FLORIDA
PUBLIC
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COMMISSION

REPORT ON

Access by Telecommunications Companies to Customers in Multitenant Environments

February 1999

VOLUME TWO

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INTRODUCTION

This volume contains copies of the comments received by the participants in response to the six primary issues identified in the first workshop. Given the diversity of affected interests in this project, all participants were encouraged to communicate among themselves and to seek grounds for a reasonable settlement. To expedite such communication, the majority of documents filed by the participants were posted on the FPSC's Internet homepage and will remain available on the homepage until the 1999 legislative session has adjourned. These documents can be accessed by following these steps:

1. Go to the FPSC homepage at http://www.scri.net/FPSC
2. Scroll down to DOCKETS.
3. Click on CURRENT DOCKET ACTIVITY.
4. Click on OPEN GENERIC DOCKETS.
5. Scroll down to 980000B-SP.
6. Click on DOCUMENT FILINGS INDEX.
7. Click on the appropriate document number (one of the numbers in bold type on the left side of the screen).

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.

STAFF WORKSHOP II

Project No. 980000B-SP
Access by Telecommunications Companies to
Customers in Multi-tenant Environments

Wednesday, August 12, 1998 - 9:30 a.m.
Betty Easley Conference Center - Room 152

ISSUES

I. In general, should telecommunications companies have direct access to customers in multi-tenant environments?

II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

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

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

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D. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal Minimum Point of Entry (MPOE)?

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations
2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., 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.

F. Based on our answer to Issue II.E above, are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is cost to be determined?

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

III. Other issues not covered in I and II.

PARTICIPANT COMMENTS

Time Warner Telecom

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: ISSUE IDENTIFICATION WORKSHOP
FOR UNDOCKETED SPECIAL PROJECT:
ACCESS BY TELECOMMUNICATIONS
COMPANIES TO CUSTOMERS IN
MULTI-TENANT ENVIRONMENTS

DATE FILED: JULY 29, 1998

COMMENTS OF TIME WARNER TELECOM

I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

ANSWER: Yes. Incumbent local exchange carriers ("ILECs") have often pointed out that a large and disproportionate share of the revenues generated from providing local exchange telephone service is derived from a very small percentage of total customers served. These customers can generally be identified as business customers and some residential customers located in urban areas. A large number of these customers are located in a multi-tenant environment such as high rise buildings in highly populated business districts or residential communities. Most rent their spaces and purchase local exchange telecommunications services from the service area ILEC which made its original arrangements as a monopoly provider of these essential services.

In order for competition to develop, competing carriers must have direct access to the customers which comprise these most lucrative markets. Access must be on a nondiscriminatory and competitively neutral basis as compared to the ILEC so that new competitors are not unfairly disadvantaged in their efforts to win market share. In many instances, alternative local exchange carriers ("ALECs") have been denied free access to multi-tenant facilities by property owners who have no particular motivation to accommodate the ALEC's request since tenants are already receiving required services. Of course, in many cases, the ALEC is offered an opportunity to purchase such access; however, these arrangements make it difficult, if not impossible, for the ALEC to compete for new business when it incurs costs not charged to its ILEC competitor. In the current environment, property owners are not in a position to demand similar fees from the incumbent provider at the risk of losing its service. The policy issue for consideration in this circumstance becomes abundantly clear. The solution to this issue will require a balancing of the legislative commitment to promote competition in the telecommunications markets and the private

property owners right to use their property without undue government restriction or interference. Potentially, there are a number of alternative solutions which could be designed through the legislative and/or regulatory process. It would seem that at least two alternatives exist:

(1) to require all providers to pay reasonable compensation to property owners for the use of the asset necessary to support the telecommunications operations; any successful resolution, however, must ensure that its impact is nondiscriminatory and competitively neutral to all providers; or

(2) to not require payment from any carrier providing competitive, alternative and new services to the tenant end users because these services increase the value of the property.

II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

ANSWER: As discussed in the preceding answer, it is imperative to survival that ALECs be permitted access. Equal access to the market place is the most fundamental concept of competition. The decision of whether to permit access must be answered affirmatively. Only the rules for permitting such access should be the subject of debate in this proceeding. Considerations for the formulation of these rules should include, without limitation the following:

(1) the demand by providers for building space and the availability of space;
(2) tenant demands for telecommunications services and the availability of services;
(3) the number of providers willing and capable of providing services;
(4) costs and operational concerns associated with providing building access to multiple providers; and
(5) calculation of fair and reasonable compensation to be paid property owners, if appropriate.

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

ANSWER: If the desired end result is a truly competitive market, competing carriers should not be restricted or prohibited from offering any service at any location, or to any end-users. For this reason, "multi-tenant environment" should be defined broadly so as to include any and all building facilities occupied or to be occupied by two or more tenants which require and purchase or will require and purchase telecommunications services from an

authorized telecommunications service provider.

B. What telecommunications services should be included in "direct access", i.e., basic local service (Section 364.02(2), F.S.), internet access, video, data, satellite, other?

ANSWER: As the ability to combine and package services becomes more critical to marketing strategies and a provider's ability to compete, customers will become less conscious of the components of their telecommunications package which are necessary to service their particular business operations or personal needs. In order to compete, therefore, it will be necessary for providers to be capable of packaging a wide variety of services. For this reason, all telecommunications services under the jurisdiction of the Florida Public Service Commission should be included.

C. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

ANSWER: As the number of competing providers and demand for building access increases, there are certain logistical, operational, technical and safety issues which will inevitably require consideration. In a vast majority of instances, property owners and their vendors resolve these issues by way of oral or written agreements, and by complying with local municipal ordinances and building rules, outside of legislative or regulatory arenas. It would logically follow, therefore, that many of these issues could be resolved by agreement. Access to the regulatory process should be reserved as a vehicle for dispute resolution in a similar manner as provided for interconnection agreements. Reasonable restrictions will not adversely impact the development of competition so long as all such restrictions are applied to all providers in a nondiscriminatory and competitively neutral manner.

Exclusionary contracts would be appropriate only if all the following circumstances existed:

(1) two or more providers are willing to provide services to the facility;
(2) the exclusive contract is subject to a bid process;
(3) all providers are afforded an equal opportunity to bid;
(4) the term of the contract is limited to two years; and
(5) all tenants of the building, at the time the contract is opened for bids, consent to the exclusive arrangement.

D. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) Or federal Minimum Point of Entry (MPOE)?

ANSWER: The demarcation point should be consistent with the federal Minimum Point of Entry ("MPOE") definition, as defined in the FCC's Report and Order in CC Docket No. 88-57 RM 5643. While the Florida Rule does mandate a minimum point of entry, it does not mandate access to building wiring nor does it provide the logistical details of building access as do the orders in the federal proceeding.

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations
2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., 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.

ANSWER: Time Warner incorporates by reference its answers to the previous questions and in addition, offers the following:

Rights:

Private Property Owners have the right to own and enjoy the use of their property without unreasonable or unduly burdensome governmental interference or restriction.

Tenants, Customers and End-Users have the right to access state-of-the-art telecommunications services which will become necessary to their business and personal endeavors, at a quality and at a price offered by a competitive market.

Telecommunications Companies have a right to provide the full array of telecommunications services for which authority has been granted to them by the State and to compete with other providers on a fair and equal basis.

Obligations:

Private Property Owners are obligated to comply with all federal and state laws as enforced by rules of the regulatory agencies in order to promote the general welfare of the citizens of the state.

Tenants, Customers and End-Users have the obligation to negotiate their contracts in good faith and comply with building regulations, contract terms and all applicable laws.

Telecommunications Companies have the obligation to comply with all laws, rules and regulations and provide quality services competently and responsibly.

F. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

ANSWER: The issue of compensation will undoubtedly become the most contentious issue in this proceeding. Historically, local exchange telephone service, a service critical to the property owner's ability to lease space, was offered by only one provider. The issue of compensation for use of building space or facilities was never considered. The difficulty for regulators is balancing the rights of the property owners with the intent of the state and federal statutes to promote competition in the local exchange market. If compensation is to be paid, the dispute will most likely arise in the calculation of "just and reasonable" compensation. Telecommunications service providers will contend that the rate of compensation should be based on the loss incurred by the property as a result of allowing the physical access. Since these providers will usually occupy a small number of square feet in any particular building, generally less than five hundred square feet, the telecommunications service providers will argue that the compensation should be minimal. Property owners will submit that the use of their space by telecommunications service providers is unique and should be treated as a licensing arrangement. Many owners will contend that these licensing fees should be calculated based upon a percentage of gross receipts. This proposal is tantamount to a tax and is inappropriate under Florida law.

Under the basic principles applied to the calculation of compensation in eminent domain cases, property owners would only be entitled to any actual loss incurred as a result of the fair market value of the property taken for use by the condemning authority. Given this, Time Warner urges the adoption of the following broad policies in calculating compensation:

(1) Affirm the Commission's jurisdiction over the matter of building access and affirm its role as adjudicator/arbiter/mediator of disputes between providers and building owners over the terms and conditions under which access will be provided.

(2) Define the term "building access" to mean access to an entire building or commercial complex under common ownership, so that whatever terms and conditions apply to a providers' placement of facilities will also operate to allow it to serve all tenants on the property. (This definition would ensure that only one agreement need be negotiated per property, so that the expense and delay inherent to the process will not be incurred again just to serve tenants on additional floors in the same facility.)

(3) Declare that reasonable compensation for the use of equipment space in the common areas of a building (e.g., the basement/utility and rooftop area) and for the installation

of conduit and wiring in the raceways and ceiling space in a building shall be presumed to be diminmus unless property owner offers evidence to rebut the presumption with respect to the individual properties.

(4) Further, prohibit the imposition of any fee for the use of raceways and ceiling space. And, permit building owners and carriers to offer evidence to rebut the presumptions stated in (3) with respect to any individual property.

(5) Prohibit building owners from requiring competitive service providers to pay for building access unless the incumbent is immediately subject to the same compensation terms for both existing facilities and new facilities in the building.

(6) Establish a dispute resolution process under which both carriers and property owners may seek expeditious arbitration or mediation of disputes regarding compensation and other terms and conditions under which the building access is granted.

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

ANSWER: The ALECs in Florida are already required to provide 911 and E911 services for their end user customers. Allowing access to additional customers in multi-tenant buildings will not change that requirement.

III. Other issues not covered in I and II.

ANSWER: Time Warner has not identified any additional issues at this time, but respectfully requests the right to comment or offer issues as they may develop in this project.

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Cox Florida Telcom, L.P. d/b/a Cox Communications
Response to Staff Data Request
FPSC Special Project No. 980000B-SP
July 29, 1998

1. **In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)**

Yes. In general, with the exception of the customers for which the Commission has already found that no alternative provider is appropriate (such as in transient situations like hotels, nursing homes, etc.), telecommunications companies should all have direct access to end user customers in multi-tenant environments through minimum point of entry ("MPOE") cross connect facilities established at the most convenient point possible at the multi-tenant property.. This issue needs to be addressed in Florida and elsewhere, to carry out the intent of the federal Telecommunications Act of 1996, as well as the 1995 revisions to Chapter 364, Florida Statutes.

Historically, local exchange telephone service was provided by only one franchised carrier in any given geographic area. As such, the issue of access to buildings or multi-building continuous property by multiple carriers was not an issue for building owners. The incumbent local exchange carrier ("ILEC") was given access to the property and/or building(s) for the purpose of installing and maintaining the wiring to provide local exchange and other services for the tenants. If the building owner did not give the incumbent local exchange company access to the building, the building owner could not provide for any phone service, thus, the building, as a marketing entity, had a major disadvantage when it came to competing for tenants. The (one) telephone company was able to get access to the building, and building owners did not view the telephone company as a revenue source but rather as allowing them to neutralize telephone service as a marketing tool against them.

Today there are multiple providers of local telephone service, some of which , are facilities-based providers such as Cox. However, in most buildings, the ILEC attempts to continue its control of the wiring between the entrance to the building (or the entrance to the property) and the customers (interbuilding and intrabuilding wiring). Further, building owners, while seeing the provision of telephone service as a profit center, do not treat all facilities-based providers equally. The result is that facilities-based CLECs are not able to obtain access to some multi-tenant buildings at all, and are requested to pay discriminatory compensation in others, making it difficult, if not impossible, to provide service to

customers in multi-tenant buildings or campus situations. This means that end users in multi-tenant buildings do not have the same opportunities to select a competitive local exchange company as do single-tenant building customers. Single-tenant building customers can change local service providers (either resellers or facilities-based providers), without being concerned about the need for the installation of multiple sets of telephone wiring in their premises.

This issue is a problem unique to facilities-based providers. Even where a facilities-based local service provider extends its network to a multi-tenant building, or group of buildings on continuous property at the request of the building owner, it cannot provide service unless the ILEC allows it to use the building wiring or the building owner allows it to retrofit the building and/or property with additional cabling. Cox's experience has shown that building owners frequently resist having multiple sets of wires, and ILECs are not inclined to allow the new entrant to use the existing building wiring, over which they allege control. This ILEC action has the effect of denying the tenants of multi-tenant buildings or of multiple buildings on continuous property the opportunity to use the services of competitive facilities-based ALECs. Cox does not believe that this was the intent of the Florida legislature or of the Congress.

A related problem can and does arise from the behavior of building owners themselves: in other states, some building owners have denied Cox the ability to serve customers in the building, or have demanded ridiculously high payments, in the form of large up front fees and a percent of all revenues (including non-telecommunications revenues) to do so. These requests for payments generally occur while the incumbent LEC is allowed to provide service with no such payments. Such behavior is discriminatory at best, has the effect of holding the customers hostage, and denies customers the benefits intended by federal and state telecommunications legislation.

II. **What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?**

- Whether policy decisions the Commission makes are consistent with the goals of providing consumers the substantial benefits of facilities-based competition, as intended by Chapter 364, Florida Statutes, and the federal Telecommunications Act. CLEC access to customers in multi-tenant buildings or on multi-building continuous property is integral to the growth of facilities-based competition. To accomplish this, the Commission should follow the FCC's directives that the MPOE should be used as the demarcation point, and that the MPOE should be as close to the property line as practical so that CLECs may connect without retrenching or adding wiring

to access the end user. This means that the remaining inter and intrabuilding wiring on the property is held out for competitive use without discrimination.

- Whether the Commission intends that all end users have their choice of telecommunications providers. In general, subject to specific exceptions where technical or operational factors render such choice impractical (e.g., service to end users in hospitals, nursing homes, dormitories, vacation rentals, and the like), the Commission should require that multi-tenant unit end users on single or continuous properties should have the same opportunities to obtain service from multiple competitive local service providers as do single building end users. .

- The rights of property owners to be able to control their property, without fostering discrimination and unequal access.

- That in a shared tenant service environment, the Commission's current rule requires individual end users to be able to obtain service from the local exchange company individually. In a multiple service provider environment, the Commission should extend this policy to enable any individual tenant to obtain service from any certificated local exchange company -- either ALEC or CLEC.

- The impact on competition of building owners who stand in the way of customers being able to choose the local service provider of their choice, either by blocking access totally or by charging the consumer or provider unreasonable fees.

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

Multi-tenant environment means a building or group of buildings on continuous property, which may be crossed by a public right of way, that is under common management or ownership, in which end users (separate from the owner or manager) may individually purchase telecommunications services. This includes commercial, residential, and mixed commercial and residential applications, including apartments and condominiums, and makes no differentiation between new and existing facilities.

From a customer perspective, transient facilities, and the types of exceptions identified in the Commission's Order No. 17111 regarding shared local exchange telephone service, should not be included in the definition of a multi-

tenant environment, in that there is no need in this proceeding, to change whether such individual end users in the Commission's already-existing exceptions may obtain local exchange service from a different provider.

However, from the perspective of a new entrant obtaining access, such "transient" applications should be included. This is because Florida's existing demarcation point rule gets in the way of a facilities-based new entrant's access to any building or group of buildings that have what is referred to as intrabuilding wiring or interbuilding wiring. For example, a nursing home with 50 units that is served by an ILEC , a PBX, or a centrex-type service today, may want to avail itself of the service offered by a CLEC. In this situation, with centrex or individual lines, the wiring to the individual units, under Florida's existing demarcation point rule, would not be available to the new entrant. So the nursing home itself could not easily choose to change local exchange carriers. Thus, the building access issue exists in multi-tenant buildings whether it is a transient application or not.

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

Telecommunications service included in "direct access" should include local and intra/inter LATA long distance telephone services (both switched and nonswitched) under the jurisdiction of the Florida Public Service Commission. Video and Internet access provided by cable television companies, as well as satellite services, are under the jurisdiction of the FCC, and not under the purview of this Commission.

C. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

The only restrictions the Commission should allow for direct access to customers in a multi-tenant environment should be those ?transient? exceptions already noted above. In general, if customers prior to the existence of local competition were able to obtain service individually from the ILEC, they should today be able to obtain service from any certificated CLEC that offers service to their building.

D. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal Minimum Point of Entry (MPOE)?

The demarcation point should be defined consistent with the federal Minimum Point of Entry ("MPOE") definition, as defined in the FCC's Report and Order in CC Docket No. 88-57 RM-5643. That is, the MPOE should facilitate the existence of competition. To do otherwise disadvantages facilities-based providers--the very companies, who are investing in new facilities, that both federal and Florida legislation encourages.

The Florida demarcation point definition in a multi tenant environment places the demarcation point at a point just inside the individual apartment (or office). Section 25-4.0345, Florida Administrative Code.

> (B) "Demarcation point" is the point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the telephone network and the customer's premises wiring. Unless otherwise ordered by the Commission for good cause shown the location of this point is:
>
> 1. Single Line/Single Customer Building - Either at the point of physical entry to the building or at a junction point as close as practicable to the point of entry.
> 2. Single Line/Multi Customer Building - Within the customer's premises at a point easily accessed by the customers.
> 3. Multi Line System/Single or Multi Customer Building - At a point within the same room and within 25 feet of the FCC registered terminal equipment or cross connect field.
>
> * * *
>
> (3) Network facilities up to and including the demarcation point are part of the telephone network, provided and maintained by the telecommunications company under tariff.

This definition was adopted at a time when the Commission was not aware that being denied access to building wiring would hinder the development of facilities-based competition. The primary emphasis, it appears, when this definition was adopted and later reviewed, was not putting a third (unregulated) party between an end user and the (regulated) telephone company. This gave building owners the opportunity to have wiring installation or maintenance provided competitively.

The federal Telecommunications Act gives competitive local exchange

companies three options for providing service: they can provide it over their own facilities (using their choice of technology), they can purchase unbundled network elements from the incumbent local exchange company, or they can resell the services of the local exchange company. These options give three viable ways that a new entrant can compete in the market.

These options do not exist when it comes to access to building wiring in an MDU situation. If the new entrant cannot use the existing wiring in a building or building complex, there generally are no other options because building owners do not approve of multiple and overlapping wiring installations.

In addition, there is the issue of business feasibility for the ALEC. If the ALEC is required (and permitted) to run a whole new set of telephone wires in order to serve some customers in a building, either the ALEC must totally wire the building to be able to provide service to any customer it is able to win from the ILEC, or it must wire the building one customer at a time -- neither of which makes good economic (or aesthetic) sense for either the CLEC or the building owner.

This becomes even more cost prohibitive in a campus-type environment with multiple buildings on a single piece of property. What Cox has encountered is that the ILEC will designate a demarcation point at the entrance to the property, which is consistent with the FCC's definition, but then it will also designate "secondary" demarcation points at each individual building. This leaves the interbuilding wiring, which should be turned over to the property owner for use by all competing service providers, still within the control of the ILEC.. Wiring on multi-unit property should be classified, or reclassified if necessary, in a manner that allows maximum and nondiscriminatory access to the customers it serves.

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of

1) **landlords, owners, building managers, condominium associations**
2) **tenants, customers, end users**
3) **telecommunications companies**

In answering the questions in Issues II.E., please address issues related to easements, cable in a building, cable to a building, space, equipment, lightning protections, service quality, maintenance, repair, liability, personnel, (price) discrimination, and other issues related to access.

1) landlords, owners, building managers, condominium associations:

- have the obligation to allow facilities-based local exchange providers to obtain access to end user customers.
- have the obligation to provide reasonable conditioned space for equipment placement.

2) tenants, customers, end users:

- have the right to obtain service from any local exchange company willing to provide service to that customer
- have the obligations laid out in Florida's telecommunication rules, and any payment and use obligations imposed by their serving local exchange companies.

3) telecommunications companies:

- allow other facilities-based companies to cross connect to them to reach individual customers
- have the obligation to meet all safety standards, including providing lightning protection;
- must meet Commission maintenance expectations
- as common carriers, may not unduly discriminate in service and pricing to various customers.

F. Based on your answer to Issue II.E., above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

The 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 services, which do not pay the owner to be able to provide service. If it is applied to all telecommunications service providers on a nondiscriminatory basis, a reasonable fee for equipment space rental (only) may be appropriate.

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

The issues surrounding 911 do not change because there are multiple local exchange providers. Both Section 364.337(2), Florida Statutes, and Commission Rule 25-24.840, F.A.C., already require all ALECs to ensure that 911 and E911 are fully functional for their customers. This is true in multi-tenant as well as single family environments.

OTHER SUBJECTS:

- LANDLORD TENANT ACT: Are landlords required to provide telephone service to tenants?

No. See Section 83.51, Florida Statutes. Cox believes that the landlord-tenant statutes (Chapter 83, Florida Statutes) should be amended to require that landlords must provide non-discriminatory access for all telecommunications service providers to provide service to tenants.

Teleport Communications Group, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Undocketed Special Project: Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)	Special Project No. 980000B-SP
	)	Filed: July 29, 1998

TELEPORT COMMUNICATIONS GROUP INC./
TCG SOUTH FLORIDA'S COMMENTS
ON ISSUES CONCERNING ACCESS TO
CUSTOMERS IN MULTI-TENANT ENVIRONMENTS

Teleport Communications Group, Inc. and its Florida affiliate, TCG South Florida (hereinafter referred to collectively as "TCG"), by and through their undersigned counsel, hereby submit TCG's comments on staff's list of issues reflected in the July 14, 1998 Notice for the August 12, 1998 workshop in this proceeding.

INTRODUCTION

TCG welcomes the opportunity to participate in this Special Project and file comments addressing staff's issues. TCG is a certificated alternative local exchange company ("ALEC") and a facilities-based provider of local exchange telecommunications services. In addressing the issues for this Special Project and preparing its report to the Legislature, the Florida Public Service Commission ("Commission") should abide by two underlying principles. First, it is the tenants and occupants of multi-tenant buildings or environments ("MTEs") whose interests are paramount in this proceeding. These MTE tenants and occupants remain stranded from the benefits of local exchange service competition--separated from access to competitive local exchange companies by the arbitrary

and discriminatory actions and positions of MTE owners and managers. Second, any legislation and Commission action implementing mandated access for tenants and occupants of MTEs must incorporate and adhere to the principle of nondiscrimination for both tenants/occupants and providers of local exchange telecommunications services.

ISSUES AND COMMENTS

I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

Broad Legislative and Policy Considerations Demonstrating the Need for Access

Telecommunications companies should have direct access to customers in MTEs. Customers in MTEs have a right to access any telecommunications provider they want. This right is conferred upon customers by the Telecommunications Act of 1996 ("the Act") and by Florida's 1995 amendments to Chapter 364, Florida Statutes.

The Act clearly expresses the policy of promoting competition for the benefit of telecommunications consumers.[1] The same policy is expressed in Section 364.01, Florida Statutes (1997):

> (3) The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications services, is in the public interest and will provide customers with freedom of choice....

[1]As stated in the preamble of the Act: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers...." Pub. L. No. 104-104, 110 Stat. 56 (1996).

(4) The commission shall exercise its exclusive jurisdiction in order to:

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest range of consumer choice in the provision of all telecommunications services.

. . .

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

§§ 364.01(3) and (4)(b) and (g), Fla. Stat. (1997) (emphasis supplied).

Notwithstanding this clear expression of federal and state law, MTE owners and managers continue to take the position that it is they who will choose between competing providers of facilities-based telecommunications services - - not their tenants and occupants. Where competitive providers require access to install facilities to provide telecommunications services to customers in a MTE such as a modern commercial office building, building owners and managers have acted individually and in concert to prevent competition by denying access or by demanding discriminatory compensation from competitive service providers and their customers as tenants. Such actions deny consumers of telecommunications services the benefits of the competition intended by the federal and state laws and Commission policy.

In addition to the Florida Legislature's clearly expressed intent to bring the benefits of local telecommunications competition to all consumers, the Legislature has enacted specific telecommunications legislation which would be rendered meaningless unless

consumers in MTEs have the right to choose the local provider of their choice. For example, Section 364.0361, Florida Statutes (1997), requires every local government in the State of Florida to "treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchises...or to otherwise establish condition or compensation for the use of rights-of-way or public property...." Thus, a competing local provider must be granted nondiscriminatory access to city or county rights-of-way. Yet the MTE owners take the position that it is their right to pick and choose which local providers may serve their tenants or occupants. This leaves the competing provider in the untenable and frustrating position of being able to secure legislatively-mandated nondiscriminatory access to local government rights-of-way only to find the door to a MTE slammed shut at the whim or caprice of an MTE owner.

A second example can be found in the Legislature's 1998 Amendments to Section 364.339, Florida Statutes, governing shared tenant services ("STS").[2] Section 364.339(5) was amended in 1998 as follows:

> The offering of shared tenant service shall not interfere with or preclude a residential or 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 residential or commercial tenant directly under the terms and conditions of the commission-approved tariffs.

[2] See Sec. 15, Ch. 98-277, Laws of Florida.

The 1998 Amendments to the STS statute confirm the Legislature's intent to ensure that both residential and commercial tenants are provided the opportunity to obtain direct access to and service from their local telecommunications provider of choice - - not just the local exchange company chosen by the building owner. Again, if MTE owners are left with the discretion to anoint the local provider(s) that they deem fit to provide service to their tenants, there is simply no way for residential and commercial tenants to secure the right of choice guaranteed under Section 364.339(5), Florida Statutes.

The Legislature's unequivocal and express intent to foster local exchange service competition for all consumers underlies the Commission's current rulemaking docket opened for the purpose of promulgating a "fresh look" rule. (See Docket No. 980253-TX). The Commission staff has preliminarily proposed a fresh look rule intended to give all consumers of local exchange services the opportunity to terminate their contracts with incumbent LECs entered into under a monopoly environment, subject to terms and conditions outlined in the proposed rule, in favor of service from a competing local exchange service provider. Without legislation requiring MTE owners and managers to provide non-discriminatory access to all local exchange telecommunications providers, the Commission's anticipated fresh look rule and the benefits of consumer choice and competition intended therein, will be foreclosed to tenants and occupants of MTEs.

Finally, the continued efforts of MTE owners and managers to arbitrarily and unlawfully control and limit access to MTEs undercuts the intent of Section 271 of the Act

and Section 364.161, Florida Statutes (1997) to develop facilities-based local exchange service competition. Facilities-based local exchange providers place less reliance on the incumbent local exchange company's ("ILEC") network allowing them to offer innovative service options, enhanced quality and services and lower prices--prices driven not only by their competitors' prices but by their own costs of providing service (rather than discounts off of the ILEC's retail prices). Section 271 of the Act authorizes BellSouth to provide interLATA service if BellSouth meets the competitive checklist and demonstrates the presence of a facilities-based competitor. Section 364.161, Florida Statutes (1997)[3], requires the ILECs to provide unbundled network features, functions and capabilities to ALECs, a clear expression of the Legislature's intent to promote facilities-based competition. The Commission has implemented the Legislature's intent by establishing interim and permanent rates for specific unbundled network elements.[4] The discriminatory actions of MTE owners and managers in depriving their tenants and occupants access to their local provider of choice eviscerates the benefits of facilities-based competition intended by the federal Act and the Commission.

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[3]In 1998, the Legislature amended Section 364.161, Florida Statutes, by adding a new subsection (4) requiring ILECs, inter alia, to provide unbundled network elements in a timely manner.

[4] See Order No. PSC-96-1531-FOF-TP issued December 16, 1996; Order No. PSC-96-1579-FOF-TP issued December 31, 1996; and Order No. PSC-98-0604-FOF-TP issued April 29, 1998.

TCG's Need for Access

TCG is a facilities-based provider of local exchange telecommunications services, including local exchange service, private line service, special access services, internet services, and intra LATA toll calling services. TCG's services are tailored for and offered to the needs of telecommunications-intensive business customers in 83 markets in the United States, including the south Florida LATA. TCG has invested substantially in the telecommunications infrastructure of Florida by installing (over 400) route miles of fiber optic cable and associated electronics as well as (three) state-of-the art digital switches. TCG will continue to invest in Florida and deploy its own network, but TCG's ability to market its services to potential customers is limited by the refusal of some building owners and managers to grant access on a non-discriminatory basis to TCG to deploy facilities to serve customers in MTEs.

The typical facilities installed by TCG in a modern commercial office building to provide services to business customers consist of fiber optic cable entering a building's common telecommunications closet and extending along common conduit to the customer's premises,[5] together with such additional facilities as may be installed in the customer's premises. TCG's facilities are operated, and may be removed, without consequence to any other tenant or to the building. These facilities are capable of and are being used to provide

[5] The fiber optic cable is less than one inch in diameter, and is typically installed in a conduit approximately two inches in diameter.

Centrex service, PBX trunking and associated local and intra LATA calling plans, and a full range of dedicated transport services at the DS0, DS1 and DS3 levels, as well as fractional DS1 services (e.g. 56 kbps).

In south Florida, TCG's efforts to market its services to customers and potential customers in MTEs have been prevented and undermined by MTE owners and managers who have engaged in a variety of actions (and inactions) which have effectively prevented TCG from gaining access to tenants and occupants in numerous MTEs. TCG will provide updated documentation and data reflecting these experiences for submission in this Special Project.

A modern commercial office building cannot function without its telecommunications network infrastructure, and the actual cost of providing access to the space required to install and maintain telecommunications facilities in such a building is negligible. However, if MTE owners and managers are permitted to deny access or to extract rents for the provision of the space required for telecommunications facilities on terms that discriminate between providers, the excess costs thereby imposed on competitive telecommunications service providers will undermine and defeat the intent of the federal and state laws to provide consumers with freedom of choice.

In the 1995 amendments to Chapter 364, Florida Statutes and the federal Act, the Legislature and Congress created comprehensive statutory schemes designed to bring the benefits of local exchange competition to all consumers including tenants/occupants in

MTEs. MTE owners and managers now threaten to shrink the scope of these legislative mandates by refusing to provide access on non-discriminatory terms to facilities-based providers of local exchange telecommunications service.

II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

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

"Multi-tenant environment" may be defined as: "public and private buildings and premises in which tenancy is offered for residential or commercial purposes, including, without limitation, apartments, condominiums and cooperative associations, office buildings, and commercial malls."

Transient occupancies, such as guests in hotels or motels, do not create a tenancy and thus are not included in the suggested definition of "multi-tenant environment."

TCG recommends no distinction between new construction and existing buildings, except as may result in the rare instance of demonstrated physical space constraints of existing buildings referenced under II.C.

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

All services accessed by a customer's local loop should be included in the consideration of direct access, including "information service" and "telecommunications" as

they are defined in subsections (20) and (43) of Section 153 of the Act , and "basic local telecommunications service" as defined in Section 364.02(2), Florida Statutes (1997). For the purpose of requiring non-discriminatory access to evolving telecommunications services by customers in MTEs, TCG recommends no limitation of these broad definitions.

C. *In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?*

A fair, equitable and lawful statutory scheme for mandated access to MTEs for all telecommunications providers should allow the public or private property owner to:

(1) Impose nondiscriminatory conditions on providers that are reasonably necessary to protect the safety, security, appearance, and condition of the property, and the safety and convenience of other persons;

(2) Impose nondiscriminatory, reasonable limitations on the time in which providers may have access to the property to install or repair a telecommunications service facility;

(3) Impose nondiscriminatory, reasonable limitations on the number of such providers that have access to the owner's property, if the owner can demonstrate a space constraint that requires limitation;[6]

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[6]The telecommunications facilities installed within MTEs typically occupy limited space. In the rare event of legitimate space constraints, the Commission could impose limitations on the warehousing of reserved but unused space, as the Commission did in the expanded interconnection docket, See In Re: Petition for expanded interconnection for alternate access vendors within local exchange company central offices by

(4) Require tenants or providers to bear the entire cost of installing, operating, repairing or removing a facility;

(5) Require providers to agree to indemnify the owner for damage caused in the installation, operation or removal of a facility; and

(6) Require that the payment of compensation, if any, be reasonable, reasonably related to the de minimus nature of any taking, and nondiscriminatory among such telecommunications providers.

On the other hand, MTE owners and managers should not be permitted to deny the right of MTE tenants and occupants to choose between competing telecommunications service providers by:

1. Denying a telecommunications service provider physical access to install cable to a building's common telecommunications space to serve a tenant/customer's premises.

2. Interfering with a telecommunications service provider's installation of telecommunications facilities as requested by a tenant.

3. Demanding payment from a tenant for exercising the right to choose any particular telecommunications service provider.

INTERMEDIA COMMUNICATIONS OF FLORIDA, INC., 94 F.P.S.C. 3:399, 414 (1994), and/or require sharing of facilities.

4. Demanding payment from a telecommunications service provider on terms that discriminate between providers.

5. Demanding payment from a telecommunications service provider on any basis other than the actual cost of providing access to the space required to install the facilities necessary to provide the services requested by the tenant/customer.

6. Entering into exclusive contracts with any telecommunications service provider.

D. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal Minimum Point of Entry (MPOE)?

Any legislative mandate that tenants and occupants of MTEs be allowed to select their local exchange service provider of choice will be fruitless if competitive providers are not permitted non-discriminatory access to MTEs. Part and parcel of such non-discriminatory access is a definition of "demarcation point" which ensures equal access to house and riser cable and precludes the imposition of excessive, discriminatory costs on competitors. Simply put, competitors must have the same access to house and riser cable as that provided to the ILEC. To achieve such non-discriminatory, equal access, the Commission should consider amendments to Rule 25-4.035, F.A.C., which would designate the minimum point of entry as the inside wire demarcation point for all MTEs - - but only if the Legislature enacts legislation mandating MTE owners and property managers to provide non-discriminatory

access to house and riser cable. Such a definition would place competitors on equal footing in gaining access to house and riser cable, and remove the prohibitive costs placed on facilities-based providers of rewiring multi-tenant buildings.

