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VIA HAND DELIVERY

**EX PARTE**

September 5, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from Thomas Cohen, on behalf of the Smart Buildings Policy Project, to Chairman Kennard, Commissioner Ness, Commissioner Furchtgott-Roth, Commissioner Powell, and Commissioner Tristani delivered today that concerns the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

cc: Chairman Kennard
Commissioner Powell
Clint Odom
Peter Tenhula
Dorothy Attwood (CCB)
Joel D. Taubenblatt (WTB)
Eloise Gore (CSB)
Paul Noone (WTB)
Richard Arsenault (WTB)
Commissioner Ness
Commissioner Tristani
Mark Schneider
Adam Krinsky
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Lauren Van Wazer (WTB)
Cheryl King (CSB)
Mark Rubin (WTB)
Commissioner Furchtgott-Roth
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Enclosure

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**Smart Buildings Policy Project**

# EX PARTE

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American Electronics Association

Association for Local Telecommunications Services

AT&T

Commercial Internet eXchange Association

Competition Policy Institute

Competitive Telecommunications Association

Digital Microwave Corporation

Focal Communications Corporation

The Harris Corporation

Highspeed.com

Information Technology Association of America

Lucent Technologies

NEXTLINK Communications Inc.

Nokia Inc.

International Communications Association

P-Com, Inc.

Siemens

Telecommunications Industry Association

Teligent

Time Warner Telecom

Winstar Communications Inc.

Wireless Communications Association International

WorldCom

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VIA HAND DELIVERY

September 5, 2000

The Honorable William Kennard, Chairman
The Honorable Susan Ness, Commissioner
The Honorable Harold Furchtgott-Roth, Commissioner
The Honorable Michael Powell, Commissioner
The Honorable Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Chairman and Commissioners:

Throughout the duration of the *Competitive Networks* proceeding, numerous competitive telecommunications carriers have placed in the record many examples demonstrating that owners of multi-tenant environments have market power and are using that market power to the detriment of tenants and competitive providers. One might think that in the face of potential action by the FCC, building owners might refrain from continuing these abusive activities. However, it is clear that the access abuses are worsening, they are systemic, and they require the immediate attention of the Commission. On behalf of the Smart Buildings Policy Project (SBPP), I wanted to make you aware of recent examples of situations occurring across the country that are at odds with several of the Commission's policies, that involve issues presently under consideration in the above-referenced proceeding, and that deserve the Commission's immediate and decisive attention.

Please find attached two letters, one dated March 24, 2000 and the other dated April 18, 2000 both from Jeffrey Wolf, Vice President, Corporate Operations, E.V. Bishoff Company (a real estate company owning approximately 120 buildings in the Pittsburgh area) to a small business tenant in a Bishoff building. Fearing retaliation from the building owner, the tenant has asked that its identity be kept confidential. The first letter states that the tenant, by the terms of its lease renewal (which the tenant has indicated it was unaware of), must "satisfy its dial tone, long distance, and bradband [sic] service needs by contracting with North Pittsburgh Systems . . . as long as the pricing of the above services . . . is equal to or less than that of Bell Atlantic." Less than a month later, Mr. Wolf sent another letter referring to the March letter in which he reminded the tenant of its "obligation to transfer [its] telecommunications service to North Pittsburgh Systems" and that "failure to comply would constitute a breach of [the] Lease Agreement."

The tenant in this circumstance is being denied a choice of local providers, is being forced to switch its local service from Verizon (its current local carrier) to another company, is being forced to change its presubscribed long distance carrier, and is being forced to take broadband services from a company it has no interest in, simply because the landlord is requiring such practices as a function of a leasehold. The lease term requires such activity insofar as the pricing of the services is equal to or less than that of Bell Atlantic. Of course, Bell Atlantic is not permitted to offer interLATA service in Pennsylvania, so there is no comparison available to the tenant. Moreover, the lease term says nothing of the quality of the services or other features offered by the landlord's chosen carrier. Finally, the lease provision denies the tenant the opportunity to even consider switching its services to the competitive carrier it may wish to use.

