BBO

March 15, 2001

VIA FEDEX PRIORITY OVERNIGHT

Carole J. Washburn
Executive Secretary
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

RE: CHAPTER 480-120 WAC TELECOMMUNICATIONS – ACCESS TO PREMISES
WUTC DOCKET NO. UT-990146

Dear Ms. Washburn:

BroadBand Office Communications, Inc., ("BBOC"), by and through its attorneys, hereby responds to the request by the Washington Utilities and Transportation Commission (the "Commission") for written comments concerning draft rule WAC 480-120-049. As explained in greater detail below, BBOC urges the Commission to reject the proposed adoption of Section 2(e) of Alternative WAC 480-120-049.

BBOC is a provider of integrated telecommunications, networking, and application services, serving customers located primarily in commercial office buildings in 38 markets nationwide. The parent company of BBOC, BroadBand Office, Inc. ("BBO"), was launched in May 1999 by the venture capital firm Kleiner Perkins Caufield & Byers and eight large commercial real estate owners. Its formation was in response to the desire by owners of commercial office buildings ("building owners") to ensure the availability of high quality advanced telecommunications and data services to their building tenants, particularly underserved small and medium-sized businesses. By pre-wiring commercial office buildings in order to offer state-of-the-art communications and networking capabilities, BBO provides its customers with the ability to simply plug into a BBO wall jack and immediately access a full range of integrated network services (local/long distance voice service, high speed Internet access, managed firewall, virtual private network services), computing services (desktop hardware) and applications services. The cutting-edge technologies offered by BBO in particular allow small and medium-sized businesses to compete with large businesses by leveraging the scale and scope economies that result when costs are shared between tenants located within the building.

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In order to create "smart buildings" that offer such advanced capabilities, dozens of companies with significant commercial office property holdings ("real estate partners")[1] have entered into building access agreements with BBO. Under these agreements, in exchange for an equity interest in the company and/or a percentage of revenues, BBO is granted access to buildings in order to pre-wire them for BBO's integrated network, applications and computing services. To the extent some BBO real estate partners have received an equity interest in the company, it is important to note that each such investment in no way represents a controlling interest in BBO. Nor is BBO a subsidiary of any of its real estate partners. Rather, BBO enjoys a cordial, but arms-length, relationship with all of its real estate partners. It is also important to note that BBO's building access agreements with its real estate partners are non-exclusive and do not limit its partners' ability to negotiate and enter into contracts with other carriers. In fact, most of BBO's real estate partners have entered into similar access arrangements with other telecommunications providers such as Teligent, Inc., Winstar Communications, Inc., Allied Riser Communications Corp., and Cypress Communications, Inc.[2]

The Commission has asked for comment on an amended version of proposed WAC 480-120-049, which requires, in pertinent part, that access and wiring agreements between telephone companies and owners of multi-unit premises not include "[a]ny term that discriminates in favor of one company with respect to the provision of access or compensation requested."[3] The Federal Communications Commission (the "FCC") is currently considering a similar requirement in the context of a rulemaking proceeding being held to address issues related to building access by competitive providers (the "FCC Building Access Proceeding"). Specifically, the FCC is considering whether to impose regulation prohibiting telecommunications carriers from providing service to buildings whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to such buildings.[4] The FCC has already adopted a regulation prohibiting exclusivity provisions in agreements between building owners and telecommunications providers. Certain of the issues addressed by BBOC in the context

[1] Over 80 prominent real estate companies have now partnered with BBO. BBO real estate partners include: A.H. Warner Center Properties, Limited Liability Company, Carlyle Broadband Holdings, L.L.C., CarrAmerica Realty Corporation, Crescent Real Estate Equities Limited Partnership, Duke-Weeks Realty Limited Partnership, EOP Operating Limited Partnership, Hamilton Partners Office Management, Inc., Highwoods Realty Limited Partnership, Hines Broadband Holding Limited Partnership, Mack-Cali Realty, L.P., Olmstead Telecom, L.L.C., TRC Telecommunications, L.L.C., S. L. Green Operating Partnership, L.P., Spieker Properties, L.P., USAA Real Estate Company, and Wein & Malkin LLP.

