ORIGINAL

BEFORE THE

Florida Public Service Commission

Tallahassee, Florida

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

JOINT COMMENTS OF
e.SPIRE™ COMMUNICATIONS, TELEPORT COMMUNICATIONS GROUP/ TCG SOUTH FLORIDA, TELIGENT, AND TIME WARNER TELECOM

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e.Spire™ Communications, Teleport Communications Group/TCG South Florida, Teligent, and Time Warner Telecom ("Joint Commenters") hereby submit their Comments in the above-captioned proceeding.[1]

I. INTRODUCTION

The telecommunications companies participating in the Florida Public Service Commission's ("Commission") second workshop expressed agreement on a wide range of issues concerning tenant end user choice of telecommunications companies in multi-tenant environments ("MTEs"). The Joint Commenters believe the substantial points of agreement should be clarified and emphasized to the Commission as a means of facilitating the

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

development of its own policies and its report to the Florida Legislature.

The Joint Commenters agree on the following 13 points, except where otherwise indicated, and respectfully urge the Commission to adopt these principles and reflect them in its recommendations to the Legislature:

1. Tenant end users in multi-tenant environments should have direct access to their certificated telecommunications company of choice;

2. Ensuring telecommunications companies' nondiscriminatory and technology-neutral direct access to tenant end users in MTEs is important to the achievement of effective telecommunications competition in Florida;

3. In all cases, the demarcation point should be moved to the Minimum Point of Entry in a multi-tenant environment.

4. The Commission possesses authority to require nondiscriminatory access for telecommunications companies to tenant end users in MTEs and, if it believes it appropriate, should sua sponte initiate a rule making proceeding to adopt the requisite MTE access rules. In addition, the Commission should recommend to the Legislature that it act quickly to enact clear, simple legislation providing MTE access where the Commission believes it lacks authority to do so;

5. Direct telecommunications company access should be nondiscriminatory and technology-neutral and should be granted for an entire building or property under common ownership (rather than on a tenant-by-tenant basis);

6. Direct access includes access to those spaces and facilities within an MTE used by a telecommunications company to provide telecommunications services to a tenant end user, including, but not limited to, inside wiring, telephone closets, riser cables, and rooftops;

7. "Multi-tenant environment" should be defined broadly to include all non-transient tenancies (both residential and commercial, existing and new). This includes

apartment buildings and condominiums, but excludes transient tenancies.

8. All services over which the Commission retains or acquires jurisdiction should be included in MTE access (including, but not limited to, basic local exchange and high speed data services);

9. Direct access to tenant end users in MTEs does not amount to an unconstitutional taking;

10. Exclusive MTE access contracts between telecommunications carriers and MTE owners should be presumed anticompetitive and unlawful until competition fully develops;

11. If compensation for MTE access is required, it must be established and assessed on a reasonable and nondiscriminatory basis. Reasonableness requires that compensation be based on, for example, the costs incurred by MTE owners in accommodating the presence of telecommunications facilities within the MTE, or the difference in value of the MTE attributable to the presence of such facilities;

12. If telecommunications companies are responsible for installing telecommunications facilities within an MTE, they should be responsible for repairing property damage caused by such installation, and for indemnifying property owners for damages and liability resulting from such installation;

13. The maintenance of E911 capability for each tenant end user in an MTE remains the serving carrier's responsibility.

Individually, the Joint Commenters adequately addressed many of these positions in the workshop discussions and their initial written submissions to the Commission. For this reason, these comments will emphasize only those issues requiring greater attention.

II. DIRECT ACCESS TO TENANT END USERS IN MTEs IS A PREREQUISITE TO THE DEVELOPMENT OF WIDESPREAD AND EFFECTIVE COMPETITION IN FLORIDA.

The telecommunications company participants in the Commission's second workshop unanimously favored direct access to tenant end users in MTEs, noting its beneficial effect on telecommunications competition. Consistent with Florida Statutes Chapter 364 and the federal Communications Act, tenant end users must have the opportunity to choose their telecommunications company(ies) without restriction. Whether the barrier to competitive service is a telecommunications company or an MTE owner, the Commission is charged with a regulatory obligation to ensure that such barriers are eliminated.[2]

The position of some building owners foreshadows the state of the Florida telecommunications market should direct access not be secured -- tenant end users across the State will be left behind as the remainder of the nation benefits from the dynamic and lower cost opportunities made possible by telecommunications competition.

