

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

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In the Matter of ) )  
 ) )  
Petition of BellSouth Telecommunications, ) )  
Inc. for Forbearance Under 47 U.S.C. §160(c) ) WC-03-220  
From Application of Sections 251(c)(3), (4), ) )  
and (6) in New-Build, Multi-Premises ) )  
Developments ) )  
\_\_\_\_\_) )

**COMMENTS OF THE REAL ACCESS ALLIANCE**

**Introduction**

The Real Access Alliance (the “RAA”)<sup>1</sup> respectfully submits these Comments in response to the Petition of BellSouth Telecommunications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 251(c)(3), (4) and (6) in New-Build, Multi-Premises Developments (the “Petition”). BellSouth Telecommunications, Inc. (“BellSouth”) has asked that the Commission forbear from applying Sections 251(c)(3), (4) and (6) to certain BellSouth facilities, referred to by BellSouth as “New-Build, Multi-Premises Developments”<sup>2</sup> and to

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<sup>1</sup> The members of the Real Access Alliance are: the Building Owners and Managers Association International (“BOMA”), the Institute of Real Estate Management (“IREM”), the International Council of Shopping Centers (“ICSC”), the National Apartment Association (“NAA”), the National Association of Industrial and Office Properties (“NAIOP”), the National Association of Realtors (“NAR”), the National Association of Real Estate Investment Trusts (“NAREIT”), the National Multi-Housing Council (“NMHC”), and The Real Estate Roundtable. A fuller description of the parties is attached hereto as Exhibit A.

<sup>2</sup> BellSouth defines these as “newly-constructed, multi-subscriber properties, including single-family home subdivisions, Multiple Dwelling Unit (MDU) residential properties, and

services provided over such facilities to end users located in such developments. The RAA opposes the Petition.

**I. THE REAL ESTATE INDUSTRY SUPPORTS COMPETITION IN THE DELIVERY OF TELECOMMUNICATIONS SERVICES.**

As the Real Access Alliance has demonstrated in other contexts, the real estate industry supports the growth of competition in the delivery of telecommunications services.<sup>3</sup> For example, the owners of commercial office space have devoted a great deal of attention to the problem of attracting providers of competitive services to their buildings, and as a general rule office properties are served by multiple facilities-based providers.<sup>4</sup> Similarly, residential property owners would like their tenants to have competitive options.<sup>5</sup> Of course, the Commission's rules have allowed non-facilities-based providers to serve customers in all kinds of buildings, and the RAA has never objected to the provision of service by such providers in any type of building or real estate development.

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multiunit premises as defined at 47 C.F.R. § 68.105(b), including multi-tenant commercial buildings, mixed use developments, malls, industrial parks and other similar developments . . . “Petition at 2.

<sup>3</sup> Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Aug. 27, 1999) (“*RAA Competitive Networks Comments*”), at 4-26; Further Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Jan. 22, 2001) (“*RAA Competitive Networks Further Comments*”), at 8-28; Further Reply Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Feb. 21, 2001) (“*RAA Competitive Networks Further Reply Comments*”), at 7-14.

<sup>4</sup> *RAA Competitive Networks Further Reply Comments* at 8-14.

<sup>5</sup> As we have noted in past proceedings, however, residential telecommunications users typically pay much less for service than business users, which makes it more difficult for multiple providers to compete in the residential market. *RAA Competitive Networks Further Comments* at 61-65.

The RAA and the real estate industry in general, however, have opposed efforts to require property owners to grant physical access to their buildings, or to interfere with the ability of property owners to manage their buildings.<sup>6</sup> The Commission has respected these concerns. In addressing that issue, the RAA has not taken a position for or against any particular sector of the telecommunications industry, but has expressed its views regardless of which parties were affected.<sup>7</sup> BellSouth's Petition is troubling for the real estate industry, and therefore requires us to participate in this proceeding. If the Commission were to grant BellSouth the requested relief, CLECs would probably only be able to serve new buildings and developments by installing their own physical facilities. We fear that this would increase the cost of entry and reduce the ability of CLECs to compete, to the detriment of property owners and their tenants.

We recognize that BellSouth objects to Commission rules that allow others to use its network. But the critical factor is that BellSouth continues to dominate the market for telecommunications services within its nine-state region. That dominance is extremely difficult for competitors to overcome – indeed, it affects property developers and owners in various ways as well. The Commission's current rules appear to offer the only practical means of promoting effective competition in the face of that dominance.

