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Sent: Wednesday, September 13, 2006 11:33 AM
To: Filings@psc.state.fl.us
Subject: Docket No. 060554-TL
Attachments: 00121950.pdf

Comments of the Florida Real Access Alliance <<00121950.pdf>>

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BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

IN RE: CARRIER OF LAST RESORT;	)	
MULTI-TENANT BUSINESS AND	)	DOCKET NO.
RESIDENTIAL PROPERTY	)	060554-TL
	)	

COMMENTS OF THE FLORIDA REAL ACCESS ALLIANCE

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September 13, 2006

EXECUTIVE SUMMARY

The Alliance supports competition in the communications arena and seeks to offer our tenants/residents a choice of the widest possible array of communications service providers, including carriers of last resort ("COLR"). Alliance members have also previously agreed that a COLR denied physical access to a multi-tenanted property should not bear COLR obligations.

The plain language of the recently enacted Carrier of Last Resort relief legislation ("Statute"[1]) and the bill's legislative history make clear that the only justifications for COLR relief at a multi-tenanted property are: (1) denial of physical access to a requesting party or (2) an existing requirement that tenants prepay for non-COLR provided basic local telecommunications service.

The Florida Assembly, in adopting SB 142, rejected both HB 817 and the model COLR relief being advocated by the carriers in Florida and in other states. In so doing the Assembly made clear that the following actions neither warrant an automatic grant of nor constitute a good faith basis for COLR relief.

- Limiting the COLR to providing only basic local telecommunications service services,
- Requiring the COLR to execute a property access agreement so long as it is consistent with Florida statutes and Florida Commission rules,
- Entering into a preferred provider contract, or exclusive marketing agreement with an entity other than the COLR.

The record is clear, however, that the Statute is being misused by COLRs in Florida to increase their bargaining leverage in negotiations with developers and owners

[1] SB 142, codified as 364.025, a copy of which is attached hereto as Exhibit B.

of multi-tenanted properties. Commission action, therefore, is required to reduce, if not eliminate, such aggressive actions by COLRs. The Commission may do this by clarifying that any requirements imposed by a property owner, absent constituting a denial of physical access to a property or the presence of a prepaid obligation on all residents for service from a provider other than the COLR, does not rise to that required by the Statute for an automatic or good cause relief waiver.

From conversations with Commission staff, it would appear that the Commission professionals have a very accurate understanding of the limited nature of the relief provided by the Statute. Still, the proposed rule needs to be expanded to make clear the above overreaching actions by COLRs must be stopped before negative precedents are set and urban legends on what is and is not permitted take hold in the community. Any rule, therefore, adopted by the Commission must clarify that neither the Statute nor any rules adopted in this proceeding:

- Create mandatory access rights to multi-tenanted residential or business properties in favor of the COLR;
- Provide any guarantee for the COLR to provide services beyond basic local telecommunications service in multi-tenanted properties;
- Impair the Constitutionally and statutorily protected rights of Florida property owners to require the COLR to enter into an access agreement to govern their conduct on the property, including the ability to limit the COLR to providing only COLR voice services, so long as the access agreement is not inconsistent with Florida law; and
- Increase the jurisdiction of the Florida Public Service Commission to impose any standards on multi-tenanted communities.

The Alliance further requests that the Commission expand the proposed rule to outline how a multi-tenanted property ("MTE") goes about petitioning for the reinstatement of COLR obligations. The Statute provides for such a fall back position, but the proposed rule does not contain any guidance in this area.

Finally, the Alliance would respectfully request that the Commission seek clarification from the Florida Assembly, should the Commission not feel empowered to address the ambiguities arising from the Statute.

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I. INTRODUCTION.

The members of the Florida Real Access Alliance[2] ("Alliance") are grateful to the Commission and its professional staff for your collective effort to inform and invite the real estate community to provide comments in this docket.[3] The members of the Alliance have long supported competition and consumer choice in communications services for our tenants/residents. The Alliance has been an active participant in legislative and regulatory discussions regarding building access and COLR obligations at the Federal[4]

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[2] The members of the Alliance are the following national real estate associations and their respective Florida affiliates: The Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Association of Industrial and Office Properties ("NAIOP"), the National Association of Realtors ("NAR"), the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi-Housing Council ("NMHC"). A description of the parties, and an example of one of their Florida affiliates is attached hereto as Exhibit A.

[3] Florida Public Service Commission, *In Re: Carrier-of-Last-Resort; Multi-tenant Business and Residential Property*, Dkt. No. 060554-TL), Notice of Proposed Rule Development, August 17, 2006.

[4] The Alliance has filed in the following FCC dockets, listed in reverse chronological order. *Petition for Forbearance of Sections 251(c)(3), (c)(4) and (c)(6) in New Build, Multi-Premises Developments,* WC Docket No. 03-220; *Petition for Declaratory Ruling That the Location of the Demarcation Point Pursuant to 47 C.F.R. & 68.105(d)(2) Preempts the Location of the Demarcation Point Pursuant to § 25-4.0345(1)(R)(2) of the Florida Administrative Code* WC-03-1 I2; *Promotion of Competitive Networks in Local Telecommunications Markets* WT Docket No. 99-217; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146; *In the Matter of Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* CC Docket No. 96-98; *Telecommunications Services Inside Wiring; Customer Premises Equipment*, CS Docket No. 95-184; *Implementation of the Cable Television Consumer Protection Act of 1992; Cable Home Wiring, MM Docket No. 92-260; Review of Sections 68.104 and 68.213 of the Commission's Rules*

and state levels,[5] including multiple legislative and regulatory proceedings within Florida.[6]

In these proceedings, the Alliance has never deviated from its message: Real estate owners and professional managers seek to ensure that their tenants have access to the maximum number of providers their property can support, but no one, other than the property owner or their designee, has the right to establish who gains access to the property.

In the instant matter, the Alliance files comments to:

- Applaud the Commission staff for its accurate portrayal of the recently enacted Carrier of Last Resort ("COLR[7]") relief legislation: The plain language of the

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Concerning Connection to Simple Inside Wiring to the Telephone Network, CC Docket 88-57.

[5] A selective list of the state dockets in which the Alliance has filed includes: North Carolina (*In the Matter of Competitive Access to Commercial and Residential Developments*, Dkt. No. P-100, Sub 152. Parties may access the docket at http://ncuc.commerce.state.nc.us/cgiin/fldrdocs.ndm/INPUT?compdesc=Generic%20Proceeding&numret=002&comptype=P&docknumb=100&suffix1=&subNumb=152&suffix2=&parm1=000120354); Mississippi (*In Re: Order of the Mississippi Public Service Commission Establishing Rulemaking Proceedings Regarding Preferred Providers Contracts for Local Exchange Carriers.* Dkt No. 2004-AD-824 (rel. 12/08/2004) ("Amended Order"); Utah (*See In the Matter of Essential Facilities and Services,* R-746-348-, DAR File No. 26112.); New York State ([Case 00-C-1945, *VIP Building Connection Product,* Task Force Report (May 30, 2002)].

[6] *See e.g.* The Alliance was very active in the Florida Public Service Commission, *Access by Telecommunications Companies to Customers in Multitenant Environments* (February, 1999) docket as well as the Florida Senate's "Interim Project 2005- 106 (Senate Report.)

[7] The Florida Senate explains Florida's rules on carrier-of-last-resort (COLR) as follows:

> Carrier of Last Resort (COLR) obligation requires the incumbent local exchange carrier to provide basic local telecommunications services to anyone who asks for it within a reasonable time, at reasonable rates. Under s. 364.025(1), F.S., the ILEC, "until January 1, 2009, ... shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory."
>
> The PSC has adopted rules to implement this section. Rule 25-4.066, Florida Administrative Code, requires "requests for primary service . . . be

Statute and the legislative history of the bill make clear that denial of physical access to the COLR or a requirement that all tenants participate in a prepaid service from a carrier other than the COLR are the only justifications for COLR relief.

- Call on the Commission expand the proposed rule to articulate examples of property owner conduct that do not constitute a physical access barrier and therefore cannot rise to the level of an automatic or good faith excuse from a carrier's COLR obligations. Included in the expansion of the proposed rules would be language to clarify the rule:
    - Creates no right of mandatory access to multi-tenanted residential or business properties in favor of the COLR;
    - Provides no guaranteed rights for the COLR to provide services beyond basic local telecommunications service in multi-tenanted properties ("MTEs"); [8]

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satisfied in each exchange . . . within an interval of three working days after receipt of application when all tariff requirements relating thereto have been complied with ...."

Report 2006-106, *Review of Access by Communications Companies to Customers in Multitenant Environments*, Committee on Communications and Public Utilities, September 2005 at (hereinafter referenced as Senate Report.)

[8] These services are defined by the PSC Rule 364.02 F.A.C.. (Definitions) as

(1) "Basic local telecommunications service" means voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multi-frequency dialing, and access to the following: emergency services such as "911," all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing. For a local exchange telecommunications company, the term shall include any extended area service routes, and extended calling service in existence or ordered by the commission on or before July 1, 1995.

In the staff analysis to accompany SB 142, the staff provided the following insights into the legislature's understanding of COLR obligations:

Section 364.025, F.S., provides for universal telecommunications service. The term "universal" service" is defined as an evolving level of access to

- Preserves the Constitutionally and statutorily protected rights of Florida property owners to require the COLR to enter into an access agreement to govern their conduct on the property, including the ability to limit the COLR to providing only COLR voice services, so long as the access agreement is not inconsistent with Florida law;[9] and
- Does not increase the jurisdiction of the Florida Public Service Commission to impose any standards on multi-tenanted communities.

The Alliance's call for an expanded rule is not made in a vacuum, but is made in response to some overly aggressive interpretations of the COLR relief legislation by a number of incumbents around the state.[10]

> telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas. Subsection (1) provides Legislative intent that universal service objectives be maintained after the local exchange market is opened to competitively provided services. Each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable period to any person requesting such service within the company's service territory until January 1, 2009. This provision is generally referred to as the "carrier-of-last-resort" (COLR) obligation.

