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WILLKIE FARR & GALLAGHER

VIA HAND DELIVERY

September 7, 2000

EX PARTE

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

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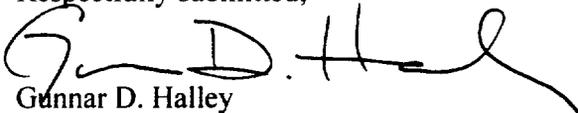
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a set of the Texas Public Utility Commission's final proposed order and rules governing telecommunications carrier access to consumers in multi-tenant buildings. It was adopted in substantially similar form by the Texas Public Utility Commission today. The only changes to the rule as they appear in the attachments were those suggested by Chairman Pat Wood, outlined in the attached memorandum from the Chairman to the other Commissioners of the Texas Public Utility Commission. Chairman Wood's changes were designed to strengthen the pro-competitive, pro-consumer intent of the rules and to further minimize the negative consequences of unreasonable building owner practices. The rules and the order demonstrate that, yet again, a regulatory body having closely investigated the issue of telecommunications carrier access to multi-tenant buildings understands the necessity for decisive action and is prepared to implement rules in order to promote the benefits of telecommunications competition for tenants in multi-tenant buildings. The rules and the order also demonstrate workable mechanisms for practical implementation of nondiscriminatory access requirements.

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 Buildings Policy Project's written ex parte presentation.

Respectfully submitted,



Gunnar D. Halley
Counsel for the SMART BUILDINGS POLICY PROJECT

- | | | | |
|-----|---------------------------|------------------------|------------------------------|
| cc: | Chairman Kennard | Commissioner Ness | Commissioner Furchtgott-Roth |
| | Commissioner Powell | Commissioner Tristani | Kathryn Brown |
| | Clint Odom | Mark Schneider | Helgi Walker |
| | Peter Tenhula | Adam Krinsky | Thomas Sugrue (WTB) |
| | Dorothy Attwood (CCB) | Jim Schlichting (WTB) | Jeffrey Steinberg (WTB) |
| | Joel D. Taubenblatt (WTB) | Lauren Van Wazer (WTB) | Leon Jackler (WTB) |
| | Eloise Gore (CSB) | Cheryl King (CSB) | Wilbert Nixon (WTB) |
| | Paul Noone (WTB) | Mark Rubin (WTB) | David Furth (WTB) |
| | Richard Arsenault (WTB) | | |

Enclosure

Washington, DC
New York
Paris
London

OPEN MEETING COVER SHEET

MEETING DATE: September 7, 2000
DATE DELIVERED: September 6, 2000
AGENDA ITEM NO.: 6
CAPTION: Project No. 21400: Building Access Rule
ACTION REQUESTED: Wood memo

FILED
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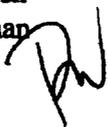
Distribution List:

Commissioners (2)

cc: Adib, Parviz
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Dolese, Trish
Featherston, David
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Mayes, Lisa
Mueller, Paula
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Silverstein, Alison
Slocum, Bret (2)
Totten, Jess
Whittington, Pam
OCP Director

Public Utility Commission of Texas

Memorandum

TO: Commissioner Judy Walsh
Commissioner Brett Perlman 

FROM: Chairman Pat Wood, III

RE: Item No. 6, September 7, 2000, Open Meeting:
Project No. 21400, Rulemaking regarding building access pursuant to PURA §§54.259, 54.260, and 54.261

DATE: September 6, 2000

This is a very well done rule. I am glad that it is finally complete, so that all commercial tenants in Texas have a chance to enjoy benefits from local telephone competition, as the Legislature intended. I have a few suggestions:

I appreciate that staff wanted to reach a compromise on the timetables, but I think 30 business days is a bit long, and may result in some commercial customers not having viable competitive choices. I would change it to 30 *calendar* days in the preamble (page 31, line 14 et seq.; page 37, line 9 et seq.; page 52, lines 11-12) and in the rule (sections e-3-A, f, and i-2). I recommend leaving the initial periods at 10 business days.

On page 12, line 4, I suggest adding the following new sentence to the end of the paragraph: "If the commission finds that the lack of a distinction between residential and commercial property in this rule is inhibiting tenant's choices, it may address such issues in future revisions to the rule."

I recommend replacing the last sentences on page 13, lines 13-14 with the following sentence: "Although not publicly filed, the agreements may be relevant when evaluating discriminatory behavior."

To avoid making any restrictive conclusions about Chapter 64's customer rights, I would change sentence on page 31, lines 9-12 to read: "This rule does not purport to address any other rights which tenants may have under PURA or any other law."

I suggest changing the text on page 39, lines 19-20 to read: "...the requesting carrier defeats the legislative goals regarding tenant's rights and could"

I recommended revising the last (rollover) sentence on page 41, line 23 to begin with the phrase: "Based on its similar experiences with incumbent local exchange carrier physical collocation, ..."

Lastly, I suggest adding the following text to the end of subsection (j) of the rule text on page 76 in order to clarify the application of administrative penalties to property owners, property managers, or telecommunications utilities: “whether by a property owner, property manager, or telecommunications utility.”

cc: Adib, Parviz Mayes, Lisa
 Cooper, Tammy Mueller, Paula
 Dolese, Trish Rowe, Evan
 Featherston, David Silverstein, Alison
 Hinkle, Martha Slocum, Bret (2)
 Hudson, Paul Totten, Jess
 Kimbrough, Todd Whittington, Pam
 Lanford, Lane OCP Director
 Malone, Melanie

Public Utility Commission of Texas

Memorandum

TO: Chairman Pat Wood, III
Commissioner Judy Walsh
Commission Brett A. Perlman

FROM: Melanie M. Malone
Office of Policy Development

RE: Item No. 2 for the September 7, 2000, Open Meeting: Project No. 21400, Rulemaking regarding building access pursuant to PURA §§54.259, 54.260, and 54.261 – Staff Recommendation for Adoption of Rule

DATE: September 7, 2000

Please find attached the staff recommendation for adoption of new rule § 26.129 relating to Standards for Access to Provide Telecommunications Services at Tenant Request.

