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VIA HAND DELIVERY

May 17, 2000

EX PARTE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Submitted on behalf of the Smart Building Policy Project, please find attached a copy of the Texas Public Utility Commission's proposed rules (16 TAC § 16.129) relating to Standards for Access to Provide Telecommunications Services at Tenant Request. The purpose of these proposed rules is to implement the Public Utility Regulatory Act, Texas Utilities Code §§ 54.259, 54.260 regarding the nondiscriminatory treatment of telecommunications utilities by property owners in Texas. A copy of these proposed rules was delivered today on behalf of the Smart Building Policy Project to Wilbert Nixon, Leon Jackler, Lauren Van Wazer, Jeffrey Steinberg, Joel Taubenblatt, and Paul Noone of the Wireless Telecommunications Bureau and to Cheryl King and Eloise Gore of the Cable Services Bureau.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's written ex parte presentation.

Respectfully submitted,

Gunnar D. Halley

No. of Copies rec'd 0+1
List A B C D E

cc: Wilbert Nixon, Leon Jackler, Lauren Van Wazer, Jeffrey Steinberg, Joel Taubenblatt, Paul Noone, Cheryl King, Eloise Gore

Enclosure

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Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICE
16 TAC §26.129

The Public Utility Commission of Texas (commission) proposes new §26.129 relating to Standards for Access to Provide Telecommunications Services at Tenant Request. The purpose of this proposed rule is to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §§54.259, 54.260, and 54.261 (Vernon 1998 & Supplement 2000) (PURA), regarding the non-discriminatory treatment of telecommunications utilities by property owners. Project Number 21400 has been assigned to this proceeding.

The proposed rule sets forth procedures whereby a requesting telecommunications carrier may seek access to the lease owner's property to install telecommunications equipment upon a tenant's request. The rule encourages independent negotiations between the telecommunications carrier and the property owner, and establishes procedures for resolution by the commission in the event an agreement cannot be reached. Further, the proposed rule addresses situations in which the property owner may deny access to the building for safety concerns or space constraints.

In 1995, the Legislature enacted PURA §§54.259, 54.260, and 54.261 as part of a comprehensive package of legislation to open Texas' telecommunications market to competition. The thrust of these particular PURA sections is to promote competition in the telecommunications market by allowing a tenant under a real estate lease to choose the provider of its telecommunications services. As the competitive marketplace has developed, the need for specific rules to implement these sections has become evident. Accordingly, the commission initiated this rulemaking proceeding to ensure the access of a telecommunications utility to the owner's property to serve a tenant as requested, thereby promoting tenant choice.

As part of the drafting process, commission staff conducted workshops in Austin, Houston, and Dallas to receive input from potentially affected persons. Further, staff participated in building tours to promote an understanding of the technical aspects of and potential space constraints due to the installation of telecommunications equipment.

The commission has prepared a takings impact assessment pursuant to Texas Government Code Annotated §2007.043. Interested persons may obtain a copy of this assessment by contacting the commission's Central Records department and referencing Project Number 21400. In summary, the commission finds that adherence to PURA §54.259 and proposed §26.129 may result in takings of real property. The purpose of the statute and proposed rule is to promote competition in the telecommunications market by effectuating a tenant's choice of telecommunications services provider. This purpose is advanced by ensuring the reasonable access of the telecommunications services provider to the owner's property to provide service to a tenant that has chosen such company as its telecommunications provider. Although PURA §54.259 and the proposed rule impose a burden on private real property, any taking that might result will be compensated. PURA §54.260 and the proposed rule require a telecommunications services provider to pay reasonable compensation to the affected property owner for the use of such space on the property.

The commission finds that the citizens of Texas will benefit from the proposed rule because it will foster competition in the tenant sector of the telecommunications services market. The language of PURA specifically sets forth the interrelationship between the property owner and the telecommunications services provider chosen by the tenant and authorizes the provider's access to the property as the means for accomplishing a tenant's choice in a telecommunications services provider. PURA further grants the commission plenary jurisdiction to enforce the statute's requirements. See PURA §54.259(c) and§54.260(b).

