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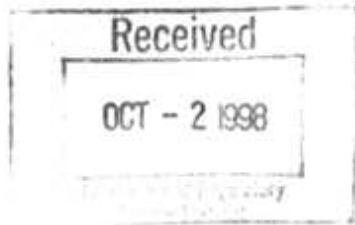
**ORIGINAL**

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Before the Florida
Public Service Commission

Special Project 980000B-SP
In Re: Issue Identification Workshop for
Undocketed Special Project:
Access by Telecommunications Companies to
Customers in Multi-tenant Environments

These comments are filed on behalf of the Florida
members of the International
Council of Shopping Centers.



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FILE RECORDS/REPORTING



On September 15, the Florida Public Service Commission ("PSC") requested additional information that would be consistent with the legislative intent and findings set forth in Chapter 364.01 (2) and (3). The PSC also requested that this information be in compliance with the Federal Communications Act of 1996; insure that tenants of multi-tenant environments enjoy the benefits of competition; and protect the property rights of landlords. Please accept the following comments on behalf of the Florida members of the International Council of Shopping Centers ("ICSC").

Shopping centers are America's marketplace, representing economic growth, environmental responsibility, and community strength. Founded in 1957, ICSC is the trade association of the shopping center industry. Its 38,000 members in 60 countries represent owners, developers, retailers, lenders, and all others having a professional interest in the shopping center industry.

According to the 1997 figures, there are 3,216 shopping centers in Florida. In 1997, shopping centers in Florida generated \$94.8 billion in retail sales and provided \$4.3 billion in state sales tax revenues. Shopping centers in Florida directly employed 930,600 individuals. ICSC's Florida members are proud to play a major role in the state's economy and way of life.

Additional Information Regarding Access by Telecommunications Companies to Customers in Multi-tenant Environments.

During the Staff Workshops conducted by the PSC as background for these comments, the PSC asked interested parties to address certain objectives articulated by the PSC, to propose definitions for some key terms and concepts, and to discuss four scenarios offered by the PSC regarding telecommunications access issues. The ICSC is happy to have the opportunity to respond to these aspects of the data/information request, which it does in turn below. However, as a preliminary matter, the ICSC believes it is essential to note that the PSC lacks the requisite legal authority-- and, as a matter of policy, should not be given such authority by the state legislature-- to regulate telecommunications

companies' access to multi-tenant environments.

A. The PSC Cannot, and Should Not, Regulate Access by Telecommunications Providers to Multi-tenant Environments

1. The PSC Has No Legal Authority for Regulating in this Area

For two independent and dispositive reasons, the PSC does not have the authority to regulate questions of access to private property by telecommunications carriers. First, the Florida State legislature has only granted the PSC statutory authority to regulate telecommunications companies, not property owners. See Fla. Stat. § 364.01(1) ("The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter."). Thus, while the PSC is free to dictate to telecommunications providers the terms upon which they can provide their service, the Commission has no authority to require property owners to make particular telecommunications services available on their property, or to interfere with property owners' contracts with third parties. Cf. *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950) (FCC has no jurisdiction over contractual rights involving property owners); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (FCC without jurisdiction to enjoin construction of Sears Tower to prevent anticipated adverse effect on television signals). Nothing in the Telecommunications Act of 1996, Pub. L. No. 104-104, or the FCC orders implementing same, FCC Order Nos. 96-325, 96-476, changes this analysis—for either the FCC or for state public service commissions.