Effectively, the practice constitutes "lease slamming" in that it forces a tenant to use the telecommunications services of a carrier it does not voluntarily choose to use. In the context of interstate, interLATA services, the Commission has a long-standing equal access policy designed to ensure that consumers can choose their long distance provider — regardless of their calling location.[1] In the context of local service, the Commission has recognized the underlying goal of the Telecommunications Act of 1996 Act to promote competitive choices in local exchange service for all Americans and to foster the development of advanced services.[2] These well-considered federal

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1 See Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, First Report and Order, 29 FCC 2d 870 (1971), aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); MCI v. FCC, 580 F.2d 590 (D.C. Cir. 1978), cert. denied, 434 U.S. 790 (1978); see also MTS and WATS Market Structure Phase III: Establishment of Physical Connections on Through Routes among Carriers; Establishment of Physical Connections by Carriers with Non-Carrier Communications Facilities; Planning among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing, Report and Order, 100 FCC 2d 860 (1985); see also Policies and Rules Concerning Operator Service Providers, Report and Order, 6 FCC Rcd 2744 (1991).

2 See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 14 FCC Rcd 15499 at ¶ 3 (1996)("The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all telecommunications markets . . . .").

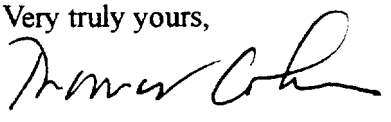
policies are being unilaterally defeated by E.V. Bishoff's lease term. The tenant in this case does not want the services of North Pittsburgh Systems. If the real estate industry's assertions were true, the landlord would want to accommodate the tenant's wishes (particularly given that Verizon's facilities are *already* in the building so there would be no burden to allowing continuation of the status quo). However, the landlord seeks to impose its choice of telecommunications carriers on the tenant *against the wishes of the tenant*.

Also attached is a letter filed with the Commission last Friday which illustrates the access difficulties that confront facilities-based carriers when landlords possess an interest in a telecommunications carrier. Several building owners with a financial interest in Broadband Office have informed Edge Connections that they could not grant Edge access to their buildings due to a year-long blackout period imposed by Broadband Office's access agreements. These agreements guarantee Broadband Office a first-mover advantage by keeping facilities-based competitors out of the building — and eliminating consumer choice — for up to one year. Edge is not alone in this regard. Other SBPP carrier members increasingly are reporting being denied access to buildings because of the moratorium on competition imposed by Broadband Office and other BLEC access agreements.

Another phenomenon that has increased in the past couple of months has been building owner insistence upon revenue sharing agreements before permitting a carrier access to the building. By way of example, S.L. Green is a landlord with a portfolio of buildings in New York City that, on many occasions, has refused SBPP members access to its properties. In more than one instance, the SBPP carrier members have signed up customers in S.L. Green buildings only to be denied access to the buildings. On many of these instances, the tenants seeking the service of the competitive carriers have alerted the landlord to their telecommunications carrier preferences but without success. S.L. Green nevertheless continues to reject access for the tenants' chosen carriers and routinely responds to the tenant that the tenant must use the services of the carrier already in the building — typically Onsite Access which maintains revenue sharing arrangements with S.L. Green. In sum, the landlord — in this case, S.L. Green — ignores the best interests and stated preferences of the tenant in order to promote the services of a carrier in whose revenue the landlord shares.

As the Massachusetts Department of Telecommunications and Energy stated in an Order last month, "[t]he legal status of landlord does not compass the role of exclusive broker of a tenant's telecommunications custom."[3] Landlords are entering new territory when they begin to regulate their tenants' telecommunications service, and this practice becomes particularly dangerous when it is exercised in a manner at odds with federal communications policies. As the Smart Buildings Policy Project has urged for some time now, the Commission must ensure that consumers — not their landlords — are able to choose their local, long distance, and broadband telecommunications providers. This will occur only with affirmative Commission action.