Staff Analysis to SB 142 posted April 19, 2006 at 1. (Hereinafter referenced as "Staff Analysis") Text is available online at http://www.flsenate.gov/data/session/2006/Senate/bills/analysis/pdf/2006s0142.ge.pdf

[9] The Alliance is aware that pursuant to PSC Rule 25-4.090 F.A.C. (Rights of Way and Easements,) a utility need only provide COLR services where they have been able to obtain "rights of way and easements satisfactory to the utility ...without cost or condemnation by the utility." The Code goes on to explain the specific issues that render a easement acceptable. According to subparagraph 2, the easement must be "...furnished by the applicant in reasonable time to meet service requirements and at no cost, cleared of trees, tree stumps, paving and other obstructions, staked to show property lines and final grade, and must be graded to within six (6) inches of final grade by the applicant all at no charge to the utility. Such clearing and grading must be maintained by the applicant during construction by the utility." ***Please note that there is no prohibition on a building owner or manager imposing the requirement of an access agreement or limiting to the COLR to providing basic telecommunications services in the access agreement.***

[10] Examples of at least one COLR's overly aggressive actions are discussed infra with documents provided in Exhibits. The Alliance is also aware that the Commission staff has met with one of the carriers to inform them that they have an overbroad reading, or

In addition, the Commission should communicate with the Florida Assembly that there is a logical inconsistency in the statute that the Commission may be without the authority to resolve. The Statute says that all 4 conditions outlined in 364.025 (b)[11] must be absent before one can petition for the return of COLR obligations. While an owner or developer may act to ensure the conditions described in Sections (b) 2, 3 and 4 no longer exist, the prohibited conditions of (b)1, which deals with the denial of access to a property at time of construction, can never cease to exist. Should a developer that denied a COLR access at the time of construction, permit the COLR access at a later date, it is not clear that this later access meets the legislative mandate. Absent a finding by the Commission that the granting of the later access meets (b)1 , a resident of a development

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worse, are misrepresenting the statute. Still, the Commission cannot be expected to meet with every carrier each time they seek to use the statute to their advantage in access negotiations. The Alliance, therefore, requests simple straight forward rules as to what does not constitute a barrier to access.

[11]The four conditions that must be absent are:

> **[Denial of Right to Install]**
> 1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;
> **[Contract to Ban or Exclude COLR]**
> 2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;
> **[Prepaid Obligation to non COLR Carrier]**
> 3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or
> **[Contract to Ban Access]**
> 4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property. [Titles and emphasis added.]

with a failed CLEC may find himself unable to look to the COLR for services because of the developer's initial decision to exclude the COLR, a decision over which the resident had no control.

Finally, the Alliance would request that these comments not serve as a bar to any real estate party's objections at a later date. For while we represent many in the real estate community, we make no claim to represent all members of the Florida real estate community.[12]

II. BY REJECTING HB 817 AND ADOPTING SB 142, THE LEGISLATURE MADE CLEAR THAT THERE ARE LIMITED CIRCUMSTANCES THAT WARRANT COLR RELIEF.

SB 142[13] was one of the last bills enacted by the Florida Assembly prior to its adjourning for 2006. The legislation was passed on May 5, 2006, unanimously by both the Florida House (YEAS 118 NAYS 0) and Florida Senate (YEAS 38 NAYS 0),[14] but not until major changes were made in the bill as introduced in the House (HB 817)[15]. It is these changes that the Alliance asserts demonstrates the purest of legislative histories, *i.e.* the examination of what the Assembly rejected.

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[12] The Alliance is reaching out to many of our real estate colleagues and constituents in an effort to provide the Commission with an exhaustive list of real estate owner/manager actions that the Commission in an expanded rule should make clear does not rise to "good cause" for denial of COLR services. It is anticipated that the filing will be made in the post hearing comment time period.

[13] A copy of SB 142 is attached hereto as Exhibit B.

[14] Florida was not the only state to enact COLR relief legislation in 2006. At roughly the same time the Florida Assembly was rejecting many of the overreaching terms of HB 817, the Indiana legislature was adopting legislation which contained many of those same overreaching terms. The Alliance believes the rejection of HB 817 and other models being moved by the COLR community such as the Indiana legislation document that the Florida Assembly did not intend to skew any access negotiations in favor of the COLR. The pertinent sections of the Indiana legislation are attached hereto as Exhibit C.

[15] A copy of HB 817 is attached hereto as Exhibit D.

A. House Bill 817 Went Beyond Fairness.

House Bill 817 went well beyond freeing the COLR of its service obligations when denied physical access to a multi-tenanted property. Most offensive in HB 817 was a section that would have freed the COLR of its service obligations if a property owner:

> Restricts or limits the types of services that may be provided by an eligible telecommunications carrier or enters into an agreement with a communications service provider which restricts or limits the types of services that may be provided by an eligible telecommunications carrier.

Members of the Alliance communicated with the House that this section of the proposed legislation would not serve consumers but would provide the "COLR an advantageous position in (building access) ...negotiations."[16] The Alliance further pointed out that "[w]hile House Bill 817 would not mandate forced access to the property, it does undercut an owner's ability to achieve an investment backed expectation on return on his property."[17] This standard for a return on investment had been recognized the year before in the Senate Interim Report, *Review of Access by Communications Companies to Customers in Multi-Tenant Environments*, Interim Report 2006-106 (September, 2005). The Alliance was very pleased that its concerns were taken seriously by the members of the House when it removed the above restriction.

It is therefore imperative that the Commission issue a clear statement in the form of an expanded proposed rule clarifying that the need for an access agreement or the limitation to providing basic telephone service are not grounds for COLR relief. Failing

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[16] *See* Letter of Gerard Lavery Lederer, Counsel for the Rèal Access Alliance to the Florida House of Representatives filed March 2005..
[17] *Id.*

to do so would result in COLRs, by their conduct and bullying tactics, being permitted to reinstate a basis for COLR relief that was rejected by the state legislature.

HB 817 also did not provide an obligation for the COLR to service a community once the non COLR preferred provider fails and the residents seek service from the COLR. The Alliance was pleased that SB 142 did include this requested relief.

B. SB 142 Mandated Fairness, not Advantage.

SB 142 provides, and the Alliance supported,[18] relief for the COLR from its obligation to serve any resident of a multi-tenanted business or residential property ("MTE") if the owner or developer denied physical access to the property or created a specific business impediment, *i.e.* tenants must pay for a communications service from someone other than the COLR before engaging the COLR for their services.[19] (It should be noted that COLR status does not bring with it only obligations. There have been many traditional benefits afforded the COLR, including the right to recover from the universal service funds and the right of eminent domain. The Commission and legislature are therefore not simple making demands on the COLR, those demands have been paid for many times over in the past as well as the present.[20])

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[18] *See* Comments and Post Work Shop Comments of the Alliance in the Senate Report.
[19] *See* text of Statute attached hereto as Appendix B.
[20] The Consumer Federation of America and the Benton Foundation explain the obligations and the benefits of being the COLR in these terms:

> There must be a carrier of last resort designated for each area of the state. The carrier of last resort is responsible for maintaining the facilities necessary to provide basic telephone service. These responsibilities are the key distinction between carrier of last resort obligations and the obligations for new entrants. A new entrant might be making service available to all customers within a given area through resale and therefore could not serve as the carrier of last resort.

The Statute at 364.025 provides a very limited basis for COLR relief: three (3) specific examples of physical access barriers and a single specific business impediment, *i.e.* all residents being required to prepay for services from a non COLR carrier before being able to obtain services from the COLR. Specifically the Statute reads (with suggested titles):

> **[Denial of Right to Install]**
> 1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;
> **[Contract to Ban or Exclude COLR]**
> 2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;
> **[Prepaid Obligation to non COLR Carrier]**
> 3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or
> **[Contract to Ban COLR Access]**
> 4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property. (Titles and emphasis provided.)

> The carrier of last resort is eligible for support to fulfill its obligation to maintain facilities in high-cost areas. For the vast majority of lines in a state, being the carrier of last resort creates no unique economic burden because rates cover costs. In high-cost areas the carrier should receive support to cover the difference between the cost of service and the rates charged.

To the extent that an area is high cost, there should be only one service provider allowed to draw funds from a subsidy pool to support service. From either a public policy or efficiency point of view, subsidizing more than one supplier in a high-cost area makes no sense. In most cases this would mean subsidizing two suppliers using the same facilities. Mark Cooper, **Universal Service: A Historical Perspective and Policies for the Twenty-First Century.** Available at http://www.benton.org/publibrary/uniserv-prospective/prospects.html

C. Staff Analysis Makes Clear That the "Lack Of Access Conundrum" Was the Central Issues Before Assembly Members.

The Staff Analysis accompanying SB 142 makes clear that the legislators sought to address the conundrum of having a regulatory responsibility to provide service to a resident in a community or building to which the COLR could not gain access.

> The [Senate Staff] report addressed the broad issues of property, carrier-of-last-resort, and customer protection. The COLR obligation becomes an issue when a tenant may request service from the LEC who is obligated to provide the service but cannot gain physical access to rights-of-way or closets. The LEC must deny the customer service. The report suggested a course of action to remedy the conundrum by seeking recourse with the commission.[21]

There is no reference in the report to limitation of services offered, the presence of marketing agreements or the requirement of executing an access agreement as the basis for COLR relief. The lack of any such reference and the rejection of HB 817 make clear that the Florida legislature did not intend to create any such good faith waiver of COLR obligations.

III. COLRS ARE NOT ENTITLED TO RECEIVE FREE ACCESS FOR NON BASIC TELECOMMUNICATIONS SERVICES.

The legislature did not limit the ability of the property owner to require a COLR to negotiate the right to provide any service and other than those services that are entitled to free access under Florida law *i.e.*, basic telecommunications services, the legislature did not limit the ability of a property owner to require a COLR to compensate an MTE owner for having aggregated demand for COLR sales of these non basic services. And for the Commission to do otherwise would amount to the Commission granting COLRs

[21] Staff Analysis at 3

privileges not otherwise provided by the legislature and result in a grant of mandatory access to COLRs for non-basic services.

The Alliance successfully made clear to the House that HB 817 skewed marketplace negotiations for access between the COLR and property owners, a marketplace in which the great majority of COLR receive "cost free" access to provide basic services. (In fact the Florida Administrative Code requires such "cost free" access.)

