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August 5, 1998

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Special Project No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing are two (2) originals and a diskette of BOMA Florida's comments regarding the above-captioned matter. Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to me via telecopy at (407) 843-4946.

Thank you in advance for your assistance in this matter. If you have any questions, please call me.

Very truly yours,

JOHN L. BREWERTON, III, P.A.

By: _____
John L. Brewerton, III

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cc: Mr. Arturo Fernandez
Ms. D.K. Mink
Catherine Bedell, Esq.
Mr. Dan Hoppe

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

INTRODUCTION

The Building Owners and Managers Association of Florida, Inc. (BOMA) is a tax-exempt Section 501(c)(6) real estate trade association organized under the laws of the state of Florida. Its chartered membership consists of local chapter associations in Greater Miami, South Florida, Tampa, Orlando, Jacksonville, North Florida (Tallahassee) and members at large throughout the state. BOMA represents some 800 member companies in the state of Florida, owning, managing and/or operating literally billions of square feet of primarily office, but also including retail, industrial and other tenant-occupied building space in this state. BOMA is a chartered member of BOMA International, Inc., founded in 1907 and based in Washington D.C., which boasts membership of approximately 17,000 real estate and related companies and representing hundreds of thousands of tenant-occupied office buildings in the United States alone.

The issues in question in this proceeding are not of first impression. Telecommunications companies, with their deep-pocket advertising and lobbying budgets, have been urging this state and Congress to pass mandatory (a/k/a/ forced building) access or similar laws in order to reduce their cost of doing business, which, from a prudent business perspective, is understandable. However, mandatory access laws, and lobbying efforts with respect thereto, were expressly rejected by Congress when it passed the Federal Telecommunications Act of 1996, because such laws would be unconstitutional on their face and effect unconstitutional takings of private property rights of building owners.

Mandatory access laws were expressly invalidated as unconstitutional by the United States Supreme Court in 1982, in a case involving a mandatory access cable television statute in the state of New York (*Infra, Loretto* v. *TelePrompter Manhattan CATV*). A litany of cases throughout the country challenging the constitutionality of similar cable statutes and ordinances were also litigated in the early to mid-1980s, all of which were also held unconstitutional under the U.S. Supreme Court's rationale stated in the *Loretto* decision. In fact, a number of such cases were decided here in the state of Florida, the most notable of which was *Storer Cable TV v. Summerwind Apartments Associates*, also discussed hereinafter.

In short, these cases hold that, to force a building owner to grant access to any party, including a telecommunications service provider, results in a governmental taking of private property rights for which full compensation to the owner must be paid either by the taking governmental entity or the beneficiary of the taking (as proposed here, the telecommunications companies). Moreover, in the *Loretto* opinion, the U.S. Supreme court expressly stated that the power to exclude third parties has traditionally be considered one of the most treasured strands in an owner's bundle of private property rights.

The following will provide BOMA's comments to the issues circulated by the Florida Public Service Commission (PSC) for discussion at its public hearing scheduled for Wednesday, August 13, 1998, relative to mandatory access.

COMMENTS

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

Comment: It is the position of the Building Owners and Managers Association of Florida, Inc. (BOMA) that telecommunications companies should not have direct access to customers in multi-tenant environments. The private property rights of building owners must be observed. Building owners must retain the authority to regulate,

supervise and coordinate on-premises activities of all service providers, including telecommunications carriers.

Installation and maintenance of telecommunications facilities within a building will disrupt building operations and those of tenants, as well as cause physical damage to the building and other property of the owner. Unauthorized entries into any building by a third party, as well as its contractors, agents, employees, etc., may also result in physical damage to the property of tenants in the building, including those not served by its telecommunications service providers. Moreover, unauthorized entries into private buildings by third parties will compromise the integrity of the safety and security of all occupants of the building, including tenants not served by the telecommunications company seeking the access. Building owners and their property managers are in the business of providing environments in which people live and work, and therefore, they are uniquely positioned and obligated under tenant leases to coordinate the conflicting needs of multiple tenants and multiple service providers, including telecommunications companies.