Second, even if the PSC had jurisdiction over property owners, any attempt to mandate access to multi-tenant environments by telecommunications providers—whether by defining demarcation points or otherwise—would result in a taking of private property under the Fifth Amendment of the U.S. Constitution. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982); *Bell*

Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994). See also *GTE Northwest, Inc. v. Public Utility Comm'n of Oregon*, 900 P.2d 495, 500 (Or. 1995) (utility company's rule mandating collocation access for enhanced service providers constitutes a taking), *cert. denied*, 517 U.S. 1155 (1996). Because the PSC has not been granted the power of eminent domain for purposes of taking private property to mandate telecommunications access—and thus the PSC has no statutory authority whereby it can justly compensate every owner of a multi-tenant environment in the State of Florida for such a taking—any regulation by the PSC mandating access to private property will be unconstitutional under the Fifth and Fourteenth Amendments. *Id.* at 506; *cf. Beattie v. Shelter Properties, IV*, 457 So.2d 1110, 1113 (Fla. App. 1st Dist. 1984) (Florida cable statute compelling landlords to give cable companies access to their premises effected an unconstitutional taking).

In short, the PSC presently lacks any statutory or constitutional basis for promulgating regulations regarding telecommunications access in multi-tenant environments.

2. Sound Policy Considerations dictate that the PSC's Role Should Not Be Expanded

Notwithstanding the statutory and constitutional barriers to the regulation of telecommunications access by the PSC, sound policy considerations counsel against giving the PSC the authority to mandate access by carriers to multi-tenant environments. First—as is discussed more fully above, and is particularly *apropos* in light of the focus on competition in the data/information request—there is no indication that the free market is not adequately regulating this area on its own. Today, the market for telecommunications services is barely recognizable from that which existed twenty years ago. Recent governmental initiatives—such as de-monopolization and the Telecommunications Act of 1996—as well as extraordinary technological advances such as the Internet and fiber optics, have transformed telecommunications service from common utility status into a new marketing opportunity for building

¹ If the state legislature gave the PSC a specific grant of authority to execute such a taking, the building owner whose property was taken would be entitled to receive the fair market value of said property as "just compensation." See

owners. As a result, commercial landlords often invest in telecommunications infrastructure in order to attract tenants, and, as access to these new developments has become necessary for commercial tenants to effectively compete in their respective businesses, telecommunications issues have become a central factor in commercial lease negotiations. Given the extraordinarily competitive nature of the commercial real estate market, prospective tenants wield considerable leverage over landlords on issues such as this. Frankly, why would a property owner in such a competitive industry not accommodate tenant requests regarding telecommunications if such accommodations were technically and financially feasible?

Second, governmental regulations mandating telecommunications access in multi-tenant environments may make such buildings less safe. Building owners are important agents of public safety, particularly with regard to enforcement of fire and safety codes. However, if property owners cannot control who does what work in their building, and when and where they do it, there is no way that our system of public safety—which charges landlords with significant responsibility, and liability, for such matters—can stand. For example, telecommunications service often requires that holes be punched in walls by laborers who have little or no training about the fire, electrical or structural safety implications of this work. Usually, these holes are made in remote locations that are not easily observable, such as above suspended ceilings or in equipment rooms. If these laborers are free to enter the premises at will to perform this work, the property owner will have little notice that such breaches are, or could be, in existence, and no recourse against the provider to insist on the necessary repairs and to prevent future violations.

Additionally, property owners are concerned with, and responsible for, the personal security and safety of their tenants. If the property owner cannot regulate who has access to the building,

United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984).

² The competitive nature of the real estate industry is perhaps best demonstrated by a recent order of the Federal Trade Commission that completely exempts acquisitions of office and residential property from the Hart-Scott-Rodino premerger notification rules because those assets "are abundant and their holdings are generally unconcentrated." 61 Fed. Reg. 13666, 13669 (Mar. 28, 1996) (codified at 16 C.F.R. § 802.2(d)).

there is no way he can even begin to preserve tenant safety.

Finally, in a "multi-tenant environment," the property owner frequently must coordinate the conflicting needs and desires of the various tenants. This is best done through an organized system of scheduled access, which can only be governed by the property owner or manager. Without such a system, tenants in multi-tenant buildings will be without a mechanism for ensuring that access to and from their space is preserved, and that the aesthetic standards that enticed the tenant to lease the premises in the first place are maintained. Because anything that places the success of a tenant's business in jeopardy is of obvious concern to a commercial landlord, any scheme that mandated access endangers the business viability of building owners as well.