This new rule implements PURA §§ 54.259, 54.260, and 54.261. This rule sets forth procedures whereby a requesting telecommunications carrier may seek access to the lease owner's property to install telecommunications equipment in order to provide services to a requesting tenant. This rule encourages independent negotiations between the telecommunications carrier and the property owner, and establishes procedures for resolution by a third party arbitrator or the commission in the event an agreement cannot be reached. Further, this rule addresses situations in which the property owner may deny access to the building for safety concerns or space constraints.

Almost all of the comments received were on issues debated at length during the public workshops held on October 26, February 1, February 7, February 11 and June 13, and therefore the project team recommends few changes to the rule despite the significant volume of comments. The volume of comments received is indicative of the polarization of the parties on many complex issues; consensus on many issues simply was not possible.

Staff participating in the development of this rule included Robert Chiappetta, Tammy Cooper, Evan Farrington, Tamarian Stevens, and Pam Whittington. If you have any questions about the recommendation, please contact me at 6-7247.

CC: Meena Thomas Roni Dempsy
John Costello Lane Lanford
Paula Mueller 21400 Project Team
Paul Hudson Todd Kimbrough
Alison Silverstein

1 The Public Utility Commission of Texas (commission) adopts new §26.129 relating to Standards
2 for Access to Provide Telecommunications Services at Tenant Request with changes to the
proposed text as published in the April 28, 2000 *Texas Register* (25 Tex Reg 3681). This rule is
4 necessary 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-
6 discriminatory treatment of telecommunications utilities by property owners. This new rule is
adopted under Project Number 21400.

8

This rule sets forth procedures whereby, upon a tenant's request, a telecommunications utility
10 may obtain access to a property owner's property to install telecommunications equipment in
order to provide telecommunications services to a requesting tenant. This rule encourages
12 independent negotiations between the requesting telecommunications utility and the property
owner, and establishes procedures for resolution by the commission in the event an agreement
14 cannot be reached. Further, this rule addresses situations in which the property owner may deny
the requesting carrier access to the building for safety concerns or space constraints.

16

In 1995, the Legislature enacted PURA §§54.259, 54.260, and 54.261 as part of a comprehensive
18 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
20 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
22 these sections has become evident. Prior to the opening of the telecommunications market to
competition in 1995, tenants in commercial buildings generally had no choice or limited choice

of telecommunications utility. The 1995 amendments to PURA changed this scheme by
2 allowing tenants to be served by the telecommunications utility of their choice. Since that time,
the commission has received several informal complaints that certain telecommunications
4 utilities have had a difficult time accessing tenants. Accordingly, the commission initiated this
rulemaking proceeding to delineate the access of the telecommunications utility to the property
6 owner's property to serve a requesting tenant, thereby promoting tenant choice.

8 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
10 tours to promote an understanding of the technical aspects of and potential space constraints due,
to the installation of telecommunications equipment.

12

The commission has prepared a takings impact assessment pursuant to Texas Government Code
14 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,
16 the commission finds that adherence to PURA §54.259 and adopted §26.129 may result in
takings of real property. The purpose of the statute and adopted rule is to promote competition in
18 the telecommunications market by effectuating a tenant's choice of telecommunications utility.
This purpose is advanced by ensuring the reasonable access of the telecommunications utility to
20 the owner's property to provide service to a requesting tenant that has chosen such company as
its telecommunications service provider. Although PURA §54.259 and this adopted rule impose
22 a burden on private real property, any taking that might result will be compensated. PURA

§54.260 and this adopted rule require a telecommunications utility to pay reasonable
2 compensation to the affected property owner for the use of such space on the property.

4 After the proposed new rule was published in the *Texas Register*, the commission received
written comments on this rule from the following: AT&T Communications of the Southwest
6 (AT&T), the Building Owners and Managers Association (BOMA), Broadband Office
Communications, Inc. (BBOC), the CLEC Coalition (CLEC Coalition), Hines Interests Limited
8 Partnership, Crescent Real Estate Equities, Ltd., Transwestern Commercial Services, Equity
Properties Trust, and Trizechahn Office Properties, Inc. (collectively, the Building Owners),
10 International Council of Shopping Centers (ICSC), Southwestern Bell Telephone Company
(SWBT), Southwest Competitive Telecommunications Association (SWCTA), Texas Apartment
12 Association (TAA), and Worldcom, Inc. (Worldcom).

14 After receiving written comments, the commission held a public hearing on this proposed rule at
the commission offices on June 13, 2000. Representatives from the following entities attended
16 the hearing and commented orally upon this rule: Aegis Communications, BOMA, Camden
Property Trust (Camden), Crescent Real Estate Equities Limited (Crescent), Equity Office
18 Properties (Equity Office), Gables Residential (Gables), Hines Interests Limited Partnerships
(Hines), the Institute of Real Estate Management (IREM), Kucera Management (Kucera), the
20 National Apartment Association (NAA), the National Mutli-housing Council Joint Legislative
Program (NMCJLP), Smart Buildings Policy Project, SWBT, TAA, Trammell Crow Company
22 (Trammell Crow), Transwestern Commercial Properties Trust (Transwestern), TrizecHahn
Office Properties, United Dominion Realty Trust (UDRT), and Winstar Communications. Mr.

