DOCKET FILE COPY ORIGINAL

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

RECEIVED

MAR - 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

| | |
|---|---|
| In the Matter of | |
| Promotion of Competitive Networks in Local Telecommunications Markets | WT Docket No. 99-217 |
| 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 Provisions in the Telecommunications Act of 1996 | CC Docket No. 96-98 |
| Review of Section 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network | CC Docket No. 88-57 |

# COMMENTS OF THE REAL ACCESS ALLIANCE

Of Counsel:
Roger Platt
Senior Vice President and Counsel
The Real Estate Roundtable
Suite 1100
1420 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

March 8, 2002

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
Senior Vice President and General Counsel
Robert Cohen
National Policy 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

## SUMMARY

The Real Access Alliance (the "Alliance") respectfully submits the results of its most recent analysis of conditions in the market for access to private buildings by telecommunications providers. The Alliance has conducted its fourth quantitative study on this issue and determined that market forces continue to perform well, despite a national recession and the worst conditions in the telecommunications market in memory.

The Alliance's newest survey reflects the experience of office building owners of all sizes, all across the country. The survey's key findings include:

- The average number of providers in buildings in 2001 was 3.7, compared to an average of three in 2000.
- 28% of all owners own at least one building served by more than five providers.
- On average, it takes 3.3 months to negotiate an access agreement, compared to an average of five months in 1999.
- It now takes about as long to negotiate a telecommunications lease as it does to negotiate a typical tenant lease.
- 62% of owners report that on the whole the negotiation process in 2001 was about the same as in the past, being neither smoother nor more difficult.
- Conditions in the telecommunications market in general have affected the building access market. Seventy-six percent of owners report receiving fewer requests than in past years.
- 79% of owners report that in at least one building a telecommunications provider has stopped serving customers.

In addition, the market is maturing in an important way. Owners report that because of the difficult financial conditions facing telecommunications providers, they have agreed to amend or waive provisions of their license agreements, including reductions in annual rent requirements. This demonstrates that owners recognize the value of the presence of competitive providers, and may form the basis for better relationships in the future.

The new survey also indicates that the voluntary commitments made by the Alliance to the Commission in September 2000 have helped improve the negotiation process. For example:

- 57% of owners are familiar with the model license agreement, and of those the same percentage have found it useful in negotiations.
- When denying a provider's request for access, 53% of respondents said they do so within a month or less. Only nine percent take longer than a month.
- Only eleven percent of new requests appear to have been generated by tenants.

Anecdotal information provided by respondents indicates that large providers – including AT&T, Qwest and others – have signed or are now negotiating licenses based on the model agreement.

In any event, the Alliance is committed to continuing to educate property owners about the commitments, their value and importance. Accordingly, as the economy improves and more property owners become familiar with the commitments, the Alliance hopes to see even further improvements in the negotiation process.

Finally, the Alliance's new survey does identify one troublesome area: competition in the residential marketplace continues to lag. In general, CLECs are not requesting access to residential buildings, presumably because business users offer greater revenue potential. The retrenchment of those few competitive DSL providers who were serving the residential market has particularly harmed the growth of competition.

The experience of the past year demonstrates that the real estate and telecommunications industries continue to work together, to their mutual benefit. The Alliance urges the Commission for its part to continue to trust the market and to resist call for needless intervention.

## TABLE OF CONTENTS

SUMMARY ..... i

INTRODUCTION ..... 1

I. THE RAA CONTACTED A CROSS-SECTION OF BUILDING OWNERS ACROSS THE COUNTRY TO ASSESS THE CURRENT STATE OF THE MARKET FOR BUILDING ACCESS. ..... 2

II. THE NEW SURVEY SHOWS THAT, EVEN UNDER THE MOST CHALLENGING ECONOMIC CONDITIONS, THE MARKET WORKS. ..... 5

III. THE RAA'S BUILDING ACCESS COMMITMENTS HAVE HELPED IMPROVE THE NEGOTIATION PROCESS. ..... 9

IV. THE RAA WILL CONTINUE TO EDUCATE ASSOCIATION MEMBERS ABOUT THE BENEFITS OF THE MODEL LICENSE AGREEMENT AND THE IMPORTANCE OF THE REAL ESTATE INDUSTRY'S BEST PRACTICES COMMITMENTS. ..... 14