Telecommunications companies demanding access to landlords' buildings require access to space in underground easements; through exterior walls and floors; through interior walls, floors and ceilings; through and in telephone and riser closets; on rooftops; and in space occupied by tenants and other licensees. In addition, telecommunications companies often require permanent space for location of their telecommunications equipment in building basements, telephone closets and riser closets, and on the rooftops of the buildings in which they serve or propose to serve tenants. Therefore, building owners must be entitled to exercise discretion in the managing, controlling and licensing of access to and space in their premises for the protection and security of not only their own interests, but also those of building tenants, licensees and other occupants.

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

Comment: In determining whether telecommunications companies should have direct access to customers in multi-tenant environments, the Public Service Commission (PSC) must consider, first and foremost, the existing private property rights of building owners. It is clear under applicable Federal and Florida state case law [*Loretto v. TelePrompter Manhattan CATV*, 458 US 419, 426. (1982) and *Storer Cable TV v. Summerwind Apartments Associates*, 451 So. 2d 1034 (3d DCA Fla. 1984) (citing *Loretto*)], that any proposed "granting" of mandatory or similar access by the state of Florida to any telecommunications company in a tenant-occupied property constitutes a "taking" of private property rights of the building owner, for which full compensation must be paid.

Other considerations include liabilities resulting from the access, space proposed to be occupied and availability thereof, security and safety of property and persons, confidentiality of tenants, lease obligations of the landlord, value of the space and access proposed, competition for the limited availability of space within the building, and other factors.

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

Comment: Inasmuch as the primary targets of most telecommunications company marketing efforts consist of commercial businesses in office buildings owned and/or managed by members of BOMA, it is obvious that the telecommunications companies seek to include commercial office buildings within the definition of "multi-tenant environments." Nevertheless, members of BOMA also own and/or develop residential, transient, condominium, retail and other properties, as well as, in a very limited number of cases, own or operate shared tenant service provider affiliates. However, for BOMA

to object to or insist on any specific definition of a "multi-tenant environment" would be tantamount to agreeing that the Public Service Commission has authority over licensed access to multi-tenant environments, to which BOMA objects.

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

Comment: To the extent that the Public Service Commission is addressing the term "direct access", BOMA suggests that such term should be defined to include any service whatsoever provided by any telecommunications carriers certificated by the state of Florida, including, without limitation, basic local telephone service, internet access, video, data, satellite, etc., as well as services related to the sale, installation and maintenance of software, cabling, hardware and equipment related or incident thereto.

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

Comment: Once again, it is BOMA's position that there should be no direct access by telecommunications carriers tenants of multi-tenant "environments", unless the same is expressly consented to by the building owner. Moreover, as BOMA has advised the Public Service Commission and the Florida Legislature in the past and as discussed in more detail hereinafter, "exclusionary" contracts (often called exclusive agreements) are the exception to the general rule and not the norm in the commercial office building industry.

Generally, it is in the best interests of property owners and their managing agents to grant access to multiple carriers desiring to provide telecommunications services to tenants within multi-tenant buildings. In other words, exclusive agreements are generally not in the owners' best interests.

Of course, in evaluating which carriers should be granted access to its property, the owner takes into consideration such factors as, but not limited to: the reputation of the respective telecommunications company; space availability in the building; consents, demands and/or needs of tenants; prior experience of the building owner and/or management company with the respective telecommunications company; terms and conditions for access requested; expected disruption to tenants and occupants; potential physical damage to the property; integrity of the safety and security of the building and its occupants; architectural integrity and aesthetics of the building and the proposed modifications by the carrier; and conflicting needs of multiple tenants and multiple service providers. Therefore, access to private buildings must be subject to the express consent of the building owner or its manager.

