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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 21, 2001

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Dear Ms. Salas:

BroadBand Office Communications, Inc. hereby submits one original and four copies of the reply comments in **WT Docket No. 99-217** *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*.

Sincerely,

BROADBAND OFFICE COMMUNICATIONS

Kathleen Q. Abernathy
Vice President, Public Policy

Enclosures

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

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Promotion of Competitive Networks in Local) WT Docket No. 99-217
Telecommunications Markets)
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)
Wireless Communications Association)
International, Inc. Petition for Rulemaking to)
Amend Section 1.4000 of the Commission's Rules)
to Preempt Restrictions on Subscriber Premises)
Reception or Transmission Antennas Designed to)
Provide Fixed Wireless Services)

REPLY COMMENTS OF BROADBAND OFFICE COMMUNICATIONS, INC.

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February 21, 2001

TABLE OF CONTENTS

SUMMARY.....i

I. DISCUSSION.....1

 A. Vigorous Competition in the Market for In-Building Services
 Makes Further Regulation of Building Access Unnecessary.....1

 B. The Regulation Proposed by Commenting Parties is
 Impractical, Anti-Competitive and Excessively Burdensome.....6

 C. Other Issues Raised by Commenters.....12

II. CONCLUSION.....14

SUMMARY

BroadBand Office Communications, Inc. (“BBOC”) submits these Reply Comments concerning the Further Notice of Proposed Rulemaking issued in the above-referenced rulemaking proceeding. BBOC respectfully requests that the Commission reject the proposed adoption of additional building access regulations. As statistical evidence entered into the record of this proceeding establishes, competition in the market for provision of in-building telecommunications services is thriving. Research data submitted by the Real Access Alliance establishes that the rate of building penetration by competitive providers is quite high, that most building owners provide access to multiple service providers within a given building, and that building owners’ primary concern in granting building access is ensuring tenant satisfaction.

Commenters advocating in favor of additional building access regulation fail to articulate a viable standard for enforcement. This failure reflects the fact that the circumstances and factors underlying the decision to grant building access vary significantly, making it impossible to establish a consistent standard for “unreasonable” discrimination. Moreover, even if a standard for unreasonable discrimination could be identified, carriers would have no practical ability to ensure that building owners would adhere to it in granting building access. Because the lack of a consistent and predictable standard for “unreasonable” discrimination would create confusion and uncertainty, and would result in an increase in the number of complaint proceedings brought before the Commission, BBOC urges the Commission to refrain from adopting additional building access regulations and to allow the marketplace to operate freely in the manner envisioned in the Telecommunications Act of 1996.

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REPLY COMMENTS OF BROADBAND OFFICE COMMUNICATIONS, INC.

BroadBand Office Communications, Inc. ("BBOC"), by and through its attorneys, submits these Reply Comments concerning the Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission (the "Commission") in the above-referenced proceeding. As explained below, BBOC urges the Commission to reject the proposed adoption of new rules directed toward carriers offering services to tenants located in multiple tenant environments ("MTEs"), and to refrain from imposing regulation concerning preferential terms contained in building access agreements

I. DISCUSSION

A. Vigorous Competition in the Market for In-Building Services Makes Further Regulation of Building Access Unnecessary

As BBOC explained in its initial Comments filed in this proceeding, competition in the market for provision of in-building telecommunications services has taken root and continues to flourish. Building owners have realized the benefits inherent in offering

their tenants access to building-wide state-of-the-art communications and IT services.¹ As one real estate industry executive has observed, “tenants now expect high-speed access in a building as much as they expect [heating, ventilation and air conditioning] and parking.”² Accordingly, building owners have demonstrated an increasing willingness to work cooperatively with service providers in order to facilitate building access on reasonable terms. Statistical evidence entered into the record of this proceeding by the Real Access Alliance (the “RAA”), a coalition of real estate industry members, in fact establishes that competition in the market for in-building services is robust and verifiable.³

The Comments filed by the RAA in response to the Commission’s FNPRM discuss the findings contained in three research studies conducted in order to determine the nature of the access granted to competitive telecommunications service providers by real estate owners and managers, the economic effects of proposed building access regulation, the level of tenant demand for advanced telecommunications services, and building owners’ general response to tenant demand.⁴ The data contained in these studies is comprehensive, but three particularly relevant facts emerge. The first is that, contrary to the assertions of some commenting parties,⁵ the rate of building penetration by competitive providers is quite high. The research reveals that the *majority* of those buildings that competitive providers prefer to serve -- *i.e.*, buildings that are located in

¹ Further Comments of the Real Access Alliance at 2-28.

