTICE OF PROPOSED RULEMAKING**

- **Any federal regulation requiring MDU owners to grant access to telecommunications or video programming providers would eviscerate the FCC's cable inside wiring rules.**
 - The fundamental purpose of the cable inside wiring rules is to limit the ability of incumbent cable operators to use their incumbency and market power to force MDU owners to sign unfavorable agreements. The rules strike a delicate balance between promoting competition in the delivery of video services in MDUs and protecting the rights of incumbent providers under the Constitution and state law. Consequently, the rules do not apply if a provider has “a legally enforceable right to remain” in a building. 47 C.F.R. § 76.804.
 - Any federal rule that would allow a video programming provider to install its facilities in a building over the objections of the building owner would circumvent the inside wiring rule. Such a new right to install facilities would mean that the provider would have a legally enforceable right to remain in any building in which it already had facilities, because if the building owner sought to exercise its rights under §76.804, the provider could simply counter by exercising its rights under the new forced access rule.
 - Even a rule that applied only to telecommunications providers would circumvent the cable inside wiring rules, because most multiple system operators are certificated CLECs. Even if they are not now offering telecommunications services, they intend to do so in the near term.
 - Because of the economics of serving MDUs, as discussed below, adopting a forced access rule would not only undercut the current inside wiring rule, but it would not even advance the alleged goal of promoting access for multiple providers. The true effect of such a rule would be to strengthen the current monopoly position held by the ILECs and the incumbent franchised cable operators. The result would be a two-wire world, in which the vast majority of MDU residents would have the same two choices they have now.
- **Providers of competitive video programming services – unlike competitive local exchange carriers -- require exclusive contracts to serve MDUs because the economics of the video market differs greatly from that of the telecommunications market.**
 - The debate over exclusive contracts arises entirely out of the economics of providing service in the two different markets. Exclusive contracts are very rare in the office market because they typically do not benefit tenants, providers, or building owners. On the other hand, exclusive contracts are more common in the residential video

market because by creating alternatives to the incumbent they benefit tenants and building owners as well as the competitive providers.

- The total revenue for video programming services yielded by the typical MDU is only a fraction of the total telecommunications revenue produced by an office building. This is a function of the average revenue per subscriber and the total number of potential subscribers in a building. The attached example shows that on average the video service revenue potential of an MDU is only 7.5% of the telecommunications revenue potential of an office building. When one compares buildings of median size, MDU video revenues are still only one-quarter of office building telecommunications revenues.
- The average revenue obtained from an individual MDU resident for video services is only a fraction of the average revenue received for providing telecommunications services to an office tenant. Cable subscribers pay, on average, about \$50 a month for service, while office telecommunications subscribers pay about \$1000 a month for service.
- It is important to remember that not all MDU residents pay for video service, and many are still unlikely to do so even if there is a competitive option, while every office tenant must have telephone service.
- In addition, individual MDU residents will never be willing to pay nearly as much for telecommunications services as office tenants, which is one reason that CLECs – despite their protestations – have little interest in serving the residential market, even over the long term.
- Because total revenues from providing video service in an MDU are so much smaller than office telecommunications revenues, each competitor needs a larger share of the total to be profitable. CLEC's often can afford to share access in a building, because even a small share of the total revenue may be enough to make money. CLECs oppose exclusive contracts, because even a single tenant may justify the cost of installing facilities. Competitive video providers, on the other hand, require exclusive contracts because they typically cannot justify the cost of installing facilities if there is another provider in the building: no single tenant could possibly produce enough revenue to be profitable.
- Similarly, because each individual cable subscriber in an MDU pays so much less than an office telecommunications subscriber (\$50 versus \$1000), it is harder to justify the increased costs of serving many such subscribers without aggregating demand through an exclusive contract. A video service provider must spend a larger proportion of its total revenue from each subscriber on marketing, billing, customer service and administration than a CLEC does for each office tenant.

- In sum, CLECs and competitive video providers are serving two entirely different markets using very different business models. The Commission should not be misled by the superficial similarities.

