FLORIDA
PUBLIC
SERVICE
COMMISSION

REPORT ON

Access by Telecommunications Companies to Customers in Multitenant Environments

February 1999

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VOLUME ONE

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EXECUTIVE SUMMARY

The 1995 amendments to Chapter 364, Florida Statutes, and the federal Telecommunications Act of 1996 were designed to promote competition. A Multitenant environment (MTE) in which a landlord or building owner controls access to the telecommunications equipment area or other related facilities in a structure appears to be a situation where limitations to competition may exist. A tenant in an MTE should have reasonable access to any telecommunications company, and a telecommunications company should have reasonable access to a tenant. Equally important, it is unacceptable for an incumbent local exchange company (ILEC) to use its incumbent position to limit an alternative local exchange company's (ALEC) ability to market its services or install its equipment in an MTE, and landlords should not impede access to competitive telecommunications service.

The pace of competition and outcome of negotiations between telecommunications providers, landlords, and tenants for access to MTEs is not acceptable to all participants. Some ALECs have experienced difficulty in negotiating acceptable financial and physical access arrangements with landlords and ILECs. ILECs have both obligations associated with carrier of last resort (COLR) responsibilities, and advantages associated with being the incumbent, monopoly provider. Landlords and property owners are protective of their constitutional rights to exclusive use and possession of their property. Their concerns about physical access to their communications facilities by multiple telecommunications companies are related to safety, security, time of access, liability, use of space, and limitations on available space.

In a competitive environment, all telecommunications companies, except ILECs with COLR responsibilities, must assess whether they can or will serve a specific structure or customer. The decision to serve is driven by a number of factors including, but not limited to, physical space constraints, technological limitations, and economic viability.

At the Legislature's direction, the Florida Public Service Commission (FPSC or Commission) has considered the promotion of a competitive telecommunications market to end users, consistency with any applicable federal requirements, landlord property rights, rights of tenants, and other considerations relevant to multitenant environments. The record developed during the course of this study indicates that there are several ways in which barriers to access may be

removed and competition may be encouraged. Some of these measures can be undertaken by the FPSC, however, it may also be appropriate for the Legislature to take a proactive role as well. The recommendations in this report attempt to minimize infringement on the existing property rights of landlords and on the landlord and tenant relationship. The following is a brief description of the six issues addressed by the report and the Commission's conclusions and recommendations regarding each issue.

Definition of Multitenant Environment

If the goal of the state and federal telecommunication legislation is to create an environment that enhances opportunities for customers to benefit from competition, then the definition of MTE should be broad. The Commission recommends that any legislation developed defining MTE should include all types of structures and tenancies except: (1) condominiums, as defined in Chapter 718, Florida Statutes; (2) cooperatives, as defined in Chapter 719, Florida Statutes; (3) homeowners' associations, as defined in Chapter 617, Florida Statutes; (4) those short-term tenancies specifically included in Rule 25-24.610(1)(a), Florida Administrative Code, the FPSC's call aggregator rule; and (5) all tenancies of 13 months or less in duration. The Commission's conclusion to exclude condominiums, cooperative, and homeowners' associations is based on the premise that these organizations are operated through a democratic process with each owner having a vote. Tenancies of 13 months or less are also excluded in order to ensure that landlords are not inordinately burdened by the requirement to provide access for short-term tenancies that are not described in our call aggregator rules.

Definition of Multitenant Environment Telecommunications Services

In determining what telecommunications services should be included in access, the Commission concludes that the rapid growth and deployment of unregulated communications technologies (e.g., wireless, rooftop satellite dishes, video conferencing, coaxial cable voice and data services, etc.) may render a broad statutory definition obsolete in a short time. Therefore, the services to which access applies should be limited to two-way telecommunications service to the public for hire within this state, pursuant to Section 364.02, Florida Statutes. For purposes of MTE

access, the Commission recommends that the definition of telecommunications services, as defined in Section 364.02, Florida Statutes, should not be amended.

Definition of Demarcation Point

Keeping the demarcation point as set forth in Rule 25-4.0345, Florida Administrative Code, versus moving to the federal minimum point of entry (MPOE) is an issue that merits additional investigation by the FPSC. Moving to the MPOE may resolve some access issues by possibly giving the ALECs quicker access to the wiring; however, inhibiting the COLRs' ability to deliver service standards directly to the customer and potentially allowing an unregulated third party to become a factor in service may outweigh the benefits of moving to the MPOE. Information gathered at the workshops did not lead to a conclusion on whether the current FPSC demarcation point should be changed to the federal MPOE. Therefore, the Commission will gather additional information through a staff workshop on how demarcation should be defined. At the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

Conditions for Physical Access

Negotiations

Issues associated with access to tenants by facilities-based ALECs appear to be the most controversial aspect of access in MTEs. Currently, there are only a limited number of facilities-based ALECs providing telecommunications service in Florida. Landlords' concerns that they may be deprived of the use of more property than just the "utility closet" are mitigated by the practical reality that there will only be a few facilities-based competitors in any one MTE. However, as competition in the telecommunications industry is encouraged, the landlords' property rights should be protected by applying standards of reasonableness to the terms and conditions of access in MTEs. Recommended standards for reasonable, nondiscriminatory, and technologically neutral access are identified in the section on jurisdiction. Therefore, the Commission recommends that ILECs, ALECs, landlords, and tenants be encouraged to negotiate all aspects of MTE access in good faith. Negotiations should be based on the premises of reasonable and nondiscriminatory access to MTEs. The tenant should be responsible for obtaining all necessary easements.

Exclusionary Contracts and Marketing Agreements

Exclusionary contracts between telecommunications companies and landlords are anticompetitive and should be against public policy. Therefore, the Commission recommends that exclusionary contracts should be prohibited.

There was also discussion of marketing agreements in which a landlord is compensated for a tenant's becoming a customer of a particular telecommunications company. While these agreements are not as egregious and offensive to competition as exclusionary contracts, their use can result in discriminatory behavior, because the landlord who enters into such an agreement has a vested interest in each new customer subscribed under the marketing agreement. Therefore, the Commission recommends that landlords disclose to potential tenants the existence of a marketing agreement.

Compensation

Any costs charged to telecommunications companies by landlords should be reasonable and nondiscriminatory. To the extent a facilities-based carrier installs equipment in an area already dedicated to public use, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space is inadequate for a particular carrier's needs, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it should develop rules in order to set reasonable standards for determining compensation for costs related to access. The Commission's recommended standards for reasonable, nondiscriminatory, and technologically neutral access are set forth in the section on jurisdiction.

However, if it is determined by the Legislature that landlords may collect a fee for access, over and above the actual costs for installing facilities, any statute addressing that issue should also address whether space already being provided for no fee would then become subject to fees and whether the COLR providing mandated service must pay any fee at all. Further, no such fee should be charged to tenants unless the landlord is a certificated telecommunications company.

Jurisdiction

Adopting legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications services providers. Any legislation developed should specifically describe the forum for resolving access-related disputes. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the Commission recommends that it is the appropriate authority for resolving access issues.

The FPSC recommends that a threshold for bringing disputes and standards for review should be as follows:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easements, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

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LIST OF TERMS AND ABBREVIATIONS

Alternative local exchange company - ALEC

BellSouth Telecommunications, Inc. - BellSouth

Building Owners and Managers Association of Florida, Inc. - BOMA

Carrier of last resort - COLR

Central Florida Commercial Real Estate Society and the Greater Orlando Association of REALTORS® - REALTORS

Community Associations Institute - CAI

Cox Florida Telcom, L.P. dba Cox Communications - Cox

e.spire™ Communications, Inc. - e.spire

Federal Communications Commission - FCC

Florida Apartment Association - FAA

Florida Association of Homes for the Aging - FAHA

Florida Chapter - International Council of Shopping Centers - ICSC

Florida Public Service Commission - FPSC or Commission

GTE Florida, Inc. - GTE

Incumbent local exchange company or local exchange company - ILEC

Intermedia Communications, Inc. - Intermedia

Loretto v. Teleprompter Manhattan CATV Corp. - Loretto

Minimum point of entry - MPOE

Multitenant environment - MTE

National Association of Regulatory Utility Commissioners - NARUC

OpTel (Florida) Telecom, Inc. - OpTel

Shared tenant service - STS

Sprint-Florida, Inc./Sprint Communications Company Limited Partnership - Sprint

Telco Communications Co. v. Clark - Telco

Teleport Communications Group, Inc./TCG South Florida - TCG

Teligent, Inc. - Teligent

Time Warner Telecom - Time Warner

WinStar Communications, Inc. - WinStar

WorldCom Technologies, Inc. - WorldCom

INTRODUCTION

Legislative History

Fostering the growth of a competitive telecommunications market is the stated purpose of the 1995 Florida Telecommunications Act (Chapter 364, Florida Statutes)[1] as well as the federal Telecommunications Act of 1996 (the Act or Public Law 104). Thus, it is essential that legislative or regulatory actions be designed to minimize or remove anticompetitive market conditions. The case of a multitenant environment (MTE), in which a landlord or building owner controls access to the telecommunications equipment area or other related facilities in a structure, appears to be a situation where limitations to competition may exist.

The subject of access to tenants in MTEs received considerable debate during the 1998 Florida legislative session. One proposed bill amendment included the following language:

> No landlord shall demand or accept payment of any fee, charge or other thing of value from any certificated telecommunications company in exchange for the privilege of having access to any tenants of such landlord for the purpose of providing telecommunications services, and no landlord shall demand or accept any such payment from tenants in exchange for access to telecommunications services unless the landlord is a certificated telecommunications company.[2]

Building owners took the position that they have a constitutional right to control access to and use of their property. In their opinion, any effort, legislative or otherwise, to impose mandatory access to their properties by telecommunications service providers constituted an illegal taking under language contained in the Fifth Amendment to the United States Constitution and in Article X of the Florida Constitution.[3]

On the other hand, alternative local exchange companies (ALECs) stated that property access restrictions limited their opportunity to serve tenants. The ALECs also stated that landlord access

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[1]Section 364.01 (3), Florida Statutes reads in pertinent part: "The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, . . . and encourage investment in telecommunications infrastructure."

[2]House Amendment No. 1 to Bill No. PCB UCO 98-03 dated March 20, 1998, p. 14.

[3]Article X, Section 6 (a) of the Florida Constitution states in part that "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner." See also *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd.*, 493 So.2d 417 (Fla. 1986).

restrictions effectively circumvented the objective of state and federal legislation to develop a competitive telecommunications market. In addition, ALECs asserted that their right to access and serve tenants should be subject to the same terms and conditions as that of the incumbent local exchange company (ILEC) currently serving the MTE with its own wiring and facilities.

Legislative Directive

The result of this very controversial debate was that Section 5 of HB 4785, now Chapter 98-277, Laws of Florida, directed the Florida Public Service Commission (FPSC or Commission) to, among other things, conduct a study and report its conclusions, including policy recommendations, to the Legislature by February 15, 1999, on access by telecommunications companies to customers in MTEs. The FPSC was directed to hold publicly-noticed workshops and to consider the promotion of a competitive telecommunications market to end users, consistency with any applicable federal requirements, landlord property rights, rights of tenants, and other considerations developed through the workshop process and FPSC research.

Study Methodology

The methodology employed to develop this report began with the drafting of a work plan. The focus of the work plan was three public workshops designed to solicit input from all participants interested in providing comments on the issue of access by telecommunications companies to tenants in MTEs. In addition to the workshops, the Commission researched and analyzed the access statutes of other states and a recently adopted National Association of Regulatory Utility Commissioners (NARUC) resolution regarding nondiscriminatory access to buildings for telecommunications carriers.[4]

The FPSC's first task was to identify and notify all potentially affected stakeholders. The affected telecommunications providers include ILECs and facilities-based and reseller ALECs. The landlord and property owner groups include a broad range of structure types and tenancies ranging from residential duplexes to high-rise and low-rise commercial and condominium structures. Tenancies range from less than a year to fixed multiyear lease agreements and typical occupancy rates vary as well. The notice list includes ILECs, ALECs, building owners, commercial and

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[4]See Appendix A for copies of other state telecommunications and cable television access statutes and Appendix B for a copy of the NARUC resolution.

residential property management groups, trade associations, real estate groups, condominium associations, the state E911 coordinator, nursing homes, a shared tenant service (STS) provider, Legislative staff, the Office of Public Counsel, and the Office of the Attorney General. Appendix C is a list of participants.

Workshops and Written Comments

The Commission's work plan centered on three public workshops that were held in July, August, and September, 1998, respectively. Workshop discussions were guided by Commission-drafted questions, identified issues, and hypothetical scenarios for issue resolution. Prior to the first workshop, all interested participants were invited to comment on suggested issues. At the first workshop, the participants discussed the proposed issues and worked to limit the scope of future discussions to the most pertinent issues. Based on the comments provided at the workshop and the lists of suggested issues, the following six areas of concern were identified:

1. How should multitenant environment be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

2. What telecommunications services should be included in direct access, i.e., basic local service (Section 364.02(2), Florida Statutes), Internet access, video, data, satellite, other?

3. How should demarcation point be defined, i.e., current FPSC definition (Rule 25-4.0345, Florida Administrative Code) or the federal minimum point of entry (MPOE)?

4. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of the following entities?
   (a) landlords, owners, building managers, condominium associations
   (b) tenants, customers, end users
   (c) telecommunications companies

   In answering the question above, please address issues related to easements, cable in a building, cable to a building, space, equipment, lightning protection, service quality, maintenance, repair, liability, personnel, price discrimination, and other issues related to access.

5. Based on the response to question 4, are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is cost to be determined?

6. What is necessary to preserve the integrity of E911?

As noted above, issue six addresses maintaining the integrity of E911 in MTEs. However, during the course of the first workshop it became evident that none of the participants viewed this issue as a problem with respect to access in MTEs. All parties supported ensuring the integrity of E911 under any circumstances. The determination of the proper forum for resolution of disputes between affected participants was raised in later workshops. Therefore, the E911 issue was replaced with the jurisdiction-related issue set forth in the issues and conclusions that follow.

Prior to the second workshop, the participants were requested to file written comments regarding the six issues and to present their views for discussion at the second workshop. Volume II of this report contains a list of the identified issues and copies of initial comments submitted by seventeen participants in response to these issues. Copies of these documents can also be obtained by contacting the FPSC's Division of Records and Reporting at the following telephone number: (850) 413-6770 or from the FPSC homepage at <http://www.scri.net/FPSC>.

The second workshop produced a variety of comments regarding the possible legal ramifications of any mandated access proposal and the extent of access-related problems. Several participants presented details regarding the installation of their specific telecommunications equipment in MTEs. In addition, the participants discussed the key differences between the FPSC's demarcation point rule and the Federal Communication Commission's (FCC) minimum point of entry (MPOE) rule.

Prior to the third workshop, the participants were requested to file rebuttal comments regarding the issues presented at the second workshop and to prepare for discussion of Commission-proposed scenarios. Discussions at the third workshop focused on the advantages and disadvantages of moving the demarcation point to the MPOE, compensation issues, and the proper forum for resolution of disputes between telecommunications services providers, landlords, and tenants. Following the third workshop, participants were again provided an opportunity to file additional comments on any issue or concern.

Data Request

A data request was issued on September 4, 1998, for the purpose of obtaining quantitative and qualitative data regarding instances of MTE access-related problems within Florida. All participants were asked to provide copies of any agreements (such as marketing agreements, exclusive contracts, and leases) designed to provide telecommunications service in MTEs. Participants were also asked to provide any other information or material they believed would be

useful to the Commission in its analysis of the MTE access issue. Thirteen responses to the data request were received.[5]

Analysis

Participants' written comments, the workshop transcripts, and data responses were analyzed in the context of the six identified issues. The following report represents the results of those analyses. It is important to note that in spite of the divergent opinions expressed throughout the term of this project, none of the participants opposed the development of a competitive telecommunications environment.

[5]Responses were received from: BellSouth Telecommunications, Inc.; Building Owners and Managers Association of Florida, Inc.; Community Associations Institute; Cox Communications; Florida Department of Management Services; GT Com Telephone Service; ITS Telecommunications Systems, Inc.; LaSalle Partners; MediaOne Fiber Technologies, Inc./MediaOne Florida Telecommunications, Inc.; Northeast Florida Telephone Company, Inc.; Teleport Communications Group, Inc./TCG South Florida; Teligent, Inc.; and WorldCom Technologies, Inc.

ISSUES AND CONCLUSIONS

INTRODUCTION

The introduction of a competitive telecommunications service provider's interests into a landlord and tenant relationship can create imbalances in that legal relationship. This is especially true when new competitive telecommunications service providers (e.g., ALECs) seek to build market share by inserting themselves into MTEs. Therefore, it is necessary to examine the rights, responsibilities, public policies, and their interrelationships to the various interests involved. The Commission began by reviewing the landlord and tenant relationship.

In the second workshop, one of the participants stated that access problems were being treated as property rights issues.[6] This statement succinctly explains why it is necessary to begin this report by describing the basic rights and responsibilities of landlords or property owners and tenants. This is a very broad topic. The Commission has limited its discussion to those rights and responsibilities pertinent to this report.

In the 1995 revisions to Chapter 364, Florida Statutes, the Legislature found that competition for local exchange telecommunications services is in the public interest and will provide customers with freedom of choice. The revisions also include the concept of universal service, which creates a statutory right to basic local service for any person requesting such service for an initial period of four years. See Section 364.025(1), Florida Statutes. Chapter 364, Florida Statutes, does not distinguish customers who are tenants from other customers.

Rights of Landlords and Tenants

Property owners have constitutional rights to exclusive use and possession of their property. Governments may not take away those rights without compensation. The issue of compensation is discussed in a later portion of this report. Property owners may limit their rights by contract, in a lease agreement, for instance; but, even when property owners enter into a lease agreement, they retain certain rights over common areas, such as communications or utility closets. The landlord and tenant relationship is a contractual relationship. Because a lease is both a conveyance and a contract, the obligations of the landlord and tenant are a product of both property and contract law.

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[6]FPSC Document Number 09055, p. 65.

The terms of a lease set out any rights and responsibilities of the parties. A lease gives the tenant exclusive right to use and occupy the owner's property. Over time laws have been passed and cases have been decided which protect tenants and ensure minimum standards for rental property. In Florida, Chapter 83, Florida Statutes, governs both residential and nonresidential tenancies and establishes fundamental rights and responsibilities, such as the tenant's right to possession and use of leased premises and the obligation of the landlord to maintain the premises. Nothing in Chapter 83, Florida Statutes, specifically describes any rights or responsibilities with regard to telecommunications services.

At the present time, ILECs have a responsibility as carrier of last resort (COLR) pursuant to Section 364.025, Florida Statutes, to furnish basic local service to any person requesting such service within the company's service territory. Thus, access to tenants, at least for a COLR, is guaranteed, and landlords cannot prevent access to tenants by ILECs. If access to MTEs by ALECs is not encouraged, the ILEC will be the only provider of service. This would substantially limit the customer's freedom of choice contemplated in the 1995 amendments to Chapter 364, Florida Statutes. Another consideration related to the obligations of a COLR is that, although the COLR may be obligated to pay for use of existing telecommunications facilities, it has not historically been charged for general access to an MTE. If landlords are permitted to charge ALECs a fee for access to a building or use of space where the COLR is not charged, ILECs will retain an anticompetitive position.

When statutes and regulations mandate telecommunications companies' direct access to tenants, bypassing the landlord and possibly interfering with the landlord's property rights, a conflict is created. Landlords are concerned about the physical access to their communications facilities by multiple telecommunications companies. They are concerned with safety, security, time of access, liability, use of space, limitations on available space, and whether the work done by the competitive telecommunications companies will meet applicable codes. These concerns are at odds with the telecommunications companies' access to tenants and the tenants' freedom to choose alternative providers.

To move the telecommunications industry closer to competition, reasonable, nondiscriminatory, and technologically neutral access to tenants in MTEs should be encouraged. Traditionally, because telecommunications services in MTEs were delivered by a monopoly provider, aesthetics, the size of dedicated floor space, and other physical and constitutional constraints have not been at issue. However, even installations by ILECs have been subject to a

property owner's reasonable conditions. This should also be true in the new era of competition. The recommendations in this report attempt to minimize infringement on existing property rights of landlords and on the landlord and tenant relationship.

Issues Addressed by Study

As a result of the first workshop, six issues were identified as key topics for further discussion. Originally, issue six addressed maintaining the integrity of E911 in MTEs. However, during the first workshop, participants indicated that this would not be a problem for any telecommunications provider. Therefore, issue six was replaced with the issue of determining the appropriate jurisdiction for resolving access-related disputes. The six areas of concern now are:

1. How should multitenant environment be defined? That is should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

2. What telecommunications services should be included in direct access, i.e., basic local service (Section 364.02(2), Florida Statutes), Internet access, video, data, satellite, other?

3. How should demarcation point be defined, i.e., current FPSC definition (Rule 25-4.0345, Florida Administrative Code) or the federal MPOE?

4. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of the following entities?
   (a) landlords, owners, building managers, condominium associations
   (b) tenants, customers, end users
   (c) telecommunications companies

   In answering the question above, please address issues related to easements, cable in a building, cable to a building, space, equipment, lightning protection, service quality, maintenance, repair, liability, personnel, price discrimination, and other issues related to access.

5. Based on the response to question 4, are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is cost to be determined?

6. What is the proper forum for settling disputes and property claims regarding access to tenants in MTEs by telecommunications companies, i.e., Florida Public Service Commission, district court, legislative action, other?

This section provides a summary of the participants' initial positions on each of the six issues. The positions are followed by the FPSC's analysis of the participants' positions and the issue

as well as conclusions. Given that some participants are both ILEC and ALEC certificated telecommunications companies, it is important to note that some of the comments submitted in this project are couched in terms that make it difficult to determine the position a participant is advocating.

DEFINITION OF MULTITENANT ENVIRONMENT

Issue 1: How should multitenant environment be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

Recommendation: The Commission recommends that the definition of MTE should be inclusive of all types of structures and tenancies except: (1) condominiums, as defined in Chapter 718, Florida Statutes; (2) cooperatives, as defined in Chapter 719, Florida Statutes; (3) homeowners' associations, as defined in Chapter 617, Florida Statutes; (4) those short-term tenancies specifically included in Rule 25-24.610(1)(a), Florida Administrative Code; and (5) all tenancies of 13 months or less in duration.

Summary of Initial Positions

BellSouth, GTE, and Sprint: ILECs generally desire a broad definition of MTE encompassing all types of new and existing structures with residential or commercial tenancies. BellSouth includes in its definition single-family, residential subdivisions, where ownership of the access roads remain privately held rather than deeded to the local government. GTE defines MTE as a building or continuous property (which may be transversed by public thoroughfares) that is under the control of a single owner or management unit with more than one tenant that is not affiliated with the owner or management unit. GTE and Sprint exclude transients (served by call aggregators) and other sharing arrangements from the definition of MTE.

Cox, e.spire, Intermedia, OpTel, TCG, Teligent, Time Warner, and **WorldCom**: These ALECs include all building types in their definition of MTE. Intermedia and TCG exclude transients from their definition of MTE.

BOMA and ICSC: These participants did not submit a response on this issue.

CAI, FAA, and **REALTORS**: CAI indicates that MTE should be broadly defined. FAA and REALTORS exclude residential property from the definition of MTE. FAA also excludes tenancies shorter than 13 months.

FAHA: FAHA members who utilize telecommunications equipment for STS do not compete with telecommunications companies.

Analysis

Defining the phrase "multitenant environment" serves as the starting point for this report. As shown below, the words "multi," "tenant," and "environment" have relatively unambiguous meanings. However, when they are combined and used in the context of a tenant seeking access to a telecommunications provider, linguistic and legal definitions can become clouded by personal and professional interpretations. According to *Webster's Ninth New Collegiate Dictionary*, the word "multi" means "many, multiple, much, or more than one."[7] Section 83.43 (4), Florida Statutes, defines "tenant" as any person entitled to occupy a dwelling unit under a rental agreement.[8] The word "environment" is used throughout the Florida Statutes but it is often preceded by an adjective such as home, social, or physical. *Webster* defines "environment" as "the circumstances, objects, or conditions by which one is surrounded."[9] The FCC defines multiunit premises as including, but not limited to, residential, commercial, shopping centers, and campus situations.[10] The participants generally agree on the definition of "multi" and offer a range of opinions regarding "tenant" and "environment."

On the whole, ILECs desire a broad definition of MTE encompassing all types of new and existing structures with residential or commercial tenancies. BellSouth includes in its MTE definition single-family, residential subdivisions, where ownership of the access roads remains privately held rather than deeded to the local government.[11] The rationale given for including all types of structures is that any limitation on the definition of MTE inhibits opportunities for competition. GTE and Sprint both support a broad definition of MTE inclusive of all tenant situations, whether residential or commercial or single or multiple buildings.[12] Similarly, ALEC

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[7]Frederick C. Mish, ed., *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, Inc., Springfield, Mass., 1986, p. 779.

[8]"Rental agreement" is defined in Section 83.43(7), Florida Statutes, as any written agreement, . . . providing for use and occupancy of premises. According to Section 83.43 (5), Florida Statutes, "Premises" means a dwelling unit and the structure of which it is a part and a mobile home lot and the appurtenant facilities and grounds, areas, facilities, and property held out for the use of tenants generally.

[9]Mish, p. 416.

[10]47 CFR Ch 1 §68.3, p. 188.

[11]FPSC Document Number 07980, p. 3.

[12]FPSC Document Number 07978, pp. 1-2 and FPSC Document Number 07975, p. 3.

participants desire to include all building types in their definition of MTE because only by defining the environment broadly will there be maximum opportunities for competition.[13]

The general exception to the ILEC's and the ALEC's definition of MTE is transient populations served by payphones or a call aggregator.[14] Given that tenancies in transient facilities are brief, transient tenants do not reside in a facility long enough to justify the time and expense necessary to become a subscriber of a telecommunications provider. Telephone service for transient facilities are usually provided by call aggregators who are, to a certain limited degree, under FPSC jurisdiction. Rule 25-24.610(1), Florida Administrative Code, was established in recognition of the fact that the telecommunications services and equipment needed to serve this population are different than other types of tenancies.

Similarly, telephone service provided to tenants through the common equipment not owned by the ILEC (i.e., shared tenant service) is defined by the FPSC in Rule 25-24.560(10), Florida

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[13]ALECs holding this view include: e.spire Communications, FPSC Document Number 07941, pp. 4-5; Intermedia Communications, Inc., FPSC Document Number 07974, pp. 1-2; OpTel Telecom, Inc., FPSC Document Number 07969, pp. 4-5; Teleport Communications Group, Inc., FPSC Document Number 07968, p. 9; Teligent, Inc., FPSC Document Number 07979 pp. 7-8; Time Warner Telecom, FPSC Document Number 07966, pp. 2-3; Cox Communications, FPSC Document Number 07967, pp. 3-4; and WorldCom Technologies, Inc., FPSC Document Number 07970, p. 3.

[14]Rule 25-24.610(1)(a), Florida Administrative Code defines "Call Aggregator" as any person or entity other than a certificated telecommunications company that, in the ordinary course of its operations, provides telecommunications service to any end user. Subject to the definition above, "call aggregator" includes but is not limited to the following:

1. Hotel as defined in Section 509.242(1)(a), Florida Statutes (1995),
2. Motel as defined in Section 509.242(1)(b), Florida Statutes (1995),
3. Resort condominium as defined in Section 509.242(1)(c), Florida Statutes (1995),
4. Transient apartment as defined in Section 509.242(1)(e), Florida Statutes (1995),
5. Rooming house as defined in Section 509.242(1)(f), Florida Statutes (1995),
6. Resort dwelling as defined in Section 509.242(1)(g), Florida Statutes (1995),
7. Schools required to comply with any portion of Chapters 228 and 246m Florida Statutes (1995), or Section 229.808, Florida Statutes (1995),
8. Nursing home licensed under Section 400.062, Florida Statutes (1995),
9. Assisted living facility licensed under Section 400.407, Florida Statutes (1995),
10. Hospital licensed under Section 395.003, Florida Statutes (1995),
11. Timeshare plan as defined in Section 721.05(32), Florida Statutes (1995),
12. Continuing care facility certificated under Section 651.023, Florida Statutes (1995), and
13. Homes, communities, or facilities funded or insured by the United States Department of Housing and Urban Development (HUD) under 12 U.S.C.S. §1701q (Law. Co-op. 1994) that sets forth the National Housing Act program designed to aid the elderly.

Administrative Code.[15] Written comments from the FAHA indicate that its members who utilize telecommunications equipment for STS do not compete with telecommunications companies, but simply facilitate the acquisition and management of telephone services on behalf of residents who might not otherwise be able to do so.[16] However, it is important to note that Section 364.339(5), Florida Statutes, provides for tenants in an STS building to have access to the COLR of local exchange telecommunications service instead of the STS provider. Section 364.339(5) Florida Statutes, states:

> The offering of shared tenant service shall not interfere with or preclude a commercial tenant's right to obtain direct access to the lines and services of the serving local exchange telecommunications company or the right of the serving local exchange telecommunications company to serve the commercial tenant directly under the terms and conditions of the commission-approved tariffs.

No comments from the participants indicate the presence of access-related problems with STS providers.

Some Florida-based organizations representing commercial and residential properties hold different views of MTEs. Property groups such as the FAA and the REALTORS prefer that residential structures such as apartments, condominiums, and housing cooperatives either be classified separately or omitted from the definition of MTE because occupancy rates are often less than one year.[17] They argue that allowing tenants to make multiple changes in their choice of telecommunications provider during such a short period of time will be disruptive to other tenants and create additional work and costs for the landlord who will have to monitor equipment installations and removals. The CAI states that the term MTE should be broadly defined. However, CAI also believes that condominiums, cooperatives, and homeowners's associations should be excluded from the definition of an MTE because the owners of property in these associations participate in a democratic decision-making process in matters related to common property usage.

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[15]Rule 25-24.560(10), Florida Administrative Code, states: "Shared tenant service" (STS) as defined in section 364.339(1), Florida Statutes, means the provision of service which duplicates or competes with local service provided by an existing local exchange telecommunications company and is furnished through a common switching or billing arrangement to tenants by an entity other than an existing local exchange telecommunications company.

[16]FPSC Document Number 09554, p. 2.

[17]FPSC Document Number 07977, p. 2., and FPSC Document Number 07973, p. 6.

Conclusion

If the goal of the state and federal telecommunication legislation is to create an environment that enhances opportunities for customers to benefit from competition, then the definition of MTE should be broad. Based on the comments filed by the participants and the focus on encouraging competition, the Commission concludes that the definition of MTE should be inclusive of all types of structures and tenancies except condominiums, cooperatives, homeowners' associations, those short-term tenancies specifically included in the FPSC's call aggregator rule, and all tenancies of 13 months or less in duration. The Commission's conclusion to exclude condominiums, cooperatives, and homeowners' associations is based on the premise that these organizations are operated through a democratic process with each owner having a vote. Tenancies of 13 months or less are also excluded in order to ensure that landlords are not inordinately burdened by the requirement to provide access for short-term tenancies that are not described in our call aggregator rules.

DEFINITION OF MULTITENANT ENVIRONMENT TELECOMMUNICATIONS SERVICES

Issue 2: What telecommunications services should be included in "direct access," i.e., basic local service (Section 364.02(2), Florida Statutes), Internet access, video, data, satellite, other?

Recommendation: For purposes of MTE access, the Commission recommends that the definition of telecommunications services, as defined in Section 364.02, Florida Statutes, should not be amended.

Summary of Initial Positions

BellSouth: Direct access should include all services. Carriers should be free to choose the desired technologies to deliver the services.

GTE: Direct access should include basic local service.

Sprint: All telecommunications services as defined in 47 U.S.C. § 153 (43), regardless of access media used, should be included in direct access.

Cox: Telecommunications services to include in direct access should be local and intra/inter LATA long distance telephone services under the jurisdiction of the FPSC.

e.spire, TCG, Teligent, Time Warner, and **WorldCom**: These ALECs support inclusion of all telecommunications services.

Intermedia: Services that qualify under Chapter 364, Florida Statutes, as intrastate telecommunications services should be included in the definition of applicable telecommunications services.

OpTel: Direct access should be construed broadly but for purposes of this study should include only those services that require a certificate of public convenience and necessity from the FPSC.

BOMA and **REALTORS**: All forms of telecommunications services should be considered.

CAI and **FAHA**: These participants did not respond to this issue.

FAA: Only basic local service should be included in a definition of MTE telecommunications services.

ICSC: Direct access is an issue that must be negotiated between building owners, tenants, and telecommunications carriers.

Analysis

With regard to what telecommunications services should be included in offering access to MTEs, it is important to begin by explaining how specific terms are defined in the federal and state statutes. The term "telecommunications service" is defined by the FCC in 47 U.S.C. § 153(43) as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Sections 364.02(11), (12), and (13), Florida Statutes, define the following terms in this manner:

> (11) "(Telecommunications) Service" is to be construed in its broadest and most inclusive sense;
>
> (12) "Telecommunications company" as . . . every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility . . .; and
>
> (13) "Telecommunications facility" as . . . real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state.

Workshop participants offer a broad range of positions on what telecommunications services should be included in MTE access. From the ILEC perspective, BellSouth and Sprint believe that all telecommunications services should be included in direct access to MTEs and that telecommunications carriers should be free to choose the technologies used to deliver these services. For example, Sprint states:

> Absent a rational basis for doing so, excluding some telecommunications services from "direct access" while including others would appear to violate the procompetitive, non-discriminatory (sic) framework contemplated in the 1996 (telecommunications) Act and the 1995 Amendments to Chapter 364, Florida Statutes.[18]

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[18]FPSC Document Number 07975, p. 4.

