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Blanca S. Bayo  
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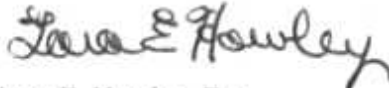
RE: Undocketed Special Project No. 980000B-SP

Dear Ms. Bayo:

Pursuant to the Public Notice dated August 20, 1998, the Community Associations Institute ("CAI") respectfully submit an original and fifteen copies of its Rebuttal Comments in the docket referenced above. CAI also submits its Rebuttal Comments on diskette.

CAI appreciates the opportunity to participate in this proceeding.

Sincerely,



Lara E. Howley, Esq.  
Issues Manager

Enclosures

ACK \_\_\_\_\_  
AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAE \_\_\_\_\_  
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1630 Duke Street  
Alexandria, VA 22314  
(703) 548-8600  
Fax (703) 684-1581  
www.caionline.org

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

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**REBUTTAL COMMENTS**

Pursuant to the Notice of Third Staff Workshop issued August 20, 1998, the Florida Legislative Alliance of the Community Associations Institute ("CAI") respectfully submits the following Rebuttal Comments in the docket referenced above. CAI, which represents condominium, cooperative, and homeowners associations and their homeowners and professionals, respectfully requests that the Florida Public Service Commission ("Commission") refrain from supporting forced entry to community association property by telecommunications service providers. The arguments outlined in the Comments submitted by telecommunications service providers ignore community associations' fundamental rights to use and control their own property. The telecommunications service providers also fail to acknowledge that community associations are already selecting alternative services and providers in response to rapid changes in the telecommunications marketplace. Forced entry policies would retard the growth of the marketplace, because telecommunications service providers would have minimal incentives to offer reasonably priced, high quality services to community associations, since they would have access to association property regardless of the price or quality of their service. The Commission should refrain from impeding the growth of this competitive marketplace and dismiss all forced entry initiatives.

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I. 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.)

The telecommunications service providers represented in this docket have argued that they should have direct access to multi-tenant environments ("MTEs") to install and maintain telecommunications equipment. They present two major arguments: that MTE owners bottleneck the provision of alternative services and that tenants should be able to choose their providers. These arguments do not take into account community associations' ownership rights and governance structure.

In this proceeding, telecommunications service providers have asserted that they need forced entry rights because community associations are "bottlenecks," prohibiting access to association property unless they can obtain payments for the use of their property.<sup>1</sup> This argument trivializes association concerns over the use of their property. Forced entry proposals threaten associations' abilities to prevent damage to their property, since any telecommunications service provider would be permitted to enter association property, regardless of the quality of its work. If a provider damaged association property or injured association residents, there would be no way to exclude the provider to prevent further damage or injury. In addition, the safety and security of association property would be compromised by the unrestrained and unmanaged entry of multiple

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<sup>1</sup> Comments of Cox, e.spire, Sprint, and Teleport.

telecommunications service providers, especially since associations would have little or no control over the means, method, location, and timing of equipment installation. The telecommunications service providers also fail to recognize that many associations have insufficient space to install multiple sets of equipment on their property. For these practical reasons alone, the Commission should dismiss the self-interested calls for forced entry privileges.

The telecommunications service providers who assert that community associations charge fees for access to association property are mistaken. Community associations are not usually in the position to charge fees for access to association property, since the provider would pass the cost of the access fee back to the same residents who chose the provider, increasing the cost of the service. However, if community associations do choose to seek fees for access to association property, that is within their right as the owners of the property. Telecommunications service providers should not be able to use association property freely, unless this access was negotiated between the parties.

At least one Commenter has argued that associations should be regulated as telecommunications service providers, because associations supposedly control the telecommunications equipment on their property.<sup>2</sup> However, this argument ignores the fact that community associations do not provide telecommunications services to their residents. In most cases, community association contracts with telecommunications service providers stipulate that the providers own and control the wiring installed. Even

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<sup>2</sup> Comments of Sprint.

in cases where associations are granted ownership or control of the wiring, this ownership or control does not make community associations telecommunications service providers. They do not offer telecommunications services to their residents; the providers do. The Commission should therefore follow the recent example of the California Public Utility Commission, which refrained from regulating community associations as telecommunications service providers.

Many telecommunications service providers have asserted that forced entry legislation is necessary because MTE tenants have a right to receive any service they desire.<sup>3</sup> This argument is predicated on the assumption that MTE residents have no voice in the selection of telecommunications service providers. This is not the case in community associations. In community associations, the board of directors – *comprised of homeowners<sup>4</sup> elected by homeowners* – seeks to accommodate the desires of community association residents while protecting the concerns and interests of all association residents. Therefore, homeowners select their service providers. Their choices, including any to exclude certain providers from association property, must be respected.

CAI, the International Council of Shopping Centers and the Florida Apartment Association have stressed the major constitutional problems caused by forced entry provisions. Forced entry legislation would take association property, posing

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<sup>3</sup> Comments of BellSouth, GTE Florida, Intermedia, OpTel, Sprint.