In sum, the only way to allow a property owner to rationally, efficiently and safely manage his asset is to preserve for the owner the right to enter into a contract with any person who has access—actual or virtual—to the building. Similarly, any shared use proposal must provide that building owners will remain free to enter into agreements granting physical access to their buildings only to those providers whom they designate. For these reasons, it would be a mistake for the Florida legislature to enact, or for the PSC to request, new authority empowering the PSC to mandate telecommunications access to multi-tenant environments.

B. Objectives

The PSC has stated four objectives that it seeks to meet with this proceeding:

1. Consistency with the legislative intent and findings set forth in Ch. 364.01 (2) &(3), Florida Statutes
2. Compliance with the Federal Telecommunications Act of 1996

³ Section 364.01 of the Florida Statutes sets forth in general terms the PSC's powers, and the legislature's intent in granting same. Read together, subsections (2) and (3) of Section 364.01 provide that the PSC shall have exclusive jurisdiction in regulating telecommunications companies, and that the PSC shall exercise its authority in order to expand competition and innovation in the telecommunications industry, and to enhance the consumer benefits arising therefrom.

⁴ Title I of the Telecommunications Act of 1996 amends the Communications Act of 1934 in an effort to spur development of competitive markets for telecommunications services. Pub. L. 104-104 (codified at 47 U.S.C. § 251 et seq.).

3. Insure tenants of multi-tenant environments enjoy benefits of competition
4. Safeguard the property rights of landlords.

As has been stated, the ICSC believes that the PSC should not mandate access to multi-tenant environments by telecommunications providers because such an action would constitute a taking of private property under the Fifth Amendment to the U.S. Constitution, and would exceed the scope of the PSC's authority and jurisdiction. Furthermore, the ICSC believes that mandating such access would contravene each of these stated objectives.

The great achievement of the Telecommunications Act of 1996 and other recent developments has been to increase competition for telecommunications services by lessening governmental regulation in the telecommunications industry. Having laid this predicate, we now should give the market the opportunity to bring its rewards—better service for lower prices. Indeed, the provision of the Florida Statutes cited by the PSC, Section 364.01, explicitly recognizes this fact. In this section, the PSC is called on to “encourage” and “promote” competition, *id.* §§ 364.01(4)(b), (c), all while rejecting “unnecessary regulatory restraints,” *id.* § 364.01(4)(e), which would “delay or impair the transition to competition.” *Id.* § 364.01(4)(f).

Moreover, as is discussed elsewhere in these comments, whatever need there may be to protect residential tenants as customers in this new competitive environment, the same concerns do not exist with commercial tenants given their leverage and high degree of sophistication in such matters. The ICSC believes that mandating telecommunications access in multi-tenant, commercial environments will not only exceed the legal authority of the PSC—and thereby impinge on the property rights of its members—but will also stymie the very competition that the Telecommunications Act of 1996 and the Florida statutes seek to foster. Simply put, there is no telecommunications innovation that the PSC can regulate that the free market cannot implement faster and more efficiently. The best way to make sure that tenants enjoy the benefits of increased competition is to allow the competitive process to work on its

own.

C. Definitions and Scenarios

The PSC has asked for interested parties to propose definitions for four terms/concepts: multi-tenant environments; access in multi-tenant environments; demarcation point; and reasonable non-discriminatory accommodations. Each of these terms is used in the four scenarios on which the PSC also has asked interested parties to comment. The ICSC discusses each of the terms and scenarios below. For ease of reference, the ICSC has organized the discussion in order of the scenarios presented by the PSC at the September 15, 1998, Staff Workshop.

Scenario "A"

OPTIONS PRESENTED

Leave the demarcation point as defined by Rule 24-4.0345, [Florida Administrative Code],

OR

Move demarcation point to FCC [minimum point of entry].

