

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

_____)	
In the Matter of)	
)	
Promotion of Competitive Networks in Local)	
Telecommunications Markets)	WT Docket No. 99-217
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications)	CC Docket No. 96-98
Act of 1996)	
_____)	

COMMENTS OF THE REAL ACCESS ALLIANCE

Matthew C. Ames
Gerard Lavery Lederer
MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue, N.W., Suite 1000
Washington, DC 20036-4306
(202) 785-0600

Counsel for Real Access Alliance

Of Counsel:

Roger Platt, Vice President and Counsel
The Real Estate Roundtable
801 Pennsylvania Avenue, N.W., Suite 720
Washington, DC 20004

Tony Edwards, Senior Vice President and General Counsel
National Association of Real Estate Investment Trusts
1875 Eye Street N.W., Suite 600
Washington, DC 20006

Elizabeth Feigin Befus, Vice President and Special Counsel
National Multi Housing Council
1850 M Street, N.W., Suite 540
Washington, DC 20036

July 30, 2007

Summary

The Real Access Alliance (the “RAA”) urges the Commission to terminate this proceeding. The Commission has already fully examined the need for regulation of access to commercial buildings by telecommunications providers and nothing that has happened since then would warrant any Commission action. Not only does the Commission lack legal authority, but the premises that underlay the proceeding when it was initiated have been shown to be inaccurate. The real estate market is highly competitive and responsive to tenant demand: property owners have every incentive to ensure that their tenants’ telecommunications needs are met. Rather than seeking regulatory relief, telecommunications providers should concentrate on marketing their services to potential customers.

In response to the Commission’s Public Notice, the RAA conducted a survey of property owners and managers. This survey shows the following:

- Most requests for access to buildings come from tenants, and property owners uniformly feel that they must respond to such requests.
- Owners and managers report that most of their buildings have multiple providers – 57.4% report that 3 or more is “typical;” 25% say 4 or more is typical. Nine percent said 6 or more was typical, with one respondent reporting 10-15 providers as typical in that company’s buildings. Only 16% of owners and managers report that 2 or fewer providers is “typical” in their buildings; in these cases by far the most common reason for the lack of competition is lack of interest on the part of providers. The second most common reason is lack of interest from tenants.
- Only two percent of survey respondents reported having even a single exclusive agreement for building access.

The Commission should not draw the conclusion that its existing rule, 47 C.F.R. § 2500, is responsible for the lack of exclusive agreements or that the rule is a good model for other market segments, because the record in this proceeding shows that exclusivity was never a problem, even before the rule was adopted.

Finally, the RAA has complied with the voluntary commitments it made to the Commission in 2000. As the Public Notice observes, there have been changes in the telecommunications marketplace because of industry consolidation. Many of the companies that most strongly pressed for Commission action in earlier stages of this proceeding no longer exist. Access to buildings, however, was never really the problem the proponents of regulation made it out to be. The fact is that building competitive telecommunications networks in the face of entrenched competition is a capital intensive and risky business. The real estate industry has always had every incentive to encourage the development of competitive alternatives, and will continue to do so. Commission intervention, however, will only distort market incentives.

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COMMENTS OF THE REAL ACCESS ALLIANCE

Introduction

The Real Access Alliance (the “RAA”)¹ respectfully submits these Comments in response to the Commission’s Public Notice released March 28, 2007 (the “Public Notice”), asking parties to refresh the record in the above-captioned proceedings. The RAA submits that the Commission fully examined this issue at an earlier stage of the proceeding and nothing that has happened since then would warrant any Commission action regarding access to commercial buildings by telecommunications carriers. Not only does the Commission lack legal authority, but the premises that underlay the proceeding when it was initiated have been shown to be inaccurate. The real estate market is highly competitive and responsive to tenant demand. Rather than seeking regulatory relief, telecommunications providers should concentrate on

¹ A description of the RAA and its members is attached hereto as Exhibit A.

marketing their services to potential customers. Regulatory action would only distort market incentives.

I. AS THE RAA HAS REPEATEDLY INFORMED THE COMMISSION, REGULATION OF ACCESS TO COMMERCIAL BUILDINGS BY TELECOMMUNICATIONS PROVIDERS IS UNNECESSARY.