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1. landlords, owners, building manager, condominium associations
2. tenants, customers and users
3. telecommunications companies

In answering the questions in Issue II.E., 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.

Landlords, Owners and Manager of MTEs

To the extent that landlords and owners of MTEs may have a right under the Fifth Amendment of the Constitution of the United States to receive just compensation for physical occupation of their premises resulting from installation of facilities used to provide telecommunications services to tenants, that right may only be exercised in a manner that does not discriminate between competing service providers on any basis other than the actual cost of providing access to the space required for the specific facilities. Historically, building owners have seldom or never exercised any claimed right to compensation from monopoly providers of local exchange telecommunications services, and have designed and constructed buildings to accommodate telecommunications facilities. The policy of the Act and of the 1995 amendments to Chapter 364, Florida Statutes, to promote competition by authorizing

competitive or alternative local exchange carriers, requires that any system of compensation be administered in a non-discriminatory manner between carriers.[7]

At minimum, parameters for any compensation paid to MTE owners and managers must be predicated on principles of reasonableness, a reasonable relationship between the level of compensation and the minimal extent of the taking, and non-discriminatory treatment of all providers. In addition, any rates or prices established for the use of the MTE owner's property should be cost based rather than based on percentages of gross revenues of the provider or other non-cost based formulas for providing revenue enhancements to MTE owners and managers at the expense of competing local exchange service providers and MTE customers who desire their services.

Landlords and owners of MTEs, and building managers as their agents, do not have the right to select on behalf of their tenants between competing providers of telecommunications services on behalf of their tenants; rather, they have the obligation under the Act and pursuant to Chapter 364, Florida Statutes, to not interfere directly or indirectly with the exercise of their tenants' freedom of choice between competing providers of telecommunications services.

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[7] Section 253(2) of the Act, concerning Removal of Barriers to Entry, provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or *have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service. (Emphasis supplied).

During the 1998 Legislative session, MTE property owners attempted to justify their disparate treatment of incumbent and competing local service providers by referencing the ILEC's obligation to serve as the carrier of last resort. This supposed justification for discriminatory treatment is specious. As previously discussed and emphasized, the intent of the Act and the recent amendments to Chapter 364, Florida Statutes, is to promote competition and provide a choice of local service providers to all consumers. There is no indication anywhere in the federal or Florida law that MTE owners or managers are somehow entitled to increased revenues as a result of local service competition. Nor is there any indication in federal or Florida law that the advent of local exchange service competition gave rise to two disparate classes of consumers - - one given free access to the ILEC and a second forced to pay increased costs in order to gain access to an ALEC. Finally, it should be noted that Section 364.025(5), Florida Statutes (1997), authorizes an ALEC to petition the Commission to become the carrier of last resort for specified service areas after January 1, 2000. This statutory provision confirms the Legislature's hope and intent that the level of competition in local exchange markets will reach the point where alternative local exchange companies will be positioned to seek and assume the obligation of carrier of last resort after January 1, 2000. The willingness of MTE owners to impede such competition undermines the intent of Section 364.025(5) and serves only to feed the misplaced notion that the ILEC's current carrier of last resort obligation justifies discriminatory treatment of tenants and occupants in MTEs.

Tenants, Customers and Users in MTEs

Tenants in MTEs, as end users of telecommunications services and as customers and potential customers of competing telecommunications service providers, have the right under the Act and pursuant to Chapter 364, Florida Statutes, to choose between competing service providers and to select the combination of offerings of services that suits their needs. The competition resulting from the exercise of consumers' right to choose will act as a check on excessive prices for services and as motivation for the provision of new and innovative services so long as MTE owners and managers do not undermine or defeat that competition by denying access or by extracting excessive rents from competing telecommunications service providers. End-user customers, including tenants in MTEs, have such obligations concerning the telecommunications services they receive as provided under contract, tariffs and applicable federal and state regulations.

Telecommunications Companies

Telecommunications companies have the right to market their services to customers in MTEs, and to obtain access to premises in order to install facilities to serve such customers. With respect to the installation and maintenance of facilities to provide service to customers in MTEs, telecommunications companies have obligations to protect the safety, security, appearance, and condition of the property used in the installation, maintenance and operation of their facilities; and to indemnify MTE owners and managers for damage caused by installing, operating, repairing or replacing their facilities. To the extent that MTE

owners have a Fifth Amendment right to compensation for physical occupation of premises resulting from the installation of facilities to provide telecommunications services and that right is exercised in a non-discriminatory manner between telecommunications service providers, then providers have the obligation to pay reasonable, reasonably related (to the limited extent of the taking), and non-discriminatory compensation to MTE owners for such use of their property.

Obligations of telecommunications service providers concerning matters such as safety, quality of service, and maintenance, set forth in applicable sections of federal and state regulations such as Rules 25-4.038, 25-4.069 and 25-24.835, Florida Administrative Code, would not appear to require amendment or restatement in the context of competing providers of service to customers in multi-tenant environments.

F. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, for what and how is cost to be determined?

Yes. If building owners may require telecommunications service providers to pay reasonable and non-discriminatory 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. Gulf Power Co. v. U.S., 998 F. Supp. 1386 (N.D. Fla.

1998).[8] If the amount of such compensation is not agreed between the building's owners or managers and the telecommunications service provider, the amount should be determined in the first instance pursuant to non-discriminatory rates set by the Commission reflecting the actual cost to the MTE owner of making the required space available for the installation of the telecommunications facilities of the particular service provider. Either party could petition the Commission if that party believes that circumstances existed justifying compensation different from the rates set by the Commission, with the Commission's determination subject to judicial review. In Gulf Power Co., supra, the court held that a similar statutory scheme under which the Federal Communications Commission determined compensation to be paid to certain electric utilities by cable and telecommunications companies for pole attachments was "not only constitutionally sound, but...the more practical approach to a just compensation decision made pursuant to the Pole Attachment Act." 998 F. Supp. at 1397. Here, the Commission could perform a similar function subject to judicial

[8] Gulf Power involved a constitutional challenge by a group of electric utilities to the "nondiscriminatory access" provisions of the Telecommunications Act of 1996's amendments to the Pole Attachment Act, at 47 U.S.C. §224. The amendments require a utility to provide a cable television system or any telecommunications carrier with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utility. The District Court granted summary judgment against the constitutional challenge of the electric utilities, finding that the availability of judicial review of the FCC's determination of rates for access to the electric utilities' poles overcame the constitutional objections raised in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed. 2d 868 (1982).

review by the Florida Supreme Court pursuant to s. 3(b)(2), Art. V of the Florida Constitution and Section 350.128(1), Florida Statutes (1997).

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

TCG has no comments at this time concerning E911 services in this proceeding.

III. Other issues not covered in I and II.

TCG has no other issues at this time.

CONCLUSION

TCG requests the Commission to submit a report to the Legislature seeking legislation which will provide the benefits of local service competition to all consumers, including tenants and occupants of multi-tenant environments, by recommending action consistent with the principles and proposals stated herein.

Respectfully submitted this 29th day of July, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to the following this 29th day of July, 1998:

Catherine Bedell, Esq.
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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July 29, 1998

BY HAND DELIVERY
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing in the captioned docket are an original and fifteen copies of the Comments and Responses of OpTel (Florida) Telecom, Inc. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 6.0/5.1 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Michael E. Katzenstein, Esq.
Florida House Committee on Utilities and Communications

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Undocketed Special Project Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)))))	Docket No. 980000B-SP

COMMENTS AND RESPONSES OF OPTEL (FLORIDA) TELECOM, INC.

July 29, 1998

INTRODUCTION

This proceeding was initiated to comply with the requirements of Section 5 of Chapter 98-277 Laws of Florida requiring the PSC to "study issues associated with telecommunications companies serving customers in multi-tenant environments . . ." The Commission is to submit its report by February 15, 1999. The responses and comments which follow were prepared to provide information and assistance to the Commission in this project.

BACKGROUND

OpTel (Florida) Telecom, Inc., itself and through affiliates ("OpTel") is a leading network based provider of integrated communication services, including local and long distance telephone and cable television services to residents of multiple dwelling units ("MDUs"). In each of its markets OpTel seeks to provide facilities based competition to the incumbent local exchange carrier ("ILEC") and the incumbent franchised cable television operator by offering services at competitive prices. Substantially all of the MDUs OpTel serves are campus style, or garden style complexes. OpTel enters into service agreements with MDU property owners and ownership associations to provide services to the residents of the MDU. As part of its agreements OpTel often upgrades and maintains all telecommunications architecture on the line side of the demarcation point, including premises wiring and campus distribution. OpTel has substantial experience with the concepts and issues being considered by the Florida Public Service Commission both through its dealings with BellSouth on the issue and its activities in the markets of other ILECs.

COMMENTS AND RESPONSES

Issue I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

RESPONSE: It is essential that certificated telecommunications companies have direct access to residents in multi-tenant environments, whether high rise, campus style or other building architecture, if a competitive telecommunications market to end users is to be promoted. The Legislature has found the competitive provision of telecommunications services to be in the public interest and that it will provide customers with choices, encourage introduction of new service and technological innovation (§364.01, Fla. Stats). To reach this objective, the Commission must insure not only that competitive providers have open, nondiscriminatory access to end users but that ILECs not be allowed to thwart the development of competition through delay, unnecessary requirements and by hiding behind network configuration established by the ILECs themselves with the effect, and possibly intent, of thwarting facilities based competition.

In order to advance the objective of competition the Commission should support efforts that will insure open, nondiscriminatory access to multi-tenant unit facilities. Competitive providers must have the ability to access multi-tenant unit facilities at a single point on the property, proximate to the property boundary line and ILECs must be required to provide the means of connection at this single demarcation point timely and without delay. Currently alternative local exchange

companies ("ALECs") are at the mercy of ILECs for necessary elements and are constantly blocked by ILEC delays in provisioning. Virtually all of the current building facilities were installed by ILECs or in a configuration designated by them and substantially all the network remains controlled by the ILEC. The inability of ALECs to utilize these facilities all but stops any facilities based competitive effort. BellSouth has acknowledged informally to OpTel that it designs property network so that it can control the customer at the BellSouth switch, obviating the need for a trunk roll, and also effectively foreclosing access by a competitor that does not wish to collocate at the BellSouth switch. BellSouth's position accordingly is that the demarcation point for each unit in an MDU should be the first jack in the unit. Collocation is expensive and inefficient, requiring a competitor to buy loops from the ILEC, rather than to use its own facilities. If an ALEC does not have the ability to use existing cable and wire a duplicative system must be put in place. This is expensive, inefficient and not acceptable to property owners. It simply will not happen in the real world. Customers of the ILECs have paid for the wire and cable through regulated rates over the years and should now be able to enjoy the benefits of their investment through free choice, unfettered by ILEC anticompetitive behavior.

To properly accommodate competition in the MDU environment there should be a single point of demarcation, without regard to when facilities were installed and without reference to what operating practices the ILEC has followed to date. The single point of demarcation must be at a minimum point of entry ("MPOE") into the MDU, which should be defined as the closest practical accessible point to where the

ILEC network wiring crosses the MDU property line. The ILEC must be required timely and without unreasonable expense to reconfigure network on the property to the demarcation point. This demarcation point should include a network interface device ("NID") accessible to all certificated carriers which would be the single gateway between a customer and its selected carrier's network. At a subscriber's choice, carrier selection can then be accomplished by a simple and single cross-connect at the NID.

In Florida, OpTel has experienced resistance and, it believes, anti-competitive behavior, by BellSouth in connection with OpTel's efforts to date to provide telecommunication services to MDUs. OpTel's requests for trunking have been met with roadblocks and delays. Attempts to establish a single demarcation point for all competitive carriers on MDUs it wants to serve have similarly been resisted, under color of Florida Commission requirements. OpTel's experience as well as that of other ALECs make it abundantly clear that competitors and the Commission cannot rely on the cooperation of the ILEC to facilitate competition. Commission action to clarify and simplify establishment of a single demarcation on each MDU property is justified and essential.

Issue II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

Issue IIA. How should "multi-tenant environment" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums,

office buildings, new facilities, existing facilities, shared tenant services, other?

RESPONSE: In order to further the development of competition in the market, the PSC should adopt a broad definition which includes business and commercial complexes as well as residential facilities. A multi-tenant environment should include:

a. Both new and existing facilities;
b. Residential , business, or mixed residential and business tenant facilities, which would include any form of rental, transient, condominium, cooperative, mobile home community, or owner-occupied units; and
c. A complex of one or more buildings under common ownership, control or management.

Only by defining the environment broadly will there be increased opportunities for competition.

Issue IIB. 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?

RESPONSE: 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 Florida Public Service Commission.

Issue IIC. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

RESPONSE: In general, certificated telecommunications carriers should have no restrictions on their ability to have competitive access to all tenants in a multi-tenant environment. This access will be facilitated by the establishment of a single demarcation point for the entire facility, as is further discussed in Issue IID below.

All exclusionary contracts that predate the effective date of any statutory or rule change implementing these policies should be voidable upon bona fide request of a certificated telecommunications company for direct access to the customers of such facility. Other than direct agreements between an end user and a carrier, the Commission should not allow any carrier to enter into an exclusionary contract that prohibits a customer from being able to select a competitive alternative.

Issue IID. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal MPOE?

RESPONSE: The establishment of a single demarcation point on any property is critical to the furtherance of competitive choice. A certificated telecommunications company should have direct access to residents in multi-tenant environments through equal and nondiscriminatory direct access to a property NID that is located at a single demarcation point at the MPOE and that serves all residents within the entire MDU property.

Upon a bona fide request of any certificated telecommunications providers to an incumbent carrier, the incumbent carrier should be required

to promptly and within prescribed time periods establish the single demarcation point. All facilities on the customer side of the NID, including interbuilding cabling and riser wire, should be customer premise equipment ("CPE"). For competitive access to customers, including any changes in carrier for services, there would be pin and jack coordination at the NID.

If the demarcation point is allowed to remain at the wall jack for single line customers in multi-customer buildings, which BellSouth has urged, alternative carriers will be required to build facilities throughout the property and to each units requiring duplicative, cost prohibitive, often infeasible and unacceptable overbuild of facilities. BellSouth would have each facilities based carriers, run plant and pairs into every unit that is seeks to serve, which could never happen as a matter of economics and reality. In any event such an overbuild would not in OpTel's experience be suffered by property owners whose property would be required to be trenched and rewired.

A single demarcation point on each MDU property, as urged by OpTel, on the other hand, would be established in consultation with the property owner and could be done, in OpTel's experience, at relatively low cost.

In addition, the definition of CPE in Rule 25-4.0345(1)(a) should be amended to include interbuilding wiring and riser cable in multi-tenant multi-

building situations. This is necessary to ensure and clarify that all network on the property is accessible by competitors.

For this report the Commission should define the "demarcation point" as the point of demarcation and/or interconnection between the telephone company communications facilities and the CPE, and it should include, in the multi-unit environment, a network interface device ("NID") that interconnects the CPE with the telephone company network. The demarcation point in the multi-tenant unit environment should, without regard to when the facilities were installed or the telephone company's standard operating practices, be the MPOE onto the premises, which, as noted above, should be defined as the closest practical and accessible point to where the telephone company's wire crosses the property line. The NID should be accessible by all certificated carriers on a non-discriminating basis.

Buildings in which several NIDs have been installed and at which the telephone company maintains multiple demarcation points should be retrofitted, at the incumbents expense, upon a *bona fide* request by a competitive carrier seeking access to the premises and on a strict time frame, not to exceed 90 days from date of request. OpTel is willing to consider sharing a part of this cost, on a parity basis with all other competitive providers seeking to have access.

In the past, ILECs have used the establishment of the demarcation point to impede the growth and development of competition. By claiming

that each individual unit in a multi-unit building has a separate demarcation point, or by limiting access to the NID, ILECs have been able to make it cost prohibitive for a new entrant to provide service to residents to the building.

By establishing a single demarcation point at the MPOE and requiring that all certificated carriers must be given access to the NID such that a change in service providers by any resident in the building can be effectuated by a single cross-connect at the NID, the PSC will help to make facilities based competitive local exchange service a reality in the multi-tenant environment.

Issue IIE. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations
2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., please address issues related to easements, cable in a building, cable to a building, space, equipment, lightning protections, service quality, maintenance, repair, liability, personnel, (price) discrimination, and other issues related to access.

RESPONSE: Tenants, customers, and end users should have the right to select a carrier to serve that customer, and for that carrier to not suffer any competitive disadvantage created by the incumbent carrier serving the property. The ILEC should not have the ability to impose any physical barriers to access by other companies nor should the ILEC

by able to advance any carrier of last resort ("COLR") argument in order to insure access for itself or deny access to other carriers. The COLR requirement address situations where there is no competition and this issue in the MDU context is precisely to enable competition which BellSouth hopes to avoid.

Landlords, owners, building managers, and condominium associations or their agents should be able to impose reasonable and nondiscriminatory charges for the use of CPE (as defined above) by carriers. Such reasonable and nondiscriminatory charges for CPE may cover both the use and maintenance of such CPE.

Telecommunications carriers should be required to install all equipment based upon common standards. Such standards will ensure that the type of facilities at a location would not prejudice the ability of a customer to choose an alternative carrier.

Issue 2F. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

RESPONSE: Compensation would be permitted but not required for the situations described in Issue IIE above.

Issue 2G. What is necessary to preserve the integrity of E911?

RESPONSE: The consumer should in all cases have access to E911. This will require trunking, transfer of consumer information and coordination between

providers. The ILEC must provision E911 in the same time frames and on the same basis for others as it does for itself.

Issue III. Other issues not covered in I and II.

RESPONSE: OpTel does not have any additional comments or issues to discuss at this time.

Dated this 29th day of July, 1998.

Respectfully submitted,

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July 29, 1998

BY HAND DELIVERY
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing in the captioned docket are an original and fifteen copies of the Comments and Responses of WorldCom Technologies, Inc. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 6.0/6.1 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Mr. Brian Sulmonetti
Florida House Committee on Utilities and Communications

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Undocketed Special Project Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)))))	Docket No. 980000B-SP

COMMENTS AND RESPONSES OF WORLDCOM TECHNOLOGIES, INC.

July 29, 1998

INTRODUCTION

WorldCom Technologies, Inc. ("WorldCom") is certificated to provide services in Florida and welcomes the opportunity to participate in the development of the report to be presented to the Legislature by the Florida Public Service Commission ("the Commission"). Both the Commission and the Legislature have expressed their support of competition in the telecommunications markets and this report and study provide another opportunity to advance that goal. The Legislature has found competition to be in the public interest and the Commission now has the opportunity to influence the further development of competition in the multi-tenant unit environment. Only with increased opportunities to compete will consumers benefit from advances in technology. WorldCom would urge the Commission to adopt an aggressive stance in this report in favor of competition. With these general comments in mind, WorldCom would offer the following comments and responses to the issues published by the Commission Staff.

COMMENTS AND RESPONSES

Issue I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations).

RESPONSE: Telecommunications companies should absolutely have direct access to customers in multi-tenant environments. Without direct access consumers would not have the opportunity to select state of the art dedicated telecommunications services at minimum cost as non multi-tenant unit consumers can. The intent of state and federal legislation is to increase competition and to afford the end-user with options, better services and access to advanced technology.

An alternative to direct access to the customer usually comes in the form of a Minimum Point of Entry ("MPOE") or a Central Distribution System ("CDS"). In this case, all telecommunication services in the building are brought to a single point in the building and then are distributed by the Building Owner (or the Owner's vendor) from that point to the customer premise. Frequently, supporters of the MPOE suggest that there are advantages associated to space, costs and related benefits. However, these are not the advantages contemplated by legislation and efforts at competition in the market. For example, lack of building riser space is rare. In each market, although there are an abundance of resellers, there are usually only 3-4 facilities-based Alternative Local Exchange Carriers ("ALECs") in any given market. Provision of 1-2 six inch vertical risers for each ALEC is not an undue burden on any normal building riser system. Further, the MPOE approach raises issues of liability, technology, quality of service and costs.

Over the past several years ALECs have found that building owners are demanding profit for ALEC entrance into their buildings while continuing to provide timely access to Incumbent Local Exchange Carriers ("ILECs") on a "no cost/no delay" basis. The building owners created a barrier to competition while choices existed. Often, the high fees demanded of the ALEC by the building owner precluded service to the building. If the goal is to create competition in the marketplace, resulting in lower cost, higher quality telecommunication services for the tenant, the ALEC cannot be required to absorb these additional fees and hope to remain competitive to the ILECs.

Issue II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

RESPONSE: There are a number of factors to consider, some of which are of concern to providers, owners, and tenants. In general it is the needs of the tenant that should be the starting point. The tenant is the common customer of the building owner and the telecommunications service providers. It is in the best interest of the owner and provider that the tenant be able to receive state of the art telecommunications services at competitive prices. Competition (i.e., lower prices and greater services) is a direct result of ALEC ability to have direct access to tenants in multi-tenant environments. For example, the ability of a tenant to have internet access at his office and his residence is now of increasing importance. The price and quality of that service is greatly affected by competition for the tenants business by ALECs in the building.

Issue IIA. How should "multi-tenant environment" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

RESPONSE: "Multi-tenant environment" should be defined as any new or existing facility that has a number of tenants who have separate telecommunications requirements.

Issue IIB. 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?

RESPONSE: All services should be included.

Issue IIC. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

RESPONSE: Reasonable restrictions to direct access to customers in multi-tenant environments should be considered as in cases where there is a lack of physical space or structural compatibility, and in some cases, building aesthetics. It is also reasonable that the cost be at the full expense of the ILEC or ALEC (i.e., no charge to the building owners). Distribution of services in the building should only occur as tenants request that service.

Issue IID. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal MPOE?

RESPONSE: The demarcation point should be located at a point that permits competitive choice and ensures nondiscriminatory access. The location of the demarcation point should not be dictated by the ILEC but should be established in consultation with the property owner. It may be necessary to redefine the existing definition of demarcation point but any definition should afford some flexibility and should be incorporated in a rule rather than legislation.

Issue IIE. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations

2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., please address issues related to easements, cable in a building, cable to a building, space, equipment, lightning protections, service quality, maintenance, repair, liability, personnel, (price) discrimination, and other issues related to access.

RESPONSE: Landlords, owners, and building managers have a right to review and approve access construction plans. Tenants, customers, and end-users should have the right to access public utility services, including access to ALECs. Telecommunications companies should have a right to compete with the ILEC on a level playing field. It should be noted that the ILEC does not typically pay rent for their equipment space, giving the ILEC an unfair advantage over the ALEC.

The telecommunications companies also have the obligation to adhere to all applicable codes and regulations; restore easements and property to their original or better condition after utilization; ensure that all work is done by qualified personnel; and build according to established guidelines and standards and with the prior approval of the building owners.

Issue IIF. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

RESPONSE: In the event that building owner provides space for telecommunications equipment and distribution right to the other tenants in the building, then the telecommunications provider should make the owner whole. It is intended that the access requirement be revenue neutral to the building owner. That is, if 150 square feet of space is provided by the building owner in the basement area, then the ILEC and ALEC should pay the reasonable compensation for space utilized.

Several factors need to be considered with regard to "reasonable compensation" for these types of space.

a. Only a small amount of space is really required. Only 150-200 square feet per ALEC as stated above. With average building size ranging from 400,000-500,000 square feet, the ALEC space requirement is insignificant.

b. Only 2-3 facility based ALECs will desire space in a particular building. Remember a ALEC's desire to be in a building is directly related to tenant demand. In every case the ALEC will analyze the cost to construct facilities vs. the expected revenue. In any event, the number of ALECs a building's total revenue can support is limited.

c. The best space for use as a point of presence ("POP") is space in the building which normally yields no rent or, at best, low rental income to the building owner — for example, building core space or basement space.

d. Build out of the POP space, conduit facilities and distribution is at the expense of the ALEC. It is intended to be revenue neutral to the building owner.

e. In virtually all cases, the ILEC serves the building in rent free space and riser space provided by the building owner at no charge. Historically, the provision of this space to the ILEC, like all utility space in the building, was considered a cost of doing business to the building owner. No prospective tenant would consider leasing space in a building in which public utility services were not available. Today, tenants require availability of ALEC services for purposes of disaster recovery and to acquire the best telecommunication services at the most competitive prices.

Considering items a-e above, the building owner should provide 150-200 square feet of space to 2-3 facility based ALECs at no cost.

We do not believe that payment based on the number of tenants served or revenue sharing with the building owner is acceptable under any circumstances. Such a mechanism would unreasonably increase the cost of market entry to the ALEC. The intent of both the federal and state telecommunications legislation is to provide higher quality and lower cost telecommunications services to the end user (i.e., the tenant) in a non-discriminatory manner. It was never intended as a new revenue source for building owners.

In the past, building owners could achieve revenue sharing agreements with telecommunications resellers (i.e., Shared Tenant Service providers), as the landlord considered them a vendor with no capital investment who derived profits from the building constructed at a high cost to the owner. Nether the ILEC or the ALEC should be treated as a reseller, as they are facility based providers and bear a high capital investment to construct their network.

Such arrangements will unreasonably inhibit market entry by new telecommunications competitors. Even though the building owner will derive substantial benefits from allowing ALEC entrance in the building in the form of attraction or retention of high tech tenants, the ALEC already bears a high cost just for the privilege to compete with the ILEC, in terms of equipment and construction cost.

In any event, the ALEC should be treated the same as the ILEC with regard to access and ability to provide services to tenants in the building. To do otherwise is discriminatory.

Issue IIG. What is necessary to preserve the integrity of E911?

RESPONSE: Before being allowed to provide service to end-users that supersedes existing 911 capabilities the ALEC must provide proof of 911 compliance to the proper jurisdictional authorities.

Issue III. Other issues not covered in I and II.

RESPONSE: WorldCom does not have any additional issues to address at this time.

Dated this 29th day of July, 1998.

Respectfully submitted,

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July 29, 1998

BY HAND DELIVERY
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing in the captioned docket are an original and fifteen copies of the Comments and Responses of e.spire™ Communications, Inc. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 6.0/6.1 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: James C. Falvey, Esq.
Florida House Committee on Utilities and Communications

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Undocketed Special Project Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)))))	Docket No. 980000B-SP

COMMENTS AND RESPONSES OF e.spire™ COMMUNICATIONS, INC.

July 29, 1998

e.spire provides the following comments concerning the necessity of building access legislation in Florida. The comments track the topics agreed upon by the parties.

I. The Florida Local Telecommunications and Data Markets Cannot be Opened to Competition Without Building Access Legislation

The Telecommunications Act of 1996 ("Act") endeavored to eliminate all barriers to entry into the local telecommunications markets. The task is a daunting one, given the local monopolies held by incumbent providers over the course of the century. Incumbent providers have a wide variety of advantages in the local marketplace. They have entrenched name recognition, they have a relationship with every customer in the market, at home and at work, they have a ubiquitous network, and they began with 100% of the market. The Act undertook to make it possible for new entrants to become "co-carriers," that is, carriers that are placed on equal footing with the incumbents in every respect. Unlike early attempts to nibble at the margins of the local markets by shared tenant service providers or centrex resellers, alternative local exchange carriers ("ALECs") sought and are entitled to equal treatment vis a vis the incumbents. The goal of the Act is to promote local competition, in order to decrease prices, increase service quality, and increase innovation. Ultimately, the purpose of the Act is to improve the level of service to ***consumers*** by ensuring that the incumbent monopoly markets became competitive markets.

The Act imposes some very stringent requirements on a wide variety of parties to achieve its ends. For example: 1) Sections 251 and 252 imposes interconnection and

unbundling requirements on the companies largest local exchange companies to ensure that ALECs have equal access to existing ubiquitous networks; 2) Section 253 limits the rights of States and cities to impose regulations that would inhibit local competition and to ensure that ALECs have equal access to municipal and other rights of way; and 3) Section 703 regulates large utility companies, to ensure that ALECs have equal access to utility poles and conduits.

Unfortunately, the Act failed to address access to multi-tenant buildings that represent the "last 100 feet" to the customer premises. Building owners, like incumbent local exchange companies, own bottleneck facilities: they control the entrance to their buildings. Like the other bottleneck facilities mentioned above – incumbent facilities, municipal rights of way, and utility pole and conduit – these bottleneck facilities must be regulated to ensure that they are not abused in a manner that inhibits the delivery of competitive local service to Florida consumers. This regulation is all the more important today because, as discussed below, experience has shown that building owners, left to their own devices, ***have*** abused their bottleneck control by extracting unfair and discriminatory payments, terms, and conditions from ALECs entering the Florida markets.

Texas, Connecticut, and Ohio have taken the lead in enacting legislation in this area. The Texas statute represents a fair balance that e.spire would support in Florida. The Texas legislation has been instrumental in helping e.spire with actual negotiations in Texas. On numerous occasions, e.spire personnel in Texas have had to resort to the Texas statute to ensure that building owners would give e.spire nondiscriminatory building access. Time and time again, the Texas statute has worked, by forcing building

owners to sit down and negotiate nondiscriminatory building access arrangements with e.spire. Initially, e.spire was categorically denied access to several large multi-tenant buildings in downtown Dallas. Typically, these buildings were owned by large out-of-state corporations that were not aware of the Texas statute. As soon as e.spire brought the statute to their attention, the negotiations began to progress and, in each case, e.spire ultimately obtained agreements based on the terms of the Texas statute.

Although e.spire is just beginning to enter the Florida markets, e.spire has already encountered several building owners that have effectively refused access, or offered contracts of adhesion which were not subject to negotiation. The following are just two examples of e.spire negotiations in Florida in which building owners have abused their bottleneck control of building access.

In one instance in Jacksonville, a national real estate company offered e.spire a contract of adhesion for building access. e.spire knew that, not only did BellSouth not pay for access, but other ALECs had entered the building without paying for building access. Nonetheless, the real estate company would only permit access at an excessive rate. When e.spire attempted to negotiate the rates, terms, and conditions of access, the company refused to change a single word, and only agreed to permit e.spire entry on its own terms. When e.spire is forced to sign agreements such as this, it completely changes our business plan for recovering our investment and breaking even in a given building. This severely impacts the spread of local competition in Florida.

In a second instance, the landlord similarly offered an off-the-rack agreement that was completely unacceptable to e.spire. Not only were the rates, terms, and conditions unacceptable, but the agreement was gauged for a wireless provider, and could not begin

to meet e.spire's needs. The landlord refused to accept e.spire's standard agreement, which was much better suited for e.spire's purposes. Ultimately, the landlord refused to return e.spire's phone calls and e.spire is still not in this building today. Again, this type of response from landlords makes it impossible to provide ubiquitous, robust competition.

In general, legislation should be simple and straightforward, like the Texas legislation. The hallmark of any legislation must be nondiscriminatory access. If the incumbent pays for access, then, and only then, can ALECs be required to pay for access. Ultimately, what most ALECs are requesting is merely the right to run a few small strands of fiber into the building. The Commission and the Legislature should also be wary of claims that ALECs are creating a grave imposition on building owners. While the Texas statute, for example, does account for the legitimate interests of building owners, excessive restrictions on building access could completely undermine the intent of any putative legislation. If legislation permits building owners to take shelter behind multiple exceptions to the rule of nondiscriminatory access, it will not serve the purpose of providing ALECs with the necessary leverage to gain access to buildings.

e.spire will briefly address the specific issues raised in the issue identification, and will provide further input at the August workshops.

Considerations for Building Access Legislation

A. **Definition of Multi-Tenant Environment:** The definition should be as broad as possible. In fact, it should not be limited to a "multi" tenant environment to the extent that a single tenant could just as easily be denied access by a landlord. Again, attempts to limit the definition will only serve to curb the development of competition in

areas that are not regulated. In e.spire's experience in Texas, when the statute is cited, the parties still actively negotiate building access contracts, meeting their specific needs and addressing particular concerns. The Texas statute wisely incorporated this idea that the parties have interests to protect. The advantage of a statute is that it brings the parties to the negotiating table, and provides a context that moves the negotiation forward.

B. Services Included: At a minimum, the definition should be broad, to include all telecommunications and data services. These should be defined broadly in a manner that will permit the inclusion of new technologies.

C. Restrictions on Access to Buildings: Restrictions on access to multi-tenant buildings will discourage the development of local competition in Florida. e.spire finds the compromise restrictions included in the Texas statute to be acceptable. For example, if no tenant in a building is interested in purchasing service, there might be no need to permit access. For the most part, however, restrictions on access are restrictions on competition, competition which provides multiple pro-consumer benefits.

In addition, the Commission should recommend that any contract that has the effect of discouraging nondiscriminatory building access be deemed illegal. For example, BellSouth has established an extremely troubling program that first came to e.spire's attention because it was being shopped around by BellSouth to influential building owners in Florida. The program appears intended to effectively lock CLECs out of major office buildings, office parks, shopping centers and other similar locales. Specifically, BellSouth is enticing property management companies to enter *exclusive* arrangements with BellSouth under which the property managers are paid handsomely for promoting BellSouth's services to tenants of the property, and for refusing to establish

similar promotional agreements with CLECs. BellSouth provided a copy of its Letter Agreement in for Property Management Services in response to a hearing request in Georgia, and a copy is attached hereto.

Under the terms of BellSouth's standard form Property Management Services Agreement, BellSouth obtains access – free of charge -- to building entrance conduits, equipment room space and riser/horizontal conduits for placement of BellSouth equipment and other telecommunications facilities needed to serve building tenants. The property manager also commits to designate BellSouth as the local telecommunications "provider of choice" to building tenants and to promote BellSouth as such. Many building tenants may not understand that they could choose to order service from a CLEC competitor. In return, BellSouth agrees to establish a "Credit Fund" which the property manager can use itself or distribute to tenants. The Credit Fund is usable to pay for selected BellSouth services (*i.e.*, seminars, non-recurring installation charges, etc.).

