



COMMUNITY ASSOCIATIONS INSTITUTE

The nation's voice for condominium, cooperative and homeowner associations

ORIGINAL

July 28, 1998

Blanca S. Bayo
Division of Records and Reporting
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Undocketed Special Project No. 980000B-SP

Dear Ms. Bayo:

Pursuant to the Public Notice dated July 14, 1998, the Community Associations Institute ("CAI") respectfully submits an original and fifteen copies of its Comments in the docket referenced above. CAI also submits its Comments on diskette.

CAI appreciates the opportunity to participate in this proceeding.

Sincerely,

Lara E Howley (handwritten signature)

Lara E. Howley, Esq.
Issues Manager

Enclosures

- ACK
AFA 5
APP
CAF
CMU 5
CTR
EAG
LEG 2
LIN
OPC
RCH 2
SEC 1
WAS
OTH

98 JUL 29 AM 10:06 MAIL ROOM



DOCUMENT NUMBER-DATE

07576 JUL 29 98

OPSC-RECORDS/REPORTING

1630 Duke Street
Alexandria, VA 22314
(703) 548-8600
Fax (703) 684-1581
www.caionline.org

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

COMMENTS

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

INTRODUCTION

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

DOCUMENT NUMBER-DATE
07976 JUL 29 88
REC-RECORDS/REPORTING

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

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

associations, an individual owns a lot; the association owns the rest of the property.

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

In contrast to most other multi-tenant environments, individual homeowners have ownership rights in community associations. By virtue of their ownership, they have the right to vote for and serve on the board of directors that governs the association.

Therefore, community association owners have a direct voice in the governance of their association, including determining the use of common property and the selection of association services and service providers.

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

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

A. Granting Forced Entry Would Be An Unconstitutional Taking

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

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

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

¹ 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).

² Loretto, 458 U.S. at 426.

state of Florida would be a taking.

Forced entry proposals would also violate the Florida Constitution. Article 10, Section 6(a) states: “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.” Forced entry proposals cannot meet this provision, since they do not serve a public good; they only support the business plans of telecommunications service providers.

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

B. Requiring Forced Entry Would Damage Community Association Common Property

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

³ Loretto, 458 U.S. at 432, n.9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Forced Entry Parameters

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

A. “Multi-Tenant Environment” Should Be Broadly Defined

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

C. The Rights Of Private Property Owners Must Be Protected

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Any Compensation Should Be Freely Negotiated

As currently occurs, any compensation to be provided community associations for the use of common property should be freely negotiated between telecommunications service providers and community associations. The state should not intervene in this process.

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

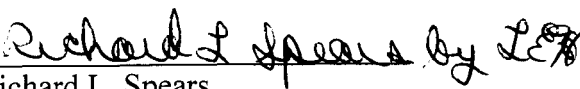
Conclusion

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

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

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

Respectfully submitted,


Richard L. Spears
Community Associations Institute Florida Legislative Alliance

Rodney D. Clark
Vice President
Government & Public Affairs
Community Associations Institute
1630 Duke Street
Alexandria, VA 22314
703-548-8600
fax 703-684-1581
Rclark@caionline.org

Lara E. Howley, Esq.
Issues Manager
Government & Public Affairs
Community Associations Institute
1630 Duke Street
Alexandria, VA 22314
703-548-8600
fax 703-684-1581
Lhowley@caionline.org