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August 28, 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; BOMA of Florida, Inc. ("BOMA")

Dear Ms. Bayo:

Enclosed for filing are fifteen (15) originals and a diskette (saved in Word 6.0 format) of BOMA'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.
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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) hereby files its rebuttal comments with the Florida Public Service Commission ("PSC") in the above-captioned proceedings. In short, it is BOMA's position that the PSC should recommend to the Florida Legislature in its Report and Policy Recommendations that private owners of multiple-tenant properties, particularly commercial office buildings, and their managing agents do not pose any competitive barriers to entry by alternative local exchange carriers (ALECs) desiring to compete in the sale of their telecommunications services with incumbent, pre-existing monopolies, also known as local exchange carriers (LECs). Therefore, no mandatory, forced building or other direct tenant access (collectively, "mandatory access") law or regulation should be advocated for adoption by the PSC or the Florida Legislature.

By their own admissions in these public hearings, the ALECs have admitted that the alleged problems (the "Alleged Problems") of which they complain (*i.e.*, that building owners are purportedly acting as monopolies and are attempting to preclude ALECs from providing competitive telecommunications services to their tenants unless ALECs pay exorbitant access surcharges on the prices for their services), is the result of actions by parties constituting less than 2% of the entire real estate industry. In other words, the ALECs are *not* having these Alleged Problems with, as they describe it, over 98% of tenant-occupied building owners and managers (collectively, "Landlords"). In fact, those Landlords are and have been entering into

bona fide license or other similar access agreements (collectively, "License Agreements") with ALECs, which License Agreements are being negotiated in arms-length transactions.

Moreover, the U.S. Supreme Court opinion issued in *Loretto vs. Teleprompter Manhattan CATV*, cited in BOMA's prior brief, is still the controlling law on the issue of mandatory access. In order to enact any mandatory access statute or regulation, the state must pay *just* compensation under the U.S. Constitution's standard of the Fifth Amendment (applied to the states via the Fourteenth Amendment) and, under Florida law, *full* compensation as required by Florida Constitution Article X, Section 6. Such compensation must be paid because any mandatory access provision, according to the *Loretto* opinion, constitutes a legislative taking of private property.

In addition, the legislative takings proposed by ALECs, as was the case in *Storer Cable TV, etc.* (also cited in BOMA's prior brief), would represent unconstitutional takings of private property rights in Florida for the benefit of private parties, *i.e.*, the ALECs. Such takings would clearly violate the mandate of Florida Constitution Article X, Section 6 requiring that all such governmental takings be solely for a *public*, as opposed to private purpose.

BOMA's rebuttal positions on the issues addressed at the PSC's Public Hearing held on July 15, 1998 in Tallahassee are as follows:

I. BOMA FAVORS COMPETITION AMONG PARTIES PROVIDING TELECOMMUNICATIONS SERVICES TO TENANTS OF BOMA'S MEMBERS. HOWEVER, MANDATORY ACCESS WILL NOT RESULT IN MORE COMPETITION, ONLY MORE LITIGATION.

The real estate industry, and BOMA in particular, favors and actually *promotes* competition among parties desiring to sell telecommunications services to tenants of commercial office buildings. BOMA's pro-competition advocacy is based on its belief that the more prevalent the competition is, the better service will be rendered, and the less expensive that service will be. Such is a fundamental postulate of our free market economy.

However, a free market economy is wholly dependent upon competition which is *not* (a) subsidized by governmental means or (b) the result of governmental intervention with the fundamental constitutionally guaranteed private property rights of its citizens. Any mandatory access law, however denominated (*e.g.*, forced building access, direct tenant access, *etc.*) will *not* promote competition. Moreover, it will *not* encourage private parties such as Landlords to conduct business with or encourage tenants to conduct business with competitive telecommunications carriers unjustly enriched to the detriment of private property owners as a result thereof.