The use of quotation marks to set off "cost free" is to reflect that Alliance member owners are very capable of understanding that there are numerous ways to value access, and payment of any access fee is not the only way to provide compensation to the building owner.

Prior to the 1996 Telecommunications Act, COLRs often enjoyed exclusive local franchises, so that a building owner faced with the practical necessity of providing telecommunications services to their tenants had no option but to grant access to the incumbent carrier. In some states, such as Florida, building owners operated under the threat, if not the actual exercise, of eminent domain powers by existing telecommunications carriers to obtain access. Therefore, while a tradition, it is incorrect to treat existing carriers as invited guests. In fact, using COLR status as a means to open a building owner's property to the carriers would compound potential Fifth Amendment issues.

Second, even if building owners had acted voluntarily in granting access to incumbent LECs in the past, imposing a new "nondiscrimination" rule would change the rules mid-stream and create a serious problem of retroactivity. *See Eastern Enterprises v.*

Apfel, 524 U.S. 498 (1998). (The settled investment-backed expectations against which property owners granted access in the past provided that the owners did not thereby engage in a wholesale waiver of their right to exclude.) *See also GTE Northwest, Inc. v Public Utility Commission*, 900 P.2d 495, 504 (1995) (en banc) ("[T]he facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to something less than a taking.")

Third, the holder of a right to exclude is by definition entitled to exercise it selectively. Conversely, a homeowner who invites her friends to a dinner party does not thereby invite all members of the public into her house. Thus, courts have repeatedly rejected attempts to allow "nondiscriminatory access rules" to swallow up the right to decide whom to let in and whom to exclude. For example, in *Loretto v. Teleprompter* CATV Corp., 458 US 419 (1982) the Supreme Court explained that:

> [i]t is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. Nevertheless, a property owner's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.... For example, it would allow the government to require a property owner to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated. 458 U.S. at 439 n.17.

Similarly, the provision at issue in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), could have been described as a "nondiscriminatory access rule." The provision stated that "'a utility shall provide a cable television system or any

telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."' *Id.* at 1328 (quoting 47 U.S.C. § 224(f)(1)). Nonetheless, the Eleventh Circuit held that the provision effected a taking and that the "nondiscriminatory access rule" argument was "foreclosed by *Loretto*." *Id.* at 1331. "Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* *See also Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund* VL, Ltd., 953 F.2d 600 (11th Cir. 1992) (narrowly construing section 621(a)(2) of the Communications Act, which grants cable companies access to dedicated easements, in order to avoid constitutional questions), *cert. denied*, 506 U.S. 862 (1992).

The Statute also provides that COLR obligations can be re-imposed if the owner or developer certifies: none of the above four (4) conditions continue to exist; the owner is not seeking a deal with another telecommunications provider; and that the owner is willing to compensate the COLR for any additional costs it incurs because it could not deploy its facilities during construction. The Alliance notes that the Commission has not proposed a rule to implement this return of obligations. The Alliance requests that the Commission do so, as well as request clarification from the legislature should the Commission not feel empowered to address the ambiguity arising from the need to undo what may not be undone in order to have access to the COLR.[22]

[22] *See* discussion above regarding the inability for one to undo a construction time ban for access by COLR if the time for construction has elapsed.

The Statute also addressed the other concerns of Alliance members. The new law is neither a mandatory access bill, nor does it enhance the jurisdiction of the Commission over private real estate owners.[23] The legislators took pains to make both points clear.

IV. THE COMMISSION CANNOT ALLOW COLR CONDUCT TO CONVERT THE STATUTE INTO A MANDATORY ACCESS BILL OR TO SELF CONFER THE RIGHT TO PROVIDE NON-BASIC SERVICES TO A PROPERTY WITHOUT EXECUTING AN ACCESS AGREEMENTS.

The statute imposes no limitations on a property owner other than prohibiting them from requiring the COLR to serve their property if they have denied physical access to the property or made all of their tenants prepay for a service from a carrier other than the COLR. Despite the House and Senate being very aware that property access agreements are standard practice in the real estate industry, the Statute does not establish as a basis for COLR relief a building owner from requiring the COLR from entering into an access agreement.

V. REQUIRING AN ACCESS AGREEMENT DOES NOT CONSTITUTE A DENIAL OF ACCESS – OWNERS MUST BE FREE TO MANAGE THEIR PROPERTIES.

The Alliance requests that the proposed rule be amended to make clear that the requirement of an access agreement from the COLR does not constitute either a physical barrier to entry nor grounds for a good faith waiver.[24] Property owners are experts at

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[23] The bill states: "(f) This subsection does not affect the limitations on the jurisdiction of the commission imposed by s. 364.011 or s. 364.013."

[24] The Alliance would remind the Commission that dating back to 1999 it has found that Florida real estate owners were meeting the telecommunications needs of their tenants. *See* Florida Public Service Commission, *Access by Telecommunications Companies to Customers in Multitenant Environments*, page 1 (February, 1999). This conclusion was

building and managing complex communities and environments. Today's property owners are as different from their predecessors of fifty years ago as are today's telecommunications companies. Owners do not simply put up four walls and a roof and then collect rent. The development process amounts to the creation of a self-contained universe, in which no detail is too small to be considered, and all details are interrelated. Successful developers/managers/owners examine every detail of a project, from site location, to color and design schemes within the building, to the type and mix of tenants in the building. Every aspect of a building affects its marketability, so every aspect must be controlled to create the desired atmosphere.

Once a building has been constructed, owners and managers must consider the same criteria and more. Property managers need to know where their buildings stand in relation to other buildings in the local marketplace in terms of rental rates, types of tenants, amenities, appearance, and so on. Property managers must also know what their potential customers are looking for. Managers take this information into account in deciding how to position a building in the market and in deciding what additional investment may be required in a building. In short, developers, owners, and managers expend large sums of money and enormous amounts of energy to create and maintain attractive places for people to live, work, and shop. They make rational, market-based decisions and have been extremely successful in developing the massive infrastructure that literally supports every business and residence in the country. With the advent of the publicly-traded real estate investment trust, sound asset management has become even

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reaffirmed by in the Senate Interim Report which found: "Property owners and managers have an incentive to allow tenant access to the provider of their choice." (Senate Report at 2)

more important. The real estate industry is not about to ignore the importance of communications (basic and broadband) services to tenants: the fiduciary responsibilities of owners and managers to investors would not permit it.[25]

Because of these market realities, property owners and real estate professionals can be counted on to behave rationally in response to the market. They will not act in any manner that could harm the value of their assets and are open to considering all market strategies that positively affect tenant demand.

From the perspective of the typical building owner, communications service providers are a "new" form of tenant service only in the sense that they are different in kind from the 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. Like other merchants in a building complex, communications companies, including COLRs seeking to provide non-basic services, pursue access to markets within a building for a profit-driven enterprise. If a building is not, or cannot be made, a profit center for a carrier, the company will take its services to a building that can be. As is the case with such diverse services as restaurants, retailers, or even laundry services, communications companies, including COLRs, are attracted to a particular building or community only when there is a sizable, essentially captive customer base. These merchants recognize that, but for the landowner's marketing and management success, this potential customer base would not have collected in large (and profitable) numbers in that building. Indeed, they might have

[25] The real estate industry also actively trains its employees to deal with new technologies, always with the goal of meeting tenant demand and protecting the value of its assets. The members of the Alliance have conducted numerous seminars for their members on telecommunications issues.

sought office or residential space in a different urban center. The service providers -- including telecom providers -- are the knowing beneficiaries of the owner's core business skills, including his or her ability to provide secure, well-managed office, retail or residential space. Thus, the telecommunications industry recognizes and benefits from the special expertise of the real estate industry, just as the tenants in a building benefit from the expertise of the owner and the service provider. This is what makes mandatory access or free access so offensive. It seeks to benefit from a property owner or manager's aggregation of services, yet refuses to acknowledge that such services and expertise should be compensated.

In every instance, property owners and real estate professionals are responding to market demands, albeit in different ways. This is the nature of the free market.

VI. THERE ARE SAFETY AND CODE CONSIDERATIONS CONTAINED IN ACCESS AGREEMENTS – AGREEMENTS THAT THE COLR MANY TIMES WILL NOT ENTERTAIN.

Property owners and real estate professionals are the front line in the enforcement of fire, safety and environmental codes, but they cannot ensure compliance with code requirements if they cannot control who works in their buildings, or when and where they do it. For the Commission to limit a owner's control over the premises, achieved by means of access agreements, would unfairly increase property owner's exposure to liability and would adversely affect public safety and health. In the past, these efforts to control premises have been challenged as many times the COLR will not enter into an access agreement, claiming as the COLR they have a government backed right to access the property. The Commission must not make the challenge harder to address.

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. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairways) 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.

Penetrations of fire-resistance assemblies are 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.

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 an Alliance member can restrict access to qualified companies and can seek recourse if the work is not done

correctly. If Alliance members were forced to allow unlimited access to service providers, including the COLR, or were prohibited from restricting or governing the terms of such access, the level of building fire safety could be significantly jeopardized. It is essential that property owners and real estate professionals and managers be able to continue to ensure 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 property owners and real estate professionals and managers have retained control. These are not merely theoretical dangers. There have been reports of actual breaches of firewalls from Alliance members. The only way fire safety can be assured in the future is by allowing property owners and real estate professionals and managers to determine who is permitted to perform work on their property.[26]

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 (2002 & 2005 93 Ed.) (specifying insulating characteristics, fire stopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios). Technicians of any single telecommunications service, including the COLR, do not have all the responsibilities of a building owner and cannot be

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[26] In addition to the fire threats, the heat and humidity of Florida also provide the threat of mold that property management must address. Real estate's concerns regarding the piercing of the building envelope due to mold are well founded and not a spurious attempt to avoid the COLR issue. A fuller discussion on drilling into exterior walls to run lines may be found in a recent web article published for its members by the National Multi Housing Council at http://www.nmhc.org/Content/ServeFile.cfm?FileID=4992 The paper is an exhaustive discussion of building practices, techniques and materials aimed at minimizing water/moisture intrusion into new and existing properties. Special attention should be paid to the discussion on p. 18 dealing with exterior walls and the minimizing of penetrations in same.

expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Providing a COLR the right to demand any advantage in access negotiations as suggested in BellSouth's form letter to developers could thus have severe unintended consequences for public safety and health.

