

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling  
Units and Other Real Estate Developments

MB Docket No. 07-51

Reply to "COMMENTS OF THE REAL ACCESS ALLIANCE"

I. Notes and disclaimers:

1. Due to time constraints and the length of the comments (the entire filing exceeded one hundred pages), I have not been able to respond to all the points raised. My selection of certain specific points to address should be taken only as a reflection of these time constraints and not as agreement with the remaining points. Many of the points raised were also raised by other commenting parties are addressed in separate replies that I already filed.
2. The membership of the Real Access Alliance includes the National Association of Real Estate Investment Trusts. In the interest of full disclosure of possible conflicts, I note that part of my retirement savings is presently invested in the "Vanguard REIT Index Fund". There is likely to be overlap between the membership of the latter association and the holdings of this fund.

## II. Summary

The Real Access Alliance raises principally two novel points:

1. That it is common for an ILEC to refuse to provide voice service if it is prohibited by an exclusive contract from also providing video service (for reasons beyond the scope of this discussion, providing video service, with or without voice service, is more lucrative than providing only voice service).
  - The Real Access Alliance argues that the power of an ILEC to withhold voice service must be offset by the power of other providers to enter into exclusive contracts, but fails to present any examples of voice service being withheld from a building whose tenants could not be prohibited from choosing for themselves whether or not to receive video service from the ILEC. Prohibiting exclusive contracts would ensure that each provider, including the ILEC, can offer video service to those tenants who choose to receive it. If exclusive contracts were prohibited, an ILEC would no longer need to threaten to withhold voice service in order to avoid being excluded from the video service market. I previously submitted comments arguing that exclusive contracts should be prohibited so that tenants can select a video service provider of their choice. If the comments of the Real Access Alliance are even partially correct, then exclusive contracts should also be prohibited to ensure that no ILEC is forced to withhold voice service.
2. That prohibiting exclusive contracts between landlords and service providers would somehow transfer power from landlords, who the Real Access Alliance admits do not seek such contracts, to providers, who the Real Access Alliance admits do seek such contracts.
  - Ignoring the internal contradictions in this position, it also misrepresents what a prohibition against exclusive contracts would do. Prohibiting exclusive contracts would not grant an ILEC or any other provider the right to serve a tenant. It would only grant all providers the same right to offer to serve a tenant, who could accept that offer, or reject it in favor of another provider. Owners would lose the power to select the provider, but this power would be transferred to the tenant, who pays for and uses the service, not to the provider. If the tenant must pay the rates charged by the provider and cannot receive service better than that offered by the provider, then the tenant should select the provider.

### III. Specific comments

The IMCC comments that I have selected to address separately and my replies are as follows:

#### A. Reply to selected statements in "Summary"

1. "[W]ho will get the benefit of those facilities first?"
  - This applies only where the exclusive contract exists from the time of construction. When a landlord, after tenants have made unrestricted use of facilities for years, signs a contract barring further use by anyone unwilling or unable to do business with the exclusive provider, the quoted question does not apply. Rather, the question becomes one of who will get to use the facilities "next", not "first". This is particularly disturbing where the facilities in question were constructed at the expense of the excluded provider or where the existence of the facilities (and the expectation of continued benefit) induced the tenant to rent.
2. "Property owners and service providers use exclusive contracts to their mutual benefit to allocate the costs of network construction."
  - This also applies only where the exclusive contract exists from the time of construction. When a landlord signs a contract excluding the provider who paid for the costs of network construction, in favor of a provider who agreed to pay the landlord for exclusive use of the constructed network, the exclusive contract prevents the network from being used for the benefit of the provider who constructed the network.
3. "Without the ability to recover some of their construction costs through exclusive contracts, property owners would have less incentive to assume the cost and risk of installing advanced wiring systems in their buildings. Conversely, when dealing with owners that are not prepared to assume such costs and risks, permitting such agreements gives service providers greater incentive to upgrade existing facilities or install facilities"
  - With the possibility of being contractually excluded at any time, no provider has any incentive to install wiring or other facilities. A provider has an incentive to install anything only if the provider knows that, as long as the provider satisfies the tenants, the provider cannot be excluded by the landlord.
4. "[If exclusive contracts are prohibited,] "providers would retain the right to decide which services to provide in which locations."
  - Additionally, each tenant would have the right to select whichever provider decided to provide the services that tenant desired. Presently, a tenant can obtain only the services that the landlord's chosen provider decides to provide.
  - Moreover, providers who choose to exercise the right not to provide the services that tenants desired would lose business to competitors who did offer those services. Presently, a provider with an exclusive contract has the right to decide which services to offer and the right to exclude those who offer other services. Without the right to exclude all providers who offer a particular service, a provider could not refuse to offer that service without losing market share.
5. "[P]roviders should be encouraged to negotiate with property owners to reach mutually beneficial agreements..."
  - Providers should be encouraged to negotiate with their customers, the tenants, not with the property owners, who have no standing to negotiate on behalf of the tenants, and have a financial interest to negotiate terms