Very truly yours,



Thomas Cohen

Enclosures (3)

cc: Clint Odom
Peter Tenhula
Thomas Sugrue (WTB)
Jeffrey Steinberg (WTB)
Leon Jackler (WTB)
Wilbert Nixon (WTB)
David Furth (WTB)
Mark Schneider
Adam Krinsky
Dorothy Attwood (CCB)
Joel D. Taubenblatt (WTB)
Eloise Gore (CSB)
Paul Noone (WTB)
Richard Arsenault (WTB)
Helgi Walker
Kathy Brown
Jim Schlichting (WTB)
Lauren Van Wazer (WTB)
Cheryl King (CSB)
Mark Rubin (WTB)

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[3] Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way and to Enhance Consumer Access to Telecommunications Services, DTE 98-36-A, *Order Promulgating Final Regulations*, slip op. at 22 (Mass. DTE, rel. July 24, 2000).

# E. V. BISHOFF COMPANY

REAL ESTATE
www.evbco.com

March 24, 2000

Pittsburgh, PA 15222

SUBJECT: Dial Tone Service

Per the terms of your lease renewal and amendment dated December 15, 1999, paragraph 30:

> "TELECOMMUNICATIONS - Lessee shall, during the term of this Lease and any Renewal thereafter, satisfy its dial tone, long distance, and brad band service needs by contracting with North Pittsburgh Systems, Incorporated or one of its subsidiaries, as long as the pricing of the above services provided by North Pittsburgh Systems, Incorporated is equal to or less than that of Bell Atlantic."

According to our records, you have not yet made this transfer, although you are contractually obligated to do so. Please contact Mr. Bill Grieco of NPSI (412.492.8640) immediately to effect this change.

Sincerely,

E.V. BISHOFF COMPANY

Jeffrey A. Wolf
Vice President
Corporate Operations

JAW/jcl

cc: David W. Bishoff
cc: Bill Grieco

☐ 33 N. Third Street, Columbus, Ohio 43215 • Telephone (614) 221-4734 • Facsimile (614) 221-4739
☐ 815 Superior Avenue, Cleveland, Ohio 44114 • Telephone (216) 619-1100 • Facsimile (216) 619-1102
☐ 355 Fifth Avenue, Pittsburgh, Pennsylvania 15222 • Telephone (412) 471-6865 • Facsimile (412) 471-6870

# E. V. BISHOFF COMPANY

REAL ESTATE
www.evbco.com

April 18, 2000

Pittsburgh, PA 15222

SUBJECT: Dial Tone Service

On March 24th, 2000, we sent a letter to your office reminding you of your obligation to transfer your telecommunications service to North Pittsburgh Systems, Incorporated, per paragraph 30 of your Lease. A copy of this letter is enclosed.

Bill Grieco of North Pittsburgh Systems, Incorporated has just notified me that, this change has not yet taken place, despite his repeated efforts to contact you to work out a service and installation plan. Your failure to comply would constitute a breach of your Lease Agreement.

Please contact Bill Grieco of NPSI at (412) 492-8640 by no later than April 5th. He will help you work out a service plan and will take care of seeing that plan put into place.

Thank you for your attention to this matter.

Sincerely,

E. V. BISHOFF COMPANY

Jeffrey A. Wolf
Vice President
Corporate Operations

JAW:jcl

Cc: David W. Bishoff
Cc: Bill Grieco

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September 1, 2000

VIA COURIER

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-204B
Washington, DC 20554

Re: WT Docket No. 99-217; CC Docket No. 96-98

Dear Ms. Salas:

Edge Connections, Inc. ("Edge"), by its attorneys, hereby submits the following document for inclusion in the record in this proceeding:

1. Memoranda entitled "Explanation of Legal Issues in the License Agreement."

This document, which Edge received from a partner of BroadBand Office ("BBO"), discusses restrictive provisions in the BroadBand Office License Agreement, including a 12-month "Blackout" period during which BBO partners must restrict access to competitive telecommunications providers, and provides guidance to a BBO partner's employees on how to address requests by competitive telecommunications providers for building access. The license provisions and negotiation procedures described in the document are consistent with Edge's experience in the Atlanta market, where several different partners of BBO have told Edge that they could not enter into a building access agreement with Edge due to a "moratorium" imposed by BBO. This demonstrates the urgent need for regulation to promote non-discriminatory building access, and that reliance on market forces alone will be insufficient to ensure non-discriminatory building access, particularly where real estate entities own equity in telecommunications providers.

An original and two copies of this notice are provided.