Many of the property owners and managers at the workshop expressed the sentiment that tenants are satisfied with the status quo. Congress, however, through the 1996 Act, clearly disagrees and has already weighed in strongly against the status

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[2] See F.S. § 364.01(4); see also 47 U.S.C. § 253(a)("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

quo.[3] Nevertheless, to the extent some tenants express such satisfaction, it comes as no surprise given the current state of tenant choice. By and large, similar customer satisfaction may have been perceived in relation to the pre-divestiture AT&T monopoly as well as with the local telephone monopolies prior to the advent of local competition. It has been the Joint Commenters' experience that if tenants are asked if they are satisfied with their telephone service, they may answer affirmatively. However, when they are asked if they would like a greater array of telecommunications options at lower rates than they currently enjoy, or simply lower rates in general, they respond enthusiastically.

Direct telecommunications company access should be nondiscriminatory and technology-neutral.[4] Carriers should be granted access on equivalent terms and, where applicable, for equivalent rates. Moreover, access obligations should recognize and accommodate the myriad of ways in which telecommunications

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[3] Indeed, MTEs may be the first places in which facilities-based residential telecommunications competition occurs.

[4] Direct access to tenant end users should also be granted for an entire building or property under common ownership. That is, once a telecommunications company is granted access to one tenant within an MTE, it should not be required to renegotiate with the MTE owner to serve additional tenants on that property. Requiring a carrier to negotiate access with an MTE owner on a tenant-by-tenant basis unnecessarily slows access and raises the transactions cost for all parties involved. Legitimate MTE owner concerns such as those relating to installation, property damage, or security, are most efficiently addressed between the carrier and the MTE owner on an MTE-wide basis.

service will be delivered: fiber, copper, microwave, or a combination thereof. Tenants can decide individually which method(s) offers them the optimal telecommunications solution.

III. THE COMMISSION SHOULD MOVE THE DEMARCATION POINT IN ALL MTEs TO THE MINIMUM POINT OF ENTRY.

The Commission can move the demarcation point in MTEs by its own action and without further grant of authority from the Florida Legislature.[5] The Joint Commenters agree that, in all cases, the demarcation point should be moved to the Minimum Point of Entry ("MPOE") in a multi-tenant environment. Establishment of the demarcation point at the MPOE will facilitate telecommunications company access to tenant end users in MTEs, will minimize disruption to an MTE caused by the entrance of additional telecommunications company facilities, and will lessen ALEC reliance on the incumbent LEC's network. The Joint Commenters respectfully urge the Commission to adopt this recommendation and to move the demarcation point to the MPOE.

The Commission's rules place the demarcation point in Multi-Line/Multi-Customer Buildings "at a point within the same room and within 25 feet of the FCC registered terminal equipment or

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[5] The Commission has asserted its jurisdiction over inside wiring. See Generic Investigation Into The Proper Regulatory Treatment of Inside Wire, Docket No. 930485-TL, *Order No. PSC-95-0035-FOF-TL*, 95 FPSC 1:119, 122 (1995)("Chapter 364, including section 364.338, applies to inside wire services and we can regulate those services pursuant to all the provisions of Chapter 364."); see also F.A.C. § 25-4.0345 (Commission rules establishing definitions and regulations concerning customer premises equipment and inside wire).

cross connect field."[6] The Commission's rule allows the network (and ILEC control) to reach deep within an MTE and stands in contrast to the Federal Communications Commission's ("FCC") inside wiring rules.

The MPOE demarcation point entails benefits lacking in the Commission's previous approach -- benefits borne by a competitive telecommunications environment. Namely, by placing the demarcation point at the MPOE, all telecommunications companies will be placed on equal footing for obtaining access to the inside wiring and riser cables within an MTE.

Moreover, the placement of the demarcation point at the MPOE simplifies a carrier's connection to the inside wiring. Where the demarcation point exists within 25 feet of the customer's premises, a facilities-based carrier must install its own facilities through the MTE and up to each individual customer within an MTE.[7] Property owners and tenants must endure redundant installation efforts by carriers and telecommunications companies must incur needless expense in installing facilities

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6 F.A.C. § 25-4.0345(1)(b)(3).