In other words, the passage of any mandatory access law will *not* cause any private building owner or property manager to freely open its doors to other telecommunications carriers, but it *will* result in expensive litigation because telecommunications carriers will seek to enforce the unconstitutional mandatory access laws against Landlords, which access will be denied. Landlords will defend, in litigation if need be, their constitutionally guaranteed private property rights. Such a catastrophic situation of needless and very expensive litigation may be easily avoided by allowing the free market to accomplish its objective, as well as the purpose of the 1996 Federal Telecommunications Act, of promoting competition, which unquestionably must result from arms-length transactions negotiated by the private parties involved.

II. ANY MANDATORY ACCESS LAW PASSED IN FLORIDA WOULD BE UNCONSTITUTIONAL UNDER FEDERAL AND FLORIDA LAW, ON ITS FACE, AND EXPRESSLY VIOLATE THE PROVISIONS OF FLORIDA'S BERT J. HARRIS, JR. PRIVATE PROPERTY RIGHTS ACT.

A. The Fifth Amendment to the U.S. Constitution, as applied to the various United States by virtue of the Fourteenth Amendment, states that there shall be no governmental taking of private property without just compensation. *Any* law to the contrary is unconstitutional. Neither Congress nor any state may constitutionally pass any law which violates the provisions of the Fifth Amendment.

B. Moreover, Article X, Section 6 of the Florida Constitution further governs this State's power of eminent domain, also known as the governmental "taking" power. Article X, Section 6(a) states that:

> **"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." [emphasis added]

Under the *Loretto* standard referred to above (in the Introduction section and BOMA's prior brief), the enforcement of any mandatory access law constitutes a *prima facie* governmental *taking* of private property, for which compensation must be paid. A multitude of cases in Florida have followed the *Loretto* standard, the most notable of which is *Storer Cable TV vs. Summerwind*, also cited in BOMA's prior brief. *Loretto* and *Storer* represent the current rules of Federal and Florida law on the mandatory access issue, and neither have been overruled, by case law or otherwise.

C. Any attempted passage of a mandatory access statute or other similar law in Florida would also expressly violate the provisions of The Bert J. Harris, Jr. Private Property Rights Protection Act, Section 70.00 *et seq.*, *Florida Statutes*, enacted by the Florida Legislature in 1995. Section 70.001(1) states, in pertinent part:

> "The Legislature recognizes that some laws, regulations and ordinances of the state and political entities of the state, as applied, may inordinately burden, restrict or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. **The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."** [emphasis added]

Any form of mandatory access law passed by this State, or any regulation proposed by the PSC which accomplishes the same objective would, without any *bona fide* doubt whatsoever, unfairly and adversely affect the interests of real property Landlords and violate the provisions of the Bert J. Harris, Jr. Private Property Rights Protection Act.

In addition, any law whatsoever which *requires* building owner's to grant access to any private telecommunications carriers would significantly and unfairly burden Landlords. As previously stated, Landlords *want* multiple carriers in their buildings, but they cannot imprudently relinquish all control to their buildings, at their own expense, for

telecommunications carriers' access or the access of their multiple contractors, subcontractors, agents, employees, representatives, etc. (collectively, "Telecommunications Affiliates") Simply put, Landlords must be entitled to exercise discretion in the managing, controlling, leasing and licensing of access to and space in and on their buildings, for the protection and security of not only their own interests, but also those interests of their tenants and other licensees and occupants of their buildings. In fact, Landlords are required to exercise that management, discretion and control pursuant to the terms of their private lease, license and similar contractual obligations with those third party occupants of their buildings.

