BEFORE THE

Washington Utilities and Transportation Commission

Olympia, Washington

In the Matter of	)	
	)	Docket No. UT-990146
Draft Access to Premises Rule	)	

COMMENTS OF THE SMART BUILDINGS POLICY PROJECT

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The Smart Buildings Policy Project ("SBPP")[1] hereby submits its comments in the above-captioned proceeding concerning the Staff's draft access to premises rule.[2]

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[1] The Smart Buildings Policy Project is a coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T, Comcast Business Communications, Commercial Internet eXchange Association, Competition Policy Institute, Competitive Telecommunications Association, DMC Stratex Networks, Focal Communications Corporation, The Harris Corporation, Highspeed.com, Information Technology Association of America, Lucent Technologies, NetVoice Technologies, Inc., Network Telephone Corporation, Nokia Inc., International Communications Association, P-Com, Inc., Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications, Inc., Wireless Communications Association International, WorldCom, and XO Communications, Inc. The SBPP website can be viewed at <www.buildingconnections.org>.

[2] See In re Notice of Proposed Rule Adoption Hearing; Opportunity to Submit Written Comment on Draft Access to Premises Rule; Notice of Rulemaking Workshop on Draft Access to Premises Rule, Docket No. UT-990146 (rel. March 5, 2001) ("Notice").

I. INTRODUCTION.

The Commission's Staff proposes an alternative to the original proposed rule WAC 480-120-049. The Staff's alternative rule proposes to prohibit exclusive or restrictive telecommunications agreements in multi-unit premises.[3] The SBPP applauds the Staff's efforts to remove barriers to the development of telecommunications competition in multi-unit premises. The SBPP supports the Commission's adoption of the Staff's alternative rule. As demonstrated below, exclusive access agreements in multi-unit premises do not serve the public interest because they prevent tenants from choosing the telecommunications carriers they desire. This, in turn, hinders the development of facilities-based competition.

It is clear that facilities-based competition will provide consumers substantial benefits. Unlike resale and unbundled element-based strategies, facilities-based competition offers the full panoply of benefits to consumers -- reduction in prices, enhanced quality of service, innovative service offerings, and use of the most cutting-edge technologies -- without relying heavily on the incumbent local exchange carrier's willingness to permit these results. However, access to multi-unit premises is critical for the development of facilities-based competition everywhere (even outside the multi-unit premises marketplace). Multi-unit premises offer a geographically-concentrated group of potential customers; therefore it is natural for new carriers with limited capital initially to pursue these lines of business that typically produce higher revenue and margins.[4] The economies inherent in the growth of competition will allow the competition born

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[3] Hereinafter, the SBPP will refer to exclusive and restrictive agreements as "exclusive access agreements."

[4] Indeed, MCI's success in the long distance market began with a geographically-limited and business-oriented plan. Its success in serving all Americans -- residential and commercial in urban, suburban, and rural areas -- is self-evident and is a product both of its targeted initial business plan and the governmental foresight that allowed this growth to occur.

in multi-unit premises to expand rapidly to other environments. Because the competitive growth curve for many competitive carriers begins with multi-unit premises, CLEC access to consumers in those properties is a condition precedent to the development of telecommunications competition everywhere.

There is significant agreement that exclusive access agreements harm the development of competition. Numerous states have prohibited exclusive access agreements, and the Federal Communications Commission ("FCC") has barred exclusive access agreements in commercial multi-unit premises. In fact, recently in response to the FCC requesting comment on whether it should extend its prohibition on exclusive access agreements to residential multi-unit premises, incumbent local exchange carriers, competitive carriers, and two State public utilities commissions all agreed that the FCC should do so. For these reasons, the Commission should adopt the Staff's alternative rule and proscribe exclusive access agreements in all multi-unit premises.

In addition, in the interest of promoting telecommunications competition, SBPP encourages the Commission to take any further steps necessary to ensure that telecommunications carriers are provided nondiscriminatory access to multi-unit premises.