² Marie Balice Ward, *Building Smart*, Commercial Investment Real Estate, November/December 2000.

³ See, Further Comments of the Real Access Alliance.

⁴ Id. at 3-25.

⁵ See, *e.g.*, Comments of the Smart Building Policy Project at 3; Comments of Cox Communications, Inc. at 5-10; Comments of AT&T Corp. at 9-12.

metropolitan areas, and that have at least 150,000 square feet and ten or more tenants -- have been penetrated by competitive providers.⁶

Second, the research confirms that it is extremely common for building owners to allow more than one service provider to offer service within a given building.⁷ Among those building owners surveyed, 80% of respondents had granted access to more than one telecommunications service provider, while nearly 60% had granted access to three or more.⁸ Finally, the research and other statements of the RAA clearly establish that building owners' primary concern in granting access to service providers, and in entering into preferential marketing agreements, is ensuring tenant satisfaction.⁹ Because many building owners have experienced significant provisioning delays, as well as a "cherry-picking" mentality among service providers, the decision to grant access often depends upon whether the requesting carrier is willing to provide service guarantees, or to provide service to smaller buildings in the building owner's portfolio.¹⁰

In direct contrast to the statistical evidence provided by the RAA proving competition in the market for provision of in-building services, only anecdotal statements have been offered by commenting parties to support their assertion that this market is in a state of failure.¹¹ It is clear that the market for provision of in-building telecommunications services is not a market in a state of failure. Nor is it a monopoly market in need of regulatory intervention. Rather, it is a market in which differentiation between providers is based upon the appropriate competitive advantages that result from

⁶ Further Comments of the Real Access Alliance at 13-14.

⁷ *Id.* at 5.

⁸ *Id.*

⁹ *Id.* at 19-21 and 66-67.

¹⁰ *Id.* at 16-21.

¹¹ *See, e.g.,* Comments of Cox Communications, Inc. at 5-10; Comments of AT&T Corp. at 9-13.

offering innovative and advanced services at reasonable prices -- not upon the unfair competitive advantages that result from prior monopolistic relationships. It appears that the market will reward those competitors who are willing to offer high-quality, reasonably-priced services and service guarantees. This demonstrates that local competition is succeeding and will benefit consumers in the manner intended by the Telecommunications Act of 1996 (the "1996 Act").¹² Moreover, there is no evidence to suggest that the market for provision of in-building telecommunications services is in danger of taking on the characteristics of a monopoly market. The likelihood of any future problems is minimal in light of the Commission's adoption of a rule prohibiting telecommunications carriers from entering into exclusivity agreements.¹³ In addition, the current trend in the real estate industry is clearly toward increased building access, more choice in providers, and an increased willingness on the part of building owners to negotiate with multiple service providers.¹⁴

In recent months, the real estate industry has proposed voluntarily guidelines for access negotiations, and has created a draft model license agreement for building access (the "Model Agreement").¹⁵ The draft Model Agreement was initially submitted by the RAA on December 14, 2000 and parties representing the telecommunications industry have been given the opportunity to respond with their comments and concerns. Revisions

¹² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of 15 and 47 U.S.C.).

¹³ In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, *First Report and Order and Notice of Proposed Rulemaking*, WT Docket No. 99-217; FCC 00-366, ¶ 27 (rel. October 25, 2000) (hereinafter referred to as the "Building Access Order").

¹⁴ See, Therese Fitzgerald, *It's Showtime*, Commercial Property News, www.cpnrenet.com/findit/2000/oct01/showtime.html, October 1, 2000

¹⁵ Building Access Order at ¶ 8.

to the initial draft of the Model Agreement will undoubtedly be made based on the comments provided, and the anticipated outcome is a Model Agreement acceptable to both the real estate industry and the telecommunications industry. Development of such a Model Agreement will simplify to a large extent the process of negotiating building access and is, as the Commission noted, “a positive step in the development of the market for building access.”¹⁶

Notwithstanding the promise of the Model Agreement, some commenting parties are quick to claim that the Model Agreement is inadequate and that Commission regulation is preferable to an industry-based solution.¹⁷ This conclusion is clearly premature. The Commission has indicated that while it will continue to monitor the progress of the development of the Model Agreement, “it is prudent to permit additional time for this initiative to develop, in the hope that industry can address [building] access issues *without further regulatory intervention*.”¹⁸ Given the Commission’s intense focus in recent years on deregulation, industry self-regulation is plainly preferable to imposition of new regulation by the Commission. Thus, BBOC submits that promulgation of new regulation by the Commission, if necessary at all, would be appropriate only after full development and implementation of the Model Agreement.