Brian Cummings, of Cummings McGlone & Associates, and Mr. Robert Cottingham, of Digital Consulting and Software Services, also attended and commented about their experiences as tenants. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

In both written comments and at the public hearing, BOMA, Crescent, Trammell Crow, and Hines generally argued that this rule and the PURA provisions upon which this rule is based are unconstitutional. Specifically, these entities argued that this rule unconstitutionally deprives the property owner of the fundamental right to exclude others, and that it violates the 5th Amendment to the U.S. Constitution because it effects a taking of private property without adequate compensation. Further, BOMA, in its written comments and at the public hearing, argued that this rule is unconstitutional because it effects a taking of private property by telecommunications utilities, but does not provide constitutionally adequate due process of law for determining the adequacy of compensation awarded for the use of such property. Specifically, BOMA argued that to meet constitutional muster, any person who suffers a taking must have the ability to have adequate compensation be decided by a jury. It argued that Texas Property Code §21.012(a), *et seq.*, clearly contemplates that compensation must ultimately be determined by the courts if the property owner objects to the compensation award made by non-judicial tribunal.

The CLEC Coalition supported the constitutionality of this rule in its written reply comments. The CLEC Coalition stated that the concern over due process violations that both the BOMA and Hines brought up in their comments were unfounded. The CLEC Coalition stated that due process is upheld, and that judicial review by a court is still the right of all parties involved. In its

reply comments, the CLEC Coalition stated that the legislature has given the commission a clear
2 grant of authority over this aspect of property owners as placed in subsection (c) of both PURA
§54.259 and §54.260. The CLEC Coalition also raised concerns over the relationship of the
4 property owners and their subsidiary communication providers, such as BBOC, and the need for
all requesting carriers to be treated equally when responding to tenant requests for service.

6
**The commission adopts this rule and rejects claims that the statute is unconstitutional. A
8 statute passed by the Legislature is presumed to be constitutional. *See generally, Nootsie
Ltd. v. Williamson County Appraisal District, 925 S.W.2d 659, 662 (Tex. 1996); HL Farm
10 Corp. v. Self, 877 S.W. 2d 288, 290 (Tex. 1994); Spring Branch I.S.D. v. Stamos, 695 S.W.2d
556, 558 (Tex. 1985). Courts, not the commission, must resolve any challenge to the
12 constitutionality of PURA §§54.259, 54.260, and 54.261.***

14 **The commission finds that this rule does not affect a building owner's right to exclude.
Instead, it secures limited access to a property by a telecommunications utility for the
16 narrow purpose of implementing the legislatively determined good of allowing tenants to
choose the provider of their telecommunications services. This rule does not allow
18 unrestricted entry to any telecommunications utility that wishes to install equipment on a
property; rather, it is effective only upon a tenant's request for a specified carrier to
20 provide telecommunications service. Further, even given such a tenant request, the
property owner and the requesting carrier may mutually agree on terms of access and this
22 rule need not be invoked except where such agreement cannot be reached.**

With respect to BOMA's argument that this rule is a taking without just compensation, the commission notes that this rule provides for reasonable compensation. The process set forth in this rule identifies factors for determining compensation when a requesting carrier is seeking space in a lease property. In addition, this rule provides guidance to the parties for their private negotiations and allows the commission the flexibility to consider additional factors in arriving at adequate compensation. Furthermore, this determination by the commission, if needed, is not without judicial review. PURA §15.001 specifies that any party to a proceeding before the commission may seek judicial review under the substantial evidence rule.

BOMA argued that PURA authorizes the commission to regulate only utilities and not property owners. In its written comments, the Building Owners asserted that this rule is unnecessary because there is no justification for the promulgation of a rule. The Building Owners argued that PURA §54.259 may be the statutory basis of this rule, yet, PURA §54.259 does not require the promulgation of any implementing rules. In addition, the Building Owners stated that there is no evidence present that would lead the commission to conclude that telecommunications utilities across Texas are being prevented from serving their customers.

In its reply comments, the CLEC Coalition opposed BOMA and the Building Owners' view that this rule is unnecessary. As a key reason for the need of this rule, the CLEC Coalition pointed to Hines' consistent view that the property owners should have the right to exclude the requesting carriers of their choosing and charge whatever fees the market will bear.

2 **With respect to the commission’s jurisdiction to enforce this rule, the commission finds that**
3 **it has plenary authority to compel the property owners to comply with the provisions of**
4 **this rule. The Legislature specifically provided in PURA §§54.259 and 54.260 that:**
5 **“Notwithstanding any other law, the commission has the jurisdiction to enforce this**
6 **section.” This language clearly gives the commission authority to ensure that property**
7 **owners comply with this rule. An agency may adopt rules consistent with its statutory**
8 **authority. See, e.g., *Railroad Commission of Texas v. Lone Star Gas Co.*, 844 S.W.2d 679,**
9 **685 (Tex. 1992); *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.—**
10 **Austin 1982, writ ref’d n.r.e.). The commission finds that in adopting this rule, it is acting**
11 **within its statutory authority. The commission further finds that adopting this rule is**
12 **necessary to carry out its statutory mandate to foster a competitive telecommunications**
13 **market pursuant to PURA §51.001.**

14 ***Preamble questions***

16 In the proposed text as published in the April 28, 2000 *Texas Register* (25 Tex Reg 3681) the
17 commission sought comment on several items. Questions related to a specific subsection of this
18 rule are included in the preamble discussion of that subsection. The comments received on
19 questions of a general nature are summarized below.

20

The commission asked parties to address the costs associated with, and benefits that will be
22 gained by, implementation of this proposed rule.

AT&T argued that the benefits of this rule are obvious and unquestionable. AT&T asserted that
2 this rule will ensure that the property owners cannot take undue advantage of their ability to
control which telecommunications utilities have access to their buildings; there is an independent
4 decision maker available should the property owners attempt to use their control of essential
pathways to captive tenants to either exclude or favor selected requesting carriers. AT&T
6 explained that this rule will ensure that the property owners are not able to extract unwarranted
monopoly levies on the requesting carriers.

8

The Building Owners asserted that the private property owners will receive little or no benefit
10 from this rule, but instead will face significant financial costs and the loss of private property
rights.