Evan Farrington, Attorney, Office of Policy Development, has determined that for the first five-year period the proposed rule isin effect there are no foreseeable implications relating to cost or revenues of the state or local

governments as a result often forcing or administering the section.

Mr. Farrington has also determined that for each year of the first five years the proposed rule is in effect the public benefits expected as a result of enforcing the rule will be that customers will have increased choice of telecommunications providers. Furthermore, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed section. There may be economic costs to persons who are required to comply with the proposed section. These costs are likely to vary from business to business, and are difficult to ascertain. However, the benefits accruing from implementation of the proposed section will outweigh these costs.

Moreover, Mr. Farrington has determined that the proposed rule will not affect a local economy for each year of the first five years it is in effect. Therefore, a local employment impact statement is not required under Administrative Procedure Act, Texas Government Code Annotated §2001.022.

The commission seeks comments on the proposed rule from interested persons. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to adopt the proposed rule. Additionally, the commission invites specific comments from interested persons on the proposal of using six months as the measure of time remaining on a lease for purposes of defining the term"tenant" in the definitions section of the proposed rule. The commission also seeks comment regarding any applicable Texas Supreme Court case law that delineates the standards necessary to determine whether compensation is adequate pursuant to the requirement in PURA §54.260(a)(6). The commission invites comment on whether the proposed rule provides property owners with adequate measures to address the security, safety, liability and other concerns specified in PURA §54.260(a)(1)-(5). Lastly, the commission seeks comment on whether it should adopt a section that allows parties to opt into alternative dispute resolution. If so, what procedures should the commission adopt for referral to mediation or arbitration?

Comments on the proposed rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701North Congress Avenue, P.O. Box 13326, Austin, Texas, 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should refer to Project Number 21400.

The commission staff will conduct a public hearing on this rulemaking pursuant to Texas Government Code §2001.029 on **Tuesday, June 13, 2000 at 9:30 a.m. in the Commissioners' Hearing Room** at the commission's offices, 1701 North Congress Avenue, Austin, Texas, 7th floor.

This new section is proposed pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated (Vernon1998 & Supplement 2000) §14.002, which provides the commission with authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes this rule pursuant to PURA §54.259,which provides it with authority to enforce the prohibition on discrimination by property owners; PURA §54.260, which provides it with authority to enforce conditions imposed by property owners; and PURA §54.261 regarding shared tenant services contracts.

Cross Reference to Statutes: PURA §§14.002, 54.259, 54.260, and 54.261.

§26.129. Standards for Access to Provide Telecommunications Services at Tenant Request.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §§54.259, 54.260, and 54.261regarding the non-discriminatory treatment of a telecommunications utility by the property

owner upon a tenant's request for telecommunications services.

(b) Application.

(1) This section applies to the following entities:

(A) "Telecommunications utilities" or "telecommunications utility" as defined in PURA §51.002(11) that hold a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and hold a certificate if required by the Public Utility Regulatory Act ;

(B) Public or private property owners of commercial property and the property owner's authorized representative(s); and

(C) Public or private property owners of commercially operated residential property with four or more dwelling units and the property owner's authorized representative(s).

(2) This section does not apply to institutions of higher education as set forth by PURA §54.259(b).

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Conduit - A pipe installed on the property, in a building between floors, attached to walls, between buildings, located in the ceiling or floor space of a building, located on a customer's premise, or from a public right of way into a building or buildings for the purposes of containing and protecting cable.

(2) Existing carrier - A telecommunications utility that has installed telecommunications equipment on the property and is providing telecommunications services to a tenant on the property through the use of its own installed telecommunications equipment at the time the requesting carrier seeks access to the property.

(3) Property - A building or buildings that are under common ownership and which are located on a single piece of land, or a campus, or a parcel of land.

(4) Property owner - The owner of the property or its authorized representative(s).

(5) Requesting carrier - A telecommunications utility, that is not the existing carrier, seeking access to space in or on one or more buildings on the property for the purpose of providing telecommunications services to one or more tenants who have requested such services.