This program has at least two anticompetitive effects, largely attributable to the fact that this arrangement is expressly an *exclusive* one. First, since BellSouth is given "free" (no cash payment) access to the building conduit and riser, BellSouth is given an inherent cost advantage in obtaining use of these essential bottleneck facilities. Second, since the property manager must agree to promote BellSouth services exclusively in order to be compensated, BellSouth has created an incentive for property managers to refuse to cooperate with ACSI and other CLECs in promoting services to building tenants. The property manager is a critical gatekeeper in obtaining access to business end users, and BellSouth has conspired with them in these instances to prevent ACSI from obtaining unfettered access to building tenants. Interestingly, BellSouth argued strenuously a few

years ago that regulators must prevent shared tenant service ("STS") providers from impeding their access to end users in STS-controlled office buildings – now, BellSouth itself is engaging in the same activity about which it protested so vociferously. If these types of agreements are not nullified, local competition in Florida will suffer.

Definition of "Demarcation Point" be Defined: e.spire will provide input on this issue at the workshop.

E. Right and Extent of Access: ALECs each have unique needs for access. For the most part, ALECs and landlords can work these issues out for themselves. The Texas statute addresses many of the more difficult issues in an equitable manner and should be closely considered as a model in these workshops.

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

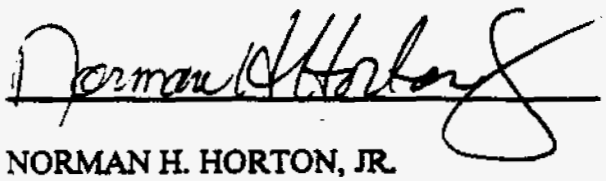
Integrity of E911: e.spire will address this issue at the workshops.

III. Conclusion

The issue of building access is critical to e.spire. e.spire is encouraged by the interest of the Commission and the Legislature in this issue. e.spire looks forward to addressing these issues at greater length at the upcoming workshops and throughout the course of this proceeding.

Dated this 29th day of July, 1998.

Respectfully submitted,



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International Council of Shopping Centers

Before the
Florida Public Service Commission

Special Project No. 980000B-SP

In Re: Issue Identification Workshop
For Undocketed Special Project:
Access by Telecommunications Companies
To Customers In Multi-Tenant Environments

Comments of
International Council of Shopping Centers

This memorandum is filed on behalf of the Florida Chapter of the International Council of Shopping Centers.

PSC Request for Comments

The Florida Public Service Commission has asked for a response to certain questions posed by the PSC on July 14, 1998. The questions make no mention of the threshold and pivotal issue of whether forced compliance by building owners is constitutional. That core question has a bearing on each issue posed by the PSC in its request for comments. Therefore, the focus of the comments in this memorandum will be primarily on that constitutional issue.

PSC Issues

Regarding the specific issues raised, we would respond as follows:

Issue I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

Response to Issue I: If direct access to customers by telecommunications companies means the mandating of an easement or license in favor of telecommunications providers over the building owner's objections, then the answer is no since such a mandate is a third party intrusion into a person's property and is thus prohibited by the Fifth Amendment to the United States Constitution. The goal of providing allegedly improved telecommunications access to some segments of society can not justify infringement of constitutional rights, due process protection and fair market value compensation for a taking of property rights.

The arguments of unconstitutionality being made in this memorandum have been made with considerable eloquence and authority in a Declaration by Charles M. Harr, Harvard Professor of Law, filed with the Federal Communications Commission in IB Docket No.

95-59 and CS Docket No. 96-83, before the Federal Communications Commission. A copy of his comments are contained in Appendix B to this memorandum.

Similar arguments were made in comments of the real estate industry, dated March 28, 1997 and filed with the Federal Communications Commission in CS Docket No. 95-184, MM Docket No. 92-260, IB Docket No. No. 95-95 and CS Docket No. 96-83. The comments were prepared on behalf of a group of nationwide real estate industry associations, and are particularly relevant on the issue of unconstitutionality. A verbatim copy of the comments are reproduced in Appendix C to this memorandum.

Secondly, the issue of "need" for this type of access should be examined and quantified if it is capable of being found to exist. Aside from the straight-forward constitutional and jurisdictional impediments to commission regulation of access to private premises, other considerations suggest the benefit of an unregulated approach. First, the nation's limited but growing experience with unregulated (competitive) access providers makes clear that there is no need for the commission to intervene on the access issue. Access is adequately regulated by the market-place, and only the market will be flexible enough to respond to fast-changing consumer needs and technological developments.

See Appendix C – Section IV. for additional discussion.

Issue II. E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) **landlords, owners, building managers, condominium associations**
2) **tenants, customers, end users**
3) **telecommunications companies**

In answering the questions in Issue II.E., 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.

Response to Issue II.: The practical issues that property owners must grapple with concerning physical access to their property is well summarized by the Declaration of Stanley R. Saddoris, dated April 15, 1996, and filed with the Federal Communications Commission in 1B Docket No. 95-59. A verbatim copy of the comments are reproduced in Appendix D to this memorandum.

Issue II. F. Based on your answer to Issue II. E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

Response to Issue II. F.: Buildings have limited and finite space for on-site equipment and lines for telecommunications utilities. But the number of future telecommunications utilities are not finite. If there are 10 today, there may be 100 ten years from now. A building owner's available space for telecommunications can include, depending on availability: dedicated telecommunications rooms of closets, ceiling space and risers for cables, parking garages, rooftops, basements, and parking garages. Building owners can run out of space or such space may be needed for other purposes, thereby causing a burden on the landlord if "equal access" is mandated. In the future, depending on the proliferation of telecommunications utilities, the burden very likely will be physically impossible to comply with because of space limitations.

Regarding the possible different ways of determining "reasonable" compensation for each of these types of space, the possibilities are infinite—they are limited only by the imagination of technology and the competition of the marketplace. The methods being used so far by the real estate and telecommunications industries include:

- fixed rentals;
- fixed rentals plus yearly escalations;
- fixed rentals plus gross revenue percentage;
- gross revenue percentage only;
- in-kind trade of services;
- combinations of the above;
- combinations of the above, with formulas relating to number of tenants served; plus
- unknown methods in the future, depending on technology and creativity of the parties.

The "reasonableness" of the compensation flowing from the telecommunications utility to the building owner depends on an unending set of factors:

- capital requirements for the telecommunications utility;
- capital requirements for the building owner;
- rate of return on investment needed by each of them;
- amount of space available in the building;
- amount of space needed by the particular utility;
- speed with which the building owner can make the space available;
- speed with which the telecommunications utility can get operational;
- the potential for harm to the equipment and lines by third-parties;
- the need for special security for the utility's equipment and lines;
- the aesthetic effects on the areas of the building that are visible to homeowners, condominium unit owners, tenants of the public;
- the debt service needs of the building owner;
- the effect on the owner's maintenance expenses of the building;
- the effect on the owner's insurance availability, coverage, and premium rates;
- risks incurred by the building owner, relating to the relative importance and potential liability exposure if the telecommunications are interrupted due to owner fault;
- the economic pressures of the then-existing up or down tenant rental market;

- what the building owner's existing tenants want in order to be happy and renew leases; and
- most importantly, what the building owner's competition is doing at any point in time.

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

Issue III. Other issues not covered in I. and II.

Response to Issue III.: The Florida Legislature charged the Public Service Commission to consider the "...promotion of a competition telecommunications market to end users..." in Chapter 98-277, Laws of Florida. Commission workshops and research should be utilized to examine the nature and extent of the existing market to end users and nature and extent of any impediments raised by building owners.

Request has been made to our membership that has developed, owned or managed millions of square feet of multi-tenant space in Florida to provide anecdotal information concerning current status of the "market" with telecommunications providers. Responses have included numerous examples of negotiated agreements. These agreements are similar to various other services provided to various tenants utilizing common area or property under the landowners exclusive control.

We would suggest that the ultimate finding will conclude that the current unregulated market is functioning so that no need for governmental intervention exists.

However, should isolated instances of property owners burdening the development of comparison in the telecommunications be found, we believe the PSC should provide a cost / benefit analysis of any alternative regulatory recommendations as such alternative impacts the property owner, the tenant, and telecommunications providers (both incumbent and alternatives).

Finally, we believe the issues set forth by the PSC in the July 14 notice do not adequately address the current state of the law applicable to "direct access". We believe the Florida Legislature should be provided information regarding federal and state legislative history concerning this specific language as well as the status of out-of-state litigation impacting "direct access."

Conclusion

The "building access" to customers in multi-tenant environments' to the extent that they mandate access rights to telecommunications utilities and impose compensation limitations on a building owner's property rights, are unconstitutional under the U.S. Constitution (Fifth Amendment).

Those "building access" provisions are not well founded in practicality and are inherently and substantially harmful to the entire real estate industry and the free enterprise system.

The PSC should refrain from enacting any rules or regulations or recommend policies to implement the "building access" provisions.

Attachments

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

DECLARATION OF CHARLES M. HAAR
IN SUPPORT OF REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION

I, Charles M. Haar, declare as follows:

I submit this Declaration in support of the Reply Comments of the above-named associations.

I am a Professor of Law at Harvard Law School and have served in this capacity since 1955. I have taught and written on property and constitutional law issues for thirty years. A copy of my resume is attached. I have edited a Casebook on Property and Law (with L. Liebman), and a Land-Use Planning Casebook (5th ed. 1996). The most recent book is Suburbs Under Siege: Race, Space, and Audacious Judges (Princeton U. Press 1996). I was Chief Reporter for the American Law Institute's Model Land Development Code in 1963-1965Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development in 1965-68; Chair of Presidential Commissions on housing and urban development (Presidents Johnson and Carter); and Chairman of the Massachusetts Housing Finance Agency.

Based on the foregoing, I submit to the Commission in this Declaration the following analysis making two points: (1) a regulation that would require placement of antennae on owners' and common private property (by tenants or other occupants, involuntarily by owners or by third parties), or limit restrictions in private agreements on such action, would be a taking under the Fifth Amendment, according to several lines of cases; and (2) because of the Fifth Amendment implications, the Commission must apply a narrow construction of the Section 207 prohibition on certain private restrictions.

I. THE PROPOSED REGULATION IS A TAKING

A. A "PER SE" TAKING. Under current United States Supreme Court precedent, "a permanent physical occupation authorized by government is taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Loretto involved a New York statute which authorized the installation of cable television equipment on plaintiff Loretto's apartment building rooftop. The Court held that this statute constituted a taking under at the Fifth Amendment as applies to the states under the Fourteenth Amendment. The installation involved the placement of cables along the roof "attached by screws or nails penetrating the masonry," "and the

placement of two large silver boxes along the roof cables installed with bolts. Id. at 422. In finding a taking, the Court noted that "physical intrusion by government" is a property restriction of unusually serious character for purposes of the Takings Clause. Id. at 426.

In the Commission's Further Notice of Proposed Rulemaking, the Commission seeks comments on a proposed rule in connection with Section 207 of the Telecommunications Act of 1996 (the "Proposed Regulation"). The Proposed Regulation, in requiring that owners allow placement of antennae (by occupants, involuntarily by owners or by third parties) on owners' and common private property, or limit restrictions in private agreements on such action, would directly implicate the Loretto rule. Such installation of reception equipment would be precisely the kind of permanent physical occupation deemed as a taking by Loretto and the line of cases which follow its analysis.

The reasoning of Loretto extends from an analysis of the character of property rights and the nature of the intrusion by government. The Court did not look at the justification for the government's physical intrusion, but exclusively at what the government had done to the claimant. It considered the injury to the claimant to be particularly serious not because of the financial loss involved or other factors, but because of the intrusiveness of the government's action. The Court found that the claimant could not use the physical area occupied by the cable equipment and concluded that it is unconstitutional permanently to prevent an owner from occupying her own property. Consequent upon the occupation, the "owner has no right to possess the occupied space himself ... [he] cannot exclude others (from the space, and he) can make no nonpossessory use of the property." Id. at 435-36. A permanent physical occupation is an especially severe incursion on the ordinary prerogatives of ownership and constitutes a per se taking of property; this per se rule provides certainty and underscores the constitutional protection of private property.

Subsequent court opinions explicitly reaffirm the Loretto rule; a regulation that has the effect of subjecting property to a permanent physical occupation is a taking per se no matter how trivial the burden thus imposed.[1]

In Loretto, the Court addressed the issue of the public benefit of the proposed regulation, finding that: where the character of governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.[2]

Following this reasoning, the Proposed Regulation effects a Fifth Amendment taking on a property owner who -- pursuant to a lease or other private agreement -- cannot prevent placement on the owners' or common private property of one or what could be many satellite dishes, microwave receivers, and other antennae. The Court will not entertain any weighing of the relative costs and benefits associated with the regulation in the case of a permanent physical occupation. Therefore, any public benefit or purpose (such as increased competition in video services or the provision of video services with educational and cultural benefit to the consumer) is irrelevant to the analysis of whether a taking has occurred. Once it is established that a regulation authorizes a permanent physical occupation, as the Proposed Regulation would, a taking has occurred and further analysis of importance of public benefits or degree of economic impact on the owner is moot.

B. ASSUMING ARGUENDO THAT CERTAIN RECEPTION EQUIPMENT IS NOT A PERMANENT INSTALLATION, THE PROPOSED REGULATION REMAINS A TAKING.

Some commenters have suggested that some installations of reception equipment pursuant to the Proposed Regulation may not be "permanent" and thus not subject to the Loretto per se takings rule.[3]

The Court addressed a situation in Nollan in which the occupation (a requirement of public access) was characterized as not permanent yet the Court still found a taking. There is a literal sense in which Nollan's land was not subject to a "permanent" physical occupation as Loretto's was, but the Court dismissed this contention. What is pivotal in the Court's view must be the state of being legally defenseless against invasion at any time. Even for non-permanent antennae installations, Court precedent would render the Proposed Regulation a taking.

A regulation falling outside the per se takings rule for permanent physical occupations would be construed "cance" in this analysis: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with investment-backed expectations"; and (3) "the character of the

1 See, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 n.18 (1987); Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

2 Loretto, 458 U.S. at 434-35 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

3 Perhaps certain equipment could be placed on a balcony and secured by ballast or its own weight, owned by the occupant and removed when the occupant vacated the premises.

governmental action."[4] An examination of each of these factors in the context of the Proposed Regulation renders the same outcome as under the Loretto rule: the Proposed Regulation works a taking on the property owner.

a. Severe economic impact of the Proposed Regulation on owners. The market for residential as well as commercial property depends in large part on the appearance of the building itself and the area surrounding the building. If occupants (be they condominium owners, apartment tenants, commercial lessees or owners without exclusive use or control of the building) were allowed to install reception equipment at their discretion around the property, the value of the property on the market could decrease substantially.

Moreover, the Proposed Regulation would interfere with the ability of an owner (or association of owners) to manage its property. Effective property management requires an owner to decide on a property-specific basis the physical aspects, facilities (including rapidly evolving communications equipment) and service offerings of its property based on its own complex, multiyear analysis of consumer demands, supply opportunities and costs. Instead of market-oriented management, the Proposed Regulation would require owners to devote substantial resources to implementing the government-imposed rules, including resources associated with, among other things, training property managers on the rules, monitoring whether occupants' requests and actions comply with the Commission's rules as well as applicable health and safety codes, developing and collection charges as allowed by the rules, sorting out interfering requests from multiple occupants or services providers, and implementing procedures and training for various emergency situations.

In the context of CC Docket No. 96-98, the Commission concluded in August 1996 that a right of access to roofs and riser conduit "could impact the owners and managers of small buildings...by requiring additional resources to effectively control and monitor such rights-of-way located on their properties." (FCC 96-325, at Par.1185.)

b. Substantial interference with investment backed expectations. Any regulation which may interfere with the market value of a piece of property would naturally rally affect any expectations of investors who financed the building as well.

c. Character of the Proposed Regulation authorizes a physical invasion. Even if the structure is temporary, the Proposed Regulation authorizes a physical appropriation of the property as well as a permanent and continuous right to install such a structure. In Nollan, 483 U.S. at 832, the Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Under Nollan, the right to traverse the property, whether or not continually exercised, effected an impermissible taking. It is the "permanent and continuous right" to install the equipment which works the taking, because the right may be exercised at any time without the consent of the owner of the property.

Therefore, the regulation would constitute a taking based on the three-factor analysis set forth in the Penn Central line of cases.

C. CLOAKING THE PROPOSED REGULATION AS A REGULATION OF THE OWNER/OCCUPANT RELATIONSHIP FAILS TO SAVE THE PROPOSED REGULATION FROM THE TAKINGS CLAUSE.

1. The Loretto footnote is not applicable to the Proposed Regulation. Some commenters argues that the holding in Loretto was "very narrow" and applies only to the situation of physical occupation by a third party of a portion of the claimant's property. Moreover, a footnote in Loretto states that "[i] f [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation." Loretto, 458 U.S. at 440 n.19. The footnote continues to describe how in this scenario where the owner would provide the service at the occupant's request, the owner would decide how to comply with the affirmative duty required by this hypothetical statute. Further the footnote indicates that the owner would have the ability to control the physical, aesthetic and other effects of the installation of the service.

Reliance on this dicta and footnote is misplaced in the context of the Proposed Regulation. Unlike a hypothetical statute requiring an owner to install a single cable interconnection, the Proposed Regulation may require an owner or association of owners to install multiple (an open-ended number) satellite dishes (DirecTV vs. Primestar vs. C-Band vs. others), microwave receivers (MMDS vs. LMDS vs. others) and other antennae. Such multiple installations may be in ways and areas which may affect the physical integrity of a roof and other building structures, a building's safety, security

[4] Penn Central, 438 U.S. at 124. See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

and aesthetics, and thus its economic value. Moreover, the Proposed Regulation may require an owner to install the cabling associated with multiple antennae in limited riser space. Under the demands of accommodating multiple video antennae, the ability of an owner to control the physical, aesthetic and other effects of the installation of the service may be far more limited than envisioned in the Loretto footnote for a single installation, and thus a taking would be caused.

2. FCC v. Florida Power is not applicable to the Proposed Regulation. Certain commenters and perhaps the Commission appear to rely on FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987), as further evidence of the limited application of the per se takings rule enunciated in Loretto. However, the holding of Florida Power is inapplicable to the Proposed Regulation and its effects on owners. In particular, Florida Power holds that the Loretto per se takings rule does not apply to that case because the Pole Attachments Act at issue in Florida Power, as interpreted by the Court, did not require Florida Power to carry lines belonging to the cable company on its utility poles. Similarly, the Court in yee, 503 U.S. at 528, analyzed a local rent control ordinance and found that Loretto did not apply because the ordinance involved regulation without a physical taking or taking of the property owners' right to exclude: "Put bluntly, no government has required any physical invasion of petitioners property."

In contrast, the Proposed Regulation would do exactly the opposite by requiring owners to install antennae.

D. BUNDLE OF RIGHTS OWNED BY A PROPERTY OWNER.

The recent trend in the Court applies the doctrine of "conceptual severance" in taking cases. By continually referring to an owner's "bundle of property rights," the Court is adopting the modern conceptualization of property as an aggregation of rights rather than a single, unitary thing.[5] Any regulation that abstracts and impacts one of the traditional key powers or privileges of property rights -- use or exclusion, for example -- is found to be a taking under the eminent domain clause.

In Kaiser Aetna, 444 U.S. at 179-80, the Court concentrated upon "the 'right to exclude' so universally held to be a fundamental element of the property right."

> _____ the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected -- denominated by the Court as "the right to pass on property" -- lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.[6]

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n. 6 (1980), the Court emphasized:

> (T)he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical things, as the right to possess, use and dispose of it....The constitutional provision is addressed to every sort of interest in the citizen may possess."

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5 See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 26 Yale L.J. 710 (1917); Michelman, Discretionary Interests -- Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan, 55 Alb. L. Rev. 619 (1992).

6 Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime.
The Court commented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Luthern Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19, (1987) (dividing up the time elements of property rights).

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner; or that prevents the owner from the use and enjoyment of the space occupied by the antennae. That the Proposed Regulation would erect barriers to what are widely held to be fundamental elements of the ownership privilege renders it vulnerable to constitutional attack. Indeed, the Proposed Regulation stands to erode just these essential powers, to exclude or to use, by forcing owners and homeowner associations to permit the installation of reception equipment on their property wherever and whenever the occupant or other owner without exclusive control or use may wish. Once the property owners lose control over the right to exclude installation of items against their wishes, they lose that which distinguishes property ownership itself, the rights "to possess", use and dispose of it." United States v. General Motors Corp. 323, U.S. 373, 378 (1945).

E. PROPERTY RIGHTS IN AESTHETIC CONTROLS. The Commission's action on the §1.4000 rule suggests that the Commission would give insufficient weight in analyzing the Proposed Regulation to the recognition in modern law that aesthetic controls are a significant component of property values and property rights.

In the § 1.4000 rule, the Commission has created an exemption for restrictions "that serve legitimate safety goals." (Par. 5(b) (1) and Par.24 of Report and Order.) It has also adopted a rule safeguarding registered historic preservation areas. (Par. 5(b)(2) and Par.26.)

Having gone this far toward accommodating local interests the Commission halts and treats environmental and aesthetic concerns with less consideration. (Par.27.) In so doing, it is acting in accordance with the historic and out-dated treatment of aesthetic controls by ordinance, building restriction, lease, homeowners association agreement, or other private agreement. By not considering the modern trends of legislation and adjudication, however, it is sacrificing significant property values; impeding market decision-making by localities, private builders and owners, and associations; and undercutting sensitive environmental concerns. Indeed, some may discern a Philistine air in the Commission's rule and any similar analysis of the Proposed Regulation that runs the danger of the Commission being branded a scoffer of beauty and a derider of efforts to shape the appearance of the built and natural environments.

The Commission agrees that Congress intended that it should "consider and incorporate appropriate local concerns," and "to minimize any interference owed to local governments and associations." The Commission also (Par. 19) takes tentative steps toward adopting aesthetics as a full-scale exemption by mentioning: a requirement to paint an antenna so that it blends into the background, screening; and, in general, requirements justified by visual impact.[7]

This hesitant approach to environmental values is a retreat from the advancement and understanding of the goals of community, building and commercial environment appearance. It behooves the Commission to make explicit an exemption for reasonable aesthetic control of dishes and antennae.

The history of aesthetic controls in this country is a useful analogy for the Commission's consideration. At the outset, the courts were out rightly hostile to aesthetic values; they were not recognized as a legitimate government interest.[8] The modern judicial position accepted in most jurisdictions is that government can regulate solely for aesthetics, as described below.

Aesthetic controls, public or private, over the form and placement of antennae and dishes reflect values representative of community-wide sentiment. Eyesores should not be permitted to undermine coherent community goals. Owners and homeowner associations can define what is attractive and what is ugly about antennae and reception devices, the same way they outlaw junkyards and ragstrewn clotheslines.[9]

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7 See also Par 37 regarding height and installation restrictions in the BOCA code. Futhermore, the Report and Order states that the Commission does not believe that the rule would adversely affect the quality of the human environment in a significan fashion (Par.26): "While we see no need to create a general exemption for environmental concerns," it argues, it does exempt registered historic presevation areas. Finally, the rule states that the Commission will consider granting waivers where it is determined that the particularly unique environmental character or nature of an area requires the restriction. (Par.27)

8 See Haar and Wolf, eds., Land-Use Planning 518-555 (4th ed. 1989). Aesthetic values were deemed too subjective and vague to warrant legal protection; consequently, the courts went so far as to say that the pesence of aesthetic motives would taint an ordinance otherwise valid under the traditional health, safety, morals, and welfare components of the police power. As the early Passaic v. Peterson Bill Posting Co., 62 A. 267, 268 (N.J. 1905), put it: "[A]esthetic considerations are a matter of luxury and indulgence rather than of necessity...." This gave way -- not without a struggle -- to intermediate judicial acceptance when it was seen that aesthetic values advanced such traditional goals as the preservation of property values.

9 See People v. Stover, 191 N.E. 2d 27 (N.Y. 1963). It is increasingly recognized that community consensus can protect agaisnt arbitrary application of regulation or restriction. See United Advertising Corp. v Borough of Metuchen, 198 A. 2d 447 (N.J. 1964). In a fundamental sense, there is a collective property right to the neighborhood or commerical environment exercised by its owners.

Over the past two decades, aesthetic considerations flourished and became routine on federal as well as state levels. There are numerous examples of legislative assertions of beauty as an appropriate end of government activity.[10] For example, the status of aesthetic values is sharply recognized in the National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (NEPA). Section 4331(b)(2) of NEPA includes, among the purposes of its "Environmental Impact Statements", the assurance of "healthful, productive and aesthetically and culturally pleasing surroundings." See Ely v. Velde, 451 F. 2d 1130, 1134 (4th Cir. 1971) ("other environmental... factors" than those directly related to health and safety are "the very ones accepted in ....NEPA").[11]

Perhaps the most direct acceptance of aesthetic controls on the federal level is that of Justice Douglas in Berman v. Parker, 348, U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled...If those who govern the District of Columbia decide that the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in that way.[12]

In light of the Commission's exemption for historic districts, the statement of Penn Central are especially pertinent; there the Court emphasized that "historic conservation is but one aspect of the much larger problem, basically an environmental one, of enchancing -- or perhaps developing for the first time -- the quality of life for people." Penn Central, 438 U.S. at 108.

The Proposed Regulation would be evaluated in the context of this evolution and progress of aesthetic and environmental goals. The Report and Order in its gingerly handling of roof line controls, may be faulted as out of step with the modern legislative and judicial endorsement of aesthetic values and design review. Certainly Paragraph 46's tentative conclusion that "non-governmental restrictions appear to be related primarily to aesthetic concerns," and the further tentative conclusion "that it was therefore appropriate to accord them less deference than local government regulations that can be based on health and safety considerations" will raise eyebrows in many circles.[13]

Increasingly, private design review is the most effective way for property owners to implement a consensual decision on the aesthetic appearance of their community.[14] Widespread agreement -- expressed often in terms of enhanced property values -- exists on ensuring that utilitarian objects are hidden from sight on or around buildings. Mechanical equipment on roofs (ventilators, exhaust outlets, air conditioners), as part of the policy for community or commercial environment appearance, is usually not permitted to be visible from the street. Regulating the appearance of a community, building or commercial environment is the proper domain of the community itself and the owner(s) since the local community and owner(s) are the best judges of what is desirable for that community, building or commercial environment. Further, there is a direct line between aesthetics and property values: "economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design the future.[15]

So long as the private design review process is conducted along procedural due process requirements it is a legitimate and desirable exercise of property owners' interests which will be upheld by the courts. The design and environmental purposes of public and private restrictions, reasonably limited and nondiscriminatory, should be an exemption extended by the Commission.

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10 The Report and Order itself incorporates elements of the National Historic Preservation Act of 1976 in its use of the National Register for Historic Places in carving out an exemption for historic districts.

11 The aesthetic-environmental language is also found in the so-called Little NEPAs of the states. See, e.g. State v. Erickson, 285 N.W. 2d 84 (Minn. 1979). Similarly, the National Highway Beautification Act regulates the manner and placement of billboards along federally assisted highways.

12 More recently, in Members of City Council of City of Los Angeles v. Taxpayer for Vincent, 466 U.S. 789, 805 (1984), the Court stated "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values." See also Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

13 See, e.g. Williams, Jr. and Taylor, 1 American Planning Law § 11.10 (1988 Revision): "[n]o trend is more clearly defined in current law than the trend towards full recognition of aesthetics as a valid basis for regulations". The demotion of aesthetics proffered by the Commission is an outdated view of the law.

14 Reid v. Architectural Board of Review, 192 N.E. 2d74 (Ohio 1963), is the classic case upholding such controls. Private design review, as an alternative or supplement to local government, controls aesthetics of the physical environment by private agreement, typically through community associations. See Bash, Private Design Review in Edge City in Design Review, Challenging Urban Aesthetic Control 137 (Scheer and Preisiev eds. 1994). In many communities with design review, Bash adds, "unsightly physical features -- such as graffiti, billboards, chain-link fences, weeds and overgrown landscaping -- are now only found in public property." Id. at 196.

15 Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963), app dism'd, 376 U.S. 186 (1964).

Protection against abuse of restrictions on devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite services is afforded by the discipline of the market. Deregulation and the freeing of competitive forces already put in place by the Commission are effective restraint on abuse. Thus, analysis of the Proposed Regulation should give substantial weight to aesthetic control imposed by landlords and owners through private agreements.

F. RELIANCE ON PRUNEYARD IS UNWARRANTED. Several commenters have relied upon PruneYard in supporting the Proposed Regulation. In analyzing the Proposed Regulation to determine whether it violates the Taking Clause, access to video information services does not rise to the level of a colorable constitutional argument based on the First Amendment.

As described in connection with Loretto, government policies and public benefits are irrelevant in per se takings. As to First Amendment concerns, the Loretto Court acknowledged it had no reason to question the finding of the New York Court of Appeals that the act served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspect." Loretto, 458 U.S. at 425. Nevertheless, the Court concluded that a "permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426.

In PruneYard, which dealt with a state constitutional right to solicit signatures in shopping centers, there was no permanent physical invasion of the property (unlike the Proposed Regulation) and the Court applied the Penn Central three-factor analysis. PruneYard does not support a First Amendment limitation to or weighting in such analysis. In holding that a taking did not occur, a key finding for the Court was that preventing shopping center owners from prohibiting this sort of activity would not reasonably impair the value or use of their property. PruneYard, 447 U.S. at 83. As the concurring opinion of Mr. Justice Marshall (the author of the subsequent Loretto opinion) states, "there has been no showing of interference with appellant's normal business operations." Id at 94. Indeed, the use of the shopping center's property in PruneYard was consistent with the reasons that the property was held open to the public, namely that it is "a business establishment that is open to the public to come and go as they please." Id at 87.

The decision quoted from the California Supreme Court's opinion which distinguished this shopping center, with 25,000 persons of the general public daily using the property, from other properties (or even portions of properties, such as roof space) where use is more restricted:

> A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations...would not markedly dilute defendant's property rights. Id. at 78.

This situation differs completely from the position of property owners subject to the Proposed Regulation in that the owner's opening of the property to the tenant does not extend an invitation to use the private property of the owner, such as the roof, which is specifically excluded from the demised premises. The notion of implied consent to use the property which the Court relies on so heavily in PruneYard is not applicable here where the owners are careful to delineate the boundaries of the demised property to exclude areas such as the roof and exterior walls.

In particular, the PruneYard Court was careful to distinguish on the Penn Central three-factor grounds the facts and state constitutional right in PruneYard from the findings of unconstitutional takings despite claims of First Amendment protections in Lloyd Corp. v. Tanner, 407 U.S. 551, 569, (1972) (finding against First Amendment claims challenging privately owned shopping center's restriction against the distribution of handbills), and Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (finding against First Amendment claims challenging privately owned shopping center's restriction against pickets). PruneYard, 447 U.S. at 80-81.

G. INCREASED EMPHASIS BY COURTS AND LEGISLATURES UPON THE PROTECTION OF PROPERTY RIGHTS. As explained above, the general movement of the Court is to protect private property under the Taking Clause.[16]

Along the same lines is Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights." Referring to Court decisions, it states that in reaffirming the fundamental

16 This trend has been underlined by many experts on constitutional law, including Chief Judge Oakes of the Second Circuit Court of Appeals. Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981).

protection of private property rights they have also "reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." Section 1(b) requires that government decision-makers should review their actions carefully to prevent unnecessary takings.

Section 3 lays down general principles to guide executive departments and agencies. Section 3(b) cautions that "[a]ctions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." Section 3(e) warns that actions that may have a significant impact "on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc." Finally, Section 5(b) requires executive agencies to "identify the takings implication" of proposed regulatory actions.

In addition, several states have passed different forms of takings impact assessment laws and value diminution laws imposing compensation requirements when a taking, variously defined, is imminent.

Loretto and Hodel are judicial inventions for putting some kind of halt to the denaturalization and disintegration of the concept of property. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent at least to the justices of the Court that this constitutional riddle needs more definite answers. By referring to the common understanding of what property at the core is all about, the settled usage that gives rise to legally recognized property entitlements, the Court is building up trenchant legal tests for a taking.

This is a reaction to its finding how hard it is to maintain an open-ended balancing posture; in the Penn Central case, the Court acknowledged difficulty in articulating what constitutes a taking. A per se rule, whether it be a permanent physical occupation or another core stick of the bundle denominated "property," is a bright line that provides a trenchant legal test for a taking, one that can be understood by a lay person and one that lawyers can utilize in advising clients. The cases laying down hard-and-fast rules are a token of the limitations on popular government by law.

The Court's trend toward defining the Fifth Amendment to set up of a private sphere of individual self-determination, securely buffered from politics by law, militates against the adoption of the Proposed Regulation. Elimination of the private property owner's power of possession, use, and enjoyment of the space used for antennae installations and removal of the power to control entry by an occupant is not likely to survive judicial (or legislative) scrutiny.

II. THE COMMISSION MUST APPLY A NARROW CONSTRUCTION OF THE STATUTORY PROHIBITION ON CERTAIN PRIVATE RESTRICTIONS. The relevant case law is clear that, in light of the substantial Fifth Amendment implications described above in this Declaration, the FCC must narrowly interpret Section 207. The statutory directive "to prohibit restrictions" and the House Report explanation that Congress intended to preempt "restrictive covenants or encumbrances: fall far, far short of a broad statutory mandate to promote various video signal delivery businesses through a requirement that owners allow placement of or place antennae at the sole discretion of occupants on owners' or common private property.

As the D.C. Circuit Court of Appeals held in Bell Atlantic v. FCC, 24 F 3d 1441, 1445 (D.C. Cir. 1994), "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[17] The court went on to state that when administrative interpretation of a statute would create a class of cases with an unconstitutional taking, use of a "narrowing construction" prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds. Id.

A fair interpretation of Section 207 does not require construing the statutory direction to prohibit certain private restrictions as going beyond the restrictions covered by the implementing rule the Commission adopted in August 1996. That rule -- addressing "any private covenant, homeowners' association rule or similar restriction property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property" -- encompasses the full extent (and perhaps more) of what the House Report intended as restrictive covenants or encumbrances." The Proposed Regulation -- whether as a right to installation by occupants, an obligation on owners, a right to installation by third parties, or other limit on restrictions in private agreements on such action -- would be contrary to the narrowing construction of Section 207 required to avoid an unconstitutional taking.