In some cases, exclusive contracts may be warranted, determined in the discretion of the building owner, based on its evaluation of the foregoing and other factors. In any event, as previously stated, it is BOMA's position that exclusive contracts are generally not favorable or in the best interests of its members. However, a building owner has the constitutional right to govern who and what companies have access to its own property, and while it may not be prudent to do so, a building owner may constitutionally exclude any party from its property. By the same token, it may lawfully enter into an exclusive agreement with any particular telecommunications company. Simply put, that is the building owner's constitutionally guaranteed right to be imprudent and to exclude from its property any party it so chooses. (*Supra, Loretto* at p. 435)

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

Comment: It is BOMA's position that the definition of demarcation point for purposes of Florida law should remain as currently defined under PSC Rule 25-4.0345, FAC.

However, BOMA International and BOMA Florida are currently evaluating this issue nationwide and therefore must reserve the right to change this position.

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

1) Landlords, owners, building managers, condominium associates;

Comment: Landlords, owners, building managers and condominium associations must retain the right to govern actual, physical and other access to their property, as discussed in both the Introduction and Section I above. Their responsibilities and obligations are and must be governed by their negotiated agreements with their tenants and telecommunications companies seeking access to their properties.

2) Tenants, customers, end users; and

Comment: Tenants, customers and users may exercise any rights, privileges, responsibilities or obligations with respect to their needs and demands for telecommunications company access provided in their contracts with their landlords. They can and do negotiate these issues and considerations within the context of their negotiations of their leases, tenant build-out and other agreements with their landlords.

3) Telecommunications companies.

Comment: Telecommunications companies have no rights whatsoever to gain access to private property and the occupants thereof, absent the express consent of the property owner. Any rights and obligations regarding telecommunications access should be governed by the negotiated, arms-lengths terms of a license or other access agreement between the landlord and the carrier, on the one hand, and the landlord and its tenant, on the other. To legislatively grant any "special priority" or other guaranteed or mandatory access status or similar right to any telecommunications company would violate the U.S.

and Florida Constitution (Article X, Section 6) provisions regarding the protection of private property rights. (*Supra*, *Loretto* and *Storer Cable TV.*)

Consequently, issues regarding easements, cabling, space, equipment, lightning protection, service quality, maintenance, repair, liability, personnel, pricing and all other considerations related to private property/building access should be governed by the terms and conditions of an agreement to be negotiated by and between the property owner and the telecommunications company, subject of course to the owner's obligations contained in its lease or other private agreements with its tenants. As discussed above, building owners are in the business of providing environments in which people work. They are uniquely positioned and obligated pursuant to their leases to coordinate the conflicting needs of multi-tenants and multi-service providers. Consequently, to infringe on landlord's property rights and/or obligations to their tenants, other licensees and customers, solely to benefit the pecuniary interests of privately-owned telecommunications companies, would result in unconscionable harm to private property owners.

In fact, private licensing and similar access agreements among building owners and telecommunications companies, both inside and outside the state of Florida, are today becoming the norm. Unfortunately, given the pre-existing monopoly-status of incumbent local exchange carriers ("LECs"), it is a much more arduous a task, if not impossible today, for property owners to attempt to negotiate agreements with such LEC carriers. Property owners simply have no leverage, and LECs generally refuse to sign any license or other access agreements whatsoever. Consequently, unless the Public Service Commission and/or Florida Legislature expressly acknowledges the interests of property owners in their own properties, particularly in this time of monopoly deregulation and promotion of competition with LECs by alternative local exchange and competitive

access service provided ("ALECs"), then a building owner has but three (3) options (or some combination thereof): (a) attempt to convince its tenants to discontinue doing business with the LECs, which of course is not a desirable or viable option for the property owner, because it could result in building service interruptions, not to mention tenant-relations nightmares; or (b) attempt to require all ALECs to execute license or other access agreements, which the ALECs claim results in discrimination against them because the LEC obtained access without executing an agreement or paying any license fee; or (c) absorb or pass on to tenants, in the form of additional rent or operating expenses, the costs of administrating access by multiple telecommunications carriers serving tenants in its building. Nevertheless, as previously stated, contractual agreements between property owners and most alternative carriers including the likes of Intermedia (ICI), Teleport Communications Group (TCG), e•spire (f/k/a ACSI), WinStar Communications, Teligent Communications, Cypress Communications, Sprint, etc. are becoming more and more common, at least among those landlords represented by BOMA membership.