V. TELECOMMUNICATIONS COMPETITION IN THE MULTI-DWELLING UNIT MARKETPLACE CONTINUES TO LAG. ..... 16

CONCLUSION ..... 18

LIST OF EXHIBITS

A Executive Summaries of Prior Survey
B Survey Questionnaire
C Tabulation of Key Results
D Bitz Declaration
E Alewine Declaration
F Skokan Declaration

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

RECEIVED
MAR - 8 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

| | | |
|---|---|---|
| In the Matter of | ) | |
| Promotion of Competitive Networks in Local Telecommunications | ) | WT Docket No. 99-217 |
| 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 Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| Review of Section 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network | ) | CC Docket No. 88-57 |

# COMMENTS OF THE REAL ACCESS ALLIANCE

## INTRODUCTION

The Real Access Alliance (the "RAA" or the "Alliance")[1] submits these Comments in response to the Public Notice issued by the Federal Communications Commission (the "FCC" or

[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International ("BOMA"), 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 Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and The Real Estate Roundtable.

the "Commission") in WT Docket No. 99-217 (the "Public Notice").[2] In order to assess the current state of the market and the effects of the RAA's voluntary commitments, the RAA has conducted the fourth in a series of surveys aimed at providing the Commission with quantitative data regarding various issues related to building access.[3] This survey and the other information provided by property owners and managers demonstrate that owners and telecommunications providers are adapting to the evolution of the market and the needs of tenants. In addition, recent news reports show that the competitive local exchange industry has increased its market share by 16%, a remarkable achievement in light of recent economic conditions.[4] Thus, the market is working, and FCC regulation of access to private buildings by telecommunications providers remains unnecessary.

## I. THE RAA CONTACTED A CROSS-SECTION OF BUILDING OWNERS ACROSS THE COUNTRY TO ASSESS THE CURRENT STATE OF THE MARKET FOR BUILDING ACCESS.

The Alliance appreciates the Commission's need for information to ascertain how the market is evolving, and appreciates the opportunity afforded by the Public Notice to supply information about the market from the perspective of building owners. In our information-

---

[2] Public Notice, DA 01-2751, *Wireless Telecommunications Bureau Requests Comment on Current State of the Market for Local and Advanced Telecommunications Services Multitenant Environments*, (Nov. 30, 2001).

[3] The surveys previously provided to the Commission can be found at: *In the Matter of Promotion of Competitive Networks*, Joint Comments of Building Owners and Managers Association *et al.*, WT 99-217 (filed Aug. 27, 1999) at Exhibit C (the "Charlton Survey"); "Partnering in the Information Age: Critical Connections," submitted to the Commission as *In the Matter of Promotion of Competitive Networks*, *Ex parte* letter from Real Access Alliance, WT 99-217 (June 30, 2000) ("Critical Connections"); and *In the Matter of Promotion of Competitive Network*, Further Reply Comments of the Real Access Alliance, WT 99-217 (filed Feb. 21, 2001, Exhibit C (the "KS&R Survey"). The executive summaries of the three studies are attached at Exhibit A.

[4] Federal Communications Commission, Industry Analysis Division, Common Carrier Bureau, *Local Telephone Competition: Status as of June 30, 2001* (rel. Feb. 27, 2002), at p. 1.

gathering activities, we have focused upon the questions and topics highlighted in the Public Notice that seemed focused upon building owners. Naturally, the Alliance is not well-placed to address the questions raised in the Public Notice from the point of view of the telecommunications industry, and we trust that the Commission will receive information from the carriers that will be responsive to those questions.

What the RAA has done is to attempt to determine current conditions in the market for building access by conducting a survey of building owners across the country. This survey was conducted informally, in an effort to obtain some useful data in a timely and cost-effective manner, so we caution the Commission and others who may read the survey and use the data that we do not claim that this is a statistically rigorous study. Our budget did not permit the organization of such an effort.