Moreover, the Commission does not contend in its Further Notice (and cannot reasonably contend) that the proposed implied taking power is necessary in order to avoid defeating the authorization in and purpose of Section 207. See

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17 Citing Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

Bell Atlantic, 24 F.3d 1446. While the Commission asks whether a further requirement on landlords is authorized under Section 207, the §1.4000 rule does not depend on restrictions on owners' or common private property.

The constitutional demand for a narrowing construction of Section 207 against the Proposed Regulation is particularly strong in light of the contrast between Section 207 and three other sections of the Telecommunications Act of 1996. These other sections clearly and specifically authorize a physical occupation of certain other entities. In contrast, proponents of the Proposed Regulation can only argue that the physical taking for video reception equipment should be promulgated pursuant to a purported implied broad mandate and general policy from Section 207.

1. Section 224 (f) (1) states that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduct, or right-of-way owned or controlled by it." Sections 224 (d) - (e) address compensation, and Section 224 (f) (2) addressees insufficient capacity, safety, reliability and generally applicable engineering purposes.

Reflecting the huge complexities that would be involved in implementing the Proposed Regulation for landlords, the Commission in its August 8, 1996 interconnection order (cc Docket No. 96-98) concluded that "the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-specific basis." (Par. 1143) In particular, the Commission rejected the request by WinStar Communications to interpret this right of access to include roofs and riser conduit; the Commission recognized that "an overly broad interpretation of ['pole, duct, conduit, or right-of-way'] could impact the owners and managers of small buildings by requiring additional resources to effectively control and monitor such rights-of-way located on their properties."[18]

2. Section 251 (b) (4) requires local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services at rates, terms, and conditions that are consistent with Section 224".

3. Section 251 (c) (6) requires incumbent local exchange carriers to provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This section also specifies "rates, terms and conditions that are just, reasonable, and nondiscriminatory, " and addresses space and other technical limitations.

When Congress intended a taking with compensation in these other circumstances, it clearly and specifically indicated that intention in the Telecommunications Act of 1996. Nothing in Section 207 addresses a taking or compensation for placement of antennae on owners' or common private property, and no such requirement can be implied.

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[18] Par. 1185 (emphasis added) & n. 2895; WinStar Communications Petition for Clarification or Reconsideration at 4-5 (Sept. 30, 1996).

Excerpts (without attachments) from the March 28, 1997
COMMENTS FROM THE RESALE ESTATE INDUSTRY
FILED WITH THE
FEDERAL COMMUNICATIONS COMMISSION
IN CS DOCKET NO. 95-184, MM DOCKET NO. 92-260,
IB DOCKET NO. 95-59, AND CS DOCKET NO. 96-83

On Behalf Of
BUILDING OWNERS AND MANAGERS ASSOCIATION, INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL
NATIONAL REALTY COMMITTEE

* * *

II. COMMISSION-MANDATED ACCESS TO PRIVATE PROPERTY VIOLATES THE OWNER'S FIFTH AMENDMENT RIGHTS. Any attempt by the Commission to compel the owners of multi-unit building to allow access to, and occupation of, their buildings by third-party telecommunications providers and their facilities would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of wires would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.[2]

For the Commission to mandate access for telecommunications providers' cables in and on private buildings would be just as unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompTer to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982).

A. Commission-mandated Wiring of Private Buildings Would be an Impermissible "Permanent Physical Occupation." The physical requirement that a landlord permit a third party to occupy space on the landlord's premises and to attach wires to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the "character of the governmental action," Supreme Court has said, "is a *permanent physical occupation* of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, supra, at 434-35 (emphasis supplied), citing Penn Central Transportation co. v. New York City, 438 U.S. 104, 124 (1978).[3]

B. Forced Carrier Access Satisfies the Legal Test for an Unconstitutional Taking. No *de minimis* test validates physical takings. The size of the affected area is Constitutionally irrelevant. In Loretto, supra, at 436-37, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." Id. at 436-37.

The access contemplated by the Commission notice is legally indistinguishable from the method or use of intrusion in Loretto, where the Court found a "permanent physical occupation" of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings' exterior wall. Id. at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation of telecommunication wires and hardware constitutes a taking, regardless of the asserted public interest, the size of the

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2 As the Court said in Ramirez de Arellano v. Weinberger, 240 U.S. App. D.C. 363, 387 n.95, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

3 In Penn Central the Supreme Court had observed that there was no "set formula" for determining whether an economic taking had occurred and that the Court must engage in "essentially ad hoc, factual inquiries" looking to factors including this economic impact and the character of the government action. No such detailed inquiry is required where there is a permanent physical occupation. Id. at 426.

affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (Loretto) and federal regulation (FCC proposed rulemaking).

C. "Just Compensation" for the Taking Requires Resort to Market Pricing. The takings objection to Commission-mandated access to private property cannot be avoided by requiring the telecommunications benefited thereby to make a nominal payment to the owner for access. In Loretto the New York statute at issue provided for a one-dollar fees payable to the landlord for damage to the property. The Court concluded that the legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the constitution.

While Loretto does not address the question of whether the invalidity of a taking is avoided by payment from a third party, other courts have held that takings to benefit a private telecommunications provider are subject to heightened scrutiny. See Lansing v. Edward Rose Associates, 442 Mich. 626, 639, 502 N.W. 2d 638, 645 (1993). AMTRAK's condemnation and conveyance of the Boston & Maine's Connecticut River railroad tracks to the Central of Vermont Railroad after payment of compensation was narrowly upheld on the technicality that the condemnation was under the adjudicatory oversight of the Interstate Commerce Commission. Nat'l R.R. Passenger Corp. v. Boston & Maine, 503 U.S. 407, 112 S.Ct. at 1403-04 (1992). That degree of governmental involvement is not contemplated here.

The practical point is this, viz., that the Commission cannot prescribe a nominal amount as compensation for access -- the affected property owner is constitutionally entitled to compensation measured against fair market values. See U.S. v. Commodities Trading Corp, 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, supra, at 337 n.3, 24 F.3d at 1445 n.3. Is ascertainment of the disputed market values of differing impingement's on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

III. CONGRESS DID NOT GIVE THE COMMISSION POWER TO COMPENSATE OWNERS FOR TELECOMMUNICATIONS CABLE EMPLACED ON THEIR PROPERTY WITHOUT THEIR CONSENT.

A. Congress Did Not Give the Commission the Power of Eminent Domain. As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. Indeed, even in the former Post Roads Act,[4] Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 13 S.Ct. at 488-89 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of public rights-of-way did not carry with it the power to take non-federal property without compensation. See Western Un. Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904), citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900).

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. Commenters have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

B. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims. The Commission's lack of explicit statutory authority to take private property cannot be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking on private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in Bell Atlantic, supra, declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in Chevron v. N.R.D.C., 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

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4 The Post Roads Act of 1866, R.S. 5263, et seq. as amended, formerly classified to 47 U.S.C. §§ 1 et seq., was repealed by the Act of July 16, 1947, 61 Stat 327.

In fact, the legislative history of Section 621(a)12) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use -- upon payment of defined compensation -- compatible utility easements across private property, shows that Congress had not intended to give the Commission power to mandate access to multi-unit buildings generally. In 1984-the House deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.

In Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (1993), aff'g 737 F.Supp. 903 (E.D. Va. 1989), the Fourth Circuit refused to extend Section 621(a)(2) to the installation of cable wires in compatible private easements in common areas of a condominium. Such a construction, the court said, joining the Eleventh Circuit's view earlier in Cable Holdings, infra, would make Section 621(a)(2) equivalent to the section of the bill that became the 1984 Cable Act that Congress deleted. The court went on to agree that, under such facts, Section 621(a)(2) would be indistinguishable from the New York statute in Loretto. Id. at 1175. The Fourth Circuit also recognized that it had a duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction." Id. at 1174-75.

Other courts have also narrowly construed Section 621(a)(2) of the Cable Act. In Cable Holdings v Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), reh'r'g en banc denied, 988 F.2d 1071 (1992), cert. denied, 506 U.S. 862 (1992), which raised the issue of a cable franchisee's right to access privately owned residential rental property, the Eleventh Circuit Court held that unless Congress provided for a taking under the Fifth Amendment "with the clearest of language", the court would not construe the statute in a manner which raised such constitutional issues. Where the language of Section 621(a)(2) regarding use of private easements by cable franchisees was ambiguous, the court construed it as requiring access to privately owned easements only in cases where private rental property owners had generally dedicated such easements to public use. The court, citing the long-standing canon governing judicial interpretation of statutes so as to avoid raising constitutional issues, determined that such an alternative interpretation would avoid raising the Fifth Amendment takings issues which were implicated in this case.

Similarly, in Cable Investments v. Woolley, 867 F.2d 151 (1989), the Third Circuit, in reaching a decision on issue of whether the Section 621(a)(2) effected a taking, found Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking for which just compensation would be required. The court held that where Congress specifically considered a mandatory access provision and such provision was deliberately omitted in the final version of the Cable Act to avoid a taking, there was no Congressional intent to support takings of private property. Id at 156-57, citing 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (floor statement of Cong. Fields).

In Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (1994), the Ninth Circuit, following Woolley, reversed the trial court's application of Section 621(a)(2), because there was no evidence of an express dedication. The court found that installation of cable to individual units constituted a physical invasion under Loretto that was not authorized by the statute. Accord, TCI of North Dakota, v. Shriock Holding Co., 11 F.3d 812 (8th Cir. 1993).

The kind of forced building access contemplated here would largely replicate the provisions for forced building access in S.1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

The general rule on implied takings is similarly given full effect in Exec. Order 12630, 5 U.S.C. § 601n (1988). Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights") requires executive department agencies to review all federal proposed rulemakings, final rulemakings, legislative proposals, and policy statements that, if implemented, could effect a taking under the Fifth Amendment, in order to protect the U.S. Treasury against unnecessary claims for just compensation. "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," published by the Attorney General in June 1988 to implement such Executive Order, requires subject federal agencies to conduct a predecisional Takings Impact Analysis (TIA). The TIA, in part, requires both an assessment of whether the rule or policy in question would effect a taking and also an analysis of alternative policies or rules that would be less intrusive on the rights of private property owners. See generally CIT Group v. U.S., 24 Cl. Ct. 540, 543 (1991).

Section V of the Attorney General's guidelines contains an analysis of "the general principles and assessment factors which inform considerations of whether a takings implication exists". Op. cit. at 11. The guidelines warn that "as a general rule where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis." Id at 13, citing Loretto in App. at 6.

C. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act. Even if the Commission had congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

> (A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id. A copy of that section is printed full as Attachment 1 hereto.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. Att'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which "result in Governmental liability under clear line of judicial precedent, such as through claims proceedings.

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official's wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency's control in creating obligations which exceed its appropriations level is considered by the Comptroller General in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9 (1996), the Court rejected the government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act and subject to precautionary procedures under Executive Order 12630.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT ATTEMPT TO REGULATE ACCESS TO PRIVATE PROPERTY. There are sound and persuasive reasons why the Commission should not attempt to regulate access to private property, even if it had jurisdiction to do so. First, there is a thriving, competitive market for real estate in this country, which is fully capable of meeting, and is responsive to, the needs of building occupants. Second, Commission regulation would interfere with the on-the-spot management needed to effectively address safety and security concerns, assure compliance with building and electrical codes, coordinate the needs of different tenants and service providers, and in general oversee the efficient day-to-day operations of hundreds of thousands of buildings.

A. Commission Intervention is not needed because the market is already providing building occupants with the services they need. Owners, managers, and investors in the nation's commercial and

residential buildings already are feeling the reverberations of the telecommunications revolution. Owners are constantly reminded by market demands (as well as a barrage of industry educational materials) that the failure to grant access to the most-advanced telecommunications will cost them dearly in lost tenants and lost opportunities.

1. Telecommunications is a Factor in Building Marketability. By way of background, businesses typically locate their offices in buildings, and because many businesses depend on access to cutting-edge communications technology, real estate necessarily functions as a part of the on- and off-ramp used by business to travel the information highway. Since technology is constantly changing and, with it, building users' (i.e., our tenants') demand for new products and services, buildings must be equipped to accommodate today's -- and tomorrow's -- talcum traffic. The decisions that any building owner (commercial or residential) makes regarding the building infrastructure are made within the context of what will make the real estate marketable to the best possible tenants, those that pay market rents and stay for predictable sustained terms.

In the regulated monopoly-controlled markets of the not-too-distant past the economics and management of telecommunications services in the real estate context were simple, if unexciting. Risks to building owners were limited but so were opportunities to make investments in telecommunications infrastructure that could yield competitive advantages. When tenants needed telephone installation or maintenance services, the Bell companies took care of it. The provision of cable television services was similarly straight-forward and predictable. These monopoly providers were common carriers with social responsibilities factored into their rates. In return for providing universal service and other societal benefits, the rules of the market place did not apply to our dealings with their representatives. In fairness, many of the risks of a competitive environment were also lacking. For example, when wire management and ownership were in the hands of one provider there was little reason for building owners to be concerned about issues of access, security, and control -- issues with considerable liability consequences to owners of real property. The telephone company was a benign and complementary part of the building infrastructure. Everything in the phone closet belonged to them and was essentially their responsibility.

As the Commission is well aware, this picture has changed radically. Consequently, the market is now generating its own ground rules in response to a new breed of competitive telecommunications providers. These providers are not weighted down by the responsibilities imposed on monopoly carriers, nor do they provide one-stop shopping for building owners seeking services (and wire management) for their buildings. The efforts of competitive access providers (CAPS) to reach untapped (but extremely lucrative markets) for telecommunications services has imposed new risks but also new opportunities for building owners. An owner's failure to work within the new rules of the marketplace results not in monetary fines or sanctions but in the far graver prospect of losing market share in a highly competitive industry.

Three or four years ago, many owners had no experience whatsoever with these "CAPS." By today, however, it is not uncommon for commercial office building owners in major metropolitan markets to find themselves facing some variation of the following scenario:

> The owner of an office building is contacted during the same week by representatives from four different telecommunications service providers with news that each has just reached an agreement to provide telecom services (telephony, cable and wireless) to major ("anchor") tenants throughout the building. The building owner is advised that installation of the new systems on eleven floors must begin within the next few days and will require access to a variety of "common areas" throughout the building, including already crowded riser space.

Though the building owner has received short notice of the work order - and, in fact, only now learned of the contracts between the four service providers and building tenants -- the real estate owner fails to comply with these requests (and to sustain much of the associated costs and liabilities associated with such building access) at his or her own economic peril.

While an initial reaction to this kind of scenario may be nostalgia for the days of monopoly providers, building owners are recognizing opportunities in the face of these new risks and challenges. In reaction to (or in preparation for) situations like these, building owners have felt considerable pressure to manage their building's infrastructure to allow for maximum access to their buildings while, at the same time, retaining traditional control over the terms of entry and use of their real estate asset.

From the perspective of the building industry, these new telecom service providers are a "new" form of tenant service only in the sense that they are different in kind from monopoly providers of the past. In fundamental respects they are comparable to other service companies seeking access to the tenant/customer base in which the owner has invested thousands, if not millions, of dollars.[5] Like other merchants in a building complex, telecom companies seek access to

[5] Attached as Attachment 2 are selected charts excerpted from the February 5, 1996, issue of Local Competition Report. These charts illustrate the tremendous growth in this deployment of fiber optic cable by competitive access providers in the last two-three years. Of particular interest in the

markets within the building for a profit-driven enterprise. If the building is not or cannot be made a profit center for the telecom company, they will bring their services elsewhere. As in the case with such diverse services as restaurants, retailers, or even laundry services, they are attracted to a particular building only when there is a sizable, essentially captive customer base. These merchants recognize that but for the landowners marketing and management success, this potential customer base would not have collected in large (and profitable) numbers in that building. Indeed, they might have sought office or residential space in a different urban center. The service providers - including telecom providers -- as the witting beneficiaries of the owner's core business skills, including his or her ability to provide secure, well-managed office, retail or residential space.

2. Owners act on market demand for optimum access. Building owners are well aware of this market dynamic and they welcome the opportunities it presents. Indeed, owners and managers of America's real estate increasingly are focused on improving wire management within buildings and targeting investments in what is sometimes called "smart building" technology. The highly competitive office market demands no less of owners, who by nature are inclined to satisfy their tenants by providing ample access to the expansive array of telecommunications products and services needed to facilitate information flows. In acknowledgment of this investment prerequisite, a number of real estate owners have even devise systems on a building-specific basis that provide cabling (copper or fiber optic) that is accessible to any and all telecommunications providers; this approach is one of the most cost-effective means of ensuring that tenants have the widest possible access to the ever-proliferating number of service providers.

For example, the thirty-one-story, 400,000-square-foot office building located 55 Broad Street in lower Manhattan used to be a "hollow headstone for the Eighties ("If you wire it, will they come?") Metropolis, October 1995 p. 35). It was vacant for more than five years following the bankruptcy of its anchor tenant in the late 1980s. New York City's moribund downtown real estate market left little hope that the building could ever return to life again. ("Real Estate" The New York Times, Wednesday, January 10, 1996). That was before it was retrofitted by its owner (at a cost of more than fifteen million dollars) with fiber optic and high-speed copper wire as well as ISDN, T-1, and fractional T-1 lines to enable Internet, LAN and WAN collectively; voice, video and data transmissions; and satellite accessibility. The building owner suggests that prospective tenants need only "plug in," and this message has been getting the attention of potential tenants as far away as the West Coast ("...high tech building a plug for downtown plan" Crain's New York Business, October 16-22, 1995).

Dubbing the building the New York Information Technology Center (ITC), the owner has highlighted a trend in technology investments by building owners aimed at attracting up and coming high tech companies. It is, in fact, part of a larger plan by the city to promote the lower Manhattan financial district as silicon alley." ("Trendlines: Smart Buildings," CIO, January 1996). Copies of articles demonstrating the high level of interest in this new breed of office building are attached hereto. Perhaps the most persuasive argument, that these kinds of investments will pay dividends, is the success the ITC's owner has had in renting space. According to the owner's Chief Operating Officer, six months earlier "you couldn't give this building away" ("Silicon Alley– puts NYC atop cyber world", Boston Globe, page 1). By January it was a "deal a week," and the owner expects the building to be fully leased by the end of the summer of 1996. (The New York Times, supra).

Building owners are developing showcase buildings or the high-end commercial market that will not only afford tenants access to the latest telecommunications technologies, but do so in an efficient, integrated manner. Other technologies that are being built into such buildings are videoconferencing facilities, speech recognition devices to enhance security, and software and electronics that allow tenants to reduce their costs through more efficient use of electrical and HVAC systems.

Of course, many other building owners prefer not to get into the business of owning or operating telecommunications facilities. But this does not mean they ignore the occupants' needs. The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and that no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms to the owner's business plan for the property. Even during the lease term, it is important for building owners and managers to keep their customers satisfied. Happy tenants are more likely to renew their leases and less likely to break them -- and building operators have a strong incentive to reduce the administrative costs and disruption that accompany high turnover rates.

Access to efficient telephone and cable systems is no less important to occupants of multi-unit residential buildings. Residents of coops, apartments buildings and condominiums not only demand these services for home entertainment; they demand these services as part of the trend toward telecommuting. Meeting these tenants needs is also a matter of financial survival for building owners and managers. Attachment 4 is a segment of a report funded by NMHC and

last chart, which shows that between 1994 and 1995 Teleport Communications Group increased the number of buildings it serves from 1,228 to 3,100, an increase of 250% in only one year. Clearly, building operators are not standing in the way of competition in telecommunications.

NAA entitled "The Future of the Apartment Industry." This recent report notes the many changes that information technology is bringing to the apartment industry. For example, the report notes that some buildings already use cable television to allow residents to see who is buzzing them at the front door of the building. Buildings also offer internal medical or emergency alert lines so the front desk can take immediate action. The report also discusses the increase in the number of Americans who work at home and the implications this has for apartment owners. Ever larger numbers of apartment residents are operating fax machines and personal computers, requiring additional telecommunications capacity, even if they are not running businesses out of their apartments.

In sum, the industry is aware of the importance of telecommunications in the home and the office, and is already acting to address it out of its own self-interest. There is no evidence that mandating access or regulating the service packages provided by owners and operators of real property is necessary.

B. Commission Regulation is undesirable because it would interfere with effective on-the-spot management. Not only is government intervention unnecessary, since property owners are already taking steps to ensure that telecommunications service providers can serve their tenants and residents, but it is undesirable. Such intervention could have the unintended effect of interfering with effective, on-the-spot property management. Building owners and managers have a great many responsibilities that can only be met if their rights are preserved, including co-compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and services providers; and managing limited physical space. Needless regulation will not only harm our members interests but those of tenants, residents, and the public at large.

1. Safety considerations: Code compliance. Building owners are the front-line in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For the Commission to limit their control would unfairly increase the industry's exposure to liability and would adversely affect public safety.

For example, building and fire codes require that certain elements of a building, including walls, floors, and shafts, provide specified levels of fire resistance based on a variety of factors, including type of construction, occupancy classification, and building height and area. See Declaration of Lawrence G. Perry, AIA, Attachment 5 hereto. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairway") must meet higher fire resistance standards than other portions of a building. The required level of fire-resistance typically ranges between twenty minutes and four hours, depending on the specific application. These "fire resistance assemblies" must be tested and shown to be capable of resisting the passage of floor and smoke for the specified time.

Over the past ten years, penetrations of fire-resistance assemblies have been a matter of great concern, as such breaches have been shown to be a frequent contributor to the spreading of smoke and fire during incidents. The problem arises because fire-resistance assemblies are routinely penetrated by a wide variety of materials, such as pipes, conduits, cables, wires, and ducts. An entire industry has been built around the wide variety of approaches that must be used to maintain the required rating at a penetration. It is not a simple issue of just filling up the hole -- the level of fire resistance required, the type of materials of which the assembly is constructed, the specific size and type of material penetrating the assembly, and the size of the space between the penetrating item and the assembly are all factors in determining the appropriate fire-stopping method.

Mandating access to buildings, without adequate supervision and control by a building's owner or manager, would allow people unfamiliar with a building the opportunity to significantly compromise the integrity of fire-resistance-rated assemblies. Telecommunications service personnel are not trained to recognize the importance of such elements in a building's construction, much less to accurately assess the types of assemblies they are penetrating or assuming any responsibility as to code compliance. Thus, while perfectly competent to drill holes and run wire, they would be unable to determine the appropriate hourly rating of a particular wall, floor or shaft, and would not know how to properly fill any resulting holes or recognize those areas that they should not penetrate at all.

In fact, it is unlikely that a person punching holes and pulling cables would even consider patching the holes after they pulled their cables through. Many of these penetrations are made above suspended ceilings or in equipment rooms where there is little or no aesthetic concern.

Maintaining the integrity of fire-resistance-rated assemblies is already a challenge for building managers because of the large number of people and different types of service providers that may be working a building. Nevertheless, currently a building operator can restrict access to qualified companies and can seek recourse, by withholding payment or denying future access, if the work is not done correctly. If building operators were forced to allow unlimited access to alternative service providers, or were prohibited from restricting such access, the level of building fire safety could be significantly

jeopardized. It is essential that building owners and managers be able to continue to ensure in the future that those personnel performing work in a building do so in a manner that does not compromise other essential systems, including fire protection features; this has not been a generic problem in the past, where building owners and managers have retained control. We emphasize that these are not merely theoretical dangers -- we have received reports of actual breaches of firewalls from our members. The only way fire safety can be assured in the future is by allowing building owners and managers to determine who is permitted to perform work on their property.

The same applies to all other codes with which a building owner must comply. See, e.g., Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Commission regulation in this area could thus have severe unintended consequences for the public safety.

While the Commission presently requires telephone companies to comply with local building and electrical codes, see Section 68.215(d) (4) of the rules, 47 C.F.R. § 68.215(d)(4), it could not practically enforce the codes, particularly where competing providers would have unrestricted access to common space.

2. Occupant security. Building operators are also concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors; they may even commit illegal or dangerous acts themselves. Of course, these possibilities exist today, but at least building operators have the right to take whatever steps they consider warranted. The commenting associations' concern is that in requiring building operators to allow any service provider physical access to a building, the Commission may specifically grant -- or be interpreted as granting -- an uncontrolled right of access by service personnel.

It is simply impracticable for the Commission to develop any set of rules that will adequately address all the different situations that arise every day in hundreds of thousands of buildings across the country. Consequently, any maintenance and installation activities must be conducted within the rules established by a building's manager, and the manager must have the ability to supervise those activities. Given the public's justifiable concerns about personal safety, building operators simply cannot allow service personnel to go anywhere they please without the operator's knowledge, and the Commission should respect that authority.

3. Effective coordination of occupants' needs. A building owner must have control over the space occupied by telephone lines and facilities, especially in a multi-occupant building, because only the landlord can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. Although this has traditionally been more of an issue for commercial properties, such coordination may become increasingly important in the residential area as well. Large-scale changes in society -- everything from increased telecommuting to implementation of the new telecommunications law are leading to a proliferation of services, service providers, and residential telecommunications needs. With such changes, the role of the landlord or manager and the importance of preserving control over riser and conduit space is likely to grow.

Therefore, the commenting associations submit that the best approach to the issues raised in the NPRM is to allow building owners to retain maximum flexibility over the control of inside wiring of all kinds. If a building operator chooses to retain complete ownership and control over its property -- including inside wiring -- it should have that right. Presumably, if this proves to be a good business practice, the market will reward building owners who decide to retain control over coordinating such issues.

On the other hand, other building operators may find that their tenants' needs require less hands-on management and control by the operator. There may be a market for buildings in which tenants and service providers work these issues out themselves. If there is, property owners will respond by letting the market grow on its own, simply because it is in their interests to serve their tenants as efficiently as possible.

Indeed, it is likely that there is demand for both approaches to managing a building. If so, any Commission action is likely to distort the market and interfere with the efficient operation of the real estate industry. Thus, to serve tenants' needs most effectively, building owners should be allowed to make their own decisions regarding the most efficient way to coordinate the activities of multiple service providers and tenants.

4. Effective management of property. A building has a finite amount of physical space in which telecommunications facilities can be installed. Even if that space can be expanded, it cannot be expanded beyond certain

limits, and it can certainly not be expanded without significant expense. Installation and maintenance of such facilities involves disruptions in the activities of tenants and residents and damage to the physical fabric of a building. Telecommunications service providers have little incentive to consider such factors because they will not be responsible for any ill effects.

As with the discussion of fire and building codes above, telecommunications service technicians are also unlikely to take adequate steps to correct all the damage they may cause in the course of their work. They are paid to provide telecommunications service, and as long as the tenant has that service they are likely to see their job as done. Since they do not work for the building operator, he has little control over their activities. If building management cannot take reasonable steps in that regard, building operators and tenants will suffer financial losses and increased disruption of their activities.

In one instance reported by a member, a cable operator installed an outlet at the request of a tenant but without notifying building management. To do so, the operator drilled a hole in newly-installed vinyl siding and strung the cable across the front of the building. Not only was this unsightly (affecting the marketability of the property), but the hole in the siding created a structural defect that allowed water to collect behind the siding. The building owner was able to resolve the matter under the terms of its carefully-negotiated agreement with the operator. If the Commission grants operators the right of access, however, building owners may find that they cannot rely on such agreements any longer.

5. **Physical and electrical interference between competing providers.** Allowing a large number of competing providers access to a building raises the concern that service providers may damage the facilities of tenants and of other providers in the course of installation and maintenance. It also poses a significant threat to the quality of signals carried by wiring within the building. Competitive pressures may induce service providers to ignore shielding and signal leakage requirements, to the detriment of other service providers and tenants in the building, or they may accidentally cut or abrade wiring installed by other service providers or occupants.

The building operator is the only person with the incentive to protect the interests of all occupants in a building. Individual occupants are only concerned with the quality of their own service, and service providers are only concerned with the quality of service delivered to their own customers. The Commission cannot possibly police all of these issues effectively. Consequently, building operators must retain a free hand to deal with service providers as they see fit. If one company consistently performs sloppy work that adversely affects others in the building, the building owner should have the right to prohibit that company from serving the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue because of matters over which it has little control.

In short, the associations' members are fully capable of meeting their obligations to their tenants and residents. As keen competitors in the marketplace, they will continue to make sure they have the services they need. It is unnecessary for the government to interject itself in this field, and any action by the government is likely to prove counterproductive.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	45-DSS-MISC-93

DECLARATION OF STANLEY R. SADDORIS
IN SUPPORT OF COMMENTS OF
NATIONAL APARTMENT ASSOCIATION,
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL,
NATIONAL REALTY COMMITTEE,
AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS

I, Stanley R. Saddoris, declare as follows:

1. I submit this Declaration in support of the Comments of the National Apartment Association; the National Building Owners and Managers Association International; the National Realty Committee; and the International Council of Shopping Centers. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am the Senior Vice President, Director of Operations for General Growth Management, Inc., and I have served in this capacity since July 1981. General Growth operates 105 shopping centers across the country and is the second largest owner and operator of shopping centers in the United States. I have a total of 27 years of experience in the management and operation of real estate.

3. In my capacity as head of operations for General Growth, I have become very familiar with issues related to the installation and operation of satellite systems in shopping malls. The access and use of satellite network systems is important for us, as well as our tenants for several reasons. A number of the national retail chains that lease space in our shopping centers use satellite communications extensively to transmit data to and from their national headquarters, as well as for financial services. The primary use of satellite communications is for the reporting of sales and inventory data on a daily basis. Satellite networks are also used to conduct credit card and check verification by retailers. Some national retailers use the satellite network for video conferencing to either conduct meetings or training sessions. The regional and local tenants in our malls also rely on satellite network systems for the same purposes, although to a lesser degree. General Growth also uses the satellite network technology to communicate with our mall management teams to communicate data and information. General Growth and our tenants have all benefitted from this technology because it has increased the speed of communications, and reduced communications expenses, as well as increased revenues.

4. The use of satellite network communications for the purposes described above began to grow sharply about three (3) years ago. More and more of our tenants sought permission to install antennas and run cable connections throughout the mall.

We were concerned that our roofs would become a field of satellite dishes and a number of concerns had to be considered.

5. Our primary concern regarding the installation and use of satellite network systems on our buildings centers on management, structural integrity, maintenance, safety, liability, security and costs. In some cases aesthetics has been an issue, but with the new technology in satellite dish construction, they have become smaller and weigh less. We still, however, want to reserve the right as to placement of a satellite dish on our roofs to prevent a visual distraction. Our biggest concern, however, is with controlling the integrity of the building, management, liability, structural damage, and maintenance costs, and protecting the safety and personal security of our employees, our tenants and their employees, and our customers. All of these concerns require that we control access to our property and the placement of satellite network equipment

6. The installation of a satellite dish on a shopping center roof can create serious structural, maintenance and property damage if not installed correctly. As an example, penetrating a roof to connect a cable to a satellite dish and a user's location can lead to leaks and water damage if the penetrations are not done correctly. Maintenance of the roof is one of the largest single maintenance concerns we have. Large flat roofs are prone to leak and deteriorate at a faster rate if not protected by good management techniques and preventive maintenance. The consequences of causing a leak by improper roof

penetration can be a serious issue, as the leaks may not be immediately detected, and may cause damage to the roofing material, the building structure, and other property damage. The responsibility for repairing such damage is the responsibility of the building owner. We are also concerned about the proliferation of satellite network equipment on roofs because of the increase in foot traffic to service and install such equipment. Roofs are not designed to carry a lot of equipment requiring penetrations and a lot of foot traffic. Any increase in these two (2) areas causes an increase in maintenance problems, and can cut the useful life of the roof in half. For these reasons, we require that all satellite dish and cabling installation be performed by certified personnel and in the presence of one of our staff members. We also prohibit the use of any satellite dish mounting system that requires penetration of the roof to stabilize the dish. Improperly installed satellite dishes and accompanying supports, if not done properly, can cause serious damage to a roof during a wet storm. For this reason, we have developed installation specifications that must be followed by any satellite dish installation.

7. We are also concerned about the integrity of our buildings. We are concerned primarily with contractors for tenants who drill holes in walls, ceilings, and the roof to run the cable connection from their store to the satellite dish. Local and national fire codes require that certain building assemblies, including walls and floors, provide specified levels

of fire resistance based on a variety of factors, including type of construction, occupancy classification building size, etc. Breaches of such fire codes have been shown to be a frequent contributor to smoke and fire spread. Only trained and knowledgeable people can determine whether the fire code permits a particular wall to be breached or how a hole should be filled in a wall that may be breached.

8. Preempting lease restrictions and building codes regarding antenna installation would raise a number of management issues. We maintain strict access to the roofs of our buildings. Contractors must sign in before being allowed to gain access to the roof. Also, unless we are familiar with a particular service contractor, we require them to be accompanied by one of our staff members while on the roof or in the building. In addition, our roof entrances are locked at all times. These rules apply to all contractors wanting to gain entrance to our roof. This could include heating, ventilating, and air conditioning contractors to service tenant and mall units, satellite dish — an antenna service personnel and installers, or electricians servicing or troubleshooting the electrical system for a tenant or the mall. Generally speaking, out of our concerns for the safety of our tenants and our customers and to limit our and our tenants' liability in cases of an incident, we try to limit the number of service personnel who have access to our building and to our building systems and to control and monitor their activities. As an example, as much as possible, we generally contract with only

one cleaning crew and one HVAC contractor for the common areas and the nondepartment store tenants. We encourage our tenants to use those contractors that are on our approved contractor list to help reduce the number of contractors needing access and negotiate to include such requirements in our leases with our tenants. Allowing tenants to install their own antennas at will makes it much more difficult and costly to limit and control such access.