¹⁶ Id. at ¶ 16.

¹⁷ See, e.g., Comments of the Smart Building Policy Project at 3-4; Comments of Winstar Communications, Inc. at 2-5; Comments of AT&T Corp. at 13-14.

¹⁸ Building Access Order at ¶ 126.

B. The Regulation Proposed by Commenting Parties is Impractical, Anti-Competitive and Excessively Burdensome

In the FNPRM, the Commission requests comment concerning how to define “nondiscriminatory access” and how the proposed nondiscriminatory access rule should be enforced.¹⁹ As BBOC explained in its initial Comments, equipment space within commercial buildings is limited, thus discrimination in providing access to equipment space is unavoidable. Accordingly, any “nondiscriminatory access” requirement must focus on defining *unreasonable* discrimination. Given, however, that the decision to grant building access involves weighing several different factors, it is clear that a single consistent standard for “unreasonable” discrimination cannot be articulated and that building owners’ access decisions must instead be judged on a case-by-case basis.²⁰

Even if a standard for unreasonable discrimination could be identified, carriers would have no practical ability to ensure that building owners would adhere to it in granting building access. Carriers do not generally have access to necessary information, such as the building owner’s internal building access policies and the proposed terms and conditions offered by competing carriers, in order to determine whether unreasonable discrimination has occurred. Nor do carriers have the expertise necessary to second-guess the building owner’s decision concerning which service provider would be the best overall choice for a particular property.

¹⁹ Id. at ¶ 156-158.

²⁰ See, Joint Comments of the Real Access Alliance at 14; see also, Steve Bergsman, *Demetree, Hornig Stress Tenant Need*, Commercial Property News, www.cpnrenet.com/archives/2000/jun16/demetree.html, June 16, 2000.

Notwithstanding this inability to detect or prevent unreasonable discrimination in the granting of building access, in the event a building owner was found to have discriminated, it would be the carriers – and more importantly their customers -- that would be punished for the actions of the building owner. Carriers seeking to enter the building would be prohibited from doing so, and carriers already providing service in the building would be required to cease provision of service to customers. Customers relying on those carriers for delivery of mission-critical communications would most certainly be harmed.

The difficulty inherent in establishing a consistent standard for “unreasonable” discrimination makes adoption of an unambiguous and equitable nondiscriminatory access rule an impossibility. Adoption of the proposed rule would create confusion and uncertainty, and would result in an unmanageable increase in the number of complaint proceedings brought before the Commission. Accordingly, BBOC urges the Commission to refrain from adopting such a rule, and to reject the proposals made by some commenting parties concerning promulgation of new building access regulation.

Winstar Communications, Inc. (“Winstar”) proposes that the Commission enforce what amounts to a “first-come, first-served” standard for nondiscriminatory access, which would require that building owners and managers negotiate access with facilities-based carriers “upon their request.”²¹ As BBOC explained in its initial Comments, however, adoption of a first-come, first-served mandatory access requirement would result in a replication of the worst aspects of the now defunct monopoly environment. Rather than creating a level playing field, a first-come-first-served approach would allow those early-entrant carriers with a large building footprint to remain dominant simply by “locking

²¹ Comments of Winstar Communications, Inc. at 5-6.

up” or “warehousing” as much equipment space in building telephone closets as possible, regardless of whether they intended to use it to provide service. Such warehousing of space would severely disadvantage other carriers. Thus, rather than providing a clear incentive to carriers to innovate and offer a greater number of services at attractive prices, a first-come-first-served requirement would reward carriers who divert resources away from such efforts in favor of a campaign to hoard scarce equipment space.

The Smart Building Policy Project (the “SBPP”) urges the Commission to adopt a nondiscriminatory access rule, but does not propose a standard that takes into account the potentially broad application of the rule. Rather than articulating a comprehensive standard for identifying all forms of prohibited activity, the SBPP focuses on a specific form of unreasonable discrimination – alleged unfairness in the access rates charged by building owners.²² The SBPP proposes the adoption of benchmark rates in order to prevent unreasonably discriminatory access rates, but provides no further practical recommendation for development of an all-encompassing standard.²³ Instead, the SBPP proposes that access disputes be settled by the Commission, and addresses the issue of the significant burden imposed upon the Commission and the parties by such an approach by claiming that, “over time, any burden . . . is likely to decline as the Commission’s responses to access disputes becomes predictable.”²⁴ The SPBB makes the additional confusing claim that once regulations are adopted by the Commission, it is unlikely that parties will seek to rely upon them since “norm theory” establishes that the existence of government regulation is likely to promote voluntarily negotiated solutions.²⁵

²² Comments of the Smart Building Policy Project at 38-41.