A. Occupant security.

Alliance members are also concerned about the security of their buildings, tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Communications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors or they may even commit illegal or dangerous acts themselves. Of course, these possibilities exist today, but at least Alliance members have the right to take whatever steps they consider warranted. The Alliance's concern is that requiring Alliance members to allow the COLR access to a building without being subject to an access agreement could result in an uncontrolled right of access by service personnel.

The Alliance is also are that it is simply impractical for the Commission to develop any set of rules that will adequately address all the different situations that arise every day in the thousands of buildings across Florida. 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, Alliance members simply cannot allow service personnel to go anywhere they please without the operator's knowledge. The Commission should respect this authority.

B. Effective coordination of occupants' needs.

A building owner or property developer must have control over the space occupied by telephone lines and facilities because only the owner can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. These are the types of issues and concerns that COLRs have traditionally objected to in access agreements. Although this has traditionally been more of an issue for commercial properties, such coordination has become increasingly important in residential developments as apartment owners try to provide high-speed Internet access and other broadband services to their residents. Changes in the marketplace enhance the role of the owner or manager in preserving control over riser and conduit space.

Any Commission action that is not clear regarding COLR's being subject to access agreements even when only providing basic telecommunications services is likely to distort the market and interfere with the efficient operation of the real estate industry. Thus, to serve tenants' needs most effectively, property owners and real estate professionals should be allowed to make their own decisions regarding the most efficient way to coordinate the activities of multiple service providers and tenants.

C. Effective management of property.

A building, a development, a conduit in the rights-of-way all have 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 certainly cannot 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. Communications service providers, including COLRs, 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, communications service technicians are unlikely to take adequate steps to correct all the damage they may cause in the course of their work absent a contractual obligation to do so. Technicians are paid by their companies or their clients (many times work is done by subcontractors) to provide communications service, and as long as the tenant has that service, their job as done. Since they do not work for the Alliance member, he has little control over their activities. If building management cannot take reasonable steps in that regard, Alliance members 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), 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 COLR a back-door right of access, property owners and real estate professionals may find that they cannot rely on such agreements any longer.

VII. COLR CONDUCT HAS ALREADY DEMONSTRATED THE POTENTIAL FOR MISCHIEF.

COLRs in their dealings with owners and developers of multiple tenanted properties have tried to characterize the bill as a mandatory access bill or a bill which

provides greater access to multi-tenant environment ("MTE")'s for COLRs than that granted by the legislature. Additionally, COLRs are attempting to use the statute as a means to enhance their leverage in negotiations.[27] The Alliance understands that these threats can be best addressed through an education program by the real estate community with our members, but a clear statement from the Commission as to what does and what does not constitute a ban or mandatory joint purchase that impacts COLR responsibility.

Additionally, the Alliance requests that the Commission expand the proposed rule to articulate specific examples of property owner conduct that does not constitute a physical access barrier or constitute a good faith basis for relief. This request is not made in a vacuum, but is made in response to some overly aggressive interpretations of the COLR relief legislation by a number of incumbents around the state. The Alliance is aware that the Commission staff has met with one of the carriers to inform them of their overly aggressive reading of the statute. While we are grateful for this action, the Commission cannot be expected to meet with every carrier each time they seek to use the statute to their advantage in access negotiations. The Alliance, therefore, requests simple

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[27]These are not the thoughts of a collection of paranoid MTE owners. A example of the press coverage may be found in the June 20, 2006 edition of *CableFAX Daily*, which stated:

> TOP STORY - According to information obtained by trade publication CableFAX Daily, BellSouth is telling builders it may not provision a housing development for phone service if the builder signs an exclusive deal with a rival for video and broadband. In a letter to a builder obtained by CableFAX, BellSouth said the "presence of these types of arrangements with alternate communications providers or infrastructure providers may affect BellSouth's provision of service to the developments." A BellSouth spokesperson said commissions and legislative bodies in its territory are redefining existing carrier of last resort obligations as they apply when exclusive communications agreements are signed with other providers. BellSouth said it recommends any developer considering such an agreement research the current rules and laws to insure they understand how they might impact a consumer's choices for service, the company added.

straight forward rules in which the Commission clarifies that neither the Statute nor any rules adopted in this proceeding:

- Create mandatory access rights to multi-tenanted residential or business properties in favor of the COLR;
- Provide any guarantee for the COLR to provide services beyond basic local telecommunications service in multi-tenanted properties;
- Impair the Constitutionally and statutorily protected rights of Florida property owners to require the COLR to enter into an access agreement to govern their conduct on the property, including the ability to limit the COLR to providing only COLR voice services, so long as the access agreement is not inconsistent with Florida law; and
- Increase the jurisdiction of the Florida Public Service Commission to impose any standards on multi-tenanted communities.

VIII. RECENT BELLSOUTH COMMUNICATIONS REFLECT AN EFFORT TO MISREPRESENT THE IMPACT OF THE STATUTE WITH THE INTENT TO ENHANCE THEIR NEGOTIATING STATUS AND THEREFORE DOCUMENTS THE NEED FOR COMMISSION ACTION.

Two examples of BellSouth's aggressive representations of the Statute can be found in letters the company sent an MTE developer in Florida. The first of these letters was dated July 19, 2006 and states:

> Before BellSouth incurs costs to prepare the property for BellSouth service, we require an authorized representative of the developer or affiliated property owner to sign and return this letter. Once we receive the signed letter, BellSouth will commence planning and engineering activities when appropriate to serve the property. By signing this letter, you agree that:
>
> - *BellSouth will not be restricted in any way from providing any service that it desires to offer at the property.*
> - *The developer, any affiliated property owner or other affiliated party, and any homeowners or condominium association, have not entered into, and do not plan to enter into, an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (i.e., charges for services provided to residents are collected through rent, fees, dues, or other*

similar mechanism), with another service provider for communications services, including any voice, data, or video service.[28]

When the property owner made it clear that BellSouth had overstated the limitations found in the Statute, BellSouth restated what it felt were the operative limitations on a property owner. The Alliance feels that BellSouth once again overstated the case.

BellSouth stated that it need not provide COLR services if there was an exclusive arrangement with an alternative provider.[29] The Statute provides for no such limitation. The Statute says that there must be a contract that requires the property owner to bar the presence of the COLR. The are numerous exclusive marketing arrangements that do not impact the COLR status, as well as the ability of a provider and property owner to enter into exclusive arrangements for video and data services that would not impact a COLR's obligations.

BellSouth stated that it need not provide COLR services if the owner engaged in bulk arrangements or preferred agreements with alternative providers as they would "significantly reduce or entirely eliminate the LEC's take rate for voice service or other communications service from residents" and " "create an 'unlevel playing field' for securing customers." [30] The Alliance believes the Statute requires that all residents or tenants with the multi-tenanted property must be subject to the bulk mandatory prepaid agreement. There is no "unlevel playing field" test. It would also appear that the Statute

[28] See Letter of **Gaines F. Spivey,** Area Manager – Network Services, Bell South to JPI Partners, LLC (July 19, 2006) a copy of which is attached hereto as Exhibit E (emphasis added).
[29] *See* Letter of **Sharon Liebman, Esquire, Senior Attorney**, Bell South to JPI Partners, LLC (August 3, 2006) a copy of which is attached hereto as Exhibit F.
[30] *Id.*

is prospective in nature, while BellSouth's characterization assumes that any preexisting contract would also be impacted by Statute. The Commission should clarify this issue. Also, since it is very likely that there are properties that have executed agreements with AT&T that might trigger the Statute, all parties would benefit from the Commission's guidance on whether the pending merger between AT&T and BellSouth would capture all such AT&T agreements as COLR agreements in the service areas in which BellSouth in the COLR.

Finally BellSouth says that it need not provide service if an MTE owner were to "introduce another provider at the development that offers communications services, including voice services, or offers residents access to those services from another provider."[31]

The Alliance does not understand how BellSouth can read the Statute to provide such an interpretation. The Statute is clear that the owner must not only introduce another provider at the property, it must either agree to bar the COLR from the property or require all tenants to pre-purchase services from that non-COLR provider to relieve the COLR of its obligations.

The Alliance suggests that the Commission examine whether this last claim by BellSouth to determine whether it has violated any of the state's laws. It seems to say that an owner's use of any carrier, regardless of terms or access for the COLR, results in a property not being eligible for COLR services.

BellSouth's position is also not consistent with what BellSouth has said in Florida or in other states on the subject of service by multiple carriers at an MTE. For instance, in

[31] *Id.*

Florida BellSouth told the Senate Interim Study Group that COLR relief should be provided only in "lockouts" where it (as COLR) cannot provide requesting customers service because of lack of access, or where a developer does not allow BellSouth to install its facilities in a new development. The Report explained the BellSouth position as follows:

> BellSouth advocates an approach taken in South Carolina. Generally, this approach includes a prohibition of agreements that restrict or limit access to real property or offer or grant incentives or rewards to an owner contingent upon such restriction.

Senate Report at 6.

In the North Carolina Utility Commission COLR proceeding, BellSouth stated that "Marketing privileges conferred on a carrier under a preferred provider contract ("PPC") are not unreasonably anticompetitive."[32] Yet in its letter to a Florida developer, BellSouth claims not only that such a relationship in anticompetitive but sufficient to void COLR obligations.

BellSouth's conduct is further exposed as being over reaching when seen in light of the straight forward agreement required to be executed by an MTE owner by Verizon.[33] Nowhere in the agreement are any of the representations required by BellSouth.

While the Alliance appreciates the logic of freeing a COLR from its obligations to serve a community to which it cannot obtain an access agreement, the Alliance does not believe the Commission has been empowered by the legislature to force a property owner

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[32] BellSouth Brief before the North Carolina Public Utility Commission filed May 14, 2004 at p. 1. An electronic version is available at the NCUC web site provided above.
[33] A copy of the Verizon agreement was obtained on August 16, 2006 from Steven D. Cohen, Esquire, Associate General Counsel, Verizon Legal Department and attached hereto as Appendix G.

into a choice between the provider of their choice for non-basic telecommunications services or forfeiting services from the COLR.

