

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

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In the Matter of)	
)	
Exclusive Service Contracts for Provision)	MB Docket No. 07-51
of Video Services in Multiple Dwelling)	
Units and Other Real Estate Developments)	
)	
)	

**JOINT REGULATORY FLEXIBILITY ACT COMMENTS
OF THE REAL ACCESS ALLIANCE**

I. INTRODUCTION

On behalf of its members, including a substantial number of small entities for purposes of the Regulatory Flexibility Act, the Real Access Alliance (“Alliance”)¹ hereby responds to the Commission's invitation for comments on its Initial Regulatory Flexibility Analysis (“IRFA”) set forth in the Appendix to the Notice of Proposed Rulemaking (“NPRM”) in MB Docket No. 07-51 (“IRFA App.”). The IRFA is required by the Regulatory Flexibility Act (“RFA”).² *See* 5 U.S.C. § 603.

¹The 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 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.

²The RFA definition of “small entity” generally includes “small business” as defined by the SBA. *See* 5 U.S.C. § 601(6). As a general proposition, SBA defines operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings as small businesses if they generate less than \$6,000,000 annually. IRFA App.

The NPRM solicits comments on the use of exclusive contracts for the provision of video services to multiple dwelling units and other real estate developments. The NPRM does not propose any specific regulations, but suggests that certain parties may be barred from entering into or enforcing such contracts, and that the terms of such contracts may be regulated, without specifying in what manner.

In its IRFA, the Commission, pursuant to the requirements of 5 U.S.C. § 603(c), purports to describe any significant alternatives to the proposed regulation, as required by 5 U.S.C. § 603(c). The IRFA, however, contains no actual discussion of any such alternatives. The IRFA instead asserts that any potential rules “would have at most a *de minimis* impact on small government jurisdictions.” The IRFA says nothing at all about any potential effect on apartment building owners, even though apartment building owners are essential parties to the kinds of contracts being examined by the NPRM. Thus, there is no presentation of actual “significant alternatives to the proposed rule” with respect to apartment building owners.

II. THE FAILURE TO INCLUDE AN ANALYSIS OF LESS BURDENSOME ALTERNATIVES VIOLATES THE RFA.

The RFA requires agencies to engage in a two-step process designed to assure that careful consideration be given to the manner in which proposed rules impact small entities economically and the means by which any such impacts can be minimized. Section 603 requires agencies to identify potential economic impacts on small entities, to consider possible ways to minimize those impacts during the formulation of its rulemaking proposal, and to subject its thought process in this respect to public comments. 5 U.S.C. § 603. Section 604 in turn requires the agency to summarize the issues raised by public comments; assess those issues; and state what, if any, changes it has made as a result of those comments. 5 U.S.C. § 604. *See also*

Southern Offshore Fishing Association v. Daley, 995 F.Supp. 1411, 1436 (M.D. Fla. 1998). The obligations imposed by the RFA, moreover, are not merely to consider less severe alternatives, but actually to adopt less severe alternatives where those alternatives will achieve the agency's regulatory goal. *North Carolina Fisheries Association, Inc. v. Daley*, 27 F.Supp.2d 650, 661 (E.D. Va. 1998).³ Section 604(a)(5), thus, specifically requires that when it adopts a final rule, an agency must prepare a final regulatory flexibility analysis with:

a description of the steps [it] has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. (Emphasis supplied.)

5 U.S.C. § 604(a)(5).

Section 603(a), moreover, explicitly requires that an agency's IRFA be made “available for public comment.” 5 U.S.C. § 603(a). A material required part of any such initial analysis is a description and discussion of proposed alternatives. 5 U.S.C. § 603(c). The Commission's failure to include any such description or discussion in its IRFA here is thus inadequate notice to the public as a matter of law and a material breach of the procedures required by the RFA. Inadequate notice is a fatal defect to the adoption of a final rule. *Cf. Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 750-52 (D.C. Cir. 1990). *See generally Southern Offshore Fishing Association, supra*, 995 F.Supp. at 1436.

³The agency's general duty, of course, is “to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.” *See Farmers Union v. FERC*, 734 F. 2d 1486, 1511 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1034 (1984). “The failure of an agency to consider obvious alternatives has led uniformly to reversal.” *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 746 n. 36 (D.C. Cir. 1986); *MVMA v. State Farm Ins. Co.*, 463 U.S. 29, 49 (1983).

The Commission must therefore withdraw its pending NPRM and reissue it with a revised IRFA that includes the required analysis of less burdensome alternatives to its proposed rules.

III. THE REVISED IRFA SHOULD RECOGNIZE THE INAPPROPRIATENESS OF REGULATION OF EXCLUSIVE CONTRACTS.

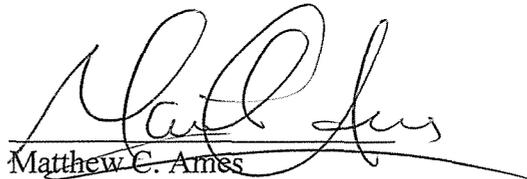
Among the factors that the Commission should consider in any discussion of less-costly alternatives pursuant to Section 603(c) is the effect that banning or regulating exclusive contracts would have on the respective bargaining positions of building owners and operators vis-a-vis telecommunications carriers and cable operators. In terms of their relative size and economic muscle, even the smallest telecommunications carriers and cable operators tend to outweigh the typical building owner or operator. Exclusive contracts are an important market mechanism for allocating costs between providers and building owners, and building owners depend on the potential grant of exclusivity to obtain significant benefits for themselves and their residents. Restricting the utility of that mechanism, even indirectly, thus stands the goal of the RFA on its head by tilting what may already be a playing field that favors service providers even more dramatically in their favor.

IV. CONCLUSION

The Commission has failed, as required by Section 603 of the RFA, to adequately describe and discuss possible alternative means of addressing its goals with less impact on small apartment building owners and to solicit public comment on its analysis of that issue. It has thus, as a matter of law, given the public inadequate notice of its own analysis of this issue and the public has thereby been deprived of the statutorily required opportunity to comment on that

analysis. To cure that breach of RFA's notice and comment requirements, the Commission should withdraw the NPRM and reissue it with a revised IRFA.

Respectfully submitted,



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