A copy of the questionnaire used by the RAA is attached as Exhibit B. The responses were collected primarily by informal phone interviews conducted by real estate professionals who are knowledgeable about carrier access issues. It will be obvious upon examination of the questionnaire that not all of the questions posed were "yes" or "no" questions, nor did they lend themselves to short standardized answers. For these reasons it has proven impractical to tabulate all of the results or provide quantitative answers to all the questions.[5] The survey does, however, shed light on a number of important topics, including both some of the specific questions asked in the Public Notice, as well as the effectiveness of the specific commitments that the RAA made to the Commission in its letter of September 6, 2000.[6]

---

[5] The tabulation of relevant results is attached as Exhibit C.

[6] *In the Matter of Promotion of Competitive Networks, Ex parte* letter from the Members of the Real Access Alliance (filed Sept. 6, 2000) (the "RAA Commitment Letter").

Of the 12 questions posed in the Public Notice, the survey results provide useful information regarding the six questions that were directed at respondents in the real estate industry. Those questions (numbers 1, 2, 4, 5, 6, and 8 in the Public Notice) will be discussed in more detail below.

In conducting the survey, the Alliance contacted about 2000 managers and owners of commercial real estate. The Alliance received responses from approximately 50 of those companies, collectively owning or managing approximately 2900 office buildings. The Alliance believed that the large number of office buildings represented in this group would provide useful responses, and our further efforts concentrated on this group. The RAA also contacted a small number of residential property owners to ask them about their experiences with competitive telecommunications providers. The data obtained from residential owners are discussed in Section V, below. Unless otherwise stated, all other figures refer to the commercial office building industry.

The survey responses reflect conditions throughout the United States. Although many of the owners that were contacted operate in only one city or perhaps a few cities, the Alliance also contacted large national owners that own or manage buildings in many markets. Properties included in the survey were located in the following cities, among others: Atlanta, Boston, Chicago, Dallas, Houston, Indianapolis, Jacksonville, Kansas City, Las Vegas, New York, Los Angeles, San Francisco, St. Louis, Washington, D.C, and Wilmington. Therefore, the Alliance believes that the survey responses generally reflect conditions over a broad geographic cross-section of the country.

Similarly, the owners who were contacted represent the full spectrum of company and building size. Some of the respondents own only one building. Others own hundreds of

commercial buildings around the country. The buildings in the survey range in size from just two stories to high-rises. For purposes of analyzing and discussing the data, we divided the respondents into three groups, based on the number of office buildings they own or manage: small owners – those responsible for access decisions for one to five buildings; medium-sized owners – those responsible for access decisions for six to fifty buildings; and large owners – those responsible for more than 50 buildings. These categories are arbitrary in that they do not represent any pre-existing categories for purposes of other analyses of the real estate industry, but there are significant differences among large, medium-sized, and small owners in terms of their geographic scope, access to capital, and other factors.

In short, as it has throughout this proceeding, the RAA has attempted to provide the Commission with actual figures regarding what is actually happening in the marketplace and how building owners and telecommunications providers actually interact. This is a difficult and complex area in which to develop sound data, and the survey reflects that reality. The difficulty and expense of gathering statistically-valid information naturally increase the risk of relying on incomplete or over-simplified data that can result in misleading or incorrect conclusions. Nevertheless, we are confident that our results reflect both a broad cross-section of the real estate industry and a snapshot of current relationships between building owners and telecommunications providers regarding building access. Combined with previous data that the Alliance has submitted, this information demonstrates that FCC regulation of building access is unnecessary.

## II. THE NEW SURVEY SHOWS THAT, EVEN UNDER THE MOST CHALLENGING ECONOMIC CONDITIONS, THE MARKET WORKS.

Conditions are understandably hard to assess because of the enormous financial difficulties that have faced the telecommunications industry in the past year, as well as general economic conditions, but on the whole the results of the survey were comparable to those of

previous surveys RAA has done. In fact, conditions in the market for building access have improved in several respects, and the survey provided no evidence that conditions had gotten worse in any respect in terms of the actual negotiation process between owners and providers.