The ICSC favors maintaining the current demarcation point.

Obviously, the primary defined term implicated in this scenario is "demarcation point."

As the options presented by the PSC suggest, this term is already defined in the Florida Administrative Code. Additionally, as the scenario also correctly suggests, the FCC has also defined "demarcation

5 "Demarcation point" is the point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the telephone network and the customer's premises wiring. Unless otherwise ordered by the Commission for good cause shown, the location of the point is:

1. Single Line/Single Customer Building -- Either at the point of physical entry to the building or a junction point as close as practicable to the point of entry.
2. Single Line/Multi Customer Building -- Within the customer's premises at a point easily accessed by the customer.
3. Multi Line Systems/Single or Multi Customer Building -- At a point within the same room and within 25 feet

point" in a multiunit context as the "minimum point of entry" (MPOE). By favoring the status quo, the ICSC is advocating that the demarcation point remain inside the customer's premises rather than be move to the property line of a multiunit building.

Commercial buildings generally are owned by a single entity and serve a number of different tenants, each of which occupies a different proportion of the building's floor space and each of which has its own peculiar telecommunications needs. Commercial tenants generally retain ownership and control over wiring within their demised premises, subject to the terms of their lease. Commercial buildings usually are designed to permit relatively fast and inexpensive remodeling and rearranging of interior space as tenant's needs change or new tenants move in. Under these circumstances, the most efficient way to meet the demands of each individual tenant is to locate the demarcation point inside the tenant's premises. In so doing, the complicated problems of wire ownership and access to extra-premise wiring are avoided, and the tenant is given maximum flexibility to manipulate intra-premise wiring in the manner that best serves its needs.

Scenario "B"

OPTIONS PRESENTED

All telecommunications companies shall have access to all customers in a multi-tenant environment for resale, i.e., where no additional telecommunications facilities must be installed; all tenants have access to [carrier of last resort],

OR

-
4. of the FCC registered terminal equipment or cross connect field.
Temporary Accommodations Subscriber Premises with Inadequate Grounding (e.g., some mobile homes, trailers, houseboats, construction modules) -- On a permanent stake, pole or structure with a suitable safety ground. Fla. Admin. Code Rule 25-4.0345(1)(b).

6. The FCC defines Minimum Point of Entry as either the closest practicable point to the location at which the wiring crosses a property line, or the closest practicable point to the location at which the wiring enters a multiunit building. 47 C.F.R. § 68.3(b)(2). The telephone company's reasonable and nondiscriminatory standard operating practices determine which of these two standards applies. *Id.*

Landlord controls access to telecommunications service; customer can ask to be served by the [carrier of last resort], if other than provided by landlord.

and

Scenario "C"

OPTIONS PRESENTED

All telecommunications companies requiring facilities installation in order to provide service to customers in multi-tenant environments shall be given access under the following conditions:

Customers in multi-tenant environment shall be responsible for obtaining authorization from and providing reasonable, non-discriminatory compensation to landlord for all telecommunications facilities installation requirements of a telecommunications company; and landlord shall provide reasonable, non-discriminatory accommodations,

OR

Customers shall be entitled to access to telecommunications service from any certificated telecommunications company; and landlord and telecommunications companies must reach reasonable accommodation for access,

OR

Landlord shall fully control access to any facilities based carriers other than [carrier of last resort].

For the legal and policy reasons discussed at length above, the ICSC favors the options in both Scenario B and C in which the building owner retains full control of access to the facility.

Three of the four defined terms/concepts appear in these two scenarios: (1) multi-tenant environments; (2) access in multi-tenant environments; and (3) reasonable non-discriminatory accommodations.