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<sup>6</sup> See generally *RAA Competitive Networks Comments*, *RAA Competitive Networks Further Comments*.

<sup>7</sup> See, e.g., *RAA Competitive Networks Comments* at 27-33 (discussing problems with access by CLECs and ILECs), 46-48 (noting ILEC monopoly power), 60-69 (describing practical concerns regardless of nature of entrant); *RAA Competitive Networks Further Comments* at 31-33 (examples of problems with different types of providers).

## **II. THE REAL ESTATE INDUSTRY WOULD NOT BENEFIT FROM THE RELIEF REQUESTED BY THE PETITION.**

BellSouth suggests that the measures proposed in the Petition would benefit the real estate industry.<sup>8</sup> This is not necessarily so. As we have noted in other contexts, one of the great strengths and defining characteristics of the real estate industry is its enormous diversity.<sup>9</sup> Property owners and developers pursue a wide range of different strategies, and it is often difficult, if not impossible, to establish a single, optimal approach. It is for this reason that we have consistently and strongly urged the Commission to avoid regulations that might interfere with the diversity of the real estate industry and the diversity of the business arrangements that the industry finds useful to serve residents and tenants.

There may be property owners who would support the Petition. Most property owners and developers, however, would not, because they recognize the benefits to their tenants and residents of encouraging the CLEC industry to grow. For example, a representative of Camden Property Trust (“Camden”) has expressed great concern over the proposal. Camden owns and or manages approximately 10,000 units in three of the nine states presently served by BellSouth. Less than five percent of those units are served by a competitive provider of any kind. BellSouth’s proposal would only affect new construction, but the low level of existing competition indicates that forbearance would reduce it even further going forward. Furthermore, owners and developers are very concerned with preserving the ability to introduce bundled services and to preserve competitive options for video and Internet services. The Petition clearly

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<sup>8</sup> Petition at 8.

<sup>9</sup> *RAA Competitive Networks Comments* at 5-29.

is aimed at including those services, and thus appears more than anything to be an effort to expand BellSouth's current competitive position into new services.

In other words, the real estate industry is very concerned that granting BellSouth the requested relief could have far-reaching consequences for competition that may not yet be fully appreciated.

### **III. ENFORCEMENT OF SECTION 251 DOES NOT DISCOURAGE INSTALLATION OF ADVANCED COMMUNICATIONS INFRASTRUCTURE.**

Bell South claims that, because of their obligations under Section 251(c), incumbent LECS cannot "compete on an equal footing for the right to install facilities in MPDs." Petition at 5. We agree that the statute imposes different obligations on ILECs and CLECS, and that as a result CLECs may be able to obtain an exclusive right to serve certain developments or buildings. ILECs, on the other hand, must be prepared to share their networks with CLECs. The RAA has no position on the relative merits of any particular regulatory scheme that the FCC or the states may enact as a result of Section 251(c). But the experience of the firms and individual professionals that compose our member associations indicates that the ILECs remain the dominant force in the telecommunications market.

Indeed, the Commission has recognized in related contexts that allowing providers to enter into exclusive contracts may have the benefit of allowing competitors to build market share.<sup>10</sup> When an incumbent dominates a market, allowing smaller competitors the benefits of

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<sup>10</sup> For example, in 1997, the Commission tentatively decided not to ban exclusive contracts for providing video services in MDUs, noting that they may be pro-competitive or anti-competitive, depending on the circumstances. *In the Matter of Telecommunications Services, Inside Wiring, Customer Premises Equipment*, Docket No. 95-184, Report and Order and Second

exclusivity may allow them to build the experience, reputations and revenues they need to enter into true head-to-head competition. If BellSouth's premise is correct, and forbearance would make BellSouth a stronger competitor in New-Build MPDs, then granting the Petition would limit the ability of CLECS to win those contracts and increase their market share over time.

In fact, we disagree with BellSouth's premise, but for a different reason. Section 251(c) is not interfering with the deployment of facilities in the markets in question. The developers BellSouth cites clearly want to enter into arrangements for the delivery of advanced services in their subdivisions. They are looking for companies to install and operate networks to do that, and they are entering into such agreements. So the facilities are being deployed.