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

Comment: These are issues, *inter alia*, for which the landlord/building owner is responsible to its tenants and should be addressed in license or similar agreements with telecommunications companies seeking access to its property.

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

Comment: The real question is not "which" compensation should be required, but whether the property owner has the ability to charge any compensation for access by telecommunications companies. Under the authority of *Loretto* and its progeny,

including *Storer Cable TV*, it is clear that landlords have the constitutional authority to require that all service vendors, including telecommunications service providers desiring to do business with tenants in their buildings, pay license, access, or other fee compensation as a condition of gaining access to their buildings and tenants.

Once again it is BOMA's position that a telecommunications company's access to a private building must be subject to the express consent of the building owner or manager. Such consent agreements should address all terms and conditions with competing carriers for such access, including any compensation payable therefor. As a matter of practicality, the building owner must be able to take into account any factor it chooses in determining to which carriers it should grant access, including without limitation, the fair market value of the access sought by the carrier. However, as previously stated, it is in the property owner's best interests to have multiple carriers providing services to tenants within their buildings, so it will naturally be inclined to negotiate such agreements. Any carriers refusing to negotiate any license or access agreements with landlords and demanding free, unfettered and uncompensated access are simply being unreasonable and ignoring owners' private property rights.

Factors typically taken into consideration by a landlord in evaluating the level of compensation to be paid to it for licensed access to its tenants generally include, but are not limited to, the: compensation paid or offered to be paid by other carriers for the same access; space limitations in the building; term of the licensed access sought; other terms and conditions of the access sought; services requested to be provided by the landlord for the benefit of the telecommunications company; lease obligations to and telecommunications service needs and demands of tenants (and the amount of space each of such tenants leases in the building); number of carriers already providing telecommunications service to tenants in the building; value of the space to other vendors

and service providers which are not telecommunications companies (*e.g.*, such as but not limited to utility and alternative utility service providers); additional one-time and ongoing risks and costs which will result to the landlord, its building and tenants as a result of such access; benefits of such additional service access to tenants; value of the space to the telecommunications carrier; and revenues to be generated by the telecommunications carrier as a result of the access to the property, among others.

It is BOMA's position that the factor "cost" is usually irrelevant in the compensation negotiation(s) between the property owner and telecommunications carrier, at least from the owner's perspective. The cost of the equipment proposed to be installed by a telecommunications company in a building shall be determined and evaluated by the telecommunications company, not the property owner. In evaluating the profit potential of a particular building, cost will obviously be a consideration to the telecommunications carrier. However, it will only be considered by the building owner to the extent that it requires a specific telecommunications company to install certain equipment or facilities in its building.

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

Comment: Of course, it is necessary to preserve the integrity of E911. However, as long as some certificated telecommunications company is willing (or obligated under tariff) to provide telephone service to a particular building, the integrity of E911 will always be preserved.

III. Other issues not addressed in I and II above:

Comment: Other issues not addressed hereinabove, but which must be considered by the Public Service Commission in this context, include but are not limited to the following:

1. The Federal Telecommunications Act of 1996 and the Florida Telecommunications Act of 1995 have in fact resulted in the establishment of immediate and significant competition among numerous recently-certificated telecommunications companies providing services to tenants both inside and outside the state of Florida. A non-exhaustive list of carriers with whom mutually-negotiated agreements with property owners have contracted is provided hereinabove in the comment provided for Issue II(E).