12

The CLEC Coalition, asserted that this rule offers clear and substantial benefits to Texas
14 consumers and the likely costs associated with this rule are insignificant, resulting in
considerable net benefits from this rule. Without a clear rule governing access to commercial
16 property, Hayes explained that building owners are able to restrict tenants' choices of
telecommunications service providers by charging excessive fees to access equipment space, by
18 delaying negotiations, and by denying access altogether.

20 In general, Hayes argued that markets work best when customers are freely able to choose the
provider best able to serve their needs. Due to competition among providers, Hayes speculated
22 that significant reductions in telecommunications prices and better service quality may be seen.
Additionally, Hayes contended that this rule will reduce negotiation costs for the property

owners and the requesting carriers and thereby make additional investment in advanced
2 telecommunications facilities more attractive. Furthermore, a tenant's right to have choices
reduces entry barriers and makes Texas a more attractive business location for rapidly growing
4 high technology communications businesses.

6 According to Hayes, the most significant potential cost is the cost of unnecessarily expensive and
substandard telecommunications service. Hayes concluded by stating that access to cost-
8 effective telecommunications service is at risk if the property owners can deny access to
competitive carriers and capture the margin on local telecommunications services themselves.

10

**The commission finds that the benefits associated with this rule outweigh any costs that
12 may result from its implementation. This proposed rule confers a benefit on the public in
that it provides tenants in Texas the ability to obtain telecommunications services from a
14 wider range of providers through the ability to choose their telecommunications service
provider. This choice enhances competition among telecommunications providers, thus
16 lowering prices and enhancing service to users of telecommunications services in Texas.
Specifically, PURA §51.001(b) states that one of the policies of the State of Texas is to
18 "encourage a fully competitive telecommunications marketplace." Adoption of this rule
implements this policy.**

20

General comments

22

At the Public Hearing, Camden asserted that this rule was incomplete because it did not require a
2 minimum point of entry (MPOE) to be established on the property for multiple
telecommunications providers to provide service. SWBT clarified that existence of MPOE is the
4 property owner's choice in Texas.

6 **The demarcation point is the network point that connects the ILEC provider (regulated) or
CLEC provided facility, terminal equipment, apparatus or wiring to a subscriber's
8 premises. In this instance, it would be the point that the requesting carrier interconnected
with the requesting tenant's premise. According to the FCC's definition, the minimum
10 point of entry (MPOE) is either (1) the closest practicable point to where the wiring crosses
a property line or (2) the closest practicable point to where the wiring enters a multiunit
12 building or buildings. Generally speaking, the demarcation point is not placed at the
MPOE unless the customer, in an existing location, requests it from the
14 telecommunications utility. The commission finds that the FCC's *Connection Of Simple
Inside Wiring to the Telephone Network* (In the Matter of Implementation of Review of
16 §68.104 and §68.213 of the Commission's Rules Concerning Connection of Simple Inside
Wiring to the Telephone Network, CC Docket Number 88-57, First Report And Order
18 (Rel. March 8, 1988 and August 13, 1990)) sufficiently addresses the issue of demarcation
points. Therefore, this rule need not address this issue further. In addition, the purpose of
20 this rule is to implement PURA §§54.259, 54.260, and 54.261 regarding the non-
discriminatory treatment of a telecommunications utility by the property owner upon a
22 tenant's request for telecommunications services. The establishment of the MPOE or the
demarcation point is not necessary when determining standards for nondiscriminatory**

**treatment of telecommunications utilities. Therefore, the commission finds that it is not
2 necessary to address the MPOE or demarcation standards in this rule.**

4 At the Public Hearing, Crescent noted that this rule did not include any provisions for
environmental concerns and did not have any provisions that obligated the requesting carrier to
6 abide by all building rules as condition of their gaining access to the property.

8 **The commission disagrees, noting that subsections (d)(2)(A), (d)(3)(B) and (g)(2) of this rule
adequately address these concerns.**

10

In its written comments, TAA argued that this rule does not fully consider the realities of today's
12 apartment market or the differences between multifamily properties and commercial office
buildings. At the Public Hearing, Camden and NAA/NMCJLP suggested that this rule make a
14 distinction between commercial and residential properties.

16 The CLEC Coalition stated that the residential multi-family properties had legitimate concerns,
not present in the commercial office environment, about accommodating multiple providers,
18 such as excessive and repeated digging up of property to lay cable and security concerns in a
residential campus-type environment. However, the CLEC Coalition suggested that the market
20 will obviate these concerns because facilities-based providers will be unlikely to incur the
expense of trenching to install facilities without a reasonable expectation of recovering their
22 investments.

The commission recognizes there may be differences between residential and commercial properties; however, PURA does not distinguish between the two for purposes of implementing the tenant's request. Accordingly, the commission finds that a distinction between residential and commercial properties in this rule is inappropriate.

BBOC argued that PURA §54.259 and §54.261 do not support application of nondiscrimination requirements in the context of building access granted pursuant to a shared tenant services (STS) agreement. BBOC urges the commission to clarify that the nondiscrimination provisions of this rule require only that the property owners ensure nondiscrimination as between the requesting carriers seeking access pursuant to a tenant's request for service.

In its reply comments the CLEC Coalition disagreed with BBOC's comments that the commission should not consider STS agreements when evaluating whether the non-discrimination provisions of PURA §54.259 have been violated. Furthermore, the CLEC Coalition believed that such arms-length transactions are precisely the types of arrangements the commission should have the ability to consider in judging unreasonable discrimination.

In its written comments, AT&T asserted that STS agreements, or other agreements between property owners and preferred carriers, should be made equally available to other "non-preferred" CLECs that seek to access the property. AT&T explained that these arrangements bear directly on the issue of reasonable rates because they must be met in order for the property owner to comply with the statutory prohibition on discrimination.

1 In its reply comments, BBOC stated that AT&T's belief that a privately-negotiated STS
2 agreement governs the terms of building access for all requesting carrier responses to the tenant
requested services is flawed. BBOC also requested that the commission clarify that the
4 nondiscrimination requirement in this rule does not require that access be granted in identical
terms as those contained in a negotiated STS agreement.