7379 70 MCA00546.DOC

**COMPARISON OF REVENUES RECEIVED BY PROVIDERS
FROM PROVIDING VIDEO SERVICE IN APARTMENT BUILDINGS
AND TELECOMMUNICATIONS SERVICE IN OFFICE BUILDINGS**

Annual revenue from providing video service in an average-sized apartment building:

- 30 units x \$50 per month per unit (\$600 per year) = **\$18,000**

Annual revenue from providing video service in a median-sized apartment building:

- 150 units x \$50 per month per unit (\$600 per year) = **\$90,000**

Annual revenue from providing telecommunications service in an average-sized office building:

- 20 tenants x \$1000 per month per tenant (\$12,000 per year) = **\$240,000**

Annual revenue from providing telecommunications service in a median-sized office building:

- 30 tenants x \$1000 per month per tenant (\$12,000 per year) = **\$360,000**

Therefore, an average-sized office building can yield over 13 times as much revenue as an average-sized apartment building. When comparing a median-sized office building to a median-sized apartment building, the office building yields four times as much revenue.

Assumptions:

1. According to a recent BOMA survey, the average number of tenants in office buildings is 22. We have used 20 to simplify the arithmetic and provide a slightly more conservative figure. The median number of tenants in the buildings covered by the BOMA survey was between 20 and 40, so we have assumed that the median number of tenants in a building is 30.
2. The number of units in apartment buildings varies greatly, but according to Census Bureau data available on the National Multi Housing Council's Web site, there are about 200,000,000 apartment units in 518,820 apartment buildings with five or more rental units. This is an average of 29 units per building. In the first example, we have rounded to 30 units both to simplify the arithmetic and to provide a slightly more conservative figure. The second example, using 150 units, represents the roughly 46% of apartment buildings that have between 50 and 300 units. On that basis, we have assumed that the median number of units in an apartment building is 150.
3. According to the FCC's 1999 Annual Cable Television Competition Report, average cable revenue per subscriber is \$44. We have rounded this figure to \$50 for the same reasons as above.

4. We do not have an accurate figure for the average amount paid by office building tenants for telecommunications services. For purposes of this comparison, we have used \$1000 per month, which we believe is a conservative estimate. The estimate was calculated by dividing an estimate of total revenues received by telecommunications providers from business subscribers by an estimate of the number of office tenants in the country. The \$1000 figure is only an approximation, but we think it provides a rough basis for comparison.

According to the Census Bureau's 1992 Economic Census, there are 5,829,983 business establishments in the country. Note that this figure is likely to be considerably higher than the number of office tenants because many businesses, especially smaller ones, will not rent space in office buildings. Therefore, to estimate the number of actual office tenants, we subtracted the number of business establishments that had no employees (411,549) or only 1 to 4 employees (2,330,762), which resulted in 3,087,671. We rounded that number to 3.1 million.

To determine total telecommunications revenues received from office tenants, we started with the Census Bureau's estimate of local, long distance and network access revenue for 1998. The Census Bureau reports \$30.3 billion in nonresidential local service revenues, \$60.0 billion in long-distance revenues, and \$31.7 billion in network access revenues, for a total of \$122 billion. We ignored long distance revenues, and assumed that all network access revenues were ultimately paid by telephone subscribers and received by local exchange carriers, so that nonresidential subscribers paid LECs approximately \$62 billion for telecommunications services in 1998. We then reduced that figure by 30% to account for revenue from owner-occupants and other subscribers who do not rent space in office buildings. The resulting figure of \$43 billion was then divided by 3.1 million office tenants for an average of \$13,870 per year or \$1156 per month, which we rounded down to \$1000 to provide a conservative figure. If long distance revenues are included, using the same method yields an average of \$2400 per month.

5. Note that we have assumed 100% penetration rates for both types of service, which exaggerates total cable service revenues by about one-third, based on historical experience.

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)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	
Review of Section 68.104 and 68.213 of)	
The Commission's Rules Concerning)	CC Docket No. 88-57
Connection of Simple Inside Wiring to)	
the Telephone Network)	

FURTHER COMMENTS OF 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

Matthew C. Ames
Nicholas P. Miller
Mitsuko R. Herrera
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

January 22, 2001

question of whether the means proposed in the FNPRM are even feasible, the courts will not allow the Commission to proceed. By merely asking the question, the FNPRM admits that what it proposes is improper.

B. The FCC's Authority Over Carriers Does Not Extend to Building Access Agreements.

The FNPRM suggests several theories that allegedly would allow the Commission to regulate building owners indirectly. The fundamental problem with all of them is that the authority of the Commission over carriers does not translate into authority that permits the Commission to regulate building access agreements.

