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October 4, 2006

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**VIA HAND DELIVERY**

Blanca S. Bayó, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Docket No. 060554-TL – Carrier-of-Last-Resort; Multitenant Business and Residential Property Rule Development**

Dear Ms. Bayó:

CMP _____
COM _____
CTR _____
ECR _____
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OPC _____
RCA _____
SCR _____
SGA _____
SEC 1
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Enclosed for filing, please find an original and 7 copies of Lennar Developers, Inc. post-workshop comments regarding proposed Rule 25-4.084, Florida Administrative Code.

Your assistance in this matter is greatly appreciated.

Sincerely,

Beth Keating

**Beth Keating**
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In re: Carrier-of-Last-Resort; Multitenant Business and Residential Property Rule Development | DOCKET NO. 060554-TL<br>FILED: OCTOBER 4, 2006 |

**POST-WORKSHOP COMMENTS ON PROPOSED RULE 25-4.084, FLORIDA ADMINISTRATIVE CODE**

In accordance with the schedule established for this Docket, and Rule 28-103.004(7), Florida Administrative Code, Lennar Developers, Inc. ("LDI") by and through its undersigned counsel, hereby files these Comments regarding Proposed Rule 25-4.084, regarding carrier-of-last-resort ("COLR") obligations for multi-tenant businesses and residential properties, and thus states as follows:

1. Lennar Developers, Inc. is a wholly-owned subsidiary of Lennar Corporation. LDI specializes in managing the design, marketing and development of luxury high-rise condominiums, and conducts business throughout Florida.

2. Lennar Corporation was founded in 1954 in Miami, Florida, and is organized under the laws of the State of Delaware. It is a $10.5 billion multidivisional, national homebuilding company, and financial services provider. Through its financial services operations, Lennar also provides high-speed Internet and cable television services.

3. The name, address and telephone number of LDI, which offers these comments, are as follows:

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Miami, Florida 33172
(305) 559-4000

4. LDI's representatives' names, addresses, and telephone numbers are:

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P.O. Box 1877
Tallahassee, FL 32302-1877
(850) 521-8002

and

James M. Tobin
Law Office of James M. Tobin
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111
(415) 732-1700

5. LDI appreciates the opportunity to provide further comment with regard to this proposed rule, as the potential impact on LDI's business is significant. LDI also appreciates the full and open discussion of this proposed rule that was had at the Rule Development workshop held on September 14, 2006. In these comments, LDI echoes many of the comments offered during that workshop by the Florida Real Access Alliance and the International Council of Shopping Centers, as well as reemphasizes our own comments offered at the workshop.

6. During this past Legislative Session, the 2006 Legislature passed Senate Bill 142, which was ultimately approved by the Governor. The new law modifies Section 364.025, Florida Statutes, including the addition of four (4) specific circumstances in which the carrier-of-last-resort obligation will be deemed automatically eliminated based on the actions of the owner or developer of a property. The obligation is eliminated when the owner or developer:

- 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;

- 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;

- 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

- 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.

Section 364.025(6)(b)(1 – 4), Florida Statutes. If the circumstances set forth above occur, the local exchange telecommunications company must notify the Commission of that fact in a timely manner. Section 364.025(6)(c), Florida Statutes.

7. In situations where the circumstances set forth above do not exist to automatically eliminate the carrier-of-last-resort obligation, the new law allows the local exchange telecommunications company to seek a waiver of its 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." This provision requires notice to the affected building owner or developer, and the Commission is required to rule on such a petition within 90 days. Section 364.025(6)(d), Florida Statutes.[1]

8. LDI urges the Commission to take particular note of the fact that the new law, pursuant to which the subject rule will be adopted, defines "communications service" as, "voice service or voice replacement service through the use of any technology." Section 364.025(a)(3.), Florida Statutes.

[1] This provision also requires the Commission to commence rulemaking to implement this subsection, which the Commission has done in opening this Docket.

9. As the term "communications service" is used in Section 364.025(6)(b)(1-4), Florida Statutes, the law is clear on its face that a local exchange telecommunications company is automatically relieved of its carrier-of-last-resort obligation only if an owner or developer enters into an agreement, or otherwise engages in a practice, that would: (1) exclude a local exchange telecommunications company from installing its facilities, in favor of another communications service provider's communications service-related facilities; (2) effectively ban the local exchange telecommunications company from providing communications service by allowing other communications services providers to provision any or all communications services on the property; (3) result in a bulk agreement for the provision of communications service to the occupants or residents of the property; or (4) otherwise restrict or limit the local exchange telecommunications company's access to the property in favor of another communications service provider. In other words, the local exchange telecommunications company must demonstrate that it is either legally or physically restricted from providing voice or voice service to the property, or that there is a significant economic impediment to providing service (i.e. the prospective customers are already paying for voice or voice replacement service with another carrier through a bulk service arrangement). Thus, on its face, Section 364.025(6)(b), Florida Statutes, was not drafted to address restrictions involving any services other than voice or voice replacement service.