6

**This rule does not prohibit STS agreements. Moreover, PURA §54.261 states that PURA
8 §54.259 and §54.260 do not require a public or private property owner to enter into a
contract with a telecommunications utility to provide STS on a property. However, if a
10 tenant located in a property that utilizes a STS provider requests service from another
telecommunications utility, that request must be honored. Further, the commission finds
12 that STS agreements may be considered when evaluating whether the non-discrimination
provisions in PURA §54.259 have been violated. However, the commission notes that STS
14 agreements are not publicly filed.**

16 *Specific comments to rule language*

18 Subsection (c) contains definitions of terms used in this rule. At the Public Hearing,
NAA/NMCJLP suggested that the word "existing" be included in the definition of "conduit," in
20 subsection (c)(1). In its written comments, Hines proposed that the words "building" or
"buildings" in the definition of "conduit" be replaced with the word "property."

22

2 **The commission declines to incorporate NAA/NMCJLP's suggestion, because the**
3 **requesting carrier's access should not be limited to existing conduit. The commission**
4 **agrees with Hines' recommendation and replaces the word "building" with "property" in**
5 **the last line of the definition of "conduit." The commission does not make the same**
6 **replacement in the second line of the definition as it is referring to the structure on the**
7 **property, i.e., the building, and therefore the word "building" is more appropriate.**

8 The CLEC Coalition notes that the term "existing carrier" is not used anywhere in this rule other
9 than in the definition in subsection (c)(2).

10
11 **The commission deletes the definition of "existing carrier" in subsection (c)(2). The**
12 **commission also revises the definition of "telecommunications equipment," published as**
13 **subsection (c)(7), now subsection (c)(6), to accommodate the deletion of the term "existing**
14 **carrier."**

15
16 In its written comments, AT&T stated that it is unclear why the definition of "property,"
17 published as subsection (c)(3), now subsection (c)(2), includes the phrase "single piece of land,
18 or a campus, or a parcel of land" and is not certain as to what buildings would be included or
19 excluded by it. AT&T suggested that the subsection be clarified to prevent disputes regarding
20 the definition. AT&T offered an alternative definition of "property" which included all buildings
21 under common ownership which are located on a single tract of land or on tracts that are
22 adjoining.

2 The Building Owners suggested that the phrase “and which are located on a single piece of land,
or a campus, or a parcel of land” be deleted from the definition of “property.” The Building
4 Owners recommended inserting “and in which a tenant has a leasehold interest” to replace the
phrase. The Building Owners also recommended inserting “complex of” in front of “buildings”
6 in the definition.

8 In its reply comments, the CLEC Coalition noted that the Building Owners’ recommendations
resulted in the elimination of the word “building” from the definition of “property.” The CLEC
10 Coalition urged the commission to test the final definition of “property” in each place in this rule
that the term is used to be sure that it makes sense.

12

**The commission adopts AT&T’s definition of “property.” The revised definition addresses
14 some of the Building Owners’ concerns. The commission does not adopt the Building
Owners’ recommendation to include a reference to a leasehold interest in the definition of
16 “property” because such an interest is included in the definition of “tenant” and is inferred
by the scope and purpose of this rule.**

18

In the written comments, the Building Owners suggested that the definition of “requesting
20 carrier,” published as subsection (c)(5), now subsection (c)(4), be revised to include only the
defined term “space,” therefore deleting the phrase “in or on one or more buildings on the
22 property.”

The commission agrees with the Building Owners' recommendation and makes the appropriate revision to subsection (c)(4). The commission also revises subsection (c)(4) to accommodate for the deletion of the term "existing carrier."

At the Public Hearing, NAA/NMCJLP also suggested that the definition of "space," published as subsection (c)(6), now subsection (c)(5), exclude rooftop space. In its written comments, TAA argued that the property owners should be able to limit access in areas that are not generally used for telecommunications equipment, such as rooftops.

In the written comments, the Building Owners asserted that the definition of "space" is too broad and should be revised to read: "*The least amount of area of a property for which access is being requested by the requesting carrier, which is required to and 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 property.*"

In its reply comments, the CLEC Coalition noted that the Building Owners' recommendations resulted in the elimination of the word "building" from the definition of "space." The CLEC Coalition urged the commission to test the final definition of "space" in each place in this rule that the term is used to be sure that it makes sense.

The commission declines to adopt NAA/NMCJLP's recommendation to exclude roof tops from the definition of "space." The statute implemented by this rule, PURA §§54.259,

54.260, and 54.261, does not place such a limitation on areas of the property the requesting carrier may access. Should access to a roof top cause a safety concern, then access may be denied through the procedures delineated in subsection (g)(2) of this rule.

Similarly, the commission declines to adopt the Building Owners' recommendation to place limitations on the amount of area of the property the requesting carrier may access. The statute implemented by this rule, PURA §§54.259, 54.260, and 54.261, does not place such a limitation on the size of the area the requesting carrier may access. Should access to a certain area of the property cause a space constraint, then access may be denied through the procedures delineated in subsection (g)(1) of this rule.

At the Public Hearing and in its written comments, TAA suggested that the definition of "tenant," published as subsection (c)(8), now subsection (c)(7), be amended to apply only in cases in which there are at least 12 months remaining on a lease term. At the Public Hearing, Crescent agreed. In the written comments, the Building Owners asserted that the six-month term used to define "tenant" is too short. The Building Owners suggested that a qualifying tenant have at least 12 months remaining on its lease. The Building Owners also took issue with the phrase "who is not subject to a filed bona fide eviction proceeding under such a lease." Instead of the referenced phrase, the Building Owners suggested that the definition read "not in default under the lease." Lastly, the Building Owners recommended the addition of "For the purposes of this definition, the remaining term shall not include unexercised renewal options" to the end of subsection (c)(7).