Nevertheless, for the state of Florida and/or the Public Service Commission to interject the state or its agency directly into the negotiation process between landlords and the telecommunications companies, and indirectly between landlords and tenants in their lease negotiations, would not only be unwarranted and unconstitutional, but futile. The free market relationships among those parties will ferret themselves out, as is already occurring in the market today. In order to promote competition, the state must allow competition, not attempt to force-feed it by unlawfully legislating mandatory or similar access by telecommunications companies. Any mandatory access or similar law will not only fail to accomplish the objective of establishing competition, but preclude it.

2. Oftentimes, telecommunications companies already possessing access to an owner's building (LECs and ALECs alike) attempt to overburden the building's telecommunications infrastructure (such as equipment rooms, risers, raceways, telephone closets, rooftops, etc.) and physically occupy more space than they actually need (*i.e.* to provide services to all tenants in the building), simply to render access to the building's tenants economically impractical for other competitors, thereby resulting in a barrier to competition. In other words, in evaluating the cost for the next carrier to gain access to the building, such access becomes too expensive because of the significant structural and cost of new construction issues facing the next carrier seeking tenant access.

For example, suppose an owner constructs a new building and installs four (4) four inch (4") telecommunications conduits (or "raceways" or "chaces") to facilitate building access by multiple telecommunications carriers. If one of the carriers (already doing business in the building) physically occupies more space than it actually needs to provide its services to its customers, then the cost to construct additional raceways must be incurred by either (a) the next telecommunications carrier desiring access to the building's tenants, or (b) the building owner itself. Therefore, in effect, the existing carrier is imposing upon other carriers economic and space barriers to competitive entry.

3. In order to promote competition, the state must consider two alternatives: (a) either immediately or gradually retract or diminish the monopolistic rights of LECs in tenant properties such as to remove barriers to entry for all ALECs and create a level playing field for all telecommunications companies; or (b) immediately or gradually elevate the status of every certificated ALEC to that of the existing LECs. Obviously, the latter of those two alternatives, particularly given the fact that there are some 150 or so telecommunications companies certificated in the state of Florida already, will result a gross abuse of the governmental power of eminent domain and effect substantial takings of private property rights, without payment of full compensation, as required by the Florida Constitution, Article X, Section 6.

4. Moreover, such taking action would violate other Florida laws, including, without limitation, the provisions of the *Bert J. Harris, Jr. Private Property Rights Protection Act* of the state of Florida. (Fla. Stat. Section 70.001 *et seq.*)

5. If the state or the Public Service Commission decides to interject itself into free market negotiations (between landlords and telecommunications companies) regarding the terms and conditions of and/or the amount of compensation to be paid by the telecommunications companies for access to landlords' properties, such would result in an artificial and arbitrary "price fixing" by the state and ignore the principles of our free market economy. The costs of providing service to a particular building must include the value (and terms of) the access sought and space demanded. Many telecommunications companies involved in this proceeding are actually offering to pay very competitive license fees to landlords in order to gain access to their properties. It is impossible to understand why the state would even consider interjecting itself into those negotiations and interrupting the free market, arms-lengths negotiations among those parties.

Once again, the free market will determine the amount of compensation payable to landlords for licensed access to their properties. Any cost considerations will be taken into account by the telecommunications company in evaluating the feasibility of an investment in access to a specific property's tenants.

6. Many telecommunications companies have proposed that parameters or limitations on the amount of license or access fees payable to landlords, such as "reasonable" and "non-discriminatory", be incorporated into proposed PSC rules or state statutes. The effect of such laws would be to governmentally limit the compensation payable to landlords for access to their properties. Such artificial limitations would not only be unlawful and violative of Florida Constitution Article X, Section 6, but also create unfair and artificial negotiating leverage in favor of the telecommunications companies to the detriment of landlords.

Once again, landlords are in the business of leasing premises to tenants. If tenants demand access via certain telecommunications carriers, the tenants will negotiate for such access within the confines of the lease or related agreements with the landlord. Absent lease obligations to tenants, landlords are in the unique position to govern access to their properties by all persons and parties, and must be allowed to do so in order to comply with their lease obligations to their tenants.