1. Building Access Agreements Are Not Common Carriage.

The Commission only has authority over a carrier's activities to the extent permitted by the Act. If a local exchange carrier ("LEC") is engaged in a non-common carrier activity, the Commission cannot regulate the LEC. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (dark fiber not offered on a common carrier basis); *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (customer premises equipment not a common carrier service). For example, the Commission cannot regulate the rent a LEC pays for its executive and administrative offices. Nor can the Commission set the price a LEC pays for fiber optic cable. Similarly, while providing service to subscribers may be a common carrier activity, obtaining the right to occupy space on private property is not such an activity. Even a cursory reading of a typical access agreement makes this clear. The model license attached at Exhibit G, for example, grants a "non-exclusive license to install, operate, maintain and remove . . . the Equipment in the Equipment Room, on the Rooftop Space of the Building, and in the Communications Spaces and Pathways, all for the limited purpose of providing the Services to

the Tenants” Such agreements are not tariffs, tariff conditions, carrier practices, or anything other than grants of the right to use space in a building subject to specified terms. In no way do they represent telecommunications common carriage or any other activity subject to the Communications Act. Consequently, the Commission cannot regulate the terms and conditions of a LEC’s access to a building.

2. The Statutory Provisions Cited in the FNPRM Do Not Apply to Building Access Agreements.

The drafters of the Communications Act never imagined that the Act would be read to address building access. As originally drafted, the Act presumes the existence of a monopoly provider and is designed to deal with the problems posed by monopoly providers, such as unfair tariff provisions. Although the 1996 Act amended the Communications Act in ways designed to advance competition, many critical sections – including those that the FNPRM now relies on for authority in this context – were not amended.⁸⁸ Congress simply has not provided any mechanism that would allow the Commission to regulate building access, directly or indirectly. The Commission cannot now distort 65-year old language drafted under entirely different circumstances to claim authority to act in ways that Congress never even conceived might be necessary. *See, e.g., Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 120 S.Ct. 1858, 1868 n.12 (2000) (1986 amendment of 1863 statute did not alter original meaning of unamended provision); *American Casualty Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n. 7 ((2d Cir. 1994) (holding the same); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670

⁸⁸ Despite the press play given the 1996 Act, it was not truly a comprehensive overhaul of the Communications Act. While it certainly marked a sharp change in Congress’s theoretical approach to telecommunications regulation, it did little to alter the underlying structure or provisions of the original Act. Huber, *et al.*, *Federal Telecommunications Law* (2d ed. 1999) at § 3.2.5 (“when Congress passed the [1996 Act], it did so largely as a series of additions to, not replacements of, the 1934 Act.”).

telecommunications provider from entering the building without first agreeing to the terms of an access agreement. We also believe that, unless expressly forbidden by the terms of an easement or access agreement, owners can direct utilities to remove or relocate their facilities. On the other hand, if a utility's access rights take the form of a license, which is the most common form of access right, a utility will not own or control anything inside a building. Consequently, in most cases, we do not believe that telecommunications providers or cable operators will be able to rely on the Commission's new interpretation. Nevertheless, in those cases in which an easement clearly permits access to the property from the outside and permits third parties to occupy the easement, it appears that the cable inside wiring rules will not apply.

V. THE FCC SHOULD CONTINUE TO EXEMPT RESIDENTIAL BUILDINGS FROM ITS PROHIBITION ON EXCLUSIVE CONTRACTS.

As the Commission is well aware, the most intractable problem presented by the telecommunications market is the delivery of competitive local exchange service at the residential level. The high cost of network construction combined with the presence of an entrenched competitor makes facilities-based competition extremely difficult to achieve. Developing competition at the residential level is particularly difficult because of the high unit cost of delivering the service: on average, residential subscriber density is lower than that of business subscribers, and the revenue per residential customer is far lower. This is a fairly simple analysis to perform, and we presume the Commission has more than enough data to confirm it.

As noted in the FNPRM, at ¶¶ 32-33, we have provided the Commission with an analysis of the revenue potential of residential buildings compared to office buildings, which we reproduce here:

Annual revenue from providing video service in an average-sized apartment building:

- 30 units x \$50 per month per unit (\$600 per year) = **\$18,000**

Annual revenue from providing video service in a median-sized apartment building:

- 150 units x \$50 per month per unit (\$600 per year) = **\$90,000**

Annual revenue from providing telecommunications service in an average-sized office building:

- 20 tenants x \$1000 per month per tenant (\$12,000 per year) = **\$240,000**

Annual revenue from providing telecommunications service in a median-sized office building:

- 30 tenants x \$1000 per month per tenant (\$12,000 per year) = **\$360,000**

Therefore, an average-sized office building can yield over 13 times as much revenue as an average-sized apartment building. When comparing a median-sized office building to a median-sized apartment building, the office building yields four times as much revenue.¹⁰³ The

¹⁰³ The above analysis is based on the following assumptions:

- According to the BOMA *Critical Connections* survey, the average number of tenants in office buildings is 22. We have used 20 to simplify the arithmetic and provide a slightly more conservative figure. The median number of tenants in the buildings covered by the BOMA survey was between 20 and 40, so we have assumed that the median number of tenants in a building is 30.
- The number of units in apartment buildings varies greatly, but according to Census Bureau data available on the National Multi Housing Council's Web site, there are about 15,029,100 apartment units in 518,820 apartment buildings with five or more rental units. This is an average of 29 units per building. In the first example, we have rounded to 30 units both to simplify the arithmetic and to provide a slightly more conservative figure. The second example, using 150 units, represents the roughly 46% of apartment buildings that have between 50 and 300 units. On that basis, we have assumed that the median number of units in an apartment building is 150.
- According to the FCC's 1999 Annual Cable Television Competition Report, average cable revenue per subscriber is \$44. We have rounded this figure to \$50 for the same reasons as above.

FNPRM notes that we applied the same reasoning to telecommunications without providing additional data. While this is correct, the initial analysis still proves the point with respect to telecommunications competition, because the numbers do not change much. The fact is that the average residential telephone subscriber does not pay much more per month for local telephone service than he does for cable television. Even if one doubles the \$50 per month figure used

-
- We do not have an accurate figure for the average amount paid by office building tenants for telecommunications services. For purposes of this comparison, we have used \$1000 per month, which we believe is a conservative estimate. The estimate was calculated by dividing an estimate of total revenues received by telecommunications providers from business subscribers by an estimate of the number of office tenants in the country. The \$1000 figure is only an approximation, but we think it provides a rough basis for comparison. We presume that the Commission could obtain such information from carriers.

According to the Census Bureau's 1992 Economic Census, there are 5,829,983 business establishments in the country. Note that this figure is likely to be considerably higher than the number of office tenants because many businesses, especially smaller ones, will not rent space in office buildings. Therefore, to estimate the number of actual office tenants, we subtracted the number of business establishments that had no employees (411,549) or only 1 to 4 employees (2,330,762), which resulted in 3,087,671. We rounded that number to 3.1 million.

To determine total telecommunications revenues received from office tenants, we started with the Census Bureau's estimate of local, long distance and network access revenue for 1998. The Census Bureau reports \$30.3 billion in nonresidential local service revenues, \$60.0 billion in long-distance revenues, and \$31.7 billion in network access revenues, for a total of \$122 billion. We ignored long distance revenues, and assumed that all network access revenues were ultimately paid by telephone subscribers and received by local exchange carriers, so that nonresidential subscribers paid LECs approximately \$62 billion for telecommunications services in 1998. We then reduced that figure by 30% to account for revenue from owner-occupants and other subscribers who do not rent space in office buildings. The resulting figure of \$43 billion was then divided by 3.1 million office tenants for an average of \$13,870 per year or \$1156 per month, which we rounded down to \$1000 to provide a conservative figure. If long distance revenues are included, using the same method yields an average of \$2400 per month.

- Note that we have assumed 100% penetration rates for both types of service, which exaggerates total cable service revenues by about one-third, based on historical experience.

above, the revenue in an average-sized building is only \$36,000 per year, and the revenue for a median-sized building is \$180,000. This narrows the gap somewhat, but it is still substantial. Furthermore, we believe our assumptions regarding business revenues were quite conservative, so the gap is very likely wider than in our example. It should be relatively simple for the Commission to obtain the necessary figures from carriers.¹⁰⁴

Accordingly, we think it is fairly simple to establish that the market for residential telecommunications services, even in MDUs, is substantially different than that for business services. The Commission should not regulate exclusive contracts for telecommunications service in residential buildings for the same reasons it has not regulated exclusive contracts for cable service: the only way to encourage competition in the residential market is by allowing small providers to develop a toehold.¹⁰⁵ If they are permitted to serve MDUs on an exclusive basis, they can be assured of sufficient cash flow to justify an initial investment. Over time, they may be able to expand outside the MDU market. Banning exclusive contracts, however, will expose small competitors to the certain threat of intrusions and anti-competitive actions by the incumbents.¹⁰⁶

¹⁰⁴ The CLEC Report states that businesses spend about \$1,500 per month on broadband services, while residences spend \$50. CLEC Report ch. 3 at 19. This supports our analysis.