1 In its reply comments, the CLEC Coalition asserted that the Building Owners' and TAA's
2 proposed definition of "tenant" would only further restrict many tenants' statutory rights.

4 The CLEC Coalition argued that the definition of "tenant" is unfair because it excludes tenants
that have less than six months on a lease even if the tenant has lived on the property for years.

6 The CLEC Coalition requests that the definition of "tenant" be modified by inserting the
following language into subsection (c)(7) after the words "six months": "or which had an
8 original term of 12 months or more and the tenant has occupied the space for more than 12
months."

10
The CLEC Coalition asserted that if such a limiting provision is included in this rule, the
12 commission must consider its effect on commercial tenants. The CLEC Coalition explains that
this rule would deny a tenant planning to renew their lease from being able to select a new
14 telecommunications service provider. Moreover, this rule would force a telecommunications
service provider to renegotiate its license with the property owner each time its existing tenant
16 renewed its lease. In this regard, the CLEC Coalition stated that this rule is inefficient. Further,
the CLEC Coalition argued that the requirement for a telecommunications provider to remove its
18 equipment if it no longer has a customer in the building, would mean that no facilities-based
provider would install equipment and wiring only to have to remove it again within months.

20
AT&T explained that while it is aware of the need for a time period to be included in the
22 definition of "tenant," it was concerned that the time period would cut too broadly. For example,
a business tenant with a five-year lease that will expire in less than six months would not qualify

1 to request service, even if he had every intention of renewing his lease for another extended
2 period or was in negotiations with the property owner. In addition, the tenant would not be able
to make a request until the lease expires and a new lease is executed. AT&T asserted that the
4 requesting carrier will not service the requesting tenant unless there is a good chance of being
able to serve the requesting tenant long enough to recover their investment. Therefore, a request
6 from a tenant that has an existing and valid lease in the building, regardless of the term
remaining on the lease, should be sufficient for purposes of this rule.

8

SWBT asserted that any definition of “tenant” that excludes any persons who are renting or
10 leasing from a landlord would run afoul of the clear and unambiguous language of PURA
§54.259. In addition, the restrictive definition would violate the fundamental rule of statutory
12 construction: that in the absence of a statutory definition, statutory construction requires the
ordinary meaning. SWBT agreed with AT&T’s approach of defining a “tenant” as “one who has
14 an existing and valid lease in the building.”

16 **The commission declines to adopt the Building Owners’ recommendation to replace the
bona fide eviction proceeding with the phrase “not in default.” The commission finds that
18 the definition of “default” is too broad and could result in tenants being denied their right
to choose their telecommunications service provider when they are only non-materially in
20 default with their lease but not subject to a bona fide eviction process.**

22 **For practical reasons, the commission retains the six-month limitation to the definition of
“tenant.” The commission declines to expand that time period to 12 months, as it would**

2 **further restrict the number of tenants who have the ability to exercise their right to select**
3 **their telecommunications service provider. The commission finds that the limitations on**
4 **the definition of “tenant” do not change the fundamental meaning of the term. The**
5 **commission finds that the six-month limitation is a reasonable balance of the tenants’ and**
6 **the property owners’ interests because it achieves the reasonable goal of providing**
7 **telecommunications services to requesting tenants, while ensuring that those requesting**
8 **tenants are serious about following through on those requests.**

8

9 **Further, the commission declines to extend the six-month minimum lease requirement by**
10 **including the tenant’s option to renew the lease. Only the current lease period will be**
11 **considered in determining the six-month minimum needed to satisfy this rule. However,**
12 **the requesting tenant and the property owner may agree to extend the six-month minimum**
13 **lease requirement by including the tenant’s option to renew the lease or previous lease**
14 **terms.**

15 Section (d) outlines the rights of the requesting tenant, the property owner, and the requesting
16 carrier. Subsection (d)(1) specifically addresses the rights of the tenant to choose the provider of
17 its telecommunications services. In its written comments, SWBT argued that PURA
18 §64.004(a)(2) states that “*all* buyers of telecommunications services are entitled to choice of a
19 telecommunications service provider and to have that choice honored”; the right is not limited to
20 “a tenant” as stated in this rule.

22

1 In its reply comments, the Building Owners suggested that the commission reject SWBT's
2 request that subsection (d)(1) be changed to apply to "all buyers of telecom services." The
Building Owners asserted that the provisions at issue, PURA §§54.259, 54.260, and 54.261
4 apply only to tenant requests for telecommunication services.

6 **The commission rejects SWBT's recommendation to revise subsection (d)(1) because the
purpose of this rule is to implement PURA §§54.259, 54.260, and 54.261 regarding the non-
8 discriminatory treatment of a telecommunications utility by the property owner upon a
tenant's request for telecommunications services. The commission agrees with the Building
10 Owners' rationale of rejecting the recommendation as the PURA provisions at issue apply
to the provision of telecommunications services to tenants, not all buyers of
12 telecommunications services.**

14 Subsection (d)(2) specifically addresses the rights of the property owner. Subsection
(d)(2)(A)(i)(I) permits a property owner to impose a condition on the requesting carrier that is
16 reasonably necessary to protect the safety of the property or persons on the property. In its
written comments, AT&T asserted that the "conditions" placed upon the requesting carrier by the
18 subsection are from PURA and, therefore, not objectionable. However, AT&T suggested that
this rule be clarified to state the only basis for excluding the requesting carrier from serving the
20 requesting tenant is a "space constraint." Therefore, AT&T continued, this rule would not allow
the property owners to impose the "conditions," which are subject to no real definition or
22 limitation in this rule or the statute. AT&T proposed specific additional language to address this
concern.

2 In its reply comments, the Building Owners argued that the commission should reject the
suggestion of AT&T that space constraints should be the only reason that access could ever be
4 denied because subsection (d)(2) is taken verbatim from the statute.