Over the course of the last eleven years, the Commission has periodically considered issues related to access to various types of buildings by providers of telecommunications services. During this time, the Commission has never been able to establish that any regulatory action was actually necessary, and the real estate industry has provided extensive data demonstrating in fact that such regulation would not only be unnecessary, but unlawful.² Nothing fundamental has changed since the Commission last took comment on this issue in the Further Notice of Proposed Rulemaking released in October 2000.³

We emphasize here that the Commission's analysis of this issue and its factual findings have always been deeply flawed. While the RAA introduced extensive, statistically valid information in past stages of this proceeding showing the competitiveness of the real estate market and the responsiveness of property owners to tenant demand, the Commission has tended to rely instead on skimpy anecdotal evidence submitted by telecommunications providers hoping to obtain regulatory favors. Consequently, when we say that nothing has changed, we mean that the underlying facts and economic incentives for both property owners and telecommunications

² See, e.g., Further Reply Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Feb. 21, 2001) at 7-18 ("*2001 Reply Comments*"); Further Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Jan. 22, 2001) at 2-52 ("*2001 Comments*"); Joint Reply Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Sep. 27, 1999) at 1-23, 29-50; Joint Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Aug. 27, 1999) at 4-48 ("*1999 Comments*").

³ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23083 (2000) ("*Competitive Networks Order*").

providers in the real world remain the same; unfortunately, the Commission's October 2000 order never reflected reality.

The Commission decided at that time to adopt a rule forbidding telecommunications providers from entering into exclusive agreements to serve commercial buildings.⁴ This rule was unnecessary even then because there was in fact no significant problem with exclusive access, as the RAA informed the Commission at the time.⁵ There is also a significant question regarding whether such a regulation was within the Commission's authority in the first place. The RAA did not object to the rule, because the rule was so clearly unnecessary that it would have no effect on the marketplace and would not, in practice, infringe on the rights of property owners.

The Commission now asks for information to refresh the record in this docket. Because the Public Notice asks no specific questions, but asks only for "any new information or arguments [parties] believe to be relevant to issues raised in the *Competitive Networks FNPRM*," it is difficult to respond. Nevertheless, the RAA has attempted to gather some factual data from property owners and managers, which will be summarized here. This information shows, once again, that the Commission should simply leave this question to the marketplace.

One point regarding the Public Notice bears particular attention, however. In addition to calling for new information parties may wish to provide, the notice states that the Commission

⁴ *Competitive Networks Order*, 15 FCC Rcd 22996-22997.

⁵ For example, in the *2001 Reply Comments*, the RAA provided the Commission with an extensive survey of commercial building tenants showing, among other things, that only one percent of the 454 respondents reported that building management had ever denied a request to obtain service from a telecommunications provider not already serving the building. *2001 Reply Comments* at 10, 12. In the *2001 Comments*, the RAA showed that several large property owners reported that it was not uncommon to have as many as eight providers in an office building. *2001 Comments* at 10-11. In the same submission, the RAA reminded the Commission of earlier survey results submitted by the RAA showing that 60% of building owners and managers reported offering their tenants three or more telecommunications service providers. *Id.* at 5.

will use this information “to determine whether additional action is necessary to address the ability of premises owners to discriminate unreasonably among competing telecommunications providers.” This statement suggests that the Commission should first and foremost reexamine the record in this docket so far. There was never any significant evidence that property owners “discriminate unreasonably” among telecommunications providers. The record shows, has always shown, and will continue to show that property owners and managers respond to tenant demand: if tenants desire the services of particular service providers, property owners have every incentive to accommodate those requests. If there is a problem in the marketplace, it is that some buildings are unable to attract competitive service providers regardless of tenant demand or the wishes of the property owner, because of the location or size of the building. The single most important factor in determining whether competition will be present in a building is whether that building is attractive to telecommunications service providers serving the surrounding area: can a particular provider earn a reasonable return on the investment needed to serve the building? Unless and until the Commission is in a position to address that kind of fundamental economic issue, it should desist from considering further regulation.