(6) Space - Area of the property for which access is being requested by the requesting carrier, which will be used to install the telecommunications equipment needed to provide telecommunications services to a requesting tenant on the property. Space includes conduit and may be located in or on the rooftop of a building or buildings on the property.

(7) Telecommunications equipment - The equipment installed or used by the existing carrier or the requesting carrier to provide telecommunications services to a tenant who has requested telecommunications services from the existing carrier or there questing carrier.

(8) Tenant - Any occupant of a building or buildings on the property under the terms of a lease with the property owner which hasa remaining term of more than six months and who is not subject to filed bona fide eviction proceedings under such lease with the property owner, or an authorized subtenant of such occupant whose

occupancy is subject to the terms of the primary lease which has a remaining term of more than six months.

(d) Rights of parties.

(1) Tenant's right to choose requesting carrier. A tenant is entitled to choose the provider of its telecommunications services.

(2) Property owner's rights to manage access. The requirements of this subsection are not intended to eliminate or restrict the property owner's rights to manage access to public or private property pursuant to PURA §§54.259, 54.260, and 54.261.

(A) A property owner may:

(i) impose a condition on the requesting carrier that is reasonably necessary to protect:
(I) the safety, security, appearance, and condition of the property; and

(II) the safety and convenience of other persons;

(ii) impose a reasonable limitation on the time at which the requesting carrier may have access to the property to install telecommunications equipment;

(iii) impose a reasonable limitation on the number of such requesting carriers that have access to the property, if the property owner can demonstrate a space constraint that requires the limitation;

(iv) require a requesting carrier to agree to indemnify the property owner for damage caused installing, operating, or removing telecommunications equipment;

(v) require a tenant or requesting carrier to bear the entire cost of installing, operating, or removing telecommunications equipment; and

(vi) require requesting carrier to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(B) A property owner may not:

(i) prevent the requesting carrier from installing telecommunications equipment on the property upon a tenant request;

(ii) interfere with the requesting carrier's installation of telecommunications equipment on the property upon a tenant request;

(iii) discriminate against such requesting carrier regarding installation, terms, or compensation of telecommunications equipment to a tenant on the property;

(iv) demand or accept an unreasonable payment of any kind from a tenant or the requesting carrier for allowing the requesting carrier on or in the property; or

(v) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, based on the identity of a telecommunications utility from which a tenant receives telecommunications services.

(3) Requesting carrier's right to access.

(A) Upon a tenant request, the requesting carrier has the right to install telecommunications equipment on the property:

(i) for a period no longer than the remaining term of the requesting tenant's lease unless otherwise agreed to by the requesting carrier and the property owner;

(ii) without interference from the property owner, except as provided in this subsection; and

(iii) at terms, conditions, and compensation rates which are non-discriminatory.

(B) The requesting carrier shall comply with all applicable federal, state, and local codes and standards, e.g., fire codes, electrical codes, safety codes, building codes, elevator codes.

(4) Restriction on exclusive agreement. A telecommunications utility shall not enter into an agreement, contract, pact, understanding or other like arrangement with the property owner to be the sole or exclusive provider of telecommunications services to a specific or defined group of actual or prospective tenants on the property.
(e) Procedures upon tenant request.

(1) Tour of property.

(A) Upon receiving a request for telecommunications services from a tenant, but prior to or concurrently with providing the property owner with notice of intent to install telecommunications equipment as described in paragraph (3) of this subsection, the requesting carrier may request, in writing, a tour of the property to determine an appropriate location for the telecommunications equipment needed to provide the telecommunications services requested by such tenant. This request shall identify the requesting tenant and be sent by certified mail, return receipt requested.

(B) The property owner shall provide such property tour within ten calendar days of receipt of the requesting carrier's written request.

(2) Request for technical drawings.

(A) In its written request for a tour of the property, the requesting carrier may request that the property owner provide computer aided design (CAD) drawings or similarly detailed drawings of the mechanical room(s), risers and other common spaces, if available, in order to assist the requesting carrier in developing plans and specifications for placement of telecommunications equipment.