²³ *Id.*

²⁴ *Id.* at 38 and 41.

²⁵ *Id.* at 41-42.

Time-consuming and burdensome complaint proceedings are not the best mechanism for developing unambiguous rules and not the best use of Commission and carrier resources. Further, the suggestion that the Commission adopt a vague and overly-broad nondiscriminatory access rule in the hopes that parties will not seek to enforce the rule, but instead will somehow reach consensus on what the rule requires without Commission intervention is both ill-conceived and unrealistic. It would not be a reasonable exercise of Commission jurisdiction to adopt a rule that is not capable of being enforced on its face. Moreover, the fundamental premise underlying this argument -- that over time a standard for identifying "unreasonable" discrimination will emerge -- demonstrates the same flawed reasoning that BBOC addresses in its initial Comments.

Because the circumstances under which building access is granted vary widely, it is not possible to create a consistent standard for "unreasonable discrimination" that takes into account each and every potential building access scenario. Rather, the reasonableness of a decision by a building owner to grant building access to a particular carrier must be judged on an ad hoc basis according to individual facts of the situation. With no established standard in place, virtually any decision by a building owner to grant building access could be called into question by a rejected carrier. Under the SBPP proposal, the Commission would be obligated to act as referee in an endless number of complaint proceedings, each one requiring the Commission to conduct a thorough examination of all of the particulars of the negotiation, including the individual thought processes of the building owners and analysis of complex business factors such as the impact of proposed infrastructure improvements on property value, current and future

tenant demographics, and zoning or use restrictions. Thus, the burden on the Commission, carriers, and building owners resulting from adoption of the SBPP proposal would be substantial and unavoidable.

Like Winstar and the SBPP, AT&T Corp. (“AT&T”) supports enforcement of a nondiscriminatory access requirement, but fails to offer a feasible standard for identifying unreasonable discrimination. AT&T proposes adoption of an “opt-in” type requirement that would allow a service provider seeking access to a building to demand access upon terms and conditions identical to those negotiated by another service provider located in that building.²⁶ Far from stimulating additional competition, this proposed standard would prevent competition from developing in the manner envisioned in the 1996 Act.

Development of meaningful competition in the market for provision of in-building telecommunications services requires that service providers have the ability to distinguish themselves from their competitors. The assumption that the competitors who offer services and rates that are attractive to customers will succeed, while those who fail to do so will not, underlies the 1996 Act’s introduction of local competition. In keeping with this notion of healthy competition, building owners seeking to enter into strategic partnerships with service providers have gravitated to those service providers who appeal to tenants by offering faster provisioned, high quality, reliable service at reasonable prices.²⁷ The access agreements negotiated between building owners and these service providers, while not exclusive, often contain terms favorable to the service provider.

²⁶ Comments of AT&T Corp. at 38-39.

²⁷ Further Comments of the Real Access Alliance at 2-28.

These favorable terms perform the pro-competitive function of recognizing and rewarding the service provider's success in distinguishing itself competitively, and provide a further opportunity for the service provider to differentiate itself from its competitors. Moreover, these favorable terms reflect the service provider's willingness to assume correspondingly higher obligations. For example, carriers are often required to make significant capital expenditures in order to satisfy certain in-building infrastructure installation requirements, and to commit to specific service level guarantees.²⁸ Thus, any benefits realized by carriers from such favorable arrangements are balanced by the significant performance and capital obligations imposed upon them. In addition, and most importantly, these agreements are negotiated in the open marketplace, based upon those terms and conditions that the market will bear.