¹⁰⁵ See also Lansdale Declaration at ¶ 13; Ansel Declaration at ¶¶ 5, 6.

¹⁰⁶ Of course, incumbents can negotiate exclusive contracts as well. As far as we are aware, however, it is relatively rare for an ILEC to enter into any kind of agreement with an MDU owner, much less an exclusive one. Furthermore, a new entrant is unlikely to choose to enter a building that is already served by an incumbent, except in unusual circumstances, so the option is of much more benefit to the competitor than it is to the incumbent. The challenge for residential CLECs will be to show that they offer better service, lower prices, or additional features that differentiate them from the incumbent, and a sheltered environment is the best place for them to start.

Finally, as discussed above, we do not believe that the Commission has the power to regulate agreements for building access because they are not agreements for the provision of telecommunications service. The Alliance supported and continues to support the Commission's ban on exclusive contracts in commercial buildings because such contracts do not serve the needs of commercial tenants and are rare. Nevertheless, the Commission's authority to adopt the ban is by no means clear. For this reason alone, the Commission should refuse to extend the ban to residential buildings.

VI. THE FCC SHOULD NOT INTERFERE WITH EXISTING EXCLUSIVE CONTRACTS IN COMMERCIAL BUILDINGS.

Once again, the Commission's authority to ban prospective exclusive contracts is questionable. It therefore follows that the Commission's authority to abrogate existing contracts is at least as questionable. Furthermore, there is no evidence that exclusive contracts present a significant barrier to competition in commercial buildings. The FNPRM cites no statistics or other quantitative evidence regarding the number or prevalence of exclusive contracts in commercial buildings. Indeed, the FNPRM does not even refer to any anecdotes referring to such contracts. We believe that the record in this stage of the proceeding will be equally thin.

In addition, as existing contracts expire, they will necessarily be replaced by nonexclusive contracts under the Commission's ban. We believe that there are few long-term exclusive contracts in force. Consequently, the Commission has no reasonable basis for abrogating existing contracts.

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)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	
)	
Review of Section 68.104 and 68.213 of)	
The Commission's Rules Concerning)	CC Docket No. 88-57
Connection of Simple Inside Wiring to)	
the Telephone Network)	
_____)	

FURTHER REPLY COMMENTS OF THE REAL ACCESS ALLIANCE

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

Matthew C. Ames
Nicholas P. Miller
Mitsuko R. Herrera
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

February 21, 2001

Moreover, according to comments submitted by SBPP, the value of the market for local telecommunications services in buildings that would be subject to any rules “will probably be a \$36 billion market.”⁷² The value of this market is further indication that the proposal set forth in the FNPRM and supported by some of the commentators would not fairly compensate building owners. At a typical rent of 5% gross revenues, comparable to shopping center rents and the cable franchise fees permitted by the Act, the CLECs effectively propose a taking of property worth roughly \$1.8 billion.

In sum, none of the commenters comes close to providing the Commission with a way of evading its obligations under the Fifth Amendment.⁷³

VII. EXCLUSIVE CONTRACTS ARE VITAL TO ENSURING THE LONG-TERM PROSPECTS FOR COMPETITION IN THE RESIDENTIAL MARKET.

Exclusive contracts are often the only way to overcome the inherent economic barriers that inhibit competitive provision of advanced telecommunications service in hard-to-serve residential buildings. For that reason, the Commission should not ban them.⁷⁴

⁷² SBPP Comments at 7 (*citing* Mark Rockwell, *BLEC's Two Sided*, tele.com at 1 (Oct. 24, 2000)).

⁷³ In this regard, we note that, contrary to the Comments of AT&T at n. 19, the rule of *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) is alive and well. The D.C. Circuit reaffirmed the rationale of that case in *GTE v. FCC*, 205 F.3d 416, 420 (D.C. Cir. 2000). Therefore, the mere fact that the Commission has had to repeatedly consider the Fifth Amendment issue and correctly expressed concern over the possibility of a taking is sufficient to foreclose regulation.

⁷⁴ We note that in the cable inside wiring proceeding, CS Docket No. 95-184, the Commission acknowledged that exclusive contracts may be pro-competitive in the video service market. Many commenters appear to be addressing video issues in this proceeding. We believe the issues and economic incentives are largely the same, but the Commission should not act without understanding that it is dealing with different services in different markets, and not all the commenters are being as clear about their goals and concerns as they might be. In any case, because the focus of this proceeding has been on telecommunications, any action that might affect the video market should be dealt with in the context of the cable proceeding.