Sincerely,

Todd D. Daubert
Counsel to Edge Connections, Inc.

TDD:slr

Enclosures

cc: Clint Odom
Peter Tenhula
Thomas Sugrue (WTB)
Joel D. Taubenblatt (WTB)
Eloise Gore (CSB)
Paul Noone (WTB)
Richard Arsenault (WTB)
Mark Schneider
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Mark Rubin (WTB)
Helgi Walker
Kathy Brown
Jeffrey Steinberg (WTB)
Leon Jackler (WTB)
Wilbert Nixon (WTB)
David Furth (WTB)

# EXPLANATION OF LEGAL ISSUES IN THE LICENSE AGREEMENT

**Restrictive Provision**

The Broadband Office License Agreement is the same as the ARC agreement except that BBO imposes a 12-month "Blackout" period from September 23, 1999-September 22, 2000 restricting access to other telecommunication providers. If you enter into an agreement with Broadband, during this period the following guidelines apply:

1. Wireless companies, such as Winstar, Teligent, MCI, NEXTLINK and AT&T may bring their services into the building, however, we are recommending that Hines properties enter into negotiations only if they are strongly driven by Owners or Tenants.
2. For any telecommunication providers, use the updated Hines Telecommunications License Agreement, currently being drafted, that includes some new provisions gleaned from the ARC and Broadband language. This new agreement will be placed on our database when completed.
3. The Restriction does not apply to (1) any existing telecommunications agreements as of September 23, 1999; or (2) the addition of one other such agreement with a Broadband Office competitor, such as ARC, Cypress, OnSite Access or Urban Media or any other "building centric" provider. In other words, the agreement allows a building to have 2 similar, building centric providers: BBO and one other, in addition to any existing providers during the restriction period.
4. The EXCEPTION is that any telecommunications provider may bring service directly to a tenant-not the entire building-during the blackout. The switch from the provider must, in this case, reside in the tenant's space.

**ALL deals must be routed to your Regional Vice President Operations for review and approval BEFORE execution, thus ensuring these guidelines are correctly interpreted.**

For your information, the following is the blackout language from the Broadband license agreement, Section 6:

"No Agreement with Direct Competitor. Licensor agrees not to enter into any access agreement with any building centric provider of bundled voice and data telecommunications services to small and medium sized businesses (including Cypress, Onsite Access and Urban Media) with respect to any Tier One Property or Tier Two Property for a period of twelve months after September 23, 1999; provided that this Section 6 does not apply to (i) any existing agreements as of September 23, 1999 and (ii) one other such agreement with such a competitor (including Allied Riser Corporation)."

**Existing Rooftop Management Agreements** (applicable only if existing)
The License Agreement provides for the dedication of approximately 50 square feet on the building rooftop. Several buildings are currently subject to exclusive Rooftop Management Agreements which require that all leases for rooftop space be obtained through the rooftop manager and that a fee be paid to that manager for its services. Hines has agreed that BBO and/or ARC will not be directly responsible for this fee. While ARC and BBO will contract with the rooftop management company, any fees associated with the lease of the rooftop space will be deducted from the five percent of Gross Receipts that are payable to the building under the Telecommunications License Agreement between the building and ARC/BBO. Any remaining "net" revenue will then be paid by ARC or BBO to the building.

The need for ARC or BBO to obtain rooftop space is usually confined to suburban locations where fiber is not laid for connections and the company must transmit their signal via an antenna or satellite dish. Therefore their need for rooftop space is very limited. In most metropolitan locations rooftop space is not required at this time, however ARC and BBO have the right to request the space at a future time, if additional services are made available only via antenna or dish.

**Notice of Non-Renewal/Cancellation**
It is recommended that, when appropriate, notice is given to terminate any exclusive agreement or that management negotiates an exclusion for itself to accommodate ARC's and BBO's rooftop space requirement. Critical termination dates in existing agreements should be carefully researched and noted.

**Cable Television Exclusive Agreement**
If an exclusive agreement exists, it is recommended that the Cable Television Agreement be reviewed for specific restriction language, as BBO and ARC are not considered Cable Television providers and are not licensed as such by the FCC.
It is further recommended that, when appropriate, notice be given to terminate any exclusive agreement.