GTE Florida, another ILEC, takes a more limited approach stating:

> Telecommunications services that comprise "direct access" should include the network access functions that are enjoyed by and currently available to the vast majority of Floridians (and Americans) today--i.e., basic local service.[19]

In general, most of the ALEC participants[20] support inclusion of all telecommunications services in their definition of direct access to MTEs. Cox, Intermedia, and OpTel provide three alternate definitions. Cox Communications states that "local and intra/inter LATA long distance telephone services under the jurisdiction of the FPSC should be included as applicable services."[21] Intermedia states that companies providing services that qualify under Chapter 364, Florida Statutes, as intrastate telecommunications services should be allowed.[22] OpTel limits its definition to only those services that require a certificate of public convenience and necessity from the FPSC.[23]

From the landlord and building owner perspective, BOMA and the REALTORS believe that a broad definition of telecommunications services is appropriate.[24] The FAA states that if direct access is mandated, basic local service is the only service that should be included in a definition of applicable telecommunications services.[25]

Conclusion

Within the range of definitions presented on this subject, there is little common ground. Support for limiting the definition of telecommunications services to those currently regulated under Chapter 364, Florida Statutes, is not overwhelming. However, the rapid growth and deployment of

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[19]FPSC Document Number 07978, p. 2.

[20]These ALECs include: e.spire Communications, FPSC Document Number 07941, p. 4; Teleport Communications Group, Inc., FPSC Document Number 07968, pp. 9-10; Teligent, Inc., FPSC Document Number 07979, pp. 8-9; Time Warner Telecom, FPSC Document Number 07966, p. 3; and WorldCom Technologies, Inc., FPSC Document Number 07970, pp. 3-4.

[21]FPSC Document Number 07967, p. 4.

[22]FPSC Document Number 07974, p. 2.

[23]FPSC Document Number 07969, p. 5.

[24]FPSC Document Number 08364, p. 5., and FPSC Document Number 07977, p. 2.

[25]FPSC Document Number 07973, p. 7.

unregulated communications technologies (e.g., wireless, rooftop satellite dishes, video conferencing, coaxial cable voice and data services, etc.), may render any new broader statutory definition obsolete in a short time. Therefore, the services to which access applies should be limited to two-way telecommunications service to the public for hire within this state, pursuant to Section 364.02, Florida Statutes.

DEFINITION OF DEMARCATION POINT

Issue 3: How should "demarcation point" be defined, i.e., current FPSC definition (Rule 25-4.0345, Florida Administrative Code) or the federal Minimum Point of Entry (MPOE)?

Recommendation: Information gathered at the workshops did not lead to a conclusion on whether the current FPSC demarcation point should be changed to the federal MPOE. Therefore, the Commission will gather additional information through a staff workshop on how demarcation should be defined. At the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

Summary of Initial Positions

Bell South: Supports the Commission's existing demarcation point rule.

GTE: Recommends adoption of the FCC's MPOE.

Sprint: Desires a comprehensive review of the existing rule as an extension of this project.

Cox, Intermedia, OpTel, TCG, and **Time Warner**: Support changing the demarcation point to the FCC's MPOE.

e.spire and **Teligent**: The MPOE should be the demarcation point separating the MTE owner-controlled inside wire from the ILEC network.

WorldCom: The MPOE or demarcation point should be established in consultation with the property owner.

BOMA: Due to an ongoing study of the issue by its national organization, the Florida BOMA chapter is unable to take a position at this time.

CAI: Supports a change to the FCC's MPOE.

FAA and **Realtors**: Did not respond in writing to this issue.

FAHA: Did not respond to this issue.

ICSC: Supports the FPSC's current demarcation point rule.

Analysis

The physical point in the telecommunications network at which the responsibility of the telecommunications company begins and ends and the customer's responsibility begins and ends is called the "demarcation point." Defining the parameters of the demarcation point establishes not only the physical boundaries between the customer and the telecommunications service provider, but also the responsibilities for maintenance, repair, or removal of telecommunications equipment or wiring from the MTE. Rule 25-4.0345(1)(b), Florida Administrative Code, defines the demarcation point as:

> 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 this point is:
> . . . Single Line/Multi Customer Building - Within the customer's premises at a point easily accessed by the customer or
> . . . Multi Line Systems/Single or Multi Customer Building - At a point within the same room and within 25 feet of the Federal Communications Commission (FCC) registered terminal equipment or cross connect field . . . .

For MTEs, this rule defines the demarcation point for installations as a point easily accessible by the customer within the customer's premises. For commercial tenants in buildings with common equipment, such as multiline phone systems, the demarcation point is within the customer's premises and in the same room with the electronics that operate the common equipment. The wiring from the telecommunications company up to the demarcation point is considered network wire. Responsibility for maintaining and repairing the wiring up to the demarcation point rests with the local exchange telecommunications company serving that customer. The demarcation rule does not currently apply to ALECs.

Many other states have adopted the FCC's definition of demarcation point, which is referred to as the minimum point of entry (MPOE).[26] FCC Rule 47 C.F.R. 68.3(2), requires the following in regard to MPOE:

> In multiunit premises in which wiring is installed after August 13, 1990, including additions, modifications and rearrangements of wiring existing prior to that date, the

[26]For purposes of the remainder of this report, the term "demarcation point" means the FPSC definition, and the acronym "MPOE" refers to the FCC definition of the minimum point of entry.

telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate locations for each customer. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point 30 cm (12 inches) from where the wiring enters the customer's premises.

The current demarcation point rule considers each tenant as the customer of the ILEC and does not allow any third party, such as a landlord, entry between the ILEC and its customer. The demarcation point is the point as close as possible inside of the customer's premises (i.e., the phone jack). On the other hand, MPOE gives the property owner or landlord the opportunity to decide where to place the MPOE rather than the tenant, if the telephone company does not have an established policy of using the MPOE. Thus, the MPOE may be further removed from the customers' premises than the demarcation point.

Among the ILECs, there is no uniformity of opinion regarding whether Florida should retain its demarcation point or change to the MPOE. Although BellSouth fully supports the FPSC's existing demarcation point rule, it proffers the following alternate definition:

Demarcation Point: The demarcation point for telecommunications services is defined as the physical point at which a provider of access to the public switched network delivers, and has full service responsibility for, services which that carrier provides to its subscribers. Unless the subscriber and carrier mutually agree on a different arrangement, the demarcation point shall consist of a carrier-provided interface connection which is clearly identifiable by the subscriber, and which provides the subscriber with:

a) an easily accessible way to connect subscriber-provided wiring to the interface and;

b) a plug and jack connection which provides the subscriber with a means to quickly and easily disconnect the carrier's access channel from the subscriber's wiring or terminal equipment in order to prevent harm to the public switched network and to facilitate service trouble isolation and determination by the subscriber and carrier.

Location of the Demarcation Point: Subscribers shall designate the demarcation point in accordance with applicable statutes, rules, tariffs and/or service agreements reached with telecommunications carriers. At multi-tenant (sic) properties where

demarcation point locations must be established prior to occupancy, the demarcation points will be assumed to be located within the premises of the tenants/subscribers.[27]

GTE Florida recommends that the FPSC adopt the MPOE but that any such adoption be conditioned on the ILEC securing full recovery of its investment in any affected facilities.[28] Sprint holds that the Commission should consider undertaking a separate comprehensive review of the demarcation point rule as an extension of the MTE project.[29]

ALECs argue that having to rely upon ILECs for timely access to equipment closets and inside wiring connections in MTEs places them at a competitive disadvantage with regard to the ILECs. It appears that the ILECs could delay access to tenants if the ILECs owned the cable facilities in the MTE by not providing access to the cables or delaying the processing of service orders. In their opinion, moving to an MPOE would eliminate the opportunity for ILECs to exercise market power through ownership and control of MTE telecommunications equipment. The ALECs[30] are nearly unanimous in their position that the MPOE is the appropriate transition point between the customer and the telecommunications facilities. TCG, an ALEC, also prefers adoption of the MPOE but adds that the Legislature must also enact legislation requiring MTE owners to provide nondiscriminatory access to house and riser cable.[31] Teligent, and e.spire, both ALECs, offer a variation to the MPOE. They suggest that the MPOE should be the demarcation point separating MTE owner-controlled inside wire from the ILEC network.[32] Finally, WorldCom, an ALEC, states that the demarcation point should be established in consultation with the property owner.[33]

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[27]FPSC Document Number 07980, p. 5.

[28]FPSC Document Number 97978, pp. 4-5.

[29]FPSC Document Number 07975, p. 5.

[30]ALECs holding this position included: Cox Communications, FPSC Document Number 07967, p. 2; Intermedia Communications, Inc., FPSC Document Number 07974, p. 2; OpTel Telecom, Inc., FPSC Document Number 07969, p. 8; Teleport Communications Group, FPSC Document Number 07968, p. 12; and Time Warner Telecom, FPSC Document Number 07966, p. 4.

[31]FPSC Document Number 07968, pp. 12-13.

[32]FPSC Document Number 07979, p. 11, and FPSC Document Number 09055, pp. 61-62.

[33]FPSC Document Number 07970, p. 4.

The landlord groups hold varying opinions with regard to the appropriate demarcation point or MPOE. BOMA states that the current FPSC rule is acceptable; however, it reserves the right to change its position because the issue is being studied at the national level by BOMA International, its parent organization.[34] The CAI favors adoption of the MPOE in order to be consistent with the FCC.[35] The ICSC supports continued use of the FPSC demarcation point rule.[36] The FAA and REALTORS did not take a position on the issue; however, they oppose the adoption of any access provision that would prevent a landlord or building owner from exercising complete control over and use of his or her property.

There are advantages to moving the demarcation point. Moving to the MPOE could possibly give ALECs quicker access to tenants because they may not have to interconnect with the ILEC. For example, Teligent provides service by placing microwave dishes on rooftops and connecting with the inside wire at the MPOE. Because the wire from the MPOE to the customer would be deregulated in the MPOE scenario, ownership of the wire might transfer to the landlord. Moving to the MPOE may give an ALEC like Teligent access to deregulated inside wire through negotiations with the landlord; thus, eliminating having to interconnect with the ILEC on premises.

There have also been allegations by ALECs that ILECs have delayed their installation orders. Moving to the MPOE and eliminating ILEC participation in the installation could alleviate this access problem. Another advantage of moving to MPOE is the possibility of ALECs having access to inside wiring for free. If the wiring is owned by the landlord, it is possible that the landlord could allow various companies use of the wire without charge or in return for lower compensation through a contractual arrangement. This could reduce the overall cost to the ALEC to provide service and would foster competition.

There are also disadvantages to moving the demarcation point. If the demarcation point is moved to the MPOE, the wire beyond the MPOE represents a substantial capital investment in wiring installed by ILECs. In Florida, there are many buildings in which the wiring has not been fully depreciated. The question then becomes, should an ILEC be compensated for its loss of

[34]FPSC Document Number 08364, pp. 6-7.

[35]FPSC Document Number 07976, p. 12.

[36]FPSC Document Number 10962, p. 8.

investment since changing ownership of the wiring without compensation would be considered a taking? Several states that use the MPOE as the demarcation point have indicated that they use a 5 or 10-year amortization plan to compensate an ILEC. However, such a plan can be problematic because the remaining customers of the ILEC would bear the cost of the amortization. Therefore, it may be appropriate to require an ALEC to share in the amortization costs when accessing tenants. If ownership of the deregulated wire is given to the landlord at the conclusion of the amortization, an ALEC could be charged a higher fee for use of the wiring by the landlord than that ALEC would have experienced using an ILEC's facilities under current demarcation rules. Such an increase in the cost of providing service could result in an impediment to competition.

Landlord-owned conduit space is another consideration that could be affected by moving the demarcation point. Using the MPOE, any number of companies could request the use of conduit space to run their own wiring. This could lead to conduit being filled in a very short time with no room for additional conduit to be installed. An example of limited conduit space is in airport facilities where the installation of conduit can be problematic because conduits are located under the runways. If the demarcation point remains as required under current rules, the wiring is considered network wire and remains under FPSC jurisdiction. Therefore, effective use of existing facilities could be mandated by rule and eliminate redundant facilities being installed.

Using the MPOE demarcation, a landlord-established demarcation point could be in a location other than the tenant's unit, such as a different floor, opposite end of the building, or other location not easily accessible by the tenant. This allows a third party, such as a landlord, to assume responsibility for ensuring connection between the MPOE and the tenant. All service standards imposed by the FPSC stop at the demarcation point. Telecommunications companies are not responsible for installations and repair beyond the demarcation point. Therefore, if there is an unregulated party responsible for the service between the demarcation point and the customer, the FPSC cannot ensure that the service will be safe, adequate, and at the standards now held for telecommunications service. Similarly, since the demarcation rule does not apply to ALECs, the FPSC cannot ensure consistent service quality where an ALEC brings network wire to a customer.

In an STS facility with common equipment, the demarcation point may be the same as the MPOE. However, if a tenant discontinues service from an STS, the demarcation point for that tenant changes back to inside the tenant's premises, and the FPSC rule then conflicts with the MPOE.

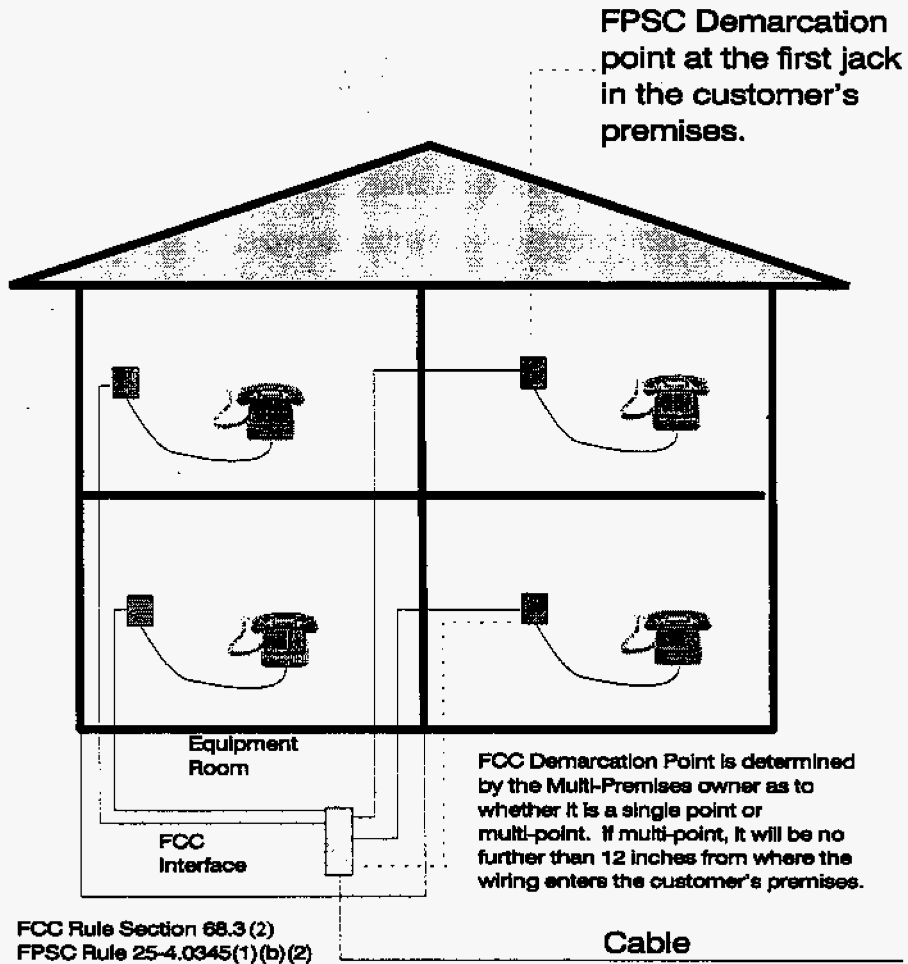
Illustration 1 depicts this demarcation conflict. To date, the FCC has not preempted a state's ability to establish its own demarcation point.

It became apparent through the workshop process that there simply is insufficient history of facilities-based ALECs experiencing problems accessing tenants in MTEs because of the demarcation rule. Currently, most ALECs serve businesses, not residential customers, and access has been gained through either an interconnection agreement, if the ALEC is reselling the ILEC service, or through an agreement with the landlord.

Rule 25-4.0345(1)(b)(2), Florida Administrative Code, requires that the demarcation point in an MTE without common equipment be the first jack in a customer's premises. Two of the rationale for establishing this demarcation point were to establish the service responsibilities of the ILEC and to provide the customer with the ability to determine the responsible party if a service problem exists. With only the ILEC and the customer involved in the service, it is clear who the customer must contact to facilitate repairs. In addition, maintaining the demarcation point will ensure that the responsibility of service quality standards are delivered to the customer, not the landlord. If the demarcation rules are also applied to the ALECs, it will ensure that any service standards the ALECs hold themselves to will be delivered directly to the customer. Although moving the demarcation point to the MPOE may help ALECs gain access to tenants in MTEs, it sets the stage for the possible degradation of service quality because the COLR would no longer be required to deliver service directly to the customer. If the customer was not satisfied with the service of the ALEC, the customer would not be guaranteed the quality of service provided through the current demarcation rules because the landlord or other third party would be interjected between the COLR and the customer.

ILLUSTRATION 1

Multiunit without Common Equipment



These rules and standards are an important component of the Commission's consumer protection provisions. If the demarcation point is set at any location other than the customer's premises (e.g., the MPOE), the landlord may be responsible for maintaining a portion of the facilities without regulation. This scenario may not be in the best interest of customers. Adoption of the MPOE could weaken existing customer protections and may not solve the fundamental issue of how to ensure nondiscriminatory access to MTEs by ALECs or other telecommunications providers. Using the current FPSC demarcation rules, the economical use of existing facilities would be encouraged through appropriate compensation to the owner of the facilities as discussed in the compensation section of this report.

Conclusion

Keeping the demarcation point as set forth in Rule 25-4.0345, Florida Administrative Code, versus moving to the MPOE is an issue that merits additional investigation by the FPSC. Moving to the MPOE may resolve some access issues by possibly giving the ALECs quicker access to the wiring; however, the inhibiting of the COLRs' ability to deliver service standards directly to the customer and allowing the possibility of an unregulated third party becoming a factor in service may outweigh the benefits of moving to the MPOE. Therefore, the Commission will conduct a staff workshop to gather information on the efficacy of rulemaking. At the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

CONDITIONS FOR PHYSICAL ACCESS

Issue 4: In promoting a competitive market, what, if any, restrictions to direct access to customers in MTEs should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Recommendation: The Commission recommends that ILECs, ALECs, landlords, and tenants be encouraged to negotiate all aspects of MTE access in good faith. Negotiations should be based on the premises of reasonable, nondiscriminatory, and technologically neutral access to MTEs. Further, the Commission recommends that tenants should be responsible for obtaining all necessary easements. Finally, the Commission recommends that exclusionary contracts are against public policy and should be prohibited. Marketing agreements are not as anticompetitive as exclusionary contracts. However, the existence of any such agreement should be disclosed to potential tenants.

Summary of Initial Positions

BellSouth: Until such time as BellSouth is no longer obligated to serve all end users in its franchised territory, and until such time as BellSouth is totally freed from rate regulation and FPSC-imposed service indices, all subscribers should have the right to subscribe to those services which have been designated by legislation as being in the best interests of the state.

GTE: Any restrictions on direct access should be strictly constrained to reasonable security, safety, appearance, and physical space limitations. Exclusionary contracts are never appropriate.

Sprint: Restrictions to direct access to customers in an MTE should only be allowed upon a compelling showing that the restriction is in the public interest.

Cox: The only restriction the FPSC should allow for direct access to customers in an MTE should be those currently listed in the call aggregator rule for transient facilities.

e.spire: Restrictions on access to MTEs will discourage development of local competition. Any contract that has the effect of discouraging nondiscriminatory building access should be deemed illegal.

Intermedia: Companies should have access to MTEs on a competitively neutral basis that preserves the tenant's choice of carriers and that does not violate the property owner's rights.

OpTel: All exclusionary contracts that predate the effective date of any statutory change implementing access policies should be voidable upon a bonafide request of a certificated telecommunications company. The FPSC should not allow any carrier to enter into an exclusionary contract that prohibits a customer from being able to select a competitive alternative.

TCG: MTE owners should be able to establish reasonable and nondiscriminatory physical and financial conditions for the purpose of protecting their property from damage or losses caused by telecommunications seeking to serve tenants in MTEs.

Teligent: Under no circumstance should the FPSC tolerate exclusive telecommunications carrier access to an MTE. MTE owners should not be placed in the position of dictating to customers which service providers they can and cannot use.

Time Warner: Reasonable restrictions will not adversely impact the development of competition so long as such restrictions are applied to all providers in a nondiscriminatory and competitively neutral manner. Access to the regulatory process should be reserved as a vehicle for dispute resolution in a similar manner as provided for with interconnection agreements.

WorldCom: Reasonable restrictions to direct access to customers in MTEs should be considered only in cases where there is a lack of physical space, structural compatibility, and in some cases, building aesthetics.

BOMA: There should be no direct access by telecommunications carriers to tenants of MTEs, unless the same is expressly consented to by the building owner. Exclusionary contracts are the exception and not the norm in the commercial office building industry.

CAI: Community associations must control all aspects of access to their property including the right to bar telecommunications service providers from their property.

FAA: Property owners must retain full authority to control the location and manner of all installations. No direct access should be allowed for tenancies of less than 13 months and exclusive contracts should be encouraged.

FAHA: Supports continued application of STS rules for applicable facilities.

ICSC: Property owners should be able to impose their own conditions for access. Limitations on a building owner's property rights are unconstitutional under the Fifth Amendment to the United States Constitution.

REALTORS: Physical entry and space use should be controlled by the landlord through contract negotiations. Exclusionary contracts may be appropriate in existing facilities due to space limitations, costs of retrofit, efficiency, security concerns, and other reasons.

Analysis

In addition to the demarcation point discussion, property owners and landlords raised a number of physical access issues such as: easements; cable placement to, in, on, and between buildings; floor space requirements; conduit sizing; access for repairs; aesthetics; safety; and liability. All of these issues were coupled with the position of landlords that to mandate unrestricted access to tenants would constitute an unconstitutional taking. Facilities-based ALECs raised concerns about access being restricted by exclusionary contracts, marketing contracts, excessive fees, unresponsive landlords, and space limitations. As in addressing other issues in this report, the FPSC examined this issue using the premise that competition in the industry is encouraged.

Telecommunications Service Providers

There are several ways to provision telecommunications services in an MTE. One that already exists and is governed by statutes and rules is STS. STS exists when service is provided to tenants through common switching equipment owned and maintained by an entity other than an ILEC. In an STS environment, a tenant has the right to be served by the COLR, in lieu of service through the STS provider, pursuant to Section 364.339, Florida Statutes, and Rule 25-24.575, Florida Administrative Code. This report does not focus on STS providers, nor did any such providers actively participate in the study.

ILECs may also provide telecommunications service in an MTE. An ILEC operating as a COLR has mandated access to tenants in MTEs by operation of Section 364.025, Florida Statutes. As a practical matter, the ILECs, by virtue of their previous monopoly status, already serve the majority of existing MTEs. The Commission does not intend to suggest or recommend any change to the existing COLR responsibilities.

The least invasive competitive telephone service provider in terms of physical access is the reseller. A December 1998, Commission report to the Legislature entitled, *Competition in Telecommunications Markets in Florida*, indicated that most of the ALECs currently operating in

Florida provide service through resale. Service to tenants by resellers is not noticeable or evident to a landlord because no equipment is installed and no access is required. Thus, because resellers require no physical access, none of the issues raised by the landlords apply to access to tenants by resellers.

Facilities-based ALECs provide service using duplicate facilities, equipment, wiring or some combination thereof. It is the physical access by these providers which causes the most controversy. Each facilities-based ALEC, as well as each of the ALEC's customers, may require a different configuration of facilities, equipment, or wiring. Each connection may require additional floor space or conduits or use an entirely different space, such as the roof. For example, one ALEC participating in the workshops requires rooftop access and drops wiring down the outside of a building. Landlords are particularly concerned about being forced to give up rooftop space, exterior walls or additional floor space to what could be an infinite number of telecommunications companies if unrestricted access to tenants were mandated. These issues of providing physical access to the facilities-based carriers are also the issues with the greatest constitutional concerns, because the landlord may be deprived of the use of more of his property than just the "utility closet." Facilities-based ALECs state that the practical reality is that there will be only a few facilities-based competitors in any one MTE. Even so, the constitutional concerns raised by the landlords must be addressed.

Property Rights Issues

All privately-owned land is held subject to some controls by statute or through legislation exercising either the power of eminent domain or the police power, including zoning, or voluntary restrictions such as easements. The state's power over land under eminent domain proceedings, in which just compensation must always be paid to the landowner, includes the power to condemn land for a public purpose and the power to condemn land for a private way of necessity. The state's power over land through the police power is exercised only under specific statutes or ordinances, under which no compensation is paid to the landowner, and includes control for the purpose of protecting the health, safety, and welfare of the public, and zoning ordinances which must be justified as protecting the health, safety, or welfare of the public. The police power, especially the general or public welfare aspect, is an expanding concept and today can encompass promoting

aesthetics and instituting architectural controls.[37] State statutes attempting to exercise police power must be reasonable and not arbitrary or unreasonable. If a statute or ordinance is arbitrary or unreasonable, it either takes property without due process of law or denies equal protection of the laws, or both, under the 14th Amendment of the Constitution of the United States and is unconstitutional and void.

The Fifth Amendment of the U.S. Constitution, Article X of the Florida Constitution, and Chapter 70, Florida Statutes, prohibit the taking of private property for public use without just compensation. Landlords urge us to examine the *Loretto* case in this regard. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), is a cablevision case concerning whether the placement of cable on the roof and down the walls of an apartment building constituted a taking. The case holds that when government action causes permanent physical occupation of property there is a taking, regardless of the level of public benefit or economic impact on the owner. Under *Loretto*, the Court held that, "The power to exclude has traditionally been considered one of the most treasured strands in an Owner's bundle of property rights." *Id.* at 435. Additionally, the *Loretto* opinion dictates that a taking of private property requires that compensation must be paid for any mandatory access provision. *Id.* at 441.

The Florida Supreme Court also invalidated mandatory access laws as unconstitutional. In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd.*, 493 So.2d 417 (Fla. 1986), the Florida Supreme Court followed *Loretto* and ruled that "the placement of cable television equipment and wiring on apartment complex property (that is not specifically held out for a tenant's use) constitutes a taking." The Court concluded that any takings of private property rights in Florida for the benefit of private parties are unconstitutional. Such unconstitutionality violates Article X, Section 6 of the Florida Constitution which requires that all governmental takings be solely for a public not private purpose.

More recently, the federal courts reviewed takings in a mandatory access case, *Gulf Power Company v. United States of America*, (U.S.D.C., N.D. Fla 1998), and determined that although mandated access to electric utility poles and conduits imposed a taking under *Loretto*, it was not an

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[37]Ralph E. Boyer, *Survey of the Law of Property, 3rd ed.*, West Publishing Company, St. Paul, Minn., 1981, p. 626.

unconstitutional taking because the underlying statute provided for just compensation. Thus, a review of the case law indicates that in order to have a constitutionally viable access law for MTEs, the law must provide just compensation and standards of reasonableness.

Mandatory access to tenants without just compensation by certificated telecommunications companies may also adversely affect the landlord's property interest and violate Section 70.001(1), Florida Statutes. The Florida Legislature specifically addressed access to private property rights by promulgating The Bert J. Harris, Jr. Private Property Rights Protection Act, Section 70.00 *et seq., Florida Statutes*, in 1995. Section 70.001(1), Florida Statutes, states, in pertinent part:

> The Legislature recognizes that some laws, regulations and ordinances of the state and political entities of the state, as applied, may inordinately burden, restrict[s] or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Ensuring access to tenants in MTEs can be distinguished from takings issues in *Loretto* because MTEs already have property dedicated to public use for the purpose of providing telecommunications service. To the extent that any competitive carrier coming into an MTE requires no more space than that already dedicated to public use, there cannot be a taking. If the ILEC does not compensate the landlord for access to the space used in a building, is it fair to require the ALEC to compensate the landlord for space already set aside for telephone or other utility services? If there is an existing carrier in an MTE, the landlord has already given up his right to exclusive use and possession of certain space in his building. Therefore, the landlord cannot complain that access by additional carriers creates a taking where access by the first service provider did not. However, to the extent that additional carriers need to occupy space not planned or contemplated for public use, compensation may be required to satisfy constitutional concerns. Compensation issues are addressed separately in a later section of this report.

As mentioned above, landlords stated that they were concerned with the issue of easements. For example, the FAA was concerned with possibly having to install cable across one apartment

dweller's unit in order to provide access to another tenant. In order to install cable across space in the possession of a tenant, that tenant would have to agree to such interference with his property unless other cable was already there. If cable was already there, then an easement already exists for access to that space. On the other hand, if no previous easement exists, then an easement to use the tenant's property would be required before access could be completed. Currently, the Commission has a rule on easements which only applies to ILECs. However, the rule provides that in certain instances all necessary easements and rights-of-way must be furnished by the subscribing customer at no cost to the ILEC, Rule 25-4.090, Florida Administrative Code. At our workshops, the landlords believed that telecommunications companies should assume the responsibility for costs related to easements and rights-of-way. ALECs stated that bearing the responsibility for costs related to easements may create an additional impediment to obtaining new customers. Based on experience with the existing rule, the Commission believes that in MTEs the obtaining of all necessary easements should be the responsibility of the tenant.

Landlords were also concerned about safety and liability related to allowing multiple carriers access to tenants. Currently, ALECs are governed by Rules 25-24.800 et seq., Florida Administrative Code. Rule 25-24.835, Florida Administrative Code, incorporates certain ILEC rules and applies these rules to ALECs. Specifically incorporated is Rule 25-4.035, Safety, Florida Administrative Code, which provides as follows:

> Each utility shall at all times use reasonable efforts to properly warn and protect the public from danger, and shall exercise due care to reduce the hazards to which employees, customers, and the public may be subjected by reason of its equipment and facilities.

In addition, ALECs are required to follow the National Electric Code and to ensure safety of persons and property pursuant to Rule 25-4.036, Design and Construction of Plant, Florida Administrative Code, which is also incorporated by reference in Rule 25-24.835, Florida Administrative Code. The provisions of Rule 25-4.036, Florida Administrative Code, address some of the safety and liability concerns of landlords:

> (1) The plant and facilities of the utility shall be designed, constructed, installed, maintained and operated in accordance with provisions of the 1993 Edition of the National Electrical Safety Code (ANSI C2-1993), except that Rule 350G of the safety code shall be effective for cable installed on or after January 1, 1996, and the National

Electrical Code (NFPA 70-1993), pertaining to the construction of telecommunications facilities.

(2) Compliance with these codes and accepted good practice is necessary to insure as far as reasonably possible continuity of service, uniformity in the quality of service furnished and the safety of persons and property.

Negotiations

Comments presented at the workshops indicated that some telecommunications providers have been able to successfully negotiate terms and conditions with landlords for facilities-based services in MTEs. To establish the extent of any access problem, the FPSC sent a data request to 83 participants. The data request asked four questions:

1. Are you aware of any specific instances during 1997 in which a landlord or building owner denied or limited access to an alternative telecommunications provider for the installation of telecommunications equipment? If so, please describe these instances.

2. Are you aware of any tenants in multitenant environments, where local telecommunications service was provided through the landlord, who were unable to obtain local service from an alternative provider during 1997? If so, please describe these instances.

3. Please describe or provide a copy of any agreements designed to provide telecommunications service in multitenant environments, including marketing agreements, exclusive contracts, and leases.

4. Please provide any other information or material that you believe would be useful to staff in its analysis of access by telecommunications companies to customers in multitenant environments.

Thirteen responses to the data request were filed. Teligent, an ALEC, responded that building owners typically limit access to tenants in two ways: "they either simply refuse to negotiate with Teligent, or they 'negotiate' for an exorbitant price, effectuating the same result." Seven specific examples of this behavior were cited by Teligent. TCG, another ALEC, provided a list of twelve buildings in the Miami and Fort Lauderdale area in which it has attempted to negotiate an access or lease arrangement with no success. The reasons cited by TCG for these failures included: (1) the building owner had an exclusive contract with BellSouth; (2) excessive demands; (3) unequal compensation; and (4) the owner simply would not respond to TCG.

BOMA, on the other hand, indicated that responses to its tenant survey showed no access-related problems between tenants in MTEs and ALECs. However, this may be because competition

in this area is relatively new and tenants may not be aware of the various types of telecommunications services being marketed to their landlord as opposed to them directly.

Throughout the workshops, it was evident that most participants shared the position that the use of good-faith negotiations between a landlord and a telecommunications provider would, in most cases, be sufficient to resolve access-related issues.[38] All participants should be encouraged to continue negotiating all aspects of MTE access. The landlords should be responsible for determining the common area dedicated to utility equipment. This space could contain equipment from multiple utilities such as electricity, natural gas, and other telecommunications companies. Ancillary space required for the installation of cables or wires such as conduits, risers, and raceways should also be the responsibility of the landlord. If a landlord were to deny access to an ALEC seeking to install telecommunications equipment, the landlord should be required to demonstrate that a preexisting condition, such as insufficient conduit space or floor area, precludes access.

To move the telecommunications industry closer to competition, reasonable, nondiscriminatory, and technologically neutral access to tenants in MTEs should be encouraged. Traditionally, because telecommunications services in MTEs were delivered by a monopoly provider, aesthetics, the size of dedicated floor space, and other physical and constitutional constraints have not been at issue. However, even installations by ILECs have been subject to a property owner's reasonable conditions. This should also be true in the new era of competition. Access to tenants in MTEs should be subject to a test of reasonableness. That is, a landlord may be allowed to place reasonable conditions on installations, as necessary, to protect the safety, functionality and appearance of the premises, and the convenience and well-being of the tenants. Similarly, security and liability are legitimate concerns which may be addressed between landlords and providers when negotiating the installation of service. Reasonable accommodations consistent with Commission service standards for emergency repairs, timely installation, and liability should also be negotiated.

[38]FPSC Document Number 10764, pp. 26-28, 36-42, 44-48, 52-54, 78-79, 87-88, and 92.

Exclusionary Contracts and Marketing Agreements

ALECs believe that exclusionary contracts should be prohibited. Building owners support the use of such contracts because there are efficiencies and economies associated with such contracts. An exclusionary contract is an agreement between a landlord and a telecommunications company in which the telecommunications company is given exclusive access to tenants in the landlord's building. Exclusionary contracts bar access to tenants by any competitors. Exclusionary contracts are inherently anticompetitive and should, therefore, be prohibited as being against public policy.