In previous filings, the Alliance and other parties submitted evidence that exclusive contracts were valuable and necessary to enable competitive providers to overcome the dominant market position of incumbent providers.⁷⁵ In response to the FNPRM, the Alliance questioned both the need to extend the ban, and the Commission's general authority to do so.⁷⁶ Other parties focused on the evidence that exclusive contracts are necessary to maximize the economic feasibility of providing service to what we will refer to as 'second-tier' residential buildings, *i.e.*, (i) smaller apartment buildings, (ii) apartment buildings in smaller, less densely populated areas, and (iii) buildings with tenants who are unlikely to pay for high-end bundled service packages.⁷⁷ Provision of advanced telecommunications service to 'second-tier' residential buildings will not occur without the benefits that exclusive contracts provide -- it is simply too expensive to build out these buildings without some means to equalize the higher per-customer cost.⁷⁸

Some parties, however, have complained that incumbent providers are now using exclusive contracts to further leverage their entrenched market dominance.⁷⁹ Led by RCN, these commentators urge the Commission to extend the ban on exclusive contracts to residential buildings. These parties also make clear that their business plans for the residential market are designed to keep per-customer costs low by primarily marketing high-end bundled service packages to tenants residing in relatively large residential buildings in densely populated areas.⁸⁰

⁷⁵ See, e.g., Declaration of Lyn Lansdale, Exhibit E to Further Comments.

⁷⁶ Further Comments at 62-65.

⁷⁷ CAI Comments at 2, CoServ Comments at 3-4, ICTA Comments at 12-13.

⁷⁸ ICTA Comments at 11.

⁷⁹ RCN Comments at 14-17.

⁸⁰ See RCN Comments at fns 14, 17.

Overall residential building tenant satisfaction with the availability, quality, and price of their telecommunications service should be the paramount interest of the Commission. RCN, however, wants the Commission to adopt regulations that support its business model, which is to build large networks and sell higher-priced bundled services in large apartment buildings.⁸¹ Smaller competitive service providers want the Commission to adopt regulations that support their business model, which is to provide discrete services to all tenants in a smaller number of “second-tier” buildings (although they will serve larger, more lucrative buildings if the opportunity arises).⁸² RCN wants to sell its bundled service, and therefore has trouble getting into buildings where the cable operator or another provider is providing a single service on an exclusive basis. Instead of examining business models, however, the Commission should determine whether tenants, not service providers, benefit from exclusive contracts. Unless and until the Commission has conclusive evidence that the use of exclusive contracts is harming the ability of residential tenants to receive advanced telecommunications services, the Commission should not attempt to extend the ban on exclusive contracts to residential buildings.

The Commission must also consider the highly diverse and fragmented nature of the apartment market. The apartment market is essentially a collection of 25 or more sub-markets, each with unique demographic characteristics: luxury, higher income, upper middle income,

⁸¹ RCN Comments at 9. RCN quotes the Commission’s characterization of its business plan with approval: “RCN’s business plan, for example, is ‘dependent upon delivering bundles of services thus generating multiple revenue streams and higher penetration rates...[by]... entering markets with high population densities, thus lowering the per customer cost of offering service.’” RCN Comments at note. 15. Similarly, Carolina Broadband states that they are focused on gaining access to the largest buildings in each market. RCN Comments at 7.

⁸² For example, CoServ is a small Texas-based competitive provider that relies on acquiring exclusive access to buildings, in return for offering the tenants reduced rates, state-of-the-art technologies and service, etc. CoServ Comments at 3. Unlike RCN or Carolina Broadband, the bulk of CoServ’s assets are sunk in the building. CoServ cannot benefit from access to unlimited buildings; its business model requires making the most out of each individual building. *Id.* at 4.

lower middle income, upper low income, low income, high-rise, mid-rise, garden, rural, suburban, small city, large city, and so on. The size, location and income profile of a building all affect its attractiveness to video providers. Consequently, one set of rules could have a devastating effect on competition in many of those sub-markets. If the FCC adopts rules that favor RCN's strategy, it may advance competition for the 20% or so of buildings at the high end, but at the cost of disrupting competitive forces operating in the remaining 80%.

