

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No.: EB-11-IH-1314
)	
Open Access Acquisition LLC)	Acct. No.: 201332080027
)	
)	FRN: 0021932637

ORDER

Adopted: September 30, 2013**Released: September 30, 2013**

By the Acting Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) and Open Access Acquisition LLC (Open Access). The Consent Decree resolves and terminates the Bureau's investigation into Open Access's possible violations of Sections 9, 251, and 254 of the Communications Act of 1934, as amended (Act),¹ and Sections 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, and 64.1195 of the Commission's rules² concerning various regulatory fees and reporting obligations, as well as required contributions to the Universal Service Fund, the Telecommunications Relay Service Fund, and North American Numbering Plan and Local Number Portability administration.

2. The Bureau and Open Access have negotiated the Consent Decree that resolves this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that the investigation raises no substantial or material questions of fact as to whether Open Access possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authority.

5. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4 (j), and 503(b) of the Communications Act of 1934, as amended³ and Sections 0.111 and 0.311 of the Commission's rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.

¹ 47 U.S.C. §§ 9, 251, 254.

² 47 C.F.R. §§ 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, 64.1195.

³ 47 U.S.C. §§ 154(i), (j), 503(b).

⁴ 47 C.F.R. §§ 0.111, 0.311.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Mr. Douglas D. Orvis II, Attorney for Open Access Acquisition LLC, Bingham McCutchen LLP, 2020 K Street, NW, Washington, DC 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. Ratcliffe
Acting Chief
Enforcement Bureau

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Open Access Acquisition LLC)	Acct. No.: 201332080027
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CONSENT DECREE

1. The Enforcement Bureau of the Federal Communications Commission and Open Access Acquisition LLC, by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau's investigation into whether Open Access violated Sections 9, 251 and 254 of the Communications Act of 1934, as amended (Act),¹ and Sections 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, and 64.1195 of the Commission's rules² concerning various regulatory fees and reporting obligations, as well as required contributions to the Universal Service Fund, the Telecommunications Relay Service Fund, and North American Numbering Plan and Local Number Portability administration.

I. DEFINITIONS

2. For the purposes of this Consent Decree, the following definitions shall apply:
- (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
 - (b) "Adopting Order" means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) "Communications Laws" means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Open Access is subject by virtue of its business activities, including but not limited to the Federal Regulatory Reporting and Contribution Rules.
 - (f) "Compliance Plan" means the compliance obligations, programs, and procedures described in this Consent Decree at paragraph 13.
 - (g) "Covered Employees" means all employees and agents of Open Access who perform, or supervise, oversee, or manage the performance of duties that relate to Open

¹ 47 U.S.C. §§ 9, 251, 254.

² 47 C.F.R. §§ 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, 64.1195.

Access's responsibilities under the Communications Laws, including the Federal Regulatory Reporting and Contribution Rules.

- (h) "Effective Date" means the date on which the Bureau releases the Adopting Order.
- (i) "Federal Regulatory Reporting and Contribution Rules" means Sections 9, 251 and 254 of the Act,³ Sections 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, and 64.1195 of the Rules,⁴ and other provisions of the Act, the Rules, and Commission orders governing related federal regulatory reporting and contribution obligations.
- (j) "Investigation" means the investigation initiated by the Bureau in File No. EB-11-IH-1314 regarding possible violations of the Federal Regulatory Reporting and Contribution Rules.
- (k) "LNP" means Local Number Portability.
- (l) "NANP" means the North American Numbering Plan.
- (m) "Open Access" or the "Company" means Open Access Acquisition LLC and its predecessors-in-interest and successors-in-interest.
- (n) "Operating Procedures" means the standard, internal operating procedures and compliance policies established by Open Access to implement the Compliance Plan.
- (o) "Parties" means Open Access and the Bureau, each of which is a "Party."
- (p) "Rules" means the Commission's regulations found in Title 47 of the Code of Federal Regulations.
- (q) "Telecommunications" or "Telecommunications Service" have the meanings set forth in Sections 3(50) and 3(53) of the Act, 47 U.S.C. §§ 153(50), 153(53).
- (r) "TRS" means Telecommunications Relay Services.
- (s) "USF" means the Universal Service Fund.

II. BACKGROUND

3. Pursuant to Section 254(d) of the Act and Sections 54.706 and 54.711 of the Rules, telecommunications service providers that provide interstate telecommunications services are required to file annual and quarterly Telecommunications Reporting Worksheets (FCC Form 499-A and FCC Form 499-Q) and contribute to the federal USF.⁵ Pursuant to Section 64.1195 of Rules, interstate telecommunications carriers are required to file registration information on FCC Form 499-A.⁶ Pursuant

³ 47 U.S.C. §§ 9, 251, 254.

⁴ 47 C.F.R. §§ 1.1154, 1.1157, 52.17, 52.32, 54.706, 54.711, 64.604, 64.1195.

⁵ See 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.706, 54.711.