As noted above, in its previous filings, the RAA demonstrated that building owners have the incentive to allow telecommunications providers access to their buildings, because they must satisfy tenant demand. We point the Commission in particular to the survey conducted by Charlton Research Co. and attached as Exhibit C to the RAA’s *1999 Comments*. This statistically-valid survey of 316 property owners and managers clearly demonstrated that owners and managers are strongly committed to responding to tenant demand for telecommunications services. This has not changed. Indeed, nothing will change in this regard. So long as property owners regard tenants as their customers, and so long as the real estate industry is as fragmented

and competitive as it has always been, this will be the case. We recognize that the Commission is used to dealing with monopoly providers and is focused on creating competitive markets where none traditionally existed. We urge, however, that the Commission recognize that the real estate market is not in any way a monopoly, which means that property owners must respond to the needs of their tenants.

In an effort to assist the Commission in its latest request for information, the RAA conducted a survey of owners and managers of commercial buildings across the country (the “2007 Survey”). We caution that this is not a statistically valid survey, because participants were self-selected; it was conducted on-line by property owners and managers who chose to respond to a request for information.⁶ Nevertheless, we believe it provides a reasonably accurate picture of conditions in the marketplace, particularly because this information is entirely consistent with what the RAA has been telling the Commission for over ten years.

The survey shows the following:

- Most requests for access to buildings come from tenants. That is to say, when tenants want the services of a particular provider, they contact their property management and request that the preferred provider be given access to the building. Owners and managers have a clear incentive to accommodate such requests.⁷ A slightly smaller number of requests come from service providers themselves. Some property owners note that they are receiving requests from small Internet service providers in what are

⁶ The Building Owners and Managers Association, International (“BOMA”) gathered this information on behalf of the RAA. BOMA contacted its members by email asking them to complete an on-line survey, and also publicized the information request in its newsletter. BOMA has approximately 4000 members in its database. Approximately 150 members responded to the request. Of these, 86 were deemed complete responses. For purposes of the survey, respondents were asked to include providers of voice and data services.

⁷ See Exhibit C to *2001 Reply Comments*, discussing tenant willingness and ability to move if telecommunications needs not met.

essentially cold calls. Property owners feel less pressure to respond to such requests, and many of them are in fact withdrawn once the potential provider learns more about the property and its tenants. Finally, property owners sometimes contact providers to request that they serve a building. These requests are normally in response to tenant desire for the service.

- Owners and managers report that most of their buildings have multiple providers – 57.4% report that 3 or more is “typical;” 25% say 4 or more is typical. Nine percent said 6 or more was typical, with one respondent reporting 10-15 providers as typical in that company’s buildings. These figures include providers of voice and data services. Thus, tenants typically have multiple choices. When one considers that service providers must be able to recover the capital costs of serving a building, it becomes clear that there is robust competition in most buildings. Consequently, new providers entering such buildings face great risks.
- Only 16% of owners and managers report that 2 or fewer providers is “typical” in their buildings. Owners and managers report that in those cases where they have only one or two providers, it is because providers are not interested in their buildings, because of size or location. Representative reasons given by survey respondents include:
 - Owner “not approached by additional providers.”
 - “The buildings are not large enough to support more than two providers.”
 - “[N]ot enough tenant base for more telecom providers.”
 - Building location is “underdeveloped.”
 - “[P]roperty is deemed saturated by providers above that number.”

- “Small market – no requests.”
- “[L]ack of interest from other providers.”
- “Industrial buildings without many providers in the area.”
- Buildings are “outside of [central business district].”
- “[C]ost to get service to the building greater than profit available.”

Note that all of these reasons have to do with the economics of providing service in a building, and nothing to do with the owner’s desire to restrict competition.

- Finally, only two percent of survey respondents reported having even a single exclusive agreement for building access. Exclusivity is therefore simply not an issue. In fact, owners report denying requests when providers ask for exclusivity. (Again, some of these requests were from Internet service providers, not providers of telecommunications services.)

The foregoing amply demonstrates that further regulation is not needed, and that the Commission’s one existing rule is not needed. Ironically, when the Commission adopted 47 C.F.R. § 64.2500, it actually stated that “the need for a prohibition on exclusive contracts [is] primarily a temporary one designed to address a transitional problem.”⁸ To be clear, the RAA does not object to the retention of the current rule, although it is unnecessary, and, for the reasons stated in the *2001 Comments*, beyond the Commission’s authority. We do not object because it causes no harm. Nevertheless, if it truly was a temporary measure, the Commission should consider repealing it. Under no circumstances should the Commission consider additional regulation.