Marketing agreements were also discussed in the workshops. The participants were not as strongly divided on the issue of marketing agreements as they were on the use of exclusionary contracts. In a marketing agreement, the telecommunications company agrees to pay the landlord some form of remuneration for each tenant subscribing to the contracting telecommunications company's services. These contracts are not as blatantly anticompetitive as exclusionary contracts. However, they impede competition because the landlord would encourage tenants to be served by one telecommunications company over others. As these agreements are more in the nature of a "finders fee" arrangement and do not prohibit access, they should not be prohibited at this time. However, landlords should disclose to potential tenants the existence of a marketing agreement.

Conclusion

Issues associated with access to tenants by facilities-based ALECs appear to be the most controversial aspect of access in MTEs. Currently, there are only a limited number of facilities-based ALECs providing telecommunications service in Florida. Landlords' concerns that they may be deprived of the use of more property than just the "utility closet" are mitigated by the practical reality that there will only be a few facilities-based competitors in any one MTE. However, as competition in the telecommunications industry is encouraged, the landlords' property rights should be protected by applying standards of reasonableness to the terms and conditions of access in MTEs.

All parties involved in telecommunications access in MTEs should be encouraged to continue to negotiate in good faith using reasonable and nondiscriminatory standards. Tenants should be responsible for obtaining all necessary easements. Recommended standards for

reasonable, nondiscriminatory, and technologically neutral access are identified in the section on jurisdiction.

Exclusionary contracts between telecommunications companies and landlords are anticompetitive and should be against public policy. Therefore, exclusionary contracts should not be permitted in MTEs.

There was also discussion of marketing agreements in which a landlord is compensated for a tenant's becoming a customer of a particular telecommunications company. While these agreements are not as egregious and offensive to competition as exclusionary contracts, their use can result in discriminatory behavior, because the landlord who enters into such an agreement has a vested interest in each new customer subscribed under the marketing agreement. Therefore, landlords should disclose to potential tenants the existence of a marketing agreement.

COMPENSATION

Issue 5: Are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is the cost to be determined?

Recommendation: The Commission recommends that all costs related to access should be reasonable and nondiscriminatory. However, a fee imposed solely for the privilege of providing telecommunications service in an MTE creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it will develop rules in order to set standards for determining compensation for costs related to access.

Summary of Initial Positions

BellSouth: Except to the extent that COLR tariffs and the Commission's Rules address the issue of granting easements and support structures, no other legislative or regulatory dictates should be established relative to financial arrangements reached between owners, carriers, and tenants. When operating out of its franchised territory as an ALEC, with the freedom to serve or not serve, BellSouth will negotiate all terms and conditions of service with tenants and owners, regardless of whether or not other carriers offer service to the subject property.

GTE: A multitenant location owner should not be allowed to charge access for an essential element in the delivery of telecommunications to the tenant. Telecommunications firms should not be required to pay multitenant location owners for the ability to terminate network facilities that are needed to provide services to tenants of the MTE and that are essential to the public welfare and a necessary part of the building or property infrastructure. Costs for all types of facilities and other common area costs should be recovered from tenants through normal rental payments.

Sprint: The costs of installing the necessary facilities at the property should be included in the rental charge or allocated as a matter of separate contract between the landlord and tenant, but should not involve the carrier. Unless an MTE owner can recover these costs from the customer requesting the service, forcing carriers to pay these costs creates an implicit subsidy in favor of MTE tenants.

Cox: Building owners should provide access to interbuilding wiring and intrabuilding wiring at no cost to the service providers. Access to phone service should be treated similarly to other utility service. If access is applied to all telecommunications service providers on a nondiscriminatory basis, a reasonable fee for equipment space rental only may be appropriate.

e.spire: The critical issues with respect to compensation are: 1) compensation must be nondiscriminatory; 2) at a minimum, compensation cannot be required until the ILEC is actually paying compensation to the landlord; and 3) compensation should not exceed the landlord's cost of providing access.

Intermedia: Access should be offered on a competitively neutral basis. Where access requires a more obtrusive presence, the terms and conditions of that access should be negotiated among the affected persons.

OpTel: Landlords, owners, building managers, and condominium associations or their agents should be able to impose reasonable and nondiscriminatory charges for the use of customer premise equipment by carriers.

TCG: If building owners may require telecommunications service providers to pay reasonable and nondiscriminatory compensation for physical occupation of common property by facilities used to provide service to customers in MTEs, the Commission should be authorized to determine just compensation for purposes of the Fifth Amendment Takings Clause, subject to judicial review. Compensation should be determined pursuant to nondiscriminatory rates set by the Commission reflecting the actual cost to the MTE owner of making the required space available for installation of telecommunications equipment of the particular service provider.

Teligent: Equal and nondiscriminatory access to tenants in MTEs should be applied to all telecommunications carriers. Ideally, access should be granted for free or subject to a nominal fee inasmuch as the ILEC is rarely charged. Reasonable compensation may vary depending upon the level of access required and the amount of space that will be occupied.

Time Warner: Supports affirmation of the Commission's jurisdiction over matters of building access and adoption of the following broad policies: 1) reasonable compensation for use of equipment space and installation of conduit and wiring in an MTE shall be presumed diminimus unless a property owner offers evidence to rebut the presumption, 2) a prohibition on the imposition

of any fee for the use of raceways and ceiling space, and 3) a prohibition on building owners from requiring competitive service providers to pay for building access unless the incumbent provider is immediately subject to the same compensation terms for both existing and new facilities in the building.

WorldCom: If the building owner provides space for telecommunications equipment, then the telecommunications provider should make the owner whole. However, any access requirement should be revenue neutral to the building owner.

BOMA: Landlords have the constitutional authority to require all service vendors desiring to do business with tenants in their buildings to pay license, access, or other fee compensation as a condition of gaining access to their buildings and tenants. All terms and conditions with respect to access, including compensation should be subject to consent agreements between the landlord and the telecommunications provider.

CAI: Any compensation to be provided community associations for the use of common property should be freely negotiated between telecommunications service providers and community associations. The state should not intervene in this process.

FAA: Compensation in the non-owner residential setting is appropriate on a limited basis. Property owners should have the right to sell or lease their property (i.e., physical space or wiring) for fair market value.

FAHA: Did not submit a response on this issue.

ICSC: Any compensation is reasonable if agreed to by the building owner and the telecommunications provider. The reasonableness of compensation is market driven and it cannot and should not be arbitrarily measured or fixed by the FPSC or the Legislature.

REALTORS: Compensation should be required for space occupied, renovations, repairs, after-hour entry, after-hours costs for building security, maintenance, etc. Actual compensation should be determined by contract. However, conditions should not be discriminatory.

Analysis

The issue of compensation was raised in connection with fees and costs for access to physical space in the common areas designated for utility services. The position of the property owners and

landlords is that they are constitutionally entitled to compensation for space occupied, renovations and repairs, and after-hours access. In their opinion, to mandate access by all telecommunications companies without any compensation would be an unconstitutional taking. Competitive ALECs believe there should be nondiscriminatory access to all tenants in an MTE. The ILECs believe that no fee should be required of them as long as they are serving as COLR. Where the ILECs are guaranteed access to MTEs without being required to pay a fee and the same is not provided to ALECs, a competitive disadvantage may be created and this may impede competition.

In most MTEs the ILEC has historically incurred the costs of installation for the purpose of serving tenants but has not paid a fee for that access. Ongoing costs related to the repair and maintenance of equipment are typically borne by the ILEC. Similarly, the provisions creating competition allow an MTE to be served by a facilities-based ALEC, which may install and own lines in the building.

At the present time, the only provision for an ILEC, serving as the COLR, to pay access costs relating to providing service to a customer in an MTE is in the Commission's rule on STS. Rule 25-24.575 (7) Florida Administrative Code, states:

> The carrier of last resort of local exchange telecommunication services shall use the STS provider's or the STS building owner's cable, if made available, to gain access to the tenant. The carrier of last resort of local exchange telecommunication services shall be required to provide reasonable compensation. Such compensation shall not exceed the amount it would have cost the carrier of last resort of local exchange telecommunication services to serve the tenant through installation of its own cable. This cost must be calculated on a pro rata basis.

The costs which are borne by COLRs in STS environments are those associated with the use of existing equipment owned by the building owner or the STS provider. The Commission does not intend to suggest or recommend any change to the existing STS rule or COLR responsibilities.

In addition to costs directly related to installation of facilities, the compensation issue also encompasses fees related to access. The issue of landlords charging a fee for access to their buildings has been contentious in this proceeding. The nightmare of innumerable companies demanding and being absolutely entitled to infinite floor space, roof access, and 24 hour repair access was well explicated by property owners and landlords. These concerns are well-founded to a limited extent; however, they are mitigated by two factors: (1) resellers do not require physical

access or space; and (2) economic efficiencies will limit the number of facilities-based ALECs interested in serving an MTE. As discussed in an earlier portion of this report, any reseller wishing to provide service to a customer in an MTE does not require physical access or floor space for equipment. The costs for providing reseller service are governed by an interconnection agreement between the existing service provider in the building and the reseller. Thus, access to tenants in an MTE by a reseller is totally "transparent" to building owners.

Demand for floor space and access to buildings by facilities-based carriers will be limited by economics. That is to say, a company will be willing to install its equipment in a building only if it believes that it will get sufficient return on its investment. This practical reality was discussed in the last workshop, and participants agreed that there would be some limitation, as a "practical business matter," on the number of facilities-based carriers coming into an MTE. It should be noted that in discussing facilities-based carriers, the FPSC is referring to any equipment or facilities being installed, some installations being more comprehensive or requiring more space or access than others.

Although landlords argue that access to tenants by telecommunications companies without compensation would constitute an unconstitutional taking, that argument fails where the property being used to provide telecommunications services or to hold equipment has already been designated for utility use and dedicated to public use. Reasonable access without compensation for use of property already surrendered for utility purposes does not constitute a taking. However, such space is finite and some consideration must be given to instances where the designated utility space in an MTE is inadequate for a particular carrier's needs.

To the extent a facilities-based carrier installs equipment in an area already surrendered for utility purposes, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space in an MTE is inadequate for a particular carrier's needs, such as when the existing floor space or conduit is insufficient or an entirely different space is required, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry and is not in the public interest.

Conclusion

Any costs charged to telecommunications companies by landlords should be reasonable and nondiscriminatory. To the extent a facilities-based carrier installs equipment in an area already dedicated to public use, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space is inadequate for a particular carrier's needs, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it should develop rules in order to set reasonable standards for determining compensation for costs related to access. The Commission's recommended standards for reasonable, nondiscriminatory, and technologically neutral access are set forth in the section on jurisdiction.

However, if it is determined by the Legislature that landlords may collect a fee for access, over and above the actual costs for installing facilities, any statute addressing that issue should also address whether space already being provided for no fee would then become subject to fees and whether the COLR providing mandated service must pay any fee at all. Further, no such fee may be charged to tenants unless the landlord is a certificated telecommunications company.

JURISDICTION

Issue 6: What is the proper forum for settling disputes and property claims regarding access to tenants in MTEs by telecommunications companies, i.e., Florida Public Service Commission, district court, legislative action, other?

Recommendation: Adopting legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications services providers. Any legislation developed should specifically describe the forum for resolving access-related disputes. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the Commission recommends that it is the appropriate authority for resolving access issues.

The FPSC recommends that a threshold for bringing disputes and standards for review should be as follows:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

Summary of Initial Positions

Given that preserving the integrity of E911 was the original sixth issue, not all participants provided written or oral opinions regarding the jurisdiction issue. To the extent that positions were enunciated, they are summarized below.

BellSouth: If the FPSC believes its authority over access issues is unclear, it should obtain a clarification from the Legislature. However, access should be a matter of free market negotiations between the property owner, end user(s), and the carrier.

Cox: On the limited issue of marketing agreements, as long as the term of the agreement relates to the provision of local exchange service the Commission has jurisdiction.

e.spire, Teligent, and **Time Warner**: The Commission's broad jurisdiction to promote telecommunications competition extends to tenant end users in MTEs and serves as the jurisdictional basis for mandating direct and nondiscriminatory access. Notwithstanding the Supreme Court opinions to the contrary, should the Commission believe its authority does not permit it to require MTE owners to allow nondiscriminatory telecommunications company access to tenant end users, it should request such authority from the Legislature.

Intermedia: There is concurrent jurisdiction in some areas. The circuit court's jurisdiction is granted under Article 5 of the Florida Constitution, and the FPSC cannot do certain things such as adjudicate contracts, award damages, or provide injunctive equitable relief. There is primary jurisdiction doctrine that says where a court has its own jurisdiction and there appears to be concurrent jurisdiction, it will often defer to the FPSC to do something that looks like fact finding with a special master, and that decision can be used and presented to a jury in a court trial.

TCG: The federal district court stated in the *Gulf Power* case that the statutory scheme under which the FCC would resolve a dispute concerning rates for access to electricity poles subject to judicial review overcame the constitutional taking objection. TCG believes that, to the extent there is a taking, a similar statutory scheme authorizing the FPSC to resolve compensation disputes, subject to judicial review, would be valid and lawful. TCG urges the Commission to request from

the Legislature the requisite authority to allow nondiscriminatory telecommunications company access to tenant end users in MTEs.

BOMA: It is not at all clear that an administrative body like the Commission is permitted to determine just compensation. Under *Monongahela*, neither the Florida Legislature nor the Commission may establish compensation to be paid to a building owner who is forced to permit the physical occupation of his property.

FAA: The Court system is the proper venue for resolving access-related disputes.

Analysis

Generally, the participants in this special project wanted the current jurisdiction to remain with the present institutions. Building owners wanted mandatory multitenant access to be an issue dealt with in the circuit court. Specifically, the FAA remarked that the Constitution mandates that the court has to have some jurisdiction for a mandatory access law. Additionally, the FAA pointed out that if the Commission is made a venue for disputes pertaining to multitenant access then hundreds of thousands of condominiums, not even including the homeowners associations and malls, would open a floodgate of access issues that the Commission would not be able to handle. The ALECs indicated that it would also be difficult to leave the courts out of the process.

Similarly, it was also recognized that jurisdiction can be overlapping and some issues are exclusive to either the courts or the FPSC but others can be shared. However, BellSouth purported that access to telecommunications services is an area over which the Commission has jurisdiction.

As the issues and positions developed through the workshop process, participants wanted to explore the issue of what court or agency would have jurisdiction over disputes arising from legislation proposed, if any, as a result of this study. This section addresses the Commission's current authority, property rights law, contract law, and recommended standards for review of access issues.

Authority of the FPSC

Jurisdiction for dispute resolution of mandatory access to private property owners by telecommunications carriers has been enumerated under the U.S. Constitution, the Florida Constitution, statutory authority, and case law. Either express or implied statutory authority has to

exist for the FPSC to regulate telecommunications providers. The FPSC is an administrative agency created by the Legislature, and as such, "the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973).

The Florida Constitution allows administrative commissions to exercise quasi-judicial power in matters connected with the functions of their offices. Quasi-judicial power is vested in the FPSC by Article V, Section 1, Florida Constitution: "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."

Section 364.01, Florida Statutes, grants the Commission exclusive jurisdiction in regulating telecommunications providers and services. Pursuant to Section 364.01(1), Florida Statutes, "The Florida Public Service Commission shall exercise, over and in relation to telecommunications companies, the powers conferred by this chapter." Section 350.011, Florida Statutes, confers on the FPSC exclusive jurisdiction to "regulate and supervise each public utility with respect to its rates and service." Pursuant to Section 364.01(3)(a), Florida Statutes, the FPSC is also charged with exercising exclusive jurisdiction in order to "protect the public health, safety, and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices."

The Commission's expertise does not lie in the areas of property and contract law. The Commission has vast experience in resolving disputes between customers and utilities in assuring quality and reliability of service. The Commission has more recently gained expertise in contract arbitration and interpretation under the Act.

Jurisdiction Over Property Rights

Judicial powers are granted to state courts pursuant to Article V of the Florida Constitution. Traditionally, the state courts have exercised authority over property law disputes. Property rights can be distinguished from telecommunications law as a fundamental constitutional right under both the Fifth Amendment (applied to the states via the Fourteenth Amendment) of the U.S. Constitution and Article X, Section 6, of the Florida Constitution (governs the State's power of eminent domain,

the taking power).[39] The Commission does not currently have authority to adjudicate property rights issues. Therefore, any legislation drafted should include a specific delineation of jurisdiction.

Jurisdiction Over Contracts

The FPSC has limited jurisdiction in contract disputes. Historically, contract disputes between parties have been settled in the state courts. In 1997, the Supreme Court of Florida held that the Commission lacked authority to decide private contract issues between a telecommunications company and a multitenant condominium owners' association. In *Telco Communications Co. v. Clark*, 695 So.2d 304 (Fla. 1997), the Commission determined that a telecommunications company was required to obtain a certificate of necessity and found that the company had no legitimate claim for nonperformance of the lease agreement contract from the association for inside wire. The Florida Supreme Court held that there was no statutory authority, express or implied, for the Commission's ruling on the type of contract issue involved and further decided that the resolution of contractual issues should be decided by the circuit court. *Id.* at 309. The FPSC lacks authority to resolve any private contract issues between telecommunications companies and building owners. Additionally, parties can not confer jurisdiction on the Commission by the language in the contract. *United Telephone Co. of Florida v. Florida Public Service Comm'n*, 496 So.2d 116, 118-19 (Fla. 1986).

To the extent that some Circuit Court proceedings involve both regulatory and contractual disputes or require the FPSC's expertise for resolution, the courts may defer to the Commission's expertise and exclusive jurisdiction on regulatory issues. The Supreme Court in *Telco* granted the motion for referral to the FPSC for the regulatory matters over which the Commission had jurisdiction, but retained jurisdiction over the contract issues. *Telco.* at 307. In *Southern Bell Tel. & Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780 (Fla. 1984), the court also held that the FPSC was authorized to review intrastate toll settlement agreements and disapprove any such agreement if detrimental to the public interest where the Legislature had given the Commission

[39]Article X, Section 6 of the Florida Constitution strictly mandates that takings of private property should be for the public, not a private purpose. Section 6 provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

statutory authority to adjudicate such disputes as are properly related to the Commission's essential function as regulator of utility rates and services. *Id.* at 783.

The Act requires state commissions to review negotiated agreements between telecommunication companies. Both Chapter 364, Florida Statutes, and the Act encourage parties to enter into negotiated interconnection agreements to implement competition. The FPSC has been given exclusive jurisdiction to either reject or approve such agreements under §47 U.S.C. 252(e).[40] Furthermore, the FPSC has jurisdiction to arbitrate any unresolved issues of telecommunication agreements.[41] Property owner contractual agreements with third parties do not fall under the Act. The authority provided to the FPSC to evaluate the negotiated agreements of telecommunication companies is narrowly construed and does not include contracts between third parties and property owners. Any expertise the Commission has in the area of contract law is specifically related to our expertise and authority in regulated industries.

All compensation is not purely contractual as discussed in an earlier portion of this report. There are cost-related issues over which the FPSC has jurisdiction. Section 364.345(b), Florida Statutes, gives the FPSC jurisdiction to prescribe the type, extent and conditions under which STS may be provided. Thus, the FPSC has exclusive jurisdiction in STS cases to determine costs related to the provision of service.

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[40]Section 252(e)states:

(1) Approval required.--Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Grounds for rejection.--The State commission may only reject--

"(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

"(I) the agreement(or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

"(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

[41]Section 252(b)(1) states:

(1) Arbitration--During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Standards for Review

As stated earlier, any legislation on access should have a standard of reasonableness and provide compensation for use of property. States such as Texas and Connecticut have passed legislation which defines the terms under which access is to be given and compensation is to be paid. Legislation in these states is fairly new and has not been tested in the courts. In the majority of states where access legislation has been passed, the states' utility commissions have been given authority over access issues in MTEs. If reasonable, nondiscriminatory access is mandated in Florida, any disputes should be resolved following enunciated standards. In addition, a threshold for bringing disputes to appropriate forum for resolution should be developed. Based on the prior controversy at the Legislature, the polarization of the participants in the workshops, the growth of competition, and the instances of problems related to access experienced by the ALECs, legislation may be appropriate. Legislation would give all parties the guidelines necessary for access, may serve to lessen the polarization between them, and should serve to reduce impediments to competition in telecommunications.

The standards for review of an access problem should first consider a threshold for initiating an action for access. To determine whether an access problem is ripe for resolution, there must first be a request for service to a telecommunications service provider by a tenant. The provider and the tenant must convey the request for access to the landlord. If the landlord is unresponsive, a written request should be submitted. A denial of access by the landlord should explain the basis for denial. If the telecommunications service provider and the tenant believe that the denial is unreasonable, discriminatory, or not technologically neutral, then, at that time, the dispute becomes ripe for resolution. The tenant and the provider would then file a complaint or petition to the appropriate forum.

The following standards should apply in negotiating access or in determining whether a denial of access is reasonable:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

Conclusion

For purposes of this report, the FPSC concludes that its limited jurisdiction in matters of property rights and contract disputes should be considered if any legislation is passed regarding access in MTEs. The FPSC would not have authority over controversies pertaining to mandatory multitenant access without specific legislative authority. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the FPSC recommends that the Legislature should specifically prescribe authority to the FPSC to determine issues such as: whether there is space for equipment; whether access to tenants is reasonably denied; the conditions for access; costs for access; and any other related issues. This will avoid any unnecessary confusion between the Commission's jurisdiction and the jurisdiction of the state courts. Any such legislation should define the threshold for initiating an action for access and the standards for review.

RECOMMENDATIONS

DEFINITION OF MULTITENANT ENVIRONMENT

Issue 1: How should multitenant environment be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

Conclusion

If the goal of the state and federal telecommunication legislation is to create an environment that enhances opportunities for customers to benefit from competition, then the definition of MTE should be broad. Based on the comments filed by the participants and the focus on encouraging competition, the Commission concludes that the definition of MTE should be inclusive of all types of structures and tenancies except condominiums, cooperatives, homeowners' associations, those short-term tenancies specifically included in the FPSC's call aggregator rule, and all tenancies of 13 months or less in duration. The conclusion to exclude condominiums, cooperatives, and homeowners' associations is based on the premise that these organizations are operated through a democratic process with each owner having a vote. Tenancies of 13 months or less are also excluded in order to ensure that landlords are not inordinately burdened by the requirement to provide access for short-term tenancies that are not described in the call aggregator rules.

Recommendation

The Commission recommends that the definition of MTE should be inclusive of all types of structures and tenancies except: (1) condominiums, as defined in Chapter 718, Florida Statutes; (2) cooperatives, as defined in Chapter 719, Florida Statutes; (3) homeowners' associations, as defined in Chapter 617, Florida Statutes; (4) those short-term tenancies specifically included in Rule 25-24.610(1)(a), Florida Administrative Code; and (5) all tenancies of 13 months or less in duration.

DEFINITION OF MULTITENANT ENVIRONMENT TELECOMMUNICATIONS SERVICES

Issue 2: What telecommunications services should be included in "direct access," i.e., basic local service (Section 364.02(2), Florida Statutes), Internet access, video, data, satellite, other?

Conclusion

Support for limiting the definition of telecommunications services to those currently regulated under Chapter 364, Florida Statutes, is not overwhelming. However, the rapid growth and deployment of unregulated communications technologies (e.g., wireless, rooftop satellite dishes, video conferencing, coaxial cable voice and data services, etc.), may render any new broader statutory definition obsolete in a short time. Therefore, the services to which access applies should be limited to two-way telecommunications service to the public for hire within this state, pursuant to Section 364.02, Florida Statutes.

Recommendation

For purposes of MTE access, the Commission recommends that the definition of telecommunications services, as defined in Section 364.02, Florida Statutes, should not be amended.

DEFINITION OF DEMARCATION POINT

Issue 3: How should "demarcation point" be defined, i.e., current FPSC definition (Rule 25-4.0345, Florida Administrative Code) or the federal Minimum Point of Entry (MPOE)?

Conclusion

Keeping the demarcation point as set forth in Rule 25-4.0345, Florida Administrative Code, versus moving to the MPOE is an issue that merits additional investigation by the FPSC. Moving to the MPOE may resolve some access issues by possibly giving the ALECs quicker access to the wiring; however, the inhibiting of the COLRs' ability to deliver service standards directly to the customer and allowing the possibility of an unregulated third party becoming a factor in service may outweigh the benefits of moving to the MPOE. Therefore, the Commission will conduct a staff workshop to gather information on the efficacy of rulemaking. At the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

Recommendation

Information gathered at the workshops did not lead to a conclusion on whether the current FPSC demarcation point should be changed to the federal MPOE. Therefore, the Commission will gather additional information through a staff workshop on how demarcation should be defined. At

the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

CONDITIONS FOR PHYSICAL ACCESS

Issue 4: In promoting a competitive market, what, if any, restrictions to direct access to customers in MTEs should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Conclusion

Issues associated with access to tenants by facilities-based ALECs appear to be the most controversial aspect of access in MTEs. Currently, there are only a limited number of facilities-based ALECs providing telecommunications service in Florida. Landlords' concerns that they may be deprived of the use of more property than just the "utility closet" are mitigated by the practical reality that there will only be a few facilities-based competitors in any one MTE. However, as competition in the telecommunications industry is encouraged, the landlords' property rights should be protected by applying standards of reasonableness to the terms and conditions of access in MTEs.

All parties involved in telecommunications access in MTEs should be encouraged to continue to negotiate in good faith using reasonable and nondiscriminatory standards. Tenants should be responsible for obtaining all necessary easements. Recommended standards for reasonable, nondiscriminatory, and technologically neutral access are identified in the section on jurisdiction.

Exclusionary contracts between telecommunications companies and landlords are anticompetitive and should be against public policy. Therefore, exclusionary contracts should not be permitted in MTEs.

There was also discussion of marketing agreements in which a landlord is compensated for a tenant's becoming a customer of a particular telecommunications company. While these agreements are not as egregious and offensive to competition as exclusionary contracts, their use can result in discriminatory behavior, because the landlord who enters into such an agreement has a vested interest in each new customer subscribed under the marketing agreement. Therefore, landlords should disclose to potential tenants the existence of a marketing agreement.

Recommendation

The Commission recommends that ILECs, ALECs, landlords, and tenants be encouraged to negotiate all aspects of MTE access in good faith. Negotiations should be based on the premises of reasonable and nondiscriminatory access to MTEs. The Commission further recommends that tenants should be responsible for obtaining all necessary easements.

The Commission recommends that exclusionary contracts are against public policy and should be prohibited. Marketing agreements are not as anticompetitive as exclusionary contracts. However, the Commission recommends that landlords disclose to potential tenants the existence of a marketing agreement.

COMPENSATION

Issue 5: Are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is the cost to be determined?

Conclusion

Any costs charged to telecommunications companies by landlords should be reasonable and nondiscriminatory. To the extent a facilities-based carrier installs equipment in an area already dedicated to public use, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space is inadequate for a particular carrier's needs, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it should develop rules in order to set reasonable standards for determining compensation for costs related to access. The Commission's recommended standards for reasonable, nondiscriminatory, and technologically neutral access are set forth in the section on jurisdiction.

However, if it is determined by the Legislature that landlords may collect a fee for access, over and above the actual costs for installing facilities, any statute addressing that issue should also address whether space already being provided for no fee would then become subject to fees and

whether the COLR providing mandated service must pay any fee at all. Further, no such fee may be charged to tenants unless the landlord is a certificated telecommunications company.

Recommendation

The Commission recommends that all costs related to access should be reasonable and nondiscriminatory. A fee imposed solely for the privilege of providing telecommunications service in an MTE creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it will develop rules in order to set standards for determining compensation for costs related to access.

JURISDICTION

Issue 6: What is the proper forum for settling disputes and property claims regarding access to tenants in MTEs by telecommunications companies, i.e., Florida Public Service Commission, district court, legislative action, other?

Conclusion

For purposes of this report, the FPSC concludes that its limited jurisdiction in matters of property rights and contract disputes should be considered if any legislation is passed regarding access in MTEs. The FPSC would not have authority over controversy pertaining to mandatory multitenant access without specific legislative authority. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the FPSC recommends that the Legislature should specifically prescribe authority to the FPSC to determine issues such as: whether there is space for equipment; whether access to tenants is reasonably denied; the conditions for access; costs for access; and any other related issues. This will avoid any unnecessary confusion between the Commission's jurisdiction and the jurisdiction of the state courts. Any such legislation should define the threshold for initiating an action for access and the standards for review.

Recommendation

Adopting legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications services providers. Any legislation developed should specifically describe the forum for resolving access-related disputes. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the Commission recommends that it is the appropriate authority for resolving access issues.

The FPSC recommends that a threshold for bringing disputes and standards for review should be as follows:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

APPENDICES

OTHER STATE STATUTES

CONNECTICUT

modification is required due to previously unforeseen circumstances.
(P.A. 94-83, S. 9, 16.)
History: P.A. 94-83 effective July 1, 1994.

Sec. 16-247l. Occupied buildings and access to telecommunications providers: Service, wiring, compensation, regulations, civil penalty.

(a) As used in this section: (1) "Occupied building" means a building or a part of a building which is rented, leased, hired out, arranged or designed to be occupied, or is occupied (A) as the home or residence of three or more families living independently of each other, (B) as the place of business of three or more persons, firms or corporations conducting business independently of each other, or (C) by any combination of such families and such persons, firms or corporations totaling three or more, and includes trailer parks, mobile manufactured home parks, nursing homes, hospitals and condominium associations. (2) "Telecommunications provider" means a person, firm or corporation certified to provide intrastate telecommunications services pursuant to sections 16-247f to 16-247h, inclusive. (b) No owner of an occupied building shall demand or accept payment, in any form, except as provided in subsection (f) of this section, in exchange for permitting a telecommunications provider on or within his property or premises, or discriminate in rental charges or the provision of service between tenants who receive such service and those who do not, or those who receive such service from different providers, provided such owner shall not be required to bear any cost for the installation or provision of such service. (c) An owner of an occupied building shall permit wiring to provide telecommunications service by a telecommunications provider in such building provided: (1) A tenant of such building requests services from that telecommunications provider; (2) the entire cost of such wiring is assumed by that telecommunications provider; (3) the telecommunications provider indemnifies and holds harmless the owner for any damages caused by such wiring; and (4) the telecommunications provider complies with all rules and regulations of the Department of Public Utility Control pertaining to such wiring. The department shall adopt regulations, in accordance with the provisions of chapter 54, which shall set forth terms which may be included, and terms which shall not be included, in any contract to be entered into by an owner of an occupied building and a telecommunications provider concerning such wiring. No telecommunications provider shall present to an owner of an occupied building for review or for signature such a contract which contains a term prohibited from inclusion in such a contract by regulations adopted hereunder. The owner of an occupied building may require such wiring to be installed when the owner is present and may approve or deny the location at which such wiring enters such building. (d) Prior to completion of construction of an occupied building, an owner of such a building in the process of construction shall permit prewiring to provide telecommunications services in such building provided that: (1) The telecommunications provider complies with all the provisions of subdivisions (2), (3) and (4) of subsection (c) of this section and subsection (f) of this section; and (2) all wiring other than that to be directly connected to the equipment of a telecommunications service customer shall be concealed within the walls of such building. (e) No telecommunications provider may enter into any agreement with the owner or lessee of, or person controlling or managing, an occupied building serviced by such provider, or commit or permit any act, that would have the effect, directly or

indirectly, of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of the services of other telecommunications providers. (f) The department shall adopt regulations in accordance with the provisions of chapter 54 authorizing telecommunications providers, upon application by the owner of an occupied building and approval by the department, to reasonably compensate the owner for any taking of property associated with the installation of wiring and ancillary facilities for the provision of telecommunications service. The regulations may include, without limitation: (1) Establishment of a procedure under which owners may petition the department for additional compensation; (2) Authorization for owners and telecommunications providers to negotiate settlement agreements regarding the amount of such compensation, which agreements shall be subject to the department's approval; (3) Establishment of criteria for determining any additional compensation that may be due; (4) Establishment of a schedule or schedules of such compensation under specified circumstances; and (5) Establishment of application fees, or a schedule of fees, for applications under this subsection. (g) Nothing in subsection (f) of this section shall preclude a telecommunications provider from installing telecommunications equipment or facilities in an occupied building prior to the department's determination of reasonable compensation. (h) Any determination by the department under subsection (f) regarding the amount of compensation to which an owner is entitled or approval of a settlement agreement may be appealed by an aggrieved party in accordance with the provisions of section 4-183. (i) Any person, firm or corporation which the Department of Public Utility Control determines, after notice and opportunity for a hearing as provided in section 16-41, has failed to comply with any provision of subsections (b) to (e), inclusive, of this section shall pay to the state a civil penalty of not more than one thousand dollars for each day following the issuance of a final order by the department pursuant to section 16-41 that the person, firm or corporation fails to comply with said subsections.
(P.A. 94-106, S. 1.)

Sec. 16-248. Rights of telephone company in operation May 23, 1985.

Every telephone company organized before May 23, 1985, under special or general law, for the transaction of a telephone exchange business, in whole or in part, is limited in its operation, so far as pertains to the telephone exchange business, to the limits of the town or towns in which the plant and structures of such company, association or corporation actually existed and were in operation, in whole or in part, on such date, except upon a finding that public convenience and necessity require an extension of such limits as hereinafter provided.
(1949 Rev., S. 5660; P.A. 85-187, S. 6, 15.)
History: P.A. 85-187 applied provisions of section to every telephone company organized before May 23, 1985, instead of to every company, association or corporation organized before May 3, 1899.

Sec. 16-249. Department to authorize extension of operations of telephone companies.