7 An otherwise facilities-based carrier could purchase the incumbent-controlled risers as unbundled elements to reach the customer. As discussed in the workshop, this approach results in service delays and increases the ILEC's responsibility for its competitors' needs. Because the Joint Commenters support the ability of a carrier to install its own facilities to reach the customer, the ILEC presumably will retain its intra-building network. Hence, carriers will retain the option of leasing those facilities on an unbundled basis from the ILEC. Nevertheless, the promotion of facilities-based competition dictates that this should not be the sole means of serving customers in MTEs.

this deep into the MTE. By contrast, the MPOE approach minimizes the areas of the building into which a carrier must install its own facilities, minimizes disruption to tenants and property owners, and minimizes burdens placed on the incumbent carrier. For the foregoing reasons, the Joint Commenters respectfully urge the Commission to amend Section 25-4.0345 of its rules by moving the demarcation point in Multi-Line Systems/Multi-Customer Buildings to the MPOE.

IV. THE COMMISSION POSSESSES AUTHORITY TO REQUIRE NONDISCRIMINATORY TELECOMMUNICATIONS COMPANY ACCESS TO TENANT END USERS IN MTEs.

During the workshop, members of the Commission Staff posed questions regarding the Commission's existing jurisdiction to require direct access to tenant end users. The Joint Commenters respectfully suggest that these concerns represent an unnecessarily limited view of the Commission's jurisdiction.[8]

The Supreme Court of Florida has emphasized repeatedly the exclusive and broad jurisdiction of the Commission to regulate telecommunications companies. The Florida Statutes invest general police power with the Commission by directing it to "protect the public health, safety, and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices."[9] The Supreme

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[8] TCG does not join the Joint Commenters for purposes of Section IV, although it does urge the Commission to request from the Legislature the requisite authority to allow nondiscriminatory telecommunications company access to tenant end users in MTEs.

[9] F.S. § 364.01(4)(a).

Court found that this expansive basis of jurisdiction authorized the Commission to order the transfer of ownership of inside wiring.[10] Logically, the Commission possesses the lesser authority to mandate that all telecommunications companies receive nondiscriminatory MTE access.

Moreover, the Supreme Court concluded that the Commission "is charged with exercising its exclusive jurisdiction in order to encourage and promote competition in telecommunications services."[11] The participants in the Commission's workshops have demonstrated that the availability of direct access to tenant end users in MTEs will promote competition in telecommunications services. The Commission's broad jurisdiction to promote telecommunications competition extends to tenant end users in MTEs and serves as the jurisdictional basis for mandating direct and nondiscriminatory access.[12] The Joint Commenters urge the Commission to recognize and give effect to its broad authority to regulate telecommunications company access to tenant end users in MTEs, particularly in light of the discretion granted the

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10 Teleco Communications Co. v. Clark, 695 So.2d 304, 308-309 (1997).

11 Florida Interexchange Carriers Association v. Clark, 678 So.2d 1267, 1269 (1996)(interpreting Fl. St. § 364.01(4)).

12 The Joint Commenters submit that the telephone inside wiring connecting an end user to the public switched network is an element of telephone service, just as is the customer premises equipment and the PSTN itself. For this reason, whether the telephone inside wire is owned and controlled by a telecommunications company or by an MTE owner, it must be made available as a necessary component of a tenant's local telephone service.

Commission by the courts.[13] If the Commission believes it appropriate, it could, sua sponte, open a rule making to adopt MTE access rules. Notwithstanding the Supreme Court opinions to the contrary, should the Commission believe its authority does not permit it to require MTE owners to allow nondiscriminatory telecommunications company access to tenant end users, it should request such authority from the Legislature. In addition, in its report, it should urge the Legislature to enact clear, simple legislation to provide MTE access in a prompt fashion.

V. A REQUIREMENT THAT MTE OWNERS ALLOW DIRECT AND NONDISCRIMINATORY ACCESS TO TENANT END USERS DOES NOT CONSTITUTE A TAKING.