⁸ *Competitive Networks Order* at ¶ 34.

II. THE COMMISSION SHOULD NOT CONCLUDE THAT ITS PROHIBITION ON EXCLUSIVE CONTRACTS IS RESPONSIBLE FOR THE LACK OF EXCLUSIVITY IN COMMERCIAL BUILDINGS.

As noted above, 98% of property owners and managers report that they have not entered into any exclusive contracts with telecommunications or Internet service providers. Exclusive contracts were never a significant problem in the market, however, and the Commission should not draw the conclusion that 47 C.F.R. § 64.2500 is responsible for this fact. In our earlier comments in this docket we showed that most buildings already have multiple providers serving them, and described the incentives for owners to allow competitive access. These conditions still apply, and they alone account for the lack of exclusive agreements. In fact, many respondents to the 2007 Survey were emphatic on this question, saying that they would never enter into such agreements because it would not be in the interests of their tenants.

The Commission also should not consider using its existing rule as a model for any other segment of the market. The Commission's rule cannot be credited with the lack of exclusivity in the telecommunications market in commercial buildings, and consequently cannot be considered a reliable model for other markets. In any event, as discussed in prior filings, *2001 Comments* at 35-55, and our most recent submission in MB Docket 07-51, the Commission does not have the authority to regulate agreements for the use of space between property owners and providers of communications services. Adopting rules with the obvious intent of governing such agreements cannot be saved merely because the text of the rule states that it applies only to a service provider.

III. THE RAA MET ITS VOLUNTARY COMMITMENTS.

As stated in the Public Notice, the RAA earlier made certain voluntary commitments in response to the Commission's concerns. Those commitments were:

- To develop and promote model building access license agreements in conjunction with telecommunications providers.
- To develop and promote model “best practices” in conjunction with telecommunications providers.
- To reach out to a wide variety of telecommunications companies for input in framing these documents.
- To ensure that this initiative reaches the retail, office, industrial, residential and manufactured housing sectors of the real estate industry.

The RAA met these commitments. The RAA retained expert counsel to work with telecommunications providers to develop a model license agreement, which was submitted to the Commission in May 2001. The document was praised by FCC officials and competitive carriers at the time. James Schlichting, then Deputy Chief of the Wireless Telecommunications Bureau said, "We are encouraged that the Real Access Alliance has, as promised, developed a model agreement for building access. We look forward with great interest to see whether this model agreement successfully facilitates negotiations for building access and thereby competitive choices in local telecommunications services for tenants in multi-tenanted environments." William J. Rouhana, then Chairman and CEO of Winstar Communications, Inc., stated "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."

The RAA also took steps at the time to ensure that property owners and managers were aware of the model license agreement and the best practices effort. A link to the model agreement was placed on the then-existing website of the Real Access Alliance for free downloading by members of the real estate and telecommunications industries. A CD of the

model agreement was distributed to all members of the Real Estate Roundtable (consisting of the CEOs of the largest owners of commercial buildings in the United States). The CDs were also provided to all the major real estate trade associations that comprise the Real Access Alliance. The model license was promoted at the annual meeting and other major events held by BOMA. It was also discussed and promoted at various conferences for attorneys representing telecommunications providers and real estate owners.

Shortly after these steps were taken, however, the CLEC industry began to suffer financially. As the Public Notice observes, many service providers have merged. Others sought protection under the Bankruptcy Code. As a consequence, for some years after the RAA undertook its voluntary effort, the telecommunications industry went through a period of retrenchment. Property owners noticed a decrease in the number of requests for access to their buildings. Indeed, this continues today. The 2007 Survey asked respondents about the number of requests for access to buildings they received in 2006, as compared to 2001. Forty-two percent of respondents reported they received fewer requests than they did in 2001; 39% said they got about the same number. Only 19% said they received more requests for access in 2006 than in 2001. There does appear to have been recent growth in the numbers of requests from small providers of Internet services. In fact, because property owners often cannot distinguish providers of Internet services from providers of purely telecommunications services, the 2007 Survey did not distinguish between the two categories, and many of the requests referred to by respondents may have been for high speed Internet access services rather than telecommunications services.