Every telephone company whose plant was in existence and in operation on May 23, 1985, desiring to extend its telephone exchange business to another town or towns, is

KANSAS

Statute 58-2553

Chapter 58.--PERSONAL AND REAL PROPERTY

Article 25.--LANDLORDS AND TENANTS

58-2553. Duties of landlord; agreement that tenant perform landlord's duties; limitations. (a) Except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord's control, the landlord shall:

(1) Comply with the requirements of applicable building and housing codes materially affecting health and safety. If the duty imposed by this paragraph is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined in accordance with the provisions of this paragraph;

(2) exercise reasonable care in the maintenance of the common areas;

(3) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning appliances including elevators, supplied or required to be supplied by such landlord;

(4) except where provided by a governmental entity, provide and maintain on the grounds, for the common use by all tenants, appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(5) supply running water and reasonable amounts of hot water at all times and reasonable heat, unless the building that includes the dwelling units is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Nothing in this section shall be construed as abrogating, limiting or otherwise affecting the obligation of a tenant to pay for any utility service in accordance with the provisions of the rental agreement. The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

(b) The landlord and tenants of a dwelling unit or units which provide a home, residence or sleeping place for not to exceed four households having common areas may agree in writing that the tenant is to perform the landlord's duties specified in paragraphs (4) and (5) of subsection (a) of this section and also specified repairs, maintenance tasks, alterations or remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(c) The landlord and tenant of any dwelling unit, other than a single family residence, may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) The agreement of the parties is entered into in good faith, and not to evade the obligations of the landlord, and is set forth in a separate written agreement signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(d) The landlord may not treat performance of the separate agreement described in subsection (c) of this section as a condition to any obligation or the performance of any rental agreement.

History: L. 1975, ch. 290, S. 14; L. 1982, ch. 230, S. 2; July 1.

OHIO

12TH OPINION of Focus printed in FULL format.

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

PUBLIC UTILITIES COMMISSION OF OHIO

1994 Ohio PUC LEXIS 778

September 29, 1994

PANEL:
[*1]

Craig A. Glazer, Chairman; J. Michael Biddison; Jolynn Barry Butler; Richard M. Fanelly; David W. Johnson

OPINION:
SUPPLEMENTAL FINDING AND ORDER

The Commission finds:

I. Background

To better understand the subject of this Entry some definitions are in order. Inside wire refers to the customer premise portion of telephone plant which connects station components to each other and to the telephone network. Inside wire in conjunction with customer premise equipment (CPE) constitutes all telephone plant located on the customer's side of the demarcation point marking the end of the telephone network. Generally, any inside wire which connects station components to each other or to common equipment of a private branch exchange (PBX) or key system is classified as complex. Simple inside wire is any inside wire other than complex wire. Embedded inside wire is defined as inside wire installed prior to January 1, 1987.

Also to better understand this order, it is necessary to first understand the history of inside wire at the federal level. Changes in the way that inside wire has historically been handled began in 1979. In a Notice of Proposed Rulemaking released on August 14, [*2] 1979, in CC Docket No. 79-105 (79-105), the Federal Communications Commission (FCC) proposed, among other things, the expensing, as opposed to capitalization, of the Station Connections Account 232. The 79-105 proceeding was initiated by a petition filed by American Telephone and Telegraph Company (AT&T) in response to an FCC decision in Docket No. 19129, in which the FCC held that its current accounting system should be modified to place the burden of all costs associated with station connections on the causative ratepayer, as opposed to the then-current system which placed the burden on present and future ratepayers. The FCC, responding to AT&T's petition in 79-105, bifurcated the Station Connections Account 232, creating two separate accounts. The Station Connections-Other Account 242 includes costs associated with the wire after the telephone pole or pedestal, which includes the telephone drop and underground cable, up to and including the

protector grounding. The Stations Connection Inside Wire Account 232 includes the remaining wire extending through a premise, after the protector, including telephone jacks. On March 31, 1981, the FCC released its First Report and Order [*3] in 79-105 requiring a four-year, phase-in to 100 percent expensing
of all inside wire installation and repair services in Account 232. The FCC further concluded that the Stations Connections-Other Account 242 should not be subject to any accounting or regulatory changes.

The FCC, in making these accounting changes, noted in the 79-105 order its belief that the final answer, as it concerned inside wire, did not rest with accounting changes, but rather with the ultimate deregulation of local exchange company (LEC)-provided inside wire installation and maintenance services. The FCC concluded that ultimate deregulation of these inside wire services would increase customer choice of installation and maintenance providers, broaden the scope of business opportunities for independent vendors, and further aid in eliminating the anticompetitive inequity the LECs held in accessing customers. The FCC went on to state, however, that it would be inappropriate at that time to order such deregulation without first allowing interested parties to comment, as well as to provide the necessary input to the technical and administrative questions.

On October 4, 1982, the FCC released a Notice of [*4] Proposed Rulemaking in CC Docket No. 82-681 which, among other things, requested comments on new accounting changes to provide for the detariffing of intrasystem wire (i.e., complex inside wire or inside wire consisting of more than two lines). On October 6, 1983, the FCC adopted it First Report and Order in this docket, ordering the detariffing of LEC-provided cable/wire installed as part of the intrasystem wire of detariffed PBXs and key systems, effective January 1, 1984. The FCC, in detariffing LEC-provided complex inside wire installation service, also required that all associated costs and revenues resulting from the provision of complex inside wire installations be accounted for below-the-line for ratemaking purposes. As a result, the FCC actually deregulated the provision of this service. The FCC did not, at this time, deregulate the LEC's provision of complex inside wire maintenance services nor the installation of either simple (i.e., inside wire consisting of two wires or less) or complex inside wire.

On July 5, 1985, the FCC adopted its Memorandum Opinion and Order in yet another docket, CC Docket 81-216. That order did not deregulate the installation of [*5] simple inside wire, but did allow subscribers to install their own business and residential one and two-line inside wire.

On January 30, 1986, the FCC adopted its Second Report and Order in CC Docket 79-105, detariffing the installation of simple inside wire and the maintenance of both simple and complex inside wire, and preempting the states from regulating the provision of these services, effective January 1, 1987. In addition to detariffing inside wire services, the FCC required that all inside wire costs and revenues be accounted for below-the-line for ratemaking purposes. The FCC indicated that this undertaking was necessary to generate cost savings from a reduction in regulatory burdens and an expansion of the competitive environment for the installation and maintenance of inside wire. The FCC also ordered all LECs to relinquish ownership of all inside wire after it had been either expensed or fully amortized. However, in a subsequent Memorandum Opinion

and Order of November 13, 1986, in CC Docket 79-105, the FCC revisited the relinquishment issue and decided that relinquishment of inside wire ownership was not the best method to achieve its inside wire detariffing [*6] objectives. The FCC stated that such action would result in unnecessary costs upon the LECs in attempting to identify, for purposes of relinquishment, wire that had been was expensed as opposed to capitalized. Therefore, the LECs were not required to relinquish ownership of the inside wire.

As a result of the FCC's release of its November 13, 1986, Memorandum Opinion and Order in CC Docket No. 79-105, the National Association of Regulatory Utilities Commissioners (NARUC) filed a petition with the United States Court of Appeals for the District of Columbia Circuit challenging the FCC's preemptive authority over the states' regulatory authority and the intrastate portion of the LECs' simple inside wire services. In its decision in National Association of Regulatory Utility Commissioners vs. The Federal Communications Commission, 880 F. 2d 422 (D.C. Cir. 1989) the Court held that the FCC may preempt state regulation of simple inside wire services only to the extent that such regulation would impede the FCC's efforts to promote competition within the provision of these services. The Court remanded, however, three FCC orders in the 79-105 docket addressing questions relating [*7] to inside wire. The first of the orders, the Second Report and Order in CC Docket 79-105, precluded the individual states from imposing common carrier tariff regulation on the installation and maintenance of inside wire after December 31, 1986.

On May 31, 1990, the FCC released its Second Further Notice of Propose Rulemaking (Second Notice) in CC Docket 79-105, requesting comments concerning the Court's remand of the FCC's orders. In its Second Notice, the FCC's proposal consisted of the following five elements: (1) the preemption of state regulation that requires or allows LECs to bundle charges for tariffed services; (2) the monitoring of state actions in relation to the prices, terms, and conditions under which LEC provide simple inside wire services; (3) a requirement that each LEC having annual income exceeding $ 100 million file, on an ongoing basis, information on state regulation of LEC prices for inside wire services; (4) the non-preemption of state regulation that requires LECs to act as providers of last resort for inside wire services as nonregulated activities for federal accounting purposes. On February 14, 1992, the FCC released its Third Report and [*8] Order in CC Docket No. 79-105 implementing each of the five elements virtually as proposed.

The Public Utilities Commission of Ohio (PUCO or Commission), by Entry issued June 24, 1986, initiated this docket in order to address at the state level the inside wire issues raised by the above-mentioned FCC Orders. On December 16, 1986, after reviewing the comments of interested persons, the Commission issued a Finding and Order which, among other things, directed that the installation and maintenance of inside wire be detariffed in the state of Ohio, on an intrastate basis, effective January 1, 1987, and further set forth guidelines to accomplish this directive. The Commission, however, reserved ruling on certain technical issues associated with this detariffing until such time as additional comments and data could be obtained and evaluated. These technical considerations included, but were not limited to, the following areas: (1) protector access; (2) network interface device (NID) installation; (3) charges for LEC-provided diagnostic services; (4) LEC relinquishment and the subsequent ownership of embedded inside wire; and (5) the deregulation of house cable and the deregulation [*9] of wire crossing public thoroughfares. On July 16,

1987, the Commission issued an entry requesting additional written comments and reply comments from all LECs, the Office of the Consumers' Counsel (OCC), as well as other interested entities, concerning these technical considerations.

On March 27, 1990, the Commission called for updated comments concerning NID installations, protector access, inside wire ownership, and the deregulation of house cable and wire crossing public thoroughfares. Additionally, as a result of the D.C. Court of Appeals decision, the Commission called for comments concerning the regulation of LEC-provided inside wire maintenance agreements and alternatives to the regulation of these plans. The Commission also requested comments concerning current company policy and treatment regarding those customers not subscribing to a LEC-provided inside wire maintenance plan.

In the time between the Commission's first request for comments on technical issues and its request for updated comments, the FCC released another Notice of Proposed Rulemaking, in its new inside wire investigation, CC Docket No. 88-57, on March 8, 1988. The FCC, among other things, was looking [*10] into some of the same technical issues that the Commission was investigating regarding protector access and NID installation and exploring whether certain of its inside wire regulations should be modified or removed. On June 14, 1990, the FCC released it Report and Order in CC Docket No. 88-57, permitting customers to access embedded inside wire and to install standard jacks up to and including at the point of demarcation between inside wire and network wire. Additionally, as discussed in detail later in this Order, the FCC amended its definition of the demarcation point for existing single unit dwellings and for new single and multiunit dwellings. Finally, the FCC reaffirmed its previous opinion that protector access should be limited to LEC personnel only; however, it did not prevent the states and other local authorities from allowing access to the protector.

In its Entry of July 8, 1993, the Commission's staff (staff) issued its initial proposals on the pertinent inside wire issues. All interested entities were encouraged to file comments regarding staff's proposals. An oral hearing on the record was held on October 5, 1993, with the intent of accomplishing the following [*11] three purposes: 1) clarify any prior comments provided in this docket; 2) respond to any of staff's questions regarding any comments provided in this docket; and 3) allow any interested party, including any non-local exchange telephone company, to respond to, but not cross examine another interested party's comments/responses.

II. Summary of Comments on the Proposed Issues.

Interested entities filing comments or replies in response to either the Commission's July 16, 1987 Entry, its March 27, 1990 Entry, its July 8, 1993 Entry, or appearing at the oral hearing of October 5, 1993, include the following: ALLTEL Ohio, Inc., and the Western Reserve Telephone Company (ALLTEL); Beeson's Phone Connection (Beeson); The Champaign Telephone Company (Champaign); Cincinnati Bell Telephone Company (Cincinnati Bell); City of Cleveland (Cleveland); GTE North Incorporated (GTE); The Department of Defense and other federal executive agencies (DOD); OCC; The Ohio Bell Telephone Company (Ohio Bell); The Ohio Telephone Association (OTA); the United Telephone Company of Ohio (United), and the Ohio Building Owners and Managers Association (OBOMA).

In accordance with the Commission requests for [*12] comments, a number

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of responses were provided regarding the following issues: (1) LEC relinquishment and the subsequent ownership and maintenance of embedded inside wire; (2) protector access; (3) NID installation; (4) charges for LEC-provided diagnostic services; (5) the deregulation of house cable and the deregulation of wire crossing public thoroughfares; (6) LEC-provided maintenance agreement limitations; and (7) the regulation of LEC-provided inside wire maintenance agreements and alternatives to the regulation of these plans. The Commission has reviewed these comments, and a summary of the filed comments and its conclusions are delineated below.

A. Local Exchange Company Relinquishment of Ownership of Inside Wiring

As previously stated in the background section of this Supplemental Opinion and Order, the FCC in its Memorandum Opinion and Order in CC Docket No. 79-105, ruled that LECs would not be required to relinquish ownership of fully amortized embedded inside wire. However, as a result of the aforementioned NARUC D.C. Court decision, the Commission proceeded in its consideration of this issue by requesting additional information regarding inside wire ownership [*13] upon full amortization of Account 232.

1. Upon full amortization of Account 232, should the Commission require the LECs to relinquish legal title to inside wire?

ALLTEL, Ohio Bell, OTA, and United believe that the Commission is without the requisite authority to order LECs to relinquish legal title to inside wire. OTA elaborated on this issue, arguing that the Commission does not have the constitutional authority to order the transfer of property to other persons with or without just compensation. OTA points out that even if LECs are to abandon ownership, a concern will still exist as to whom ownership should revert to, as well as a concern regarding warranty and disclosure of defects.

Ohio Bell, GTE, ALLTEL, Cincinnati Bell, and United have all reached zero net investment in Account 232. However, it is the belief of most LECs and OTA that companies should be permitted to abandon or relinquish legal title at their own option and that voluntary arrangements be made by the pertinent parties. Further, these companies believe that in the event that a LEC does abandon its inside wire, disputes of ownership between the property owner and the subscriber should be determined by [*14] the courts, and not by the Commission. United published legal notice indicating that it was abandoning ownership; however, no assignment of ownership has occurred. Most other LECs have completely depreciated its inside wire investment but have not formally abandon ownership. GTE has for all practical purposes relinquished ownership interest in the inside wire but it has not provided formal notice with respect to the actual relinquishment of its ownership interest. OBOMA contends that the inside wire is owned by the LECs and that the Commission does not have the jurisdiction to reassign ownership. Ohio Bell represents that inside wire is an asset of the LEC and remains as such until it is negotiated away. OBOMA believes that the property owner should not have to assume ownership unless it is conveyed, assumed, or appropriated. OBOMA believes that FCC is presently re-examining the issue of inside wire ownership in existing buildings.

In contrast, Beeson and DOD believe that the Commission should mandate LEC relinquishment of fully amortized embedded inside wire. Beeson alleges that most customers already believe that they own their inside wire. DOD maintains

that, in particular, [*15] legal title to inside wire should pass to the property owner, rather than the transitory subscriber, as the property owner has a more substantial and lasting interest in the property in which the wire is installed. Additionally, DOD recommends that relinquishment of any wire accounted for in Account 232, the FCC account designated for the amortization of
embedded inside wire, should occur at one time. If title were not transferred at one time, subscribers would have to bear excessive charges as a result of administrative costs involved with tracking a segmented change of ownership.

Cleveland contends that, after full amortization of Account 232, the LECs should be required to relinquish ownership of inside wire to the property owner since the LECs have been fully compensated for the wire, and the Commission has removed any responsibility of the companies to repair and maintain the wire.

OCC believes that, since the Commission has authority over the LECs, it has the authority to order relinquishment of inside wire. OCC refutes OTA's constitutional arguments stating that, due to the wire's labor intensive nature, its salvage value is nominal. Moreover, OCC maintains that the FCC, [*16] in its Second Report and Order (CC Docket 79-105) adopted on January 30, 1986, rejected the LECs' constitutional arguments against ordering the relinquishment of inside wire. OCC states that the FCC concluded that ratepayers' rights would be abridged if telephone companies were to receive additional compensation for such wire after it has been expensed or fully amortized. Therefore, OCC is suspicious as to what the LECs desire from continued ownership. It is OCC's contention that most residential inside wire should probably be categorized as a fixture and, therefore, owned by the property owner. Recognizing that the Ohio Revised Code prohibits a tenant from removing a fixture, OCC contends that title to most inside wire should, thus, be transferred to the property owner.

2. Who should be responsible for the maintenance of embedded simple inside wire?

In response to the Commission's inquiry concerning whether property owners or subscribers should be responsible for the maintenance of embedded inside wire, Beeson states that the property owner should be responsible for this wire since this situation would not differ from that of electric utilities. The owner of the property [*17] should be the party responsible for maintaining the wire, adding or rearranging the wire and should also be responsible for the testing of the inside wire. According to Beeson, if property owners were not to assume maintenance responsibility, the property owner would have ownership in name only. Cleveland also believes that maintenance and repair responsibilities should be the responsibility of the property owner. DOD maintains that disputes of maintenance responsibilities should be settled in accordance with Ohio contract law and Ohio landlord/tenant law.

OTA contends that LECs have no choice but to hold the subscriber responsible for the maintenance of the inside wire. This conclusion results from the fact that the LEC billing systems are not geared to the property owner, but instead are geared to the subscriber. Further, the property owner may not be in the LEC's territory and the LEC's contractual relationship is not with the property owner, but is with the subscriber. Like OTA, United maintains that LECs have a contractual relationship with their subscribers, not property owners, to provide local exchange and associated telephone service for which bills are rendered.

[*18] United asserts that it seldom knows who owns the property. Any requirement to bill an entity other than the subscriber would allegedly increase LECs' administrative costs and would probably be resisted by property owners. United and GTE also state that the responsibility for ongoing maintenance is a contractual matter between the landlord and the tenant.

Ohio Bell maintains that the Commission does not have any statutory authority over landlords or tenants so as to vest responsibility or ownership in the property owner.

OBOMA indicates that its members do not want to become involuntary owners of abandoned LEC inside wire. They neither desire the responsibility for the requisite maintenance nor do they have the proper training to do so. OBOMA does not want the property owner to become involved in arranging for the tenant's telecommunications service. OBOMA does not believe that the ownership and maintenance issues can presently be addressed by lease terms since it will be awhile before all existing leases are recycled and amended.

OCC opposes OTA's belief that the LECs have no choice but to hold subscribers financially responsible for inside wire maintenance. OCC contends that [*19] a choice does exist, but that the LECs desire to maintain a captive market for a detariffed service. Since the Commission converted these services from utility services to non-utility services, OCC believes that property owners should be responsible for the maintenance of inside wire, especially since tenants do not have equal bargaining power to negotiate inside wire maintenance terms. OCC also requests that the Commission require all LECs to inform subscribers, by an actual notice, that landlords, and not tenant/subscribers, are responsible for maintaining inside wire and that the landlord's permission should always be sought by the LEC before repairs are made. OCC further contends that, in an attempt to enhance their own inside wire business, the LECs have been unfairly usurping their monopoly monthly billing powers for local service in order to obtain the inside wire business of the perceived captive customer.

Commission Guidelines on Ownership and Maintenance of Inside Wire

The Commission stated in its December 16, 1986, Finding and Order, Case No. 86-927-TP-COI, that it believed that LECs intend to abandon inside wire facilities upon full amortization; it did not [*20] require such, nor did it determine to whom legal title would actually pass upon relinquishment. Due to the fact that most of the commenting LECs have now made known their opposition to relinquishment, it is clear that the LECs will not, on their own, formally relinquish ownership of inside wire despite the full amortization of Account 232. Upon reviewing the comments filed pertaining to ownership, the Commission finds that despite the fact that most, if not all, LECs have already reached a zero net investment in Account 232 relating to inside wire, the companies may still possess some property rights in the inside wire itself. Therefore, the Commission does not believe that total relinquishment of inside wire ownership by the LECs is appropriate at this time. In accordance with the FCC's Memorandum Opinion and Order of November 13, 1986, in CC Docket No. 79-105, although LECs shall be permitted to maintain inside wire ownership, subscribers/property owners shall be permitted to remove, replace or rearrange inside wire at their own expense without prior consent of the LECs. In addition, no person owning, leasing, controlling, or managing a multi-tenant building shall forbid [*21] or unreasonably restrict any occupant, tenant,

lessee, or such building from receiving telecommunications services from any provider of its choice, which is duly certified by this Commission.

The Commission agrees with the commenting LECs, OTA, and OBOMA that ownership and the responsibility for the maintenance of inside wire should be left to individual agreements or contracts between landlords and their tenants, in addition to the application of local property law. However, the Commission is extremely concerned about customer education pertaining to the issue of inside wire maintenance and, therefore, notes that this issue is specifically addressed by the required customer notice provided for in Appendix A of this Order.

B. Protector Access

The Commission, in its Entries of July 16, 1987, March 27, 1990, and July 8, 1993, requested comments regarding the issue of whether protector access should be restricted to particular entities. The FCC, in its Report and Order in CC Docket No. 88-57, reaffirmed its previous conclusion that protector access be limited to LEC personnel only; however, it did not prevent the states from allowing access to the protector.

All commenting [*22] LECs and the OTA oppose allowing non-LEC personnel access to the protector. The protector is a small device attached to the outer wall of a dwelling which provides grounding of a phone line in an attempt to prevent subscribers from being injured as a result of electrical shock. The LEC and OTA maintain that allowing non-LEC personnel access could compromise the integrity of the LEC portion of the phone network or could possibly, due to faulty grounding, result in human injury from electrical shock. In addition, the commenting LECs and the OTA all express concern that, if non-LEC protector access is permitted, it would confuse the responsibility and legal liability for damage claims, thereby increasing the exposure of LECs to damage claims and litigation. If non-LEC protector access is allowed, individuals without proper training or knowledge will presumably be working on the protector. United avers that only employees of utilities should be permitted access to utility-owned facilities. DOD opposes non-LEC protector access, except where it is necessary for preserving communications in the interest of national security.

OTA asserts that Ohio's LECs are prepared to respond timely, [*23] at tariffed rates, to all tariff requests necessitating access to the protector. It is OTA's belief that it is a common practice of Ohio's telephone companies not to charge for diagnostic services when no NID is present and when a LEC determines trouble to be situated on the customer side of the demarcation point. ALLTEL indicated that, provided a NID is present, a competitive provider of inside wire services will not require protector access. Ohio Bell also believes that prohibiting protector access will not result in increased costs to subscribers since the diagnosing of all inside wire problems without NIDs and the repair of all protector problems will occur free of charge.

OCC questions OTA's motives for rejecting non-LEC access to the protector. OCC contends that OTA's arguments, concerning network injury for disallowing non-LEC access to the protector, are suspect since the LECs could have anti-competitive motivations. OCC further argues that the cost to the residential consumers in terms of time and money outweighs the remote potential harm to the network. These costs include the charges incurred by the customer for having the LEC work on the protector and the time involved [*24] waiting

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for this service. OCC believes that it would be inappropriate to require LECs' competitors and subscribers to depend on the LEC to complete repair jobs requiring access to the protector. OCC does believe, however, that the issue of human injury due to electrical shock still must be considered. Cleveland favors non-LEC personnel being permitted access to LEC protectors. In this way the customer will be able to avoid additional charges when retaining a non-LEC entity to rectify problems with their inside wire. At a minimum, Cleveland believes that certified electricians should be allowed protector access.

If protector access is permitted, all of the commentors believe that this access should be limited to those persons with sufficient understanding to accomplish the task. The commentors varied as to how it can be determined that one is capable of handling protector access. Beeson recommends that a questionnaire be created to allow persons wishing to access the protector to determine if they are competent enough to engage in protector access. DOD recommends that individuals desiring to pursue protector access attend training seminars sponsored by the LECs and other comparable [*25] entities. OCC believes that LEC-sponsored training would be both burdensome and wasteful. Instead, OCC contends that protector access information be included in the information section of the white pages of the LEC directories, and that additional explanations and information be provided when LECs respond to consumer inquiries. OCC believes that the subscriber may be held accountable if damage to the network does occur from accessing the protector.

OTA believes that the requisite training responsibilities should be overseen by a central, responsible authority such as the Commission. United, however, does not believe that this recommendation will be effective since it is unsure that the Commission has the authority to regulate the activities of non-LEC personnel. Ohio Bell, likewise, questions how the Commission can establish certification criteria to allow protector access and how the criteria can be enforced.

Commission Guidelines on Protector Access

The Commission finds that non-LEC personnel should not be permitted to access the protector because of the primary concern that human injury due to electrical shock may result from an unqualified person working with the protector. [*26] The Commission agrees with those commentors who stated that it would be most difficult to establish and enforce criteria which certifies individuals as qualified for protector access. Although OCC's suggestion of providing information in telephone directories and Beeson's suggestion of creating a questionnaire would be informative in nature, the Commission does not believe that it would be effective in actually preventing the likelihood of human injury due to electric shock. The FCC, in CC Docket No. 79-105 and CC Docket No. 81-216, similarly concluded that the private benefits derived from permitting customers to access the protector and its grounding are exceeded by the public detriment of increased risk of harm or damage to persons and property.

The Commission is also concerned about the possibility of harm to the network if non-LEC access to the protector is permitted. The protector is owned and maintained by the LEC and is located on the LEC's side of the demarcation point. The demarcation point represents the location of interconnection between the telephone company's communication facilities (network) and the property owner's or subscriber's facilities. The Commission [*27] agrees that non-LEC access

to the protector will only result in confusion regarding liability for damages arising from improperly maintained protectors. The Commission concurs with the FCC's initial conclusion, in CC Docket No. 81-216, Memorandum Opinion and Order released July 12, 1985, that access to the protector poses a potential harm to the network that justifies, at a minimum, reserving access to the protector on the telephone side of the demarcation point to the LEC alone. If a subscriber proceeds to access the protector on his/her own initiative, the Commission finds
that the LEC will not be held accountable for erroneous wire procedures at the protector resulting from such access.

OCC, particularly, objected to subscribers being inconvenienced by having to schedule and wait for LEC premise visits providing protector access. The Commission, at this time, is unaware of customer complaints regarding this issue and, therefore, concludes that this concern does not warrant granting protector access.

The Commission finds that Beeson raises a valid concern in relation to the maintenance of that portion of wire between the protector and the NID which cannot be tested by non-LEC [*28] personnel for service difficulties. Therefore, the Commission finds that at any location where a NID has been properly installed, regardless of who installed it, the LEC should be responsible for the maintenance of that portion of wire between the NID and the protector.

C. Installation of NIDs

The Commission, in its Entries of July 16, 1987, March 27, 1990, and July 8, 1993, requested comments regarding the issue of whether universal installation of NIDs by LECs should be required.

A NID is defined as a standard jack located within 12 inches of the protector. It allows subscribers access to the LEC's network for the purpose of providing a convenient testing point to determine on which side of the demarcation point service problems exist. The demarcation point, as previously defined, is the point of interconnection between the telephone company's communications facilities (network) and the property owner's or subscriber's facilities. In some instances, the NID and protector are located in one common housing.

Beeson contends that the Commission should require that the installation of NIDs and protectors be contained in one common unit, thereby eliminating the need to test [*29] the span of wire between the protector and a NID. Beeson also believes that these common units should be installed at no charge to any subscriber who desires one. Likewise, OCC maintains that, absent non-LEC protector access, NIDs should be timely installed upon a customer's request. The cost of these installations should be accounted for below-the-line for ratemaking purposes, and the Commission should require LECs to provide notice to their subscribers of the availability of NID installations.

OTA contends that mandatory installation of NIDs is not necessary since most LECs voluntarily install these devices during new installations and premise visits. OTA alleges that those customers subscribing to LEC wire maintenance programs have no immediate need for a NID because diagnosis and repair of wire

are covered by the plan regardless of which side of the demarcation point the problem lies. OTA does recognize, however, that NIDs are the best means of allowing subscriber access to the phone network through the effective separation of inside and network wire, and to provide for effective testing to identify trouble. OTA and GTE further believe that LECs should be afforded the option [*30] to adopt a phase-in approach to the installation of NIDs as determined on a company-by-company basis rather than mandatory retrofitting of all residential subscribers and small businesses with a NID.

Ohio Bell opposes a requirement that LECs universally install NIDs free of charge at the premise of every subscriber. Ohio Bell maintains that such a requirement is unnecessary since it already does not charge for NIDs at new installations and, further, does not charge the subscriber for a repair visit at an existing site if there is no NID, no maintenance plan enrollment, and the trouble is located on the subscriber side of the demarcation point. Under these circumstances, both Ohio Bell and United state that it will install a NID at no charge and advise the customer of their options to repair the inside wire. If a subscriber is enrolled in an inside wire maintenance plan and a problem is diagnosed on the customer's side of the demarcation point, no service charge will be incurred by the subscriber; however, the company will not install a NID at that time.

Many of the local exchange companies indicated that they will demonstrate the appropriate usage of the NID at the time of installation. [*31] GTE stated that written instructions regarding NID usage are also left with the subscribers.

Cleveland maintains that the Commission should require LECs to provide free installation of NIDs upon receiving a trouble call from a subscriber. Cleveland further proposes that, regardless of whether a subscriber chooses a maintenance plan, if a NID is not in place, an inside wire problem should be corrected at no charge to the subscriber.

OCC contends that implementation of NIDs alleviates safety and technical concerns regarding protector access, and resolves a major inability for the LECs' competitors to provide inside wire maintenance services. The NID allows customers to determine, without having to access the protector, whether a service difficulty concerns the inside or outside wire. In the absence of a NID, OCC contends that a subscriber, not being able to detect where the problem is, will call the LEC and hope that the problem is in the outside wire, thereby resulting in no service charge. OCC further states that, in the absence of a NID, and particularly if protector access is limited to LEC personnel, no competitor of the LEC would be able to complete a job requiring protector [*32] access. Therefore, OCC believes that a NID should be installed free of charge during each premise visit regardless of whether the customer subscribes to a maintenance plan.

Commission Guidelines on the Installation of NIDs

The FCC, in its Report and Order released on June 14, 1990, in CC Docket No. 88-57, found that any risk of harm to the network is outweighed by the customer benefits associated with permitting customers or their agents to connect simple inside wire to the LEC's network by installing a standard jack or NID. The Commission concurs with the FCC's finding and believes that a standard jack or

NID can be installed by the subscriber or a non-LEC entity. The Commission also agrees with the commenting LECs and OTA that it would be unduly burdensome, both economically and administratively, to require LECs to install NIDs at all embedded inside wire locations. However, the Commission recognizes that NIDs provide for a more defined demarcation point which allows for convenient testing points and enables defective wire to be readily disconnected from the telephone network. Therefore, rather than requiring the universal deployment of NIDs, the Commission will require [*33] LECs to install NIDs free of charge at new installations, as well as during premise visit, regardless of customer subscription to a LEC-provided maintenance agreement. In the event of an emergency which would not allow time for a NID installation during a premise visit, the LEC should return within a reasonable time period to install a NID free of charge. All costs associated with these installations shall be accounted for above-the-line as a regulated activity, since NIDs installed by LECs will continue to be part of the LECs' networks. Although the Commission would encourage LECs to do so whenever possible, it will not require NIDs and protectors to be contained in common housing.

In the event a subscriber requests that a specific trip be made to his/her premise solely for the installation of a NID, and absent any service difficulties, the LEC should charge the subscriber for the involved labor at its existing company-specific tariffed rates. All revenues and costs associated with these installations should be accounted for above-the-line as a regulated activity, since, as stated previously, NIDs installed by LECs will continue to be part of the LECs' networks. Correspondingly, [*34] LECs should retain ownership and maintenance of the NIDs they install, in addition to maintenance responsibility for the wire between the NID and the protector. As previously stated, although the FCC, in its Report and Order, in CC Docket No. 88-57, has now permitted non-LEC entities to install NIDs, the Commission assumes that the FCC, unless stating otherwise, intended for the LEC installation of these devices to remain regulated.

The Commission concludes that the subscriber or property owner should be responsible for the proper installation and maintenance of those NIDs not installed by LECs. However, the Commission will still hold LECs responsible for the wire between the NID and the protector at embedded simple inside wire locations, since neither subscribers nor property owners are capable of adequately testing for service difficulties on this portion of wire. Non-LEC installed NIDs must, however, be installed in accordance with the FCC's Rules and Regulations. In the event they are not, the Commission may not hold LECs responsible for the maintenance of all of the wire up to the protector.

D. LEC Policy Regarding Diagnostic Charges Assessed to Subscribers Not Subscribing [*35] to a LEC-Provided Maintenance Agreement

In its December 16, 1986 Finding and Order in this proceeding, the Commission recommended that certain operating procedures be followed by LECs in providing diagnostic services to subscribers, regardless of whether they are enrolled in a maintenance plan.

The Commission, in its Entry of March 27, 1990, requested that the LECs provide an update regarding their policy concerning diagnostic charges. Staff, in the Commission Entry of July 8, 1993, issued a proposed recommendation regarding LECs charging for diagnostic services which required that LEC premise

visits for determining whether service difficulties exist with network wire or inside wire shall be provided to subscribers free of charge in the event that a NID is not in place. The costs associated with this service would be accounted for above the line as a regulated activity. Staff's proposal would allow LECs to assess a premise visit charge in those cases where the problem is found to exist on the customer's side of the demarcation point and the subscriber has a NID in place but refuses to utilize it. The proposed recommendation also required that, prior to actually performing [*36] a premise visit, LECs must
explain the customer responsibilities along with the necessary instructions concerning inside wire diagnostic testing. Finally, staff recommended that LEC premise visits for inside wire diagnostic services, regardless of a NID being in place, should be considered a tariffed regulated activity and accounted for above the line.

In response to the Commission's inquiry, United maintains that it has already adopted the operating procedures as proposed by the staff in the Commission's July 8, 1993 Entry. OCC, OTA, ALLTEL, and GTE have also indicated their support for the proposed procedures.

In its response to the Commission's Entry of July 8, 1993, Ohio Bell, stated that, if trouble is eventually found on the customer's side of the demarcation point and the customer does not have a maintenance agreement, a non-tariffed service charge will be assessed for any customer refusing to use his/her NID to identify the problem since Ohio Bell believes that this diagnosis is a competitive service. Furthermore, an additional non-tariffed charge will be assessed if the subscriber requests the problem to be corrected. If the subscriber does not have a NID and no maintenance [*37] plan enrollment, there is no charge for the repair visit. Cincinnati Bell presently charges for diagnostic premise visits if the difficulty exists on the customer's side of the demarcation point regardless of whether a NID is in place.