II. A PROHIBITION ON EXCLUSIVE CARRIER ACCESS TO PROPERTIES IS IN THE PUBLIC INTEREST.

A. CONSUMERS ARE BETTER SERVED BY CHOICE OF TELECOMMUNICATIONS CARRIERS.

As a matter of policy and law, the Commission should prohibit exclusive telecommunications carrier access agreements with multi-unit premises owners. Exclusive access contracts remove choice from consumers and eventually adversely impact service quality, rates, and innovation because exclusive carriers lack the threat of competition, thereby removing

the incentive for carriers to provide quality service. Moreover, both residential and commercial tenants have limited recourse in addressing the lack of telecommunications choices offered in buildings served under exclusive contracts. To change telecommunications carriers, tenants in exclusive access properties would have to move; however, the terms of leases and the high costs of moving typically outweigh the savings tenants would receive from switching carriers.[5] The FCC recognized that

> [a]n exclusive contract may benefit a building owner when it possesses some market power over tenants, such as where tenants are already committed to long-term leases and moving costs are prohibitive. Where that is the case, building owners may have the ability and incentive to engage in behavior that does not maximize tenant welfare, including the possible use of exclusive contracts.[6]

Tenants, rather than their landlords, are more appropriate arbiters of which carrier offers the telecommunications services and prices they want. There is no reason to believe that landlords are better positioned to know and understand the telecommunications needs of tenants than are tenants. Indeed, not all tenants possess the same needs -- the right choice for one may well be the wrong choice for another. If property owners make this choice instead of tenants, it will be the property owners that determine which carriers succeed in the market, not the end users of telecommunications services. For these reasons, the Commission should prohibit exclusive access agreements with multi-unit premises owners.

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[5] See Written Testimony of John B. Hayes, Charles River Associates, Inc. before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives (March 21, 2000)(explaining that where the total cost to relocate equals a full year's rent, if telecommunications expenditures are 20 percent of rent, and if a CLEC can save tenants 30 percent on their telecommunications bills, then it would take 16 years (ignoring discounting) for the savings on telecommunications services to pay for a move).

[6] Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, FCC 00-366, at ¶ 31 (rel. Oct. 25, 2000)("*FCC Competitive Networks First R&O and FNPRM*")).

Some parties may argue that exclusive agreements provide carriers with the requisite market share to make service to the premises economic or otherwise permit a carrier to recoup its investment in the premises. However, to the extent that it is economically feasible for only one carrier to upgrade and serve a particular property, natural market forces will lead to *de facto* exclusives. Indeed, if future costs of upgrades decrease or if different technologies render it economical for there to be multiple service providers in a property, a *de jure* exclusive would prevent those advances from benefiting consumers. Any presumption should be in favor of competition and against exclusivity. To the extent that a carrier absolutely needs an exclusive in a property to cost-justify the investment, it should seek a waiver of the Commission's prohibition at that time.

B. THERE IS SIGNIFICANT AGREEMENT THAT EXCLUSIVE ACCESS ARRANGEMENTS HARM COMPETITION.

Washington law is replete with evidence of disfavor for arrangements that preclude telecommunications competition, such as exclusive access agreements. For example, the legislature has declared that it is the policy of the State of Washington to "[p]romote diversity in the supply of telecommunications services and product in telecommunications markets throughout the state."[7] In addition, an exception is made to the prohibition on regulation of private shared telecommunications services for circumstances in which tenants have no alternative access to local exchange telecommunications companies, demonstrating a policy of promoting regulatory intervention to eliminate the anti-competitive effects borne of exclusive access arrangements.[8] Finally, the Supreme Court of Washington has expressed the "state's

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[7] R.C.W. § 80.36.300(5).

[8] R.C.W. § 80.36.370(5).

abhorrence of monopolies" and has even held that the Commission lacks the authority to grant exclusive rights to telecommunications carriers.[9]

With specific regard to exclusive or restrictive building access arrangements, the FCC found that the presence of exclusive access agreements in commercial properties hinders the development of competition, and for this reason, it prohibited carriers from entering into such agreements.[10] It noted that "exclusive contracts for telecommunications services in commercial settings hold the potential for limiting tenants' choices, without any countervailing benefits."[11] Similarly, a number of States have prohibited exclusive access agreements. The Nebraska Public Service Commission ("PSC") prohibited exclusive access agreements in multi-unit premises in March 1999.[12] Recently, in its comments to encourage the FCC to extend its rules to prohibit exclusive access agreements in residential multi-unit premises, the Nebraska PSC stated that "[w]e found that exclusionary contracts are barriers to entry . . . ."[13] In addition, Texas, Connecticut, Ohio, Massachusetts, and California have all prohibited exclusive access agreements.[14] In its comments to the FCC supporting the extension of the FCC's ban to

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9 Consolidated Cases Concerning the Registration of Electric Lightwave, Inc., and The Registration and Classification of Digital Direct Satellite, Inc., 123 Wash.2d 530, 537-538, 869 P.2d 1045, 1050 (1994).