(1) multi-tenant environments: The FCC recently declined to define "multiunit

premises." See FCC Order No. 97-209 at ¶ 21 (Jun. 12, 1997) ("We find that in such situations the issue of whether the building should be considered a single or multiunit premises generally can be resolved by applying the carrier's reasonable and nondiscriminatory standard operating practice."). Florida law provides little guidance as to what an appropriate definition of "multi-tenant environment" should be. "Tenant" has been defined in Florida as "any person entitled to occupy a premises under a rental or lease agreement." Fla. Admin. Code Rule 25-24.560(11). Thus, one might suggest that a "multi-tenant" facility be defined as a facility occupied by more than one tenant. However, such a definition would be at odds with other provisions of Florida law.

While "multi-tenant" has not been defined for purposes of telecommunications, it has in other contexts. For example, Florida's Fair Housing Act defines "covered multifamily dwelling" as one having four or more units. Fla. Stat. § 760.22(2). Similarly, the regulations of the Florida Housing Finance Authority define a "qualifying multi-family housing development" as one that contains dwelling units for four or more eligible persons. Fla. Admin. Code Rule 67-12.002. However, the Zoning Regulations for the Capitol Center Planning Commission define a "multiple unit" dwelling as one with three or more units. Fla. Admin. Code Rule 60F-3.002(38)(c). Other states have defined "multi-tenant" to be as few as two, Mo. Ann. Stat. § 441.650(1)(5), and as great as five. Wash. Admin. Code § 51-30-1103.2.2.2.4.

As described above, the ICSC believes that there are significant differences between residential and commercial tenants with regard to the telecommunications equipment that each require, the frequency with which telecommunications services and equipment will need to be changed or enhanced, the degree to which either will invest in telecommunications infrastructure, the bargaining position of each in negotiating lease terms related to telecommunications, etc. Therefore, to the extent that a definition of "multi-tenant environment"

is promulgated, whether by the legislature or the PSC, the ICSC believes that this difference should be taken into account.

Accordingly, whatever the ultimate definition of "multi-tenant environments" may be, the ICSC suggests that the definition be made subject to the following proviso:

"Multi-tenant environment does not include a building, or any part of a building, leased for commercial rather than residential use."

(2) access in multi-tenant environments: For the reasons stated in this comment, the ICSC believes that the PSC does not have the authority to regulate access in multi-tenant environments. To the extent that the PSC does propose regulations or legislation in this area, such proposal should exempt commercial properties from the regulation, in recognition of the fundamental differences between residential and commercial multi-tenant properties.

Subject to the foregoing, if commercial facilities are included in such a regulation, the definition of "access in multi-tenant environments" should include the following proviso:

"In a commercial context, 'access in multi-tenant environments' means whatever terms and conditions of access to the subject property are set by the property owner in furtherance of an agreement between the property owner and the tenant regarding such access."

(3) reasonable non-discriminatory accommodations: For the reasons stated in this comment, the ICSC believes that the PSC does not have the authority to regulate access in multi-tenant environments, and thus does not have the related authority to determine "reasonable non-discriminatory accommodations" as that term is contemplated in Scenario C. To the extent that the PSC does propose regulations or legislation in this area, such proposal should exempt commercial properties from the regulation, in recognition of the fundamental differences between residential and commercial multi-tenant properties.

Subject to the foregoing, if commercial facilities are included in such a regulation, the

definition of "reasonable non-discriminatory accommodations" should include the following proviso:

"In a commercial context, 'reasonable non-discriminatory accommodations' means whatever accommodations regarding access to the subject property are set by the property owner in furtherance of an agreement between the property owner and the tenant regarding such access."

Scenario "D"

OPTIONS PRESENTED

Disputes arising out of determination of reasonable accommodations or compensation shall be within the jurisdiction of the PSC,

OR

Circuit Courts.

The ICSC believes that any disputes regarding access to private property can only be handled by the state courts. As stated above, the PSC only has jurisdiction over telephone carriers, not property owners. Thus, the state courts are the only forum with jurisdiction to settle property disputes between all the relevant parties.