9. Out of concern for such issues, we have developed a leasing policy to regulate and limit the number and use of satellite dishes on our roofs. If a tenant can show that it has special needs or requirements or that its level of use warrants its own satellite dish, we will allow a tenant to install such equipment. They must, however, install it based on our approval of the location and by our specific specifications. We also require that any roof penetrations be completed by the mall roofing contractor. To assist us in controlling the number of satellite dishes on our roofs, we have contracts with two (2) national service providers that offer retailers satellite network communications to facilitate the transmission of data and services. If a tenant can be serviced through either of the two (2) national service providers, we ask that they do so. This reduces additional satellite dishes on the roof and protects the integrity of our building systems.

10. This process is the same that we use in leasing space and other rights to our tenants and other service providers,

i.e., negotiations and agreements between parties in a competitive market regarding the space and services to be provided and leased and the allocation of the obligations, limitations, rights, and costs between the parties. Service providers compete for the right to provide service in our centers, and like our tenants and other service providers, are chosen based on the nature, quality and cost of the service provided and must meet our requirements regarding financial stability, insurance, etc. Our policies regarding the regulation and limitation of antennas are a subject of negotiations with our tenants and are reflected in our lease agreements with them and the rules and regulations of the center. Under our standard policy, tenants are free to chose between the competing designated providers, and, as beneficiaries of the competition between them, usually are able to obtain services from them at an equal or lower price than they could elsewhere on their own. Thus, there is competition between service providers at two levels. First, they compete to become designated providers, and then they compete to sign up and provide services to individual tenants. Our tenants benefit from the competition in terms of price and service, while avoiding the disruption and costs that would occur if the owner did not have the ability to control his property.

11. Our agreement with satellite service providers is very similar in terms to our usual retail tenant leases. Our retail leases provide for a base rent, plus a percentage of tenants'

revenues over a specified break point. We treat satellite dish space in the same way, by changing a small base rent plus a percentage of revenue once enough retailers are using the antenna to cover the satellite provider's basic costs. If we did not provide satellite service in this way so as to recover the costs associated with the installation, maintenance, and use of the antennas, all of our tenants, whether or not they use satellite services, would have to pay for the additional maintenance and management costs resulting from the presence of satellite dishes through their share of the Common Area Maintenance ("CAM") expenses paid by all tenants, based on their gross leasable area in addition to their monthly rent. In other words, by leasing antenna space, we reduce the Common Area Maintenance expenses of all tenants, and allocate expenses arising from the antennas only to those tenants that use the satellite services. This is particularly beneficial to small, local, and regional retailers who do not rely on satellite communications as extensively as national tenants.

12. I am unaware of any complaints from tenants arising out of our satellite dish network policies. They understand our concerns and recognize that we are trying to hold down everyone's costs and maintain order and security in the center. We make every effort to assure that the needs of all our tenants are met and to accommodate tenants who have special needs in terms of satellite network communications. It is in our economic

interests to accommodate them in any way possible to increase their sales and their profits.

13. Because of the issues I've raised, I am very concerned over the prospect of FCC preemption of our leases. Allowing tenants to set up satellite dishes wherever they want, without any control or supervision by our personnel, would present serious safety, maintenance, security, management and cost allocation problems that would far outweigh any benefit to such tenant rights.

Florida Apartment Association

FLORIDA PUBLIC SERVICE COMMISSION

In Re: Undocketed Special Project:
Access by Telecommunications Companies
to Customers in Multi-Tenant Environments.

Undocketed Special Project No. 980000B-SP

Submitted by:

Florida Apartment Association
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SUMMARY OF POSITIONS

The Florida Apartment Association ("FAA") is comprised of owners and managers of multi-tenant residential properties. FAA members manage approximately 260,000 residential units in the state. The FAA believes mandatory direct access is unnecessary to promote competition.

Competition for telecommunications services exists today in the residential market on the community level. Existing communities offer many choices. Residents choose their preferred community based upon the services offered by the property owner. Renters select telecommunications services when they shop for an address. If a renter wants a particular phone provider, they are able to find a community that offers service through that provider in their preferred geographic area.

Property owners today have the ability to choose and change providers and will do so based on market demands. Thus, telecommunication providers compete for the ability to provide service to entire residential communities.

The issue presented is whether individual residential renters should be considered "customers" in multi-tenant environments. The Florida Apartment Association believes that the customer is the community and that residential competition already exists on the community level. Direct access to residential apartment customers is unwieldy, presents many logistic, safety and liability concerns, and might be an unconstitutional taking. The Florida Apartment Association believes that direct access should not include

residential communities where the resident does not have an ownership interest in the property. However, if the Public Service Commission determines providers must have direct access to individual renters, then it must take several issues into account.

Florida's residential properties are built with a variety of characteristics. Some are low income housing, some offer full amenities such as technology in each unit. Some communities are a single highrise building, some are campus style, and some are cinderblock construction. Some serve military personnel. Some serve students. These varying styles, price points, populations and locations do not lend themselves to a one-size-fits-all solution to the access issue. The length of tenancy is typically very short (less than one year in most cases) in a residential apartment setting, further complicating logistic issues.

Any access law must take into account the property rights held by the owner, as well as the right of a tenant to quiet enjoyment of their unit. An access law that allows constant wiring and re-wiring of properties based on any telecommunication provider's desire is not acceptable. Owners cannot tolerate destruction of their property or disruption in their communities on a regular and ongoing basis. Markets and the ability to enter into contracts must also be considered. Liability is a further concern.

DISCUSSION

I. In general, should telecommunications companies have direct access to customers in multi-tenant environments?

Direct access might be sensible in some settings. However, there are no public policy reasons to mandate direct access in the residential setting where the resident has no ownership interest in the property.

The only conceivable public policy reason for mandating direct access is to promote competition. If competition exists in certain markets, then direct access is not necessary in that market. The residential apartment market is distinct from the commercial or other residential markets. Competition already exists in the residential market.

In residential non-owner communities, the choice of telecommunications providers is market driven. In fact, the Federal Trade Commission exempts the acquisition of rental residential property from the Hart-Scott-Rodino premerger notification rules because these assets "are abundant and their holdings are generally unconcentrated." 61 Fed. Reg. 13669 (Mar. 28, 1996); 16 C.F.R. §802. The high level of fragmentation in the market means that no individual owner has any significant degree of market power. Because of the resulting competition, building operators must respond to the needs of tenants by accommodating requests for service.

Property owners carefully design communities to appeal to certain demographics. They vary their communities to attract

renters from a particular socio-economic strata, geographic area, or even design communities based on the length of stay, such as student housing. They use amenities to attract renters. Renters select amenities when they shop for their address.

Marketing an apartment community must be done very carefully. Apartments, unlike snack foods, can't be moved if the developer or owner "guessed" the market wrong. Thus, the market is closely examined. Owners profile renters. If renters in a particular market area prefer a particular telecommunications provider, owners will see that the desired service is provided.

Competition for residential units is fierce. An owner can fail to fill their units by making a simple mistake. For example, in certain areas renters will not move into a community if they cannot transfer their existing phone number or cannot obtain high speed internet.

Many apartment units in Florida are owned by publicly traded companies. These owners have a fiduciary duty to return value to shareholders. They will provide whatever services are economically feasible to ensure high occupancy rates. If more than one telecommunication provider is demanded by the market, owners will respond.

Many providers compete to service a community. Usually the property owner enters into an agreement with a provider to bring service to the entire property. The ability to guarantee the entire community to a service provider *helps new* and *smaller* companies *compete*. Without guaranteed volume, these smaller

competitors cannot justify the cost of competing for just a few customers. Direct access will be a barrier to competition for small companies.

Additionally, the competition for an entire community keeps prices low. Each provider offers its best deal to the owner. When all providers are guaranteed access to all units, the incentive to compete is gone. *Prices will go up.*

In short, no barrier to competition exists in the residential multi-tenant market. Rather, competition exists between providers who compete to serve entire properties. Thus, government does not need to create artificial rules.

II. A. How should "multi-tenant environment" be defined?

"Multi-tenant environment" should not include residential properties where the occupant has no ownership interest. It should not include tenancies shorter than 13 months.

Direct access in a non-ownership setting results in confusion for the entire property. Can tenants change providers monthly? Would buildings be violated and construction personnel be on site constantly?

The renter does not own the property and has no right to alter the unit. Direct access grants non-owners new rights that override the owner's rights. This holds true for short-term renters as well. These units experience 60 percent turnover per year. Choice in this setting is impossible to manage.

B. What services should be included in direct access?

FAA opposes direct access in the residential setting where residents have no ownership interest. However, if direct access is mandated, it should only include basic service.

Not all properties are in a market where other services are in demand. For example, some high-end student housing includes internet. In other communities, internet access is never demanded.

Until competition exists in the video market, it should not be considered. Property owners are anxious to give residents access to all types of video programming services, but property owners must retain full authority to control the location and manner of installation.

Our best example of experience with direct access comes from other countries. The Czech Republic has direct access for satellite services. Their skyline is littered with dishes. Citizens would oppose this, as evidenced by the dislike of wireless facilities.

C. 1. In promoting a competitive market, what restrictions to direct access should be considered?

Direct access cannot include destruction of property or disruption in communities.

Most apartment communities do not have a "phone room" or conduit. Service is provided through a box outside the buildings or inside a single unit. Inside wires run through the ceilings and attics. Access to facilities is through someone's apartment. No

renter will live in a building where workers are always fishing wires through the wall.

Many apartments are constructed with a mandatory fire wall between every two units. The fire wall cannot be breached. How will wiring be accomplished? The PSC is not in a position to develop and enforce comprehensive safety regulations. Those matters are appropriately governed by state and local building codes.

If the fire wall is breached and not repaired, the telecommunication provider who caused the damage must be liable for any resulting injuries. Property owners must be granted statutory immunity.

In many properties, the ground and parking lots must be dug up to bury wire. Holes and trenches scattered on a property are unacceptable. Even single routes are unacceptable if they are regularly dug up.

Aesthetic considerations undeniably affect property values. Wire nests outside buildings are unacceptable. Subsequent providers sometimes inadvertently interrupt current service. The property owner pays for this mess with high vacancy rates.

Just as telecommunication providers are not experts in property management, owners are not telecommunications experts. However, direct access might be acceptable if all service is provided through a single set of wires. In addition, providers would have to repair any and all damage or changes to the property, and all wiring must be underground. A bond guaranteeing payment

for property repair should be posted. Providers should bear legal liability for damage and personal injury. Providers should have to provide some sort of guarantee of service to owners and renters. No direct access should be allowed for tenancies of less than 13 months. Turnover rates in the non-owner residential market are simply too high to make direct access work without a 13-month threshold.

C. 2. In what instances would exclusionary contracts be appropriate and why?

Exclusive contracts for a zip code or area code are not appropriate. However, on the community level, exclusive contracts promote competition. They should be encouraged.

Exclusive contracts guarantee volume. New and smaller companies need guaranteed volume to justify the expense of entering the market. Only large companies can compete without guaranteed volume.

Exclusive contracts also result in lower prices to users. Providers compete on price to win the ability to serve communities. Property managers like to promote low cost service. Guaranteed direct access evaporates the incentive to offer lower prices. Providers don't have to bring an owner a "better deal" to win the community. In addition, a provider can serve a large number of customers at a lower cost per capita.

With 60 percent turnover rates, providers would face an administrative nightmare keeping track of customers. In any given

year, a provider may have to connect or disconnect the same unit a number of times. Exclusive contracts carry a guaranteed term of service. This lowers costs.

All current contracts should be honored. Owners should have the ability to renew existing contracts as well.

A property owner must have the right to enter into a contract with any person who has access to the buildings. This is the only rational way to manage the property and protect the persons and property of all involved.

D. Please address issues related to easements ... and other issues related to access.

Physical issues related to equipment, protection, maintenance, repairs, or liability are addressed above. The FAA can only accept direct access if no physical damage occurs.

Easements would cloud title and should not be legislatively mandated.

E. Are there instances in which compensation should be required?

Compensation in the non-owner residential setting is appropriate on a limited basis.

Some properties own the wiring on and inside their property. This asset is sometimes sold outright to a provider. Property owners should have the right to sell their property for fair market value, even if the property is wires.

Some owners charge a fee to lease space to telecommunications providers. This should be preserved.

Lastly, many property owners charge a fee to telecommunication companies to cover the cost of maintenance and repair, or to indemnify for damage. This, too, should be preserved. In the alternative, a bond should be required.

III. Conclusion

Direct access seeks to open competition for telephone service to residents of apartment communities. However, direct access is not necessary in the non-owner residential market because competition already exists in this market. It would create chaos on apartment properties as residents move in and out. It will lead to a deterioration in service and an increase in cost for residents. It will violate private property rights. The FAA opposes direct access in the non-owner residential setting.

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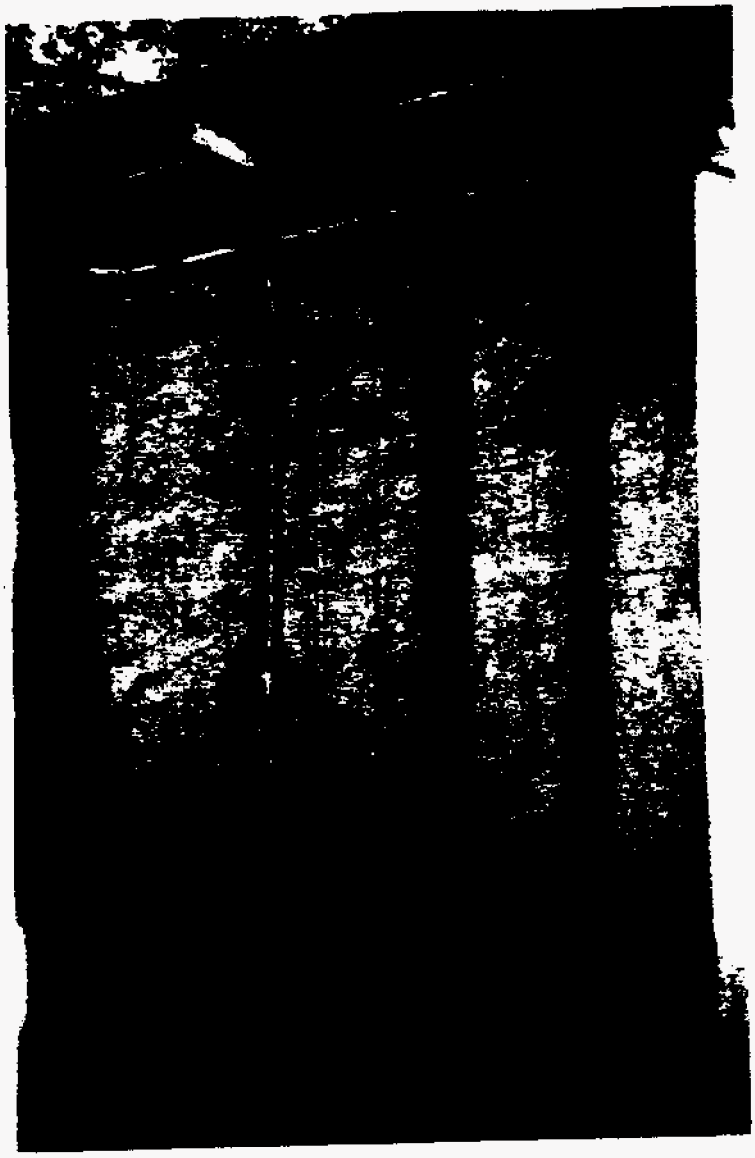
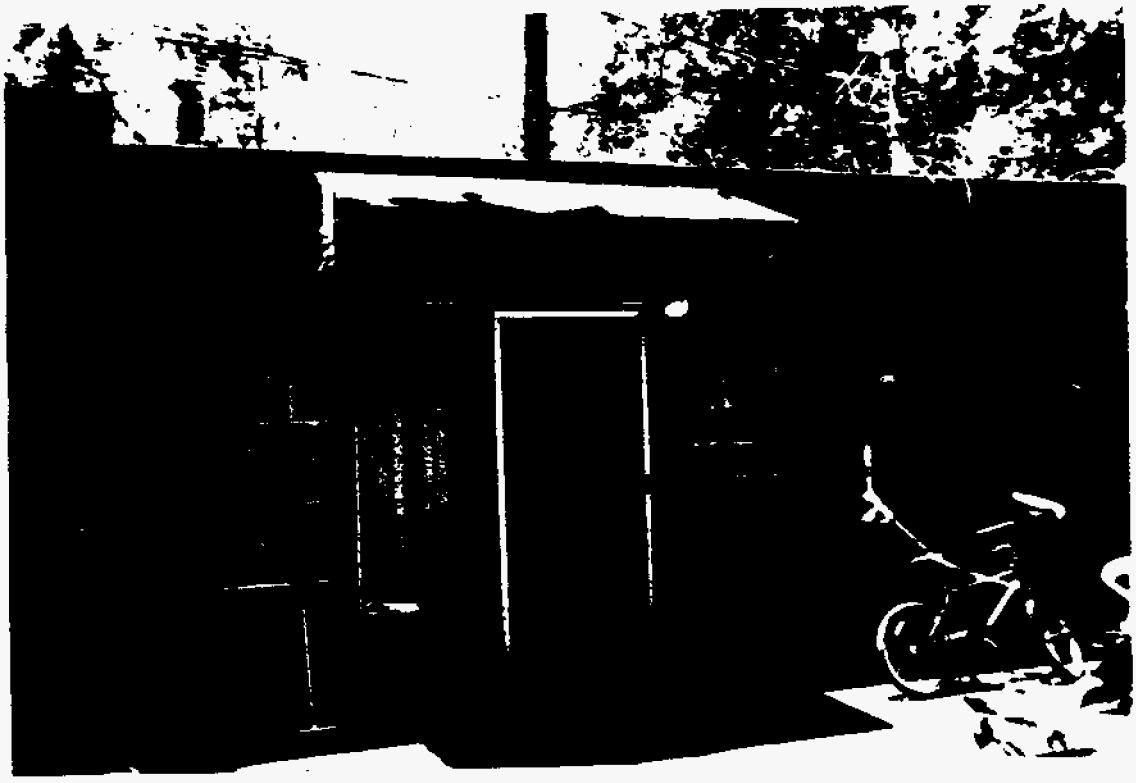


bundled phone and cable wires and security wires - electrical wires in conduit



phone and cabl and security wires - partia conduit (left side of door)

bundled phone, cable and security wires - note multiple wires running through eaves

poor exterior cable installation - draped on outside of building by installer

Intermedia Communications, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Undocketed Special Project by Telecommunications Companies to Customers in Multi-Tenant Environments.	)	DOCKET NO.: 980000B-SP
	)	FILED: 7-29-98

INTERMEDIA COMMUNICATIONS INC.'S COMMENTS ON MULTITENANT ISSUES

Intermedia Communications Inc. (Intermedia) hereby submits in the above-referenced matter its initial comments to the issues identified by the staff.

COMMENTS

I. **In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)**

Yes, companies should have access to customers/tenants in multi-tenant environments on a competitively neutral basis that preserves tenant choice of carriers and that does not violate the owner's property rights. Access should not cause any permanent changes to the property, create safety problems, interfere with management functions, or otherwise compromise the owner's property interests. Where access requires a more obtrusive presence, the terms and conditions of that access should be negotiated among the interested persons.

II. **What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?**

The Commission should consider the competing interests of the property owner, the carriers and the tenants, as well as whether direct access is necessary to ensure competitive goals and customer protection. The Commission should recognize, however, that the legislation referring this matter to it for study does not use the term "direct access." That term is used only in Section 364.339 where the tenant is guaranteed direct access by the incumbent. The Commission should avoid pursuing "direct access" for companies as the legislative goal, but rather focus on assuring all companies access that promotes competition, protects consumers, and honors private property rights.

A. **How should "multi-tenant environment" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new**

facilities, existing facilities, shared tenant services, other?

"Multi-tenant environment" should be defined to include residential environments, commercial environments, condominiums, office buildings, new facilities, existing facilities, and shared tenant service locations. It should not be defined to include call aggregators and locations serving transients (payphones).

B. **What telecommunications services should be included in "direct access", i.e., basic local service (Section 364.02(2), F.S.), Internet access, video, data, satellite, other?**

Companies providing services that qualify under Chapter 364 as intrastate telecommunications services should be allowed appropriate access to tenants.

C. **In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?**

Please see response to Issue I.

D. **How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.035, F.A.C.) or federal Minimum Point of Entry (MPOE)?**

The Commission definition should be dropped in favor of the federal MPOE. Most states have already adopted the MPOE and it creates consistency across the board.

E. **With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:**

1) **Landlords, owners, building managers, condominium associations**
2) **Tenants, customers, end users**
3) **Telecommunications companies**

In answering the questions in Issue II.E., 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.

Please see answer to I above.

F. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

Please see answer to I above.

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

Companies should have access to customers/tenants in multi-tenant environments in a manner that does not compromise the integrity of E911. The best method for preserving the integrity E911 may vary with the circumstances, and thus should be negotiated among the interested persons.

III. Other Issues Not Covered in I and II.

Intermedia is willing to address other concerns as they arise.

Respectfully submitted, this 29th day of July, 1998.

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July 29, 1998

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Special Project No. 980000B-SP
Access by Telecommunications Companies
To Customers in Multi-Tenant Environments

Dear Ms. Bayo:

Enclosed for filing in the above-referenced special project is the original and fifteen (15) copies of the Positions on Issues of Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership. A diskette with this document in Microsoft Word 97 format is also enclosed with this letter.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

J. Jeffry Wahlen

Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Access by Telecommunications Companies To Customers in Multi-Tenant Environments	Docket No. 980000B-SP Filed: July 29, 1998

/

SPRINT CORPORATION'S POSITIONS ON ISSUES

Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership, submit the following positions on the issues identified by the Staff in the July 17, 1998, Notice of Second Staff Workshop.

Issues and Positions

I. **In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussions of broad policy considerations).**

Position: Yes. Telecommunications carriers should have direct access to customers in multi-tenant environments ("MTE"). The goals of the Telecommunications Act of 1996 ("1996 Act")[1] are to (1) open the local exchange and exchange access markets to competitive entry, (2) promote increased competition in telecommunications markets that are already open to competition, and (3) reform and preserve the system of universal service so that universal service is maintained.[2] These goals are also reflected in the 1995 amendments to Chapter 364, Florida Statutes. The public policy of the United States and the State of Florida includes the development of local exchange competition and giving consumers the power to choose between competing telecommunications carriers and the services they offer.

[1] Pub. L. No. 104-104, 110 Stat. 56 *to be codified at* §§ 47 U.S.C. §§ 151 *et. seq.*
[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996).

Prior to 1995, the Florida Public Service Commission had complete authority to decide who should provide local exchange services in a particular geographic area. It did so by giving a small number of local exchange companies an exclusive franchise to serve all of a discrete geographic area. Congress and the Florida Legislature did not invite competition into the local exchange market so that multi-tenant building owners, property managers and landlords (collectively "landlords") could assume the historical role of the FPSC by deciding which carrier serves an MTE through contract or otherwise. Rather, by enacting 47 U.S.C. § 251(a)(4), which addresses conduit, and the other provisions of the 1996 Act, Congress designed a system where carriers could compete for end user customers on a non-discriminatory, competitively neutral basis.

This kind of competitive environment requires non-discriminatory equal access by certificated carriers at some point on or at the premises of an MTE.[3] To allow otherwise would subordinate the interests of end user customers and the development of competitive local exchange markets to the landlords. Sprint supports an approach to MTEs that balances the interests of affected parties, promotes competition and encourages the development of new technology and services by certificated carriers.

[3] Determining the location of that point is a critical part of the solution to whatever problems may exist in MTEs. If landlords demand monopoly control over access to customers in an MTE, it may be necessary for the FPSC or some other regulatory authority to regulate MTE landlords through certification, the development of minimum technical and service standards (equipment, lightening protection, etc.) and other means usually associated with the regulation of bottleneck monopolies (including enforcing interconnection responsibilities).

II. **What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?**

A. **How should "multi-tenant environment" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?**

Position: In general, the term "MTE" should be broadly defined to include all "tenant" situations, whether residential or commercial or single or multiple building; however, it should not include "transients" and certain other sharing arrangements. The definition should include residential condominiums, as well as new and existing facilities. When excluding "transients" and other sharing arrangements, the Commission should adopt the reasoning it used in the 1980s when it declined to certificate entities like hospitals (excluding doctors in private practice with offices in hospitals), dormitories, nursing homes, adult congregate living facilities, continuing care facilities, and retirement homes. These entities provide telephone service to persons who are resident in the facility for short periods of time and would find it impractical to obtain service in their own names for that short period of time.

B. **What telecommunications service should be included in "direct access," i.e., basic local service (section 364.02(2), F.S.), Internet access, video, data, satellite, other?**

Position: All telecommunications services as defined in 47 U.S.C. § 153(43)[4] provided by a telecommunications carrier, regardless of access media used, should be included in "direct

[4] That section states: "The term 'telecommunications service' means 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."

access." 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 framework contemplated in the 1996 Act and the 1995 Amendments to Chapter 364, Florida Statutes.

C. **In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?**

Position: 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. Whether accomplished by new legislation or rules adopted under existing law, there should be a strong rebuttable presumption that any arrangement whereby a telecommunications carrier gets exclusive use of private building riser space, conduit, easements, closet space, and the like, is anti-competitive and unlawful. Any other result would be inconsistent with the pro-competitive purposes behind the 1996 Act and the 1995 Amendments to Chapter 364, Florida Statutes.

D. **How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal MPOE?**

Position: Developing a new definition of "demarcation point" is important to a meaningful resolution of the issues facing carriers, customers and landlords in an MTE. Adopting an MPOE approach to the definition of demarcation point could reduce the physical presence of a carrier's facilities at an MTE, but could leave landlords in control of, and responsible for significant amounts of wires, cable and other equipment beyond the demarcation point needed to serve customers. FPSC's current demarcation point rule generally places the demarcation point closer to the customer and minimizes landlord responsibility and control over portions of the

telecommunications network, but presents potential problems when the different tenants in a MTE demand service from different carriers. Revisiting the definition of the demarcation point in MTEs could be a way to balance the interests of customers, carriers and landlords. The FPSC should consider a comprehensive review of its existing rule as an extension of this project. The Commission should consider this a long-term project and devote the necessary resources to its completion.

E. **With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:**

(i) **Landlords, owners, building managers, condominium associations**

(ii) **Tenants, customers end users**

(iii) **Telecommunications companies**

In answering the questions in Issue 2.e., 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.

Position: The rights, privileges, responsibilities or obligations of the various parties implicated in an MTE are complicated. The special project exists so that the FPSC can make policy recommendations to the Legislature. Accordingly, the FPSC should focus more on what the rights and responsibilities among the parties **should** be than what those rights and responsibilities **are.**

With that in mind, Sprint offers the following comments:

1. Carriers and landlords share a common interest in serving their common customers. The interests of those customers should be paramount.

2. The 1996 Act and the 1995 Amendments to Chapter 364, Florida Statutes, were intended to promote competition. Competition is intended to help consumers. Solutions to MTE problems that harm competition also harm consumers and should be avoided.

3. To different degrees, both landlords and carriers are already subject to laws and rules that govern their activities. For example, Chapter 83 of Florida Statutes governs residential and non-residential tenancies in Florida. There are many statutes that regulate land use, commercial development, condominiums and other areas that are implicated in an MTE. Most cities and counties have a building code, and there is an effort ongoing to developing minimum state building codes. As the Commission develops its recommendations to the Legislature, it should remember that the answer to the MTE problem might require legislation in places other than Chapter 364. For example, it may be appropriate to recommend changes to the building code to establish minimum standards for the provision of conduit and riser space, lightening protection and other similar matters. Likewise, if Landlords demand control of telecommunications facilities on their property, it may be necessary to amend Section 83.67(1), Florida Statutes, to prevent Landlords from disconnecting telecommunications services to non-paying tenants as a means to coerce payment of rent.

4. Universal service is an important public policy goal. To this end, the Florida Legislature codified the concept of carrier of last resort ("COLR") to ensure that all qualified consumers would have access to telecommunications services.

Landlords should not be allowed to interfere with a COLR's obligations through private contract or otherwise.

5. Under any existing technology, telecommunications services to customers in an MTE cannot be accomplished without at least some access to conduit, riser space and equipment rooms, and the installation of cable, wire and other equipment. Telecommunications services are as essential to tenants as electricity, water and sewer. Most tenants would likely consider a unit without telecommunications services uninhabitable. It is in the mutual interests of landlords and carriers to resolve any MTE problems in a manner that promotes customer choice of telecommunications carriers and services.

6. The Commission has historically regulated persons who own and/or operate telecommunications facilities for hire to the public. If landlords demand monopoly control over the facilities on their property needed to serve end user customers, impose a separate charge on tenants for service, or seek to extract a fee from a carrier for the right to serve an MTE, the landlords should be regulated by the FPSC in some fashion as telecommunications carriers, especially regarding the obligation to interconnect on a non-discriminatory basis with other telecommunications carriers.

F. **Based on your answer to Issue 2.e., above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?**

Position: The answer to this question depends on the location of the demarcation point. The provision of facilities at an MTE beyond the demarcation point should be considered an

obligation of the landlord or the customer, not the carrier. Historically, local exchange companies have not been required to pay compensation to place facilities from the property boundary to the demarcation point, and it seems abundantly clear that the 1996 Act was not enacted to give landlords the opportunity to extract monopoly rents from any carrier seeking to serve the demands of tenants in a MTE. If customers in an MTE demand service from a carrier and existing facilities cannot be used by the carrier to provide that service, 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 they can recover these costs from the customer requesting the service, forcing carriers to pay these costs creates in implicit subsidy in favor of MTE tenants.

G. **What is necessary to preserve the integrity of E911?**

Position: The integrity of E911 at MTEs should be preserved. Sprint is not aware of any specific E911 problems at MTEs, but reserves the right to comment further if technical problems are identified during the workshop.

II. **Other issues not covered in 1 and 2.**

If an interested participant wishes to discuss any issue not specifically delineated above, they may do so wherever they deem appropriate or as part of Issue 3.

Position: None at this time.

Community Associations Institute

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Issue Identification Workshop For Undocketed Special Project: Access by Telecommunications Companies To Customers in Multi-Tenant Environments	)))))	Special Project No. 980000B-SP

COMMENTS

Pursuant to the Notice of Second Staff Workshop issued July 14, 1998, the Community Associations Institute ("CAI") respectfully submits the following Comments in the above-referenced docket. CAI, which represents condominium, cooperative, and homeowners associations and their homeowners and professionals, respectfully requests that the Florida Public Service Commission ("Commission") refrain from supporting forced entry to community association property by telecommunications service providers. Such forced entry would constitute a taking of private property prohibited by the United States and Florida Constitutions and damage community associations' common and individually-owned property. Such an approach is also unnecessary, as the competitive telecommunications marketplace is providing incentives for community associations to choose multiple providers. The Commission should refrain from impeding the growth of this competitive marketplace by proposing forced entry.

INTRODUCTION

CAI, through its Florida Legislative Alliance, represents Florida's condominium associations, cooperatives, and homeowner associations. Approximately 11,000,000

individuals reside in more than 55,000 associations throughout the state. Many of these citizens participate actively in CAI's nine Florida Chapters. Nationally, CAI provides a voice for the 42 million people who live in over 200,000 community associations of all sizes and architectural types throughout the United States. In Florida and nationally, CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI also has extensive community association homeowner and manager education programs. In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations.

In order to fully address the issues presented in this Notice, it is necessary to explain the legal basis for and governance structure of community associations. All community associations are comprised of property that is owned separately by an individual homeowner and property owned in common either by all owners jointly or the association. There are three legal forms of community associations: condominiums, cooperatives, and homeowners associations, which differ as to the amount of property that is individually owned. In condominium associations, an individual owns a particular unit; the rest of the property is owned jointly by all unit owners. In cooperative associations, the individual owns stock in a corporation that owns all property; the stock ownership gives the individual the right to a proprietary lease of a unit. In homeowners

associations, an individual owns a lot; the association owns the rest of the property. Generally, an individual owns less property in a condominium than a homeowners association, while there is no individual property ownership in a cooperative. Therefore, while individuals do own or use property in community associations, they do not fully own all property in the association. Community associations either own or control association common property, using and maintaining this property for the benefit of all association residents.

In contrast to most other multi-tenant environments, individual homeowners have ownership rights in community associations. By virtue of their ownership, they have the right to vote for and serve on the board of directors that governs the association. Therefore, community association owners have a direct voice in the governance of their association, including determining the use of common property and the selection of association services and service providers.

I. Telecommunications Service Providers Should Not Be Granted Forced Entry Rights To Community Association Common Property

Many telecommunications service providers have requested the right to force entry onto community association common property in order to install and maintain telecommunications service equipment. Granting forced entry would violate the United States and Florida Constitutions, damage association common property, and hinder the growth of a competitive telecommunications marketplace.

A. Granting Forced Entry Would Be An Unconstitutional Taking

In this proceeding, telecommunications service providers are requesting that the Commission permit entrance to property for installation of telecommunications equipment, regardless of the property owner's consent. This request would constitute a taking that would be prohibited by the United States and Florida Constitutions unless just compensation were provided.

The statutory scheme proposed by the telecommunications service providers in Florida is the same as that invalidated by the United States Supreme Court in Loretto v. Manhattan Teleprompter.[1] In Loretto, the Supreme Court invalidated a New York statute that forced a landlord to allow a cable provider access to property in order to install wiring. The Court ruled that that installation amounted to a permanent physical occupation of the landlord's property, which was deemed to be a taking of private property.[2] The Court further reasoned that permanent occupancy of space is still a taking of private property, regardless of whether it is done by the state or a third party authorized by the state.[3]

The Loretto analysis applies to community associations in the situation proposed by Florida telecommunications service providers, since community associations (or all unit owners) own the common property to which telecommunications service providers are seeking access. Therefore, any forced entry to common property promulgated by the

[1] 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).
[2] Loretto, 458 U.S. at 426.

state of Florida would be a taking.

Forced entry proposals would also violate the Florida Constitution. Article 10, Section 6(a) states: "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." Forced entry proposals cannot meet this provision, since they do not serve a public good; they only support the business plans of telecommunications service providers.