This Hobson's choice is especially troubling in a residential setting. For while the Federal Communications Commission ("FCC") chose to ban exclusive contracts between office building owners and a common carrier,[34] it did not extend the prohibition to residential properties. In fact, the FCC on more than one occasion has found that exclusive agreements in the residential setting can be pro-competitive. *See, e.g.,* FCC Order No. 97-376, In the Matter of Telecommunications Inside Wiring, Report and Order *et. al*, CS Docket No. 96-184, MM Docket No 92-260, rel. October 17, 1997. ("Cable Inside Wire Order").

IX. CARRIERS DO NOT LIKE MARKET POWER OF DEVELOPERS.

Carriers, most especially COLRs, have for too long enjoyed an unfair advantage over consumers in negotiations over services, fees and support. The ability to grant exclusive contracts and the ability to make bulk purchases on behalf of all residents in the community or MTE have leveled the playing field between developer and carrier, with MTE occupants the ultimate beneficiaries.

In other state proceedings proof of this frustration over the loss of market power is clear for all to see. For example in a Mississippi MTE access docket in which BellSouth

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[34] See FCC Order No. 00-366, In the matter of Promotion of Competitive Networks, First Report and Order, WT Docket No. 99-217, rel Oct. 25, 2000. ("Competitive Networks Order."). The rule reads:

> No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises. (47 C.F.R. Sec. 64.2500)

was a participant, a company named Fiberlink complained to the Mississippi Commission that MTE owners are demanding in exchange for access or an exclusive marketing agreement:

- prices for residents that are below market,
- universal availability of all service to every resident of an MTE; or
- the availability of enhanced services before such services have gained broad market acceptance.

The Alliance is at a loss as to how the Commission or the Florida legislature could find fault with a tool that delivers such consumer benefits. The Alliance respectfully suggests that the Commission recognize that what may be characterized by carriers as an unreasonable demand on the part of an MTE owner oft times leads to both a consumer benefit for the landlord's tenants and a marketable amenity for that particular MTE. Such amenities are required if a property owner is to distinguish their property in the highly competitive real estate market. Should the Commission permit COLR actions to *de facto* ban exclusive contracts, it would deny property owners an invaluable (and perhaps the only) tool to achieve consumer benefits for their tenants. While such an action may serve the needs of the COLR community, it will not serve the needs of the Commission's real constituents – consumers.

The Alliance suggests the real intent of the COLR is not to protect consumers so much as it is to quash facilities-based competition in the residential market where an local exchange carrier ("LEC") such as BellSouth views any exclusive (other than their traditional franchise) agreement as evil ("There can be no legitimate question that PPCs

that designate an exclusive provider of local exchange services are anticompetitive."[35]), competitive providers such as the SECCA[36]note that PPCs (preferred provider contracts) are not "per se anticompetitive."[37]

Provision of advanced telecommunications service to 'second-tier' residential buildings or geographically dispersed residential communities will not occur without the benefits that exclusive contracts provide to providers that are willing to take the capital risk. It is just too expensive to deploy communications networks in these buildings without some means to equalize the higher per-customer cost.

To the extent that permitting the use of exclusive contracts presents some possibility of abuse by incumbent providers, any abuse could be curbed by such measures as prohibiting incumbent providers from unilaterally imposing exclusive access as a condition of service; or by shortening the term of exclusive contracts to the period necessary for a provider to recover its investment. It is the former complaint that real estate owners are increasingly facing. LECs, despite their COLR responsibilities, have withheld or delayed deployment of services to developments that have sought to limit the LEC to the provision of common carrier services. This effort to limit the LEC's services to those for which they have tariffs is not rooted in the property owner's desire to penalize the LEC, but rather in their need to support multiple providers on site by means of granting various carriers exclusive agreements for specific services or bundles of services.

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[35] *See* Comments of BellSouth in Mississippi proceeding filed January 12, 2005 at 2 ("BellSouth"). Emphasis omitted.
[36] *See* Comments of SECCA in Mississippi proceeding filed January 12, 2005 at 5.
[37] Id.

It has been this ability of property owners to drive the market by means of offering exclusive contracts that has led to the continued existence of CLECs in residential settings. And it is this valuable tool that has allowed property owners to demand enhanced services and discounted rates from carriers, both incumbent and competitors alike.

The Alliance is aware tenants in MTEs with exclusive video contracts or PPCs in place are receiving:

- Free or discounted broadband services;
- Free or discounted installation;
- Waivers of credit checks and deposits as the apartment owners have already performed credit checks;
- Rates that are either lower or equal to the retail rates of the local franchised providers; and
- Technological offerings or bundled services superior to those offered in non-MTEs by incumbent or competitive providers.

If the Commission allows a COLR to expand, by its actions, exclusive video contracts or PPCs, it would eliminate perhaps the only tool available to MTE owners to attract a provider of enhanced services or negotiate for the benefit of the property owner's tenants.

X. OTHER JURISDICTIONS FACED WITH THIS EVIDENCE HAVE SOUGHT ALTERNATIVE MEANS TO FREE THE COLR OF OBLIGATIONS THEY CANNOT MEET.

Florida, while a leader on property access issues, is not alone in addressing this issue. The Alliance would also cite to the Commission the experiences of the states of Utah, New York, North Carolina and Mississippi, all of whom have examined the issue of exclusive contracts, PPCs and access ban agreements in the recent past. Like the FCC,

each of these jurisdictions resolved the issue without implicating the property rights of real estate owners in those states.

- In Utah, the Utah Public Service Commission and staff sought to amend the definition of what constituted essential facilities to include the wires of a preferred communications provider ("PCP") located within a development or a building. *See In* the Matter of Essential Facilities and Services, R-746-348-, DAR File No. 26112. That matter has yet to be concluded, but the Alliance has received representation from the staff that it now understands the legal and constitutional limitations under which such actions must be considered
- In New York [Case 00-C-1945, VIP Building Connection Product, Task Force Report (May 30, 2002)], as a means to promote competition, the staff of the New York Public Service Commission examined access to in-building loops and other inside wires. The staff presided over numerous industry meetings to facilitate market resolution but, throughout the report and proceedings, repeatedly acknowledged the rights of property owners to exclude and the legal and constitutional restrictions on access to buildings.
- In North Carolina, the North Carolina Utility Commission ("NCUC") reviewed an almost identical proposed order to the terms outlined in House Bill 817. *See* In the Matter of Competitive Access to Commercial and Residential Developments, Dkt. No. P-100, Sub 152, (rel. 10/29/2004). The NCUC rejected not only bans on exclusive and preferred provider contracts but also proposed bans on weighted commissions. BellSouth was a strong proponent for the retention of all three contract forms, and sought only the ban of contracts based on the physical exclusion of a carrier.[38] The NCUC was guided by the continued sanctity of private property.

XI. RESEARCH REVEALS THAT TENANT ACCESS HAS NEVER BEEN A PROBLEM.

The Commission and Florida Senate is their research on the subject both concluded that there was not a systematic denial of access to a tenant's choice of competitive carrier. That research also revealed that access to the COLR was a given. For this reason the Alliance has never agreed that that any preferred provider legislation or regulation is required. Still, the legislature has acted, and the Commission must craft rules to meet the mandate of the Florida Assembly. The Alliance shares the following research

[38] *See* BellSouth Brief before the North Carolina Public Utility Commission filed May 14, 2004 An electronic version is available at the NCUC web site provided above.

with the Commission in the hope that as it crafts its rules to meet the legislature's intent, the Commission's focus should be not on "carrier access to tenants," but rather "tenant access to competitors." While this may appear to be a matter of semantics, Alliance members assert it is far from so. For too long the focus has been on carriers' claims and complaints, not on consumers. When it is the tenant that seeks access for a carrier, the record is clear that such access has been generally provided.[39]

A. Surveys of Office Tenants Show that They Are Receiving Communications Services from the Providers of their Choice, and that Property owners and Real Estate Professionals Do Not Prevent Tenants from Obtaining those Services.

The Alliance commissioned several surveys to document the relationship between the real estate and telecommunications industry. The first of these surveys, conducted by Charlton Research, Inc. (the "Charlton Survey"),[40] was submitted to the FCC. Among other things, the Charlton Survey found:

- Two-thirds of property owners and real estate professionals had never denied access to any competitive carrier, let alone the COLR, seeking space in their building, regardless of whether the carrier was under contract with a tenant.
- Of the 36% that indicated they had, on at least one occasion, denied a carrier (i.e.,

[39] In addition to the following research, the Alliance would remind the Commission of the tenant research BOMA Florida provided to the Commission in 1998 in the building access docket. *See* Florida Public Service Commission, *Access by Telecommunications Companies to Customers in Multitenant Environments,* Comments of BOMA Florida (1998).

[40] In August 1999, for filing at the Federal Communications Commission, the Alliance commissioned a Charlton Research, Inc. to conduct a survey regarding access granted to competitive telecommunications service providers by real estate owners and managers. *In the Matter of Promotion of Competitive Networks*, Joint Comments of Property owners and real estate professionals and Managers Association et al., WT 99-217 (filed Aug. 27, 1999), at Exhibit C. In addition, in response to requests for additional data made by the FCC staff during the *ex parte* period, BOMA financed and submitted an additional study regarding demand for telecommunications service by tenants and building owner responses to such demands. "Partnering in the Information Age: Critical Connections," submitted to the Commission as *In the Matter of Promotion of Competitive Networks, Ex Parte* Letter from Real Access Alliance, WT 99-217 (June 30, 2000).

they may have allowed other carriers into the building), two factors were found to be in common. First, the carriers were seeking to access the building on a speculative basis, i.e. they had no tenants as customers; and two, they refused to pay a competitive rent. (Neither of these circumstances speaks to COLR access to buildings or developments.)