The survey found significant improvements in several key areas. The first is that the number of providers typically available in a building has increased substantially over the figures previously provided to the Commission in past surveys done by the RAA.[7] The average in the survey was 3.7 providers per building; in 2000, by contrast, BOMA published a survey which found an average of three providers per building.[8] One of the more surprising results of the survey was that the smaller owners reported the largest number of providers on average. Owners of 1-5 buildings reported an average of about 4.5 providers, compared to only 2.8 for the medium sized owners (5-50 buildings) and 2.9 for the large owners. The survey does not address the size of the buildings involved, however, nor is it possible to distinguish between them on the basis of location.

In addition, approximately 28% of all owners reported owning at least one building served by more than five providers.

Another very important improvement was in the speed of the negotiation process. Respondents stated that on average it takes them 3.3 months to negotiate an access agreement – 3.6 months for small owners, 3.1 months for medium-sized companies, and 2.5 months for large owners. In the past, the negotiation process has taken much longer. In our initial comments in this proceeding, filed in August 1999, we reported an average of five months.[9] In other words,

---

[7] Question 2 of the Public Notice asks about the number of buildings to which multiple carriers have obtained access.

[8] Critical Connections at 51.

[9] Charlton Survey at Exec. Summary p. 3; Charlton Survey responses at pp. 8, 9.

over the course of the last two years, for large owners the average negotiation time has been cut in half and for small owners it has been cut by about a third. And interestingly, in 1999 we reported that the time it takes to negotiate a typical tenant lease is about three months[10] – exactly the time it now takes to negotiate an agreement with a telecommunications provider. More than any other finding in the survey, we believe that this reduction in the time it takes to negotiate an access agreement illustrates the power of the marketplace.

The survey also asked owners whether the negotiation process in 2001 was generally smoother than in the past, similar, or more difficult. There seems to have been little change in this regard. Of all owners, 62% reported that their experience had been similar. Nineteen percent said it was smoother, while another 19% said the process was more difficult than in previous years. As discussed below, however, it does appear that the RAA's model license agreement has helped the negotiation process in some cases. In any event, given the period covered by the survey, which has seen the national economy in a recession and the telecommunications industry in perhaps its worst slump in history, this is actually a remarkably good result.

Owners did, however, generally report having received fewer requests for access than in previous years: Seventy-six percent of all owners reported having received fewer requests for building access in 2001 than in previous years. Only two percent reported receiving more requests, with the remaining 22% saying they had about the same number of requests in 2001.

Not surprisingly, the single major problem reported by owners has been the financial condition of the telecommunications industry. Many providers have either gone out of business or stopped expanding their operations. As a consequence, many tenants have lost service and

---

[10] *Id.*

had to get new providers in place. Roughly 81% of owners reported that in at least one of their buildings a telecommunications provider had stopped serving customers.[11] Practically all of these cases were the result of the bankruptcy or other financial problems of the respective providers. Seventy-nine percent of owners also reported that they were aware of situations in which they had granted access to a provider but the provider had never begun service. Fortunately, because the typical office building is served by multiple providers, tenants have had ready alternatives.

Even these unfortunate trends have a positive side, however. The real estate industry is very familiar with market downturns and the need to work with tenants and business partners of all kinds. Consequently, many owners have recognized that telecommunications providers now face unusually straitened business circumstances, and owners have attempted to reach accommodations with providers. For example, some owners have agreed to amend the terms of existing license agreements to allow providers to serve fewer properties than promised; owners also have waived rent provisions in their license agreements, allowing providers to occupy buildings either rent-free or at much-reduced rents. *See* Declaration of Brent Bitz, attached as Exhibit D. These cases illustrate the value of gross revenues rent provisions: providers only pay rent if they actually have revenue from a building. *Id.*

Other owners have been able to accommodate provider needs through technical means. For example, some owners have installed central distribution systems that advance competition by allowing providers access to tenants without the need for installing extensive facilities in the

---

[11] Question 4 of the Public Notice asks competing carriers about the percentage of buildings to which they have obtained access that they are actually serving. We are unable to answer that question, but the data referred to in this paragraph indicate that the number of providers that are not serving buildings may be substantial. It is certainly very high among wireless providers, for obvious reasons.

building. By providing a fiber optic ring, or other high-capacity wiring, throughout the building, these owners have provided telecommunications companies with the means to provide service throughout the building by making only one connection. By assuming the risk of this capital investment, these owners have thus reduced some of the up-front cost that deters providers from offering service in a building, while at the same time, reducing the risks of property damage or other harm to the building's owner and tenants.