[2] In every building BBO enters, the incumbent local telephone company ("ILEC") is BBO's primary competitor.

[3] Amended WAC 480-120-049, §(2)(e).

[4] 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, ¶ 135 (rel. Oct. 25, 2000) (hereinafter the "FCC Building Access Order").

of the FCC Building Access Proceeding are relevant to the instant proceeding. Accordingly, copies of the comments filed by BBOC in the FCC Building Access Proceeding are attached hereto.

BBOC submits that competition in the market for in-building services is robust, and, therefore, that the new building access regulation proposed by the Commission is not necessary. The ability to offer tenants immediate access to advanced telecommunications services has become a competitive factor in the already highly competitive market for leased commercial office space. 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."[5] Because it is clearly in their best interest to ensure tenant access to advanced communications services, building owners have demonstrated an increasing willingness to work cooperatively with service providers in order to facilitate building access on reasonable terms. One BBO real estate partner, for example, currently has access agreements with both BBO and a large wireless carrier, as well as with various carriers specifically requested by tenants and the ILEC in the regions in which it is located.[6]

Statistical evidence entered into the record of the FCC Building Access Proceeding by the Real Access Alliance (the "RAA"), a coalition of real estate industry members, establishes that competition in the market for in-building services is robust and verifiable.[7] The statistical evidence offered by the RAA is comprehensive, but three particularly relevant facts emerge. The first is that, contrary to the assertions of some commenting parties,[8] 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 metropolitan areas, and that have at least 150,000 square feet and ten or more tenants -- have been penetrated by competitive providers.[9]

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.[10] 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

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5 Marie Balice Ward, *Building Smart*, Commercial Investment Real Estate, Nov./Dec. 2000.

6 Therese Fitzgerald, *It's Showtime*, Commercial Property News, www.cpnrenet.com/findit/2000/oct01/showtime.html, pp. 8-10, Oct. 1, 2000.

7 *See*, Further Comments of the Real Access Alliance (filed in the FCC Building Access Proceeding on Jan. 22, 2001).

8 *See*, *e.g.*, Comments of the Smart Building Policy Project at 3 (filed in the FCC Building Access Proceeding on Jan. 22, 2001); Comments of Cox Communications, Inc. at 5-10 (filed in the FCC Building Access Proceeding on Jan. 22, 2001); Comments of AT&T Corp. at 9-12 (filed in the FCC Building Access Proceeding on Jan. 22, 2001).

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

10 Id. at 5.

more.[11] 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.[12] 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.[13]

In addition, 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").[14] The draft Model Agreement was released 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 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 FCC has noted, "a positive step in the development of the market for building access."[15]

Thus, 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.[16] Accordingly, a regulation requiring uniformity in the terms of building is not necessary, and in fact would be more likely to hinder than to aid the further development of competition. By requiring that all service providers be offered access on identical terms, the proposed rule would prevent competition from continuing to develop in the manner envisioned in the federal Telecommunications Act of 1996 (the "1996 Act").[17]

The standard for non-discrimination established by the proposed Section 2(e) of the Alternative WAC 480-120-049 is a uniformity standard. However, the requirement that building owners grant building access to different telecommunications providers upon identical terms ignores the practical reality that different providers pursue different strategies in seeking building access. For new entrants with limited resources, for example, the ability to offer equity or a revenue-sharing opportunity as consideration is critically important. By doing so, the new entrant is often able to secure a lower access

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[11] Id.
[12] Id. at 19-21 and 66-67.
[13] Id. at 16-21.
[14] FCC Building Access Order at ¶ 8.
[15] Id. at ¶ 16.
[16] *See also*, Therese Fitzgerald, *It's Showtime*, Commercial Property News, www.cpnrenet.com/findit/2000/oct01/showtime.html, Oct. 1, 2000.
[17] 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.).

rate, or other beneficial terms. More established providers such as incumbent local providers or large inter-exchange carriers, on the other hand, have ample resources and may pursue a business strategy that involves compensating the building owner solely through payment of the access rate, rather than with equity. Both business strategies are valid, and allowing flexibility in the structuring of access arrangements is crucial to ensuring that new market entrants are able to compete against entrenched industry players.