The insight from the Charlton Survey is that property owners and real estate professionals accede to tenants' request for access on behalf of a carrier. This was further demonstrated in a nationwide survey conducted for the Alliance by Knowledge Systems and Research in January and February of 2001 (the "KS&R Survey.")[41] This survey was submitted to the FCC in 2001, and conclusively demonstrated both that tenants are not having a problem obtaining telecommunications service from competitive providers, let alone the COLR, and that property owners and real estate professionals are not standing in the way.

The survey sample included urban, suburban, and rural businesses.[42] On average, a survey respondent was located in a two or three story building, which is typical of commercial buildings across the country.[43] The survey also reached consumers in much larger buildings. Respondents included retail, professional services, finance, insurance, real estate, healthcare, manufacturing, educational, government, not-for-profit, consulting, wholesale trade, construction, transportation, utilities, leisure, lodging, tourism, and other service industry businesses.

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[41] Some may criticize the survey for including only business tenants. The residential and commercial markets, however, are very different in terms of both cost structure and revenue potential. The profit potential of direct facilities-based competition in the residential market is much lower, and consequently very few providers have expressed even the remotest interest in it.

[42] KS&R Survey at 21. 53% of respondents were located in urban areas, 34% in suburban, 13% in rural areas. *Id.*

[43] *Id* at 21. Average number of floors in a respondent's building was 3.6, and the median number of floors was 2.

The survey was conducted by telephone and consisted of twelve to fifteen minute interviews with 454 senior decision-makers for each business. The survey had a margin of error of +/-4.6%. The results revealed:

- Almost all business tenants are either satisfied or very satisfied with their current choices of telecommunications service providers.
- Almost all business tenants are aware that they can choose alternative telecommunications providers.
- The vast majority of business tenants who chose an alternative provider were able to receive service from the alternative provider and were satisfied with their alternative service.
- Only three respondents (less than 1% of those surveyed) reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.
- A substantial percentage of business tenants would move at the end of their lease if their telecommunications needs could not be met at their current location.
- The median lease term is three years, and the median time remaining on a lease is one year.

The KS&R Survey demonstrated that commercial building tenants are aware that they can choose to receive services from alternative service providers.[44] One hundred six respondents (23%) have placed at least one request for service with someone other than their incumbent telecommunications provider in the past three years.[45] Among these 106 respondents, 87% report that the alternative service provider was able to accept all of their service requests.[46] Of 100 respondents that had service requests accepted by alternative telecommunications providers, 87% report that that they received service by the agreed-upon date.[47] For those that did not receive service by the agreed upon date, on average, the problem was resolved within one month.[48]

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[44] *Id.* at 12.
[45] *Id.* at 12.
[46] *Id.* at 13. 9% reported that some service requests were accepted, and some were denied. 2% reported that service requests were denied. *Id.*
[47] *Id.* at 14.
[48] *Id.* at 14.

B. Business Tenants Overwhelmingly Report That Property Owners and Real Estate Professionals Are Not Impeding Access to Alternative Service Providers.

The KS&R Survey also confirmed that property owners and real estate professionals are not blocking tenant access to competitive telecommunications services. Only 3 respondents -- less than 1% of those surveyed -- answered "yes" to the question: "Has your building management ever denied a request by your company to obtain telecommunications service from a provider not already serving your building?"[49]

Even if the handful of respondents who did not have the information to answer the question is factored in, the survey still demonstrates that 95% of all surveyed business tenants have never had the building management deny them their choice of telecommunications service provider. In other words, property owners and real estate professionals and managers are not inhibiting competition, and are not a bottleneck to building access by telecommunications service providers.

C. Business Tenants Are Willing To Move If Their Telecommunications Needs Are Not Met.

The risk that commercial tenants will leave if their telecommunications needs are not met is significant. Thirty-nine percent of 454 survey respondents replied that they would consider leaving the building at lease renewal time if their telecommunications needs were not met.[50] Among survey respondents, the average commercial tenant lease is 3.6 years (median term is 3 years), and the average commercial tenant has 2.1 years

[49] *Id.* at 16. 4% of respondents did not know if the building management ever denied a request to obtain service from a service provider not already providing service within the building. *Id.*

[50] *Id.* at 17.

remaining on the lease (median remaining length is 1 year). Consequently, this is a very real threat.

XII. CAN A COLR, OR ANY CARRIER THAT OFFERS WIRELESS OR VOIP SERVICES BE PHYSICALLY DENIED ACCESS: ARE EXCLUSIVE DEALS REALLY EXCLUSIVE?

The members of the Alliance are not experts on the state of the communications environment. Still, as casual observers of the market, we are surprised that a COLR in Florida could actually be denied access to consumers. The Alliance in under the impression that the every COLR in Florida also offers, or has a corporate affiliate that offers, cell services and VoIP services, both of which are capable of providing basic telecommunications services. Since both services do not require access to the property to deploy lines, can it be said that any carrier that has wireless or IP services is denied access even in the presence of an exclusive agreement between a building owner and a communications provider?

The Alliance also asks whether technology had not already made moot the question of exclusive contracts. Consumers have access to at least three different types of providers and while a property owner can still honor its PPC. For example, pursuant to 47 C.F.R. 1.4000 (OTARD rules), MTE tenants are guaranteed the right to install satellite dishes within their lease space to send and receive voice, video and data services. In addition to satellite services, consumers residing in an MTE governed by an exclusive agreement have access to cell phones and a VoIP service available over the PCP's or satellite provider's broadband network.

The Alliance asks the Commission to consider the numerous alternatives available to consumers, especially since BellSouth is the owner of the second largest cell company in the nation and announced that its financial status has been strengthened by its cellular operations.[51]

XIII. CONCLUSION.

In light of the above, the proposed rule needs to be expanded to clarify that neither the Statute nor any rules adopted in this proceeding:

- Create mandatory access rights to multi-tenanted residential or business properties in favor of the COLR,
- Provide any guarantee for the COLR to provide services beyond basic local telecommunications service in multi-tenanted properties.
- Impair the Constitutionally and statutorily protected rights of Florida property owners to require the COLR to enter into an access agreement to govern their conduct on the property, including the ability to limit the COLR to providing only COLR voice services, so long as the access agreement is not inconsistent with Florida law.
- Increase the jurisdiction of the Florida Public Service Commission to impose any standards on multi-tenanted communities.

The Alliance further requests that the Commission expand the proposed rule to outline how an MTE property owner goes about petitioning for the reinstatement of COLR obligations. The Statute provides for such a fall back position, but the proposed rules does not contain any guidance in this area.

Finally, the Alliance respectfully requests that the Commission seek clarification from the Florida Assembly, should the Commission not feel empowered to address the ambiguities arising from the Statute.

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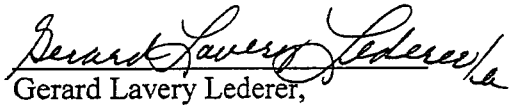
[51] John Curran, BellSouth ***CFO: Wireless Merger Paying Off***, TR Daily (January 25, 2005).

Respectfully submitted,



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Attorney for the Florida Real Estate Alliance

September 13, 2006

EXHIBIT A

MEMBERS OF THE ALLIANCE

- Founded in 1907, the Building Owners and Managers Association (BOMA) International is an international federation of more than 90 local associations and affiliated organizations. BOMA's 19,000-plus members own or manage more than 9 billion square feet of commercial properties in North America and abroad. The mission of BOMA International is to enhance the human, intellectual and physical assets of the commercial real estate industry through advocacy, education, research, standards and information.

- The Building Owners and Managers Association of Florida (BOMA Florida) consists of over 1,200 members representing the majority of office space and buildings in the State of Florida. This organization not only includes Owners/ Property Managers, but, various types of associate members servicing the commercial industry such as HVAC, engineers, carpet suppliers, roofing contractors, appraisers, painters, alarms, lawyers, etc. Through their business activities, members of BOMA Florida represent the third largest sales tax-paying base in the State of Florida.

- The Institute of Real Estate Management ("IREM") educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in real estate management, serves as an advocate on issues affecting the industry, and enhances and supports its members' professional competence so they can better identify and meet the needs of those who use their services. IREM was established in 1933 and has 10,000 members across the country.

- Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. Its more than 54,000 members in the United States, Canada, and over 96 other countries include owners, developers, retailers, lenders, and other real estate professionals. ICSC's nearly 50,000 U.S. members represent almost all of the 47,000 shopping centers in America.

- The National Apartment Association ("NAA") has been serving the apartment industry for 60 years. It is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. NAA has nearly 50,000 professionals who own manage more than six million apartments.

- The National Association of Industrial and Office Properties ("NAIOP") is the trade association for developers, owners, and investors in industrial, office, and related commercial real estate. NAIOP has over 13,500 members in 50 chapters throughout 46 North American (5 of which are in Florida). NAIOP offers its

members business and networking opportunities, education programs, research on trends and innovations, and strong legislative representation.

- The National Association of Real Estate Investment Trusts ("NAREIT") is the national trade association for real estate investment trusts (REITs) and publicly-traded real estate companies. Its members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals that advise, study and service those businesses.

- The National Association of Realtors ("NAR") is the nation's largest professional association, representing more than 720,000 members. Founded in 1908, the NAR is composed of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. The association works to preserve the free enterprise system and the right to own, buy, and sell real property.

- The National Multi-Housing Council ("NMHC") represents the interests of the larger and most prominent firms in the multi-family rental housing industry. NMHC's members are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance, and management of such properties.

- The Real Estate Roundtable ("RER") provides Washington representation on national policy issues vital to commercial and income-producing real estate. RER addresses capital and credit, tax, environmental, technology and other investment-related issues. RER members are senior executives from more than 200 U.S. public and privately owned companies across all segments of the commercial real estate industry.