- unfavorable to the tenants. If negotiation is to occur, the tenants must be permitted to participate.
6. "Instead of seeking government help, competitive providers should concentrate on listening to property owners, understanding their concerns, and working with them... [emphasis added]"
    - Instead of seeking exclusive contracts with landlords, providers should concentrate on listening to *tenants*, understanding their concerns, and working with them. This quotation, and the one before it, demonstrate the fundamental difference between my position and that of the Real Access Alliance. I believe that the persons who pay for a service and use it should have some say in the selection of a provider. The Real Access Alliance's position is based on the premise that the provision of television service to tenants is a matter between provider and landlord only.
  7. "To the extent that the Commission has been swayed by complaints about the behavior of certain cable operators, the Commission should understand that the ILECs do not come to the Commission with clean hands."
    - I concede that no provider is perfect. For this person, customers should be allowed to select whichever provider they find less objectionable. Even if the excluded providers are not completely innocent, the tenants certainly are completely innocent victims of the contracts, and should not be bound by them.
  8. "The ILECs do not need regulatory assistance..."
    - However, the tenants do need assistance. The proposed ban on exclusive contracts is needed to protect the tenants, not the ILECs.

B. Reply to selected statement in "Introduction"

"Property owners are perfectly willing to work together with service providers for the mutual benefit of the property owner, the provider..."

- While sometimes welcome, the "assistance" of property owners should not be obligatory on tenants. Service providers and tenants should be free to contract privately, provided that they do not violate the terms of any contract to which either of them has consented, and should not be bound by the terms that the landlord has negotiated with a different provider.

C. Reply to selected statements in Section "I"

1. "APARTMENT OWNERS BENEFIT FROM AND WANT COMPETITION FOR THEIR RESIDENTS"
  - If this were true, the apartment owners would refuse to sign exclusive contracts that eliminate all competition for residents. Apartment owners want competition for exclusive contracts, because they are paid for exclusive contracts. True competition would allow residents to select a provider who did not pay the landlord. This is exactly what the Real Access Alliance opposes.
2. "Owners want to retain existing residents... Anything that encourages residents to stay is valuable, and anything that encourages them to leave is a potential problem."
  - Unfortunately, this is not true in all jurisdictions or situations. For example, the rent control laws in New York City unwisely create a financial incentive for landlords to discourage tenants from staying and encourage them to leave. (These laws provide that a landlord may not charge a satisfied tenant market rent, but may charge the next tenant more, if the original tenant can be "persuaded" to leave.) Elsewhere, landlords may demand unreasonable amounts of money in return for allowing tenants to terminate leases early. Additionally, when a tenant departs before the end the lease term, the

landlord may find a new tenant and collect rent from both tenants for the same months, even if the practice is technically illegal. While the reasons for landlords to try to make tenants miserable are complex and beyond the scope of this proceeding, the Federal Communications Commission should recognize that such situations do exist. While I know of no conclusive evidence that any landlords seek to use exclusive contracts with a provider known to be unsatisfactory to tenants for the purpose of causing tenants to depart for a building with a more satisfactory provider, this certainly could occur.