III. THE PASSAGE OF ANY MANDATORY ACCESS LAW WOULD RESULT IN CHAOS IN COMMERCIAL OFFICE BUILDINGS.

As previously stated, Landlords are required, pursuant to the terms of their existing leases, licenses and other agreements with third parties occupying or using their properties, to control the environments in which those parties work and conduct their businesses. Recently, the California Public Utilities Commission ("CPUC") was petitioned by telecommunications carriers doing business in that state, who requested that the CPUC grant them mandatory access to tenant-occupied buildings. In a second preliminary decision rendered by Administrative Law Judge Thomas R. Pulsifer on behalf of the California Public Utilities Commission, the request by telecommunications carriers for mandatory access rights to tenant-occupied properties was again expressly rejected. Relevant text from that decision includes the following:

> **"We do not have jurisdiction to require non-utility third parties to grant utility access to their properties.** Merely because a building owner or manager

provides private service to tenants within the building, there is no basis for its treatment as a 'telephone corporation'..."

"We recognize, moreover, that the private property rights of building owners must be observed. Building owners must retain authority to supervise and coordinate on-premises activities of service providers within their buildings. Installation and maintenance of telecommunications facilities within a building may disrupt tenants and residents, and could cause physical damage to the building. Unauthorized entry into a private building by a third party could compromise the integrity of the safety and security of occupants of the building. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers. Telecommunications carriers' access to private buildings shall therefore be subject to the express consent of the building owner or manager..."

"Building owners are in the business of providing environments in which people live and work. Building owners typically do not provide telephone service to their tenants. We disagree...that a building owner provides a special form of 'special access' telecommunications service through the act of making available its building facilities to a telecommunication provider. By merely providing the telephone carrier with access to a building's facilities, the building owner does not become a telecommunications utility. If we were to accept such a

definition as proposed by the [telecommunications] Coalition, we would also have to find that building owners are also electric utilities, water utilities, and every other type of business that requires access to reach customers..." [emphasis added]

Of course, any decision by the California Public Utilities Commission is not binding in any way upon the State of Florida or any of its agencies including this PSC. However, the excerpts from and the wisdom of the practicalities addressed in the opinion cited above cannot be disregarded, especially since telecommunications carriers in the State of California possess quasi-governmental eminent domain taking powers. (As the PSC is well aware, certificated telecommunications companies do *not* have such property taking authority here in Florida).

IV. TELECOMMUNICATIONS CARRIERS' PROPOSALS FOR MANDATORY ACCESS LAWS WOULD ONLY BENEFIT THEIR OWN PECUNIARY INTERESTS, AND NOT THOSE OF TENANTS OR LANDLORDS.

Many of the telecommunications carriers represented in these proceedings have stated that they are advocating mandatory access in order to protect the "rights" of tenants to receive alternative telecommunications services from parties other than the incumbent LECs. However, such assertions are both misleading and untenable. Telecommunications carriers are seeking mandatory access to benefit their own financial "bottom lines", not those of tenants. Telecommunications carriers, like any other large corporations, have obligations to their shareholders to make profits. (Admittedly, Landlords have similar obligations.)

Nevertheless, if the genesis of those profits comes at the expense of Landlords, the telecommunications carriers will certainly attempt to pursue all possible actions to obtain that result, including the spending of hundreds of thousands of dollars lobbying to the Florida Legislature and the PSC under the guise that, if a mandatory access law is passed, then telecommunications services will "all of a sudden" become less expensive. To a superficial degree, such an argument may appear to have some merit.

However, what the telecommunications carriers have failed to address is that there are costs attendant to managing and administrating their access to tenant-occupied buildings. The expenses of management and administration of multiple carriers' access to these properties, including those related to management and engineering personnel, fire and safety code compliance, tenant security, parking, construction, HVAC requirements, emergency power needs, and the Landlords' physical space availability, just to name a few, are ignored by the carriers in these proceedings.

These are significant concerns in managing tenant buildings, and they raise substantial economic risks for Landlords. In other words, they cost Landlords money. To demand that Landlords relinquish control over these issues in their buildings, simply to benefit the bottom-line profits of telecommunications carriers, would represent irresponsible government intervention.

In addition, the foregoing costs will, in one way or another, be passed through to the tenants desiring to benefit from competitive telecommunications access. To illustrate, if any mandatory access law is passed, the management and administrative costs attendant thereto must be passed through to customer-tenants, either in the form of (a) increases in the prices for their

telecommunications services or (b) higher rents, additional rent items, or increases in operating expenses payable by the tenants pursuant to their lease agreements.