To the extent that permitting the use of exclusive contracts presents some possibility of abuse by incumbent providers, any abuse could be curbed by such measures as prohibiting incumbent providers from unilaterally imposing exclusive access as a condition of service; and shortening the term of exclusive contracts to the period necessary for a provider to recover its investment.

RCN appears to have some evidence of such abuse.⁸³ RCN's comments, however, do not change the fact that exclusive contracts remain vital to the efforts of building owners to attract, and competitive service providers to offer, advanced telecommunications service in 'second-tier' residential buildings. Small competitive service providers are only willing to serve 'second-tier' residential buildings if building owners grant the exclusive access that makes such service economically feasible. In return, as the comments demonstrate, competitive service providers are willing to offer tenants innovative, specially-tailored, and/or specially priced telecommunications and video service packages.⁸⁴

RCN asserts that lack of choice itself justifies prohibiting exclusive contracts entirely. There is no argument that one purpose of the 1996 Act was to encourage competition and growth

⁸³ RCN Comments at 5-8.

⁸⁴ ICTA Comments at 11-12.

of competitive services. But if the Commission were to eliminate exclusive contracts, consumers would lose access to a range of other providers that rely on the exclusive contract to serve 'second tier' buildings. Several parties stated that extending the ban on exclusive contracts to residential buildings would result in making it difficult to provide certain buildings with telecommunications service. PrimeLink argues that small and rural providers should be permitted to maintain exclusive contracts.⁸⁵ PrimeLink has entered into a contract to provide exclusive telecommunications service to an Air Force base that is currently being redeveloped. PrimeLink spent \$3 million in reliance on an exclusive contract, and also obtained a \$10.5 million loan in reliance on that contract. The Community Associations Institute supports exclusive contracts because they benefit condominiums and homeowner associations.⁸⁶ And finally, several parties note that their exclusive contracts were obtained through a competitive bid process and that there are specific benefits that they can only obtain through use of exclusive contracts.⁸⁷ In the video provider context, in previous filings, the Alliance provided the Commission with evidence that exclusive contracts permit building owners to negotiate for special cable package features, from addition of A&E to the basic cable package for seniors living in retirement communities, to movies-on-demand channels in buildings with primarily young professionals as tenants.

Furthermore, although RCN attacks the use of exclusive contracts, RCN engages in the practice itself.⁸⁸ And there is no evidence that RCN would be willing to make the investment to

⁸⁵ PrimeLink Comments at p. 3.

⁸⁶ CAI Comments at 2.

⁸⁷ Educational Parties Comments at 10-11; County of Los Angeles Comments at 4, 7-8; U.S. Dept. of Defense Comments at 2, 4-6; IMCC Comments at 5-6.

⁸⁸ Bruce Mohl and Patricia Wen, "Sweetheart Deals Said to Limit Choices for Net, Phone, Cable," Boston Globe (Jan. 30, 2000), p. B2.

complete head-to-head in a building already served by an ILEC or cable MSO. RCN might be willing to in the largest, most lucrative buildings -- but not in the bulk of apartment buildings in the country. In determining whether or to extend the ban on exclusive contracts to residential buildings, the Commission must weigh the common or collective good enjoyed by all tenants in a residential building when an exclusive contract is negotiated for their benefit, against the individual good of the privilege of a few service providers to serve a few residents within a building. In other words, by agreeing to accept one provider, smaller or less desirable residential buildings may be able to receive comparable services to those offered in large residential buildings, services which might otherwise not be available. For smaller competitive service providers, who offer lower priced packages and rely on quantity on subscribers to become profitable, exclusive contracts are essential to survival.⁸⁹

This form of bundling tenants together to receive better pricing is similar to the bundled service pricing plan offered by RCN. If a tenant agrees to forgo use of other providers, and accept RCN as his or her single provider for local telephone, long distance, cable and internet access, RCN will offer the tenant substantial discounts.⁹⁰ RCN further contends that if an incumbent is permitted to enter into an exclusive contract to provide any communications service, the new facilities-based entrant will be foreclosed from the market because the new entrant must be able to compete for all potential services.⁹¹ RCN asks the Commission to prevent residential building tenants from receiving any of the current benefits under an exclusive contract on the grounds that someday a new facilities-based entrant might want to connect a

⁸⁹ CoServ Comments at 5.

⁹⁰ RCN Comments at 9. "For example, RCN's bundled service offering, called Resilink™, offers subscribers substantial discounts for subscribing to more than one service."