Beeson, in its response to the Commission's Entry of March 27, 1990, concurred in the belief that, in the absence of a NID, LEC diagnostic services should be provided free of charge. Commission Guidelines on Diagnostic Services Where There is No Maintenance Agreement

If a NID has not been installed in a location experiencing service difficulties, and absent non-LEC protector access, the subscriber or property owner is often unable to determine which side of the demarcation point the service problem exists. Therefore, the Commission concludes that each LEC should be required to adopt a policy whereby in the event a NID is not in place, LEC premise visits for the purpose of determining whether service difficulties exist with network wire or inside wire shall be provided free of charge to the subscriber. The costs associated with the provision of this service shall be accounted for above-the-line as a regulated activity. The LECs should provide [*38] the Commission's Utilities Department for review, a description of the operational accounting process to be utilized to carry out this directive.

In the event, however, the subscriber has a NID in place, with no inside wire maintenance agreement, and affirmatively refuses to utilize the NID to locate service difficulties, the Commission agrees with those commentors who advocate that the LECs be permitted to assess a premise visit charge in those cases where the problem is found to exist on the subscriber's side of the demarcation point.

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It is unrealistic to require LECs to perform premise visits free of charge when the subscribers or property owners have the means available to diagnose their potential inside wire difficulties. It is imperative, however, that the LECs explain in full detail to each subscriber, at the time the subscriber calls for service and before a service vehicle is dispatched, his or her responsibilities concerning inside wire diagnostic tests. This includes explaining the potential applicable charges if the subscriber refuses to perform these tests. The LEC must be able to inform the subscriber whether a NID is located on the premise for diagnostic testing. [*39] If the company does not know if a NID is present, then diagnostic services must be provided at no charge in accordance with this Order. If a subscriber with a NID and no inside wire maintenance agreement incorrectly uses the NID or incorrectly diagnoses the problem, after being fully explained his/her responsibilities, the LEC may charge a company-specific tariffed premise visit charge.

If the customer is a party to a LEC inside wire maintenance agreement, no separate premise visit charge should be assessed for attempting to isolate the inside wire trouble and the customer may be entitled to further trouble isolation and/or repair provisions as specified in the maintenance agreement.

LEC premise visits for inside wire diagnostic services, even where a NID is in place, shall be considered a regulated activity and accounted for above the line. This will enable the Commission to ensure that LECs are providing adequate information regarding customer responsibilities for inside wire diagnosis and that all LECs are offering customers sufficient information in order to perform their own inside wire diagnostic tests even with the existence of a NID. The companies should provide the [*40] Commission's Utilities Department with a written description of how they will implement this directive including the appropriate operational accounting process and customer education information.

The aforementioned Commission guidelines on diagnostic services amend those recommendations previously stated on pages 9 and 10 of the Commission's Finding and Order of December 16, 1986.

E. Deregulation of House Cable and Wire Between Buildings Crossing Public Thoroughfares

The Commission, in its Entries of July 16, 1987, and March 27, 1990, requested comments regarding the issues of whether the Commission should deregulate the installation and maintenance of house cable and under what circumstances the Commission should permit the non-LEC installation of cable/wire crossing a public thoroughfare. House cable, also known as riser cable, is defined as the vertical wiring serving the individual floors of multi-tenant structures.

OTA maintains that house cable should only be deregulated on a case-by-case, company-specific basis. OTA alleges that deregulation of house cable would allow customers/property owners free access to this equipment thereby prohibiting LECs from being able [*41] to protect the security and reliability of the service provided to their customers. OCC agrees that deregulation subjects subscribers in multi-tenant buildings to potential inconvenience, confusion, and unwarranted impositions where one subscriber's service problem could become another subscriber's service problem.

The Commission in its Entry of March 27, 1990, also inquired as to the circumstances under which the Commission should permit the installation by non-LEC personnel of cable/wire between two buildings crossing a public thoroughfare. A public thoroughfare is defined as any street or highway governed by a state, county, or other local authority, which requires an inside wire vendor to first obtain a "right of way" prior to being permitted to cross the thoroughfare with its equipment or facilities. Beeson believes that non-LEC personnel should not be permitted to install cable/wiring crossing public thoroughfares, but that non-LEC personnel should be permitted to install cable/wire between buildings on private property. DOD believes, on the other hand, that the Commission should permit non-LEC personnel to install wire required by the property owner to obtain service. [*42] OCC maintains that questions involving attachments to LEC facilities, regardless of whether they cross streets or roads, should continue to be governed by company tariffs. OTA and United believe that the Commission does not have the authority to allow others to install cable/wiring across public thoroughfares. United contends that only telephone, telegraph, and electric utilities have been granted statutory authority to install and maintain cable/wiring crossing public thoroughfares.

In response to the Commission's July 8, 1993 Entry requesting additional comments on this matter, most LECs and OTA indicated that they are in general agreement with Staff's proposals regarding house cable and wire crossing public thoroughfares.

OCC believes that grave public safety concerns would arise if house cable and wire crossing public thoroughfares were deregulated. Cincinnati Bell states that it is not aware of any public safety concerns that would arise if house cable and wire crossing public thoroughfares were deregulated, provided proper safety procedures are followed. Ohio Bell does not foresee any public safety concerns provided applicable building codes and the National Electric Code [*43] are followed.

At the Commission's Oral Arguments held on October 5, 1993, GTE and Ohio Bell indicated that confusion may have existed with some of the commenters as the combination of terms in the title of this section might have suggested that house cable could cross public thoroughfares, which is not the case. Finally, the majority of the LECs indicated there is significant competition in the provision of these services to warrant, upon an individual LEC request, the deregulation of wire crossing public thoroughfares. The LECs did not specifically quantify, however, the level or extent of the competition within their respective service territories for the provision of this service.

Commission Guidelines Regarding the Deregulation of House Cable

The FCC's rules adopted in its Report and Order released on June 14, 1990, in CC Docket No. 88-57, have afforded LECs the option to relocate the point of demarcation point to the minimum point of entry at new multi-unit installations existing after July 15, 1990, including additions, modifications, and rearrangements, based on the LEC's reasonable and nondiscriminatory practices. The minimum point of entry, as defined by the [*44] FCC, is either the closest practicable point to where the wire crosses the property line, or the closest practicable point to where the wire enters the multi-unit building or

buildings. If the LEC does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multi-unit premise owner shall determine whether there shall be a single demarcation point location for all customers or separate such locations for each customer. In the event there are several points of demarcation within the multi-unit premise, the FCC prohibits the location to exceed further inside the premise than a point twelve inches from where the wire enters the customer's premise.

As a result of the FCC's June 14, 1990 decision in CC Docket No. 88-57, house cable installed after July 14, 1990 has been effectively deregulated provided a LEC elects to place the point of demarcation at the minimum point of entry at a multi-unit location. As the FCC's CC Docket No. 88-57 rules and regulations afford the LECs with several options as to where the demarcation point is located, each LEC is required to provide to the Telecommunications Division of the Commission's Utilities Department [*45] by November 1, 1994, a general description of the location of its demarcation point in multi-unit installations (i.e., at the property line, at the minimum point of entry at the building, or at the premise owner's discretion). In the event a LEC selects the property line as the applicable demarcation point, the company shall explain in its filing, as to where the necessary grounding will occur and how customers/property owners will secure access to the LEC's network. LEC maintenance of all house cable installed prior to July 15, 1990, shall continue to be provided at the company's tariffed labor rates for that service. If the LEC chooses the property line or the minimum point of entry as the demarcation point, then maintenance of house cable installed after July 15, 1990, shall be provided on a deregulated basis, in accordance with the FCC's June 14, 1990 decision in CC Docket 88-57. If the LEC does not select the property line or the minimum point of entry as the demarcation point, thereby permitting the landlord to determine the location of the demarcation point, the maintenance of any house cable installed after July 15, 1990 as well as any wire up to the demarcation point [*46] established by the landlord, shall be the responsibility of the LEC.

Commission Guidelines Regarding the Deregulation of Wiring Between Buildings Crossing Public Thoroughfares

Consistent with the Commission's policies established in its Alternative Regulation investigation, Case No. 92-1149-TP-COI, the Commission will determine if a LEC's installation and maintenance of wire crossing public thoroughfare should be detariffed upon the individual LEC's request. Large LECs (i.e., those over 15,000 access lines) are permitted to submit such a request, and the necessary supporting information, as part of an alternative regulation plan. The burden of proof shall be placed upon the LEC to demonstrate that sufficient competition exists in the provision of these services before the Commission will approve such a request. Absent Commission approval of these detariffings, the LEC's maintenance and installation of wiring crossing public thoroughfares shall be provided at the company-specific tariffed labor rate.

F. LEC-Provided Maintenance Agreement Limitations

The Commission, in its Entries of March 27, 1990, and July 8, 1993, requested comments regarding the issue of the existence [*47] of limitations present in inside wire maintenance plans and the manner in which these limitations are enforced. Many of the commenting LECs in addition to OTA believe that inside

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wire maintenance is presently competitive and, therefore, Commission established customer notice requirements and Commission established refund/cancellation policies are inappropriate, unnecessary, and burdensome. Cincinnati Bell and OTA both assert that appropriate customer protection is already in place and, therefore, they do not approve of the customer notice procedures proposed in Appendix B of the Commission's July 8, 1993, Entry or the submission with staff of maintenance plans and promotional materials prior to their issuance. If a customer notice is required, Cincinnati Bell recommends that it be sent out once a year to all subscribers enrolling in inside wire plans rather than at the
time that each individual subscriber enrolled in an inside wire maintenance plan.

GTE and United do not utilize a 30-day waiting period for inside wire maintenance services. GTE is not in favor of a 30-day "cooling off" period since it creates the potential for the company providing free maintenance service if [*48] the subscriber subsequently cancels. United does not believe that a "cooling off" period is necessary since inside wire maintenance plans are not expensive offerings that are marketed in a high pressure manner.

Ohio Bell requires a 3-day waiting period for existing customers and no waiting period for new or relocated customers. Ohio Bell is not in favor of a 30-day waiting period/30-day "cooling off" period because the waiting period would punish all subscribers due to a few abusers and the "cooling off" period would encourage abuse. All commenting LECs state that they will maintain inside wire regardless of who provides the installation. However, some companies, such as ALLTEL, GTE, United, and Ohio Bell, indicate that their maintenance plans do not cover any portion of inside wire which has been improperly installed or maintained by entities other than the LEC. Cincinnati Bell avers that their maintenance plans cover inside wire regardless of whether it has been improperly installed or maintained. Cincinnati Bell and ALLTEL state that a 30-day waiting period is required before its inside wire maintenance agreement takes effect in order to prevent a subscriber with an inside [*49] wire problem from subscribing to the wire maintenance plan solely to avoid the more expensive and less convenient repair alternatives. There is no waiting period for those customers establishing service for the first time. Cincinnati Bell represents that it is always educating its customers about their rights and responsibilities for the installation of inside wire. All of the commenting LECs indicated that they do not maintain written maintenance agreements but primarily enroll subscribers based on a verbal commitment

OCC and Cleveland both recommend that measures be taken to eliminate subscriber confusion regarding the specific circumstances under which the LEC is or is not responsible for the repair of the wire. Specifically, OCC argues that all maintenance agreements should be in writing with the coverage provisions stated in plain english. OCC contends that the inside wire maintenance plan promotional materials presently distributed by the LECs do not fairly explain the various repair options available to the subscriber. OCC agrees with Cincinnati Bell's practice of repairing all inside wire under LEC-provided maintenance agreements, even if the inside wire was previously [*50] improperly installed or maintained by other entities. OCC contends that it is unfair for the LEC to accept a subscriber into a plan and then, when a problem arises, inform the customer that there is no coverage for the improperly installed or maintained inside wire. Alternatively, OCC believes the LECs

should be required to refund all maintenance plan charges paid at the time the repair is denied. Cleveland cites the failure of many LECs to maintain improperly installed inside wire as indicative of the need for the Commission to regulate maintenance plans. Also, OCC recommends that subscribers be provided with a two-week "cooling off" period after enrollment during which the plan could be cancelled without charge. OCC agrees with the customer notice procedures proposed in Appendix B of the Commission's July 8, 1993 Entry, and believes that all maintenance plans and promotional materials should be docketed with the Commission and open to public comment prior to their issuance.

Commission Guidelines on LEC-Provided Maintenance Agreement Limitations

The Commission finds that, if a LEC provides inside wire maintenance agreements, they should be offered to all customers of the [*51] same class of service regardless of who installed the inside wire. The Commission concurs with the LECs, however, that LECs should not be held responsible for the repair of inside wire installed by a non-LEC entity which was not provided in accordance with Part 68 of the FCC Rules and Regulations and the National Electric Code. In order to avoid the potential for subscriber confusion, all LECs shall be required to clearly state this limitation, if pertinent, in all communications with the subscriber regarding subscription to inside wire maintenance agreements, including the customer notice provided for in Appendix A.

The Commission recognizes OCC's concern that some of the inside wire maintenance plan promotional materials distributed by the LECs may not fairly explain the various repair options available to the subscriber. Therefore, all promotional materials related to maintenance agreements provided by the LEC must be in writing and incorporate the requisite provisions stated herein. Additionally, each LEC providing an inside wire maintenance plan is required to provide a customer notice to its subscribers as provided for in Appendix A of this order. Each LEC shall provide [*52] copies of the proposed customer notice to the Commission's Consumer Services Department and OCC, as well as any other future inside wire marketing materials, 30 days in advance to its being issued by the company to subscribers.

Beginning December 1, 1994, all inside wire maintenance plan enrollment shall occur on a positive enrollment basis via a ballot which should be submitted to the Commission's Consumer Services Department for review 30 days in advance to its being issued by the company to subscribers. The Commission intends through these requirements to establish more uniform maintenance agreement provisions and, thereby, reduce some of the subscriber confusion which exists concerning these inside wire agreements and allow the subscriber to make an educated choice regarding inside wire repairs.

Further, as suggested by OCC, LECs must refund to its customers, any prior inside wire charges whenever a repair is denied for improper installation. The Commission does not, however, favor a required "cooling off" or waiting period after enrolling in an inside wire service agreement. The Commission agrees with these LECs which are concerned that such requirements may not be responsive [*53] to their customers' needs. Finally, inside wire maintenance plans should be offered on a month-to-month basis with the opportunity for the subscriber to cancel enrollment at anytime without being subject to a penalty charge.

G. Regulation of Charges and Revenues Related to LEC-Provided Inside Wire Maintenance Agreements

The Commission, in its Entries of March 27, 1990 and July 8, 1993, requested comments regarding the possibility of the regulation of the charges and revenues related to LEC-provided inside wire maintenance plans and alternatives to regulation.

ALLTEL, Cincinnati Bell, GTE, United and Ohio Bell all aver that competition exists for the provision of LEC maintenance plans. Competitive substitutes referred to by the LECs include the hiring of an electrician, the customer performing the work himself/herself, or retaining the LEC on a time and materials basis and putting aside a little money each month or taking out a loan to pay for the inside wire repair.

ALLTEL, GTE, Ohio Bell, Cincinnati Bell, United and OTA strongly argue against regulation of inside wire maintenance agreements through the establishment of price limits, the imputation of maintenance plan revenues [*54] to regulated rates, or the required filing of customer notices. United believes that a competitive marketplace will provide the necessary pricing discipline and the appropriate consumer response to those services not needed or wanted. GTE, Ohio Bell, and United allege that the Commission's objective to create a competitive environment has been achieved as evidenced by the number of competitors advertising in telephone directories. Ohio Bell urges that the Commission not place harsher restrictions on deregulated inside wire maintenance than the requirements it has placed on detariffed competitive telecommunication services in Case No., 89-563-TP-COI.

GTE believes that requiring imputation of maintenance plan revenues to regulated rates would be inequitable since the LECs competitors would not have the same requirements placed on them. Cincinnati Bell asserts that such imputation should not occur since regulated services already benefit from unregulated services due to economies of scope, economies of scale, and by allocations of joint and common costs.

In response to the Commission's inquiries concerning existing cost allocation safeguards between regulated and deregulated accounts [*55] for the LEC provision of inside wire services, all commenting LECs stated that they comply with Part 64 of the FCC Rules. In addition to utilizing Part 64, CBT states that it further utilizes allocation studies and time reporting procedures to ensure that ratepayers do not finance new unregulated ventures. GTE submits that its above-the-line and below-the-line business activities are allocated via GTE's cost allocation manual which was reviewed by the Commission during the company's last rate case. GTE further asserts that the application of any unregulated profits or losses to a regulated ratemaking process creates an uneconomic subsidy and would contradict the FCC's goal of financially separating the two businesses. United states that the use of a fully allocated costing methodology benefits local ratepayers by assuring that a portion of United's fixed costs is passed on to the deregulated venture in accordance with FCC guidelines.

Contrary to the LECs' position, Beeson, OCC, and Cleveland all contend that there is currently no competition in the provision of inside wire maintenance

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plans and that the availability of non-LEC providers of inside wire installation and maintenance [*56] cannot be considered as competition for LEC-provided service agreements. These entities allege that the LECs, unlike non-LEC providers, can capitalize on their position as the provider of local service in order to market their inside wire maintenance agreements. They believe that, because no effective competition exists, maximum limits need to be established on monthly charges for inside wire maintenance plans. OCC believes that, in order to determine the appropriate price ceilings, the Commission should order a utility cost-of-service review which includes costs, revenues, and profits, as well as inside wire statistics such as the frequency of repair. In addition, OCC advocates that a $ 5.00 ceiling be established for sign-up fees and that the Commission require a contribution of revenues from the below-the-line accounts to regulated services in order to reduce the deficiencies associated with this deregulation. Cleveland believes that the specific revenue and costs associated with inside wire maintenance plans can only be determined after discovery is permitted and hearings are held, thereby permitting the Commission to determine whether the accounting methods adopted by the [*57] LECs truly reflect the resources used by the companies in performing inside wire repair and the solicitation of maintenance agreements.

Commission Guidelines on Regulation of Charges and Revenues Related to LEC-Provided Inside Wire Maintenance Agreements.

After reviewing the comments filed by the various commenters, the Commission does not believe that it is appropriate at this time to make a further determination on this issue. Therefore, the regulatory guidelines stated in the Finding and Order of December 16, 1986, shall continue to be in effecting relation to the regulatory treatment of the charges and revenues related to LEC-provided inside wire maintenance agreements.

III. Conclusion.

The Commission has reviewed the present state of inside wire and examined some of the technical issues associated with the deregulation of inside wire. Upon examining the comments filed by the various entities, the Commission is now able to establish policy directives, as delineated above, concerning the relinquishment/ownership of inside wire, protector access, installation of NIDs, diagnostic charges assessed to customers not subscribing to a LEC-provided maintenance agreement, [*58] deregulation of house cable and wire between buildings crossing public thoroughfares, and LEC-provided maintenance agreement limitations.

Regarding the issue of ownership and maintenance, the Commission concludes that total relinquishment of inside wire by the LECs will not be required at this time. Maintenance responsibility should be left to individual agreements or contracts between landlords and their tenants.

Regarding the issue of protector access, the Commission concludes that non-LEC personnel should not be allowed to access the protector. In addition, at any location where a NID has been installed, regardless of who installed it, the LEC should be responsible for the maintenance of that portion of wire between the NID and the protector.

Regarding the issue of NID installation, the Commission concludes that LECs

should install NIDs free of charge at all new installations, as well as during any premise visit. In the event a subscriber specifically requests the installation of a NID, the LEC should charge the subscriber for the involved labor at its existing tariffed rate. The subscriber or property owner is responsible for the proper installation and maintenance of those [*59] NIDS not installed by LECs.

Regarding the issue of LEC diagnostic charges, the Commission concludes that the LEC must be able to inform the subscriber whether a NID is located on the premise for diagnostic testing. If the company does not know if a NID is present, then diagnostic services must be provided at no charge. In addition, if a NID is not in place, LEC diagnostic premise visits to home shall be provided free of charge. If a subscriber has a NID and either refuses to utilize it or incorrectly uses the NID after being fully explained his/her responsibilities, the LEC may charge a tariffed premise visit fee.

Regarding the issue of the deregulation of house cable the Commission concludes that, due to the FCC's relocation of the point of demarcation between inside wire and network wire, house cable has already been effectively deregulated on an ongoing basis and, therefore, no further Commission action is necessary at this time. Each LEC is required to file in this docket, within 45 days of this Supplemental Finding and Order, a description of its location of the demarcation point in multi-unit installations existing after July 1990. Regarding the issue of the deregulation [*60] of wire between buildings crossing public thoroughfares, the Commission does not believe that an adequate amount of information has been provided to warrant industry-wide deregulation.

Regarding the issue of LEC-provided maintenance agreement limitations, the Commission concludes that such maintenance agreements should be offered to all customers regardless of who installed the inside wire. LECs should not, however, be held responsible for the repair of inside wire installed by a non-LEC entity which was not provided in accordance with Part 68 of the FCC Rules and Regulations and the National Electrical Code. LECs must refund to customers, any prior inside wire charge whenever a repair is denied for improper installation. Beginning December 1, 1994, LECs shall only enroll subscribers in such plans via a ballot reflecting the subscribers' positive enrollment. Each LEC providing an inside wire maintenance plan is required to provide customers notice to its subscribers as provided for in Appendix A.

Regarding the issue of regulating charges and revenues related to LEC-provided inside wire maintenance, the Commission does not believe it is appropriate at this time to make a further [*61] determination on this issue.

By November 1, 1994, each LEC is required to provide to the Telecommunications Division of the Commission's Utilities Department, a general description of the location of its demarcation point in multi-unit installations. In the event that the LEC selects the property line as the applicable demarcation point, the company shall explain in its filing, as to where the necessary grounding will occur and how customers/property owners will secure access to the LEC's network. In addition, each LEC should provide the Commission's Utilities Department for review, on or before November 1, 1994, a description of the operational accounting process and customer education information to be utilized in order for the company to comply with the Commission's directives pertaining to diagnostic services provided to the

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subscriber.

Each LEC shall provide the Commission's Consumer Services Department and OCC with all maintenance agreements, promotional materials related to maintenance agreements, customer notices as provided for in Appendix A, customer ballots, as well as any other future updates of these materials, 30 days in advance to being issued by the company to [*62] subscribers.

As a final matter, as reflected in Appendix B to this order, the staff has significant concerns about the telemarketing practices of inside wire maintenance plans by the LECs. The staff's proposal on how to eliminate this concern in the future is likewise contained in Appendix B to this order. Accordingly, at this time, the Commission invites all stakeholders and interested entities to submit comments to the Commission in this docket on the staff's proposal contained in Appendix B. Initial comments must be filed by October 17, 1994, and the reply comments must be filed by October 31, 1994. Upon receipt of the initial comments, an Attorney Examiner's Entry will be issued directing the commentors to serve copies of their initial comments on all other commentors and setting forth a list of those who have filed initial comments. Those entities filing reply comments must serve copies of the reply comments on all entities which filed initial comments.

It is, therefore,

ORDERED, That the various inside wire issues referenced herein be treated in accordance with the guidelines set forth in Section II of this Supplemental Finding and Order. It is, further,

ORDERED, That [*63] those LECs providing telephone service within the state of Ohio shall submit to the Commission staff the requisite information in accordance with the provisions set forth in Section II of this Supplemental Finding and Order. It is, further,

ORDERED, That all interested entities are invited to file, in this docket, comments and reply comments to the proposal set forth in Appendix B by October 17, 1994, and October 31, 1994, respectively. It is, further,

ORDERED, That a copy of this Supplemental Finding and Order be served upon all local exchange companies subject to the jurisdiction of this Commission and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

APPENDIX A

The following is the Commission's inside wire customer notice requirments. The Commission maintains that all local exchange companies (LECs) in the state of Ohio should issue their customer notices by direct mail to all new and relocating subscribers after applying for service and on a one-time basis to all existing subscribers.

The Commission stresses that the customer notice is intended to be strictly informational and must be written in plain, easy-to-understand language. Moreover, [*64] the Commission stresses that the customer notice is not

intended to be used to promote enrollment into any of the companies' inside wire maintenance plans. To ensure that each LEC's notice meets or exceeds the following parameters, each LEC must submit its customer notice, within 45 days of this order, to the Commission's Consumer Services Department, Public Interest Center for review and approval. All subsequent modifications of the company's notice must also be submitted to the Commission's Consumer Services Department, Public Interest Center for its review and approval prior to being sent to customers. Finally, all oral representations by a LEC regarding inside wire maintenance plans, all company training materials utilized by company personnel,
and all inside wire information provided in the company's telephone directory shall be consistent with the guidelines delineated in Appendix A.

SECTION I

INTRODUCTION - CUSTOMER RESPONSIBILITY AND OPTIONS

A LEC shall be required to inform its customers, in detail, of the customer rights, responsibilities, and options concerning the repair and maintenance of inside wire and customer premise equipment (CPE). Specifically, subscribers [*65] shall be informed by the companies, in plain English, of the definition of inside wire and CPE, and further inform customers of their responsibilities concerning the maintenance of inside wire and CPE. Subscribers shall also be informed of their options concerning the maintenance and repair of the inside wire. Such options include the following: the subscribers may repair the wire, the subscribers may hire an independent contractor to provide the service on a time and materials basis, the subscribers may hire the LEC to repair the wire on a time and materials basis, or the subscribers may enroll in a LEC-provided maintenance plan. Furthermore, this mailing must inform subscribers of the LEC's obligation to repair, at no charge, service difficulties not associated with CPE or inside wire. If pertinent, the LECs must explain that its maintenance agreement does not provide coverage for the repair of inside wire installed by a non-LEC entity not in accordance with Part 68 of the FCC Rules and Regulations and the National Electric Code. Finally, the LECs shall explain that responsibility for the maintenance of inside wire is left to individual agreements or contracts between landlords [*66] and their tenants, in addition to the application of local property law. Therefore, tenants should be advised to contact their landlord first for repar service, prior to contacting the company.

SECTION II

NETWORK INTERFACE DEVICES (NIDS)

Each LEC, in this portion of its mailing, shall be required to inform its customers of the location of a NID and its proper use to identify service difficulties on the customer's side of the demarcation point. The mailing shall also explain, in detail, that a NID creates a defined point of demarcation between network and inside wire and, when utilized properly, will assist the subscriber in determining if service difficulties exist with the inside wire. The mailing must explain where the NID is located in both multi-unit and single unit dwellings, and that all dwellings built as of December 31, 1987, will have a NID. Finally, customers shall be informed in this section of the customer notice, that, if they do not have a NID and desire one, they may install a NID

themselves, or hire the LEC or an independent contractor to install one for them. The customers should be informed that, if they choose to install the NID themselves, they will be [*67] responsible for the proper installation and maintenance in accordance with the FCC's Rules and Regulations.

SECTION III

CUSTOMER TROUBLE REPORTS

Each LEC, in this section of its customer notice, shall be required to inform customers that, if a NID is not in place and the LEC's customer cannot ascertain with certainty that the service difficulty is located on the customer's side of the demarcation point, the LEC is required to come to the home at no charge to diagnose the problem, and is further required to install a NID at no charge during this premise visit. Finally, the LEC is required to reiterate to customers the repair options available (i.e., repair the problem themselves, hire an independent contractor, or pay the local exchange company to repair the inside wire service difficulty).

APPENDIX B

During the last several years, the Public Interest Center (PIC) has received over 100 contacts regarding inside wiring. Initially, the majority of the contacts centered around customers' confusion about the changes in inside wiring maintenance and their "new" responsibility. Customers also expressed their uncertainty as to the level of protection the inside wire maintenance [*68] programs provided them. This uncertainty was demonstrated in the many questions PIC received about whether repair work or installation of telephone jacks was covered by inside wire maintenance plans.

Customers have also expressed concern about increases in their inside wire maintenance plan costs and were unhappy that the Commission no longer regulated those costs. They were unsure whether to upgrade to a different level of protection, to keep the same level, or to discontinue their plans. Many were upset that the Commission could not advise them in their decisions. PIC also received questions regarding the ownership of wiring in apartment complexes; specifically, customers wanted to know who was responsible for inside wire repairs. Overall, customers appear confused as to when the company's obligations end and their obligations begin.

Since early 1993, Staff has monitored hundreds of calls received by residence business office representatives. All of the residence business offices from the large local exchange companies (LECs) have been visited at least once, and staff encountered problems with inside wire marketing at most of these companies. In the course of monitoring [*69] the performance of the residence business offices of the LECs, staff has encountered misleading marketing practices in the offering of inside wire maintenance plans to consumers. These misleading sales practices occurred most often during telephone conversations between LEC residence business office representatives and customers who were ordering new service, requesting additional services, or making billing inquiries.

An example of the inside wire marketing practices staff is concerned about is the overselling of maintenance plan features as proffered by one of the large LECs. The following language is from a LEC training manual concerning inside

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wire maintenance plans: Items 2 and 6 under "Suggestions to recommend and/or overcome objections" are troublesome:

2. Our repair department is available to you 24 hours a day, seven days a week. With [maintenance plan X] we will be able to diagnose your problem whenever you need us and without the concern of a high service charge.

6. The apartment complex may say they will be responsible for the repair. Please remember that when charges are billed, they are billed to you. We are also available for you 24 hours a day. Most maintenance [*70] people are not prepared to make repairs within 24 hours. Let us take those worries out for you by setting up the [maintenance plan x].

Concerning Item 2, the repair department may be available to take repair calls from customers 24 hours a day, but it is available to only diagnose problems 24 hours a day - and is not available to make normal repairs after regular business hours. Staff made a series of eight test calls to four different large LECs in March of 1994. During each of these calls, staff specifically asked a repair department representative, if a service problem occurred after regular business hours, would repair crews would be dispatched to accomplish repairs. In five out of eight of the calls, staff was assured that the repairs would be accomplished 24 hours a day. However, the repair crews of the large LECs cited above do not make normal repairs 24 hours a day, and the claims of the repair service representatives were inaccurate.

Item 6 also is not entirely correct, since it is not necessarily true that charges are always billed to the apartment dweller. The responsibility for inside wire maintenance charges is generally dependent upon who requests [*71] the maintenance, i.e. the landlord or the tenant. Traditionally, the party requesting the maintenance is responsible for the charges and repairs. A representative of one large LEC, in selling a plan to an apartment dweller asked, "Where will your landlord be at 2:00 a.m. or 3:00 a.m. when your service goes out?" The question implies that though a landlord may not be available in the middle of the night to make a phone repair, the LEC inside wire maintenance plan would provide protection. As stated above, no LEC inside wire maintenance plan provided 24-hour repair service. This question was posed to a new customer who was sufficiently informed about his responsibility to tell the representative that he wanted to check his lease before he committed to a maintenance plan.

In monitoring calls at the LECs, staff overheard several representatives claim that the maintenance plans also covered outside wire repair. Several representatives told customers that the cheaper basic maintenance plan was "obsolete" and then convinced them to sign up for the more expensive, more comprehensive plan. However, because the basic plan was not "obsolete" but had been grandfathered, some customers [*72] upgraded unnecessarily.

Representatives from several companies urged customers to buy the more comprehensive, and expensive, inside wire maintenance plans, rather than the more basic plans. Frequently, the basic plan does not cover customer premises equipment (CPE), which is covered by the more expensive plans. The LEC representative steers the customer towards the more expensive plan by warning the customer that he or she will incur a premises visit charge if a repair crew

is dispatched, the trouble is found in the CPE and the customer is covered by only the basic plan. Though the service representative's statement may be true, it undercuts the trend of empowering customers to take responsibility for their own CPE and inside wire. Over the last few years, most of the large LECs have been installing Network Interface Devices (NIDs) and instructing customers as to their responsibilities regarding the customer's side of the point of demarcation. The LECs also routinely inform their customers in written materials how to isolate certain telephone service problems. Customers should routinely be informed of their options, in case of a repair problem which includes self-help options, [*73] as well as maintenance repair plans.

These examples are typical of presentations made repeatedly by representatives of most of the large LECs. Staff concerns were pointed out to business office supervisors at the conclusion of each LEC visit.

Staff is particularly concerned about the oral representations made to customers initiating service regarding the provision of inside wire maintenance plans, because the new customer is normally informed about inside wire maintenance plans during the initial service order process over the telephone. A review of customer contacts, test calls, and the monitoring of customer conversations with customer service representatives has heightened that concern. Moreover, staff is concerned that tenants in residential properties may unnecessarily be pressured over the telephone into purchasing a service which may be the responsibility of the landlord. Through telephone solicitation, tenants are not given the opportunity, outside of a pressured environment, to review this matter with their landlords.

Accordingly, the staff recommends that the Commission adopt the following requirement pertaining to a LEC's marketing of its inside wire maintenance [*74] plan:

A LEC shall not attempt to market and/or discuss its inside wire maintenance plan with a customer in a telephone conversation unless the telephone call is initiated by the customer and the customer, on his/her own initiative, inquires about an inside wire maintenance plan. However, a LEC may market its inside wire maintenance plan through the mail or other advertising media.

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TEXAS

Sec. 54.257. Interference With Another Telecommunications Utility.

If a telecommunications utility constructing or extending the utility's lines, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of another utility, the commission by order may:

(1) prohibit the construction or extension; or

(2) prescribe terms for locating the affected lines, plants, or systems.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

Sec. 54.258. Maps.

A public utility shall file with the commission one or more maps that show each utility facility and that separately illustrate each utility facility for transmission or distribution of the utility's services on a date the commission orders.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

Sec. 54.259. Discrimination by Property Owner Prohibited.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

(1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;

(2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;

(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;

(4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or

(5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

(1) an institution of higher education as defined by Section 61.003, Education Code; or

(2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

Sec. 54.260. Property Owner's Conditions.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

(1) impose a condition on the utility that is reasonably necessary to protect:

(A) the safety, security, appearance, and condition of the property; and

(B) the safety and convenience of other persons;

(2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;

(3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;

(4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;

(5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

Sec. 54.261. Shared Tenant Services Contract.

Sections 54.259 and 54.260 do not require a public or private property owner to enter into a contract with a telecommunications utility to provide shared tenant services on a property.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997

FLORIDA

718.1232 Cable television service; resident's right to access without extra charge.– No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

History.–s. 16, ch. 81-185.

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CALIFORNIA

Decision **REVISED DRAFT DECISION OF ALJ PULSIFER** (Mailed 7/7/98)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	R.95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	I.95-04-044 (Filed April 26, 1995)

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Appendix A

independent trench. Likewise, electric utilities should not bear the cost of modifications which benefit only telecommunications carriers.