In summary, although in an economy as enormous as that of the United States there are certainly going to be exceptions, the RAA's confidence in the marketplace as the proper place to resolve business access issues has been vindicated. Furthermore, as owners and providers learn more about each others' business needs and about what it is reasonable and possible to expect of the other side during negotiations, the Alliance is firmly convinced that relations between owners and providers will continue to improve.

## III. THE RAA'S BUILDING ACCESS COMMITMENTS HAVE HELPED IMPROVE THE NEGOTIATION PROCESS.

In the course of this proceeding, the RAA and major property owners have made certain commitments to the Commission intended to address some of the concerns raised by the telecommunications industry regarding building access.[12] Among those commitments are (1) the development of a model license agreement and; (2) a commitment to respond within 30 days to any request for access generated by a tenant, where the provider has indicated its willingness to use the model license agreement. The Alliance has made its members aware of these commitments at conferences and through newsletters and other communications with its members, and we believe that these efforts have improved the negotiating process.

---

[12] *See* RAA Commitment Letter.

First of all, as the Commission is aware, over a period of many months the model license agreement was drafted and distributed for comment with significant input from both building owners and telecom carriers.[13] A draft was published by the Alliance in December 2000. Although the model is still not as widely used as the Alliance is working to ensure, both the latest survey and anecdotal evidence indicate that the model has been useful in easing negotiations between owners and providers. For example, one medium-sized property owner reports great success with the model agreement. ATAPCO Properties, Inc. ("ATAPCO") owns office buildings in Delaware, Indiana, Maryland and Washington, D.C. ATAPCO has negotiated agreements with QWest, Teligent and Winstar based on the model license, and is currently negotiating license agreements with AT&T, Global Crossing and Time-Warner.[14] All of these agreements are based on the RAA's model license agreement. Thus, a number of major telecommunications providers are willing to use the RAA's model, and actually have done so.

ATAPCO is not alone. The survey found that 57% of owners were familiar with the model agreement, and that of those who were familiar with it 57% had found it useful in negotiations. Many of those who reported that they had not found it useful also stated that they had already developed their own similar forms, or typically used the provider's form. Thus, we believe that the model agreement has been helpful in establishing the beginnings of a uniform basis for negotiation on the terms of building access.

---

[13] When the RAA issued the model agreement, William J. Rouhana, Chairman and CEO of Winstar Communications, Inc., stated that "We are pleased that the real estate industry solicited comments from our company and those of other telecommunications providers in preparing this agreement. We believe that this effort is a significant step in enabling service providers and landlords to more quickly identify and appropriately address the issues involved in providing services to tenants in their buildings." *See* Chris Baker, *Real Estate Coalition Offers Tips for Getting Office Buildings Wired*, WASHINGTON TIMES, May 28, 2001 at D7; *Office Tenants To Benefit from Landmark Telecom Model License Agreement*, PR NEWSWIRE (May 22, 2001).

[14] *See* Declaration of Robert Alewine, attached as Exhibit E.

One of the more interesting findings of the survey was that many more larger owners were familiar with the model agreement. One hundred percent of owners of 50 or more buildings who answered the question were familiar with it, compared to only 38% of small owners (1-5 buildings) and 70% of medium-sized owners (6-50 buildings). Similarly, two-thirds of the large owners who were familiar with the model said that they found the model agreement useful, compared to 50% of small owners and 57% of medium-sized owners. At the same time, the fact that many smaller owners find the model agreement useful is very encouraging, since those are the companies most in need of assistance in dealing with these issues. The existence of a readily-available model means that when approached these smaller companies will be less likely to delay negotiations as they acquaint themselves with the issues.