6 **The commission rejects AT&T's recommendation as the language in subsection (d)(2) is
taken verbatim from PURA §§54.259 and 54.260.**

8

At the Public Hearing, NAA/NMCJLP asserted that subsection (d)(2)(A)(iv), which gives the
10 property owner the right to require the requesting carrier to agree to indemnify the property
owner for damage caused installing, operating, or removing telecommunications equipment, is
12 meaningless unless a specific performance bond of substantive value is placed on the requesting
carrier.

14

**The commission rejects NAA/NMCJLP's recommendation as the language in subsection
16 (d)(2) is taken verbatim from PURA §54.259. The commission finds that requiring
requesting carriers to post a bond may result in a barrier to entry. The commission
18 recognizes that PURA §§ 54.260(4) requires the requesting carrier to indemnify the
property owner for damage caused by installing, operating, or removing a facility. If a
20 property owner is concerned that the entire cost will not be borne by the requesting
carrier, the property owner should negotiate contract terms addressing this issue with the
22 requesting carrier. If a satisfactory resolution is not reached, the property owner may seek
resolution under section (i) of this rule.**

2 Subsection (d)(3) specifically addresses the rights of the requesting carrier. In its written
comments, the Building Owners suggested that the following text be added to the end of
4 subsection (d)(3)(A) in order to clarify the purpose of the subsection: “in order to provide
telecommunications services to the requesting tenant.” The Building Owners also suggested that
6 subsections (d)(3)(A)(i)-(ii) be deleted as they are redundant with subsection (d)(2) of this rule.

8 In its reply comments, the CLEC Coalition recommended that subsections (d)(3)(A)(i)-(ii) be
retained as the requesting carriers should not have to figure out what specific rights they have by
10 parsing the property owner’s rights.

12 **The commission adopts the Building Owners’ recommendation and incorporates the
language to clarify subsection (d)(3)(A). However, the commission rejects the Building
14 Owners’ recommendation to delete subsections (d)(3)(A)(i)-(ii). The commission believes
that this rule must include clear boundaries delineating the requesting carriers’ rights.**

16

The CLEC Coalition objected to subsection (d)(3)(A)(i), which limits a requesting carrier’s
18 rights to “a period no longer than the remaining terms of the requesting tenant’s lease” because it
would unnecessarily complicate issues when a tenant has a renewal option or another contractual
20 right to extend occupancy beyond the remaining term of the lease. In addition, the CLEC
Coalition argued that the subsection would unnecessarily force renegotiations of the agreement
22 between the property owner and the requesting carrier. Thus, the CLEC Coalition urged the
deletion of subsection (d)(3)(A)(i).

2 In its reply comments, the Building Owners stated that the CLEC Coalition's fear over
telecommunications access agreements being co-terminus with the term of the tenant's lease is
4 unfounded because the Building Owners' position is that the requesting carriers' agreement with
the property owner automatically continues, without need for negotiation, where a tenant lease
6 automatically renews.

8 **As previously discussed, the commission declines to extend the six-month minimum lease
requirement by including the tenant's option to renew the lease. Only the current lease
10 period will be considered in determining the six-month minimum needed to satisfy this
rule. Further, in light of the Building Owner's comments, the commission adds the
12 following sentence to subsection (d)(3)(A)(i): "Should the requesting tenant's lease renew,
the agreement between the requesting carrier and the property owner automatically
14 continues, without the need to renegotiate, for the term of the requesting tenant's renewal."
This modification alleviates the CLEC Coalition's concern that this rule would force a
16 telecommunications service provider to renegotiate its agreement with the property owner
each time its existing tenant renewed its lease.**

18

At the Public Hearing, Crescent suggested that this rule specifically require the requesting carrier
20 to follow all the rules and procedures established by the property owner. In its written
comments, the Building Owners suggested that this provision be inserted in subsection (d)(3)(B).

22

The commission declines to incorporate the Building Owners' recommendation because
2 **such a provision would be too broad, allowing the property to impose restrictions and**
conditions on the requesting carrier that are outside the scope and the spirit of the statute
4 **being implemented by this rule. The added restrictions or conditions could possibly lead to**
discriminatory behavior. The commission notes that subsection (d)(2)(A) permits the
6 **property owner to impose certain conditions and limitations on the requesting carrier.**

8 The CLEC Coalition argued that subsection (d)(3)(B) imposes obligations and conditions on the
requesting carrier that are not found in PURA. In addition, the CLEC Coalition suggested that
10 language be added that states that the safety requirement is presumptively met by complying
with all applicable codes.

12
In its reply comments, the Building Owners objected to the inclusion of the CLEC Coalition's
14 revised subsection (d)(3)(B).

16 **The commission rejects the CLEC Coalition's recommendation to add language that**
presumes that the installation of telecommunications equipment is safe if the requesting
18 **carrier has complied with all applicable codes. Subsection (d)(3)(B) does not judge whether**
the requesting carrier's installation of telecommunications equipment is safe, rather, it
20 **requires the requesting carrier to comply with all applicable codes. The determination of**
whether the requesting carrier's installation of telecommunications equipment is safe is
22 **addressed in subsection (g)(2) of this rule.**

Subsection (d)(4) prohibits the telecommunications utilities from entering into an exclusive
2 agreement with the property owner. In its written comments, SWBT argued that this subsection
is not consistent with PURA §64.004(a)(2) because it only prevents telecommunications utilities
4 from entering into exclusive provider agreements, whereas PURA §64.004(a)(2) states that “*all*
buyers of telecommunications services are entitled to choose their provider.” Thus, SWBT
6 explained, it would appear to allow non-certificated providers such as STS providers to enter into
exclusive provider agreements with owners of apartment complexes and shopping malls, thereby
8 depriving tenants on those properties their right to choose. SWBT also asserted that the
subsection prohibits telecommunications utilities from entering exclusive provider agreements
10 only where “tenants” are involved, whereas PURA §64.004(a)(2) states that “*all* buyers of
telecommunications services,” including homeowners and condominium owners, are entitled to
12 choose their telecommunications service provider. Thus, SWBT explained, this rule does not
fully implement PURA §64.004(a)(2). SWBT proposed amended language to address its
14 concerns.