3. “[O]wners support competition and would prefer that their residents have access to multiple providers.”
  - This is not true because landlords are only paid by providers who are granted exclusivity. When multiple providers have access, they must offer service to tenants at a lower price that does not allow them to pay landlords.
4. “Apartment owners are subject to intense market pressure...owners compete fiercely to attract tenants.”
  - This may be true in some places. It is not true everywhere, especially with respect to those rent controlled apartments that, by law, an owner must make available for an amount of money far below market rent. While the wisdom of these laws is hotly debated, they must not be constructively defeated by allowing landlords to extort service providers to charge tenants unlimited sums, ostensibly not “rent” to evade the law, and then pay the money to the landlord. If the federal government disagrees with these laws, Congress is free to enact legislative remedies. Allowing evasion through indirect rent in the guise of television service fees is not an appropriate way to grant relief from rent control laws. As long as the current laws remain in effect, the artificially low rents ensure that an apartment owner can easily find tenants, and have no incentive to allow tenants to use acceptable television service providers.
5. “There are over 500,000 apartment properties in the country, and over 17,000,000 apartment units.”
  - Yet, of all these, none has a rent-paying tenant who has commented in favor of exclusive contracts in this proceeding or who declares in the Real Access Alliance’s exhibits that he or she is satisfied by the provider selected by an apartment owner. For comparison purposes, during the Revolution, approximately 1/3 of the colonists were Loyalists. According to the quoted figures, the total number of tenants now exceeds the total population of the United States in 1776. Although the British had no difficulty finding numerous Americans opposed to independence, neither the exclusive provider industry nor the apartment owners have presented any examples of tenants who support their cause.
6. “Over time, those owners that make the most rational decisions will be the most successful at attracting and retaining tenants.”
  - This is clearly incorrect in that those who irrationally offer rents so low that the owning the apartment is not profitable will obviously be more successful at attracting and retaining tenants. More relevantly, it is rational for a landlord to enter into a contract that causes tenants to depart, if the landlord receives more money from the service provider than the landlord loses due to tenant departure, or if rent control laws make turnover advantageous to the landlord.
7. “There are no uniform solutions, and in a free market economy apartment managers can and should be left to make their own decisions about how to meet their tenants’ needs.”
  - Tenants can and should be left to make their own decisions about how to meet their own needs. In a free market, tenants would be left to make their own decisions about how to meet their own needs, and would not have to go

through this proceeding to obtain that right. Apartments managers should not be allowed to force their decisions on tenants. In a truly free market, no third party would be allowed to force their selection of service provider on a customer.

8. "If a communications provider is to bear the capital expense of installing its facilities in a building...Service providers weigh carefully the cost of installing new facilities in buildings..."
  - Even if this argument were valid on its merits, it would apply only to new installations. There is no justification for allowing a landlord of a building with existing facilities to suddenly start excluding providers who are simply unwilling to pay (or continue to pay) the landlord. Service providers cannot undertake these costs when they risk being excluded, at any future time, without cause. Removing the possibility of future exclusive contracts will allow providers to know that, as long as they satisfy the tenants, they will be able to continue to provide services with the facilities that they construct.
9. "The Commission should not imagine ... that the only barrier to such competition is the existence of exclusive agreements."
  - This is true. The mere threat that a landlord may, at any future time, with or without cause, enter into a contract that excludes a provider is a barrier to competition by that provider. The actual existence of the contract is not a necessary condition for this barrier to exist. Precisely for this reason, the Federal Communications Commission should eliminate not only the existing contracts, but also the possibility of future exclusive contracts, with a permanent ban. A temporary ban will leave open the possibility of future exclusion, a risk that is sufficient to pose a barrier to competition, even in the absence of actual contracts.
10. "In fact, viewed strictly from the regulatory perspective, the most logical thing for the Commission to do to advance the availability of competitive services inside MDUs would be to require service providers to serve any building at their expense upon the request of the property owner."
  - This is correct, up to the last two words. The resident, not the owner, should have the power described here. Granting tenants the powers sought by building owners would accomplish exactly the pro-competitive goals that the Real Access Alliance pretends to support.
11. "[P]roviders would retain the right to decide which services to provide in which locations."
  - Additionally, each tenant would have the right to select whichever provider decided to provide the services that tenant desired. Presently, a tenant can obtain only the services that the landlord's chosen provider decides to provide.
12. "[T]hat mechanism – with property owners and service providers jointly making the investment decisions – works better than any regulatory mandate possibly could."
  - Prohibiting exclusive contracts between property owners and service providers would not result in a "regulatory mandate" making the investment decisions. It would merely ensure that the service providers considered the views of the tenants, instead of the landlords.
13. "If residents are unhappy with the amenities on offer, they will not rent..."
  - It is absurd to suggest that a typical tenant would think to check on the quality of service provided by the television service provider before signing a lease. Furthermore, landlords are currently free to select an exclusive provider after a tenant has made an irrevocable decision to rent.