Several MTE owner representatives suggested that ordering nondiscriminatory MTE access would constitute a permanent physical occupation of an MTE owners' property and therefore would be a constitutional taking under Loretto v. Teleprompter Manhattan CATV Corp.[14] However, an analysis of current Takings Clause doctrine reveals that requiring the provision of nondiscriminatory MTE access for telecommunications companies

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13 See Teleco Communications, 695 So.2d at 308 ("PSC orders come before this Court cloaked with a presumption of validity.")(citations omitted); see also Florida Cable Television Ass'n v. Deason, 635 So.2d 14, 15 (1994)("Commission orders come to the Court 'clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. An agency's interpretation of a statute it is charged with enforcing is entitled to great deference.")(citations omitted).

14 458 U.S. 419 (1982) (holding that a permanent physical occupation is a per se taking and remanding for a determination of just compensation).

does not constitute a taking. In the first instance, MTE access does not amount to a compelled physical invasion; rather, it entails the regulation of rights and duties that already exist between MTE owners and tenants. Because of this, the inquiry into whether an MTE access obligation involves the element of "required acquiescence" is unwarranted.[15]

A. MTE Access Does Not Involve A "Physical Occupation."

Regulatory modification of the relative rights between landlords and tenants is not a per se taking.[16] Leases between tenants and MTE owners, and the laws governing them, establish certain rights, either explicitly or implicitly.[17] For example, absent an express provision to the contrary, tenants have the implicit right to access and use certain building common areas, as a way of necessity between the "landlocked" unit and the

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15 See id. at 441; Federal Communication Commission v. Florida Power Corp., 480 U.S. 245 (1987). Nevertheless, the MTE owner retains a meaningful choice to exclude all telecommunications companies from the MTE in the first instance.

16 See Loretto, 458 U.S. at 441 ("We do not...question...the authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.").

17 See, e.g., 49 Am. Jur. 2d *Landlord and Tenant* § 625 (1995)("The implied covenant of quiet enjoyment in every lease extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the premises."). In Loretto, the Supreme Court declined to opine as to the respective rights of the landlord and tenant under state law, prior to the passage of the law at issue, to use the space occupied by the cable installation. 458 U.S. at 439 n.18.

street outside.[18] Public policy goals led to the establishment of implicit rights for tenants -- such as ingress and egress -- and access to the tenant end user's telecommunications carrier of choice is a natural recognition of the realities of modern tenancy.

An MTE access requirement is not unlike the regulation at issue in Yee v. City of Escondido.[19] In Yee, the Supreme Court considered a rent control ordinance that restricted the termination of mobile home park tenancies. The Court found that the ordinance did not constitute a compelled physical occupation of land. The Court noted that the statute "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant."[20] The Court went on to explain that

> [w]hen a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not

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18 49 Am. Jur. 2d *Landlord and Tenant* § 628 (1995) ("Where property is leased to different tenants and the landlord retains control of passageways, hallways, stairs, etc., for the common use of the different tenants, each tenant has the right to make reasonable use of the portion of the premises retained for the common use of the tenants."); see id. at § 651 ("The landlord's interference with the tenant's right of access and exit . . . may constitute a constructive eviction, especially in case of the lease of rooms or apartments in a building."). Tenants are also entitled to an implied right of necessity for the use of conduits and pipes through a building for utility services, even if it includes some enlargement. Id. at § 632.

19 503 U.S. 519 (1992).

20 Id. at 528 (emphasis in original).

like without automatically having to pay compensation.[21]

By requiring MTE owners to provide nondiscriminatory MTE access to telecommunications companies, the Commission similarly adjusts existing contractual obligations of MTE owners vis-à-vis their tenants to comply with the public interest. Like the rent control ordinance in Yee, the requested MTE access requirement alters the relative rights existing under a rental contract and would not constitute a per se taking. Indeed, the MTE owners' provision of tenant access to telephone service will be altered by the Commission only to the extent that it gives tenants the right to access their carriers of choice.[22]

B. Where No Physical Occupation Occurs, The "Required Acquiescence" Analysis Is Misplaced.

Because nondiscriminatory MTE access does not amount to a compelled physical occupation, the MTE owners' initial choice to exclude all telecommunications companies is considered in a materially different light than the manner in which the Loretto Court considered it. In Loretto, the cable operator argued that

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[21] Id. at 529 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).