To legislatively force any Landlord to accept the administrative burden and expense (not to mention the undesirable task of informing its tenants that their rents will be raised because additional telecommunications carriers have been legislatively granted free access to their building), is unfair and would unjustly enrich telecommunications carriers.

V. LICENSING AND OTHER ACCESS AGREEMENTS PROPOSED BY LANDLORDS FOR EXECUTION BY TELECOMMUNICATIONS CARRIERS ARE COMMON IN THE MARKETPLACE TODAY. THEREFORE, NO GOVERNMENTAL INTERVENTION IN THOSE TRANSACTIONS IS NECESSARY OR DESIRABLE.

The Federal Telecommunications Act of 1996 is but two years old, and the Florida Telecommunications Act of 1995 is just a few months older. Nevertheless, telecommunications companies and Landlords have been negotiating arms-length License Agreements for years, dating prior to the enactment of both of those laws. Some ALECs object to signing Landlords' agreements on the basis that they are allegedly "onerous" and "adhesive" contracts. What these carriers really mean to say, but will not admit, is that they do not want to sign *any* contracts which benefit or protect Landlords whatsoever.

To illustrate, oftentimes a telecommunications carrier seeking access to a Landlord's building will propose its own form of what it declares to be a "fair" agreement. In fact, those documents proffered by telecommunications companies for execution by Landlords are: (a) proposed to be unilaterally executed by Landlords (*e.g.*, similar to title deeds), (b) constitute only

one or two pages of one-sided "granting" text favoring only the carriers; and (c) would result in the granting to the telecommunications carriers of *permanent* easements in the buildings. In other words, these documents, if executed, result in the encumbering of title to the Landlord's property and adversely impact the value of the building upon its future sale by the Landlord.

To compound matters, such documents proposed by telecommunications carriers usually do not contain any protections whatsoever for the Landlord, its tenants, or other building occupants. The compensation generally offered for such permanent easements is nominal, *i.e.*, $150.00 to $200.00. Of course, most prudent Landlords object to signing such documents, not only because they encumber title to their properties, but also because they are unconscionable and strictly one-sided in favor of the carriers.

The typical form of License Agreement proposed by Landlords for execution by telecommunications carriers much more closely resembles a lease than a permanent easement. However, the document is commonly structured as a license agreement, not a lease, because of operational considerations indigenous to the carrier's business, which potentially affect all tenants in the building. Also, the telecommunications carriers are usually granted non-exclusive access rights to certain portions of the property which, due to space limitations, sometimes must be commonly shared with other telecommunications carriers and utility service providers, much to their mutual complaints.

Landlords are in the business of negotiating documents with tenants, as well as telecommunications carriers. All ALECs (not to mention LECs) participating in these proceedings are represented by competent counsel. In addition, it is obvious that the telecommunications carriers in these proceedings are not unsophisticated parties. In fact, according to the August, 1998 publication ***Exchange***, the trade journal publication for the ALEC

industry, the capitalization of *each* of the ALECs in these proceedings either approximates or well exceeds *a billion dollars*. Very few property owners can boast that size or financial strength. If any party has an advantage in the negotiation of License Agreements, it is probably the multi-billion dollar telecommunications carriers, not Landlords.

In addition, it is incredible that, as the carriers would suggest, building owners, who actually *want* alternative telecommunications carriers in their buildings, would try to prohibit carriers from competing in the sale of their services to tenants, without reason. It is also highly improbable that Landlords would attempt to extort exorbitant license fees from carriers, because, once again, they *want* competition in their buildings. Lastly, Landlords do not impose unreasonable burdens on telecommunications carriers desiring to serve their tenants because they bring additional amenities to their buildings. The accusations in these proceedings by telecommunications carriers (*i.e.*, that Landlords are unreasonable, favor doing business with incumbent LECs, and do not want tenants to have telecommunications service options) presuppose that Landlords voluntarily take actions clearly adverse to both their best interests, as well as those of their tenants. Those accusations by the carriers ignore the fact that new carriers bring additional amenities to their buildings. Therefore, the ALECs' argument that the passage of a mandatory access law is necessary in order to make Landlords more "reasonable" and less discriminatory in negotiations with ALECs is without merit and not based on market reality. These positions are simply not plausible, they defy logic, and they are based solely on ulterior motives.