⁶ See 47 C.F.R. § 64.1195.

to Section 225(b)(1) of the Act and Section 64.604 of the Rules, providers of interstate telecommunications services are required to contribute to the TRS Fund.⁷ Pursuant to Section 251(e)(2) of the Act and Sections 52.17 and 52.32 of the Rules, telecommunications service providers are required to contribute to the costs of establishing numbering administration and local number portability.⁸ Pursuant to Section 9(a)(1) of the Act and Sections 1.1154 and 1.1157 of the Rules, interstate telecommunications carriers are required to pay regulatory fees.⁹

4. Open Access's predecessor, Open Access, Inc., began providing telecommunications services in 2002.¹⁰ On March 31, 2011, Open Access, Inc. merged with and into Open Access with Open Access as the surviving entity.¹¹

5. Open Access is a Delaware corporation that provides Ethernet, SONET, wavelength, private network, Internet access, dark fiber, and collocation services to carriers, governmental entities, and private business customers in twenty-three states and the District of Columbia.¹² Open Access is subject to the requirements discussed in paragraph 3, above.

6. In September 2011, Open Access voluntarily disclosed to the Bureau potential violations of the Act and the Rules involving federal regulatory reporting and contributions. On June 22, 2012, the Bureau issued a Letter of Inquiry (LOI) to the Company regarding its compliance with its federal regulatory reporting and contribution obligations.¹³ On August 22, 2012, the Company filed its response to the Bureau's LOI.¹⁴

7. As of the Effective Date, Open Access has paid all invoiced amounts for the USF, TRS Fund, cost recovery mechanisms for NANP and LNP administration, and regulatory fees and has complied with the regulatory reporting obligations discussed above.

III. TERMS OF AGREEMENT

8. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

⁷ See 47 U.S.C. § 225(b)(1); 47 C.F.R. § 64.604.

⁸ See 47 U.S.C. § 251(e); 47 C.F.R. §§ 52.17, 52.32.

⁹ See 47 U.S.C. § 159(a)(1); 47 C.F.R. §§ 1.1154, 1.1157.

¹⁰ *Response of Open Access Acquisition to the Enforcement Bureau's June 22, 2012 Letter of Inquiry*, dated August 22, 2012, Exhibit 1-A (*LOI Response*).

¹¹ *Id.* at 2.

¹² *Id.* at Exhibit 1-A (*LOI Response*).

¹³ See Letter from Pamela S. Kane, Deputy Div. Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to David L. Mayer, General Counsel and Exec. VP Business Development, Lightower Fiber Networks (June 2, 2012) (*LOI*). Open Access Acquisition LLC and Lightower Fiber Networks are subsidiaries of Light Tower Holdings LLC.

¹⁴ See *supra* note 10.

9. **Jurisdiction.** Open Access agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and that the Bureau has the authority to enter into and adopt this Consent Decree.

10. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

11. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation. In consideration for termination of the Investigation, Open Access agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Open Access concerning the matters that were the subject of the Investigation. The Bureau also agrees that in the absence of new material evidence it will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Open Access with respect to Open Access's basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission licenses or authorizations.

12. **Compliance Officer.** Within thirty (30) calendar days after the Effective Date, Open Access shall designate a senior corporate manager with the requisite corporate and organizational authority to serve as a Compliance Officer and to discharge the duties set forth below. The person designated as the Compliance Officer shall be responsible for developing, implementing, and administering the Compliance Plan and ensuring that Open Access complies with the terms and conditions of the Compliance Plan and this Consent Decree. In addition to the general knowledge of the Communications Laws necessary to discharge his/her duties under this Consent Decree, the Compliance Officer shall have specific knowledge of the Federal Regulatory Reporting and Contribution Rules prior to assuming his/her duties.

13. **Compliance Plan.** For purposes of settling the matters set forth herein, Open Access agrees that it shall within sixty (60) calendar days after the Effective Date, develop and implement a Compliance Plan designed to ensure Open Access's future compliance with the Communications Laws, and with the terms and conditions of this Consent Decree. With respect to the Federal Regulatory Reporting and Contribution Rules, Open Access shall implement the following procedures:

- (a) **Operating Procedures.** Within sixty (60) calendar days after the Effective Date, Open Access shall establish Operating Procedures that all Covered Employees must follow to help ensure Open Access's compliance with the Federal Regulatory Reporting and Contribution Rules. Open Access's Operating Procedures shall include internal procedures and policies specifically designed to ensure that Open Access complies with the Federal Regulatory Reporting and Contribution Rules. Open Access shall also develop a Compliance Checklist that describes the steps a Covered Employee must follow to ensure compliance with the Federal Regulatory Reporting and Contribution Rules.
- (b) **Compliance Manual.** Within sixty (60) calendar days after the Effective Date, the Compliance Officer shall develop and distribute a Compliance Manual to all Covered

Employees. The Compliance Manual shall explain the Federal Regulatory Reporting and Contribution Rules and set forth the Operating Procedures that Covered Employees shall follow to help ensure Open Access's compliance with the Federal Regulatory Reporting and Contribution Rules. Open Access shall periodically review and revise the Compliance Manual as necessary to ensure that the information set forth therein remains current and accurate. Open Access shall distribute any revisions to the Compliance Manual promptly to Covered Employees.