16 The Building Owners stated that subsection (d)(4) properly imposes the prohibition against
exclusive agreements on the telecommunications utilities, not on the private property owners.
18 The Building Owners proposed that the phrase “specific or defined group of” be deleted as
inclusion of the phrase leaves open the possibility that in some instances exclusive agreements
20 may be permitted. The Building Owners believe this could lead to confusion.

22 **The commission agrees with SWBT that all buyers of telecommunications services should
be able to select their provider; that is the intent and purpose of subsection (d)(4).**

2 **However, the commission declines to make the revisions recommended by SWBT as the**
3 **scope of this rule is the provision of telecommunications services to tenants, not all buyers**
4 **of telecommunications services. In addition, the commission adopts the Building Owners’**
5 **recommendation and deletes the phrase “specific or defined group of” from subsection**
6 **(d)(4) to alleviate confusion.**

7
8 Subsection (e) outlines the procedures to be followed after the requesting carrier has received the
9 tenant request. Subsection (e)(1) establishes the procedure in which the requesting carrier may
10 request to tour the property. In the written comments, the Building Owners asserted that the
11 requesting carrier’s request for a property tour should always be sent before the requesting
12 carrier’s notice of intent to install telecommunications equipment. The Building Owners also
13 suggested that the following language be added to the end of subsection (e)(1)(A): “to the
14 property manager and to the notice of addresses identified in the tenant’s lease to receive
15 notices.”

16 **The language in subsection (e)(1)(A) states that the request for a tour may be received *prior***
17 ***to or concurrently* with the notice of intent. Therefore the commission does not believe that**
18 **the subsection necessitates modification to alleviate the Building Owners’ concern.**

19
20 **The commission agrees with the Building Owners’ recommendation that the request for a**
21 **tour of the property also be delivered to the persons identified on the tenant’s lease. The**
22 **commission modifies subsection (e)(1)(A) to require that the request for a tour of the**

**property be sent to the property's on-site manager or designee, if the property has such a
2 manager, and to the person identified in the tenant's lease to receive notices.**

4 At the Public Hearing, in regard to subsection (e)(1)(B), UDRT asserted that ten days was
insufficient time to prepare for a tour of the property. UDRT suggested that the subsection allow
6 for at least 30 days. Camden, Kucera, and IREM generally agreed that the timelines are too
short.

8

At the Public Hearing, Robert Cottingham stated that the ten-day period to arrange a visit of the
10 property is very reasonable. In its written comments, the CLEC Coalition urged the retention of
the proposed timeline in order for requesting tenants to be provisioned service as quickly as
12 possible.

14 **The commission revises subsection (e)(1)(B) to require a tour of the property within ten
business, rather than calendar, days of the receipt of the requesting carrier's written
16 request. This revision is an effort to balance the requesting carrier's ability to promptly
serve the requesting tenant versus providing a reasonable amount of time for the property
18 owner to respond to the requesting carrier's request. The commission finds that a
reasonable balance is created by the revision to subsection (e)(1)(B). The Commission also
20 adds subsection (e)(1)(C), which allows the requesting carrier and the property owner to
extend the timeline upon agreement.**

22

UDRT was concerned with the ten-day timeline associated with the request for technical drawings, in subsection (e)(2). UDRT argued that the timeframe is too short. Instead, UDRT suggested that the technical drawing be provided to the carrier at the time of the tour of the property, which would be at least 30 days. Camden, Kucera, and IREM generally agreed that the timelines are too short. In regard to the technical drawings, NAA/NMCJLP argued that many property owners would be unable to provide drawings, no matter the timeframe, because they would be unfamiliar with what was being requested.

8

In its written comments, the CLEC Coalition urged the retention of the proposed timeline in order for requesting tenants to be provisioned service as quickly as possible.

The commission revises subsection (e)(2)(B) to require technical drawings to be provided within ten business, rather than calendar, days of the receipt of the requesting carrier's written request. This revision is an effort to balance the requesting carrier's ability to promptly serve the requesting tenant versus providing a reasonable amount of time for the property owner to respond to the requesting carrier's request. The commission finds that a reasonable balance is created by the revision to subsection (e)(2)(B). The commission also adds subsection (e)(2)(C), which allows the requesting carrier and the property owner to extend the timeline upon agreement.

20

In its written comments AT&T supported subsection (e)(2)(B), however, AT&T suggested that the subsection is open-ended and could be read to allow the property owners to tack on substantial administrative fees and other unrelated fees. AT&T proposed language to modify

22

2 this subsection that would require the requesting carrier to bear the reasonable cost of
reproducing the requested drawing.

4 **The commission agrees with AT&T's concern and adopts in part AT&T's modification to**
subsection (e)(2)(B). **Instead of requiring the requesting carrier to bear the cost of**
6 **reproducing the requested drawing, the revised subsection requires the requesting carrier**
to bear the cost of providing the requested drawings, in addition to the cost of reproducing
8 **the requested drawings. The commission finds that the cost of providing the requested**
drawings may include costs other than the reproduction costs, e.g., shipping charges. **The**
10 **commission's intent is that the clarified language will prevent discriminatory activity and**
inflated charges.

12

The Building Owners asserted that technical drawings of the property are highly confidential and
14 proprietary and may provide information on security-sensitive tenants. The Building Owners
suggested that subsection (e)(2)(B) be revised to require the property owner to turn over
16 technical drawings only after the requesting carrier has signed a confidentiality agreement
chosen by the property owner.

18

The commission does not elect to make the Building Owners' modification at this time.
20 **Confidentiality agreements are a matter of practice. Therefore, the commission**
encourages parties to utilize confidentiality agreements when necessary.

22