VI. SEVERAL TELECOMMUNICATIONS CARRIERS HAVE STATED THAT THE PURPOSE FOR THE INSTANT PROCEEDINGS IS TO ALLOW THE PSC TO

GATHER THE EVIDENCE TO *PROVE* THAT A MANDATORY ACCESS LAW IS NECESSARY TO PROMOTE COMPETITION BETWEEN LECs AND ALECs. SUCH ALLEGATIONS ARE CLEARLY CONTRARY TO THE PURPOSE OF THE LEGISLATIVE MANDATE TO THE PSC REGARDING THESE PROCEEDINGS.

During the 1998 Florida Legislative Session, many telecommunications carriers collaborated in sponsoring a telecommunications bill that attempted to introduce mandatory access into law. The real estate industry was not consulted at all, prior to or in the drafting of that bill, even though the telecommunications carriers knew that, if their lobbying efforts were successful, the resulting law would involve an unconstitutional usurpation of the private property rights of Landlords. A bill of goods had been sold to the House Utilities and Communications Committee and certain members of the Legislature which was misleading and did not depict reality in the marketplace. Ultimately, the telecommunications lobbying efforts failed in 1998, because our lawmakers realized that passage of a mandatory access law was not only controversial, but also unconstitutional.

In addition, in the most recent PSC hearing, the telecommunications carriers stated that the vast majority, in fact, *admittedly over 98% of Landlords, are not being unreasonable* in licensing telecommunications access to their tenants. It was expressly claimed by the carriers themselves that *less than 2% of all Landlords are causing ALECs the "Alleged Problems"* which are being addressed in these public hearings.

If such is the case, then why are Landlords required to defend their constitutionally guaranteed private property rights in these proceedings? Who are the telecommunications carriers really trying to benefit? If less than 2% of all Landlords are causing the Alleged

Problems of which ALECs complain, why should the Florida Legislature or the PSC tie the hands of Landlords in managing their own properties or otherwise unwisely intervene in ongoing marketplace negotiations? These are all questions that should be asked and answered by the PSC in its report to the Florida Legislature resulting from these proceedings.

SUMMARY AND CONCLUSIONS

The technology involved in bringing building tenants telephone, data exchange, video information and other telecommunications services is ever-evolving. Mergers and consolidations among multi-billion dollar competitors in the industry are the norm, not the exception. According to another telecommunications industry trade association publication, ***State Telephone Regulation Report*** (August 21, 1998), *201 telecommunications carriers have been certificated in the state of Florida already. Florida already boasts a greater number of certificated ALECs than any other state in the U.S., including California and New York.*

The PSC should be asking, "If in fact Landlords are allegedly creating barriers to competition in Florida, then why have 201 companies sought to sell their services in this state?" Certainly, all 201 of their financial business plans cannot ignore the reality of the marketplace, which is that telecommunications carriers and Landlords are reasonably and mutually negotiating, in good faith, in arms-length transactions, the licensing of telecommunications access to Landlords' properties.

If the Florida PSC or Legislature opens Pandora's box by passing *any* mandatory access law, such will immediately result in a plethora of litigation, pursuant to which Landlords will seek to protect their constitutionally guaranteed private property rights. The true motivations of telecommunications carriers should be viewed with close scrutiny, as should the status of the

marketplace today, and the PSC should recommend that the Florida Legislature *should not consider or adopt any mandatory access law* because not only would such a law be unnecessary, but also an unconstitutional infringement on all Landlords' private property rights.

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.