In addition, terms of access that vary between carriers are often justifiable to the extent they reflect one carrier's willingness to assume more significant contractual obligations than another carrier. A carrier may, for example, agree to make significant capital expenditures in order to satisfy certain in-building infrastructure installation requirements, or commit to specific service level guarantees, in exchange for more favorable access terms -- again, merely a difference in business strategy.[18] Clearly, any benefits realized by such carriers are balanced by the significant performance and capital obligations imposed upon them. Thus, in many cases it is an apples to oranges comparison to measure the rates, terms, and conditions applicable to one carrier against those applicable to another.

Finally, a building owner's willingness to grant a particular carrier access on favorable terms may reflect that carrier's success in distinguishing itself from its competitors by providing a broad range of innovative, high-quality services at reasonable rates. The notion that the competitors who offer services and rates that are attractive to customers will succeed, while those who do not will fail, forms the underpinning of the decision in the 1996 Act to allow competition in the local services market. Congress sought to create dynamic market-based competition, in which innovation by competitors would serve both to benefit consumers and to raise the level of expectation for other competitors. 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.[19] In the current non-exclusive, non-monopolistic competitive environment, in which tenants are not forced to use a single in-building provider, building owners are motivated to grant favorable terms only to those carriers that they believe will attract tenants and provide a consistently high level of service. The competitive success enjoyed by those competitors that distinguish themselves in this way promotes innovation and improvement by all competitors.

The proposal to require all service providers to be granted building access on identical terms poses a significant threat to this mechanism for reinforcing competition. The proposed approach, similar to an opt-in approach, adopts a regulatory mechanism designed for a monopoly environment and attempts to impose it in a competitive environment. It is important that the Commission draw a distinction between unfair

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[18] 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*.

[19] Further Comments of the Real Access Alliance at 2-28.

competitive advantages that result from prior monopolistic relationships, and appropriate competitive advantages that result from offering innovative and advanced services. Only by preserving an environment in which carriers retain the flexibility to make use of available resources, and the freedom 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. Accordingly, rather than requiring all carriers to pursue an identical business strategy, the Commission should ensure that competitive carriers remain free to pursue their individual business strategies and to use their available resources in a manner that encourages competition, innovation, and benefits to consumers. To proceed otherwise would deal a blow to new entrants and would dramatically reduce the amount of competition in the market for in-building services.

In addition to being anti-competitive, the proposed regulation is also impractical to the extent it would require that carriers review the terms upon which access was granted to other carriers before entering into an access agreement with a building owner. This information, is rarely, if ever, provided in the context of building access negotiations. It is, in fact, often the case that parties are prohibited from disclosing such information by the terms of applicable non-disclosure agreements. Plainly, it is neither fair nor realistic to impose upon carriers the responsibility for determining the reasonableness of access terms imposed by building owners when such carriers have no practical ability to obtain the relevant information necessary to make such a determination.

Because the current level of competition in the market for provision of in-building services makes new regulation unnecessary, and because the proposed regulation is both anti-competitive and impractical, BBOC urges the Commission to reject the proposed adoption of Section 2(e) of Alternative WAC 480-120-049. Rather than imposing additional regulation that would have the unintended effect of diminishing competition, the Commission should trust that market forces will continue to create an environment in which viable competitors will succeed based upon their ability to offer a high level of service at reasonable prices.

Sincerely,

Aimee M. Cook
Corporate and Public Policy Counsel

Attachments (2)