<sup>4</sup> In different forms of community associations, those residents with an ownership interest have different names: unit owner in condominium associations, cooperative resident in cooperative associations, and homeowner in planned communities. In these Rebuttal Comments, all three types of owners are named homeowners.

constitutional obstacles to enactment and enforcement. To avoid this entanglement, the Commission should not support forced entry proposals.

As noted by the International Council of Shopping Centers and the Florida Apartment Association, the marketplace is rapidly changing, with community associations taking advantage of new telecommunications service options. Community associations are choosing telecommunications services from alternative service providers that provide high quality, reasonably priced, flexible services that are demanded by association residents. Forced entry policies would deter the growth of that marketplace, and instead, would create artificial markets by granting privileges to low quality telecommunications service providers that would otherwise be unable to compete based on the quality of and demand for their services. With any provider able to force installation of telecommunications equipment on association property, providers would not have to demonstrate service quality and competitive pricing or address any other legitimate concerns for the valuable and limited space they would require. Therefore, forced entry policies would impede the growth of quality competition and possibly prevent association residents from receiving better services from more professional providers.

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

A. 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?

CAI agrees that the term "multi-tenant environment" should be defined broadly.<sup>5</sup>

However, this term should only be defined broadly to clarify that forced entry will not be required in any multi-tenant environment.

B. 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?

CAI agrees that a broad range of telecommunications services should be included.<sup>6</sup>

However, the Commission should use the broad definition to clarify that it will not support any forced entry proposal for any telecommunications service.

C. 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?

Many telecommunications service providers assert that there should be little or no constraints on forced entry proposals.<sup>7</sup> Some providers recognize community associations' safety, security, maintenance, and aesthetic concerns, but minimize these issues.<sup>8</sup> Community associations' safety, security, space, and aesthetic concerns are not

<sup>5</sup> Comments of e.spire, OpTel, Sprint, Time Warner.

<sup>6</sup> Comments of BellSouth, e.spire, Realtors, Sprint, Teleport, Time Warner, Worldcom.

<sup>7</sup> Comments of BellSouth, Cox, e.spire, GTE, OpTel, Sprint, Teleport, Time Warner, Worldcom.

<sup>8</sup> Comments of GTE, Teleport, Worldcom.

trivial; they impact the well being of association residents and efficient operation of association communities.

Some telecommunications service providers purport to provide solutions to these problems. However, these "solutions" do not adequately resolve these concerns. For example, one telecommunications service provider proposes that it would sign agreements indemnifying the association for any damage caused.<sup>9</sup> But indemnification agreements cannot adequately protect associations from damage; they provide no incentive to telecommunications service providers to refrain from damaging association property. The only way to prevent damage to community association property is for the community association to control and manage access to its own property.

Many telecommunications service providers suggest that associations should be able to place restrictions on access for safety, security, maintenance, or aesthetics reasons if these restrictions are "nondiscriminatory."<sup>10</sup> However, this limited ability to restrict forced entry would not permit community associations to protect their property, since telecommunications service providers would likely challenge every enforcement of these limited restrictions as "discriminatory."

Telecommunications service providers also would permit community associations to regulate equipment installation on their own property if there are space concerns.<sup>11</sup> This

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<sup>9</sup> Comments of Teleport.

<sup>10</sup> Comments of Teleport, Time Warner.

<sup>11</sup> Comments of GTE, Teleport, Worldcom.



proposal recognizes an obvious fact: that only a certain number of providers will be able to install wiring in a particular building. This "solution" does not adequately protect associations from demands for access when a building lacks the space necessary for equipment installation and challenges when an association informs a telecommunications service provider that there is inadequate space for its installation. In addition, this "solution" does not ensure that the best providers would be able to offer service. The first providers to gain access to associations would be able to remain on the property, regardless of the quality of their service. New competitors offering better, more affordable, more flexible service options would be unable to enter the association property, depriving association residents of the benefits of the competitive market.

In supporting forced entry proposals, the telecommunications service providers ignore the fact that they are requesting the Commission to deprive community associations of fundamental property rights: to use and control the property they own. These rights cannot be abrogated merely to increase the profit margins of for-profit telecommunications service providers. Telecommunications service providers will gain access to community associations by providing high quality, flexible, popular, and reasonably priced services and by working in good faith to address community associations' legitimate concerns. Community associations generally want a wide variety of telecommunications services; providers that work with community associations to offer these services will succeed in gaining their business.

Many telecommunications service providers have argued that the Commission should invalidate<sup>12</sup> or severely limit<sup>13</sup> exclusive service contracts. The providers fail to recognize that in some situations, exclusive contracts are beneficial to both providers and associations. Telecommunications service providers occasionally require exclusive service contracts in order to recoup equipment installation costs. To receive any service, community associations sign these contracts.