#### D. Reply to selected statements in Section "II"

1. "[T]he basic bargain in this type of arrangement [exclusive marketing] is for the building owner to agree to serve as a marketing representative of the video services provider –

that is, the building management markets the video services provider's service offering to its prospective tenants on an exclusive basis..."

- This poses a conflict of interest for the landlord who is also deciding, on the tenants' behalf, which provider the tenant will use. In and of itself, a contract providing for exclusive marketing rights is not objectionable if tenants are completely free to obtain service from a different provider. However, if the marketing leads tenants to believe that they are prohibited from using other providers, that is objectionable, regardless of whether the prohibition does or does not exist in fact. For example, yesterday, I received a letter from the Federal Communications Commission informing me that my former landlord had made a misstatement in a letter stating (1) that there was a rule prohibiting me from obtaining service from any provider other than Consolidated Smart Systems and (2) that I would be evicted if I violated this rule. Unfortunately, the letter informing me that the rule did not actually prohibit me from obtaining service from another provider did not arrive until after I had already been forced to move because of multiple frauds committed by Consolidated Smart Systems, including opening a DIRECTV account in my name without my authorization to do so and failing to pay the resulting bills which it had agreed to pay, until they were several months past due and service had been terminated.
2. "Contracts giving exclusive access to a building."
    - These are particularly objectionable in that the landlord is restricting access to the property rented to the tenants. This is no different than if the landlord was to prohibit the tenant from having pizza, furniture, or other things delivered by any business other than the one that provided the landlord with compensation in return for exclusivity. If this is allowed, a landlord could even restrict what candidates for political office had access to meet with tenants in their apartments and ask for their votes.
  3. "Depending on the desirability of the building to the service provider, and the property owner's negotiating skill, the agreement will also contain additional terms."
    - This is true because the property owner is free to negotiate without the consent of the affected tenant. If the tenant was free to negotiate on his or her own behalf, or to hire a competent negotiator, the tenant would not be dependent on the negotiating skills of the property owner.
  4. "Property owners uniformly report that service providers, not property owners, regularly request exclusivity of some type."
    - This would not be true if, as the Real Access Alliance contends elsewhere in its comments, (1) property owners act in the interests of tenants and (2) exclusivity is in the interests of tenants. If both of these were true, property owners would request exclusivity. Their failure to do so proves that either (a) they act in their own interest by granting exclusivity only if paid to do so, (b) they believe that exclusivity is not in the interests of tenants, or (c) both. In any case, it demonstrates that exclusivity does not result from benevolence by property owners. It most likely results from payments from providers to property owners.
  5. "Based on very limited data, we estimate that no more than half of the apartment buildings in the country are subject to some form of exclusive agreement."
    - This figure apparently refers to the percentage of buildings where agreements are already in place and thereby minimizes the full magnitude of the harm done by allowing exclusive contracts. All tenants, whether they are aware of it or not, are subject to the threat that the landlord may sign an exclusive contract, without advance notice to the tenant, and thereby exclude all providers acceptable to the tenant. When this happens, the tenant must either (a) move immediately, pay for the cost of moving furniture, etc., and pay whatever penalties may apply for early termination of a lease, (b) obtain

service from the new exclusive provider, often under unfavorable terms, and in some cases continue to pay that provider even after moving (providers may require that a person agree to pay for a year or longer before providing any service, or may continue to charge a person after that person has attempted to cancel service), or (c) do without service entirely, at least until the end of the lease term. Tenants in buildings that do not yet have exclusive contracts are in even greater danger from exclusive contracts than tenants in buildings that already have exclusive contracts.