10. Likewise, the language of the new bill gives no indication that services beyond voice service are to be considered when determining if the "good cause" standard set forth in Section 364.025(6)(d), Florida Statutes, has been met. Rather, throughout the text, the service at issue is referred to either as "communications service," which is defined in Section 364.025(a)(3), supra, or it is referred to as the local exchange telecommunications company's

"carrier-of-last-resort" obligation, which is set forth in Section 364.025(1), Florida Statutes. Neither of these provisions refers to the panoply of other competitive services that the local exchange telecommunications company may offer. These definitions are, instead, specifically tied to "voice or voice replacement" service, as provided in the new law, or to basic local telecommunications service, which is defined in Section 364.02(1), Florida Statutes, in pertinent part, as:

> 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 multifrequency 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.

11. Notably, the Florida Legislature specifically rejected language that would have expanded the bases for waiver or elimination of the carrier-of-last-resort obligation to include other competitive services, such as cable, data, and perhaps even marketing arrangements. The original version of House Bill 817, which was one of the bills in which the carrier-of-last-resort relief provisions were originally placed, contained an additional basis for automatic relief from the carrier-of-last-resort obligation:

> 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.

The fact that the Legislature eliminated this provision demonstrates that the Legislature intended to focus the bill on the service that is directly associated with the carrier-of-last-resort obligation, voice service.

12. In passing Senate Bill 142, which was ultimately signed into law by the Governor, the Legislature clearly intended to address situations in which the local exchange

telecommunications company cannot gain access to rights-of-way or telecommunications closets, but has, nonetheless, been asked to provide service by a tenant, as further highlighted by the Senate Staff's reference to its Interim Report in the staff analysis that accompanied Senate Bill 142.[2] This reference is yet another clear indicator that the Legislature did not intend to address competitive issues pertaining to other types of services.

13. Thus, with regard to the proposed rule at issue in this Docket, LDI suggests that the Commission must consider either defining "good cause," or at least setting some parameters addressing what it will consider to be good cause. This is important for three key reasons. First, without a definition or parameters for "good cause," LDI anticipates that the Commission will receive petitions for waiver based upon reasons that are wholly unrelated to the Legislative intent behind the new law. At a minimum, the Commission should make clear that "good cause" can only be demonstrated by some physical impairment in the incumbent carrier's ability to provide "communications service" as defined in the new law (i.e. "voice service" or "voice replacement" service), or a significant economic impairment, one which has the consequence of precluding the construction and operation of the incumbent carriers' network to the premises and to its end users.

14. For example, when developers initiate plans for a new development, they will often enter into negotiations with a wide variety of providers for various aspects of communications and technology service to the developments. They may reach an agreement with one provider to simply install the cable and conduit for a defined fee, while they may reach an agreement with another provider to provide cable and cable modem service. They might also enter into an agreement with a satellite provider, a competitive local service provider, or a wireless provider to offer their services to new residents of the development at a discount, in exchange for a defined fee or perhaps for the exclusive right to distribute their marketing materials on site. These types of arrangements are common in the industry and all are means by which a developer puts together an attractive real estate package for consumers at a competitive price. While some of these agreements may be exclusive or otherwise limit the ability of a carrier to engage in a specified activity or provide a particular type of service, it does not mean

[2] Staff Analysis of Senate Bill 142, referencing Report 2006-106 - *Review of Access by Communications Companies to Customers in Multi-tenant Environments,* Committee on Communications and Public Utilities (September 2005).

that all such agreements should be considered when determining whether the "good cause" standard has been met. Nevertheless, if "good cause" is not somehow defined or at least corralled, LDI anticipates an onslaught of such petitions for waiver using similar such agreements as support. As one of the largest builders/developers in this state, LDI has significant concerns regarding the time and expense associated with responding to a barrage of petitions.

15. Defining "good cause" in the new rule would allow negotiations to take place in an environment in which everyone has a good idea of the rules of the road, and in which there is a certain level of regulatory certainty. Without some clarification or refinement of the "good cause" standard, developers will find themselves at risk when negotiating with anyone other than the incumbent carrier for a wide variety of services that do not fall under the definition of "communications service." In such instances, an incumbent carrier could, (and LDI suspects likely would), claim that any impairment in its ability to provide a non-communications service, or even to "effectively" compete in the provision of such service, ultimately impairs its ability to provide voice service to the development. At a minimum, the incumbent carrier would be able to use just the threat of filing a petition as a veritable sledgehammer in negotiations with a developer. Even in situations in which it is not entirely clear that the circumstances that exist at a subject development would meet the "good cause" standard, the incumbent carriers would be able to use the mere threat of the delay caused by the filing of a petition to extract more favorable terms and conditions for providing service, including exclusive contracts.