[22] A regulation that is not a per se taking but rather a "public program adjusting the benefits and burdens of economic life to promote the common good" is analyzed by balancing the public and private interests involved. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Agins v. Tiburon, 447 U.S. 255, 260-61 (1980). Under this analysis, the public interest -- as defined by the pro-competitive goals of the Florida Statutes -- as well as the competitive benefits for tenants (and, indeed, for MTE owners in light of the resultant MTE value enhancement), outweigh perceived burdens on MTE owners to justify the provision of nondiscriminatory MTE access.

a choice existed because building owners could avoid the statutory access requirements by ceasing to rent the property altogether. The Court rejected that argument, expressing a concern that a "landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."[23]

The Yee Court limited Loretto's forfeiture of rights analysis to situations in which a physical taking has already been found to exist. That is, in Loretto the statute allowed as an initial "invasion" access by a cable operator even where no cable operator had facilities in the building. By contrast, in Yee, no compelled physical occupation was found. As noted above, the ordinance was deemed a valid regulation of the existing contractual landlord-tenant relationship. Where, as in Yee, no compelled physical occupation is present, the MTE owner cannot be said to be forced into forfeiting the right to rent property in order to avoid a compelled physical occupation.[24] Hence, the "required acquiescence" analysis is inapposite.

The requested nondiscriminatory MTE access requirement merely regulates a voluntarily executed contract and does not permit telecommunications company access in the first instance. It therefore cannot be considered a per se taking. For this reason, although the MTE owner retains a meaningful choice to

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23 Loretto, 458 U.S. at 439, n.17.

24 Indeed, the effect is identical to a Commission-imposed prohibition on telecommunications companies from serving MTEs to which nondiscriminatory access is not permitted.

avoid an MTE access obligation, the "required acquiescence" inquiry need not be pursued.

C. Even Under A "Required Acquiescence" Analysis, MTE Access Does Not Constitute A Taking.

Nevertheless, even if the analysis were pursued, a nondiscriminatory MTE access requirement does not amount to a taking because it lacks the necessary element of "required acquiescence".[25] The Supreme Court concluded that the Pole Attachment Act of 1978 did not effect a taking because there was no "required acquiescence."[26] That is, the Act simply gave the Commission authority to regulate rates; it did not force pole owners to enter into contracts where there were none. Moreover, in Yee, the Court concluded that "[b]ecause they voluntarily open[ed] their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."[27]

Likewise, MTE owners subject to the requested nondiscriminatory MTE access requirement retain a meaningful choice to restrict the access of any and all telecommunications companies. They are not compelled to permit access to anyone in the first instance. However, as in Yee, once they have "open[ed]

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25 See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987)(limiting Loretto to find a permanent physical occupation only where the element of "required acquiescence" is present).

26 Id. at 252 ("This element of required acquiescence is at the heart of the concept of occupation.").

27 Yee, 503 U.S. at 531 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).

their property to occupation by others," the government retains a legitimate regulatory interest in that relationship and MTE owners cannot assert a physical invasion takings claim. Because nondiscriminatory MTE access, by definition, addresses situations in which one carrier has access to an MTE, cases involving subsequent entry (such as Yee) are more closely analogous to the positions advocated by the Joint Commenters than cases which address the allowance of an initial "invasion" (such as Loretto).

The Storer Cable case is similarly distinguishable from the instant request.[28] In Storer Cable, the Florida Supreme Court concluded that "the placement of cable television equipment and wiring on apartment-complex property that is not specifically held out for tenant use constitutes a taking."[29] Moreover, the requirement was deemed unconstitutional even though the statute sought to classify cable TV access as a tenant right.

Nevertheless, like Loretto, the case discussed the right to exclude the first cable operator. By contrast, the MTE access at issue in the Commission's workshops contemplates the right to exclude the subsequent telecommunications companies. The difference is of constitutional significance. As noted above, the Joint Commenters' proposal would merely regulate the practice

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28 Storer Cable T.V. of Florida v. Summerwinds Apartments, 493 So.2d 417 (1986).