6. "The most important factor governing the use of exclusive agreements has to do with paying for and retaining control over the use of inside wiring.... Historically, property owners ... have seen little benefit in investing in inside wiring facilities, particularly in view of the constant changes in technology.... Nonetheless, service providers would just as soon not bear the capital cost of installing inside wiring if they can help it. This means that allocating the costs of inside wiring is a fundamental issue in discussions between apartment owners and service providers."
  - Even if this argument were valid on its merits, it would apply only to new inside wiring. There is no justification for allowing a landlord of a building with existing inside wiring to suddenly start excluding providers who are simply unwilling to pay (or continue to pay) the landlord to use that wiring, especially if they paid for the cost of installing it. Service providers cannot undertake these costs when they risk being excluded, at any future time, without cause. Removing the possibility of future exclusive contracts will allow providers to know that, as long as they satisfy the tenants, they will be able to continue to provide services with the inside wiring that they install.
7. "Consequently, the inside wiring for both cable and telecommunications services in apartment buildings is frequently the property of the respective providers."
  - This is another reason that landlords should not be allowed to exclude those providers from access. Landlords who exclude providers who own the inside wiring are excluding those providers from access to the excluded provider's own property.
8. "Conversely, building owners that require service providers to install wiring must often grant exclusivity to induce the service providers to bear those costs."
  - Even if this were true in any cases, it would apply only where the provider granted exclusivity is the provider who installed the wiring. Where one provider installs the wiring and another may later be granted exclusivity, the possibility of being excluded at a later date is an inducement not to bear the cost of installation.
9. "Even with door fees and commissions, property owners typically recover no more than half of their wiring construction costs."
  - This may or may not apply in cases where wiring construction coincides with the onset of exclusivity; I know of no cases where that has occurred. However, where a provider pays for exclusivity in a building with existing wiring and no wiring construction occurs, there are no new wiring construction costs to be recovered, and the property owner keeps the entire amount of the door fees and commissions as pure profit.
10. "Having a direct business relationship with the provider also helps both apartment owners and residents, because the provider is more likely to cooperate with the property manager in responding to requests and complaints regarding service in the building."
  - The critical phrase here is "with the property manager". Exclusive contracts ensure that the provider does not need to cooperate with the residents unless the property manager chooses to make a request. Because of the profitability of receiving money from the provider, the manager is unlikely to press the issue, and may simply ignore complaints regarding service in order to keep receiving the payments from the provider. Providers would have to cooperate with tenants if tenants could threaten to switch providers, but

exclusive contracts prevent this, so providers need to cooperate with no one other than the apartment manager and building owner.

E. Reply to selected statements in Section "III"

1. "Fewer than Half of All Apartment Buildings Are Subject to Any Form of Exclusivity. As noted in the preceding section, our very rough estimate is that no more than half of apartment buildings are subject to any kind of exclusivity provision. A smaller proportion – we are not sure how many – are subject to exclusive access agreements."
  - As noted previously, while fewer than have may already have exclusivity, tenants in the others are subject to the risk of exclusivity beginning at any moment.
2. "This is important, because it helps establish the scope of any alleged problem."
  - This is misleading, but true in a way. The statement that fewer than half of buildings already have exclusivity indicates that the tenants in over half of buildings may lose access to their chosen providers at any moment, if their landlords sign exclusive contracts.
3. "Providers may sometimes be stymied by such agreements, but on a proportional basis, given that there are more than 500,000 apartment buildings in the country with more being built every year, it would seem that a large market remains wide open to entry by competitors."
  - As long as landlords can sign exclusive contracts at any time, no building is open to entry by competitors. As long as competitors know that they may, after investing a considerable sum of money entering a building, be excluded at any time, without cause, the building is not open to them. Buildings will truly be open to competitors only when the competitors can enter with the knowledge that the landlord will not exclude them.
4. "[R]esidents who do not subscribe to a particular service will not be charged for that infrastructure."
  - Providers with exclusive contracts require tenants to subscribe to services that they do not want in order to receive the services that they do want. Exclusive contracts prevent tenants from using providers willing to offer only the services desired by the tenant.
5. "Without some form of exclusivity, providers would have no incentive to incur the costs needed to provide the benefits."
  - If exclusive contracts were prohibited, providers who provide acceptable service at competitive prices would have the incentive of the revenue obtained from voluntary customers. Without exclusivity, tenants would not be forced to switch from a provider who was providing benefit to the tenant. If a provider's service or prices are so unacceptable that it cannot keep customers without exclusivity, then it should improve its service or prices, rather than seeking to have a third party exclude its competitors who tenants favor.
6. "These agreements give the owner significant leverage to enforce a consistently high level of customer service and programming from the provider. Quality of service commitments typically set a minimum standard for performance for tasks that are important to the residents, such as outage response times and installation windows." I do not know of any case of a rent-paying tenant who received "a consistently high level of customer service".
  - In the absence of exclusivity, providers must provide acceptable customer service, programming, outage response times, etc., or tenants will choose use a provider who does offer these things. Exclusive contracts allow providers who do not offer these things to keep business that they would otherwise lose to competitors.