In similar proceedings, both the Federal Communications Commission ("FCC") and other states have recognized the constitutional defects inherent in any forced entry scheme. Florida should follow these examples and refrain from mandating forced entry to common and other private property. Florida should not grant telecommunications companies a special statutory or regulatory privilege to take private property for their economic gain. It is unnecessary and inappropriate to limit the rights of community associations and their residents simply to advance the business plans of various telecommunications providers.

B. Requiring Forced Entry Would Damage Community Association Common Property

In addition to the constitutional infirmities posed by forced entry proposals, there are many practical problems that would be caused or exacerbated by these provisions. Under

[3] Loretto, 458 U.S. at 432, n.9.

forced entry, telecommunications service providers would have no incentive to refrain from damaging common property. Forced entry schemes also do not recognize the limited amount of space available for telecommunications equipment installation in community associations.

In the current marketplace, community associations are able to choose telecommunications service providers that will not damage common property during equipment installation and maintenance. Forced entry would allow all telecommunications service providers access to common property, regardless of whether they damage the property. Further, forced entry eliminates the incentive to protect the physical integrity of common property, for telecommunications service providers who do cause damage cannot be barred from common property.

With multiple service providers having the unrestricted right to enter common property, the potential for damage to common property and telecommunications equipment would increase exponentially. Since multiple providers would often be using the same portions of common property, it is conceivable that the same portion of common property would be damaged, restored to some extent, then damaged again by another service provider. It is also conceivable that a new service provider would damage a previous provider's telecommunications equipment during installation, with either or both providers holding the association liable for damages. Forced entry would not allow associations to coordinate installation in order to minimize disruption to common property, telecommunications equipment, and association residents.

Community associations lose their ability to control common property under forced entry, diminishing association ability to protect resident safety and security. Community associations are often ultimately responsible for the activities that occur on common property. If telecommunications service providers damage common property or injure association residents, community associations may be held liable without having had the opportunity to limit the risk of damage or injury before it occurred. Attempts to hold telecommunications service providers liable for any damage caused would be expensive and burdensome.

Forced entry proposals also ignore the space limitations inherent in every association building or property. Real estate is a finite resource and common area space is almost always limited. It is nearly impossible for community associations to accommodate an unlimited number of providers. Therefore, forced entry may cause telecommunications service providers to compete with each other to install wiring in as many buildings as possible before all available space is occupied. This rush to occupy space may result in poor quality installations or increased damage to common property.

Forced entry proposals ignore the governance structure of community associations. Community association homeowners, through their boards of directors, select the telecommunications service providers that will serve the association. They choose service providers who will provide high quality, low cost service without damaging common or individual property. Forced entry will eliminate this ability, so that

association homeowners will be required to accept any terms dictated by service providers who cannot be excluded from the property even if they provide low quality, high cost service or damage property. Community association homeowners choose to live in associations because they desire to have some control of the governance of their communities; forced entry eviscerates this community governance.

Since forced entry would eliminate community associations' abilities to control telecommunications equipment installations on common property, association risks and liabilities will escalate. Forced entry proposals dismiss these increased risks and liabilities. Forced entry proposals will not increase competition, but will harm community associations and their residents. For this reason, the Commission should reject any forced entry proposal.

C. The Telecommunications Marketplace Is Effectively Promoting Competition Without Forced Entry

Many telecommunications service providers claim that forced entry is necessary to promote competition. Nonetheless, growth of competition in the current marketplace belies that assertion. Instead of increasing the number and quality of service providers in the marketplace, forced entry will actually hinder the growth of competition.

Forced entry proposals permit telecommunications service providers to have access to private property regardless of the quality of their service. Community associations

cannot exclude providers of low quality service from their property. Therefore, there is no incentive for providers to improve their service.

Telecommunication service provider knowledge, expertise and reputation will vary tremendously if forced entry is established. To ensure that community association residents receive dependable service, association boards of directors must be able to weigh factors such as a provider's reputation when allocating limited space to telecommunications companies. This is imperative if residents are to have a variety of dependable telecommunications options. Forced entry eliminates these selection options, forcing associations to accept service from any provider regardless of its reputation or experience.

For the reasons listed above, the Commission should not support forced entry proposals. Such proposals would require unconstitutional taking of common property, damage common property and increase the risk of injury to association residents, and hinder effective competition in the telecommunications marketplace. Access by telecommunications companies to community association or other property should not be regulated by the state but should remain a function of the marketplace. A telecommunications provider's access to community associations is based on the quality of services it provides and the demand for those services. A reputable provider with a quality service will be competitive in this environment and the state should encourage such competition rather than create artificial markets for providers seeking to avoid it.

The state of Florida should refrain from supporting the creation of such an artificial market.

II. Forced Entry Parameters

The Commission raises several important issues for consideration regarding forced entry parameters and has pointed out many of the difficulties inherent in forced entry legislation. Therefore, the Commission should refrain from supporting any forced entry initiatives.

A. "Multi-Tenant Environment" Should Be Broadly Defined

Regardless of whether a building is residential or commercial, leased or owned, or organized as a community association, forced entry proposals have the same effect: they eviscerate control over private property to the detriment of property owners and tenants alike. Forced entry should not apply to any multi-tenant environment.

C. The Rights Of Private Property Owners Must Be Protected

Community associations must control access to common property for any equipment installation and maintenance. Without control over the means, method, and location of telecommunications equipment installation, and control over the timing of access to common property, community associations will not be able to minimize the risks and liabilities. Community associations must regulate the timing of telecommunications

service provider personnel access to common property. Community associations must maintain their rights to ensure that any installation of telecommunications equipment occurs in a location and in a manner that will be least disruptive to the association, its residents, and the equipment of other telecommunications service providers. Community associations must also be able to bar telecommunications service providers from their property.

In some circumstances, exclusionary contracts would foster competition. Community associations could promote competition among various service providers by offering exclusivity as a term of a service contract. To obtain the contract, telecommunications service providers would be required to demonstrate that they could provide high quality, low cost services. Under forced entry, no such demonstration is necessary; community associations must permit access to every provider, regardless of price or quality of service. In addition, service providers with access to the property would be required to maintain or improve the quality of service, knowing that community associations could terminate access to the property. Exclusionary contracts could often increase competition among telecommunications service providers.

In some situations, in which a telecommunications service provider would have to install new wiring or substantially upgrade existing wiring, an exclusionary contract may be the only incentive for the provider to expend the necessary resources to complete the project. Community associations should be able to retain the option of offering exclusionary

contracts to attract such capital investment. Forced entry would eliminate the ability of certain associations to obtain any service if exclusionary contracts were prohibited.

The FCC is currently considering many issues relating to the continued enforceability of exclusionary contracts. The Commission should refrain from making any decisions on these issues until the FCC completes its review.

D. The Demarcation Point Should Be Set At The Minimum Point of Entry

Any demarcation point established by the Commission should be at the minimum point of entry (MPOE), as defined by the FCC. This eliminates the confusion between federal and state standards.

E. 1. Community Associations Have Obligations To Maintain Common Property

Community associations exist to maintain and preserve the value of both individual and association common property. If common property is damaged, associations are liable for the damage and repair cost. To protect common property, community associations must be able to control access to that property.

In many community associations, the association owns the common property. One of the inherent rights of property ownership is the right to exclude unwanted persons from that

property. Forced entry would erode that fundamental property right, for the benefit of the business objectives of telecommunications service providers.

E. 2. Community Association Homeowners Govern The Use Of Common Property

Since community association homeowners vote for and serve on governing boards of directors, they control the operations of the association. When the board of directors selects telecommunications service providers to serve the association, it does so on behalf of all association homeowners. Therefore, all homeowners have a voice, either direct or indirect, in the selection of telecommunications service providers. Forced entry proposals do not increase the availability of desired telecommunications service to community association homeowners, since they already select the desired providers.

The current housing marketplace is very competitive. One of the reasons homeowners purchase in a community association is the quality of the amenities offered by the association. In order to remain competitive and attentive to their residents, community associations want to ensure that numerous telecommunications services are available to homeowners. As the demand for innovative services grows, community association boards of directors will respond to those demands and permit additional telecommunications service providers to enter onto association property. The development of new technology and services will ensure that community associations offer competitive telecommunications service options to their homeowners, without eroding control over common property.

E. 3. Telecommunications Service Providers Have No Access Right to Common Property

Notwithstanding the assertions of various telecommunications service providers, they do not have the right to enter onto common property and use it to increase their profitability. Telecommunications service providers neither own nor maintain common property. They are for-profit businesses. Therefore, they cannot assert any rights to common property, nor should they be able to do so.

•

Once telecommunications service providers have been invited onto common property, they have obligations to community associations to minimize any disruption to common property and association residents. If damage is done on common property, service providers are liable for any repair costs. While telecommunications service providers often retain ownership and control of telecommunications equipment, and obtain easements to perform necessary maintenance, these rights do not provide them with unfettered access to and control of common property. The conduct and operations of telecommunications service providers on common property are and should continue to be governed by freely negotiated contracts between community associations and telecommunications service providers.

F. Any Compensation Should Be Freely Negotiated

As currently occurs, 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.

In addition, telecommunications service providers should be required to indemnify associations for any property damage or personal injury that may be caused by the installation or maintenance of telecommunications equipment on common property. Community associations should not be required to bear the expense of repairing damage caused by equipment installed without their consent.

Conclusion

Due to constitutional, practical, and economic impediments, the Commission should refrain from supporting any forced entry initiatives. Forced entry would constitute a taking of community association common property, forbidden by the United States and Florida Constitutions. Forced entry would eviscerate control over and increase the exposure of association common property to damage and disruption due to the entry of uninvited service providers onto association property. Forced entry would also impede the development of the telecommunications marketplace, since service providers would not be required to develop new technology or pricing in order to gain access to community associations. The Commission should explore other options for promoting

the development of the telecommunications services marketplace, for forced entry will only hinder that development.

CAI appreciates the opportunity to present its testimony before the Commission.

Respectfully submitted,

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

Greater Orlando Association of REALTORS®

Memo

To: The Florida Public Service Commission

From: The Central Florida Commercial Real Estate Society and the Greater Orlando Association of REALTORS®

CC: Gene Adams, Vice President of Governmental Affairs, Florida Association of REALTORS

Date: July 28, 1998

Re: REPLY TO REQUEST FOR COMMENTS BY THE FLORIDA PUBLIC SERVICE COMMISSION

ACCESS BY TELECOMMUNICATIONS COMPANIES TO MULTI-TENANT ENVIRONMENTS

I. *In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)*

To answer this question, we need to define "access".

a. If "access" means telecommunications companies should have the right to solicit customers in a multi-tenant building then the response would be yes.

b. If "access" means physical entry into the building, it should only be as a result of a contractual relationship between the property owner and the telecommunications provider. This is especially important if the property owner is required to provide space and/or unlimited entry.

c. It is also important for the Commission to determine what they mean by "non-discriminatory" access to the property.

II. *What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?*

A. *How should "multi-tenant environment" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?*

Any facility contained in a single building or internal complex of buildings under a single ownership. Residential facilities should be classified separately. There are special considerations that are unique to apartments, condo's and coop's.

B. *What telecommunications services should be included in "director access", i.e., basic local service (Section 364.02(2), F.S.), Internet access, video, date, satellite, other?*

All forms of telecommunications services should be considered. Since telecommunications technology is ever-changing, the public would be better served if all possible services are considered in this process.

C. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

1. Physical entry and space use should be controlled by landlord/owner through contract negotiations. Again, the type of access necessary and the definition of "non-discriminatory" access needs to be clearly defined.

2. Exclusionary contracts may be appropriate in existing facilities due to space limitations, cost of retrofit, efficiently, and for facilities where security/national defense, medical, law enforcement, and property data would be compromised.

D. *How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C) or federal Minimum Point of Entry (MPOE)?*

N/A

E. *With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:*

1. *Landlords, owners, building manager, condominium associations.*

These individuals should have unabridged rights to control use of their property.

2. *Tenants, customers, end users.*

They have rights subject to their contracts with the property owner/landlord. (the tenant can make the telecommunications provider a subject of their contract with the owner if necessary)

3. *Telecommunications companies*

Their rights should not override property rights of landlord/property owner and should be subjected to contract negotiations.

F. *Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?*

Compensations should be required for:

a. Space occupied

b. Renovations and repairs

c. After-hour entry

d. After-hour costs for building security, maintenance, etc.

Actual compensation should be determined by contract. However, *conditions should not be discriminatory.*

G. *What is necessary to preserve the integrity of E911?*

This should be the primary concern of the Commission. Emergency 911 should identify its needs, based on industry technology, before the Commission moves forward.

GTE Florida, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Access by Telecommunications Companies) Special Project No. 980000B-SP
To Customers in Multi-Tenant Environments) Filed: July 29, 1998
_____)

COMMENTS OF GTE FLORIDA INCORPORATED

These are GTE Florida Incorporated's comments on the issues identified in this proceeding.

Issue I: In general, should telecommunications companies have direct access to tenants in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations).

GTE'S RESPONSE: Yes. Certified telecommunications companies should have direct access to tenants in a multi-tenant environment. The multi-tenant location owner manages access to an essential element in the delivery of telecommunications to the tenants, and telecommunications is essential to the public welfare. The owner should therefore be required to permit certified telecommunications companies access to space sufficient to provide telecommunications services to tenants.

Issue II: What must be considered in determining whether telecommunications companies should have direct access to tenants in multi-tenant environments?

A. How should "multi-tenant" be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

GTE'S RESPONSE: A multi-tenant location should be defined 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. Multi-tenant environments include both new and existing

facilities such as multi-family residential apartment buildings, multi-tenant commercial office buildings, existing shared tenant service locations, condominiums, town houses or duplexes, campus situations or business parks, shopping centers, and any other facility arrangement not classified as a single unit. GTE believes, however, that call aggregators should not be considered to present a multi-tenant situation for purposes of this inquiry. Call aggregators are different from the other situations listed above in that they serve transient populations and there is no end user tenant to which the telecommunications company may connect.

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

GTE'S RESPONSE: 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. While technology and regulatory changes are rapidly creating new opportunities for all customers to benefit from a vast array of services over existing and new telecommunications infrastructure(s), there is considerable uncertainty about the precise form the emerging telecommunications infrastructure(s) may take.

With regard to the issue at hand, it is not certain whether multi-tenant telecommunications markets will be served by copper wire, coaxial cable, high-capacity optics, wireless, satellite, or hybrid combinations of these and other technologies. Similarly, it is unknown what mix of services customers in various multi-tenant facilities

want or would be willing to pay for. Tenants' rights of direct access should therefore be defined in accord with the existing, statutory basic service definition, rather than including items like Internet access, video, and data. The Commission (or the Legislature) always has the option of expanding the scope of direct access as technologies and demand become better defined.

C. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

GTE'S RESPONSE: Any restrictions on direct access should be strictly constrained to reasonable security, safety, appearance, and physical space limitations. If space constraints do exist, an owner should be permitted to limit the number of telecommunications companies that have direct access. In cases where space is limited and several telecommunications companies seek access, each company that requests direct access should be required to prove that a bona fide customer service request exists to justify requested space. This requirement is necessary to prevent firms from obtaining space in order to erect artificial barriers to entry.

For a number of reasons, GTE does not believe that exclusionary contracts are ever appropriate. First, each tenant should have the right to choose a telecommunications company (or companies). Second, if the Commission adopts the FCC's minimum point of entry (MPOE) regime, the location's demarcation point will be readily accessible to new entrants, which will effectively facilitate intra-location competition. Third, the FCC has ruled under the MPOE policy that the incumbent local

exchange carrier owns existing inside wiring, but does not control the use of the wire. Therefore, a new entrant has the option of using existing intra-location cabling, if suitable, or installing new cabling. This option facilitates the new entrant's ability to enter the market and argues against employment of exclusionary contracts.

If the Commission or Legislature, however, permits exclusive contracts, it must recognize the effect of this policy on existing carrier of last resort obligations. If multi-tenant location owners are permitted to negotiate exclusive agreements, then for all practical purposes, the Commission (or Legislature) will have concluded that the carrier of last resort concept does not apply for multi-tenant locations.

D. How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal MPOE?

GTE'S RESPONSE: The Commission should adopt the FCC's MPOE demarcation point definition as clarified and amended in CC Docket No. 88-57, *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network.*

In this docket's *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking,*[1] the FCC found that " the demarcation point for multiunit installations must not be further inside the customer's premises than [twelve

[1] Review of Section 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking (FCC 97-209), 12 FCC Rcd 11897 (released June 17, 1997)(1997).

inches] from where wiring enters the customer's premises"[2] ,"or as close thereto as practicable."[3] This MPOE policy arose from the FCC's concern that carriers could establish a practice of locating the demarcation point well inside the customer's premises. This would result in leaving a potentially substantial run of cabling inside the premises on the carrier's side of the demarcation point. The FCC found that this practice would prevent customer access to wiring within their premises, and would interfere with customers' ability to connect simple inside wiring to the network because customers are not permitted to access wiring on the carrier's side of the demarcation point. The practice would also grant a single telephone company an exclusive franchise for a portion of intra-location cabling, thereby leading to contention among competing telecommunications companies over terms, conditions, and prices.

Finally, if the Commission moves from its maximum point of entry policy to an MPOE regime, the ILEC must be ensured full recovery of its investment in the affected facilities.

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities, or obligations of:

(1) landlords, owners, building managers, condominium associations

GTE'S RESPONSE: Assuming the Commission adopts the FCC's MPOE policy, in new multi-tenant locations, the location owner (or possibly the tenant) is responsible for the placement of inside wire cabling from the demarcation point to the tenants' locations. Construction,

[2] Id. at 11909.
[3] Id. at 11909-11910.

operation, maintenance of wiring and equipment, and service quality on the owner's side of the demarcation point are the responsibility of the building owner or customer.

In existing multi-tenant locations, the point of demarcation would be relocated to the minimum point of entry (if adopted by the FPSC) when one of the following conditions is fulfilled:

> The building owner or customer asks GTE to move or change the physical location of the network termination.
>
> The building owner or customer requires new and/or additional network outside plant facilities. The point of demarcation for the new and/or additional facilities will be established at the minimum point of entry upon completion of the outside plant work order.
>
> A new entrant telecommunications company requests use of the incumbent telecommunications company's intra-location cabling.

(2) tenants, customers, end-users

GTE'S RESPONSE: The rights, privileges, responsibilities and obligations of tenants, customers, and end-users are based upon the contractual agreements between these parties and their respective landlords, owners, building managers, and condominium associations.

(3) telecommunications companies

GTE'S RESPONSE: In the MPOE regime for multi-tenant locations, the telecommunications company places the minimum amount of network facilities into the location, possibly through an easement, and usually to an equipment space or closet in the basement or first floor of a building or another defined property point that is generally close

to the public right of way. The telecommunications company is responsible for the maintenance, repair, and service quality of facilities up to the defined point of demarcation. The multi-tenant location owner (or possibly tenant) is responsible for the installation, maintenance, repair, and service quality of the inside wiring from that demarcation point to the tenants' locations.

Building accommodations and other facilities that are required by telecommunications companies in a multi-tenant location may include conduit from the public right of way to a point of demarcation between network facilities and inside wire within the building or property, wall space, floor space, equipment closets, commercial power outlets (if required), access to ground electrode, and specialized environmental conditioning, (e.g., extra air conditioning capacity, fire suppression equipment, lightning protection, secure and lockable space). Telecommunications company personnel should, through prior agreement or contractual arrangement, have 24-hour access to the space for repair and maintenance purposes. The quantity of space needed will vary widely based upon the type of facility placed (e.g., copper or derived channels), the number of customers or tenants served, and the types of services that are to be provided.

F. Based on your answer to Issue II. E. above, 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?

GTE'S RESPONSE: No. A multi-tenant location owner should not be allowed to charge for access to an essential element in the delivery of telecommunications to the tenants.

Telecommunications firms should not be required to pay multi-tenant location owners for the ability to terminate network facilities that are needed to provide services to tenants of that multi-tenant location and that are essential to the public welfare and a necessary part of the building or property infrastructure. Multi-tenant location owners do not charge other firms providing essential services (e.g., electric, gas, water, and sewage) for the right to provide such services. The space used by telecommunications, electric, water and other essential services firms is common area that benefit all tenants. This type of common area is analogous to the space required to provide elevator service, stairways and shared rest rooms in multi-story buildings. Costs for all types of these and other common areas should be recovered from tenants through normal rental payments.

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

GTE'S RESPONSE: GTE offers the optional PBX product PS 911 which provides individual station location and automatic number identification (ANI) within multi-tenant locations. Other telecommunications service companies in Florida offer this E911 PBX product with similar features. The ubiquitous deployment of products with these features would preserve the integrity of E911 in multi-tenant locations.

Respectfully submitted on July 29, 1998.

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Teligent, Inc.

BEFORE THE

Florida Public Service Commission

Tallahassee, Florida

In the Matter of	)	
	)	
Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)	Special Project No. 980000B-SP

COMMENTS OF TELIGENT, INC.

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July 29, 1998

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BEFORE THE

Florida Public Service Commission

Tallahassee, Florida

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COMMENTS OF TELIGENT, INC.

Teligent, Inc. ("Teligent")[1] hereby submits its Comments in the above-captioned proceeding.[2]

I. INTRODUCTION

The Florida Public Service Commission ("Commission") will be one of the first State public service commissions to consider the issue of telecommunications carrier access to tenants in multi-tenant environments ("MTEs"). Its analysis and recommendations concerning the issues below will be pivotal not only for the Florida Legislature, but also for other States, and perhaps the Federal Communications Commission. As an initial matter, Teligent firmly believes that the Commission has authority to fashion rules that provide for tenant access in the absence of

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1 Teligent is a fixed wireless competitive local exchange carrier holding a Certificate of Authority to provide alternative local exchange services in the State of Florida.

2 Access by Telecommunications Companies to Customers in Multi-Tenant Environments, Special Project No. 980000B-SP, *Issues to be Considered* (issued July 14, 1998)("Issues List").

legislation specific to the issue.[3] Further, in addition to rules drafted by the Commission alone, Teligent urges the Commission to recommend to the Florida Legislature that tenants in MTEs be guaranteed access to their telecommunications carrier of choice on reasonable and nondiscriminatory terms.

II. DIRECT ACCESS TO TENANTS IN MULTI-TENANT ENVIRONMENTS IS IMPORTANT TO A COMPETITIVE TELECOMMUNICATIONS MARKET IN FLORIDA.

In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

Yes, telecommunications companies should have direct access to customers in MTEs. Telecommunications competition brings choices in carriers, lower prices, and innovative services to consumers.[4] Yet, one sector of the population is sometimes denied these benefits: those individuals and companies located in MTEs. Florida's pro-competitive telecommunications statutes and the federal 1996 Telecommunications Act are largely invisible to some of these tenants.

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[3] See F.S. § 364.01(4)(a)("The commission shall exercise its exclusive jurisdiction in order to protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.")(emphasis added).

[4] See Fl. St. § 364.01(3)("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, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.").

Traditionally, control over the "last mile" was held by the incumbent local exchange carrier ("ILEC"). The Commission implemented rules designed to provide competitive carriers with access to this last mile so that consumers could benefit from telecommunications competition.[5] In one model -- that of single tenant buildings or homes -- the tenant or owner of the building or home is also the recipient of telecommunications service. Under this scenario, the decision of whether to offer a competitive carrier access to the facility is a function of whether the individual or corporate tenant/owner wishes to avail itself of competitive alternatives.

However, when a third party blocks the telecommunications consumer's access to its desired carrier, it thwarts Florida's efforts to promote competition. When that third party is the ILEC, the Commission's unbundling and interconnection rules may offer a remedy. However, when that third party is the owner or manager of an MTE, the remedy is less apparent and the traditional problem of lack of access to competitive carriers persists.

The alternative local exchange carrier ("ALEC") and the telecommunications consumer may be unable to reach each other because the MTE owner retains monopolistic control over the sole means of access to the consumer -- the "last hundred yards" of the network. Absent remedial access measures that apply to MTEs,

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[5] See Fl. St. § 364.16 (providing for interconnection); Fl. St. § 364.161 (providing for unbundling and resale).

control of even this small portion of the telecommunications network has the potential to eviscerate the pro-competitive goals of the Florida Legislature and the Commission.

There is no question that, ultimately, the most effective competitive entry strategy will wrest control from the local monopoly and offer a true alternative to the existing local network. Facilities-based competition achieves this result. Entry strategies reliant upon resale or unbundled network elements ("UNEs") offer improvements for consumers over the local monopoly environment. They may even represent important steps for competitors toward making facilities-based competition possible. However, these strategies, to varying degrees, rely on the ILEC network, its costs, and its level of efficiency or inefficiency.

By contrast, an alternative facilities-based network places far less reliance on the ILEC's network. Its independence permits it to compete from the fundamental level of network costs and efficiencies to offer enhanced quality, innovative services and features, and lower prices to customers.[6] Notwithstanding

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[6] The Commission promoted the goal of decreasing ALEC reliance on the ILEC network by minimizing that portion of the ILEC's network that an ALEC would have to purchase. By ordering GTE Florida to unbundle loop distribution, loop concentrator/multiplexer, and loop feeder, it allowed ALECs to deploy some portions of loop facilities themselves -- with their own facilities -- rather than relying on the ILEC's entire loop. See Petitions by AT&T Communications of the Southern States et al., Docket Nos. 960847-TP and 960980-TP, *Final Order on Arbitration*, Order No. PSC-97-0064-FOF-TP (FPSC May 21, 1997); see also AT&T Communications of the Southern States, Docket Nos. 960833-TP, 960846-TP and 960916-TP, *Final Order on Arbitration*, Order No. PSC-96-1579-FOF-TP (FPSC Dec. 31, 1996)(requiring

the benefits of resale and UNE strategies, telecommunications competition policy requires that facilities-based competition be achieved as quickly as possible in order to bring the greatest benefit to consumers. Without true facilities-based entry, competitors and regulators will continue to battle the anticompetitive incentives of an entity with monopoly control over the foundations of the telephone network.

The true facilities-based competitor needs nondiscriminatory and reasonable access to tenants in MTEs to provide these tenants competitive options and to offer them the best rates. By contrast, a non-facilities-based competitor usually does not require independent access to its customer in an MTE because it uses the ILEC's facilities. Because tenant access is not an issue for these carriers, the issue may not have been raised as often or as loudly as the need for interconnection, unbundling, or wholesale discounts. But as facilities-based competition grows, the issue of tenant access will affect all new, facilities-based competitors -- and increasingly ILECs -- whether they deliver service with copper, fiber, or microwaves.

The Florida Legislature and the Commission have accomplished much in their efforts to bring competition to local telephone markets by affording carriers the right to interconnect, lease UNEs, and purchase services for resale at wholesale discounts.

BellSouth to unbundle loop distribution at the feeder distribution interface).

Nevertheless, competitors face daunting installation and access costs that incumbents do not face. This disparity, compounded by the difficulty for competitors to obtain the requisite access to some MTEs, needlessly impairs facilities-based competition to the detriment of Florida's consumers, and threatens to diminish considerably the effectiveness of the Commission's other local competition efforts.

III. THE INTERESTS OF TENANTS MUST REMAIN THE PARAMOUNT CONSIDERATION IN THE ANALYSIS OF TENANT ACCESS TO TELECOMMUNICATIONS CARRIERS.

The Commission Staff is to be commended for raising many important, specific, and diverse points for consideration in the Issues List. Teligent submits that the overriding principle that must govern consideration of specific sub-issues must be the interests of tenants in MTEs. Of course, telecommunications carriers and owners/managers of MTEs also possess interests properly considered in this proceeding. Yet, the Commission's public interest mandate[7] requires it to place great emphasis on the interests of telecommunications consumers -- in this context, the tenants in MTEs. Indeed, Teligent was pleased to observe at the Commission's first workshop that, notwithstanding the varied positions of the parties, agreement on this particular principle was nearly unanimous.

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[7] F.S. § 364.01(4)(a).

A. The Definition of Multi-Tenant Environment Should Consider the Interests of Affected Tenants and Should Include Both Commercial and Residential Environments.

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

In defining "multi-tenant environment," the interests of the affected tenants in each environment should be the principal focus.[8] Relevant features governing the evaluation include: (1) the duration of a typical tenancy; (2) the importance of telecommunications to tenants in that particular environment; and, (3) the expectations of the tenant. For example, a small business in a long-term office building lease has a much greater interest in the quality, availability, and pricing of telecommunications services than a weekend guest in a Miami hotel.[9]

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[8] Teligent believes that the inquiry properly considers the premises rather than the type of provider offering telecommunications services on the premises. Therefore, it does not address shared tenant services.

[9] The duration of the former tenancy is long (likely without effective renegotiation opportunities), telecommunications is likely to be important to the small business, and its expectations are probably that it should have the ability to maximize its interests with respect to telecommunications. By contrast, the weekend hotel guest's tenancy is of short duration, telecommunications is probably somewhat incidental to the tenancy, and the expectations of the tenant probably lie more with comfort and convenience than with the cost and innovative features of available telecommunications services. These are generalizations and, of course, the degree of interests will vary. However, they do provide some measure of principled direction.

Teligent's initial marketing efforts will focus on small- and medium-sized businesses. Therefore, access to tenants in commercial environments such as office buildings -- new and existing -- is most relevant to Teligent's initial business plans and therefore its primary immediate interest. These facilities should be included within the definition of "multi-tenant environment." A principled approach consistent with the focus on tenant interests suggests that tenants in multi-tenant residential environments such as apartment buildings/complexes and condominiums -- new and existing -- should also enjoy the benefits of telecommunications competition. For this reason, Teligent supports inclusion of such facilities within the definition of "multi-tenant environment."

B. Tenants Should Enjoy Direct Access To All Telecommunications Services.

What telecommunications services should be included in "direct access," i.e., basic local service (Section 364.02(2), F.S.), internet access, video, data, satellite, other?

All telecommunications services should be included in "direct access." The variety of technologies used to offer telecommunications services such as copper, fiber, microwave, and satellite are not limited to providing a particular type of service. Put simply, telecommunications services are largely independent of the technology used to provide them. For example, Teligent plans to provide basic local service, long distance service, high-speed data, Internet services, and video conferencing capabilities using its point-to-multipoint microwave facilities. The convergence phenomenon would render

identification of provisioned services an unnecessarily difficult process. Teligent encourages the Commission to avoid recommending this complicated endeavor.[10] Instead, tenants themselves should be permitted to choose which services they will use. Moreover, consistent with the basic principle of nondiscrimination, owners and managers of MTEs should accommodate the technology that a tenant determines is best suited to deliver the desired services. For example, Teligent's microwave facilities can provide fiber optic speeds to buildings where actual fiber installations would be uneconomical -- all without digging up any streets.

C. Given That Facility Overcrowding Is A Theoretical Problem Not Likely To Be Realized, The Commission Should Prohibit Direct Access Restrictions That Limit A Tenant's Choice Of Telecommunications Carriers.

In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

At the Commission's first workshop, some participants raised concerns about space limitations and overcrowding of telecommunications facilities in MTEs. The space quandary is largely theoretical. The costs attending the installation of telecommunications facilities within an MTE dictate that the

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[10] Moreover, a determination of services for inclusion in "direct access" is needless. The service inclusion inquiry in the context of universal service is necessitated by the limits of public funding. By contrast, no public funding mechanisms are involved in the context of access to MTEs. Consequently, the process of limiting services to be included in "direct access" is not necessary.

endeavor will not be undertaken if consumer demand within the MTE is insufficient to recoup those costs. Logically, the number of carriers seeking to install facilities within a building will be limited by the number of services to which potential tenant customers will subscribe.[11] Nevertheless, in the unlikely event that space limitations become a problem, they should be addressed on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building, and requirements that carriers share certain facilities.

In no circumstance should the Commission tolerate exclusive telecommunications carrier access to an MTE. MTE owners and managers should not be placed in the position of dictating to customers which service providers they can or cannot use. An MTE owner's control of that decision would undermine the forces of competition within an MTE in stark opposition to the policy goals of this Commission, the Florida Legislature, and the federal 1996 Telecommunications Act.

The Commission addressed a similar scenario in the context of shared tenant services.[12] All STS providers must allow LECs direct access to tenants who want local service from the LEC. In

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[11] Moreover, the telecommunications facilities that will be installed within and on top of MTEs typically will not occupy much space.

[12] See Proposed Amendment of Rule 25-24.575, F.A.C., Shared Tenant Service Operations, and Proposed Adoption of Rule 25-24.840, F.A.C., Service Standards, Docket No. 961425-TP; *Order No. PSC-97-0437-FOF-TP*, 97 FPSC 325 (Fla. PSC Apr. 17, 1997).

the event that the STS provider and the building owner are not the same entity, the Commission's Order requires that the STS provider guarantee and obtain the permission of the building owner for the requisite LEC access. In this fashion, tenant choice is preserved. The operative principle invalidates exclusivity arrangements as well.[13]

D. The Commission Should Define The Demarcation Point As The Minimum Point Of Entry In All Business And Residential Multi-Tenant Environments.

How should "demarcation point" be defined, i.e., current PSC definition (Rule 25-4.0345, F.A.C.) or federal Minimum Point of Entry (MPOE)?

The Commission should designate the minimum point of entry (MPOE) in all business and residential MTEs as the demarcation point separating MTE owner-controlled inside wire from the ILEC network. In the alternative, the Commission should expressly require ILEC unbundling of MTE riser and house wiring[14] from the MPOE to the existing demarcation point, determine cost-based rates for such risers, and, critically, permit competing carriers to access such unbundled risers without the discriminatory delays

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[13] If all tenants in an MTE happen to choose the same telecommunications carrier, that telecommunications carrier enjoys practical exclusivity. Of course, so long as all tenants retain the ability to choose an alternative provider, practical exclusivity -- as distinct from exclusivity as a matter of law or contract with the MTE owner -- does not threaten availability of competitive benefits for MTE tenants and is therefore consistent with Commission policy.

[14] Herein the term "risers" shall refer to both vertical and horizontal telephone wires that connect, for example, wiring blocks in the basement of an MTE at the MPOE with individual tenant premises.

and costs imposed by dispatching and coordinating with ILEC personnel.