(B) Such drawings should be provided to the requesting carrier, at the requesting carrier's expense, within ten calendar days of the property owner's receipt of the requesting carrier's written request.

(3) Notice of intent to install telecommunications equipment.

(A) Upon receiving a request for telecommunications services from a tenant, the requesting carrier shall notify the property owner not fewer than 30 calendar days before the proposed date on which installation of telecommunications equipment needed to provide the telecommunications services requested by a tenant is to commence.

(B) Such notice shall be sent by certified mail, return receipt requested, to the property's on-site manager and to

the person identified in the tenant's lease to receive notices. The requesting carrier shall also provide a copy of the notice of intent to any person designated by the property's on-site manager as the proper party to receive such notice.

(C) The requesting carrier shall include, but is not limited to, the following in its notice of intent:

(i) the identity of the requesting tenant;

(ii) the property address and building number (if applicable);

(iii) the proposed timeline for the installation of telecommunications equipment;

(iv) the type of telecommunications equipment to be installed;

(v) the proposed location, space requirements, proposed engineering drawings, and other specifications of the telecommunications equipment;

(vi) the conduit requirements, if any; and

(vii) a copy of PURA §§54.259, 54.260, and 54.261 and this section (Substantive Rule §26.129).

(f) Requirement to negotiate for 45 days.

(1) Upon receipt of the requesting carrier's notice of intent to install telecommunications equipment, the property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment and reasonable compensation due the property owner as a result of such installation.

(2) If such an agreement is not reached within 45 calendar days of the property owner's receipt of the requesting carrier's notice of intent, either party may file for resolution with the commission pursuant to subsection (i) of this section.

(3) The requesting carrier and the property owner may agree, in writing, to extend the period of negotiation prescribed by this subsection.

(g) Parameters for installation of telecommunications equipment. The property owner shall not deny the requesting carrier access to space, except due to inadequate space or safety concerns.

(1) Inadequate space.

(A) Property owner's denial due to inadequate space. The property owner may deny access to space if it does so within ten calendar days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the space and/or conduit required for installation is not sufficient to accommodate the requesting carrier's request.

(B) Demonstration of inadequate space.

(i) In the event the property owner denies access to space, the property owner shall demonstrate that there is insufficient space and/or conduit to accommodate the requesting carrier's request for space. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access; or it may utilize

any other method of proof mutually agreed upon by the property owner and the requesting carrier.

(ii) Such demonstration shall be completed within ten calendar days of the requesting carrier's receipt of the property owner's denial.

(iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten calendar days to dispute the property owner's assertion that a space limitation exists by pursuing commission resolution pursuant to subsection (i)
of this section.

(C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) Safety concerns.

(A) Property owner's denial due to safety concern. The property owner may deny access to space if it does so within ten calendar days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the installation of the requesting carrier's telecommunications equipment would cause an unreasonable circumstance that would compromise the safety of the property and/or persons on the property.

(B) Demonstration of safety concern.

(i) In the event the property owner denies access to space, the property owner shall demonstrate that an unreasonable safety hazard that requires the denial of access to space exists. The property owner shall specify the alleged safety hazard and cite any applicable codes and/or standards. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access, or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
(ii) Such demonstration shall be completed within ten calendar days of the requesting carrier's receipt of the property owner's denial.

(iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten calendar days to dispute the property owner's assertion that a safety hazard exists by pursuing commission resolution pursuant to subsection (i)of this section.

(C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(h) Parameters for determining reasonable compensation for access.

(1) The property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding reasonable and non-discriminatory compensation due the property owner as a result of the requesting carrier's installation of telecommunications equipment required to provide telecommunications services to a requesting tenant.

(2) The property owner shall not impose a fee on the requesting carrier unrelated to the requesting carrier's usage of space and/or provision of telecommunications services to a requesting tenant, except as provided by agreement of the property owner and the requesting carrier.