10 *FCC Competitive Networks First R&O and FNPRM* at ¶¶ 27-40.

11 Id. at ¶ 34.

12 In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 6 (Neb. PSC, March 2, 1999).

13 Comments of the Nebraska Public Service Commission, WT Docket No. 99-217, at 2 (FCC, filed December 22, 2000).

14 See Tex. Admin. Code, Title 16, Part II, § 26.129(d)(4); Conn. Gen. Stats. § 16-2471(e); In the Matter of the Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sep. 29, 1994); Order establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-

exclusive access agreements in residential multi-unit premises, the Florida Public Service Commission stated that "[e]xclusionary contracts are inherently anticompetitive and should, therefore, be prohibited as being against public policy."[15]

Moreover, there was consensus among incumbent local exchange carriers and competitive carriers regarding exclusive agreements before the FCC. Verizon stated that "exclusive access arrangements in a multi-tenant environment constrain competition and reduce the services available to both commercial and residential tenants."[16] As such, Verizon encouraged the Commission to extend its exclusive access prohibition to residential environments.[17] Similarly, SBC supported "the Commission's prohibition on carrier exclusive access contracts in commercial MTEs and urge[d] the Commission to extend that ban to residential MTEs so that consumers may have their choice of providers."[18] In addition to the SBPP, competitors such as AT&T, RCN, and Sprint also encouraged the Commission to extend its exclusive access prohibition to residential environments.[19] Thus, the Commission should

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Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services, D.T.E. 98-36-A, 2000 WL 1509964 (Mass D.T.E.), *Order Promulgating Final Regulations* at 28-31 (July 24, 2000); Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, R. 95-04-043; I.95-04-044, *Decision 98-10-058*, slip op. at 100 (Cal. PUC Oct. 28, 1998).

15 Comments of Florida Public Service Commission Comment, WT Docket No. 99-217, at 2 (filed Jan. 22, 2001) (quoting Florida Public Service Commission's "Report on Access by Telecommunications Companies to Customers in Multitenant Environments").

16 Comments of Verizon, WT Docket No. 99-217, at 3 (FCC, filed Jan. 22, 2001).

17 Id. at 4.

18 Comments of SBC, WT Docket No. 99-217, at 1 (FCC, filed Jan. 22, 2001).

19 Comments of AT&T, WT Docket No. 99-217, at 41 (FCC, filed Jan. 22, 2001); Comments of RCN, WT Docket No. 99-217, at 17 (FCC, filed Jan. 22, 2001); Comments of Sprint, WT Docket No. 99-217, at 9 (FCC, filed Jan. 22, 2001).

adopt the Staff's alternative rule and proscribe exclusive access agreements in all multi-unit premises.

C. THE COMMISSION SHOULD PROMOTE TIMELY PROVISION OF COMPETITIVE SERVICES TO TENANTS BY PROVIDING FOR AUTOMATIC AND IMMEDIATE ELIMINATION OF EXCLUSIVE ACCESS PROVISIONS IN EXISTING AGREEMENTS OR EASEMENTS.

The SBPP suspects that Commission Staff included Section 3 of the proposed rule to emphasize that the prohibition on exclusive contracts applied not only to contracts entered into after the effective date of the proposed rule, but also to contracts that exist at the time the rule is adopted. In this regard, the elimination of both existing and future exclusive access arrangements is a pro-competitive measure supported by the SBPP and reflected in the policies and rules of other pro-competitive regulatory agencies.

Nevertheless, SBPP believes that, as written, Section 2 can be interpreted to apply to existing exclusive access arrangements rendering inclusion of Section 3 unnecessary. Moreover, the inclusion of Section 3 may actually impair the Commission's pro-competitive intentions. By delaying the effective operation of the anti-exclusivity rule "until the agreement or grant is modified to remove the exclusivity or restriction," the rule may involve the unintended consequence of delaying competitive, advanced or upgraded services from being delivered to tenants. The delay would derive from the requirement that a reformation of contract occur *before* the carrier could commence the facility installation or alteration necessary for the provision of the new services to tenants.

Accordingly, the SBPP recommends the following modification to the proposed rule:

(3) Upon a tenant's, building owner's or carrier's request for installation on property covered by an exclusive or restrictive easement, right-of-way of a carrier's facilities, or once a ~~No~~ company ~~may~~ undertakes a requested change in service or alteration of facilities on property covered by an exclusive or restrictive easement, right-of-way, or license, ~~until~~ the exclusive or restrictive agreement or grant is deemed to be automatically and immediately modified to remove the exclusivity or restriction.