We shall adopt an advance notice requirement of at least 60 days prior to the commencement of a physical modification to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

IX. Obtaining Third-Party Access to Customer Premises

A. Parties' Positions

During the ROW workshops, various parties raised the issue of how the Commission could assist utilities seeking to obtain access to the full pathway up to and including the minimum point of entry (MPOE) to a customer's premises.

Pacific states that the pathway up to and including the MPOE to a customer's premises usually includes facilities in the public ROW and facilities on the property to be served. An LEC only controls the supporting structure that is in the public way; the property owner provides and owns the supporting structure on his or her property. Pacific claims it cannot supercede the property rights of owners by permitting access to third parties. If the utility is able to successfully negotiate access with the property owner, Pacific offers to provide access to its equipment rooms and other facilities as long as the security and safety of its equipment is not compromised.

In some cases the property owner has determined that a single entity shall provide service to the premises. While acknowledging this can create difficulties if a tenant desires service from a different carrier, Pacific claims this is an issue between the tenant and the property owner, and cannot be resolved by the carrier.

Pacific believes that the Commission should require all utilities to permit nondiscriminatory access to facilities on private property that they own or

control, but should not dictate to owners which carrier they must choose to provide service. Pacific proposes that the Commission consider limiting the amount of access or rental fees a carrier is permitted to pay a property owner for access rights.

GTEC agrees to provide access up to the MPOE, to the extent that GTEC owns and there is availability on the poles, conduits, ducts, or the ROW in question. Since the property owner is responsible for facilities beyond the MPOE, however, GTEC opposes a Commission regulation that would abrogate private agreements between such property owners and a carrier which would allow other carriers the ability to trespass on such property without negotiating their own agreement.

While the Coalition acknowledges that this Commission lacks jurisdiction to require non-utility third parties to grant utilities access to their properties, the Coalition argues that there are still important actions the Commission can take to assist CLCs in this area. First, the Coalition asks the Commission to make findings of fact regarding the importance of the development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs. The Coalition believes such findings would be useful in eminent domain proceedings to gain access to tenants' facilities.

The Coalition further asks the Commission to require utilities that have vacant space (excess capacity) in existing entrance facilities (*e.g.*, conduit) into commercial buildings to make such space available up to the MPOE so that competitors may gain access to building cellars, telephone closets (or cages) and risers, network interconnection devices and/or frames, and so forth, in such buildings. Further, the Coalition asks the Commission to require that ILECs not impede such access where it is requested by landlords on behalf of their tenants.

Additionally, the Coalition asks that ILECs be required to promptly meet their responsibilities for connecting CLC network interconnection devices (NIDs) with their own. (See, Interconnection Order I, ¶¶ 392-96.) Finally, the Coalition asks that ILECs and incumbent EUs be required to exercise their own powers of eminent domain, just as they would on their own behalf to obtain or expand an existing ROW over private property, in order to accommodate a CLC's request for access.

The Coalition argues that under no circumstances should a building owner or manager be allowed to charge CLCs for use of its inside wire while allowing ILECs unlimited use of the same facilities at no charge. The Coalition suggests that the Commission can exercise its influence to prevent such discriminatory treatment in the following manner. Assuming that the Commission has the authority to regulate building owners as "telephone corporations" as defined under PU Code § 234, the Coalition suggests that the Commission could declare it will refrain from such regulation if, but only if, the building owner makes access to inside-wire available to ILECs and CLCs alike on a nondiscriminatory basis.

As a basis for this recommendation, the Coalition cites the Commission's "shared tenant services" ("STS") decision, D.87-01-063.[24] In the STS decision, the Commission adopted a set of guidelines aimed at insuring that, among other things, tenants in buildings or campus-like settings where the landlord provides PBX services to tenants (via a PBX switch and inside wire owned by the landlord) continue to have options for obtaining telephone services

[24] *Re Pacific Telephone and Telegraph Company* (D.87-01-063) 23 CPUC 2d 554, 1987 Cal. PUC LEXIS 838 ("the STS decision"), *modified* (D.87-05-009) CPUC 2d 179, 1987 Cal. PUC LEXIS 725.

from the provider of their own choosing. The decision provided that landlords would not be regulated as a public utilities, even though they appeared to fit within the literal terms of PU Code §§ 233 and 234, *if but only if*, they complied with the STS guidelines. The rationale underlying the decision is that the Commission could have asserted jurisdiction, had it wanted to do so, over such telecommunications services providers under the statutory definitions of a "telephone line" in PU Code § 233 and of a "telephone corporation" in PU Code § 234. The Coalition claims that a similar sort of Commission authority should apply to any which is charging certificated telephone corporations, ILECs and/or CLCs, for access to a building system or systems of entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, etc. The Coalition argues that the building owner or manager is not providing such service to *tenants*, but to telecommunications carriers. The Coalition characterizes such as directly akin to a special access service through which situation, the building owner or manager is, or, if necessary in a given case, certainly could be held to be, operating a "telephone line," and offering service to the public or a portion thereof (*i.e.*, to certified carriers) within the meaning of PU Code § 233.

Edison and SDG&E argue that an electric utility must be allowed to deny access requests when its property rights do not allow use of the property by a third party. Edison and SDG&E also oppose being required to exercise their powers of eminent domain in order to accommodate a telecommunications provider's request for access, claiming that such an exercise of powers would go beyond the legally authorized limits for electric utilities. Edison argues that its powers of eminent domain do not allow it to condemn property for the benefit of telecommunications providers. Edison believes that since certificated telecommunication providers have the power of eminent domain, they should not depend upon the electric utilities to secure their access rights.

Electric utilities also frequently obtain easements or licenses containing provisions that limit use of the property to operations directly related to the generation, transmission or distribution of electricity. Edison argues that it should not be obligated to negotiate broader easements or licenses to allow telecommunications carriers to access the property, since this would impose additional costs on the utility and its customers and shareholders.

Comments were also filed jointly by a group known as the "Real Estate Coalition"[17] representing the interests of owners and managers of multiunit real estate. The Real Estate Coalition concurrently filed a motion for leave to intervene and become a party in the proceeding. Separate comments were filed by the Building Owners and Managers Association of California (BOMA) with a similar motion to intervene. There is no opposition to either of the motions for leave to intervene, and the motions shall be granted. Both parties represent very similar interests.

The Real Estate Coalition argues that the Commission lacks jurisdiction to regulate building owners, and opposes rules permitting telecommunications carriers to enter the premises of multiunit buildings and install facilities without the express consent of the underlying property owner. The Real Estate Coalition believes forced access by telecommunications carriers would constitute an unlawful taking under *Loretto v. TelePrompTer Manhattan*

[17] The Real Estate Coalition is composed of the Building Owners and Managers Association International, the Institute of Real Estate Management, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multihousing Council

CATV Corp, 458,US 420 (1982), because it would entail a physical occupation without the owner's consent.

The Real Estate Coalition identifies a number of effects that are triggered by telecommunication carriers' access to buildings, including fire and safety code compliance, tenant security, and the ability of building owners to manage finite physical space needs.

BOMA argues that the Commission should not attempt to regulate access issues between the telecommunications industry and private property owners in order to avoid distorting an otherwise free and functioning market. BOMA argues that the real estate industry is highly competitive, and building owners have a strong incentive to satisfy the telecommunications needs of their tenants, and have no incentive to ban or restrict telecommunications service providers. BOMA argues that building owners must have the freedom and power to select and coordinate which telecommunications companies have access to their buildings .

B. Discussion

We do not have jurisdiction to require non-utility third parties to grant utilities access to their properties. We recognize, however, that the development of a competitive telecommunications infrastructure and deployment of alternative facilities to customers' premises by CLCs are important to the health of California's economy. The adoption of rules to facilitate the CLCs' ability to negotiate access to customer premises is consistent with our policy of opening all telecommunications markets to competition. To the extent that owners of buildings and their tenants are able to choose among multiple telecommunications carriers, they are likely to benefit from higher

quality service at lower cost and with greater responsiveness to customers' needs.

To facilitate the development of the competitive telecommunications infrastructure, we shall require that incumbents with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings make such space available to competitors up to the MPOE. This requirement will enable CLCs to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings. We shall also require that ILECs promptly meet their responsibilities for connecting CLC NIDs with their own. Incumbent utilities shall not be required to exercise their powers of eminent domain to expand their existing ROW over private property to accommodate a CLC's request for access. The CLC, as a telephone corporation, has independent authority sufficient to pursue its own eminent domain litigation, and there is no basis to require contracting for such litigation through the incumbent. The eminent domain powers of a CLC are covered under PU Code § 616, which states that "a telephone corporation may condemn any property necessary for the construction and maintenance of its telephone system."

We disagree with the Coalition's claim that owners or managers of buildings may be classified as "telephone corporations" subject to Commission jurisdiction under PU Code § 234 merely because they provide access to their building facilities to telecommunications services to the tenants of their building. A telephone corporation must hold itself out as a provider of service to the public or some portion thereof. Merely because a building owner or manager provides private service to tenants within the building, is no basis for treatment as a "telephone corporation" as defined by § 234.

We recognize, moreover, that the private property rights of building owners must be observed. Building owners must retain authority to supervise

and coordinate on-premises activities of service providers within their building. Installation and maintenance of telecommunications facilities within a building may disrupt tenants and residents, and could cause physical damage to the building. Unauthorized entry into a private building by a third party could compromise the integrity of the safety and security of occupants of the building. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers. Telecommunications carriers access to private buildings shall therefore be subject to the express consent of the building owner or manager.

We disagree with the Coalition's analogy seeking to apply the Commission's treatment of STS providers to all building owners which provide access to one or more telecommunications carriers. Building owners are in the business of providing environments in which people live and work. Building owners typically do not provide telephone service to their tenants. We disagree with the Coalition's claim that a building owner provides a form of "special access" telecommunications service through the act of making available its building facilities to a telecommunications provider. By merely providing a telephone carrier with access to a building's facilities, the building owner does not become a telecommunications utility. If we were to accept such a definition as proposed by the Coalition, we would also have to find that building owners are also electric utilities, water utilities, and every other type of business that requires access to a building to reach customers.

While building owners are entitled to exercise due discretion in managing and controlling access to their premises for the protection and security of the building occupants, they may not abuse such discretion in a manner that would unfairly or capriciously discriminate against carriers seeking ROW access in order to offer competitive local exchange service. While the Commission does

not regulate building owners as telecommunications utilities, we still retain jurisdiction under PU Code Section 762 to order the erection and fix the site of facilities of a public utility where necessary "to secure adequate service or facilities." Likewise, under PU Code Section 701, the Commission is authorized to "do all things which are necessary and convenient in the exercise of [its] jurisdiction." Accordingly, in light of the Commission's jurisdiction in this regard, building owners may not unreasonably deny access to competing carriers with impunity.

X. Third Party Access to Jointly-Owned Facilities

A. Parties' Positions

Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area. Joint pole associations have traditionally fostered access to and the joint ownership of pole facilities. Membership is comprised of ILECs, CLCs, wireless providers, municipalities, and electric and water utilities. Pursuant to such joint pole associations, third parties have acquired access to jointly owned poles as tenants of one of the owners. In their comments, parties addressed the issue of whether existing joint pole associations were an adequate vehicle to protect the interests of third parties seeking access to facilities.

GTEC recommends that the existing process of access through joint pole associations has worked well and should continue and not be supplanted with an untested method. Those third parties who are non-members may apply to become members of the association. GTEC argues that it is not necessary for yet another organization to be established to protect the interest of third parties,

as this would be incompatible with the current joint pole association process, and would needlessly complicate a currently effective system.

PG&E believes that provisions addressing the rights and responsibilities of a joint owner are needed when allowing third parties access to the jointly owned poles as tenants. PG&E argues that third party connections also must comply with safety and reliability requirements, and should not take precedence over the use of the pole by any joint owner for its current or future utility service.

PG&E believes that, with the restructuring of the telecommunications and the electric industry, the Commission needs to carefully consider how the obligations and compensation for pole ownership and/or use should be structured to provide a reasonable balance between responsibility for and benefits from the pole system. PG&E believes that ultimately all users will need to pay for their pole use in a manner that is either market based or economically equivalent to sharing fully the ownership costs and responsibilities for facilities subject to shared ownership.

PG&E argues that third party tenants' quality of access cannot exceed the access which their licensor or leasor enjoys under the Joint Pole Agreement, and that the joint owner must be able to provide for its own capacity requirement before accommodating third party requests. PG&E suggests that a telecommunications entity which does not wish to join the Joint Pole Association, but still desires the same quality of access as an owner, can negotiate a separate joint ownership agreement with the entity or entities holding ownership interests in the pole.

The Coalition states that new distribution facilities constructed by a member of a joint pole organization will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities

constructed by a party that is not a member of a joint pole organization would not be subject to joint pole association rules. Since several of the members of the Coalition are also members of joint pole associations, the Coalition states it is not in a position to comment on whether a different vehicle is needed to protect the interests of third parties.

Since such organizations are controlled by regulated utilities, they are agents of parties subject to the Commission's jurisdiction. Even though joint pole organizations are not themselves public utilities, the Coalition argues they are fully subject to Commission jurisdiction and control, through the operation of the ordinary principles of agency law. Therefore, the Coalition believes the Commission can take whatever steps it deems necessary to protect the interest of third parties. The Coalition further claims that the Commission has authority to provide for reciprocal access by privately-owned utilities to the ROW and support structures owned by local governmental agencies to the extent those agencies are members of joint pole associations and receive benefits from such membership.

The Coalition argues that the utility members of any joint pole organization must not be permitted to degrade access to utility support structures and ROW directly or indirectly, simply because an attaching party has chosen not to become a full member of such an organization.

B. Discussion

We conclude that the provisions governing third-party access to utility facilities previously discussed should also apply in the case of facilities which are owned collectively through joint pole associations or similar arrangements. Based on parties' comments, we find no need at this time to make any further modifications in the existing arrangements governing joint pole

associations to protect third parties that do not belong to a joint pole association. Likewise, no party seeking access to a utility pole should be discriminated against merely because it is not a member of such an association. We may at a later time consider the needs for additional rules to protect against unfair discriminatory treatment for nonmembers of joint pole associations.

XI. Expedited Dispute Resolution

A. Parties' Positions

Parties present differing views regarding how the Commission should facilitate the resolution of disputes in the event parties cannot reach agreement through negotiations over the terms and conditions of ROW access.

In its proposal, the Coalition distinguishes disputes over requests for initial access versus all other disputes over access. The Coalition recommends that the Commission develop a new type of expedited and informal proceeding for resolving disputes concerning initial access to utility support structures, patterned after the Commission's existing Law and Motion procedure for discovery dispute resolution. This new type of proceeding would be presided over by an ALJ, assisted by Telecommunications Division or the Safety and Enforcement Division staff with relevant experience and knowledge of utility support structures. The hearing would not be reported. The ALJ would hear the initial access dispute and resolve it, either at the hearing or within no more than three working days, employing such fact finding techniques as necessary for expeditious resolution of the initial access dispute.

The Coalition claims that the Commission's existing formal complaint process is much too slow and cumbersome for resolution of such disputes. Absent an expedited dispute resolution procedure, the Coalition argues, the CLC must either comply with the terms of access, which may be

difficult, expensive and time-consuming, or file a complaint for relief at this Commission, which may be an equally difficult, expensive, and time-consuming process, while, in the meantime, access is denied.

For all other disputes between ILECs and telecommunications carrier involving access to ILEC utility support structures (*i.e.*, disputes concerning other than initial access), the Coalition agrees that arbitration is a useful alternative to the use of the Commission's existing complaint process. (See, Interconnection Order 1, ¶¶ 1227, 1228; see also, Commission Resolution ALJ-174 (adopting arbitration procedures for resolution of interconnection agreement disputes).)

CCTA believes that the process established by the Act and the FCC provide a good starting point for expedited resolution by this Commission of disputes involving denial of access. The FCC Order requires the requesting party to provide the ROW or facility owner a written request for access. If access is not granted within 45 days of the request, the ROW or facility owner must confirm the denial in writing by the 45th day. Upon the receipt of a denial notice from the ROW or facility owner, the requesting party has 60 days to file its complaint with the FCC, and final decisions relating to access are to be resolved by the FCC expeditiously. (Interconnection Order ¶ 1225.) The requesting party also may seek arbitration pursuant to § 252 of the Act which governs procedures for the negotiation, arbitration, and approval of certain agreements between ILECs and telecommunications carriers. If arbitration is undesirable or proves unsuccessful, then court proceedings are an alternative.

CCTA proposes additional dispute resolution procedures for situations in which parties have already entered into contracts for access to ROW. Specifically, CCTA proposes that such disputes be negotiated by field

personnel first. If the dispute remained after two days, it could be forwarded to the supervisor of the field representative. After five days, it would go to the Engineering Manager. After five more days, it would go to the Utility Manager-General Agreements. If the dispute remained after five more days, it would go to arbitration.

Pacific supports an expedited dispute resolution process, but argues that parties must be required to attempt to resolve their differences in good faith before bringing them before the Commission. Pacific proposes that if the Commission adopts a similar expedited review process as prescribed by the FCC, the Commission should require the parties to first attempt to resolve any dispute themselves before going to the Commission. Pacific also argues that it may take longer than 45 days to determine availability for more complicated requests for access.

GTEC does not oppose an expedited process to resolve disputes concerning access to ROW that arise out of negotiated or arbitrated agreements, but asks the Commission not to permit such a dispute resolution process to improperly circumvent or replace of the negotiation process required by § 252 of the Act.

Edison believes that the procedures prescribed in § 252 have the potential to distort the negotiating process and to impose a significant additional burden on the Commission and its staff. Rather than negotiating in earnest, Edison argues, parties may be tempted to state their demands and then insist that the Commission arbitrate a solution. Unless all parties to the negotiation request the Commission's assistance as mediator, Edison argues, the Commission should refrain from any role in the parties' negotiations. If negotiations fail to produce an agreement, Edison believes the Commission's role as arbitrator should be limited to imposing appropriate conditions to prevent

discrimination among competing carriers and unreasonable restrictions to access, and the Commission should limit inquiry to the two following issues:

1. Is the utility insisting on a prohibitive pricing arrangement as a means of favoring one carrier over another?
2. Are the non-pricing terms and conditions sought by the utility reasonably related to legitimate concerns about safety, limitations on liability and system reliability and stability, and are they being applied in a non-discriminatory manner to all similarly situated carriers?

Edison argues that the carrier should have the burden of demonstrating that the utility has discriminated against that carrier or sought to impose unreasonable restrictions to access.

PG&E believes that to the extent a dispute involves expert engineering issues such as those relating to GO 95, responsibility and authority for hearing and resolving the dispute should be referred to Commission-designated experts whose education and training qualify them to decide engineering matters. Moreover, PG&E believes their interpretations should have precedential authority for GO 95 purposes generally. PG&E therefore recommends that the Commission designate specific members of its engineering staff experienced in GO 95 to be responsible for GO 95 interpretation and implementation, including resolution of disagreements about the application of GO 95 to any specific ROW access dispute,[18] to achieve technically sound,

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[18] In making this suggestion, PG&E recognizes that the parties to the December storm proceeding have recommended an OII into design standards in GO 95. Pending the resolution of the OII proposal, however, PG&E argues that users of poles need a way to resolve GO 95 questions which will result in sound engineering results, while also supporting construction of new telecommunication lines, to the extent consistent with GO 95 and other applicable standards.

consistent and timely interpretations. PG&E also recommends that the expedited proceeding allow for an evidentiary record to be transcribed.

B. Discussion

The rules, guidelines, and performance standards adopted herein should reduce the extent of disputes and impasses among the parties in negotiating ROW access agreements. Nonetheless, our adopted rules leave discretion to the parties to negotiate individual agreements, and leave the potential for disputes to arise. We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below. We expect parties to make a good faith effort to resolve their disputes before bringing them before the Commission. As a condition of the Commission's accepting a dispute for resolution, the moving party must show that they have attempted in good faith to negotiate an arrangement which is consistent with the rules and policies set forth in this decision. This showing must be included in the request for dispute resolution. The burden of proof shall be on the party which asserts that a particular constraint exists preventing it from complying with the proposed terms for granting ROW access.

The following prerequisites must be satisfied as evidence of good faith negotiations prior to the Commission's acceptance of a request for resolution of a ROW dispute. The party seeking access must first submit its request to the utility in writing. As discussed previously, we are establishing a default deadline of 45 days for a utility to confirm or deny whether it has space available to grant requests for access to its support structures or ROW. If the request is denied, the utility shall state the reasons for the denial or why the requested space is not available, and include all the relevant evidence supporting the denial. In the event of a denial, Step 1 of the dispute resolution process is

invoked. We shall expect the parties to escalate the dispute to the executive level within each company to attempt to negotiate an alternative access arrangement to accommodate their mutual needs. If the parties are unable to reach a mutually agreeable solution after five days of good-faith efforts at negotiation, any party to the negotiations may request the Commission to arbitrate the dispute.

In order to formally initiate the process for binding arbitration, a party to the dispute shall file a formal complaint with the Commission, with an attached motion requesting that the matter be submitted to the Commission for binding arbitration. This option shall be invoked only where all parties to the dispute must consent to be bound by the results of the arbitrators' decision. To expedite the process, the motion should affirm whether all parties to the dispute consent to be bound by the arbitration outcome. Under the binding arbitration option, parties shall have 15 days from the filing of the complaint to prepare for the arbitration. An arbitration hearing shall be held before a panel of three hearing officers.

Each party to the arbitration may present witnesses, but no more than two days of hearings shall be permitted, with each party allocated one day. Within 15 days of the conclusion of hearings, the parties may submit pleadings setting forth their respective positions. The arbitration panel shall than issue a decision on each of the contested issues in the dispute within 20 days of receipt of the pleadings. The arbitrators' decision will be the final decision rendered on the dispute.

While the arbitration process is proceeding, parties may continue to seek an informal resolution of their dispute, and may pursue a mediated solution on a parallel track to the arbitration process. In the event parties pursue mediation on such a parallel track, they may request that the Commission

appoint a mediator or may contract for their own mediation services. The mediator will have discretion to schedule mediation sessions as warranted given the particular situation involved. The prospects of an arbitrated outcome may provide parties with the incentive to seek their own mediated solution as means of retaining control over the outcome. In the event no mediated solution has been achieved by the time scheduled for the arbitrator's decision, the mediation process shall be terminated.

In the event that all parties to the dispute do not consent to be bound by an arbitrated decision, the arbitration option may not be used. The dispute will be resolved through the formal complaint process pursuant to the Commission's Rules of Practice and Procedure. These rules are governed by the provisions of Senate Bill (SB) 960, under which complaint filings are categorized as adjudicatory proceedings. In view of the competitively sensitive nature of ROW access disputes, we appreciate the need for an expedited resolution of filed complaints relating to ROW access. Within the bounds of the statutory requirements of SB 960, we shall expedite the complaint process as much as possible in order to minimize the adverse competitive impacts of delays in resolving disputes.

Under the requirements of SB 960, a party has 30 days to file an answer to a complaint, and the complaint must be resolved within 12 months of the filing. For complaints involving ROW access disputes, we believe that final decisions can be rendered much sooner than the 12 months permitted by SB 960. We shall not require a separate scoping memo or a prehearing conference for such complaints since the rules in this decision form the basis for the scope of any complaint relating to ROW access disputes. Parties shall have 10 days to prepare for an evidentiary hearing once the answer has been filed. At the end of the 10 days, the assigned hearing officer will convene an evidentiary hearing.

Each party may present witnesses, but no more than two days of hearings shall be permitted, with each party allocated one day. Within 15 days of the conclusion of hearings, the parties may submit pleadings setting forth their respective positions. The principal hearing officer shall than issue a decision on each of the contested issues in the complaint within 20 days of receipt of the pleadings. The decision will be the final decision unless challenged by a member of the Commission, in conformance to SB 960 rules.

We will leave it to the discretion of the hearing officer to conduct the dispute resolution proceeding, to establish service lists, and to determine the need for any written submittals in the proceeding. The motion requesting need only be served on parties to the dispute, the assigned ALJ, and the Director of the Telecommunications Division. The motion should also be served on the Docket Office which will publish a notice of the motion in the Daily Calendar.

To facilitate the speedy resolution of disputes, we will generally discourage parties who are not part of the dispute from participating in the mediation or arbitration process.[19] Any resolution that results from the dispute resolution process will generally be nonprecedential. However, if a dispute raises generic issues or affects others, the presiding ALJ may solicit comments and testimony from all parties to the dispute; and the Commission may issue decisions. Our normal rules of practice and procedures should be followed at all times during the dispute resolution process.

We shall not adopt PG&E's request that only Commission-designated experts with education and training in engineering be assigned to

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19 To avoid a party's need to become part of the service list of a specific dispute in order to obtain an ALJ ruling on the merits of the dispute, we shall make copies of the ALJ ruling available through our Formal Files.

resolve disputes involving engineering issues. We shall continue to rely on the Commission's long established practice to use ALJs to adjudicate and to mediate contested proceedings which come before the Commission. The ALJ is specifically equipped to resolve contested issues dealing with a variety of technical disputes as well as legal matters. The assigned ALJ routinely consults with technical staff employed by the Commission with education and training in the area of expertise called for by the nature of the dispute as necessary to understand and resolve technically complex disputes. It would not be the best use of Commission resources to deviate from this successful practice by assigning a Commission staff expert with training in engineering matters to be responsible for mediating or arbitrating such contested issues. Therefore, all disputes regarding ROW access, including those dealing with engineering or safety issues shall be referred to an ALJ for resolution. The ALJ shall consult with the Commission's technical staff as appropriate to deal with engineering, safety, or other technically complex issues in dispute among the parties.

Findings of Fact

1. Under § 224 of the Telecommunications Act of 1996, both incumbent local exchange carriers and electric utilities have an obligation to provide any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

2. Nondiscriminatory access to the incumbent utilities' poles, ducts, conduits, and rights of way is one of the essential requirements for facilities-based competition to succeed.

3. Given the complexities and the diversity of ROW access issues, it is not practical to craft uniform tariff rules which address every situation which may arise.

4. The adoption of general guiding principles, and minimum performance standards concerning ROW access will promote a more level competitive playing field in which individual negotiations may take place.

5. The general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities subject to the rules in Appendix A.

6. CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers.

7. Exclusive reliance on the negotiation process will not necessarily produce fair prices for ROW access.

8. Given the advances in technological capabilities of cable television providers to offer a wide array of both one-way and two-way communications services over their cable facilities, it has become increasingly difficult to clearly delineate a cable television provider as offering only "cable video" service as opposed to "telecommunications" services.

9. Cable television corporations' provision of different services on their wireline communication system does not normally add any additional physical burden to the use of its facilities attached in the right of way of a public utility company.

10. PU Code § 767.5(a)(3) applies the term "pole attachment" to any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure or ROW of a public utility.

11. Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more for pole and conduit attachments than cable operators that do not provide telecommunications services when their

attachments are made in the identical manner and occupy the same amount of space would subject such carriers and cable operators to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets.

12. Sections 224(d) and (e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 Y.S.C. § 224(d) and (e)), do not require states to provide for different rate provisions for cable operators commencing February 8, 2001, depending on whether they offer cable television service exclusively or whether they also offer telecommunications services. Attempting to distinguish "cable television service" from "telecommunications service" would entangle the Commission in semantic disputes and would not represent the best use of the Commission's resources.

13. Since the enactment of the Telecommunications Act of 1996 on February 8, 1996, the California Legislature has not amended California's pole attachment, statute, PU Code § 767.5, to add a provision analogous to subsection (e) of the federal pole attachment statute, 47 U.S.C. § 224, which was added to that statute by the Telecommunications Act of 1996. Subsection (e) provides for a higher pole attachment rate for telecommunications carriers and cable operators providing telecommunications services to be phased in between the years 2001 and 2006.

14. The California Legislature has not given this Commission any directive to follow the pole attachment pricing approach in 47 U.S.C. § 224(e).

15. The Coalition's proposed 7.4% allocation of capital costs which may be charged for pole attachments is based on the statutory formula in § 767.5(c),

which was based on the FCC's pole attachment formula, fully accounts for the relative use of usable and non-usable space on the pole.

16. The use of embedded cost as a pricing basis for pole attachments is more conducive to the development of competitive market than the use of incremental costs.

17. Prices based on embedded costs of utility pole attachments are lower than incremental costs due to the fact that many of the poles were installed decades ago and have largely been depreciated for accounting purposes over time.

18. If incumbent utilities were free to charge incremental-cost-based rates or even higher rates based on their bargaining leverage, they would be able to extract excessive economic rents associated with these highly depreciated assets while forcing the CLCs to pay rates which may impede their ability to compete.

19. Under the terms of an agreement executed between Pacific and AT&T, Pacific agreed to provide information to AT&T regarding the availability of conduit or poles within 10 business days of receiving a written request, and within 20 business days, if a field-based survey of availability was required.

20. Under the terms of their agreement, if AT&T's written request sought information about the availability of more than five miles of conduit, or more than 500 poles, Pacific agreed to: (1) provide an initial response within 10 business days; (2) use reasonable best efforts to complete its response within 30 business days; and (3) if the parties were unable to agree upon a longer time period for response, Pacific would hire outside contractors, at the expense of the requesting party.

21. The terms of the Pacific/AT&T agreement regarding the time frame for responding to requests about access to ROW provide a reasonable basis for formulating generic rules for response times for Pacific and GTEC.

22. It is in the interests of public health and safety for the utility to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or to the public.

23. When working on an electric utility's facilities or ROW, telecommunications providers' compliance with at least the same safety practices as trained and experienced electric utility workers is necessary to avoid exposing the public to grave danger and potentially fatal injuries.

24. There is no evidence that the overlashing or replacement of conductors by cable television corporations occupies more pole space. Instead new electronics or replacement conductors are added to existing support strands without need for treatment as a new attachment, which has been the pre-existing practice. The FCC has strongly endorsed such overlashing improvements as pro-competitive.

25. Changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment has safety and reliability implications that the utility must evaluate before work begins.

26. Commission GO 95 and CAL-OSHA Title 8 generally address the safety issues that arise from third-party access to the utility's overhead distribution facilities.

27. Because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns, advance notification and utility supervision is required as conditions of granting

telecommunications carrier access to underground electrical facilities in addition to the requirements of GO 128 and CAL-OSHA Title 8.

28. To determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, an engineering analysis may be needed for each pole or anchor location to show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment after the attachment, accounting for windloading, bending moment, and vertical loading.

29. Any engineering analysis that is required by incumbent utilities must be reasonably required and actually necessary. If such engineering analysis is performed within reasonable written industry guidelines by qualified CLC engineers, it should be deemed acceptable unless a check for accuracy discloses errors.

30. The ROW access issues in this proceeding interrelate with issues before the Commission in Application (A.) 94-12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995.

31. Parties in A.94-12-005 proposed that the Commission establish an Order Instituting Investigation (OII) to review, among other things, the adequacy of GO 95 design standards on wood pole loading requirements.

32. Incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and to plan for capacity needs to accommodate future customer demand.

33. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which

prohibits a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services.

34. Since electric utilities are not yet in direct competition with CLCs, but are engaged in a separate industry, the potential concerns over a reservation policy permitting discriminatory treatment of a competitor are not as pronounced as compared with ILECs.

35. The development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs is important to the development of a competitive market.

36. Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area.

37. New distribution facilities constructed by a member of a joint pole organization, will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization, would not be subject to joint pole association rules.

38. The Commission has the constitutional mandate to insure the availability of public utility services throughout the State of California including within municipalities.

39. The Commission has previously asserted jurisdiction over the placement of facilities within the rights of way of municipalities in General Order 159.

51. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench.

52. An advance notice should be given at least 60 days prior to the commencement of a physical modification to a ROW to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

53. Incumbent utilities with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings should make such space available to competitors, subject to consent of the building owner or manager, up to the minimum point of entry to the extent the incumbent utility owns or controls such facilities.

54. Incumbent utilities are not required to exercise their powers of eminent domain to expand the incumbent's existing ROW over private property to accommodate a telecommunications carrier's request for access.

55. The Commission does not have jurisdiction to regulate building owners or managers as "telephone corporations" under PU Code § 234, nor to require that they provide equal access to all carriers.

56. For purposes of resolving disputes between telecommunications carriers and incumbent electric utilities or ILECs regarding ROW accesses, the rules adopted in Appendix A of this order should generally apply.

57. Before the Commission will process a dispute resolution, the parties must show they were unable to reach a mutually agreeable solution consistent with

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*** THIS SECTION IS CURRENT THROUGH THE 1997 SUPPLEMENT ***
*** (PERMANENT AND TEMPORARY LEGISLATION AS OF APR. 12, 1997)
(EMERGENCY LEGISLATION AS OF MAR. 31, 1997) ***

TITLE 43. PUBLIC UTILITIES
CHAPTER 18. CABLE TELEVISION

D.C. Code @ 43-1844.1 (1997)

@ 43-1844.1. Landlord-tenant relationship

(a) No landlord of a residential property shall:

(1) Interfere with the installation of cable television facilities upon his or her property or premises, except that a landlord may require:

(A) That the installation of cable television facilities conform to those reasonable conditions and architectural controls set forth by the landlord as being necessary to protect the safety, functioning, appearance of the premises, and the convenience and well-being of other tenants;

(B) That the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation, or removal of the facilities; and

(C) That the cable television company agrees to indemnify the landlord for any damages caused by the installation, operation or removal of the facilities.

(2) Demand or accept payment from any tenant, in any form, in exchange for permitting cable television service or facilities on or within his or her property or premises, or from any cable television company in excess of any amount allowed by the Office upon application by the landlord. The Office shall, by rule, provide procedures by which landlords may apply for and receive adequate compensation following notice provided in accordance with due process of law.

(3) Discriminate in rental charges or otherwise between tenants who receive cable television service and those who do not.

(b) Rental agreements and leases executed prior to October 22, 1983, may be enforced notwithstanding this section.

(c) No cable television company may enter into any agreement with the owners, lessees, or persons controlling or managing buildings served by cable television, or do or permit any act that would have the effect, directly or indirectly, of diminishing or interfering with existing rights of any tenant or other occupant of the building to use or avail himself or herself to master or individual antenna equipment.

(d) The Office shall issue rules to carry out the purposes of this section.