- (c) **Compliance Training Program.** Open Access shall establish and implement a Compliance Training Program on compliance with the Federal Regulatory Reporting and Contribution Rules and the Operating Procedures. As part of the Compliance Training Program, Covered Employees shall be advised of Open Access's obligation to report any noncompliance with the Federal Regulatory Reporting and Contribution Rules under paragraph 14 of this Consent Decree and shall be instructed on how to disclose noncompliance to the Compliance Officer. All Covered Employees shall be trained pursuant to the Compliance Training Program within sixty (60) calendar days after the Effective Date. Any person who becomes a Covered Employee at any time after the Initial Training Program shall be trained within thirty (30) calendar days after the date such person becomes a Covered Employee. Open Access shall conduct the compliance training on an annual basis, and shall periodically review and revise the Compliance Training Program as necessary to ensure that it remains current and complete and to enhance its effectiveness.

14. **Reporting Noncompliance.** Open Access shall report any noncompliance with the Federal Regulatory Reporting and Contribution Rules and with the terms and conditions of this Consent Decree within fifteen (15) calendar days after discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of noncompliance; (ii) the steps that Open Access has taken or will take to remedy such noncompliance; (iii) the schedule on which such remedial actions will be taken; and (iv) the steps that Open Access has taken or will take to prevent the recurrence of any such noncompliance. All reports of noncompliance shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, S.W., Washington, D.C. 20554, with a copy submitted electronically to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William A. Kehoe at William.Kehoe@fcc.gov, and David M. Janas at David.Janas@fcc.gov.

15. **Compliance Reports.** Open Access shall file Compliance Reports with the Commission ninety (90) calendar days after the Effective Date, twelve (12) months after the Effective Date, twenty-four (24) months after the Effective Date, and thirty-six (36) months after the Effective Date.

- (a) Each Compliance Report shall include a detailed description of Open Access's efforts during the relevant period to comply with the terms and conditions of this Consent Decree and the Federal Regulatory Reporting and Contribution Rules. In addition, each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of Open Access, stating that the Compliance Officer has personal knowledge that Open Access (i) has established and implemented the Compliance Plan; (ii) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (iii) is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 14 of this Consent Decree.

- (b) The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and shall comply with Section 1.16 of the Rules and be subscribed to as true under penalty of perjury in substantially the form set forth therein.¹⁵
- (c) If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of Open Access, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully (i) each instance of noncompliance; (ii) the steps that Open Access has taken or will take to remedy such noncompliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that Open Access has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken.
- (d) All Compliance Reports shall be submitted to the Chief, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, SW, Washington, DC 20554, with a copy submitted electronically to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William A. Kehoe at William.Kehoe@fcc.gov, and David M. Janas at David.Janas@fcc.gov.

16. **Termination Date.** Unless stated otherwise, the obligations set forth in paragraphs 13 through 15 of this Consent Decree shall expire thirty-six (36) months after the Effective Date.

17. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to Section 208 of the Act¹⁶ against Open Access or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by Open Access with the Communications Laws.

18. **Voluntary Contribution.** Open Access agrees that it will make a voluntary contribution to the United States Treasury in the amount of one million three hundred thousand dollars (\$1,300,000) within thirty (30) calendar days after the Effective Date (Voluntary Contribution). Open Access shall send electronic notification of payment to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William A. Kehoe at William.Kehoe@fcc.gov, and David M. Janas at David.Janas@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the Account Number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁷ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions regarding the form of payment:

- Payment by check or money order must be made payable to the order of the Federal

¹⁵ 47 C.F.R. § 1.16.

¹⁶ 47 U.S.C. § 208.

¹⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

Questions regarding payment procedure should be addressed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

19. **Waivers.** Open Access waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues the Adopting Order as defined herein. Open Access shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Open Access nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Open Access shall waive any statutory right to a trial *de novo*. Open Access hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act,¹⁸ relating to the matters addressed in this Consent Decree.

20. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

21. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which Open Access does not expressly consent) that provision will be superseded by such Rule or Commission order.

22. **Successors and Assigns.** Open Access agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

23. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the Communications Laws.

24. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

¹⁸ See 5 U.S.C. § 504; 47 C.F.R. Part 1, Subpart K.

25. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

26. **Authorized Representative.** The individual signing this Consent Decree on behalf of Open Access represents and warrants that he is authorized by Open Access to execute this Consent Decree and to bind Open Access to the obligations set forth herein. The FCC signatory represents that he is signing this Consent Decree in his official capacity and that he is authorized to execute this Consent Decree.

27. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Robert H. Ratcliffe
Acting Chief
Enforcement Bureau

Date

David L. Mayer
Executive Vice President,
General Counsel, and Secretary
Open Access Acquisition LLC

Date