(3) The property owner and the requesting carrier shall negotiate terms and conditions concerning the removal of the requesting carrier's telecommunications equipment upon the departure of a tenant served by such requesting

carrier or the end of the service agreement between a tenant and the requesting carrier.

(4) The property owner may require a security deposit not to exceed an amount equal to one month of fees or rents as determined by the agreement between the requesting carrier and the property owner.

(i) Failure to reach negotiated agreement.

(1) Alternative Dispute Resolution. As an alternative to petitioning the commission for resolution of a dispute, parties may voluntarily submit any controversy or claim under this subsection to settlement by alternative dispute resolution. This alternative dispute resolution shall be conducted under the alternative dispute resolution procedures of Chapter 2009, Administrative Procedure Act, and Chapter 154, Civil Practice and Remedies Code.

(2) Petition to commission for resolution of dispute. If a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment, the reasonable compensation due the property owner as a result of such installation, or other disputed issues is not reached within 45 calendar days of the property owner's receipt of the requesting carrier's notice of intent to install telecommunications equipment, either the property owner or the requesting carrier may petition the commission for resolution. The petition shall include proof of the requesting carrier's proper service of notice of intent to the property owner in the form of an affidavit and attached copy of return receipt.

(3) Types of disputes and information required for each.

(A) Installation dispute.

(i) The property owner may deny access consistent with subsection (g) of this section.

(ii) The property owner and the requesting carrier shall each provide the commission with information specifying the space or safety related installation dispute(s) that is preventing a negotiated agreement.

(iii) The property owner and the requesting carrier shall each provide the commission with information supporting its position in the dispute(s).
(B) Reasonable compensation dispute.

(i) The property owner shall provide the commission with the amount of compensation being sought and the basis for such claim, including information supporting the factors listed in clause (iii) of this subparagraph.

(ii) The requesting carrier shall provide the commission with information supporting the amount of compensation it deems reasonable to compensate the property owner for installation of its telecommunications equipment.

(iii) In determining a reasonable amount of compensation due the property owner for installation of the requesting carrier's telecommunications equipment, the commission may consider, but is not limited to, the following:

(I) the location and amount of space occupied by installation of the requesting carrier's telecommunications equipment;

(II) evidence that the property owner has a specific alternative use for any space which would be occupied by the requesting carrier's telecommunications equipment and which would result in a specific quantifiable loss to the property owner;

(III) the value of the property before and after the installation of the requesting carrier's telecommunications equipment and the methods used to determine such values;

(IV) possible interference of the requesting carrier's telecommunications equipment with the use and occupancy of the property which would cause a decrease in the rental or resale value of the property;

(V) actual costs incurred by the property owner directly related to installation of the requesting carrier's telecommunications equipment;

(VI) the market rate for similar space used for installation of telecommunications equipment in a similar property; and

(VII) the market rate for tenant leaseable space in the property or a similar property.

(C) Other disputed issues.

(i) The property owner and the requesting carrier shall each provide the commission with information specifying any other dispute(s) preventing a negotiated agreement.

(ii) The property owner and the requesting carrier shall each provide the commission with information supporting its position regarding these other dispute(s).

(4) Procedure.

(A) Upon the proper filing of a petition, as set forth in paragraph (1) of this subsection, the commission may proceed to resolution of a dispute pursuant to the commission's procedural rules as set forth in Chapter 22 of this title (relating to Practice and Procedure).

(B) In addition to the requirements set forth in paragraph (1) of this subsection, all petitions shall comply with the requirements of Chapter 22, Subchapter D of this title (relating to Notice) and Chapter 22, Subchapter E of this title (relating to Pleadings and Other Documents).

(C) The commission may grant interim relief, subject to true-up, so as not to impair or delay, the right of the requesting carrier to install, maintain, and remove its telecommunications equipment, or to provide telecommunications services to a requesting tenant, during the pendency of the proceeding.

(j) Administrative penalties. The provisions set forth in §22.246 of this title (relating to Administrative Penalties) shall apply to any violation of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on April 13, 2000.

TRD-200002642
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 28, 2000
For further information, please call: (512) 936-7308