29 Id. at 418. The statute at issue prohibited compensation to the building owner for allowing access to the building for cable wiring installation.

of allowing access rather than mandating the same. Of course, the MTE owner is allowed the choice of whether to participate in the regime in the first instance by deciding whether or not to grant access to the incumbent LEC ("ILEC") or another single telecommunications company.[30] In sum, the Commission should not hesitate to order or recommend nondiscriminatory and direct MTE access based on Takings Clause concerns.[31]

VI. COMPENSATION FOR MTE ACCESS SHOULD BE ESTABLISHED AND ASSESSED ON A REASONABLE AND NONDISCRIMINATORY BASIS.

Reasonable compensation to MTE owners for telecommunications company access would suggest that some relationship to cost is warranted. The Texas Public Utilities Commission considered this issue and concluded likewise. Its building access Enforcement Policy Paper notes that

> [c]ompensation mechanisms that are based on the number of tenants or revenues are not reasonable because these arrangements have the potential to hamper market entry and discriminate against more efficient telecommunications utilities. By equating the cost of access to the number of tenants served or the revenues generated by the utility in serving the building's tenants, the property owner effectively discriminates against the telecommunications utility with

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30 See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 255 (1987)(limiting Loretto and concluding that a permanent physical occupation exists only where the element of "required acquiescence" is present and noting that the "element of required acquiescence is at the heart of the concept of occupation").

31 Alternatively, if nondiscriminatory and direct MTE access is deemed a taking, the Legislature can require that full compensation be paid to an MTE owner in exchange for telecommunications company access to the MTE, subject to review by the Commission or the courts.

> more customers or greater revenue by causing the utility to pay more than a less efficient provider for the same amount of space.[32]

The Joint Commenters recommend the adoption of a similar approach for Florida. As a consequence, telecommunications companies will be provided the correct economic signals to serve tenant end users -- artificial economic barriers will not deter efficient competitive entry -- and Florida tenants will not lose telecommunications options or pay inflated telecommunications rates.

Some workshop participants suggested that MTE owners must be reimbursed "full compensation" for MTE access -- a suggestion that appears to mistakenly assume a constitutional taking. Notwithstanding the absence of a taking, as explained above, the Florida constitutional standard of "full compensation" for MTE access, when properly calculated, may provide for the reasonable compensation that an MTE owner can demand for telecommunications company access.

"Full compensation," within the meaning of the Florida Constitution, is determined by reference to the state of affairs that would have existed absent any condemnation proceeding

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32 Informal Dispute Resolution: Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions, Project No. 18000, *Enforcement Policy Memorandum from Ann M. Coffin and Bill Magness, Office of Customer Protection, to Chairman Wood and Commissioners Walsh and Curran* at 6 (Oct. 29, 1997).

whatever -- had the owners retained ownership.[33] Fair market value may be used to calculate full compensation, but the two are not necessarily identical.[34] Indeed, "[f]ull compensation in eminent domain matters consists of two elements: the value of the property taken, and severance damages to the remainder, if any, in a partial taking."[35] This calculation contemplates the value enhancement generated by the presence of alternative telecommunications companies within an MTE.[36] Therefore, full compensation, or the difference in value of the MTE attributable to the presence of alternative telecommunications facilities, may constitute the reasonable compensation owed an MTE owner for telecommunications company access.

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33 Florida Dept. of Revenue v. Orange County, 620 So.2d 991 (1993).

34 See Jacksonville Expressway Authority v. Henry C. DuPree Co., 108 So.2d 289, 291 (1958)("Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist [the court] in determining what is full or just compensation, within the purview of [the] constitutional requirement.").

35 Dept. of Transportation v. Rogers, 705 So.2d 584, 587 (5th Dist. Fla. 1997).

36 See Taylor v. State Dept. of Transportation, 701 So.2d 610 (2d Dist. Fla. 1997)(severance damages in eminent domain proceedings are generally measured by the reduction in value to the remaining property).

VII. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully request that the Commission suggest to the Legislature prompt enactment of clear, simple legislation providing the MTE access consistent with the principles articulated above for the State of Florida. Moreover, should the Commission deem it appropriate, it should, sua sponte, initiate a rule making to adopt MTE access rules consistent with these comments.

Respectfully submitted,

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August 26, 1998

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, certify that a copy of this document was served on all parties of record in this proceeding on August 26, 1998, by hand delivery, except where indicated, to the following individuals:

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