In remarks to the CompTel convention in Florida earlier this week, however, a representative of the Small Buildings Policy Project ("SBPP") previewed some of the conclusions that SBPP plans to present to the FCC in its filing on this issue.[15] While we have not had the benefit of reviewing the final filing, some information that puts the SBPP remarks in context may be helpful to the Commission.

First, SBPP asserts that competitive carriers are unsuccessful in gaining access to buildings in 30% of the requests. Of course, a lot more needs to be known about the type of requests at issue - residential or commercial, how many carriers were already in the building, whether the requests are tenant-initiated or carrier-initiated on speculation that tenants will sign up, and so on. But the converse of a 30% rate of unsuccessfully prosecuted requests is an astounding 70% success rate in gaining access to buildings. By any measure, that is good.

---

[15] Brian Hammond, *CompTel Panelists: FCC Ruling, Model Pact Fall Short on Building Access*, TR Daily (Mar. 5, 2002).

Indeed, it is a dramatic improvement. In 1999, the RAA reported that the Charlton Survey found that owners had either granted access or were still negotiating with providers in 65% of cases.[16] While we still stand by that figure, Winstar criticized the Charlton Survey, asserting that in fact it showed that only 45% of CLEC requests are successful.[17] If this criticism was correct, then by SBPP's own admission, market conditions have improved enormously.

Second, it is asserted that not one competitive carrier has seen the model agreement in the marketplace. This unequivocal statement is puzzling to us not only because our publicity efforts and survey data indicate otherwise, but because it could mean that competitive carriers are not even asking for the model agreement. Much more needs to be known about the context of this assertion before it can be evaluated, but we are preliminarily concerned about this as a possible cause.

The model agreement was the product of months of intensive outreach by the building owners to competitive carriers, carefully revised to address legitimate concerns raised. It was crafted in good faith as a vehicle to address the main complaint of the competitive carriers as this proceeding came to a head - that getting an answer about access took too long. If the competitive carriers are not seeing the agreement because they are not asking for it, it is a grave disappointment to the good faith efforts of the building owners. In any event, the evidence of our own research efforts, as described above, belies the reported assertions of SBPP.

The survey also found that owners are complying with another important commitment, which was raised in Question 6 of the Public Notice. Fifty-three percent of the survey respondents report that when denying a provider's initial request for access, they do so within a

---

[16] Charlton Survey responses, at p. 4.

[17] *In the Matter of Promotion of Competitive Networks*, WT Docket No. 99-217 (Reply Comments of Winstar Communications (filed Sept. 27, 1999), at p. 14.

month or less. In fact, many owners respond within a week. Only three percent of owners report taking more than a month. The remainder (44%) either did not know, or stated that they had not received requests or had not denied requests in 2001. Accordingly, there seems to be little problem with providers applying for access and then being left uncertain regarding the status of their requests.

The survey did not provide information regarding the length of time that it takes to deny requests for access generated by tenants. The survey does, however, indicate that this is not likely to be a problem. Respondents were asked how many of the requests for access they received in 2001 were generated by tenants, and this proved to be a very small number: only 11% of the total. The number of tenant-generated requests seems to be substantially larger in the case of buildings owned by small and medium-sized owners. Five percent of the requests received by large owners were tenant-generated, compared to 12% for small owners and 27% for medium-sized owners. This may be because larger owners are more attractive to providers seeking to negotiate portfolio-wide arrangements, and therefore are more likely to be approached by providers than smaller owners. In any event, regardless of the reason for that particular difference, it seems that delays in tenant-generated requests are unlikely to be a problem, both because they seem to be relatively rare, and because when they do occur the building owner will have a stronger incentive to respond quickly than it would to a request from a provider.[18]

The survey results thus indicate that several of the important concerns that faced the Commission and the telecommunications industry are being addressed by the RAA's voluntary

---

[18] This data bears to some degree on Question 8 in the Public Notice, which asks about differences in the length or nature of negotiations or the frequency of denials in the case of tenant-generated requests.

commitments. As the economy improves and applications for access increase, we believe that the trends identified in the survey will continue.

## IV. THE RAA WILL CONTINUE TO EDUCATE ASSOCIATION MEMBERS ABOUT THE BENEFITS OF THE MODEL LICENSE AGREEMENT AND THE IMPORTANCE OF THE REAL ESTATE INDUSTRY'S BEST PRACTICES COMMITMENTS.