7. "They also require the provider to provide service upgrades comparable to those provided by other providers..."
  - This would not be necessary without exclusive contracts. Without exclusive contracts, tenants could simply use one of those "other providers", whom the Real Access Alliance admits offer the services that exclusive providers only offer if the property owner chooses to insist.
8. "Not all providers want to serve all buildings. In fact, sometimes a provider will not be interested in serving a building or even upgrading facilities in a property it already serves because of the capital investment required. For residents to receive improved service, in those cases a building owner may find that it must grant exclusive rights to induce the provider to upgrade its facilities."
  - This is partially, perhaps entirely, because the provider may be excluded shortly after the upgrade if another provider obtains an exclusive contract. If exclusive contracts were prohibited, providers could upgrade without risking being excluded. Presently, the only defense against exclusion is to preemptively sign an exclusive contract first.
9. "[S]ervice providers find it much easier and more effective to market their services at the same rates on a regional basis. It is feasible for them to offer lower rates to targeted subscribers, but not feasible for them to charge particular subscribers rates higher than those offered in marketing materials. One might argue that, in theory, a provider with an exclusive agreement would be free to charge residents of the community a higher rate, and therefore would. But this ignores how communications services are actually marketed and purchased. If providers are competing in the larger market..."
  - Most commenting parties that acknowledge holding exclusive contracts admit that they only do business in buildings with exclusive contracts and do not attempt to compete in the larger, but less profitable, market of non-exclusive properties. Exclusive providers prepare their marketing materials specifically for exclusive properties. The rates that they charge are not merely higher than those charged [by other providers] to residents of non-exclusive properties, they are so much higher that they are able to make more money charging excessive rates to residents of exclusive properties than charging reasonable rates to residents of all properties. If it is true that they do not have a two-tiered system, then they are simply setting their rates at the higher rate that they are "free to charge" residents of the exclusive property. This, incidentally, also defeats the argument raised by other pro-exclusivity commenting parties that the providers who survive only through exclusive contracts somehow compete with the providers who serve the non-exclusive market.
10. It is very difficult to market a service at an advertised rate on television or in a newspaper, for example, and then both identify potential subscribers ordering services as residents of buildings or other community associations that are not subject to competition, and inform them they are ineligible for the advertised rate."
  - Providers holding exclusive contracts do not need to advertise on television or radio. Because the landlord selects the provider and informs the tenants of the selection, no advertising is needed.
11. "Consequently, the RAA believes that a survey of rates in apartment buildings would show that, as a rule, subscribers residing in buildings subject to exclusivity agreements pay the same rates as their neighbors in single family housing served by the same provider." Subscribers residing in buildings subject to exclusivity agreements do not have "neighbors in single family housing served by the same provider."
  - As most commenting parties that acknowledged holding exclusive contracts admitted, they do not offer service to single family housing. The residents of neighboring single family homes do pay less than the residents of the properties subject to exclusive contracts, but not to the same providers.

12. "It is also worth noting that agreements between apartment owners and service providers frequently specify that the provider not charge any rates other than those imposed on other residents of the same franchise area."
  - The agreements may specify that the rates not exceed those charged by the holder of the exclusive contract, who may charge uniformly high rates. The agreements cannot specify that the rates not exceed those charged by other providers; to do so would violate antitrust law.
13. "...all the negotiating power would shift to the provider. The power to deny access is ultimately the property owner's only power, the only thing an owner can trade in return for strong service and upgrade commitments from the service providers."
  - The power to select another provider is ultimately the tenant's only power, the only thing an tenant can trade in return for strong service and upgrade commitments from the service providers. Exclusive contracts deny tenants this power. If exclusive contracts were prohibited, power would shift from the owner to the tenant. The negotiating power of the provider would be unaffected.
14. "Many such statutes grant the incumbent cable operator, and only the incumbent cable operator, the right to enter buildings on specified terms..."
  - These statutes should be changed. Tenants should be allowed to choose from any provider, incumbent or otherwise. Landlords should not be allowed to deny building access to any provider chosen by a tenant.
15. "The Commission should not confuse the theoretical prospect of creating a partial duopoly with effective competition."
  - Exclusive contracts create a situation where only the holder of the exclusive contract serves properties with exclusive contracts and only the provider who does not hold exclusive contracts serves properties without exclusive contracts. Without exclusivity contracts, the provider who does not currently hold exclusive contracts would be free to serve any property and the provider who currently holds exclusive contracts would have to serve properties without exclusive contracts (or leave the market).
16. "Subscribers in some buildings might then have two choices of providers, but they would lose any opportunity for improved services or amenities negotiated by the property owner."
  - The subscribers would, however, gain the opportunity for whatever services or amenities the subscribers negotiated for themselves. Presently, the exclusive contracts prevent them from effectively negotiating. The services or amenities that they would negotiate for themselves are likely to be preferable to them (although not necessarily to the property owner) to those for which the property owner decides to negotiate.