⁹¹ RCN Comments at 13-14.

particular residential building, but only if the new entrant can be assured of the possibility of selling a full bundle of services. RCN ignores the possibility that either through competitive bid, or by shopping around, it is possible that the building owner chose the best package it could find, and agreed to the exclusive contract provision to reduce rates even more.

The Telecommunications Research Action Center (“TRAC”) opposes exclusive contracts because they limit the provision of telecommunications services to renters, who TRAC states are predominately poor and non-white.⁹² The trouble with this argument is that most competitive service providers are not interested in serving buildings with low income residents. For example, RCN wants to provide bundled services because its average per customer revenue jumps from \$88 per month for a la carte services, to \$125 per month for provision of bundled services.⁹³ The only way a service provider will have an incentive to serve buildings with low-income residents is if it can be assumed that it will have a large customer base in the building, to make up for the lower rates residents will be able to afford.

RCN contends that existing systems will not be upgraded without the threat of competition, and that exclusive contracts provide “powerful weapons that preserve a *status quo* for providers of outdated and overpriced network facilities.”⁹⁴ The Alliance agrees that shortening the length of exclusive contracts to the period necessary to provide a reasonable return on investment would be a sensible change.⁹⁵ But otherwise, RCN provides no evidence that exclusive contracts do not provide competitive service providers with incentive to build new

⁹² TRAC Comments at 2.

⁹³ RCN Comments at fn. 17.

⁹⁴ RCN Comments at 12-13.

⁹⁵ Although this begs the question of what that term would be, how it would be computed, and whether the FCC is equipped to deal with the issue.

networks by ensuring that they will be able to recover their investment. In fact, other comments provide evidence of exactly this point.⁹⁶

Finally, the Alliance would also like to correct two misstatements made by RCN in its comments. It is the service provider that usually requires the residential MTE owner to grant the provider exclusive access as condition of providing service, not the other way around.

Residential building owners enter into exclusive contracts because the service provider requires exclusive access to ensure that it will generate enough market share within the residential building to recoup its capital costs and reasonable profit.⁹⁷ In other cases, where competitive service is not available, the owner may have no choice but to agree to an exclusive access condition as required by the incumbent service provider. In either case, there is no stunning “rush to sign exclusive contracts by MTE owners.”⁹⁸

Second, RCN states building owners cannot be expected “to act in their tenants’ best interests.”⁹⁹ As stated in previous comments to the Commission, building owners have strong economic incentives to satisfy the telecommunications needs of their tenants. Revenues from telecommunications-related services represent only a tiny share of overall building income, and the loss of even one resident because of poor telecommunications service would be just too costly. The bulk of building income is derived from rent. The only way for building owners to keep their vacancy rates low and their rents at market, is to accommodate the needs of their tenants.

⁹⁶ PrimeLink Comments at 2.

⁹⁷ ICTA Comments at 10.

⁹⁸ RCN Comments at iii.

⁹⁹ RCN Comments at 18.

The bottom line is that some limited evidence has been provided to demonstrate that some providers are being denied access to relatively large residential buildings. No evidence has been provided to demonstrate that tenants are being denied services from a provider with an exclusive contract that they would otherwise receive from an alternate provider. Yet strong evidence exists to demonstrate that exclusive contracts enable smaller buildings, which would not otherwise be financially attractive to competitive service providers, to negotiate innovative service packages for their tenants. Over 50% of apartment properties have 50 units or less. Exclusive contracts remain vital to the efforts of building owners to attract competitive service for their residential tenants. The Commission should not prohibit exclusive contracts without substantial evidence that the majority of residential tenants are harmed by the use of exclusive contracts.

VIII. COMMENTERS GENERALLY OPPOSE REGULATION OF PREFERENTIAL MARKETING ARRANGEMENTS.

Nearly all of the commenters support preferential marketing arrangements, including some who would ban exclusive contracts.¹⁰⁰ The Alliance shares the view that preferential agreements allow providers to differentiate themselves and thereby promote competition.¹⁰¹ The Commission should not attempt to regulate preferential agreements.

IX. STATE BUILDING ACCESS REGULATIONS ARE NOT APPROPRIATE MODELS FOR COMMISSION ACTION.

The FNPRM requested comments on state rules regarding access to buildings. Interestingly, few of the commenters discussed those rules. There appears to be no consensus

¹⁰⁰ See Comments of RCN, AT&T, SBC.

¹⁰¹ See Comments of PrimeLink, CAI, ICTA.