7. The Public Service Commission is not in the real estate business. Therefore, the PSC should not arbitrarily or unnecessarily involve itself in the negotiations of terms and conditions of or amounts of license fees payable for telecommunications company access to tenant-occupied properties. For the PSC or the state to involve itself in that negotiating process would be analogous to governmentally mandating rental rates payable for tenant space within buildings, which would obviously result in unconstitutional takings of private property rights. Moreover, legislating mandatory access would also require landlords to incur additional and unnecessary expense of hiring regulatory lawyers to advise them in dispute proceedings before the Public Service Commission in the event that a telecommunications company desires to subject the landlord to a "spending war" in the process of negotiations or as part of its negotiation strategy. Clearly, such was not the intention of the Federal Telecommunications Act of 1996 or the Florida Telecommunications Act of 1995.

8. Technology is ever-evolving in the telecommunications industry. Hybrid telecommunications companies (hard-wire and wireless, combined) are becoming more and more common. Telecommunications carriers are requiring access to both the interiors as well as exteriors, *e.g.* the rooftops, of buildings. All carriers require space,

which is a valuable commodity to a landlord. Space is what landlords "sell". For the government to usurp those private property rights and grant mandatory, free or other state-regulated access to the private property of landlords would result in an abomination of private property rights and only lead to more disputes between carriers and property owners. It would be more advantageous for all parties, and accomplish the objectives and mandates of the Federal and Florida Telecommunications Acts, if the state simply allows the parties to negotiate among themselves such that our free market economy will be allowed to thrive without unnecessary governmental regulation.

SUMMARY AND CONCLUSIONS

It is clear from all applicable federal and state case law that any mandatory access statute, ordinance, administrative or other rule, or any other law proposing to impose mandatory access on private property owners would result in a governmental taking of private property, for which full compensation must be paid under the Florida Constitution. Moreover, the properties in question in the factual scenarios of those cases were tenant-occupied properties.

Therefore, the terms and conditions for a telecommunications carrier's access to a particular building must be negotiated by the parties involved. Landlords are in the business of satisfying tenants. Consequently, if a tenant demands access for a specific telecommunications service provider, and such access adversely impacts the rights and obligations of the owner to its other tenants (or the owner's managing agent to such owner), the owner (or manager) cannot be forced to grant unfettered access to such carrier, much less an unlimited number of other telecommunications companies demanding access. Owners must be able to protect their property interests, as well as the interests of each of their tenants. Any proposed mandatory access law will jeopardize the owner's ability to protect those interests.

Telecommunications carriers, like any other service vendors, have no guaranteed right to do business with any party or at any place. Such is a fundamental precept of a free market economy. Building owners must be able to regulate access to their properties by all persons or else they subject themselves to unlimited liability. Such is an express consideration in lease negotiations with their tenants.

Moreover, telecommunications company access must be administrated by landlords, and that access results in additional costs and burdens on landlords, and ultimately their tenants. Those costs and burdens should rightfully be passed on to the entities profiting from such access, *i.e.*, the telecommunications companies demanding it. If such access costs and burdens are not reflected in the prices for telecommunications services charged to tenants, then they most certainly will be reflected in increased lease rentals and common operating expenses shared by all tenants of the building (collectively, "Rents"). Such a result would unfairly benefit telecommunications carriers at the expense of landlords and tenants.

A primary purpose of the Florida and Federal Telecommunications Acts was to foster competition with LECs by ALECs. It was <u>not</u> an objective thereof to raise Rents for tenants, for the direct pecuniary benefit of telecommunications companies, which will be a direct result of the passage of any mandatory access or any other similarly intentional law by this state or its agency.

Respectfully submitted on behalf of the
Building Owners and Managers
Association of Florida, Inc. by
JOHN L. BREWERTON, III, P.A.

By: _____
John L. Brewerton, III, Esq.