#### F. Reply to selected statement in Section "IV"

"There is no evidence that subscribers who live in MDU buildings are paying higher rates than other subscribers, and for good reason: Section 623(d) requires uniform rates throughout a franchise area."

- Most commenting parties that acknowledged holding exclusive contracts for MDU properties admitted that they serve only MDU properties. They can, and do, charge higher rates than providers who serve non-MDU properties. MDU residents are prohibited by exclusive contracts from using the providers who serve non-MDU properties. Only in the absence of exclusive contracts would MDU residents be able to use the same providers as other subscribers and thereby receive the protections of Section 623(d).

#### G. Reply to selected statements in Section "V"

1. "Telecommunications providers are most emphatically not at the mercy of property owners, in any respect."
  - Tenants, however, are most emphatically at the mercy of property owners, and of holders of exclusive contracts.
2. "While serving any particular building is in the end optional for a telecommunications provider, having telecommunications service available in a building is mandatory for property owners."
  - Receiving telecommunications service is also mandatory for tenants. Further, availability of telecommunications service at reasonable prices and with acceptable customer service is mandatory for tenants, but is not mandatory for property owners, who can also persuade an unsuspecting tenant to rent an apartment prior to learning the cost of telecommunications service or the quality of the provider. For providers, serving any particular one tenant is even less mandatory and even more optional than serving an entire building. For tenants, receiving service is even more mandatory than it is for landlords.
3. "For a property owner, the building is the entire market, and tenants will neither move into nor stay in a building that does not have telephone service."
  - The title of this proceeding refers solely to video service, not telephone service. Putting that aside, it is no longer uncommon for tenants to rely solely on cellular telephones, even when at home, rather than pay to use terrestrial telephone wires. Additionally, most tenants are not aware of the service, or lack thereof, until after they move into an apartment, and cannot easily move from the apartment upon learning of the situation.
4. "This [that tenants must have acceptable service] means that telecommunications providers have the upper hand in dealing with property owners..."
  - The need for service means that providers holding exclusive contracts have the upper hand in dealing with tenants. It does not give anyone an upper hand over property owners, who would in any event be free to select another provider for themselves, provided that they did not prevent tenants from doing the same.
5. "[T]he ILECs are perfectly willing to tie other demands to requests for voice service."
  - Specifically, the ILECs commonly demand not to be excluded by exclusive contracts. If exclusive contracts are prohibited, then they would not need to make that demand and exclusive contracts will cease to be a reason for denial of voice service.
6. "Telecommunications Providers Have Been Known To Refuse To Provide Telephone Service in MDUs and Other Real Estate Developments in Order To Obtain the Right to Provide Other Types of Services."
  - Again, this is because exclusive contracts were being used to prevent them from offering those services to tenants who seek those services. If exclusive contracts are prohibited, then exclusive contracts will cease to be a reason for denial of voice service.
7. "Property owners report instances in which they have been informed by an ILEC that the ILEC would not install facilities for the delivery of voice service unless the property owner also agreed to allow the ILEC to provide video service."
  - Once again, the tenant should be allowed to receive video service from the ILEC if the tenant choose to do so. Because exclusive contracts exclude the ILEC from the lucrative video services, and allow another provider (who does not offer the less profitable voice service) to provide the video service exclusively, the ILEC is unreasonably asked to provide only the less profitable voice service and not even offer the more profitable video service. If exclusive contracts are prohibited, then both providers will be free to offer video services and the ILEC will have no reason to refuse to install voice service facilities. (Hopefully, both providers would choose to offer both video

service and voice service. Even if the non-ILEC provider did not offer voice service, the tenant would be able to obtain voice service from the ILEC and video service from the provider of the tenant's choose.)