The Alliance and its member associations remain committed to educating the real estate industry about the model license agreement and promoting the use of the model. As noted above, the model has been successfully used by many members of the RAA to improve the negotiation process. RAA members will continue to promote awareness of the model license, inform its membership of successful negotiations accomplished through use of the model, and to periodically update and amend the model license as necessary.

Improving the choice of telecommunications service providers available to real estate tenants increases tenant satisfaction and pleasing tenants is an essential goal shared by all Alliance members. Providers are valuable tenants themselves, because they provide the kinds of services that make properties more attractive to non-telecommunications tenants. And as with all tenants, real estate managers and owners will continue to require written agreements before permitting a tenant to occupy any building. Thus, there will be a continuing need for the model agreement.

Some of the ways in which Alliance members have and continue to make the model license available to property owners are:

- Distributing copies of the model on CD-ROM disks upon request;
- Posting the model on association web sites;
- Including CD-ROM disks in annual association reports distributed to members; and
- Including CD-ROM disks in real estate, telecommunications and continuing legal education conferences.

In addition to simply making the model agreement available, RAA members have educated their members and others interested in real estate and telecommunications issues, about how to use and understand the model by:

- Publishing articles in newsletters, association-published magazines, and building and real estate trade publications;
- Presenting educational workshops, seminars, and presentations to association board members, conference attendees, real estate and telecommunications attorneys, and real estate telecommunications task force members;
- Debating and participating in real estate, telecommunications and/or legal conferences and summits including American Bar Association conferences, Practicing Law Institute seminars, and joint industry-government telecommunications summits.

Finally, both the RAA and attorneys involved in preparing the model have reached out to industrial real estate owners, *i.e.*, companies and organizations with large property holdings that are not in the real estate management business *per se*, such as insurance companies, educational institutions, and investment funds, to explain how to use the agreement, the benefits of the agreement, and where to obtain copies of the agreement.

The RAA will continue these educational outreach efforts, continue to market the model agreement as a useful tool for real estate and telecommunications professionals, and continue to use the model as a means of working with the telecommunications industry to foster choice and competitive telecommunications service for all building tenants.

## V. TELECOMMUNICATIONS COMPETITION IN THE MULTI-DWELLING UNIT MARKETPLACE CONTINUES TO LAG.

Owners of apartment buildings and other types of rental residential property have a strong interest in encouraging the deployment of telecommunications services in their buildings to meet the needs of their tenants. Dependable and reliable telecommunications service is as important to apartment residents as dependable and reliable HVAC, power, security and elevator systems. As e-commerce, telecommuting, telecommunications/video-conferencing, and e-mail/electronic document transfers have grown, residential owners anticipate that resident demand for new telecommunications services will grow. In anticipation of increased demand for advanced services, in recent years building owners have been particularly interested in introducing competitive DSL service in their buildings, and many owners had entered into contracts with such providers. Unfortunately, despite the best efforts of those owners, the financial crisis in the telecommunications industry has resulted in a slowdown of competitive service providers active in the market.[19]

As a consequence, telecommunications competition in the apartment marketplace continues to lag. The vast majority of buildings are still served only by the ILEC and the incumbent cable operator.

Owners of residential buildings have received very few requests for access in the past year. The Alliance surveyed 15 residential owners around the country, including very large national residential real estate companies, to get a general sense of the state of telecommunications competition in the apartment market. We did not concentrate on residential

---

[19] For example, in July 2000, Bozzutto Management Company entered into an agreement with Darwin Networks to provide high-speed Internet access using DSL and wireless technology in 30 apartment communities. Shortly after beginning service and achieving penetration rates of as

properties because the primary focus of this proceeding has been on telecommunications in the office market and the model license agreement does not apply to residential properties. In addition, the lack of residential competition is an established fact. That lack of competition is due to the basic economics of providing residential telecommunications services. Business users are able and willing to pay much more for telephone service than residential users. Consequently, CLECs typically prefer to provide service to business users only and bypass less affluent residential consumers. Thus, it is extremely rare for two providers to ever attempt to compete head-to-head for basic voice service in any residential context.

By the same token, the business and residential real estate markets are very different, which means that agreements for provider access must reflect different concerns. Residential buildings may incur annual resident turnover rates of fifty percent and higher. Residential owners have many of the same concerns as office building owners regarding safety, security, and property management, but residential owners also tend to be more concerned about service quality and reliability. This is because in those few instances where there is a competitive telecommunications provider in a building, the provider is there through the desire of the owner to offer an alternative provider, and the presence and performance of the provider reflects on the owner's reputation and relations with its residents.[20]

Consequently, it was no great surprise to learn that only one of the residential owners was familiar with the model agreement and none had used it. The model agreement simply is not as useful for residential building owners because it does not reflect the particular needs of the residential market.

---

much as 30%, depending on the community, Darwin terminated service. *See* Declaration of Scott Skokan, attached as Exhibit F, at ¶¶ 3-5.

[20] *See* Skokan Declaration at ¶¶ 5-6.

In addition, of the 15 apartment owners who responded to the survey, only seven had been contacted even by a single competitive provider with respect to a single building, and only four had entered into any agreements in 2001.[21] Those agreements covered only about 19% of all the residential buildings represented in the survey.[22] The average time frame for reaching agreement was about three months, or comparable to the negotiating period for the office buildings discussed above.

The survey does not indicate that a large number of property owners who have entered into agreements with competitive providers have had service terminated as a result of financial problems in the telecommunications industry. There is a great deal of anecdotal evidence to that effect, however, as many property owners report that such competitive residential providers as Reflex, Darwin Networks, and others have filed for bankruptcy or cut back on expansion plans.[23] The survey results may simply be a result of the fact that only a small minority of buildings had reached agreements with competitive DSL providers in the first place.

## CONCLUSION

The experience of the past year demonstrates that, when left their own devices, businesses behave rationally and reasonably. They learn to work together to mutual advantage and to accommodate each others legitimate business needs. This experience also demonstrates

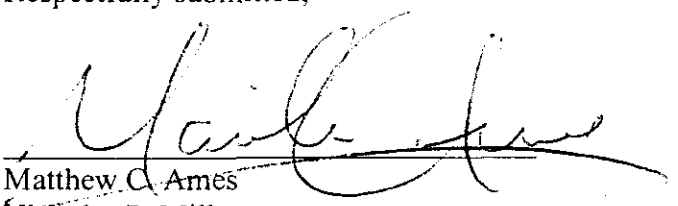
---

[21] We must note that a perennial problem in conducting this kind of survey of residential owners is distinguishing between competitive video providers and telecommunications providers. The survey expressly excluded cable operators and requested information only about voice or at providers, but some of the respondents may have included cable or video providers in their responses.

[22] Another definitional issue in the residential market has to do with the term "buildings." In garden apartment or townhouse communities, a given property may have dozens of buildings. When combined with the question of whether these respondents were referring to cable, telephone, DSL, or other types of providers, it is difficult to tell what this figure means.

the wisdom of the Commission's decision not to interfere in the market for building access. The Real Access Alliance urges the Commission to continue to trust the market and to resist calls for needless intervention.

Respectfully submitted,



Matthew C. Ames
Nicholas P. Miller
Mitsuko Herrera

MILLER & VAN EATON, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036-4306
Telephone: (202) 785-0600
Fax: (202) 785-1234

Attorneys for the Real Access Alliance

March 8, 2002

Of Counsel:

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

Bruce Lundegren
Regulatory Counsel
National Association of Home Builders
1201 15th Street, N.W.
Washington, DC 20005-2800

[23] *See id.* at ¶ 7.

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

Tony Edwards
Senior Vice President and General Counsel
Robert Cohen
National Policy 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

## LIST OF EXHIBITS


Exhibit A -- Executive Summaries of Prior Survey

Exhibit B -- Survey Questionnaire

Exhibit C -- Tabulation of Key Results

Exhibit D -- Bitz Declaration

Exhibit E -- Alewine Declaration

Exhibit F -- Skokan Declaration