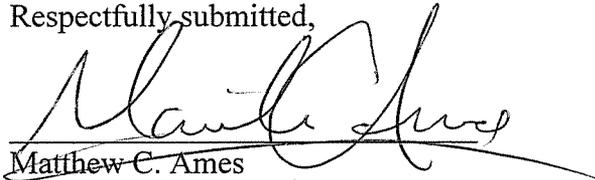
In any event, the real estate industry has done what it promised to do. As discussed above and in our other filings, the central problem with providers getting access to building has

always had more to do with the economics of the telecommunications industry than with the behavior of property owners.

CONCLUSION

For all the foregoing reasons, the Commission should refrain from any further regulation of agreements between providers of telecommunications service and the owners of commercial buildings. Any such regulation is unnecessary, and Congress has not given the Commission any authority over such agreements. This proceeding should be terminated.

Respectfully submitted,



Matthew C. Ames
Gerard Lavery Lederer
MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue, N.W., Suite 1000
Washington, DC 20036-4306
(202) 785-0600

Counsel for Real Access Alliance

Of Counsel:

Roger Platt, Vice President and Counsel
The Real Estate Roundtable
801 Pennsylvania Avenue, N.W., Suite 720
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Tony Edwards, Senior Vice President and General Counsel
National Association of Real Estate Investment Trusts
1875 Eye Street N.W., Suite 600
Washington, DC 20006

Elizabeth Feigin Befus, Vice President and Special Counsel
National Multi Housing Council
1850 M Street, N.W., Suite 540
Washington, DC 20036

July 30, 2007

EXHIBIT A

DESCRIPTION OF THE COMMENTERS

The Real Access Alliance (“RAA”) is an *ad hoc*, unincorporated coalition of trade associations whose members include the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of 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 RAA was formed to encourage free market competition among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America’s real estate owners. Descriptions of the RAA’s member associations appear below.

The members of the RAA are:

- The Building Owners and Managers Association (“BOMA”) International is an international federation of 108 local associations. BOMA International’s 19,000 members own or manage more than 9 billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.
- The Institute of Real Estate Management (“IREM”) educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in real estate management, serves as an advocate on issues affecting the industry, and enhances and supports its members’ professional competence so they can better identify and meet the needs of those who use their services. IREM was established in 1933 and has 10,000 members across the country.
- The International Council of Shopping Centers (“ICSC”) is the trade association of the shopping center industry. ICSC now has over 50,000 members worldwide in the United States, Canada, and more than 70 other countries, representing owners, developers, retailers, lenders, and all others having a professional interest in the shopping center industry. ICSC’s approximately 45,000 United States members represent approximately 44,000 shopping centers in the United States.
- The National Apartment Association (“NAA”) has been serving the apartment industry for 60 years. It is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. NAA represents approximately 29,597 rental housing professionals holding responsibility for more than 4,911,000 apartment households nationwide.

- The National Association of Industrial and Office Properties (“NAIOP”) is the trade association for developers, owners, and investors in industrial, office, and related commercial real estate. NAIOP is comprised of over 9,500 members in 46 North American chapters and offers its members business and networking opportunities, education programs, research on trends and innovations, and strong legislative representation.
- The National Association of Real Estate Investment Trusts (“NAREIT”) is the national trade association for real estate investment trusts (REITs) and publicly-traded real estate companies. Its members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals that advise, study and service those businesses.
- The National Association of Realtors (“NAR”) is the nation’s largest professional association, representing more than 720,000 members. Founded in 1908, the NAR is composed of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. The association works to preserve the free enterprise system and the right to own, buy, and sell real property.
- The National Multi-Housing Council (“NMHC”) represents the interests of the larger and most prominent firms in the multi-family rental housing industry. NMHC’s members are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance, and management of such properties.
- The Real Estate Roundtable (“RER”) provides Washington representation on national policy issues vital to commercial and income-producing real estate. RER addresses capital and credit, tax, environmental, technology and other investment-related issues. RER members are senior executives from more than 200 U.S. public and privately owned companies across all segments of the commercial real estate industry.