16. Consumers want as many options as possible for service to their homes, and they certainly expect to be able to obtain service, if they so desire, from the high-profile brand name providers that are the incumbent carriers. As such, we are concerned that developers, like LDI, will be forced to contract only with the incumbents for the full range of services offered by the incumbent (i.e. voice, high-speed internet, video), as well as marketing rights. Consequently, LDI's ability to pursue other options for services will be drastically impaired.

17. Ultimately, this will impact not only the costs passed on to LDI's customers, but will likely have a detrimental impact on alternative providers of services that compete with any aspect of the incumbent carriers' bundled packages. Customers in new developments will suffer from fewer choices in service providers, and the property itself will be devalued due to the

limited service options. Long term, this could have serious consequences for the building industry as a whole, which contributes significantly to economic development in this State.

18. It also should not go unnoticed that while this would impair the developers' ability to pursue exclusive contracts for service, even if they are only tangentially related to communications service, the incumbents would not be impaired in seeking to enter exclusive contracts in their own right. In fact, it is common practice for them to do so now. A rule that does not clearly define the "good cause" standard in this context will only give them greater leverage in pursuing such contracts, to the ultimate detriment of consumers.

19. LDI emphasizes that it has worked well with the incumbent carriers before and fully intends to do so in the future. That being said, business relationships do tend to work better when the leverage of the parties involved is relatively equal. In such environments, issues and disagreements most often tend to be worked out at the business level, with little need for escalation. That is not, however, typically the case when leverage significantly shifts to one party or the other. Unfortunately, recent communications with one particular incumbent carrier give every indication that at least one incumbent intends to try to use the new law to unfairly skew the relative negotiating power between itself and developers.

20. With regard to the procedural aspects of the Rule, LDI suggests that the procedure for the Commission's consideration of these petitions should be defined. LDI recognizes that the statute requires the Commission to act on a Section 364.025(6)(d) petition within 90 days. The statute does not, however, indicate that the action taken at that point would be final. If a final Order is contemplated, rather than Proposed Agency Action, LDI suggests that the rule as it stands does not provide an adequate point of entry for the affected owner/developer. In addition to providing for comments 10 days after the petition is filed, it would seem logical that participation during the Commission's consideration of a staff recommendation addressing such a petition would be allowed. Accordingly, LDI suggests that procedural language along these lines be incorporated in the final rule.

21. LDI also suggests that it is important to make clear that certain contracts between a developer and other parties will be considered proprietary business information that will not be made available for review by competitors. As such, in the context of considering a petition for relief by an incumbent carrier, LDI asks that the Commission acknowledge in some way that

these contracts are proprietary and not subject to disclosure to anyone but the Commission and Commission staff during the course of consideration of a petition.

22. Finally, to the extent that it appears an incumbent carrier is declining to serve a development for reasons clearly outside the "good cause" standard, LDI suggests that consideration should be given to some expedited, interim process for obtaining relief. Specifically, LDI suggests that the Commission consider including an interim determination step whereby the petitioning carrier would either be required to continue the work necessary to provision service to the subject property, or allowed to terminate such preparatory work, pending the Commission's final decision on the carrier's petition.

23. In conclusion, the concerns expressed in these comments can be easily addressed by including a definition or guidelines as to what constitutes "good cause." There should be some substantial demonstration that the owner or developer has done something that constructively prohibits or substantially impairs a carrier's ability to provide service to customers on the property. Service should be clearly tied to the definition of "communications service" as set forth in the new law, and consideration should be given to providing examples of some of the types of exclusive contracts that would not constitute "good cause." These proactive measures will ensure that there are no unintended consequences that negatively impact telecommunications competition and the housing market to the detriment of economic development in Florida.

Respectfully submitted this 4th day of October, 2006.

Lennar Developers, Inc.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail First Class to the persons listed below this 4th day of October, 2006:

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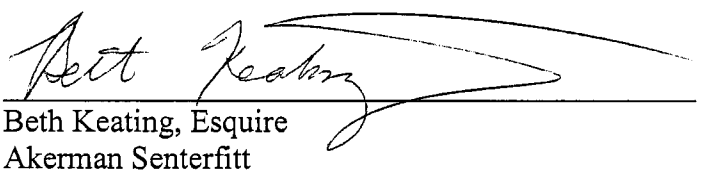

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