In this manner, operation of the anti-exclusivity/anti-restriction rule occurs automatically and immediately, lowering transactions costs and delay for all involved.

III. THE COMMISSION MUST PROHIBIT DISCRIMINATORY BEHAVIOR.

A prohibition on exclusive access agreements in multi-unit premises, while beneficial, is not completely sufficient to render the harms caused by discriminatory behavior against competitive carriers ineffective. For this reason, the SBPP is encouraged that the Staff has included language in its proposed alternative rule prohibiting any contract term that "discriminates in favor of any one company with respect to the provision of access or compensation requested."[20] For competitive carriers to compete against incumbent local exchange carriers, they must have nondiscriminatory access to all consumers, including those working and living in multi-unit premises.

Restrictions imposed by building owners on telecommunications carrier access to multi-unit premises rank among the most formidable obstacles to facilities-based competition. In recognition of this barrier, NARUC passed a resolution urging regulatory commissions to adopt rules to address the need for nondiscriminatory telecommunications carrier access to multi-unit

[20] See Staff's Proposed Alternative WAC 480-120-049(2)(e).

premises.[21] A significant number of property owners respond slowly to competitive carriers' requests for access or delay access for several months or even years by seeking unreasonable terms during negotiations.[22] Some owners even deny access entirely, or largely ignore requests for access. Others impose such burdensome conditions on, or charge such exorbitant rates for access that providing competitive services to the property is rendered impossible or uneconomic. Moreover, the proscriptions against exclusive access arrangements, while commendable, are insufficient to cure the problem. Because multi-unit premises owners can unilaterally maintain exclusive carrier access arrangements, exclusive access prohibitions that apply only to carriers or are enforced only against carriers will not prevent exclusive access arrangements.[23] For these reasons, it is crucial that the Commission prohibit building owners from engaging in the discrimination and delay that harms the ability of tenants to take service from competitive carriers. Thus, to the degree the Staff's proposed rule does not permit the Commission to take such action, the Commission should consider expanding its reach.

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21 Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers, NARUC 1998 Summer Meeting, Seattle, Washington.

22 When consumers subscribe to a new telecommunications carrier, they typically will not tolerate a delay of weeks, much less months or years, for the commencement of service from the carrier. It is partly for this reason of commercial necessity that access requirements (and any time periods governing negotiation periods between building owners and telecommunications carriers) should be triggered upon a carrier's request for access from a building owner. To avoid unnecessary delay, the access process should not be predicated upon a tenant's request for service from the carrier.

23 In comments submitted to the FCC, the Community Associations Institute stated that "while the FCC may be able to prohibit providers from enforcing exclusive access provisions in existing residential contracts, it should be beyond question that the FCC is not empowered to prohibit community associations and owners from enforcing exclusive access provisions that are to their benefit" Comments of the Community Associations Institute, WT Docket No. 99-217, at 7-8 (FCC, filed Jan. 21, 2001). In the same proceeding, AT&T cautioned the FCC that even a contract that does not, by its terms, provide exclusive access to any single carrier, the building owner "may achieve the same practical result simply by discriminating among telecommunications providers with respect to other critical terms that would equally block access to [multi-unit premises] by competing LECs." Comments of AT&T, WT Docket No. 99-217, at 14 (FCC, filed Jan. 21, 2001). Moreover, it will be difficult if not impossible to determine whether exclusive access arrangements arise pursuant to the informal request of a carrier or result from the unilateral action of the building owner. The Commission must be prepared to prohibit exclusive or restrictive arrangements from all sources.

If the Commission is inclined to adopt additional rules, the Texas PUC's rules offer a practical guide.[24] In its rules, the PUC clearly established the relative rights of multi-unit premises' owners and carriers. Parties have thirty days to negotiate access to properties, they are provided specific rights to request information from each other, and the rules provide for remedies when negotiations fail. In addition, the Texas PUC's rules address safety issues, space constraints, and reasonable compensation. The SBPP supports the rules established by the PUC in Texas and encourages the Commission to consider using them as a guide.

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[24] See Tex. Admin. Code, Title 16, Part II, § 26.129.

IV. CONCLUSION

The Smart Buildings Policy Project commends the Commission for, once again, being at the vanguard of pro-competitive policies that will benefit Washington telecommunications consumers. It strongly urges adoption of the Staff's proposed rule and encourages the Commission to take any necessary additional action to ensure that tenants in multi-unit premises can choose their facilities-based telecommunications carrier without unreasonable interference from their landlord.

Respectfully submitted,

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