The risers connecting individual tenants to ILEC facilities at the MPOE represent the "last hundred feet" to a customer in an MTE. Although this last hundred feet is only a portion of the loop's "last mile," it represents a disproportionately large competitive barrier to serving such customers. The cost and complexity of rewiring existing buildings -- some stretching many stories high, such as the NationsBank Tower in Miami -- can add thousands of dollars to the cost of serving just one customer in a building. Unlike an ILEC that performs such installations during building construction for every floor and traditionally has been given free access to such wiring thereafter, competitors must often deal with myriad hurdles, both in time and money, in drilling through floors and cabling elevator shafts during and after business hours. Just like that portion of a loop connecting an ILEC switch to a building, existing risers give incumbents a decided advantage in cost and time-to-service.

Ironically, as a result of the existing demarcation rules in Florida, carriers relying on resale or unbundled loops -- who, through such reliance, are limited in the innovative services they can offer customers -- are able to avoid the costs of rewiring buildings, while facilities-based carriers like Teligent -- who are able to offer customers new and innovative services and thus the greatest benefits of competition -- must incur these costs. Compare, for example, the $17 loop rate per month available from BellSouth to the thousands of dollars of

construction required just for the in-building portion of a duplicate loop facility. The existing Commission rules strongly discourage facilities-based competition, which offers the greatest benefit to consumers, in favor of the more limited benefits of resale and unbundled loop-based competition.

In ordering the unbundling of subloop elements, the Commission has taken the first step in eliminating the disincentives to those facilities-based competitors that are able to build out past the ILEC central office to the feeder-distribution interface. Given the presence of competitors who are now able to bring facilities all the way to a customer's building, and the concomitant benefits that go along with that ability, the next logical step is to eliminate disincentives for these fully facilities-based competitors.

Clearly the most effective way to eliminate these disincentives is to designate the MPOE as the inside wire demarcation point for all MTEs. Assuming MTE owners and managers are precluded from discriminating against competitors (the subject of the rest of these comments), if the demarcation point is moved to the MPOE, all competitors will have equal access to building risers. The severe disparity in costs and access between incumbents and new entrants would be greatly reduced. This designation would also forward the goals underlying the Federal Communications Commission's efforts to deregulate inside wiring and create competitive pressures similar to those now operating on customer premises equipment.

The technical and practical feasibility of such a designation is not in question. States such as Illinois and California have long designated the MPOE as the inside wire demarcation point, and, with building owner permission, competitors access risers to offer customers a variety of competing services. Rather than either rewiring a building or having to depend on the competing incumbent for access to existing risers, in these states competitors are placed on equal footing so long as building owners do not discriminate among them.

The alternative solution -- providing unbundled access to incumbent-controlled risers -- eliminates discrimination only if the costs of such access (in time and money) approximate those of the incumbents.[15] Unfortunately, even assuming reasonably cost-based charges for use of the risers themselves, the delays and costs of coordinating with the ILEC, particularly with regard to dispatching ILEC personnel, competitively disadvantages new entrants to such an extent that rewiring, with all its problems, is often more attractive. Thus, if the Commission were to pursue unbundled access to risers instead of moving the demarcation point, the Commission would have to provide for competitor access

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[15] As an example, the New York Public Service Commission has ordered such access. It decided against moving the demarcation point to the MPOE because New York Telephone could not determine, on a building-by-building basis, whether the existing demarcation point was in fact at the MPOE or at the customer premises. See AT&T Communications of New York, et al. v. New York Telephone Co., Case 95-C-0657; 94-C-0095; 91-C-1174, *Opinion and Order in Phase II*, 1997 N.Y. PUC LEXIS 709 (NYPSC Dec. 22, 1997).

to the wiring blocks at the MPOE of an MTE without the necessity of ILEC personnel being present.[16] Such unescorted access already occurs in states where the demarcation point is at the MPOE, and any concerns over competitor access to ILEC network components could be addressed contractually through the imposition of industry-accepted technical standards or certification. The only difference between the two scenarios is that the ILEC would receive payment for use of the risers and would hold competing carriers liable should any problems arise with ILEC facilities or customers as a result of the access.

Building risers are every bit as much a bottleneck facility as loops or local transport facilities. Given that other States have already acted to provide access to risers in a nondiscriminatory manner, the Commission should take immediate action under its existing jurisdiction, as well as make a recommendation to the legislature to remedy the situation.

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[16] Of course, ILEC personnel would have to be involved if there are no cross-connect facilities at the MPOE.

E. The Interests Of Tenants And The Principle Of Nondiscrimination Must Control The Rights And Responsibilities Of The Parties.

With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations
2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., 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.

In furtherance of a competitive market -- and in the related interests of maximizing tenant choice -- direct access rules must adhere to the principle of nondiscrimination. Telecommunications carriers should compete on the basis of service quality and rates and should not succeed or fail in the market because of discrimination. The terms, conditions, and compensation for the installation of telecommunications facilities in MTEs must not disadvantage a new entrant qua new entrant. Discriminatory rules or recommendations that would disadvantage a particular carrier or type of carrier will, by necessity, reduce the choices available to MTE tenants. Therefore, for purposes of telecommunications competition and maximum tenant choice, the Commission should design rules or recommendations that adhere to and promote the principle of nondiscrimination.

As a function of nondiscrimination, any tenant access rules, recommendations, or conditions should be technologically neutral. As noted above, services are and will continue to be offered

using a variety of technologies. The spectrum of transmission technologies should be accommodated and encouraged in providing for access to MTEs.

As a fixed wireless ALEC, Teligent's method of delivering service to consumers using spectrum and modern technologies avoids many inefficiencies and unnecessary costs of traditional wireline distribution without sacrificing the benefits. Teligent does not need to dig up streets to run wires and conduits. Rather, Teligent uses fixed, digital microwave radio applications to transport communications, and intends to deploy a point-to-multipoint architecture. Conceptually, the airwaves replace the LEC's wires as the transmission medium. Small rooftop antennas receive and transmit radio signals from location to location.[17] The signals reach customers in the building through telephone inside wire or special connections to the customer's office. The antennas will permit variances in network transmission capacity so that the bandwidth used by customers will increase or decrease in accordance with the needs of a particular application. This technology avoids waste and maximizes efficient spectrum utilization.

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[17] Teligent's rooftop facilities are specific to serving the tenants within that building. Teligent's small antenna (approximately 12 inches in diameter) is mounted on the side of a building or on a small pole or tripod on the rooftop above the height of a person and at sufficient elevation to allow line-of-sight communications with other Teligent antennas. Because its antennas are building-specific, Teligent does not place towers or other facilities in the public rights-of-way, nor does it construct the large towers associated with mobile wireless services.

To provide facilities-based service to a tenant in an office building, Teligent must first obtain rooftop access for the placement of its small antenna. The antenna allows Teligent to receive and transmit radio signals which are converted to or from wireline frequencies for customer communication inside the building. Most of the Teligent antennas are very small -- smaller than a DBS home receiver. When viewed on a rooftop, they are dwarfed in size by satellite dishes and broadcast television antennas. Hence, rooftop access for Teligent's antenna is unobtrusive (particularly in relation to existing rooftop structures) and would not interfere with other uses of the rooftop.

Teligent generally cannot serve a tenant requesting service with its point-to-multipoint architecture unless Teligent can place its antenna on the rooftop of that tenant's building. The antenna must be located on the building being served because a coaxial cable runs from the Teligent antenna through a modulator and to the building's or customer's inside wire demarcation point where connection with the customer's telephone system is accomplished. Hence, rooftop access is critical.

As discussed in Section III.D., access to riser cables -- and conduit space generally -- is necessary to carry the signal, for example, over wires from the rooftop antenna through the building to a basement wiring closet, where risers connecting to individual tenant telephone lines are accessible. Thus, Teligent requires access to the telephone inside wire from the demarcation point to the tenant's premises. Any tenant access rules or

recommendations should ensure that the foregoing facilities are available and/or accommodated.

Owners, landlords, and managers of MTEs (as well as condominium associations) must abide by the fundamental obligation of not restricting or burdening a tenant's right to access that tenant's telecommunications provider of choice on reasonable terms. Teligent does not dispute the need to honor the property rights that owners of MTEs possess. However, the right of tenants to enjoy telephone service is sometimes subsumed by the heated -- and, in this case, needless -- debate over property rights. The Florida Legislature has made it clear that individual property rights and the right to enjoy telephone service are not mutually exclusive.[18] Indeed, the great importance that the Legislature places on telephone service for all Floridians is manifest in several separate statutory provisions.

- Upon ordering this inquiry, the Florida Legislature "determined that access to tenants by certificated telecommunications companies may be an important component in the promotion of competition in the delivery of telecommunications services in this state."[19]

- Telecommunications companies in Florida must serve all persons who request telecommunications service (and no

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[18] See, e.g., F.S. 704.01(2) (providing a statutory way of necessity for a tenant on "hemmed-in" lands over adjoining property for purposes of obtaining telephone service); see also Deseret Ranches of Florida v. Bowman, 349 So.2d 155 (1977)(affirming constitutionality of F.S. § 704.01). The interests in telephone service of a land-locked parcel are analogous to the interests in telephone service of a tenant in an MTE.

[19] Ch. 98-277, § 5, Florida General Statutes.

exception is made for tenants in MTEs).[20] An MTE owner's refusal to permit a carrier's access to a tenant is contrary to this policy of choice for all telecommunications consumers.

- Further, the Florida Legislature provided for the provision of telephone service by ALECs.[21] Surely, the Legislature did not intend its own laws and policy to be overridden by unilateral decisions of MTE owners to bar tenant access to competitive options.

- Finally, in recognition of the importance of telephone service, the Florida Legislature enacted laws to ensure the maintenance of universal service.[22] This policy underscores the essential importance assigned to the maintenance of telephone service for all Florida consumers.

Taken together, these laws exhibit a clear intention on the part of the Florida Legislature to ensure access to the telecommunications provider of choice for all Florida consumers -- and they make no exception for Florida consumers living or working in MTEs.[23] Owners and managers of MTEs have a

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20 F.S. § 364.03 ("Every telecommunications company shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications service as demanded upon terms to be approved by the commission.").

21 F.S. § 364.337.

22 F.S. § 364.025.

23 In analyzing issues related to easements within an MTE for purposes of telecommunications carrier access, it is important to distinguish cases relying upon cable operator access to buildings. See, e.g., Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); see also Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 911 F.2d 1169, 1174 (4th Cir. 1993). These cases involve the interpretation of a specific statutory provision applicable only to cable operators which requires that an

responsibility to see that these statutory goals are given effect.

In addition, owners and managers must accommodate a telecommunications carrier's need for 24-hour, seven day a week access to telecommunications facilities in the event of an emergency. Within the context of this requirement, the MTE owner or manager and the telecommunications carrier can fashion appropriate emergency access arrangements.

Telecommunications carriers retain their service quality responsibilities within MTEs, including lightning protection and the requirement to provide E911. Moreover, telecommunications carriers must maintain responsibility for the maintenance and repair of their facilities, as well as for the repair of any damage that may be done to an MTE in the course of facility installation. To that end, Teligent believes it is eminently fair to assign liability to telecommunications carriers for damages they cause through the installation or placement of their facilities within an MTE. Finally, in accomplishing their maintenance, repair, and service obligations, telecommunications carriers should take all reasonable steps to minimize disruption to the tenants and owners of MTEs.

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in-building easement be dedicated for general utility purposes. See 47 U.S.C. § 621(a)(2). These cases are inapposite to the issue at hand: by its terms, Section 621(a)(2) of the federal Communications Act is limited to cable operators and to their use of public rights-of-way and dedicated easements.

F. Compensation For Tenant Access Must Be Reasonable And Applied In A Nondiscriminatory Manner.

Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

Teligent supports equal and nondiscriminatory access to tenants in MTEs for all telecommunications carriers. Ideally, telecommunications carrier access to tenants in MTEs should be granted for free or subject to a nominal fee inasmuch as the ILEC is rarely charged. Of course, MTE owners are entitled to reasonable and nondiscriminatory compensation for making facilities available to telecommunications carriers. This means that all telecommunications carriers should be treated on a similar basis. If an MTE owner requires reasonable compensation from the incumbent LEC, that MTE owner is entitled to reasonable compensation from new competitors like Teligent. If the MTE owner continues to allow the incumbent LEC free access, ALECs like Teligent should also be afforded free access. Reasonable rates may vary depending upon the level of access required and the amount of space that will be occupied.

The Commission need not establish rates or rate formulae for access. However, the Commission can describe rate structures that are presumed reasonable or unreasonable by adopting a set of presumptions. In this manner, the Commission eliminates a market failure -- the inequality of bargaining positions derived from the MTE owner's/manager's monopoly status. This method allows parties to negotiate specific rates within the reasonable parameters defined by the Commission. Of course, parties should

be free to negotiate mutually acceptable terms that vary from the model.

Examples of reasonable parameters include the following:

- The Commission should consider per se unreasonable an MTE owner's requirement that a telecommunications carrier share a percentage of the gross revenue it derives from the MTE as a condition or price of access. This arrangement does not approximate cost-based pricing and suggests the extraction of monopoly rents.[24] The surplus benefits of telecommunications competition are more appropriately directed to consumers.

- The Commission should require that rates be assessed on a nondiscriminatory basis. For example, if the incumbent LEC does not pay for access to an MTE, neither should other telecommunications carriers.

- Under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.

- Access rates must be related to the cost of access and must not be inflated by the MTE owner so as to render competitive service within an MTE an uneconomic enterprise for more than one carrier.

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[24] The Texas Public Utility Commission's building access Enforcement Policy Paper notes that "[c]ompensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space." Informal Dispute Resolution: Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions, Project No. 18000, *Enforcement Policy Memorandum from Ann M. Coffin and Bill Magness, Office of Customer Protection, to Chairman Wood and Commissioners Walsh and Curran* at 6 (Oct. 29, 1997).

G. To Preserve and Ensure The Availability Of Access To Emergency Services, The Commission Should Restrict Tenant Access To Carriers With E911 Obligations.

What is necessary to preserve the integrity of E911?

Teligent shares Florida's commitment to the availability of effective E911 capabilities. Tenant access to E911 capabilities is of paramount importance. For this reason, tenant access should be restricted to those telecommunications carriers legally obligated to satisfy the Commission's E911 standards, i.e., carriers certificated by the Commission. Compliance will continue to be the responsibility of each carrier as a function of its state certification.

IV. THE LOCK-IN EFFECT HINDERS NATURAL MARKET ADJUSTMENT.

In many instances, the market resolves the access issue: the owner or manager of the MTE is responsive to tenant needs and recognizes that the value of the premises is enhanced by the presence of alternative telecommunications carriers. These owners or managers permit telecommunications carrier access to the MTE without imposing unreasonable fees. Indeed, this market-based approach is Teligent's preferred method of obtaining access to tenants within MTEs.

However, the market often cannot be relied upon to secure competitive telecommunications options for tenants in MTEs. For example, the manager of one Florida property has demanded from Teligent a rooftop access fee of $1,000 per month and a $100 per month fee for each hook up in the building. Teligent estimates that this fee structure would cost Teligent well over $100,000 per year -- just to service one building. Yet another management

company for a Florida building demands that Teligent pay the management company $700 per customer for access to the building, in addition to a sizable deposit, a separate monthly rooftop fee, and a substantial monthly riser fee that, when taken together, precludes Teligent from providing tenants in that building a choice of telecommunications carriers. Still, other buildings demand revenue sharing arrangements. A large number of building owners and managers in Florida do not want a second telecommunications carrier in the building; indeed, one building management company told Teligent not to solicit its tenants. In such instances, regulatory intervention is not only appropriate, but imperative.

The argument that all a tenant need do is move to another location misapprehends the economic realities of commercial tenancy. Natural market adjustment will be slowed substantially due to the lock-in effect of long-term leases. This phenomenon was noted by the Building Owners and Managers Association ("BOMA") in its effort to argue that building owners should not have to bear the maintenance costs of riser cable in multi-unit buildings. As a Federal Communications Commission Order notes, BOMA has asserted that "many tenants have long term leases that will prevent building owners from passing on [the] additional costs [of riser maintenance] to their tenants."[25]

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[25] Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-209 at ¶ 25 (rel. June 17, 1997)(emphasis added).

The lock-in effect, a concept well-grounded in legal and economic precedent, was addressed by the U.S. Supreme Court in its 1992 Kodak decision.[26] Kodak was charged with seeking to impose high service costs on purchasers of its copier equipment who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated that "even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive."[27] Although some sophisticated customers may be able and willing to assume the costs of the requisite information gathering and processing, the Court noted that

> [t]here are reasons . . . to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . . [I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.[28]

Even those customers with sufficient information may suffer uneconomic exploitation from the lock-in effects. As the Court observed,

> [i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some

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26 Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

27 Id. at 474.

28 Id. at 475.

level of service-price increases before changing equipment brands.[29]

The economic concept of "lock-in" effects is well established and also was part of the explanation for the Department of Justice's recent insistence on a phase-out period for the 1956 IBM consent decree; the Department sought, among other things, to ensure that any mainframe users who wanted to switch computer platforms due to termination of the decree could do so over time since their enormous software investment would leave them "locked-in" for years to IBM.

The situation described by the Supreme Court in Kodak is closely analogous to that of small to mid-size commercial tenants in long-term leases who wish to take local telephone service from a competitor. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option and had no way of knowing that these choices would become available. Therefore, such tenants could not and would not have negotiated for the competitive carrier access in their leases necessary to allow them competitive local exchange service.

Moreover, the cost of breaking a commercial lease and moving is prohibitively expensive (and, nonetheless, should not be a precondition to enjoying the benefits of local telephone competition). Although it is possible that a few sophisticated customers may have negotiated or renegotiated lease terms to provide for competitive carrier building access, many smaller

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[29] Id. at 476.

businesses and individuals almost certainly have not realized the benefits of the renegotiated leases of a few sophisticated customers, particularly due to the MTE owner's ability to discriminate among tenants with respect to lease terms and conditions. Therefore, many tenants find themselves locked-in to arrangements that preclude affordable access to competitive options in local exchange service. In light of this market failure, Commission intervention is warranted to ensure that tenants in MTEs are given the freedom to choose their telecommunications carrier.

V. CONCLUSION

In conclusion, Teligent urges the Commission to promote the availability of competitive benefits for tenants in MTEs by recommending action to the Legislature (or adopting rules unilaterally pursuant to rulemaking) consistent with the proposals made herein.

Respectfully submitted,

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Dated: July 29, 1998

CERTIFICATE OF SERVICE

I, Gunnar D. Halley, attorney for Teligent, Inc., certify that a copy of this document was served on all parties of record in this proceeding on July 29, 1998, by hand delivery, except where indicated, to the following individuals:

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July 29, 1998

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Special Project No. 980000B-SP

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunication's Inc.'s Positions, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me.

Sincerely,

Nancy B. White (wr)

Nancy B. White

Enclosures

cc: A. M. Lombardo
R. G. Beatty
William J. Ellenberg II

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Access by Telecommunications Companies to Customers in Multi-Tenant Environments	Special Project No.: 980000B-SP
	File Date: July 29, 1998

POSITIONS OF BELLSOUTH TELECOMMUNICATIONS, INC.

COMES NOW, BellSouth Telecommunications, Inc. ("BellSouth"), through counsel, in response to the Florida Public Service Commission's (the "Commission") Notice of Second Staff Workshop, dated July 14, 1998, and hereby provides its Positions as follows.

POSITIONS

I. In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

Yes. Telecommunications companies should have "direct access" to customers. BellSouth proposes that "direct access" be defined as the provision of a carrier's services to a demarcation point located within the end user's (customer's) premises.. Such direct access could be attained via:

a) premises wiring that is owned by the serving carrier, or

b) premises wiring that is owned by another party but used by the serving carrier in lieu of its own wiring in a manner in which the carrier retains full service responsibility to the end user even though the carrier has chosen to utilize another party's facilities.

Both scenarios result in "direct access".

Of particular note in support of the need for "direct access" is a position statement listed on the web page of the Building Owners & Managers Association (BOMA), International (see www.boma.org). In support of its position that that carriers should not be free to unilaterally declare an MPOE demarcation point policy, BOMA states that "Building owners incur substantial

difficulty and expense because they lack the knowledge and technical information necessary to properly handle inside wiring responsibilities." BellSouth understands BOMA's concerns and agrees that owners' core business is real estate, not telecommunications. BellSouth's limited experiences with MPOE demarcation in other states fully supports BOMA's contention that owners do not appear ready yet to "properly handle inside wiring responsibilities."

It is BellSouth's firm belief that end users want and deserve the ability to hold their chosen carrier fully responsible for total service delivery to their premises. Furthermore, it is BellSouth's understanding that the Florida Commission's current "premises demarc" rule (25-4.0345,F.A.C.), and service indices imposed by the Commission on BellSouth, assume that the carrier has full service responsibility to the end user. In this respect, BellSouth believes that this rule is in the best interests of the general subscriber body . However, these efforts by the Commission to ensure carrier-specific quality of service will continue to be effective only if the carrier has full control over the facilities used to deliver service. "Direct access" is best achieved when a carrier is able to utilize its own telecommunications facilities rather than another party's. In Section III, Other Issues, B. "Access To Wiring And Equipment", BellSouth explains in detail the circumstances under which it would consider using another party's facilities and, by doing so, maintain "direct access" and full responsibility for service delivery to the end user.

Conversely, BellSouth proposes that the term "indirect access" be used (at least for purposes of these workshops) to describe the delivery of a carrier's services to the Minimum Point Of Entry (MPOE) of a property. In an "indirect access" scenario, extension of service from the MPOE to the end user's premises is the responsibility of another party; i.e., the property owner, the owner's designated agent or another carrier. BellSouth's experience has been that "indirect access" results in disjointed service - and end user confusion, frustration and dissatisfaction. These undesirable results are due to the lack of end-to-end responsibility by any one party. "Indirect access" bifurcates end-to-end responsibility.

In summary,

a) BellSouth has proposed useful definitions for "direct" and "indirect" access.

b) End users want and deserve "direct access" by their chosen carrier.

c) BellSouth fully supports the Commission's existing rule that requires ILECs to locate the demarcation point on the end user's premises.

II. What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

Any carrier which is subject to the Commission's Rules should have "direct access" to customers; "direct access" being defined as proposed in paragraph I.

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

"Multi-tenant environment" should be defined as any environment wherein end users of telecommunications services lease, or otherwise reside on, property where access to the end users' premises is controlled by another party.

All of the examples that the Commission cited fit this description, and should include new and existing properties. Although not noted by the Commission, single family residential subdivisions, where ownership of the ingress/egress roads remains privately held rather than deeded to the local governmental authority also fits the definition proposed by BellSouth.

For purposes of establishing access regulations, it is essential that the adopted definition of "multi-tenant environment" be as simple and straightforward as possible and, if at all possible, absent of exceptions that tend to confuse and weaken any rules that may be ultimately promulgated. BellSouth believes its proposed definition is concise, comprehensive and applicable.

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

The definition of "direct access", as proposed in paragraph I above, defines the means and scope of responsibility by which a carrier delivers service to an end user. Therefore, BellSouth sees no reason why it would be necessary to include or exclude particular telecommunications services from the definition of "direct access".

Thus, relative to permissible services included within the scope of access rights:

a) All services should be included in discussions of "direct" access.

b) Carriers should be free to choose the desired technologies used to deliver

these services.
c) Carriers should be free to provide any services offered for lawful purposes.

C. In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Using BellSouth's proposed definition of "direct access", the Legislature and/or the Commission must address the concerns of property owners relative to the placement of multi-carrier telecommunications facilities on their properties. If the Commission adopts the stance that a property owner has the authority to prevent a carrier from placing its facilities on the owner's property, then this authority is, in effect, a restriction to "direct access".

Secondly, any rule which allows property owners to deny a carrier "indirect" access (i.e., no service - not even to a MPOE), would be a restriction to access.

Relative to the overall question of whether property owners have the authority to refuse to allow, one or more telecommunications companies to provide service to tenants (either by "direct" or "indirect" access), BellSouth's primary concern is not with the ultimate resolution of this question relative to non-Carrier of Last Resort ("COLR") carriers. BellSouth believes that in a fully deregulated environment, market forces will ultimately determine those carriers (and, in fact, those properties) which will be chosen by end users. As a COLR, however, the ability of a tenant/end user to obtain, and BellSouth's ability to provide, services is of great concern to our company and presumably is to legislators and regulators within the state of Florida.

BellSouth's position is that property owners should allow tenants to be served by a COLR, preferably via "direct access" (premises demarc). COLRs, including BellSouth do not have the freedom to pick and choose those subscribers or properties which they desires to serve, whereas other carriers have such an option. Thus, within its franchised service territory BellSouth is literally the "last resort" for subscribers who are bypassed by other carriers. For these and other reasons, detailed terms and conditions for service provisioning have been carefully crafted and documented in BellSouth's filed tariffs which have been approved by the Commission.

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 service indices imposed by the Commission, all subscribers should have the right to subscribe to those services which have been designated by Florida legislation as being in the best interests of the citizens of the state.

Relative to the question of whether exclusionary contracts should be permitted, BellSouth's position is that carriers should not be prevented from marketing their services to occupants of multi-tenant properties. BellSouth believes that, in the long run, the most desirable properties will be those which permit tenants to obtain service from any carrier offering service to the property., Owners of such properties may tout their non-exclusionary leases and, perhaps, go a step further and offer their own branded service in concert, or in competition, with one or more carriers. Preferred carriers who offer the best mix of price, features and service will succeed by adding value to a property.

D. How should "demarcation point" be defined, I.e., current PSC definition (Rule 25-4.0345, F.A.C.) or, federal Minimum Point Of Entry (MPOE)?

Although BellSouth fully supports the Commission's existing "premises demarc" rule , the Commission may wish to consider the more detailed versions shown below. NOTE: This definition would apply to services delivered by carriers who the Commission decides should be subject to the rule.

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 location in accordance with applicable statutes, rules tariffs and/or service agreements reached with telecommunications carriers. At multi-tenant 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.

E. With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) landlords, owners, building managers, condominium associations
2) tenants, customers, end users
3) telecommunications companies

In answering the questions in Issue II.E., 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.

(1) A landlord, owner, manager, condo association or any other party which controls access to the premises of a telecommunications end user in a multi-tenant environment should permit tenants to access services provided by their desired carrier and to clearly communicate to tenants any and all terms and conditions relative to tenant access to such telecommunications services.

(2) Tenants, customers and end users should have access to services offered by their desired carrier. BellSouth feels strongly that end users are best served when carriers are able to provision their services to the end user's premises, utilizing their own wiring and equipment. In any event, end users have the right to know precisely what the serving arrangements are for the property prior to signing a lease. At a minimum:

a) Is the tenant, customer or end user able to easily obtain service from their chosen carrier?

b) Where is the demarcation point for carriers' services?

c) How and who does the tenant contact to obtain telecommunications service?

d) If a MPOE demarcation point exists, who is responsible for service between the MPOE and tenant unit? Are there any tenant, customer, end user or carrier fees associated with this service? How does the tenant go about calling in a repair problem?
What charges, if any, apply if a repair trouble is found to be not caused by the investigating telecommunications provider?

e) Procedures for accessing E911 if differing in any way from the norm.

In addition, end users should have the right to maintain their chosen telecommunications provider for the term of their lease.

Although BellSouth fully supports the Commission's Rule 25-4.0345, if the Commission modifies this rule to permit MPOE demarcation points, at a minimum end users should have the right to access carrier services at the MPOE in a manner which is easily identifiable; i.e., the tenant's line is terminated on a separate, individual, female-ended Network Interface jack that is tagged and which can accommodate plug-in of a standard male-ended modular telephone plug.

Finally, end users should have the right to freely choose carrier services without direct or indirect economic penalty. End users should not have to bear the burden of access fees or other levies which are not based upon any value added services received.

(3) Telecommunications companies should not be prevented from offering services to subscribers on multi-tenant properties.

F. Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

Except to the extent that COLR tariffs and the Commission's Rules address the issue of granting of easements and support structures (See: III.A. below), no other legislative or regulatory dictates should be established relative to financial arrangements reached between owners, carriers and tenants. As stressed in previous comments, however, COLR services and COLR customers must continue to be protected by tariffs until such time as the legislature and the Commission determines that the COLR concept is no longer needed, and thus, COLRs are free to serve or refuse to serve any customers they so choose.

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.

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

1. All carriers must equip their telecommunications hardware and software for dial access to 911.

2. The availability of accurate end user location addresses is a concern if the Commission allows a carrier's demarcation point to be at the MPOE. In such situations, the carrier's physical serving terminal would be located at the MPOE and, thus, the tenant's address could feasibly be listed as the main address of the multi-tenant complex rather than the tenant's actual apartment or suite

address number. This could possibly result in emergency personnel not being able to identify the caller's exact location within the multi-tenant environment.

3. If an MPOE demarcation point is established, dial tone may only exist at the MPOE demarcation jack. If the wiring between the MPOE and the tenant's unit is not intact, the tenant will not receive dial tone in the living unit and, thus, will not have access to 911 service.

4. Access to 911 would be jeopardized if a party disconnected a carrier's wiring to, or at, the carrier's network interface jack. The Commission may wish to consider adopting a rule, consistent with Florida law, which specifies that a carrier's wiring and equipment must never be disturbed without approval of the carrier.

III. Other Issues not covered in I and II:

A. Access to Easements and Support Structures: In consideration of BellSouth's obligation to provide service to all subscribers, BellSouth's filed tariffs obligate subscribers to provide easements and other supporting structures at no cost to BellSouth. (In a multi-tenant environment, the property owner usually, but not always, acts as an agent for all subscribers relative to these requirements.) In such cases it would appear to be inappropriate for the property owner to require compensation for access. Also, lease rates typically include access to common areas by tenants. Thus, double compensation for the same space could occur if the property owner also seeks to have carriers pay again for this space.

Certain supporting structures such as conduits, equipment rooms, plywood backboards, electrical outlets, etc. are "fixtures" of the property and remain in place for the benefit of the property owner, tenants or other telecommunications companies in the event that the incumbent carrier's services are disconnected. Thus, even in a totally deregulated environment, with no carrier designated as COLR, there remain very real and compelling arguments as to why property owners and/or subscribers should provide access to structures that are, or become, "fixtures". This is the case with plumbing, heating, cooling and any other infrastructure which is shared in whole or in part by tenants. This notwithstanding, it is BellSouth's position that in a fully competitive market with no COLR obligations, telecommunications carriers, subscribers and property owners will and should negotiate numerous terms and conditions, including the provision of structures, in order to arrive at mutually agreeable serving arrangements.

BellSouth is not in favor of any government-mandated standards for owner-provided support structures. BellSouth notes that existing national and local codes cover items which impact life/safety issues. Also, voluntary industry standards and methods exist which are readily available to concerned

owners(see ANSI/TIA/EIA Standards and BICSI design/installation manuals). In addition, COLR state and federal tariffs contain reasonably sufficient specifications on other support structure elements commonly used today. Any needed changes to these tariffed specifications should be addressed in separate Commission proceedings wherein all of the associated issues can be properly addressed; e.g., effect on subscriber rates, etc. In summary, BellSouth is of the opinion that existing rules and tariffs relative to COLR provisioning should be left intact and that, where Commission rules and tariffs are not currently applicable, then owners and carriers should be able to negotiate support structure issues without further Commission regulations.

B. Access To Wiring And Equipment: As described previously, the definition of "indirect access" proposed by BellSouth entails a carrier demarcation point at the Minimum Point Of Entry (MPOE) of the multi-tenant property.

In such a MPOE scenario, the resulting question arises: how do carrier services get extended from the MPOE to the end user? The most probable answer is via wiring which is installed and maintained by the property owner (or an agent of the owner), or perhaps by another carrier who the owner has permitted to install wiring and equipment.

A similar but clearly different scenario arises when a carrier is requested, or required by regulatory mandate, to place its demarcation points at end users' premises but is not permitted by the property owner to install its own wiring on the property. Such a scenario exists on a limited basis in the Commission's Shared Tenant Services (STS) rule whereby, in STS situations, BellSouth must utilize wiring owned by a third party if such wiring:

a) meets requirements of the National Electrical Code (NEC) and

b) can be accessed at costs which are no higher than the costs BellSouth would have incurred if it had installed its own wiring.

However, BellSouth's position regarding the use of third party wiring and equipment is very straightforward. No carrier, whether a COLR or not, should be forced by regulatory dictate to use facilities owned by another party. All carriers should have the freedom to make a decision regarding such use on purely its own operational, technical and economic criteria.

Therefore, the current rule for use of third party wiring on STS properties is clearly deficient and should be revoked. There are so many operational factors and technical specifications to be taken into consideration relative to a carrier's choice of transmission media and equipment that attempting to establish a "laundry list" administered by regulatory mechanisms is a futile endeavor. For

example, the NEC addresses only a very minute set of factors relative to wiring, all of which are oriented toward life/safety issues, not performance. Other voluntary industry standards, such as those promulgated by the American National Standards Institute in conjunction with the Telecommunications Industry Association and Electronics Industry Association (ANSI/TIA/EIA), attempt to address performance, however, even these organizations recognize that telecommunications providers utilize proprietary and individualized network architectures that do not always lend themselves to "cookie cutter" standards. Certainly, standardized media and equipment would make everyone's life easier in the telecommunications industry, but that simply is not the case today, nor will it be in the foreseeable future. All one has to do is read any telecommunications periodical to clearly see the widely diverse opinions on which media is "best". In point of fact, success in the marketplace is often a direct function of how effectively a telecommunications provider is able to differentiate its products, services and technologies.

What, for example, should BellSouth do if it intended to deploy fiber plant and a property owner's wiring consisted of metallic facilities which met NEC specifications and could be accessed at a reasonable cost? Should BellSouth modify its deployment plans to accommodate another party's technology choice? Should BellSouth's subscribers be denied the benefits of fiber technology? Should BellSouth take a step backward and modify systems and central office equipment to accommodate metallic plant? The answer to all these questions is a resounding NO! Nor should any other carrier be required to do so.