AT&T's proposal to allow any provider to essentially "opt-in" to the negotiated terms of access agreements between building owners and other service providers poses a significant threat to this mechanism for reinforcing competition. This approach adopts a regulatory mechanism designed for a monopoly environment and attempts to impose it in a competitive environment. Only by preserving an environment in which carriers are able to distinguish themselves on appropriate competitive grounds (*i.e.*, by offering superior services at reasonable rates), will the Commission ensure the further development of competition. In addition to the general harm to competition such a proposed rule would cause, requiring disclosure of the terms of access agreements could cause specific harm to the parties involved, to the extent such terms contain competitively sensitive information. Creation of an "opt-in" right for carriers seeking building access

²⁸ For example, BBOC invests substantial sums of money in order to pre-wire each building for advanced communications and data services – *often without a single customer in the particular building.*

would be an extreme act -- particularly in the absence of explicit statutory authority to create such a right or a demonstrated a market failure – and would represent a significant intrusion into the business dealings between service providers and building owners. It is worth noting that in passing its building access legislation, the Texas legislature expressly declined to require building owners that had entered into an agreement for building-wide services with one carrier, to enter into an agreement for the same type of service with another carrier, thus rejecting the “opt-in” approach advocated by AT&T.²⁹

C. Other Issues Raised by Commenters

The General Services Administration (the “GSA”) notes that CLECs continue to incur difficulty in obtaining access to ILEC facilities,³⁰ and proposes that ILECs be required to pay recurring charges equivalent to those imposed upon CLECs.³¹ BBOC supports this proposal. The U.S. Department of Defense (the “DOD”) requests that buildings located on military installations and the activities of appropriated and non-appropriated fund entities of the DOD be exempt from the Commission’s nondiscriminatory access rules.³² BBOC concurs that such military sites should be exempt from any nondiscriminatory access rules adopted by the Commission. Finally, the County of Los Angeles requests that buildings owned by state and local governments be exempt from the rule prohibiting exclusive access agreements.³³ BBOC does not oppose this request by the County of Los Angeles.

²⁹ See, Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 54.261 (Vernon 1999) (“[Code provisions prohibiting building access discrimination] do not require a public or private property owner to enter into a contract with a telecommunications utility to provide shared tenant services on a property”).

³⁰ Comments of the General Services Administration at 3-5.

³¹ Id. at 7.

³² Comments of the Department of Defense at 10.

³³ Comments of the County of Los Angeles at 5.

In addition, Comments were filed by the Public Services Commissions of Florida and Nebraska (the “Florida PSC” and “Nebraska PSC”) and the Public Utilities Commission of Texas (the “Texas PUC”). The Florida PSC and Nebraska PSC address marketing agreements between carriers and building owners, stating that such agreements are anti-competitive.³⁴ As BBOC has noted, however, agreements containing preferential terms are an indication of healthy competition. Such arrangements reflect appropriate competitive advantages that result from offering a superior level of service and committing to more demanding contractual obligations. They also provide an opportunity for new competitors to enter the market. The ongoing development of competition requires that the Commission protect carriers’ ability to enter into such agreements.

The Texas PUC notes that it promulgated new building access regulation in September 2000 and encourages the Commission to take this regulation into account in determining whether federal action is necessary.³⁵ In considering the Texas regulation, it is important to note that the Texas PUC adopted the new regulation in response to a statutory mandate passed by the Texas legislature in 1995. Thus, the legislation was issued *prior to* passage of the 1996 Act, at a time when competition in the market for provision of in-building telecommunications services was significantly less developed than it is today. As BBOC has explained, competition in the market for provision of in-building telecommunications services has grown considerably, and all indications are that it will continue to do so. Moreover, as the Texas PUC explains, the building access

³⁴ Comments of the Florida Public Service Commission at 2; Comments of the Nebraska Public Service Commission at 2.

³⁵ Comments of the Texas Public Utilities Commission at 1.

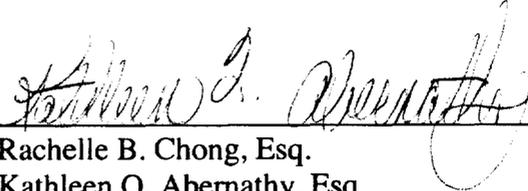
requirements are triggered by a *tenant request for service*.³⁶ It is clear that building owners' access decisions are primarily motivated by the desire to ensure tenant satisfaction. Thus, implementation of a rule designed to guarantee an identical outcome is unnecessary.

II. CONCLUSION

For the reasons set forth above, BBOC respectfully requests that the Commission reject the proposed adoption of a rule requiring carriers to ensure the reasonableness of building owners' decisions to grant building access, and that it refrain from imposing regulation relating to preferential terms contained in access agreements.

Respectfully submitted,

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³⁶ Id. at 1.

Certificate of Service

I, Ann Monahan, do hereby certify that on, copies of the foregoing Reply Comments of BroadBand Office Communications, Inc., were served this 21nd day of February, 2001, by hand delivery or postage paid to the following parties:

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