HISTORY: Aug. 21, 1982, D.C. Law 4-142, @ 45a, as added Oct. 22, 1983, D.C. Law 5-36, @ 2(pp), 30 DCR 4289.

NOTES:
SECTION REFERENCES. --This section is referred to in @ 43-1849.

LEGISLATIVE HISTORY OF LAW 4-142. --See note to @ 43-1801.

LEGISLATIVE HISTORY OF LAW 5-36. --See note to @ 43-1802.1.

SHORT TITLE. --The first section of D.C. Law 5-36 provided: "That this act may be cited as the "Cable Television Communications Act of 1981 Clarification Amendment Act of 1983'."

CITED in District Cablevision Ltd. Partnership v. McLean Gardens Condominium Unit Owners' Ass'n, App. D.C., 621 A.2d 815 (1993).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, title, subtitle, chapter, subchapter or subpart.

ILLINOIS

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*** THIS SECTION IS CURRENT THROUGH PUBLIC ACT 90-573 ***
*** (1997 REGULAR SESSION) ***

CHAPTER 65. MUNICIPALITIES
ILLINOIS MUNICIPAL CODE
ARTICLE 11. CORPORATE POWERS AND FUNCTIONS
POWERS OVER CERTAIN BUSINESSES
DIVISION 42. POWERS OVER CERTAIN BUSINESSES

65 ILCS 5/11-42-11.1 (1997)

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 24, para. 11-42-11.1]

@ 65 ILCS 5/11-42-11.1. [Right to receive cable television service]

Sec. 11-42-11.1. (a) In any instance in which a municipality has (i) granted a franchise to any community antenna television company or (ii) decided for the municipality itself to construct, operate or maintain a cable television system within a designated area, no property owner, condominium association, managing agent, lessee or other person in possession or control of any residential building located within the designated area shall forbid or prevent any occupant, tenant or lessee of any such building from receiving cable television service from such franchisee or municipality, nor demand or accept payment from any such occupant, tenant or lessee in any form as a condition of permitting the installation of cable television facilities or the maintenance of cable television service in any such building or any portion thereof occupied or leased by such occupant, tenant or lessee, nor shall any such property owner, condominium association, managing agent, lessee or other person discriminate in rental charges or otherwise against any occupant, tenant or lessee receiving cable service; provided, however, that the owner of such building may require, in exchange and as compensation for permitting the installation of cable television facilities within and upon such building, the payment of just compensation by the cable television franchisee which provides such cable television service, said sum to be determined in accordance with the provisions of subparagraphs (c) and (d) hereof, and provided further that the cable television franchisee installing such cable television facilities shall agree to indemnify the owner of such building for any damage caused by the installation, operation or removal of such cable television facilities and service.

No community antenna television company shall install cable television facilities within a residential building pursuant to this subparagraph (a)

unless an occupant, tenant or lessee of such residential building requests the delivery of cable television services. In any instance in which a request for service is made by more than 3 occupants, tenants or lessees of a residential building, the community antenna television company may install cable television facilities throughout the building in a manner which enables the community antenna television company to provide cable television services to occupants, tenants or lessees of other residential units without requiring the installation of additional cable television facilities other than within the residential units occupied by such other occupants, tenants or lessees.

(b) In any instance in which a municipality has (i) granted a franchise to any community antenna television company or (ii) decided for the municipality itself to construct, operate or maintain a cable television system within a designated area, no property owner, condominium association, managing agent, lessee or other person in possession and control of any improved or unimproved real estate located within such designated area shall forbid or prevent such cable television franchisee or municipality from entering upon such real estate for the purpose of and in connection with the construction or installation of such cable television system and cable television facilities, nor shall any such property owner, condominium association, managing agent, lessee or other person in possession or control of such real estate forbid or prevent such cable television franchisee or municipality from constructing or installing upon, beneath or over such real estate, including any buildings or other structures located thereon, hardware, cable, equipment, materials or other cable television facilities utilized by such cable franchisee or municipality in the construction and installation of such cable television system; provided, however, that the owner of any such real estate may require, in exchange and as compensation for permitting the construction or installation of cable television facilities upon, beneath or over such real estate, the payment of just compensation by the cable television franchisee which provides such cable television service, said sum to be determined in accordance with the provisions of subparagraphs (c) and (d) hereof, and provided further that the cable television franchisee constructing or installing such cable television facilities shall agree to indemnify the owner of such real estate for any damage caused by the installation, operation or removal of such cable television facilities and service.

(c) In any instance in which the owner of a residential building or the owner of improved or unimproved real estate intends to require the payment of just compensation in excess of $1 in exchange for permitting the installation of cable television facilities in and upon such building, or upon, beneath or over such real estate, the owner shall serve written notice thereof upon the cable television franchisee. Any such notice shall be served within 20 days of the date on which such owner is notified of the cable television franchisee's intention to construct or install cable television facilities in and upon such building, or upon, beneath or over such real estate. Unless timely notice as

herein provided is given by the owner to the cable television franchisee, it will be conclusively presumed that the owner of any such building or real estate does not claim or intend to require a payment of more than $1 in exchange and as just compensation for permitting the installation of cable television facilities within and upon such building, or upon, beneath or over such real estate. In any instance in which a cable television franchisee intends to install cable television facilities as herein provided, written notice of such intention shall be sent by the cable television franchisee to the property owner or to such person, association or managing agent as shall have been appointed or otherwise designated to manage or operate the property. Such notice shall include the address of the property, the name of the cable television franchisee, and information as to the time within which the owner may give notice, demand payment as just compensation and initiate legal proceedings as provided in this subparagraph (c) and subparagraph (d). In any instance in which a community antenna television company intends to install cable television facilities within a residential building containing 12 or more residential units or upon, beneath, or over real estate that is used as a site for 12 or more manufactured housing units, 12 or more mobile homes, or a combination of 12 or more manufactured housing units and mobile homes, the written notice shall further provide that the property owner may require that the community antenna television company submit to the owner written plans identifying the manner in which cable television facilities are to be installed, including the proposed location of coaxial cable. Approval of such plans by the property owner shall not be unreasonably withheld and such owners' consent to and approval of such plans shall be presumed unless, within 30 days after receipt thereof, or in the case of a condominium association, 90 days after receipt thereof, the property owner identifies in writing the specific manner in which such plans deviate from generally accepted construction or safety standards, and unless the property owner contemporaneously submits an alternative construction plan providing for the installation of cable television facilities in an economically feasible manner. The community antenna television company may proceed with the plans originally submitted if an alternative plan is not submitted by the property owner within 30 days, or in the case of a condominium association, 90 days, or if an alternative plan submitted by the property owner fails to comply with generally accepted construction and safety standards or does not provide for the installation of cable television facilities in an economically feasible manner. For purposes of this subsection, "mobile home" and "manufactured housing unit" have the same meaning as in the Illinois Manufactured Housing and Mobile Home Safety Act [430 ILCS 115/1 et seq.].

(d) Any owner of a residential building described in subparagraph (a), and any owner of improved or unimproved real estate described in subparagraph (b), who shall have given timely written notice to the cable television franchisee as provided in subparagraph (c), may assert a claim for just compensation in excess of $1 for permitting the installation of cable television facilities within and upon such building, or upon, beneath or over such real estate. Within 30 days

after notice has been given in accordance with subparagraph (c), the owner shall advise the cable television franchisee in writing of the amount claimed as just compensation. If within 60 days after the receipt of the owner's claim, the cable television franchisee has not agreed to pay the amount claimed or some other amount acceptable to the owner, the owner may bring suit to enforce such claim for just compensation in any court of competent jurisdiction and, upon timely demand, may require that the amount of just compensation be determined by a jury. Any such action shall be commenced within 6 months of the notice given by the cable television franchisee pursuant to subparagraph (c) hereof. In any action brought to determine such amount, the owner may submit evidence of a decrease in the fair market value of the property occasioned by the installation or location of the cable on the property, that the owner has a specific alternative use for the space occupied by cable television facilities, the loss of which will result in a monetary loss to the owner, or that installation of cable television facilities within and upon such building or upon, beneath or over such real estate otherwise substantially interferes with the use and occupancy of such building to an extent which causes a decrease in the fair market value of such building or real estate.

(e) Neither the giving of a notice by the owner under subparagraph (c), nor the assertion of a specific claim, nor the initiation of legal action to enforce such claim, as provided under subparagraph (d), shall delay or impair the right of the cable television franchisee to construct or install cable television facilities and maintain cable television services within or upon any building described in subparagraph (a) or upon, beneath or over real estate described in subparagraph (b).

(f) Notwithstanding the foregoing, no community antenna television company or municipality shall enter upon any real estate or rights of way in the possession or control of any public utility, railroad or owner or operator of an oil, petroleum product, chemical or gas pipeline to install or remove cable television facilities or to provide underground maintenance or repair services with respect thereto, prior to delivery to the public utility, railroad or pipeline owner or operator of written notice of intent to enter, install, maintain or remove. No entry shall be made until at least 15 business days after receipt of such written notice. Such written notice, which shall be delivered to the registered agent of such public utility, railroad or pipeline owner or operator shall include the following information:

(i) The date of the proposed installation, maintenance, repair or removal and projected length of time required to complete such installation, maintenance, repair or removal;

(ii) The manner and method of such installation, maintenance, repair or removal;

(iii) The location of the proposed entry and path of cable television facilities proposed to be placed, repaired, maintained or removed upon the real estate or right of way; and

(iv) The written agreement of the community antenna television company to indemnify and hold harmless such public utility, railroad or pipeline owner or operator from the costs of any damages directly or indirectly caused by the installation, maintenance, repair, operation, or removal of cable television facilities. Upon request of the public utility, railroad, or owner or operator of an oil, petroleum product, chemical or gas pipeline, the community antenna television company shall provide proof that it has purchased and will maintain a policy or policies of insurance in amounts sufficient to provide coverage for personal injury and property damage losses caused by or resulting from the installation, maintenance, repair or removal of cable television facilities. The written agreement shall provide that the community antenna television company shall maintain such policies of insurance in full force and effect as long as cable television facilities remain on the real estate or right of way.

Within 15 business days of receipt of the written prior notice of entry the public utility, railroad or pipeline owner or operator shall investigate and determine whether or not the proposed entry and installation or repair, maintenance, or removal would create a dangerous condition threatening the safety of the public or the safety of its employees or threatening to cause an interruption of the furnishing of vital transportation, utility or pipeline services and upon so finding shall so notify the community antenna television company or municipality of such decision in writing. Initial determination of the existence of such a dangerous condition or interruption of services shall be made by the public utility, railroad or pipeline owner or operator whose real estate or right of way is involved. In the event that the community antenna television company or municipality disagrees with such determination, a determination of whether such entry and installation, maintenance, repair or removal would create such a dangerous condition or interrupt services shall be made by a court of competent jurisdiction upon the application of such community antenna television company or municipality. An initial written determination of a public utility, railroad, or pipeline owner or operator timely made and transmitted to the community antenna television company or municipality, in the absence of a determination by a court of competent jurisdiction finding to the contrary, bars the entry of the community antenna television company or municipality upon the real estate or right of way for any purpose.

Any public utility, railroad or pipeline owner or operator may assert a written claim against any community antenna television company for just compensation within 30 days after written notice has been given in accordance with this subparagraph (f). If, within 60 days after the receipt of such claim for compensation, the community antenna television company has not agreed to the amount claimed or some other amount acceptable to the public utility, railroad

or pipeline owner or operator, the public utility, railroad or pipeline owner or operator may bring suit to enforce such claim for just compensation in any court of competent jurisdiction and, upon timely demand, may require that the amount of just compensation be determined by a jury. Any such action shall be commenced within 6 months of the notice provided for in this subparagraph (f). In any action brought to determine such just compensation, the public utility, railroad or pipeline owner or operator may submit such evidence as may be relevant to the issue of just compensation. Neither the assertion of a claim for compensation nor the initiation of legal action to enforce such claim shall delay or impair the right of the community antenna television company to construct or install cable television facilities upon any real estate or rights of way of any public utility, railroad or pipeline owner or operator.

To the extent that the public utility, railroad, or owner or operator of an oil, petroleum product, chemical or gas pipeline deems it appropriate to supervise, monitor or otherwise assist the community antenna television company in connection with the installation, maintenance, repair or removal of cable television facilities upon such real estate or rights of way, the community antenna television company shall reimburse the public utility, railroad or owner or operator of an oil, petroleum product, chemical or gas pipeline for costs reasonable and actually incurred in connection therewith.

The provisions of this subparagraph (f) shall not be applicable to any easements, rights of way or ways for public service facilities in which public utilities, other than railroads, have any interest pursuant to "An Act to revise the law in relation to plats", approved March 21, 1874, as amended [765 ILCS 205/0.01 et seq.], and all ordinances enacted pursuant thereto. Such easements, rights of way and ways for public service facilities are hereby declared to be apportionable and upon written request by a community antenna television company, public utilities shall make such easements, rights of way and ways for public service facilities available for the construction, maintenance, repair or removal of cable television facilities provided that such construction, maintenance, repair or removal does not create a dangerous condition threatening the safety of the public or the safety of such public utility employees or threatening to cause an interruption of the furnishing of vital utility service. Initial determination of the existence of such a dangerous condition or interruption of services shall be made by the public utility whose easement, right of way or way for public service facility is involved. In the event the community antenna television company or municipality disagrees with such determination, a determination of whether such construction, maintenance, repair or removal would create such a dangerous condition or threaten to interrupt vital utility services, shall be made by a court of competent jurisdiction upon the application of such community antenna television company.

In addition to such other notices as may be required by this subparagraph (f), a community antenna television company or municipality shall not enter upon the real estate or rights of way of any public utility, railroad or pipeline owner or operator for the purposes of above-ground maintenance or repair of its television cable facilities without giving 96 hours prior written notice to the registered agent of the public utility, railroad or pipeline owner or operator involved, or in the case of a public utility, notice may be given through the statewide one-call notice system provided for by General Order of the Illinois Commerce Commission or, if in Chicago, through the system known as the Chicago Utility Alert Network.

HISTORY:
Source: P.A. 86-820; 86-1410; 90-450, @ 10.

NOTES:
NOTE.
This section was Ill.Rev.Stat., Ch. 24, para. 11-42-11.1.

EFFECT OF AMENDMENTS.
The 1997 amendment by P.A. 90-450, effective January 1, 1998, in subsection (c), inserted "or upon, beneath, or over real estate that is used as a site for 12 or more manufactured housing units, 12 or more mobile homes, or a combination of 12 or more manufactured housing units and mobile homes" in the sixth sentence and added the ninth sentence.

CASE NOTES

ANALYSIS
Retroactivity
Standing
Taking of Property

RETROACTIVITY
Notwithstanding the absence of express language in this section making it retroactive, plaintiff who alleged a continuing trespass beginning before the section's enactment could maintain an action thereunder, since the section governs not only the construction or installation of a cable television system but also its operation and maintenance. Stone v. Omnicom Cable Television of Ill., Inc., 131 Ill. App. 3d 210, 86 Ill. Dec. 226, 475 N.E.2d 223 (2 Dist. 1985).

STANDING
Homeowner's association did not have standing to challenge a cable television company's installation of cable in adjoining property owned by the homeowner association's members pursuant to statute prohibiting homeowner association's from preventing a franchisee's entry upon property to install a cable television

system. Indian Hill Neighbors' Ass'n v. American Cablesystems, 171 Ill. App. 3d 789, 121 Ill. Dec. 677, 525 N.E.2d 984 (1 Dist. 1988).

TAKING OF PROPERTY

This section does not unconstitutionally permit a taking without just compensation because it implicitly recognizes that cable installation involves a taking, as it provides a procedure for compensating the property owner. Times Mirror Cable Television v. First Nat'l Bank, 221 Ill. App. 3d 340, 164 Ill. Dec. 8, 582 N.E.2d 216 (4 Dist. 1991).

MAINE

MAINE REVISED STATUTES

THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT
1997 FIRST SPECIAL SESSION OF THE 118TH LEGISLATURE

TITLE 14. COURT PROCEDURE--CIVIL
PART 7. PARTICULAR PROCEEDINGS
CHAPTER 710-B. CABLE TELEVISION INSTALLATION

14 M.R.S. @ 6041 (1997)

@ 6041. Installation; consent of building owner required

1. CABLE TELEVISION INSTALLATION. A tenant in a multiple dwelling unit may subscribe to cable television service, subject to the following provisions.

A. A cable operator who affixes or causes to be affixed cable television facilities to the dwelling of a tenant shall do so at no cost to the owner of the dwelling; shall indemnify the owner immediately for damages, if any, arising from the installation or the continued operation of the installation, or both; and shall not interfere with the safety, functioning, appearance or use of the dwelling, nor interfere with the rules of the owner dealing with the day-to-day operations of the property, including the owner's reasonable access rules for soliciting business.

Nothing in this section may prohibit an owner from contracting with the cable operator for work in addition to standard installation.

B. No cable operator may enter into any agreement with persons owning, leasing, controlling or managing a building served by a cable television system or perform any act which would directly or indirectly diminish or interfere with the rights of any tenant to use a master or individual antenna system.

C. A cable operator must have the owner's written consent to affix cable television system facilities to a tenant's dwelling. The owner may refuse the installation of cable television facilities for good cause only. Good cause includes, but is not limited to:

(1) Failure to honor previous written contractual commitments; or

(2) Failure to repair damages caused by a cable operator during prior installation.

D. In the absence of written consent, the consent required by paragraph C shall be considered to have been granted to a cable operator upon his delivery to the owner, in person or by certified mail, return receipt requested by the addressee, the following:

(1) A copy of this section;

(2) A signed statement that the cable operator will be bound by the terms of this section to the owner of the property upon which the cable television system facilities are to be affixed; and

(3) Notice to the owner in clear, understandable language that describes the owner's rights and responsibilities.

E. If consent is obtained under paragraph D, the cable operator shall present and the owner and operator shall review, prior to any installation, plans and specifications for the installation, unless waived in writing by the owner. The operator shall abide by reasonable installation requests by the owner. In any legal action brought pursuant to this paragraph, the burden of proof relative to the reasonable nature of the owner's request shall be on the cable operator. The cable operator shall inspect the premises with the owner after installations to ensure conformance with the plans and specifications. The cable operator shall be responsible for maintenance of any equipment installed on the owner's premises and shall be entitled to reasonable access for that maintenance. Unless waived in writing by the owner, the cable operator, prior to any installation, shall provide the owner with a certificate of insurance covering all the employees or agents of the installer or cable operator, as well as all equipment of the cable operator, and must indemnify the owner from all liability arising from the operator's installation, maintenance and operation of cable television facilities.

F. If consent is obtained under paragraph D and the owner of any such real estate intends to require the payment of any sum in excess of a nominal amount defined in this subsection as $ 1, in exchange for permitting the installation of cable television system facilities to the dwelling of the tenant, the owner shall notify the cable operator by certified mail, return receipt requested, within 20 days of the date on which the owner is notified that the cable operator intends to extend cable television system facilities to the dwelling of a tenant of the owner's real estate. Without this notice, it will be conclusively presumed that the owner will not require payment in excess of the nominal amount mentioned in this section specified for such connection. If the owner gives notice, the owner, within 30

days after giving the notice, shall advise the cable operator in writing of the amount the owner claims as compensation for affixing cable television system facilities to his real estate. If, within 30 days after receipt of the owner's claim for compensation, the cable operator has not agreed to accept the owner's demand, the owner may bring an action in the Superior Court to enforce his claim for compensation. If the Superior Court decides in favor of the owner and orders the cable operator to pay the owner's claim for compensation, the cable operator shall reimburse the owner for reasonable attorneys fees incurred by the owner in litigation of this matter before the Superior Court. The action shall be brought within 6 months of the date on which the owner first made demand upon the cable operator for compensation and not after that date.

It shall be presumed that reasonable compensation shall be the nominal amount, but such presumption may be rebutted and overcome by evidence that the owner has a specific alternative use for the space occupied by cable television system facilities or equipment, the loss of which shall result in a monetary loss to the owner, or that installation of cable television system facilities or equipment upon the multiple dwelling unit will otherwise substantially interfere with the use and occupancy of the unit or property to an extent which causes a decrease in the resale or rental value of the real estate. In determining the damages to any such real estate injured when no part of it is being taken, consideration is to be given only to such injury as is special and peculiar to the real estate and there shall be deducted from the damages the amount of any benefit to the real estate by reason of the installation of cable television system facilities.

G. None of the steps enumerated in paragraph F, to claim or enforce a demand for compensation in excess of the nominal amount, shall impair or delay the right of the cable operator to install, maintain or remove cable television system facilities at a tenant's dwelling on the real estate. The Superior Court shall have original jurisdiction to enforce this paragraph.

H. No person owning, leasing, controlling or managing any multiple dwelling unit served by a cable television system may discriminate in rental or other charges between tenants who subscribe to these services and those who do not, or demand or accept payment in any form for the affixing of cable television system equipment on or under the real estate, provided that the owner of the real estate may require, in exchange for permitting the installation of cable television system equipment within and upon the real estate, reasonable compensation to be paid by the cable operator. The

compensation shall be determined in accordance with this subsection.

I. As used in this subsection, unless the context otherwise indicates, the following terms have the following meanings.

(1) "Cable television operator," "cable operator" or "operator" means any person, firm or corporation owning, controlling, operating, managing or leasing a cable system or any lawful agent appointed by any one of the persons or entities mentioned in this subparagraph.

(2) "Multiple dwelling unit" means any building or structure which contains 2 or more apartments or living units.

(3) "Owner" means the person or persons possessing legal title to real estate or the lawful agent appointed by an owner.

(4) "Tenant" means one who has the temporary use and occupation of real property owned by another person.

MASSACHUSETTS

GENERAL LAWS OF MASSACHUSETTS

Chapter 166A: Section 22. Interference with rights of building occupants served by system; installation; consent of building owners; multiple dwelling units.

Section 22. No operator shall enter into any agreement with persons owning, leasing, controlling or managing buildings served by a CATV system, or perform any act, that would directly or indirectly diminish or interfere with existing rights of any tenant or other occupant of such a building to the use of master or individual antenna equipment.

An operator who affixes, or causes to be affixed, CATV system facilities to the dwelling of a tenant shall do so at no cost to the landlord of such dwelling, shall indemnify the landlord of such dwelling for any damage arising out of such actions, and shall not interfere with the safety, functioning, appearance or use of such dwelling.

The consent required by section thirty-five of chapter one hundred and sixty-six shall be deemed to have been granted to an operator upon his delivery to the owner or lawful agent of the owner of property upon which he proposes to affix CATV system facilities of a copy of this section and a signed statement that he agrees to be bound by the terms of this section.

An owner of property, or his lawful agent, may sue in contract to enforce the provisions of an operator's agreement under this section.

No person owning, leasing, controlling or managing a multiple dwelling unit or units or a manufactured housing community, as defined in section thirty-two F of chapter one hundred and forty served by a CATV system shall discriminate in rental or other charges between tenants or manufactured home owners or occupants who subscribe to such CATV services, and those who do not; provided, however, that the owner of such real estate may require reasonable compensation in exchange for permitting the installation of CATV system equipment within and upon such real estate, to be paid by an operator, and any such taking and compensation shall be determined in accordance with the provisions of chapter seventy-nine.

No person owning, leasing, controlling or managing a multiple dwelling unit or units, or a manufactured housing community, as defined in section thirty-two F of chapter one hundred and forty, shall prohibit or otherwise prevent an operator from entering such buildings or manufactured homes for the purpose of constructing, installing or servicing CATV system facilities if one or more tenants or occupants of a multiple dwelling unit or units, or one or more owners or occupants of a manufactured home or homes, have requested such CATV services. A cable television operator shall not make an installation in an individual dwelling unit or manufactured home unless permission has been given by the tenant occupying such unit or the owner or occupant of such manufactured home.

An owner whose property is injuriously affected or diminished in value by occupation of the ground or air or otherwise by such construction of CATV system facilities may recover damages therefor from the operator pursuant to chapter seventy-nine. The right of an operator to construct, install or repair CATV system facilities and to maintain CATV services shall not be delayed or impaired by the assertion of a specific claim, or the initiation of legal action to enforce such claim. The superior court shall have exclusive original jurisdiction of all actions seeking injunctive relief to permit the construction, installation or repair of CATV system facilities.

A cable television operator shall indemnify the landlord for any damage caused by the installation, operation or removal of cable television facilities. An owner of property may require that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants.

MINNESOTA

Minnesota Statutes 1997 Display Document 9 of 50

Chapter Title: CABLE COMMUNICATIONS
Section: 238.22

Text:

238.22 Definitions.

Subdivision 1. Scope. The terms used in sections 238.22 to 238.27 have the meanings given them in this section.

Subd. 2. **Dwelling unit.** "Dwelling unit" means a single unit providing complete, independent, living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.

Subd. 3. Multiple dwelling complex. "Multiple dwelling complex" means a site, lot, field, or tract of land or water, other than a condominium, cooperative, or mobile home park, whether occupied or under construction, containing more than four **dwelling units**.

Subd. 4. Property owner. "Property owner" means any person with a recorded interest in a multiple dwelling complex, or person known to the cable communications company to be an owner, or the authorized agent of the person.

Subd. 5. Resident. "Resident" means a person or entity paying rent to a property owner.

Subd. 6. Access. "Access" means entrance onto the premises of the property owner and an easement for purposes of surveying, designing, installing, inspecting, maintaining, operating, repairing, replacing, or removing equipment used in the construction and operation of a cable communications system.

Subd. 7.

...More

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Section: 238.22 continued...

Alternative providers. "Alternative providers" means other providers of television programming or cable communications services.

Subd. 8. Association member. "Association member" means an individual owner of a cooperatively owned multiple dwelling complex.

Subd. 9. Other providers of television programming or cable communications services. "Other providers of television programming or cable communications services" means operators of master antenna television systems (MATV), satellite master antenna television systems (SMATV), multipoint distributions systems (MDS), and direct broadcast satellite systems (DBS).

HIST: 1983 c 329 s 3; 1985 c 285 s 30-32

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Chapter Title: CABLE COMMUNICATIONS
Section: 238.24

Text:

238.24 Conditions for access.

Subdivision 1. In general. An installation of cable communications facilities under sections 238.22 to 238.27 must conform to reasonable conditions necessary to protect the safety, functioning, and aesthetic appearance of the premises, and the convenience and well-being of the property owner and residents.

Subd. 2. Owner approval. A property owner may require from a cable communications company before installation or modification of cable communications facilities, diagrams showing plans for the placement and securing of the facilities. A property owner may approve or disapprove installation plans. Approval of plans may not be unreasonably withheld.

Subd. 3. Installation; bond. The facilities must be installed in an expeditious and workmanlike manner, must comply with applicable codes, and must be installed parallel to utility lines when economically feasible. A property owner may require a cable communications company to post a bond or equivalent security in an amount not exceeding the estimated cost of installation of the cable communications facilities on the premises. Any bond filed by a cable communications company with a municipality which would provide coverage to the property owner as provided under this subdivision shall be considered to fulfill the requirements of this subdivision.

Subd. 4. Indemnify for damage. A cable communications company shall indemnify a property owner for damage caused by the company in the installation, operation, maintenance, or removal of its facilities.

Subd. 5. Relocation. A property owner may require a cable communications company, after reasonable written notice, to promptly relocate cable communications facilities on or within the premises of the property owner for the purpose of rehabilitation, redecoration, or necessary maintenance of the premises by the property owner.

...More

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Section: 238.24 continued...

Subd. 6. Master antenna television system. Nothing in sections 238.22 to 238.27 precludes a property owner from entering into an agreement for use of a master antenna television system by a cable communications company or other television communications service.

Subd. 7. Cost allocated. A cable communications company shall bear the entire cost of the installation, operation, maintenance, and removal of a cable communications facility within the initial franchise service area.

Subd. 8. Compensation for access. (a) A cable communications company shall:

(1) compensate the property owner for the diminution in fair market value of the premises resulting directly from the installation of the nonexclusive cable communications system; and

(2) reimburse the property owner in an amount not to exceed $100 for premises containing less than ten **dwelling units**, and $200 for other premises, for actual costs incurred by the property owner with respect to the professional review of the plans and drawings regarding installation or modification of the cable communications system, associated contractual materials, and other documentation.

(b) With respect to paragraph (a), clause (1), any party appearing in a proceeding as provided under section 238.25 may introduce evidence of damages, if any, and special benefits, if any, to the property occurring by reason of the installation of the cable communications system.

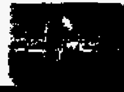
Subd. 9. Not retroactive. Nothing in sections 238.22 to 238.27 affects the validity of an agreement effective before June 15, 1983 between a property owner, a cable communications company, or any other person providing cable communications services on or within the premises of the property owner.

Subd. 10. Channel capacity. (a) A property owner must provide access by a franchised cable communications company, as required under section 238.23, only if that cable company installs equipment with channel capacity sufficient to provide access to other providers of television programming or cable communications services so that residents or association members have a choice of alternative providers of those services. If the equipment is installed, the cable communications company shall allow alternative providers to use

the equipment. If some of the residents or association members choose to subscribe to the services of an alternative provider, the cable company that installed the equipment shall be reimbursed by the other providers for the cost of equipment and installation on the property on a pro rata basis which reflects the number of subscribers of each provider on that property to the total number of subscribers on that property. In determining the pro rata amount of reimbursement by any alternative provider, the cost of equipment and installation shall be reduced to the extent of cumulative depreciation of that equipment at the time the alternative provider begins providing service.

(b) If equipment is already installed as of June 15, 1983 with channel capacity sufficient to allow access to alternative providers, the access and pro rata reimbursement provisions of paragraph (a) apply.

HIST: 1983 c 329 s 5; 1985 c 285 s 33



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Chapter Title: CABLE COMMUNICATIONS
Section: 238.241

Text:

238.241 Conditions for access by alternative providers.

Subdivision 1. Channel capacity. Cable companies granted access to a multiple dwelling complex under section 238.25 shall provide equipment with sufficient channel capacity to be used by alternative providers of television programming or cable communications services.

Subd. 2. Technical plan approval. The cable communications company shall determine the technical plan best suited for providing the necessary channel capacity sufficient to allow access to other providers. The plan must be submitted to the property owner for approval. The owner's approval may not be unreasonably withheld. No additional compensation for evaluation of the plan may be paid or given to the property owner over and above that permitted under section 238.24, subdivision 8.

Subd. 3. Duplicate connections. The cable communications company is not required to provide equipment for connecting more than one television receiver in one **dwelling unit** within the multiple dwelling complex. However, the company may provide duplicate connections at its discretion.

HIST: 1985 c 285 s 34

Minnesota Statutes 1997 Display Document 12 of 50

Chapter Title: CABLE COMMUNICATIONS
Section: 238.242

Text:

238.242 Reimbursement.

Subdivision 1. Providing alternative service. Other providers of television programming or cable communications services shall notify the cable communications company when a resident or association member occupying a **dwelling unit** in a multiple dwelling complex requests the services provided for by this section or section 238.241. After reaching agreement with the alternative service provider for reimbursement to be paid for use of the equipment, the cable communications company shall make available the equipment necessary to provide the alternative service without unreasonable delay.

Subd. 2. Reimbursement determination. The amount to be reimbursed must be determined under section 238.24, subdivision 10. The reimbursed amount must be paid in one installment for each instance of requested use. The payment may not be refunded upon subscriber cancellation of the alternative service.

Subd. 3. Financial records made available. The cable communications company, upon written request, shall make available to the alternative provider financial records supporting the reimbursement cost requested.

HIST: 1985 c 285 s 35

MINNESOTA STATUTES 1997
*** THIS SECTION IS CURRENT THROUGH THE 1997 LEGISLATIVE SESSIONS ***
Telecommunications
CHAPTER 237 TELEPHONE AND TELEGRAPH COMPANIES;
TELECOMMUNICATIONS CARRIERS
PRIVATE TELEPHONE SERVICES

Minn. Stat. @ 237.68 (1997)

237.68 Private shared telecommunications service

Subdivision 1. Definition. For the purposes of this section, "private shared telecommunications services" means the provision of telephone services and equipment within a user group located in discrete private premises, in building complexes, campuses, or high-rise buildings, by a commercial shared services provider or by a user association, through privately owned customer premises equipment and associated data processing and information management services and includes the provision of connections to the facilities of a local exchange and to long-distance telephone companies.

Subd. 2. Requirements. A person who owns or operates a building, property, complex, or other facility where a private shared telecommunications system is operated shall establish a single demarcation point for services and facilities provided by the telephone company providing local exchange service in the area that is mutually agreeable to the property owner or operator and the telephone company. The obligation of a telephone company to provide service to a customer at a location where a private shared telecommunications system is operated is limited to providing telephone company service and facilities up to the demarcation point established for the property where the private shared telecommunications system is located.

Subd. 3. Access to alternative providers. A tenant of a building, property, complex, or other facility where a private shared telecommunications system is operated may establish a direct connection to and receive telephone service from the telephone company providing local exchange service in the area where the private shared telecommunications system is located. At the request of a tenant where a private shared telecommunications system is operated, the owner or manager of the property shall make facilities or conduit space available to the tenant to allow the tenant to make separate connection to and to receive telephone service directly from the telephone company operating local exchange service in the area. The tenant has the choice of installing the tenant's own facilities or using the existing facilities. The facilities or conduit space must be provided by the owner or operator to the tenant at a reasonable rate and on reasonable terms and conditions. It is the obligation of the tenant to arrange for premises wire, cable, or other equipment necessary to connect the tenant's telephone equipment with the facilities of the telephone company

operating local exchange service at the location of the demarcation point.

Subd. 4. Enforcement. If the commission finds that the owner or operator of a private shared telecommunications system has failed to comply with a request under this section, the commission may order the owner or operator to make facilities or conduit space available sufficient to allow the tenant to make separate connection with the telephone company, and provide the services at reasonable prices and on reasonable terms and conditions.

Subd. 5. Exemption. A provider of private shared telecommunications services is exempt from section 237.16 if the telecommunications services are only provided to tenants or for the provider's own use.

Subd. 6. Service by local telephone company. The telephone company providing local exchange service shall provide service to anyone located within a shared services building at the demarcation point within a reasonable time upon request.