In addition, some associations use exclusive service contracts as a means to obtain the most competitive contracts. In order to obtain the association's patronage, telecommunications service providers will offer reduced bulk prices and enhanced services.

The service providers who seek the invalidation of exclusive service contracts fail to recognize the fact that the marketplace is eliminating most anticompetitive exclusive contracts, since community associations will not enter into these contracts when other more competitive telecommunications options are available. Therefore, the Commission should refrain from invalidating exclusive service contracts, as the marketplace will eliminate the detrimental exclusive service contracts.

D. 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)?

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<sup>12</sup> Comments of e.spire, GTE, OpTel, Sprint, Teleport.

<sup>13</sup> Comments of Time Warner.

CAI supports those parties who recommend that the demarcation point should be fixed at the minimum point of entry (MPOE).<sup>14</sup> This will set one demarcation point for the purposes of both federal and state law. However, CAI opposes any attempt to impose additional liability on community associations for maintenance of telecommunications equipment beyond the demarcation point, as at least one telecommunications service provider has suggested,<sup>15</sup> unless the parties have agreed to transfer of ownership and control by contract. This proposal, coupled with forced entry, would deprive community association of their fundamental property rights while obligating them to maintain equipment that they do not own and did not agree to permit onto their property.

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

- 1) landlords, owners, building managers, condominium associations
- 2) tenants, customers, end users
- 3) telecommunications companies

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, personnel, (price) discrimination, and other issues related to access.

Based on your answer to 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?

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<sup>14</sup> Comments of Cox, GTE, Intermedia, Sprint, Time Warner.

<sup>15</sup> Comments of GTE.

Many telecommunications service providers have asserted that community associations have no rights to control their own property; they only have the obligation to permit access.<sup>16</sup> This argument contravenes all established property rights.<sup>17</sup> The Commission should not abrogate community associations' rights to use their own property for the benefit of their residents.

Telecommunications service providers assert that community association residents should have the right to select their own providers.<sup>18</sup> Community association residents already have that right, since they either directly or indirectly choose their telecommunications service providers.

Telecommunications service providers assert that they have the right to provide service to association residents.<sup>19</sup> The ability to provide service is not a right; it is only a profit motivation. To the extent that providers seek to use community association property for equipment installation and maintenance, this motivation must conform to and not infringe upon community associations' fundamental property rights. While some providers admit that they have obligations to maintain and repair property in which telecommunications equipment is installed, they do not recognize community associations' rights to control

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<sup>16</sup> Comments of BellSouth, Cox, Teleport, Worldcom.

<sup>17</sup> See, Comments of Florida Apartment Association, Realtors.

<sup>18</sup> Comments of Cox, OpTel, Teleport, Time Warner, Worldcom.

<sup>19</sup> Comments of BellSouth, Time Warner.

their own property.<sup>20</sup>

Many telecommunications service providers argue that no compensation would be necessary for access to community association property.<sup>21</sup> They ignore the fact that forced entry proposals mandate a taking of community association property. Therefore, compensation would be necessary should any forced entry policy be established. This compensation would be best determined through negotiation of the contracting parties.

### CONCLUSION

The telecommunications service providers that have participated in this proceeding have argued that forced entry is necessary to obtain additional customers. They assert that the intrusion on community associations and other multi-tenant environments is minimal and can easily be solved through indemnity agreements and the payment of de minimis compensation. They ignore several fundamental points.

In supporting forced entry proposals, the telecommunications service providers are requesting that the Commission deprive community association homeowners of the fundamental right to control property that they own. The ability to obtain compensation and indemnity agreements and restrict access in certain narrowly defined circumstances does not adequately compensate for the loss of control over property. The ability to increase profit margins does not justify taking association property.

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<sup>20</sup> Comments of Cox, Teleport, Time Warner, Worldcom.

<sup>21</sup> Comments of Cox, GTE, Sprint.

Telecommunications service providers are for-profit businesses. In proposing forced entry requirements, they are seeking an advantage no other business can claim: the right to use another's private property for their own gain. Community associations are able to select the businesses that provide other services to the association and exclude unwanted businesses from their property. Telecommunications service providers should be treated no differently.

The Commission should also recognize that forced entry requirements are unnecessary, since the entry of new telecommunications service providers is permitting community associations to select alternative providers to serve their associations, often simultaneously. As more providers enter the marketplace, this competition will only increase. Since forced entry does not provide incentives for these new providers to offer high quality, low cost service, the growth of this dynamic marketplace would be hindered by forced entry legislation. Moreover, forced entry proposals would place Florida community associations at risk because such proposals remove the need for providers to respect community associations' legitimate safety, security, aesthetic, and space concerns. Forced entry requirements have no place in this rapidly evolving marketplace.

CAI respectfully requests the Commission to dismiss all forced entry proposals.

Respectfully submitted,

*Richard L. Spears by L E H*

Richard L. Spears

Community Associations Institute Florida Legislative Alliance

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

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

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