The only question is whether the networks are to be installed by BellSouth or by competitors. But the fact that BellSouth may be dissuaded from bidding on contracts does not mean that advanced networks will not be built. And the FCC should be skeptical of BellSouth's claims in this regard. BellSouth is so dominant in its region, and has such great experience and resources, that it can probably compete effectively even at a disadvantage, especially against relatively small, undercapitalized and inexperienced companies.

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Further Notice of Proposed Rulemaking, 13 FCC Rcd 23659, ¶ 258 (1997). Earlier this year, the Commission decided not to regulate exclusive contracts for video services at all; the Commission recognized that exclusive contracts benefit competitive providers and advance competition. *In the Matter of Telecommunications Services, Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, ¶¶ 62, 73, 71 (2003). To date, the Commission has also declined to regulate exclusive contracts for telecommunications services. *Promotion of Competitive Networks*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 (2000). These examples are distinguishable in that both competitors and incumbents remain free to enter into exclusive contracts, whereas Section 251(c) only applies to the incumbents. But the point remains valid: exclusivity can promote competition by allowing competitors to build market share in the face of a powerful incumbent.

In addition, it appears that current conditions are probably encouraging the installation of advanced infrastructure, because the new entrants must install advanced networks to differentiate themselves from BellSouth and to recoup their capital investments. If a sizable number of new buildings and developments become wired with networks capable of delivering ubiquitous, advanced, bundled services, then BellSouth will have to compete by doing the same. In other words, Section 251 appears to be promoting the installation of advanced networks, not hindering it. Conversely, granting BellSouth relief may promote installation of advanced networks by BellSouth for a time – but if the resulting competition forces new entrants out of the market, BellSouth will once again be free to proceed at its own pace, and overall installation may decline.

Finally, one of the reasons developers have entered into the types of arrangements BellSouth is concerned with may be that developers often find it difficult to negotiate with the ILECs. Developers have found that incumbents drag their feet in responding to requests for the installation of wiring inside MDUs, and may insist on installing wiring in configurations that do not suit the builder's requirements. Because builders operate on tight deadlines, and vacant buildings impose significant strains on cash flow, builders often find they must comply with the ILEC's demands. Entering into agreements with competitors to serve entire developments, on the other hand, permits developers to negotiate timetables and other mechanisms that protect their interests by allowing construction to be completed on time, and ensuring that tenants have telecommunications services available on the day they move in. It is difficult to see how the real estate industry would benefit from any proposal that would extend or enhance BellSouth's market power.

#### **IV. FORBEARANCE IS NOT WARRANTED.**

As BellSouth notes, 47 U.S.C. § 160 states that the Commission “shall forbear” from applying regulations if the Commission determines that three conditions are met. Those conditions are met when: (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and not discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is in the public interest.

The RAA agrees with BellSouth’s statement that “being able to offer a broad array of high-quality communications services at attractive prices is a key differentiator in the competitive real estate market.” But BellSouth has submitted no evidence that forbearance will actually lead to attractive prices, especially over the long term. In addition, we fear that forbearance will in the end delay the growth of competitors, and therefore in the long run result in higher prices: if competition never develops, BellSouth will have no reason to lower its prices. And of course under BellSouth’s proposal there will be little or no competition in the affected New-Build MPDs: construction by facilities-based competitors would be too expensive.

The remaining elements of the statutory test are not met for the same reason: it is not in the interest of consumers or in the public interest to hinder the growth of competition. Thus, we do not believe the Commission should grant the Petition.

## CONCLUSION

For the reasons indicated above, the Bureau should deny the Petition.

Respectfully submitted,

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November 10, 2003

## APPENDIX A

### MEMBERS OF THE REAL ACCESS ALLIANCE

- The Building Owners and Managers Association, International (“BOMA International”) is an international federation of 101 local associations. BOMA International’s 17,000 members own or manage more than 8.5 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. Its 38,000 members in the United States, Canada, and more than 70 other countries represent owners, developers, retailers, lenders, and all others having a professional interest in the shopping center industry. ICSC’s 34,000 United States members represent almost all of the 43,661 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.

Certificate of Service

I hereby certify that I have caused to be delivered this 10th day of November, 2003,  
copies of the foregoing Comments of the Real Access Alliance to the following persons:

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By Hand

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