With the above rationale in mind, BellSouth's positions on the use and availability of premises wiring are summarized as follows:

1. Although certainly not a matter of regulatory mandate, property owners would be well advised to install support structures (conduit, etc.) which will reasonably facilitate the installation of media by multiple carriers. This just makes good common sense in today's environment. Doing so would obviate most if not all of the issues regarding shared use of wiring.

2. BellSouth is obligated to resell its services, and in its incumbent franchise area must also "unbundle" its network facilities and thus must share its wiring wherever technically feasible. Conversely, BellSouth expects that other carriers should similarly offer the resale and use their facilities to BellSouth when technically feasible.

3. If a property owner will not allow BellSouth to install its own wiring to the end user's premises, BellSouth would choose one of the following alternatives:

a) Enter into a facilities-use contract with the owner of the premises wiring

and accept full responsibility for service to end users in accordance with existing tariffs and Commission rules and service indices. Furthermore, BellSouth will make every effort to ensure that the use of third party facilities is transparent to the end user. The decision to enter into a facilities-use contract would be solely BellSouth's.

b) If an acceptable agreement cannot be reached with the owner of the premises wiring, BellSouth will place its demarcation points at the MPOE, assuming that the end user/subscriber accepts service in this manner, and that Commission Rules are modified to permit demarcation at the MPOE.

c) If the Commission's premises demarc rule remains intact and an acceptable facilities-use agreement cannot be reached, BellSouth would be unable to provide service to the customer, and should then be relieved of its COLR obligations as to that service request.

4. BellSouth believes that the procedures outlined in (3 a,b,c) above make sense for all carriers and that no legislative or regulatory dictate should exist which would require any carrier to use wiring or equipment owned by another party, regardless of the circumstances. Terms and conditions of facilities-use contracts must be totally a matter of free market negotiation. ,

C. Use Of Space: BellSouth understands property owners' concerns that space for telecommunications equipment is a limited resource. Owners voice a concern that a plethora of serving carriers would require an inordinate amount of space on their properties. BellSouth believes that such a situation , while theoretically possible, is unlikely for several reasons:

a) Given "X" amount of tenant floor space, there is some "Y" level of telecommunications needs, regardless of whether one or ten carriers are providing service. The Jones family may need two lines today versus one yesterday, however the fact that two carriers rather than one are providing service does not necessarily mean that double the space for wiring and equipment is needed. Industry standards attempt to quantify these factors and typically propose formulae that telecommunications designers utilize to plan "structured systems"; i.e., generic plans that are vendor transparent. Granting, however, that telecommunications needs are increasing and granting that generally more carriers may translate into more common space, there is nevertheless only just so much space that will be required to service a property. Property owners should retain the responsibility to adequately design and size their equipment rooms and support structures to handle reasonably expected demand for such spaces.

b) The trend in the telecommunications industry is for cables and equipment to reduce in size, not increase in size. For example, yesterday's 3600 pair copper cable requiring its own 4" conduit can now be replaced by one fiber optic cable which is no more that 5/8" in diameter.

BellSouth's positions relative to the space issue are summarized as follows:

1. As part and parcel of an owner's job to provide common services to tenants, owners should stand ready to accommodate their tenants' changing telecommunications needs and to make appropriate modifications to their space planning and sizing specifications.

2. It is wrong for owners to attempt to make compensation for space a profit-making endeavor.

3. Owners need to monitor the reasonableness of space usage by serving carriers.

D. Access Time Issue: Some owners apparently express concern over the need to provide carriers with seven days a week/24 hours a day ("7/24") access to buildings. BellSouth's experience has been that, normally, its ability to gain timely access is easily resolved with property owners. Both owners and carriers must have service to their tenants and customers as a common and overriding objective. In its selection process, owners are able to discern the viability of carriers relative to their ability to provide timely, reliable service. If a selected carrier wishes, or is forced by regulatory mandate, to provide 7/24 service to tenants, the owner should make arrangements to accommodate this need. Also, if tenants in the building need 7/24 support, the property owner, as a matter of good business practices, should facilitate the satisfaction of this tenant need.

Recently, BellSouth has experienced isolated cases where access for installation and repair service has become an problem. The Commission should, therefore, investigate the prevalence of such difficulties and, if necessary, consider adopting rules which require the fullest possible access rights since such access is clearly in the public interest.

The individual nature of tenant needs may or may not require off-hour access. BellSouth believes that the access time issue should, ideally, not be the subject of governmental oversight or regulation. But key to this assumption is that owners inform tenants before a lease is signed if access by utilities is limited. That way, tenants whose business depends on 7/24 service can freely opt to select another property where access is not limited.

If BellSouth is forced to pay additional fees to access tenant, then BellSouth will pass these fees along to the tenants in the building (the cost carrier scenario).

Respectfully submitted this 29th day of July, 1998.

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VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Special Project No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing are two (2) originals and a diskette of BOMA Florida's comments regarding the above-captioned matter. Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to me via telecopy at (407) 843-4946.

Thank you in advance for your assistance in this matter. If you have any questions, please call me.

Very truly yours,

JOHN L. BREWERTON, III, P.A.

By: _____
John L. Brewerton, III

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Issue Identification Workshop For Undocketed Special Project: Access by Telecommunications Companies To Customers in Multi-Tenant Environments	)))))	Special Project No. 980000B-SP

INTRODUCTION

The Building Owners and Managers Association of Florida, Inc. (BOMA) is a tax-exempt Section 501(c)(6) real estate trade association organized under the laws of the state of Florida. Its chartered membership consists of local chapter associations in Greater Miami, South Florida, Tampa, Orlando, Jacksonville, North Florida (Tallahassee) and members at large throughout the state. BOMA represents some 800 member companies in the state of Florida, owning, managing and/or operating literally billions of square feet of primarily office, but also including retail, industrial and other tenant-occupied building space in this state. BOMA is a chartered member of BOMA International, Inc., founded in 1907 and based in Washington D.C., which boasts membership of approximately 17,000 real estate and related companies and representing hundreds of thousands of tenant-occupied office buildings in the United States alone.

The issues in question in this proceeding are not of first impression. Telecommunications companies, with their deep-pocket advertising and lobbying budgets, have been urging this state and Congress to pass mandatory (a/k/a/ forced building) access or similar laws in order to reduce their cost of doing business, which, from a prudent business perspective, is understandable. However, mandatory access laws, and lobbying efforts with respect thereto, were expressly rejected by Congress when it passed the Federal Telecommunications Act of 1996, because such laws would be unconstitutional on their face and effect unconstitutional takings of private property rights of building owners.

Mandatory access laws were expressly invalidated as unconstitutional by the United States Supreme Court in 1982, in a case involving a mandatory access cable television statute in the state of New York (*Infra, Loretto* v. *TelePrompter Manhattan CATV*). A litany of cases throughout the country challenging the constitutionality of similar cable statutes and ordinances were also litigated in the early to mid-1980s, all of which were also held unconstitutional under the U.S. Supreme Court's rationale stated in the *Loretto* decision. In fact, a number of such cases were decided here in the state of Florida, the most notable of which was *Storer Cable TV v. Summerwind Apartments Associates*, also discussed hereinafter.

In short, these cases hold that, to force a building owner to grant access to any party, including a telecommunications service provider, results in a governmental taking of private property rights for which full compensation to the owner must be paid either by the taking governmental entity or the beneficiary of the taking (as proposed here, the telecommunications companies). Moreover, in the *Loretto* opinion, the U.S. Supreme court expressly stated that the power to exclude third parties has traditionally be considered one of the most treasured strands in an owner's bundle of private property rights.

The following will provide BOMA's comments to the issues circulated by the Florida Public Service Commission (PSC) for discussion at its public hearing scheduled for Wednesday, August 13, 1998, relative to mandatory access.

COMMENTS

I. Issue: In general, should telecommunications companies have direct access to customers in multi-tenant environments? Please explain. (Please address what need there may be for access and include discussion of broad policy considerations.)

Comment: It is the position of the Building Owners and Managers Association of Florida, Inc. (BOMA) that telecommunications companies should not have direct access to customers in multi-tenant environments. The private property rights of building owners must be observed. Building owners must retain the authority to regulate,

supervise and coordinate on-premises activities of all service providers, including telecommunications carriers.

Installation and maintenance of telecommunications facilities within a building will disrupt building operations and those of tenants, as well as cause physical damage to the building and other property of the owner. Unauthorized entries into any building by a third party, as well as its contractors, agents, employees, etc., may also result in physical damage to the property of tenants in the building, including those not served by its telecommunications service providers. Moreover, unauthorized entries into private buildings by third parties will compromise the integrity of the safety and security of all occupants of the building, including tenants not served by the telecommunications company seeking the access. Building owners and their property managers are in the business of providing environments in which people live and work, and therefore, they are uniquely positioned and obligated under tenant leases to coordinate the conflicting needs of multiple tenants and multiple service providers, including telecommunications companies.

Telecommunications companies demanding access to landlords' buildings require access to space in underground easements; through exterior walls and floors; through interior walls, floors and ceilings; through and in telephone and riser closets; on rooftops; and in space occupied by tenants and other licensees. In addition, telecommunications companies often require permanent space for location of their telecommunications equipment in building basements, telephone closets and riser closets, and on the rooftops of the buildings in which they serve or propose to serve tenants. Therefore, building owners must be entitled to exercise discretion in the managing, controlling and licensing of access to and space in their premises for the protection and security of not only their own interests, but also those of building tenants, licensees and other occupants.

II. Issue: What must be considered in determining whether telecommunications companies should have direct access to customers in multi-tenant environments?

Comment: In determining whether telecommunications companies should have direct access to customers in multi-tenant environments, the Public Service Commission (PSC) must consider, first and foremost, the existing private property rights of building owners. It is clear under applicable Federal and Florida state case law [*Loretto v. TelePrompter Manhattan CATV*, 458 US 419, 426. (1982) and *Storer Cable TV v. Summerwind Apartments Associates*, 451 So. 2d 1034 (3d DCA Fla. 1984) (citing *Loretto*)], that any proposed "granting" of mandatory or similar access by the state of Florida to any telecommunications company in a tenant-occupied property constitutes a "taking" of private property rights of the building owner, for which full compensation must be paid.

Other considerations include liabilities resulting from the access, space proposed to be occupied and availability thereof, security and safety of property and persons, confidentiality of tenants, lease obligations of the landlord, value of the space and access proposed, competition for the limited availability of space within the building, and other factors.

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

Comment: Inasmuch as the primary targets of most telecommunications company marketing efforts consist of commercial businesses in office buildings owned and/or managed by members of BOMA, it is obvious that the telecommunications companies seek to include commercial office buildings within the definition of "multi-tenant environments." Nevertheless, members of BOMA also own and/or develop residential, transient, condominium, retail and other properties, as well as, in a very limited number of cases, own or operate shared tenant service provider affiliates. However, for BOMA

to object to or insist on any specific definition of a "multi-tenant environment" would be tantamount to agreeing that the Public Service Commission has authority over licensed access to multi-tenant environments, to which BOMA objects.

B. Issue: What telecommunications services should be included in "direct access", *i.e.*, basic local service (Section 364.02(2), F.S.), internet access, video, data, satellite, other?

Comment: To the extent that the Public Service Commission is addressing the term "direct access", BOMA suggests that such term should be defined to include any service whatsoever provided by any telecommunications carriers certificated by the state of Florida, including, without limitation, basic local telephone service, internet access, video, data, satellite, etc., as well as services related to the sale, installation and maintenance of software, cabling, hardware and equipment related or incident thereto.

C. Issue: In promoting a competitive market, what, if any, restrictions to direct access to customers in multi-tenant environments should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Comment: Once again, it is BOMA's position that there should be no direct access by telecommunications carriers tenants of multi-tenant "environments", unless the same is expressly consented to by the building owner. Moreover, as BOMA has advised the Public Service Commission and the Florida Legislature in the past and as discussed in more detail hereinafter, "exclusionary" contracts (often called exclusive agreements) are the exception to the general rule and not the norm in the commercial office building industry.

Generally, it is in the best interests of property owners and their managing agents to grant access to multiple carriers desiring to provide telecommunications services to tenants within multi-tenant buildings. In other words, exclusive agreements are generally not in the owners' best interests.

Of course, in evaluating which carriers should be granted access to its property, the owner takes into consideration such factors as, but not limited to: the reputation of the respective telecommunications company; space availability in the building; consents, demands and/or needs of tenants; prior experience of the building owner and/or management company with the respective telecommunications company; terms and conditions for access requested; expected disruption to tenants and occupants; potential physical damage to the property; integrity of the safety and security of the building and its occupants; architectural integrity and aesthetics of the building and the proposed modifications by the carrier; and conflicting needs of multiple tenants and multiple service providers. Therefore, access to private buildings must be subject to the express consent of the building owner or its manager.

In some cases, exclusive contracts may be warranted, determined in the discretion of the building owner, based on its evaluation of the foregoing and other factors. In any event, as previously stated, it is BOMA's position that exclusive contracts are generally not favorable or in the best interests of its members. However, a building owner has the constitutional right to govern who and what companies have access to its own property, and while it may not be prudent to do so, a building owner may constitutionally exclude any party from its property. By the same token, it may lawfully enter into an exclusive agreement with any particular telecommunications company. Simply put, that is the building owner's constitutionally guaranteed right to be imprudent and to exclude from its property any party it so chooses. (*Supra, Loretto* at p. 435)

D. Issue: How should "demarcation point" be defined, *i.e.*, current PSC definition (Rule 25-4.0345, F.A.C.) or federal Minimum Point of Entry (MPOE).

Comment: It is BOMA's position that the definition of demarcation point for purposes of Florida law should remain as currently defined under PSC Rule 25-4.0345, FAC.

However, BOMA International and BOMA Florida are currently evaluating this issue nationwide and therefore must reserve the right to change this position.

E. Issue: With respect to actual, physical access to property, what are the rights, privileges, responsibilities or obligations of:

1) Landlords, owners, building managers, condominium associates;

Comment: Landlords, owners, building managers and condominium associations must retain the right to govern actual, physical and other access to their property, as discussed in both the Introduction and Section I above. Their responsibilities and obligations are and must be governed by their negotiated agreements with their tenants and telecommunications companies seeking access to their properties.

2) Tenants, customers, end users; and

Comment: Tenants, customers and users may exercise any rights, privileges, responsibilities or obligations with respect to their needs and demands for telecommunications company access provided in their contracts with their landlords. They can and do negotiate these issues and considerations within the context of their negotiations of their leases, tenant build-out and other agreements with their landlords.

3) Telecommunications companies.

Comment: Telecommunications companies have no rights whatsoever to gain access to private property and the occupants thereof, absent the express consent of the property owner. Any rights and obligations regarding telecommunications access should be governed by the negotiated, arms-lengths terms of a license or other access agreement between the landlord and the carrier, on the one hand, and the landlord and its tenant, on the other. To legislatively grant any "special priority" or other guaranteed or mandatory access status or similar right to any telecommunications company would violate the U.S.

and Florida Constitution (Article X, Section 6) provisions regarding the protection of private property rights. (*Supra*, *Loretto* and *Storer Cable TV*.)

Consequently, issues regarding easements, cabling, space, equipment, lightning protection, service quality, maintenance, repair, liability, personnel, pricing and all other considerations related to private property/building access should be governed by the terms and conditions of an agreement to be negotiated by and between the property owner and the telecommunications company, subject of course to the owner's obligations contained in its lease or other private agreements with its tenants. As discussed above, building owners are in the business of providing environments in which people work. They are uniquely positioned and obligated pursuant to their leases to coordinate the conflicting needs of multi-tenants and multi-service providers. Consequently, to infringe on landlord's property rights and/or obligations to their tenants, other licensees and customers, solely to benefit the pecuniary interests of privately-owned telecommunications companies, would result in unconscionable harm to private property owners.

In fact, private licensing and similar access agreements among building owners and telecommunications companies, both inside and outside the state of Florida, are today becoming the norm. Unfortunately, given the pre-existing monopoly-status of incumbent local exchange carriers ("LECs"), it is a much more arduous a task, if not impossible today, for property owners to attempt to negotiate agreements with such LEC carriers. Property owners simply have no leverage, and LECs generally refuse to sign any license or other access agreements whatsoever. Consequently, unless the Public Service Commission and/or Florida Legislature expressly acknowledges the interests of property owners in their own properties, particularly in this time of monopoly deregulation and promotion of competition with LECs by alternative local exchange and competitive

access service provided ("ALECs"), then a building owner has but three (3) options (or some combination thereof): (a) attempt to convince its tenants to discontinue doing business with the LECs, which of course is not a desirable or viable option for the property owner, because it could result in building service interruptions, not to mention tenant-relations nightmares; or (b) attempt to require all ALECs to execute license or other access agreements, which the ALECs claim results in discrimination against them because the LEC obtained access without executing an agreement or paying any license fee; or (c) absorb or pass on to tenants, in the form of additional rent or operating expenses, the costs of administrating access by multiple telecommunications carriers serving tenants in its building. Nevertheless, as previously stated, contractual agreements between property owners and most alternative carriers including the likes of Intermedia (ICI), Teleport Communications Group (TCG), e-spire (f/k/a ACSI), WinStar Communications, Teligent Communications, Cypress Communications, Sprint, etc. are becoming more and more common, at least among those landlords represented by BOMA membership.

In answering the questions in Issue II.E., 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.

Comment: These are issues, *inter alia*, for which the landlord/building owner is responsible to its tenants and should be addressed in license or similar agreements with telecommunications companies seeking access to its property.

F. Issue: Based on your answer to Issue II.E. above, are there instances in which compensation should be required? If yes, by whom, to whom, for what and how is cost to be determined?

Comment: The real question is not "which" compensation should be required, but whether the property owner has the ability to charge any compensation for access by telecommunications companies. Under the authority of *Loretto* and its progeny,

including *Storer Cable TV*, it is clear that landlords have the constitutional authority to require that all service vendors, including telecommunications service providers desiring to do business with tenants in their buildings, pay license, access, or other fee compensation as a condition of gaining access to their buildings and tenants.

Once again it is BOMA's position that a telecommunications company's access to a private building must be subject to the express consent of the building owner or manager. Such consent agreements should address all terms and conditions with competing carriers for such access, including any compensation payable therefor. As a matter of practicality, the building owner must be able to take into account any factor it chooses in determining to which carriers it should grant access, including without limitation, the fair market value of the access sought by the carrier. However, as previously stated, it is in the property owner's best interests to have multiple carriers providing services to tenants within their buildings, so it will naturally be inclined to negotiate such agreements. Any carriers refusing to negotiate any license or access agreements with landlords and demanding free, unfettered and uncompensated access are simply being unreasonable and ignoring owners' private property rights.

Factors typically taken into consideration by a landlord in evaluating the level of compensation to be paid to it for licensed access to its tenants generally include, but are not limited to, the: compensation paid or offered to be paid by other carriers for the same access; space limitations in the building; term of the licensed access sought; other terms and conditions of the access sought; services requested to be provided by the landlord for the benefit of the telecommunications company; lease obligations to and telecommunications service needs and demands of tenants (and the amount of space each of such tenants leases in the building); number of carriers already providing telecommunications service to tenants in the building; value of the space to other vendors

and service providers which are not telecommunications companies (*e.g.*, such as but not limited to utility and alternative utility service providers); additional one-time and ongoing risks and costs which will result to the landlord, its building and tenants as a result of such access; benefits of such additional service access to tenants; value of the space to the telecommunications carrier; and revenues to be generated by the telecommunications carrier as a result of the access to the property, among others.

It is BOMA's position that the factor "cost" is usually irrelevant in the compensation negotiation(s) between the property owner and telecommunications carrier, at least from the owner's perspective. The cost of the equipment proposed to be installed by a telecommunications company in a building shall be determined and evaluated by the telecommunications company, not the property owner. In evaluating the profit potential of a particular building, cost will obviously be a consideration to the telecommunications carrier. However, it will only be considered by the building owner to the extent that it requires a specific telecommunications company to install certain equipment or facilities in its building.

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

Comment: Of course, it is necessary to preserve the integrity of E911. However, as long as some certificated telecommunications company is willing (or obligated under tariff) to provide telephone service to a particular building, the integrity of E911 will always be preserved.

III. Other issues not addressed in I and II above:

Comment: Other issues not addressed hereinabove, but which must be considered by the Public Service Commission in this context, include but are not limited to the following:

1. The Federal Telecommunications Act of 1996 and the Florida Telecommunications Act of 1995 have in fact resulted in the establishment of immediate and significant competition among numerous recently-certificated telecommunications companies providing services to tenants both inside and outside the state of Florida. A non-exhaustive list of carriers with whom mutually-negotiated agreements with property owners have contracted is provided hereinabove in the comment provided for Issue II(E).

Nevertheless, for the state of Florida and/or the Public Service Commission to interject the state or its agency directly into the negotiation process between landlords and the telecommunications companies, and indirectly between landlords and tenants in their lease negotiations, would not only be unwarranted and unconstitutional, but futile. The free market relationships among those parties will ferret themselves out, as is already occurring in the market today. In order to promote competition, the state must allow competition, not attempt to force-feed it by unlawfully legislating mandatory or similar access by telecommunications companies. Any mandatory access or similar law will not only fail to accomplish the objective of establishing competition, but preclude it.

2. Oftentimes, telecommunications companies already possessing access to an owner's building (LECs and ALECs alike) attempt to overburden the building's telecommunications infrastructure (such as equipment rooms, risers, raceways, telephone closets, rooftops, etc.) and physically occupy more space than they actually need (*i.e.* to provide services to all tenants in the building), simply to render access to the building's tenants economically impractical for other competitors, thereby resulting in a barrier to competition. In other words, in evaluating the cost for the next carrier to gain access to the building, such access becomes too expensive because of the significant structural and cost of new construction issues facing the next carrier seeking tenant access.

For example, suppose an owner constructs a new building and installs four (4) four inch (4") telecommunications conduits (or "raceways" or "chaces") to facilitate building access by multiple telecommunications carriers. If one of the carriers (already doing business in the building) physically occupies more space than it actually needs to provide its services to its customers, then the cost to construct additional raceways must be incurred by either (a) the next telecommunications carrier desiring access to the building's tenants, or (b) the building owner itself. Therefore, in effect, the existing carrier is imposing upon other carriers economic and space barriers to competitive entry.

3. In order to promote competition, the state must consider two alternatives: (a) either immediately or gradually retract or diminish the monopolistic rights of LECs in tenant properties such as to remove barriers to entry for all ALECs and create a level playing field for all telecommunications companies; or (b) immediately or gradually elevate the status of every certificated ALEC to that of the existing LECs. Obviously, the latter of those two alternatives, particularly given the fact that there are some 150 or so telecommunications companies certificated in the state of Florida already, will result a gross abuse of the governmental power of eminent domain and effect substantial takings of private property rights, without payment of full compensation, as required by the Florida Constitution, Article X, Section 6.

4. Moreover, such taking action would violate other Florida laws, including, without limitation, the provisions of the *Bert J. Harris, Jr. Private Property Rights Protection Act* of the state of Florida. (Fla. Stat. Section 70.001 *et seq.*)

5. If the state or the Public Service Commission decides to interject itself into free market negotiations (between landlords and telecommunications companies) regarding the terms and conditions of and/or the amount of compensation to be paid by the telecommunications companies for access to landlords' properties, such would result in an artificial and arbitrary "price fixing" by the state and ignore the principles of our free market economy. The costs of providing service to a particular building must include the value (and terms of) the access sought and space demanded. Many telecommunications companies involved in this proceeding are actually offering to pay very competitive license fees to landlords in order to gain access to their properties. It is impossible to understand why the state would even consider interjecting itself into those negotiations and interrupting the free market, arms-lengths negotiations among those parties.

Once again, the free market will determine the amount of compensation payable to landlords for licensed access to their properties. Any cost considerations will be taken into account by the telecommunications company in evaluating the feasibility of an investment in access to a specific property's tenants.

6. Many telecommunications companies have proposed that parameters or limitations on the amount of license or access fees payable to landlords, such as "reasonable" and "non-discriminatory", be incorporated into proposed PSC rules or state statutes. The effect of such laws would be to governmentally limit the compensation payable to landlords for access to their properties. Such artificial limitations would not only be unlawful and violative of Florida Constitution Article X, Section 6, but also create unfair and artificial negotiating leverage in favor of the telecommunications companies to the detriment of landlords.

Once again, landlords are in the business of leasing premises to tenants. If tenants demand access via certain telecommunications carriers, the tenants will negotiate for such access within the confines of the lease or related agreements with the landlord. Absent lease obligations to tenants, landlords are in the unique position to govern access to their properties by all persons and parties, and must be allowed to do so in order to comply with their lease obligations to their tenants.

7. The Public Service Commission is not in the real estate business. Therefore, the PSC should not arbitrarily or unnecessarily involve itself in the negotiations of terms and conditions of or amounts of license fees payable for telecommunications company access to tenant-occupied properties. For the PSC or the state to involve itself in that negotiating process would be analogous to governmentally mandating rental rates payable for tenant space within buildings, which would obviously result in unconstitutional takings of private property rights. Moreover, legislating mandatory access would also require landlords to incur additional and unnecessary expense of hiring regulatory lawyers to advise them in dispute proceedings before the Public Service Commission in the event that a telecommunications company desires to subject the landlord to a "spending war" in the process of negotiations or as part of its negotiation strategy. Clearly, such was not the intention of the Federal Telecommunications Act of 1996 or the Florida Telecommunications Act of 1995.

8. Technology is ever-evolving in the telecommunications industry. Hybrid telecommunications companies (hard-wire and wireless, combined) are becoming more and more common. Telecommunications carriers are requiring access to both the interiors as well as exteriors, *e.g.* the rooftops, of buildings. All carriers require space,

which is a valuable commodity to a landlord. Space is what landlords "sell". For the government to usurp those private property rights and grant mandatory, free or other state-regulated access to the private property of landlords would result in an abomination of private property rights and only lead to more disputes between carriers and property owners. It would be more advantageous for all parties, and accomplish the objectives and mandates of the Federal and Florida Telecommunications Acts, if the state simply allows the parties to negotiate among themselves such that our free market economy will be allowed to thrive without unnecessary governmental regulation.

SUMMARY AND CONCLUSIONS

It is clear from all applicable federal and state case law that any mandatory access statute, ordinance, administrative or other rule, or any other law proposing to impose mandatory access on private property owners would result in a governmental taking of private property, for which full compensation must be paid under the Florida Constitution. Moreover, the properties in question in the factual scenarios of those cases were tenant-occupied properties.

Therefore, the terms and conditions for a telecommunications carrier's access to a particular building must be negotiated by the parties involved. Landlords are in the business of satisfying tenants. Consequently, if a tenant demands access for a specific telecommunications service provider, and such access adversely impacts the rights and obligations of the owner to its other tenants (or the owner's managing agent to such owner), the owner (or manager) cannot be forced to grant unfettered access to such carrier, much less an unlimited number of other telecommunications companies demanding access. Owners must be able to protect their property interests, as well as the interests of each of their tenants. Any proposed mandatory access law will jeopardize the owner's ability to protect those interests.

Telecommunications carriers, like any other service vendors, have no guaranteed right to do business with any party or at any place. Such is a fundamental precept of a free market economy. Building owners must be able to regulate access to their properties by all persons or else they subject themselves to unlimited liability. Such is an express consideration in lease negotiations with their tenants.

Moreover, telecommunications company access must be administrated by landlords, and that access results in additional costs and burdens on landlords, and ultimately their tenants. Those costs and burdens should rightfully be passed on to the entities profiting from such access, *i.e.*, the telecommunications companies demanding it. If such access costs and burdens are not reflected in the prices for telecommunications services charged to tenants, then they most certainly will be reflected in increased lease rentals and common operating expenses shared by all tenants of the building (collectively, "Rents"). Such a result would unfairly benefit telecommunications carriers at the expense of landlords and tenants.

A primary purpose of the Florida and Federal Telecommunications Acts was to foster competition with LECs by ALECs. It was not an objective thereof to raise Rents for tenants, for the direct pecuniary benefit of telecommunications companies, which will be a direct result of the passage of any mandatory access or any other similarly intentional law by this state or its agency.

Respectfully submitted on behalf of the
Building Owners and Managers
Association of Florida, Inc. by
JOHN L. BREWERTON, III, P.A.

By: _____
John L. Brewerton, III, Esq.

Florida Association of Homes for the Aging

ORIGINAL

M E M O R A N D U M

August 31, 1998

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BEDELL) CB

RE: UNDOCKETED SPECIAL PROJECT NO. 980000B-SP - Access by Telecommunications Companies to Customers in Multi-Tenant Environments

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Attached is an **ISSUE MEMORANDUM LETTER FROM THE FLORIDA ASSOCIATION OF HOMES FOR AGING DATED AUGUST 10, 1998**, to be filed in the above-referenced docket.

CB/slh
Attachment
cc: Division of Communications

ACK ____
AFA ____
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Celebrating 35 Years of Service"

FLORIDA ASSOCIATION OF HOMES FOR THE AGING

An Organization of Retirement Housing and Health Care Communities

FAHA

William R. Whitley
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Karen R. Torgesen
Executive Director

MEMORANDUM

TO: The Public Service Commission

FROM: Mary Ellen Early, Director of Public Policy
Julie Miller, Director of Housing

SUBJECT: August 12 workshop on "Assess by Telecommunications Companies to Customers in Multi-Tenant Environments" -- Special Project No. 9800003-SP

The Florida Association of Homes for the Aging is a statewide association consisting of nursing homes, assisted living facilities, government-financed or insured housing for the elderly, and retirement communities that provide the full continuum of care, including a licensed nursing home or assisted living facility or both. Most of our members are non-profit organizations. Over 50,000 residents, most of whom are over the age of 78, reside in these facilities. Thousands of other Floridians live in similar facilities that are not part of our association.

Since the early 1980's, some of our members have provided telephone services to tenants through a shared telephone system. The Public Service Commission affirmed their right to use shared tenant services in docket number 860455-TL, order number 17111, issued on January 15, 1987.

The purpose of this memo is to request that the Public Service Commission, in its deliberations on "Access by Telecommunication Companies to Customers of Multi-Tenant Environments" consider the special needs of elderly and disabled Floridians who reside in group living facility/communities that are licensed, certified, or financed by a government agency. We respectfully request that you reaffirm current policy to exempt these facilities from restrictions on the use of shared tenant services.

Our response is limited to the telecommunication needs of persons residing in long-term care facilities and retirement housing as defined in this memo. We are not technical experts in the field of telecommunication services. Therefore, we do not have the expertise to respond to specific issues identified in the workshop notice that appeared in the July 31, 1998 issue of the Florida Administrative Weekly.

In group living facility environments, such as a nursing home, assisted living facility, government financed/subsidized housing for the elderly, or a retirement community with a licensed nursing home or assisted living facility, a shared tenant telephone system (central office trunk lines via a PBX or master switchboard) operated by the facility should be permitted. Direct access to customers by the local telephone company is not warranted.

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- Oftentimes, these facilities provide multiple levels of care that co-exist on a campus.

- These providers have never been regulated by the PSC. They have had a specific exemption (PSC order #17111) from regulation since 1987.

- They are not in the business of providing local exchange telephone services and do not compete with telephone companies. They use local and long distance companies but facilitate the acquisition and management of telephone services on behalf of residents.

- Through the use of a shared tenant system, elderly and disabled residents of these facilities enjoy telecommunication services that might not otherwise be available. These include local exchange service, three-digit in-house dialing through the PBX or master switchboard, an in-house emergency response system and, when required, assistance from the switchboard operator in making calls.

- Most shared telephone systems provide not only affordable telephone services, but also an emergency response system. Some have an automatic tie into an in-house operator or nurses station in the event of an emergency. If a resident knocks the headset off the hook, staff receives an automatic signal for help.

- Nursing homes, assisted living facilities, continuing care retirement communities and HUD housing are already heavily regulated by a number of government agencies. Oftentimes, these facilities are collocated so residents move from building to building as their needs change. The overlap makes it difficult to classify these facilities as transient rentals. Stays can be for an extended period of time or for a few weeks. Through call aggregator services, residents are provided with telephone services regardless of where they move, even if the stay is temporary.

- As people live longer, their stay in a communal or institutional setting designed specifically for seniors has become longer. While some stays are short-term, many Floridians live out their lives in a nursing home, assisted living facility, continuing care retirement community or HUD funded or insured housing complex for the elderly. When the PSC issued Order #17111, they acknowledged that these facilities should not be classified as transient rentals.

- Since the PSC issued order #17111 on January 15, 1987 exempting these providers from shared tenant and call aggregator regulation, we are not aware of any consumer complaints to the commission that would warrant a change in policy or rule.

The long-term care facilities and retirement housing communities that use shared tenant services are not competing with telephone companies. Frequently, the telephone service is provided as part of the personal care, housing and emergency response package available to residents/patients. Availability of a shared telephone service in long-term care facilities and retirement housing is clearly in the public interest and beneficial to elderly Floridians. It is also

consistent with public policy initiatives to promote a variety of long-term care and residential options that help to postpone or eliminate the need for nursing home care.

If the Public Service Commission determines that there is a need to restrict the use of shared tenant services, we believe that the following exemption should continue. Occupants of all homes, communities or facilities for the aged, disabled or retired in which at least 75% of the occupants are over age 62, or totally or permanently disabled, and meet one or more of the following criteria:

a. is licensed in part or in whole as a nursing home pursuant to Ch. 400, F.S.;
b. is licensed in part or in whole as an assisted living facility pursuant to s.400.404, F.S., or exempt from licensure as an assisted living facility pursuant to s.400.404, F.S.;
c. is certificated as a continuing care facility pursuant to Ch. 651 F.S.; or
d. is financed or insured by the U.S. Dept. of Housing and Urban Development (HUD) pursuant to the National Housing Act or financed in part or in whole by the State Apartment Incentive Loan program pursuant to s.420.507, F.S.

We were unsure about the appropriateness of responding to the PSC workshop notice that appeared in the Florida Administrative Weekly. Specifically, it was not clear that our members would be affected by issues to be addressed during the workshop. Since we were unable to obtain guidance from Commission staff on the appropriateness of submitting comments, we decided to respond.

If you need additional information, including information from PSC hearings on this issue, please do not hesitate to contact us.

Thanks in advance for your time and consideration of this important issue.