EXHIBIT B

An act relating to communications; amending s. 364.051, F.S., relating to price regulation; allowing a telecommunications company to publicly publish price lists for nonbasic services; providing guidelines for such publication; allowing 1 day's notice for price changes to nonbasic services; deleting a company's option to elect that its basic services be treated as nonbasic services; requiring a company to request that the Public Service Commission lessen its service quality regulation; providing criteria for granting a petition to change regulatory treatment of retail services; amending s. 364.025, F.S.; providing definitions; providing that a local exchange telecommunications company obligated to serve as the carrier of last resort is not obligated to provide basic local telecommunications service to customers in a multitenant business or residential property under certain circumstances; requiring the local exchange telecommunications company to notify the Public Service Commission when it is relieved of the obligation to provide service; providing for the local exchange telecommunications company to request a waiver of its carrier of last resort obligation from the commission; providing for carrier of last resort obligation to apply when specified conditions cease to exist; providing for effect

of the act on the commission's jurisdiction; providing an appropriation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (5), (6), and (7) of section 364.051, Florida Statutes, are amended to read:

364.051 Price regulation.--

(5) NONBASIC SERVICES.--Price regulation of nonbasic services shall consist of the following:

(a) Each company subject to this section shall, at its option, maintain tariffs with the commission or otherwise publicly publish ~~containing~~ the terms, conditions, and rates for each of its nonbasic services, and may set or change, on 1 day's ~~15 days'~~ notice, the rate for each of its nonbasic services. For a company electing to publicly publish the terms, conditions, and rates for each of its nonbasic services, the commission may establish guidelines for the publication. The guidelines may not require more information than what is required to be filed with a tariff. The~~, except that a~~ price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period until there is another provider providing local telecommunications service in an exchange area at which time the price for any nonbasic service category may be increased in an amount not to exceed 20 percent within a 12-month period, and the rate shall be presumptively valid. However, for purposes of this subsection, the prices of:

1. A voice-grade, flat-rate, multi-line business local exchange service, including multiple individual lines, centrex

lines, private branch exchange trunks, and any associated hunting services, that provides dial tone and local usage necessary to place a call within a local exchange calling area; and

2. Telecommunications services provided under contract service arrangements to the SUNCOM Network, as defined in chapter 282,

shall be capped at the rates in effect on July 1, 1995, and such rates shall not be increased prior to January 1, 2000; provided, however, that a petition to increase such rates may be filed pursuant to subsection (4) utilizing the standards set forth therein. There shall be a flat-rate pricing option for multi-line business local exchange service, and mandatory measured service for multi-line business local exchange service shall not be imposed. Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

(b) The commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of nonbasic services with revenues from

basic services, and ensuring that all providers are treated fairly in the telecommunications market. The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and nonvolume-sensitive costs.

(c) The price charged to a consumer for a nonbasic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

(6) After a local exchange telecommunications company that has more than 1 million access lines in service has reduced its intrastate switched network access rates to parity, as defined in s. 364.164(5), the local exchange telecommunications company's ~~basic local telecommunications service may, at the company's election, be subject to the same regulatory treatment as its nonbasic services. The company's~~ retail service quality requirements that are not already equal to the service quality requirements imposed upon the competitive local exchange telecommunications companies shall at the company's request to the commission ~~thereafter~~ be no greater than those imposed upon competitive local exchange telecommunications companies unless the commission, within 120 days after the company's request ~~election~~, determines otherwise. In such event, the commission may grant some reductions in service quality requirements in some or all of the company's local calling areas. The commission may not

impose retail service quality requirements on competitive local exchange telecommunications companies greater than those existing on January 1, 2003.

(7) After ~~If~~ a local exchange telecommunications company that has more than 1 million access lines in service has reduced its intrastate switched network access rates to parity, as defined in s. 364.164(5) ~~elects, pursuant to subsection (6), to subject its retail basic local telecommunications services to the same regulatory treatment as its nonbasic services~~, the local exchange telecommunications company may petition the commission for regulatory treatment of its retail services at a level no greater than that imposed by the commission upon competitive local exchange telecommunications companies. The local exchange telecommunications company shall:

(a) Show that granting the petition is in the public interest;

(b) Demonstrate that the competition faced by the company is sufficient and sustainable to allow such competition to supplant regulation by the commission; and

(c) ~~(b)~~ Reduce its intrastate switched network access rates to its local reciprocal interconnection rate upon the grant of the petition.

The commission shall act upon such a petition within 9 months after its filing with the commission. ~~In making its determination to either grant or deny the petition, the commission shall determine the extent to which the level of competition faced by the local exchange telecommunications company permits and will continue to permit the company to have its retail services regulated no differently than the~~

~~competitive local exchange telecommunications companies are then being regulated.~~ The commission may not increase the level of regulation for competitive local exchange telecommunications companies to a level greater than that which exists on the date the local exchange telecommunications company files its petition.

Section 2. Subsection (6) is added to section 364.025, Florida Statutes, to read:

364.025 Universal service.--

(6)(a) For purposes of this subsection:

1. "Owner or developer" means the owner or developer of a multitenant business or residential property, any condominium association or homeowners' association thereof, or any other person or entity having ownership in or control over the property.

2. "Communications service provider" means any person or entity providing communications services, any person or entity allowing another person or entity to use its communications facilities to provide communications services, or any person or entity securing rights to select communications service providers for a property owner or developer.

3. "Communications service" means voice service or voice replacement service through the use of any technology.

(b) A local exchange telecommunications company obligated by this section to serve as the carrier of last resort is not obligated to provide basic local telecommunications service to any customers in a multitenant business or residential property, including, but not limited to, apartments, condominiums, subdivisions, office buildings, or office parks, when the owner or developer thereof:

1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;

2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;

3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or

4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property.

(c) The local exchange telecommunications company relieved of its carrier-of-last-resort obligation to provide basic local telecommunications service to the occupants or residents of a multitenant business or residential property pursuant to paragraph (b) shall notify the commission of that fact in a timely manner.

(d) A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the

commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

(e) If all conditions described in subparagraphs (b)1.-4. cease to exist at a property, the owner or developer requests in writing that the local exchange telecommunications company make service available to customers at the property and confirms in writing that all conditions described in subparagraphs (b)1.-4. have ceased to exist at the property and the owner or developer has not arranged and does not intend to arrange with another communications service provider to make communications service available to customers at the property, the carrier-of-last-resort obligation under this section shall again apply to the local exchange telecommunications company at the property; however, the local exchange telecommunications company may require that the owner or developer pay to the company in advance a reasonable fee to recover costs that exceed the costs that would have been incurred to construct or acquire facilities to serve customers at the property initially, and the company shall have a reasonable period of time following the request from the owner or developer to make arrangements for service availability. If any conditions described in subparagraphs (b)1.-4. again exist at the property, paragraph (b) shall again apply.

(f) This subsection does not affect the limitations on the jurisdiction of the commission imposed by s. 364.011 or s. 364.013.

Section 3. The sum of $800,000 of recurring funds from the General Revenue Fund is appropriated to the Office of Public Counsel for the 2006-2007 fiscal year.

Section 4. This act shall take effect upon becoming a law.

EXHIBIT C

COLR SECTIONS OF INDIANA HB 1279[52]

Sec. 7. (a) After March 27, 2006, a communications service provider shall not enter into any contract, agreement, or other arrangement that does any of the following:

(1) Requires any person to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service to Indiana customers; or

(B) access to real property by another communications service provider.

(2) Offers or grants incentives or rewards to an owner of real property if the incentives or rewards are contingent upon the property owner's agreement to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service on the property; or

(B) access to the owner's real property by another communications service provider.

A contract, an agreement, or any other arrangement that violates this section is void if the contract, agreement, or arrangement is entered into after March 27, 2006. However, a contract, an agreement, or any other arrangement that otherwise violates this section remains in effect until such time as it would normally terminate or expire if the contract, agreement, or arrangement is entered into before March 28, 2006.

(b) This section does not prohibit a communications service provider and a subscriber from entering into any lawful contract, agreement, or other arrangement concerning the communications
service offered by the communications service provider to the subscriber.

(c) Upon:

(1) a complaint filed by:

(A) another communications service provider;

(B) a subscriber or potential subscriber of communications service;

(C) the utility consumer counselor; or

(D) any class satisfying the standing requirements of IC 8-1-2-54; or

(2) the commission's own motion;

the commission may investigate whether a communications service provider has violated this section. If, after notice and an opportunity for hearing, the commission determines that the communications service provider has violated this section, the commission may issue an order imposing a civil penalty of not more than five hundred dollars ($500) for

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[52] A full copy of the bill and its legislative history may be found at http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2006&session=1&request=getBill&docno=1279

each violation. For purposes of this subsection, each day that a contract, an agreement, or an arrangement prohibited by this section remains in effect constitutes a separate violation.

Chapter 32.4. Telecommunications Providers of Last Resort

Sec. 16. (a) If a provider, other than the incumbent local exchange carrier, operates under an arrangement by which the provider is the exclusive provider of basic telecommunications service in a particular geographic area, building, or group of residences and businesses, the incumbent local exchange carrier is relieved of any provider of last resort obligations that the incumbent local exchange carrier would ordinarily have with respect to the particular geographic area, building, or group of residences and buildings.

(b) If:

(1) a provider with an exclusive service arrangement described in subsection (a) decides to cease operations in all or part of the particular geographic area, building, or group of residences and buildings that the provider serves under the arrangement; and

(2) the incumbent local exchange carrier:

(A) has insufficient facilities to serve the affected customers of the exiting provider; and

(B) elects to purchase the facilities of the exiting provider;

the incumbent local exchange carrier has twelve (12) months to make any modifications necessary to the purchased facilities to allow the incumbent local exchange carrier to serve the affected customers of the exiting provider. The incumbent local exchange carrier may apply to the commission for an extension of the period allowed under this subsection, and the commission shall grant the extension upon good cause shown by the incumbent local exchange carrier.

(c) If:

(1) a provider with an exclusive service arrangement described in subsection (a) decides to cease operations in all or part of the particular geographic area, building, or group of residences and buildings that the provider serves under the arrangement; and

(2) the incumbent local exchange carrier:

(A) has insufficient facilities to serve the affected customers of the exiting provider; and

(B) elects not to purchase the facilities of the exiting provider;

the incumbent local exchange carrier has twelve (12) months to deploy an approved alternative technology necessary to allow the incumbent local exchange carrier to serve the affected customers of the exiting provider. The incumbent local exchange carrier may apply to the commission for an extension of the period allowed under this subsection, and the commission shall grant the extension upon good cause shown by the incumbent local exchange carrier.