8. "In Florida, for example, despite their obligations as the carriers of last resort ('COLR') within their service areas, BellSouth, Verizon and Embarq have threatened not to install their telephone networks in buildings and developments that have exclusive contracts with cable operators for video and data but not wire services."
  - Of course, this could not have occurred if there were not exclusive contracts in the first place.

#### H. Reply to selected statements in Section "VI"

1. The ILECs are large and well-established companies that have proven their staying power over decades. They do not need regulatory favors, especially at the expense of property owners, who are by comparison much smaller and more vulnerable to market forces."
  - Tenants, however, do need regulatory protections and are even smaller and even more vulnerable than property owners. Transferring the power to select the service provider from the property owner to the tenant would not be a favor to the ILECs. It should be done for sake of the tenants.
2. "Banning exclusive agreements will not only favor providers at the expense of property owners...."
  - It will not favor providers. It will favor tenants. Providers are not obligated to enter into exclusive contracts, but do so anyway. Tenants do not enter into exclusive contracts, but are obligated to abide by them. Further, considering that the Real Access Alliance admits that property owners do not seek exclusive contracts and that the providers do seek exclusive contracts, one must conclude that exclusive contracts are favorable to providers, not owners, and that banning exclusive contracts would favor owners, not providers.
3. "Consequently, the RAA again respectfully urges the Commission to avoid interfering with the private right of contract."
  - The "right of contract" is the right of the party receiving and paying for a service to contract with the provider. A third party, the landlord in this case, has no right to enter into a contract restricting someone who is not a party to the contract, the tenant in this case. Exclusive contracts interfere with the "right of contract" of the tenant to contract with the provider who the tenant, not the landlord, has the right to select.

#### IV.

- Reply to Exhibits
- Conclusion

In “Exhibit A DESCRIPTION OF THE COMMENTERS”, the Real Access Alliance concedes that its membership includes no tenants of residential buildings or organizations of tenants of residential buildings, but instead consists exclusively of owners and their employees:

- an association of “building owners and managers”,
- an institute serving “real estate managers”,
- a council of those having an interest in the shopping center industry,
- an association of “rental housing professionals”,
- an association “for developers, owners, and investors”,
- an association of real estate companies,
- an association of realtors,
- a council of “firms” in the rental housing industry, and
- a roundtable of “senior executives” from “the commercial real estate industry”.

Similarly, exhibits C, D, and E, consist of declarations of three persons who state that they are directors of owners of apartments. (Exhibits F and G consist of correspondence between a developer and a provider who is reluctant to invest in offering service for fear of being excluded if the developer later enters into an exclusive contract with another provider.) None of the seven (7) exhibits include declarations from any of the residents of the apartments.

Every party that has commented in favor of exclusive contracts, including the Real Access Alliance, represents the interests of either providers, landlords, or both. As I have noted previously, exclusive contracts benefit only the parties to those contracts (landlords and providers). Not even one comment in favor of exclusive contracts has come from a party representing only the interests of tenants.

The decision that the Federal Communications Commission makes in this matter has far broader implications than communications technology. The fundamental question is whether the landlord or the tenant has the right to select the provider who the tenant uses and to negotiate the terms and costs of services. If the landlord has this right, then the landlord may restrict the tenant’s choice of furniture deliverers, home health aides, gasoline brands, food, and even candidates for political office, without review or appeal, and may do so in response to payments from the prospective exclusive providers, without regard for the interest of the tenant.

It was once generally agreed that slaves, women, and African-Americans were mentally incapable of making financial decisions and needed someone else to negotiate on their behalf, and that property-owning white males should make all decisions for the persons who lived on their property, much as a parent does for a small child. By prohibiting tenants from negotiating directly with service providers, and saying that they are doing so for the tenants’ own good, landlords imply a continued belief that some persons are too mentally inferior to make basic financial decisions for themselves, and need to be treated like children. If this is the case, then the government should consider reinstating the laws that once prohibited tenants from voting and restricted the franchise to property owners. Surely, anyone too dumb to be trusted to select a television service provider should not be deciding who will be the next President of the United States.

If the Federal Communications Commission agrees with the Real Access Alliance that the government should consider only the interests of landlords and providers, and ignore the interests of tenants, then the Federal Communications Commission should ignore my

comments as well. However, if it feels that the interests of tenants should also be considered, then the lack of even one documented case of a rent-paying tenant who was satisfied with a provider who was granted exclusivity by a landlord, out of the millions of tenants who supposedly receive such service, should make it question the wisdom of preserving the status quo.