HISTORY:
1987 c 340 s 12

NOTES:

NOTE: See section 237.5799

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*** THIS SECTION IS CURRENT THROUGH THE 1997 SUPPLEMENT ***
*** (SIXTY-NINTH (1997) SESSION) ***

TITLE 58. PUBLIC UTILITIES AND SIMILAR ENTITIES
CHAPTER 711. COMMUNITY ANTENNA TELEVISION SYSTEMS

Nev. Rev. Stat. Ann. @ 711.255 (1997)

@ 711.255. Service to tenants: Prohibited conduct by landlord; notice and cost of installation; compensation for access; construction, installation, repair and purchase of facilities; discounts prohibited

1. A landlord shall not:

(a) Interfere with the receipt of service by a tenant from a community antenna television company or discriminate against a tenant for receiving such a company's service.

(b) Except as otherwise provided in subsection 3, demand or accept payment of any fee, charge or valuable consideration from a community antenna television company or a tenant in exchange for granting access to the community antenna television company to provide its services to the tenant.

2. A community antenna television company which desires to provide such services to a tenant shall give 30 days written notice of that desire to the landlord before the company takes any action to provide that service. Before authorizing the receipt of such service a landlord may:

(a) Take such reasonable steps as are necessary to ensure that the safety, function and appearance of the premises and the convenience and safety of persons on the property are not adversely affected by the installation, construction, operation or maintenance of the facilities necessary to provide the service, and is entitled to be reimbursed by the community antenna television company for the reasonable expenses incurred;

(b) Require that the cost of the installation, construction, operation, maintenance or removal of the necessary facilities be borne by the community antenna television company; and

(c) Require the community antenna television company to provide evidence

that the company will indemnify the landlord for any damage caused by the installation, construction, operation, maintenance or removal of the facilities.

3. A landlord is entitled to receive reasonable compensation for any direct adverse economic effect resulting from granting access to a community antenna television company. There is a rebuttable presumption that the direct adverse economic effect resulting from granting access to the real property of the landlord is $1,000 or $1 for each dwelling unit thereon, whichever sum is greater. If a landlord intends to require the payment of such compensation in an amount exceeding that sum, the landlord shall notify the community antenna television company in writing of that intention. If the company does not receive such a notice within 20 days after the landlord is notified by the company that a tenant has requested the company to provide its services to the tenant on the landlord's premises, the landlord may not require compensation for access to that tenant's dwelling unit in an amount exceeding $1,000. If within 30 days after receiving a landlord's request for compensation in a amount exceeding $1,000, the company has not agreed to pay the requested amount or an amount mutally acceptable to the company and the landlord, the landlord may petition a court of competent jursidiction to set a reasonable amount of compensation for the damage of or taking of his real property. Such an action must be filed within 6 months after the date the company completes construction.

4. In establishing the amount which will constitute reasonable compensation for any damage or taking by a landlord in excess of the sum established by rebuttable presumption pursuant to subsection 3, the court shall consider:

(a) The extent to which the community antenna television company's facilities physically occupy the premises;

(b) The actual long-term damage which the company's facilities may cause to the premises;

(c) The extent to which the company's facilities would interfere with the normal use and enjoyment of the premises; and

(d) The diminution or enhancement in value of the premises resulting from the availability of the service.

The court may also award to the prevailing party reasonable attorney's fees.

5. The company's right to construct, install or repair its facilities and maintain its services within and upon the landlord's premises is not affected or impaired because the landlord requests compensation in an amount exceeding the sum established by rebuttable presumption pursuant to subsection 3, or files an action to assert a specific claim against the company.

6. A community antenna television company shall not offer a special discount or other benefit to a particular group of tenants as an incentive to request the company's services, unless the same discount or benefit is offered generally in the county.

7. The community antenna television company and the landlord shall negotiate in good faith for the purchase of the landlord's existing cable facilities rather than for the construction of new facilities on the premises.

8. As used in this section, "landlord" means an owner of real property, or his authorized representative, who provides a dwelling unit on the real property for occupancy by another for valuable consideration. The term includes, without limitation, the lessor of a mobile home lot and the lessor or operator of a mobile home park.

HISTORY: 1987, ch. 742, @ 1, p. 1818; 1989, ch. 484, @ 1, p. 1038.
LEGAL PERIODICALS
Review of Selected Nevada Legislation, Property, 1987 Pac. L.J. Rev. Nev. Legis. 171.

USER NOTE: For more generally applicable notes, see notes under the first section of this chapter or title.

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*** THIS SECTION IS CURRENT THROUGH P.A. 1997, CH. 261 ***
*** (207TH LEGISLATURE, SECOND ANNUAL SESSION) ***

TITLE 48. PUBLIC UTILITIES
CHAPTER 5A. CABLE TELEVISION

N.J. Stat. @ 48:5A-49 (1997)

@ 48:5A-49. Landlords allowing cable television service reception by tenants; prohibition of charges and fees; indemnification of owners by installers; definitions

a. No owner of any dwelling or his agent shall forbid or prevent any tenant of such dwelling from receiving cable television service, nor demand or accept payment in any form as a condition of permitting the installation of such service in the dwelling or portion thereof occupied by such tenant as his place of residence, nor shall discriminate in rental charges or otherwise against any such tenant receiving cable television service; provided, however, that such owner or his agent may require that the installation of cable television facilities conforms to all reasonable conditions necessary to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants; and further provided, that a cable television company installing any such facilities for the benefit of a tenant in any dwelling shall agree to indemnify the owner thereof for any damage caused by the installation, operation or removal of such facilities and for any liability which may arise out of such installation, operation or removal.

b. For purposes of this section:

(1) "Owner" includes, but is not limited to, a condominium association and housing cooperative, and "owner of any dwelling or his agent" includes, but is not limited to, a mobile home park owner or operator.

(2) "Condominium association" means an entity, either incorporated or unincorporated, responsible for the administration of the form of real property which, under a master deed, provides for ownership by one or more owners of individual units together with an undivided interest in common elements appurtenant to each unit.

(3) "Housing cooperative" means a housing corporation or association which entitles the holder of a share or membership interest thereof to possess and

occupy for dwelling purposes a house, apartment or other structure owned or leased by the corporation or association, or to lease or purchase a dwelling constructed by the corporation or association.

(4) "Tenant" includes, but is not limited to, a resident of a mobile home in a mobile home park.

NEW YORK

§ 228. Landlord-tenant relationship. 1. No landlord shall (a) interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

(1) that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants;

(2) that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

(3) that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

(b) demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

(c) discriminate in rental charges or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to January first, nineteen hundred seventy-three may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television company, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

PENNSYLVANIA

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT (1996 SESSIONS) ***

TITLE 68. REAL AND PERSONAL PROPERTY
PENNSYLVANIA STATUTES
CHAPTER 8. LANDLORD AND TENANT
LANDLORD AND TENANT ACT OF 1951
ARTICLE V-B. TENANTS' RIGHTS TO CABLE TELEVISION

68 P.S. @ 250.551 (1997)

[P.S.] @@ 250.551 to 250.555. Renumbered as 68 P.S. @@ 250.501-A to 250.505-A in 1993

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LANDLORD AND TENANT ACT OF 1951
ARTICLE V-B. TENANTS' RIGHTS TO CABLE TELEVISION

68 P.S. @ 250.502-B (1997)

[P.S.] @ 250.502-B. Tenants protected

A landlord may not discriminate in rental or other charges between tenants who subscribe to the services of a CATV system and those who do not. The landlord may, however, require reasonable compensation in exchange for a permanent taking of his property resulting from the installation of CATV system facilities within and upon his multiple dwelling premises, to be paid by an operator. The compensation shall be determined in accordance with this article.

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68 P.S. @ 250.503-B (1997)

[P.S.] @ 250.503-B. Tenants' rights

The tenant has the right to request and receive CATV services from an operator or a landlord provided that there has been an agreement between a landlord and an operator through the negotiation process outlined in section 504-B or through a ruling of an arbitrator as provided for in this article. A landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring CATV services from an operator of the tenant's choice provided that there has been an agreement between a landlord and an operator through the negotiation process outlined in section 504-B or through a ruling of an arbitrator as provided for in this article. A landlord may not prevent an operator from entering such premises for the purposes of constructing, reconstructing, installing, servicing or repairing CATV system facilities or maintaining CATV services if a tenant of a multiple dwelling premises has requested such CATV services and if the operator complies with this article. The operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises. An operator shall not provide CATV service to an individual dwelling unit unless permission has been given by or received from the tenant occupying the unit.

PENNSYLVANIA STATUTES

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68 P.S. @ 250.504-B (1997)

[P.S.] @ 250.504-B. Right to render services; notice

If a tenant of a multiple dwelling premises requests an operator to provide CATV services and if the operator decides that it will provide such services, the operator shall so notify the landlord in writing within ten days after the operator decides to provide such service. If the operator fails to provide such notice, then the tenant's request shall be terminated. If the operator agrees to provide said CATV services, then a forty-five day period of negotiation between the landlord and the operator shall be commenced. This original notice shall state as follows: "The landlord, tenants and operators have rights granted under Article V-B of the act of April 6, 1951 (P.L. 69, No. 20), known as 'The Landlord and Tenant Act of 1951.' " The original notice shall be accompanied by a proposal outlining the nature of the work to be performed and including an offer of compensation for loss in value of property given in exchange for the permanent installation of CATV system facilities. The proposal also shall

include a statement that the operator is liable to the landlord for any physical damage, shall set forth the means by which the operator will comply with the installation requirements of the landlord pursuant to section 505-B and shall state the time period for installation and security to be provided. The landlord may waive his right to security at any time in the negotiation process.

During the forty-five day period, the landlord and the operator will attempt to reach an agreement concerning the terms upon which CATV services shall be provided. If, within the forty-five day period or at any time thereafter, the proposal results in an agreement between the landlord and the operator, CATV services shall be provided in accordance with the agreement. If, at the end of the forty-five day period, the proposal does not result in an agreement between the landlord and the operator, then this article shall apply. The right of a tenant to receive CATV service from an operator of his choice may not be delayed beyond the forty-five day period contained in the original notice or otherwise impaired unless the matter proceeds to arbitration or court as provided in this article. An operator may bring a civil action to enforce the right of CATV services installation given under this article.

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68 P.S. @ 250.505-B (1997)

[P.S.] @ 250.505-B. Compensation for physical damage

An operator shall be liable to the landlord for any physical damage caused by the installation, operation or removal of CATV system facilities. A landlord may require that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises and the convenience and well-being of tenants. A landlord may also require that the installation of cable television facilities conforms to reasonable requirements as to the location of main cable connections to the premises, the routing of cable lines through the premises and the overall appearance of the finished installation. To the extent possible, the location of the entry of a main cable connection to the premises shall be made at the same location as the entry into the premises of public utility connections. A second

or subsequent installation of cable television facilities, if any, shall conform to such reasonable requirements in such a way as to minimize further physical intrusion to or through the premises.

PENNSYLVANIA STATUTES

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68 P.S. @ 250.506-B (1997)

[P.S.] @ 250.506-B. Compensation for loss of value

(a) A landlord shall be entitled to just compensation from the operator resulting from loss in value of property resulting from the permanent installation of CATV system facilities on the premises.

(b) If a landlord believes that the loss in value of the property exceeds the compensation contained in the proposal accompanying the original notice or believes that the terms involving the work to be performed contained in the proposal are unreasonable, or both, the issue of just compensation or reasonableness of terms shall be determined in accordance with the following procedure:

(1) At any time prior to the end of the forty-five day period from the date when the landlord receives the original notice that the operator intends to construct or install a CATV system facility in multiple dwelling premises, the landlord shall serve upon the operator written notice that the landlord demands a greater amount of compensation or believes that the terms involving the work to be performed are unreasonable.

(2) If the operator is dissatisfied with the result of the negotiations at the conclusion of the forty-five day negotiation period, then he shall notify the landlord of the terms which the operator believes to be unreasonable and shall accompany this notice with a formal request for arbitration.

(3) Arbitration proceedings shall be conducted in accordance with the procedures of the American Arbitration Association or any successor thereto. The proceedings shall be held in the county in which the multiple dwelling premises or part thereof are located. Requirements of this act relating to time,

presumptions and compensation for loss of value shall apply in the proceedings. The cost of the proceedings shall be shared equally by the landlord and the operator. The arbitration proceedings, once commenced, shall be concluded and a written decision by the arbitrator shall be rendered within fourteen days of commencement. Judgment upon any award may be entered in any court having jurisdiction.

(4) Within thirty days of the date of the notice of the decision of the arbitrators, either party may appeal the decision of the arbitrators in a court of common pleas, regarding the amount awarded as compensation for loss of value or for physical damages to the property. During the pendency of an appeal, the operator may not enter the multiple dwelling premises to provide CATV services, except as to those units that have existing CATV services. The court shall order each party to pay one-half of the arbitration costs.

(c) In determining reasonable compensation, evidence that a landlord has a specific alternative use for the space occupied or to be occupied by CATV system facilities, the loss of which will result in a monetary loss to the owner, or that installation of CATV system facilities upon such multiple dwelling premises will otherwise substantially interfere with the use and occupancy of such premises to an extent which causes a decrease in the resale or rental value thereof shall be considered. In determining the damages to any landlord in an action under this section, compensation shall be measured by the loss in value of the landlord's property. An amount representing increase in value of the property occurring by reason of the installation of CATV system facilities shall be deducted from the compensation.

(d) The time periods set forth in this section may be extended by mutual agreement between the landlord and the operator.

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT (1996 SESSIONS) ***

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ARTICLE V-B. TENANTS' RIGHTS TO CABLE TELEVISION

68 P.S. @ 250.508-B (1997)

[P.S.] @ 250.508-B. Alternative service

Nothing in this act shall preclude a landlord from offering alternative CATV services to tenants provided that the provisions of this article are not violated.

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT (1996 SESSIONS) ***

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ARTICLE V-B. TENANTS' RIGHTS TO CABLE TELEVISION

68 P.S. @ 250.509-B (1997)

[P.S.] @ 250.509-B. Compliance with requirements for historical buildings

The operator shall comply with all Federal, State or local statutes, rules, regulations or ordinances with respect to buildings located in historical districts.

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT (1996 SESSIONS) ***

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68 P.S. @ 250.510-B (1997)

[P.S.] @ 250.510-B. Existing CATV services protected

CATV services being provided to tenants in multiple dwelling premises on the effective date of this act may not be prohibited or otherwise prevented so long as the tenant in an individual dwelling unit continues to request such services.

RHODE ISLAND

GENERAL LAWS OF RHODE ISLAND
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*** THIS SECTION IS CURRENT THROUGH THE JANUARY 1997 SESSION
*** (1997 CUMULATIVE SUPPLEMENT) ***

TITLE 39. PUBLIC UTILITIES AND CARRIERS
CHAPTER 19. COMMUNITY ANTENNA TELEVISION SYSTEMS

R.I. Gen. Laws @ 39-19-10 (1997)

@ 39-19-10. **Installation of cable television in multiple dwelling units**

A tenant in a multiple dwelling unit may subscribe to CATV service, subject to the following provisions:

(1) A CATV **operator who affixes or causes to be affixed CATV facilities** to **the dwelling of a tenant** shall (i) do so at **no cost to the landlord** of the dwelling, (ii) **indemnify the landlord** for damages, if any, arising from the installation and/or the continued operation thereof, and (iii) **not interfere with the safety, functioning, appearance** or use **of the dwelling,** nor **interfere** with the rules and regulations of the owner dealing with the day-to-day operations of the property, **including the owner's reasonable access rules for soliciting business.** Nothing in this subdivision shall prohibit a landlord from contracting with the CATV operator for work in addition to standard installation.

(2) No CATV operator shall enter into any agreement with persons owning, leasing, controlling, or managing a building served by a CATV system or perform any act which would directly or indirectly diminish or interfere with the rights of any tenant to use a master or individual antenna system.

(3) (i) A CATV operator shall have the landlord's consent to affix CATV system facilities to a tenant's dwelling by delivery to the owner, in person or by certified mail, return receipt requested, of a copy of this section and a signed statement that the CATV operator will be bound by the terms of this section to the owner or lawful agent of the property upon which the CATV system facilities are to be affixed.

(ii) The CATV operator shall **present and review** with the **owner prior to any installation, plans and specifications for the installation, and shall abide** by **reasonable installation requests by the owner.** The CATV operator will inspect the premises with the owner after installation to insure conformance with the plans and specifications. The owner may waive in writing the prior presentation

of the plans and specifications. The CATV operator shall be responsible for the maintenance of any equipment installed on the owner's premises and shall be entitled to reasonable access for maintenance. The CATV operator shall also, prior to any installation, provide, upon the request of the owner, a certificate of insurance covering all the employees or agents of the installer or CATV operator as well as all equipment of the operator.

(4) If the owner of any such real estate intends to require the payment of any sum in excess of a nominal amount, herein defined as one dollar ($1.00), in exchange for permitting the installation of CATV system facilities to the dwelling of a tenant, the owner shall notify the CATV operator by certified mail, return receipt requested, within twenty (20) days of the date on which the owner is notified that the CATV operator intends to extend CATV system facilities to the dwelling of a tenant of the owner's real estate. Absent such notice, it will be conclusively presumed that the owner will not require payment in excess of the nominal amount specified in this subdivision for the connection.

(5) If the owner gives notice, the owner will, within thirty (30) days after giving notice advise the CATV operator in writing of the amount the owner claims as compensation for affixing CATV system facilities to his or her real estate. If within thirty (30) days after receipt of the owner's claim for compensation, the CATV operator has not agreed to accept the owner's demand, the owner may bring an action in the superior court for the county in which the real estate is located to enforce the owner's claim for compensation. The action shall be brought within six (6) months of the date on which the owner first made a demand upon the CATV operator for compensation and not thereafter.

(6) It shall be presumed that reasonable compensation therefor shall be the nominal amount, but the presumption may be rebutted and overcome by evidence that the owner has a specific alternative use for the space occupied by CATV system facilities or equipment, the loss of which shall result in a monetary loss to the owner, or that installation of CATV system facilities or equipment upon the multiple dwelling unit will otherwise substantially interfere with the use and occupancy of the unit to an extent which causes a decrease in the resale or rental value of the real estate. In determining the damages to any real estate injured when no part of it is being taken, consideration is to be given only to such injury as is special and peculiar to the real estate, and there shall be deducted therefrom the amount of any benefit to the real estate by reason of the installation of CATV system facilities.

(7) None of the foregoing steps to claim or enforce a demand for compensation in excess of the nominal amount shall impair or delay the right of the CATV operator to install, maintain, or remove CATV system facilities to a tenant's dwelling on the real estate. The superior court shall have original jurisdiction to enforce the provisions of this subdivision.

(8) It shall be an unfair trade practice under chapter 13.1 of title 6 for any person owning, leasing, or managing any multiple dwelling unit served by a CATV system to discriminate in rental charges or other charges to tenants based on the tenants' subscription to a CATV service from and after June 25, 1986 or to demand or accept payment, except as provided in this section, for the affixing of CATV facilities to a tenant's dwelling; provided, however, that this subdivision shall not apply to contracts entered into on or before June 25, 1986.

HISTORY: P.L. 1986, ch. 257, @ 1.

NOTES:
Reenactments. The 1997 Reenactment (P.L. 1997, ch. 326, @ 1) redesignated the subdivisions, substituted "Nothing in this subdivision" for "Nothing herein" in the second sentence of subdivision (1), and substituted "amount specified in this subdivision" for "amount hereinbefore specified" in the last sentence of subdivision (4).

WEST VIRGINIA

ARTICLE 18A. TENANTS' RIGHTS TO CABLE SERVICES.

§5-18A-1. Short title.

This article shall be known and may be cited as the "Tenants' Rights to Cable Services Act".

§5-18A-2. Legislative findings.

The Legislature finds and declares as follows:

(a) Cable television has become an important medium of public communication and entertainment.

(b) It is in the public interest to assure apartment residents and other tenants of leased residential dwellings access to cable television service of a quality and cost comparable to service available to residents living in personally owned dwellings.

(c) It is in the public interest to afford apartment residents and other tenants of leased residential dwellings the opportunity to obtain cable television service of their choice and to prevent landlords from treating such residents and tenants as a captive market for the sale of television reception services selected or provided by the landlord.

§5-18A-3. Definitions.

As used in this article:

(a) "Board" means the West Virginia cable television advisory board created under the provisions of article eighteen of this chapter.

(b) "Cable operator" means any person or group of persons: (1) Who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in the cable system; or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system.

(c) "Cable service" or "cable television service" means: (1) The one-way transmission to subscribers of video programming or other programming service; and (2) subscriber interaction, if any, which is required for the selection of video programming or other programming service.

(d) "Cable system" means any facility within this state consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but does not include: (1) A facility that serves only to retransmit

the television signals of one or more television broadcast stations; (2) a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless that facility or facilities uses any public right-of-way; or (3) a facility of a public utility subject, in whole or in part, to the provisions of chapter twenty-four of this code, except to the extent that those facilities provide video programming directly to subscribers.

(e) "Cable television facilities" includes all antennas, poles, supporting structures, wires, cables, conduits, amplifiers, instruments, appliances, fixtures and other personal property used by a cable operator in providing service to its subscribers.

(f) "Landlord" means a person owning, controlling, leasing, operating or managing the multiple dwelling premises.

(g) "Multiple dwelling premises" means any area occupied by dwelling units, appurtenances thereto, grounds and facilities, which dwelling units are intended or designed to be occupied or leased for occupation, or actually occupied, as individual homes or residences for three or more households. The term includes mobile home parks.

(h) "Person" means an individual, partnership, associate, joint stock company, trust, corporation or governmental agency.

(i) "Tenant" means a person occupying single or multiple dwelling premises owned or controlled by a landlord but does not include an inmate or any person incarcerated or housed within any state institution.

§5-18A-4. Landlord-tenant relationship.

(a) A landlord may not:

(1) Interfere with the installation, maintenance, operation or removal of cable television facilities upon his property or multiple dwelling premises, except that a landlord may require:

(A) That the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the multiple dwelling premises and the convenience and well-being of other tenants;

(B) That the cable operator or the tenant or a combination thereof bear the entire cost of the installation or removal of such facilities; and

(C) That the cable operator agrees to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities;

(2) Demand or accept any payment from any tenant, in any form, in

exchange for permitting cable television service on or within his property or multiple dwelling premises, or from any cable operator in exchange therefor except as may be determined to be just compensation in accordance with this article;

(3) Discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

(b) Provisions relating to cable television service or satellite master antenna systems contained in rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

(c) A cable operator may not enter into any agreement with the owners, lessees or persons controlling or managing the multiple dwelling premises served by a cable television, or do or permit any act, that would have the effect, directly or indirectly, of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

(d) The cable operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a cable system within any multiple dwelling premises.

§5-18A-5. Prohibition.

Except as provided in this article, no landlord may demand or accept any payment from any cable operator in exchange for permitting cable television service or facilities on or within the landlord's property or multiple dwelling premises.

§5-18A-6. Just compensation.

Every landlord is entitled to a single payment of just compensation for property taken by a cable operator for the installation of cable television service or facilities. The amount of just compensation, if not agreed between the landlord and cable operator, shall be determined by the board in accordance with this article upon application by the landlord pursuant to section nine of this article. A landlord is not entitled to just compensation in the event of a rebuild, upgrade or rewiring of cable television service or facilities by a cable operator.

§5-18A-7. Right of entry.

A cable operator, upon receiving a request for service by a tenant or landlord, has the right to enter property of the landlord for the purpose of making surveys or other investigations preparatory to the installation. Before such entry, the cable operator shall serve notice upon the landlord and tenant,

which notice shall contain the date of the entry and all other information described in subsection (b), section eight of this article. The cable operator is liable to the landlord for any damages caused by such entry but such damages shall not duplicate damages paid by the cable operator pursuant to section nine of this article.

§5-18A-8. Notice of installation.

(a) Every cable operator proposing to install cable television service or facilities upon the property of a landlord shall serve upon said landlord and tenant, or an authorized agent, written notice of intent thereof at least fifteen days prior to the commencement of such installation. Verbal notice to the tenant shall be legally sufficient if the date and time of entry is communicated to the tenant by either the landlord or cable operator at least twenty-four hours prior to entry.

(b) The board shall prescribe the procedure for service of such notice, and the form and content of such notice, which shall include, but need not be limited to:

(1) The name and address of the cable operator;

(2) The name and address of the landlord;

(3) The approximate date of the installation; and

(4) A citation to this act.

(c) Where the installation of cable television service or facilities is not effected pursuant to a notice served in accordance with this section, for whatever reason including denial of entry by the landlord, the cable operator may file with the board a petition, verified by an authorized person from the cable operator, setting forth:

(1) Proof of service of a notice of intent to install cable television service upon the landlord;

(2) The specific location of the real property;

(3) The resident address of the landlord, if known;

(4) A description of the facilities and equipment to be installed upon the property, including the type and method of installation and the anticipated costs thereof;

(5) The name of the individual or officer responsible for the actual installation;

(6) A statement that the cable operator shall indemnify the landlord for any damage caused in connection with the installation, including proof of insurance or other evidence of ability to indemnify the landlord;

(7) A statement that the installation shall be conducted without prejudice to the rights of the landlord to just compensation in accordance with section nine of this article;

(8) A summary of efforts by the cable operator to effect entry of the property for the installation; and

(9) A statement that the landlord is afforded the opportunity to answer the petition within twenty days from the receipt thereof, which answer must be responsive to the petition and may set forth any additional matter not contained in the petition.

If no appearance by the landlord is made in the proceeding or no answer filed within the time permitted, the board shall grant to the petitioning cable operator an order of entry, which order constitutes a ruling that the petitioning cable operator has complied with the requirements of this article. If the landlord files a written answer to the petition, the cable operator shall have ten days within which to reply to the answer. The board may grant or deny the petition, schedule an administrative hearing on any factual issues presented thereby or direct such other procedures as may be consistent with the installation of cable television service or facilities in accordance with this article. The only basis upon which the board may deny a petition by the cable operator is that the cable operator has not complied with the requirements of this article.

Within thirty days of the date of grant or denial of the petition, or issuance of any other order by the board following a hearing or other procedure, the cable operator or landlord may appeal such grant or denial or order of the board to the circuit court of Kanawha county. Any order issued by the board pursuant to this section may be enforced by an action seeking injunctive or mandamus relief in circuit court where the property is located.

§5-18A-9. Application for just compensation.

(a) If the landlord and cable operator have not reached agreement on the amount of just compensation, a landlord may file with the board an application for just compensation within four months following the service by the cable operator of the notice described in section eight of this article, or within four months following the completion of the installation of the cable television facilities, whichever is later.

(b) An application for just compensation shall set forth specific facts relevant to the determination of just compensation. Such facts should include, but need not be limited to, a showing of:

(1) The location and amount of space occupied by the installation;

(2) The previous use of such space;

(3) The value of the applicant's property before the installation of cable television facilities and the value of the applicant's property subsequent to the installation of cable television facilities; and

(4) The method or methods used to determine such values. The board may, upon good cause shown, permit the filing of supplemental information at any time prior to final determination by the board.

(c) A copy of the application filed by the landlord for just compensation shall be served upon the cable operator making the installation and upon either the mayor or county commission of the municipality or county, respectively, in which the real property is located when the municipality or county is the franchise authority.

(d) Responses to the application, if any, shall be served on all parties and on the board within twenty days from the service of the application.

(e) (1) The board shall within sixty days of the receipt of the application, make a preliminary finding of the amount of just compensation for the installation of cable television facilities.

(2) Either party may, within twenty days from the release date of the preliminary finding by the board setting the amount of just compensation, file a written request for a hearing. Upon timely receipt of such request, the board shall conduct a hearing on the issue of compensation.

(3) In determining just compensation, the board may consider evidence introduced including, but not limited to, the following:

(A) Evidence that a landlord has a specific alternative use for the space occupied or to be occupied by cable television facilities, the loss of which will result in a monetary loss to the owner;

(B) Evidence that installation of cable facilities upon such multiple dwelling premises will otherwise substantially interfere with the use and occupancy of such premises to the extent which causes a decrease in the resale or rental value; or

(C) Evidence of increase in the value of the property occurring by reason of the installation of the cable television facilities.

(4) For purposes of this article, the board shall presume that a landlord has received just compensation from a cable operator for the installation within a multiple dwelling premises if the landlord receives compensation in the amount of one dollar for each dwelling unit within the multiple dwelling

premises or one hundred dollars for the entire multiple dwelling premises, whichever amount is more.

(5) If, after the filing of an application, the cable operator and the applicant agree upon the amount of just compensation, a hearing shall not be held on the issue.

(6) Within thirty days of the date of the notice of the decision of the board, either party may appeal the decision of the board in the circuit court of Kanawha county regarding the amount awarded as compensation.

§5-18A-10. Existing cable services protected.

Cable services being provided to tenants on the effective date of this article may not be prohibited or otherwise prevented so long as the tenant continues to request such services.

§5-18A-11. Exception.

Notwithstanding any provision in this article to the contrary, a landlord and cable operator may by mutual agreement establish the terms and conditions upon which cable television facilities are to be installed within a multiple dwelling premises without having to comply with the provisions of this article.

WISCONSIN

WISCONSIN STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH ALL 1995-1996 LEGISLATION ***
*** INCLUDING LEGISLATION THROUGH 1997 ACT 60, ENACTED 12/19/97 ***

FUNCTIONS AND GOVERNMENT OF MUNICIPALITIES
CHAPTER 66. GENERAL MUNICIPALITY LAW

Wis. Stat. @ 66.085

66.085 Access to cable service.

(1) Definitions. (a) "Cable operator" has the meaning given in s. 66.082 (2) (b).

(b) "Cable service" has the meaning given in s. 66.082 (2) (c).

(2) Interference prohibited. The owner or manager of a multiunit dwelling under common ownership, control or management or the association or board of directors of a condominium may not prevent a cable operator from providing cable service to a subscriber who is a resident of the multiunit dwelling or of the condominium or interfere with a cable operator providing cable service to a subscriber who is a resident of the multiunit dwelling or of the condominium.

(3) Installation in multiunit building. Before installation, a cable operator shall consult with the owner or manager of a multiunit dwelling or with the association or board of directors of a condominium to establish the points of attachment to the building and the methods of wiring. A cable operator shall install facilities to provide cable service in a safe and orderly manner and in a manner designed to minimize adverse effects to the aesthetics of the multiunit dwelling or condominium. Facilities installed to provide cable service may not impair public safety, damage fire protection systems or impair fire-resistive construction or components of a multiunit dwelling or condominium.

(4) Repair responsibility. A cable operator shall be responsible for any repairs to a building required because of the construction, installation, disconnection or servicing of facilities to provide cable service.

HISTORY: 1989 a. 143.

NARUC RESOLUTION REGARDING NONDISCRIMINATORY ACCESS TO BUILDINGS FOR TELECOMMUNICATIONS CARRIERS

WHEREAS, Historically local telephone service was provided by only one carrier in any given region; and

WHEREAS, In the historic one-carrier environment, owners of multi-tenant buildings typically needed the local telephone company to provide telephone service throughout their buildings; and

WHEREAS, Historically, owners of multi-tenant buildings granted the one local telephone company access to their buildings for the purpose of installing and maintaining facilities for the provision of local telephone service; and

WHEREAS, Competitive facilities-based providers of telecommunications services offer substantial benefits for consumers; and

WHEREAS, In order to serve tenants in multi-unit buildings, competitive facilities-based providers of telecommunications services require access to internal building facilities such as inside wiring, riser cables, telephone closets, and rooftops; and

WHEREAS, Facilities-based competitive local exchange carriers, including wireline and fixed wireless providers, have reported concerns regarding their ability to obtain access to multi-unit buildings at nondiscriminatory terms, conditions, and rates that would enable consumers within those buildings to enjoy the benefits of telecommunications competition that would otherwise be available; and

WHEREAS, All States and Territories, as well as the Federal Government, have embraced competition in the provision of local exchange and other telecommunications services as the preferred communications policy; and

WHEREAS, Connecticut, Ohio, and Texas already utilize statutes and rules that prohibit building owners from denying tenants in multi-unit buildings access to their telecommunications carrier of choice; and

WHEREAS, The President of NARUC testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition that "[f]or competition to develop, competitors have to have equal access. They have to be able to reach their customers and building access is one of the things that state commissions are looking at all across the country."; and

WHEREAS, The attributes of incumbent carriers such as free and easy building access should not determine the relative competitive positions of telecommunications carriers; and

WHEREAS, The property rights of building owners must be honored without fostering discrimination and unequal access; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, urges State and Territory regulators to closely evaluate the building access issues in their states and territories, because successful resolution of these issues is important to the development of local telecommunications competition; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings; and be it further

RESOLVED, That the NARUC supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider.

Sponsored by the Committee on Communications

Adopted July 29, 1998

LIST OF INTERESTED PERSONS
Special Project 980000-B

American Association of Retired Persons (AARP)
Edward Paschall

AIMCO Property Asset Management
Steven D. Ira

ALLTEL Florida, Inc.
Harriet Eudy

Apartment Association
Dennis Fuller

AT&T Communications of the Southern States, Inc.
Rhonda Merritt/Tracy Hatch

Ausley Law Firm
John Fons/Jeffry Wahlen

BellSouth Telecommunications, Inc.
Ms. Nancy H. Sims

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CAI Florida Legislative Alliance
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Central Florida Commercial Real Estate Society
Matt Sullivan, President

Codina Development Corporation
Trish Blasi

Community Associations Institute (CAI)
Rodney D. Clark, Vice President
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Chris Keena, Property Operations Manager

Cypress Communications
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Florida Association of Realtors
Gene Adams

Florida Association of Homes for the Aging
Mary Ellen Early

Florida Cable Telecommunications Assoc., Inc.
Laura Gallagher

Florida Legal Services, Inc.
Benjamin Ochshorn

Florida Public Telecommunications Assoc.
Angela Green

Florida Telephone International Assoc.
Susan Langston

Frontier Communications International, Inc.
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GTC, Inc.
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House Democratic Office
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William J. Burhop, Exec. Director

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Institute of Real Estate Management
Shane Winn

Institute of Real Estate Management
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Mr. Steven Brown

International Council of Shopping Centers
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John Guthrie/Susan Masterton

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Thomas Group, Inc.
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Michael Twomey, Esq.

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Bill Huttenhower

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WinStar Communications, Inc.
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