Chapter 32.6. Access to Real Property by Communications Service Providers

Sec. 8. (a) Notwithstanding IC 8-1-32.4-14, the commission may not require a communications service provider, including a provider of last resort, to provide any communications service to the occupants of multitenant real estate if the owner, operator, or developer of the multitenant real estate does any of the following to the benefit of

another communications service provider:

(1) Permits only one (1) communications service provider to install the provider's facilities or equipment during the construction or development phase of the multitenant real estate.

(2) Accepts or agrees to accept incentives or rewards that:

(A) are offered by a communications service provider to the owner, operator, developer, or occupants of the multitenant real estate; and

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(B) are contingent upon the provision of communications service by that provider to the occupants of the multitenant real estate, to the exclusion of any services provided by other communications service providers.

(3) Collects from the occupants of the multitenant real estate any charges for the provision of communications service to the occupants, including charges collected through rent, fees, or dues.

(4) Enters into an agreement with a communications service provider that is prohibited by section 7 of this chapter

EXHIBIT D

Operative Sections of HB 817 (as introduced)

(b) A telecommunications company that is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201 and is otherwise obligated by this section to serve as the carrier of last resort is not obligated to provide basic local telecommunications service to any customers in a multitenant business or residential property, including, but not limited to, apartments, condominiums, subdivisions, office buildings, or office parks, when the owner or developer thereof:

1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of an eligible telecommunications carrier, during the construction phase of the property;

2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the eligible telecommunications carrier;

3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the eligible telecommunications carrier, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues;

4. Restricts or limits an eligible telecommunications carrier's access to the property or enters into an agreement with a communications service provider that restricts or limits an eligible telecommunications carrier's access to the property or that grants incentives or rewards to such owner or developer contingent upon such restriction or limitation; or

5. Restricts or limits the types of services that may be provided by an eligible telecommunications carrier or enters into an agreement with a communications service provider which restricts or limits the types of services that may be provided by an eligible telecommunications carrier.

EXHIBIT E

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Sanford, Florida 32771

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Fax: 407 327-2402
Pager: 800 552-3813
Mobile: 407 865-4226
Internet Gaines.Spivey@bellsouth.com

Gaines F. Spivey
Area Manager – Network Services

July 19, 2006

JPI Partners, LLC
Henry Williams Pye
Assistant Vice President
Resident Services and Technology
311 Marist Court
Durham, North Carolina 27713

RE: College Suites at Orpington

Dear Mr. Pye:

This letter is a follow-up to conversations you have had with Glenn Prunyi from our Engineering Group regarding BellSouth's service provisioning to the referenced project. Included in this letter is important information regarding BellSouth's requirements preparatory to our commencing work on this project. We thank you for considering BellSouth and look forward to working with your team.

Before BellSouth incurs costs to prepare the property for BellSouth service, we require an authorized representative of the developer or affiliated property owner to sign and return this letter. Once we receive the signed letter, BellSouth will commence planning and engineering activities when appropriate to serve the property. By signing this letter, you agree that:

- The developer or its affiliated property owner will grant to BellSouth, at no cost, easements for the placement of its cables and equipment within the property at mutually agreeable locations. To meet the estimated service dates of this project, easements must be granted and recorded by September 1, 2006.
- BellSouth will be provided with site plans and valid addresses for the project by September 1, 2006. The plans will include lot lines and measurements.
- To the extent required by applicable laws and rules, or as otherwise agreed upon, the developer or its affiliated property owner will provide support structures necessary for the installation of BellSouth's facilities (for example, conduits, trenches, pullboxes, equipment space, backboards, electrical power, as applicable.)
- BellSouth will not be restricted in any way from providing any service that it desires to offer at the property.
- The developer, any affiliated property owner or other affiliated party, and any homeowners or condominium association, have not entered into, and do not plan to enter into, an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (i.e., charges for services provided to residents are collected through rent, fees, dues, or other similar mechanism), with another service provider for communications services, including any voice, data, or video service.

In addition, if (insert developer's name) or any affiliated party or homeowners or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (as defined above) with another service provider for communications services, including any voice, data, or video service, within 18 months of the date of first occupancy, (insert developer name) will be responsible to BellSouth for the then unrecovered costs associated with the engineering and installation of the initial facilities.

Please sign where indicated below and return the signed letter to me by August 4, 2006. By signing this letter, you agree that, if BellSouth proceeds with engineering and construction work and ultimately does not provide service to residents due to any of the conditions above not being met, or other conditions that limit BellSouth's ability to provide service, then you will reimburse BellSouth for the costs of such work. This cost recovery would be in addition to any other remedies available to BellSouth. You will promptly inform BellSouth if the conditions are not met or of any limiting conditions.

The person signing below must be a representative who is authorized to sign for your company and by signing below represents that he or she has that authority.

Thank you for choosing BellSouth. If you have any questions, please contact me at 407-327-0530

Sincerely,

BellSouth Telecommunications, Inc.

_____
Gaines F. Spivey

Accepted and Agreed By:

JPI Partners, LLC

By:_____ _____
Authorized Representative

Name:_____

Title:_____

Date:_____

EXHIBIT F

BellSouth Telecommunications, Inc.
Museum Tower Building
150 West Flagler Street
Suite 1910
Miami, FL 33130

sharon.liebman@bellsouth.com

Sharon R. Liebman
Senior Attorney

305 347 5570
Fax 305 375 0209

August 3, 2006

VIA U.S. MAIL AND E-MAIL
HPye@JPI.com

Henry Pye
Assistant Vice President
Resident Services and Technology
JPI Partners, LLC
600 East Las Colinas Boulevard, Suite 1800
Irving, Texas 75039

Re: College Suites at Orpington

Dear Mr. Pye:

We received your July 20, 2006 letter to Gaines Spivey regarding the above development under construction by JPI. It is our understanding that the development will include 156 apartment units, each with 4 bedrooms (to be rented by the bedroom to college students) and that first residents are expected in/around March 2007.

Your letter advises that JPI plans to offer basic video and data services to residents and to include the cost of those services in their rent. JPI concludes that the referenced bulk offerings do not satisfy Section 364.025(6)(b)1-4, relating to relief from carrier of last resort obligations (or COLR).

As you know, in return for consideration to developers, developers are entering into agreements with alternate communications providers to serve developments with increasing frequency. The agreements may:

- restrict the ability of the carrier with COLR in the territory or the "LEC" to provide service to residents, due to exclusive arrangements with the alternate provider;
- significantly reduce or entirely eliminate the LEC's take rate for voice or other communications services from residents, due to "bulk" arrangements with the alternate provider or preferred arrangements that create an "unlevel playing field" for securing customers; and/or
- introduce another provider at the development that offers communications services, including voice services, or offers residents access to those services from another provider.

In enacting Section 364.025, Florida Statutes during the recent 2006 legislative session, the Florida Legislature recognized that COLR relief is appropriate under certain circumstances where the above agreements exist or where they or other factors affect the LEC's provision of service to a development. The COLR obligation was established at a time when the LEC was the sole source for communications service; the legislation recognizes that the availability of service from alternate providers due to arrangements made by developers erodes the need for a carrier of "last resort."

Your letter did not mention paragraph (6)(d) in the legislation. This paragraph allows a company like BellSouth to petition the Florida Public Service Commission for relief from COLR for "good cause shown based upon the facts and circumstances of provision of service to the multi-tenant business or residential property." The paragraph may be relevant for College Suites at Orpington.

Your letter also mentions the developer letter agreement that BellSouth asked JPI to sign. Given the agreements that JPI has entered into with an alternate provider, we understand that JPI will not sign the letter.

We will provide additional feedback after considering the information that you provided to us in your July 20 letter.

Sincerely,

Sharon Liebman

EXHIBIT G

License Agreement

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned Licensor hereby grants unto VERIZON _____ INC. ("Verizon"), having an address at _____, its successors and assigns, the right, privilege and authority to construct, reconstruct, relocate, replace, operate, repair, maintain and at its discretion remove the following facilities:

Fiber optic network facilities, including but not limited to: Fiber optic cables, drops, jumpers, splice enclosures, distribution hubs and distribution terminals, optical network terminals, power supply units, battery backup units, innerducts, wall plates, conduits, raceways and moldings, copper cables and wires, coaxial cables and wires, jacks, interconnection devices, interface modules, optical network equipment cabinets, and associated equipment and facilities. [adjust as needed to reflect site specific facilities requirements]

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within the building(s) which the undersigned owns or in which the undersigned has an interest, located at _____ in the City/Town of _____, State of _____ (the "Building").

If Verizon installs conduits, raceways or molding in the Building, then it shall be installed at locations and with materials approved by Licensor. Upon installation, such conduits, raceways and molding will be deemed building fixtures and will be owned by the owner of the Building, subject to Verizon's right to remove, replace and maintain them. The fiber optic, copper and coaxial cables and lines and any flexible microducts installed by Verizon within such conduits, raceways and molding will not be building fixtures and will continue to be owned by Verizon. Licensor shall not move, disturb, alter or change such cables and lines or connect, directly or indirectly, any telephones, computers, televisions or other devices to such cables and lines. If molding is installed, it may cover the conduits and raceways containing Verizon's cables and lines as well as any adjacent conduits and raceways owned by Licensor or any cable TV or other communications company serving the Building, and Licensor shall have the right to remove, replace and maintain such molding and shall also have the right to allow its contractors and any cable TV or other communications company serving the Building to remove, replace and maintain such molding.

It is understood that the work shall be performed in a workmanlike manner and that any damage to the premises caused thereby shall be corrected by Verizon and that while constructing, reconstructing, relocating, replacing, operating, repairing, maintaining and removing its facilities Verizon shall hold harmless and indemnify the Licensor from physical injury to its property, its employees or the public which may occur at any time through the negligence of Verizon.

Licensor understands that Verizon's obligation to furnish service to occupants in the Building is contingent upon Licensor allowing Verizon to maintain its fiber optic network facilities in the Building. However, at any time after the fifth anniversary of the date of this Agreement, Licensor may, upon 120 days' prior written notice to Verizon, terminate this Agreement.

This Agreement is binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

In witness whereof, the undersigned has duly executed this Agreement as of _____, 20 ___.

LICENSOR: _____

Name:

Title: