

STORAGE NAME: h1135.uco

DATE: March 31, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
UTILITIES AND COMMUNICATIONS
ANALYSIS**

BILL #: HB 1135

RELATING TO: Multi-tenant Telecommunications Services

SPONSOR(S): Representative Goodlette

COMPANION BILL(S): SB 1010(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) UTILITIES AND COMMUNICATIONS
 - (2) REAL PROPERTY & PROBATE
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4)
 - (5)
-

I. SUMMARY:

The bill establishes a Legislative finding that an important public purpose is achieved by providing access to multi-tenant environments, public and private, residential and nonresidential, for telecommunications companies seeking to promote competition and choice in delivering telecommunications services.

The bill gives the Public Service Commission ("PSC") exclusive jurisdiction to resolve disputes between telecommunications companies, tenants, and landlords concerning the provision of telecommunications services in multi-tenant environments. The bill establishes prerequisites for bringing an action for access and standards to govern such proceedings. The PSC is given rulemaking authority to implement the bill.

The bill defines "exclusionary contract," "marketing agreement," and "multi-tenant environment."

Multi-tenant environment *excludes* the following:

- *Condominiums and cooperatives* in which the owners have delegated responsibility to specified groups to secure one provider of telecommunications services for all end users;
- *Homeowners associations;*
- *Short term tenancies served by call aggregators;*
- *Tenancies that are less than 12 months in duration.*

The bill establishes standards to govern telecommunications carrier access to tenants in multi-tenant environments including: access; charges; easements; safety, security, and aesthetics of the property; use of building conduit; prohibition of fees for the privilege of providing telecommunications service; obligations of the carrier of last resort; prohibition of exclusionary contracts; and, disclosure of marketing agreements.

A landlord is prohibited from requiring a local exchange telecommunications company to compensate the landlord under this section if such a company provides service to tenants as the carrier of last resort and another telecommunications company is not providing telecommunications services to tenants in that building.

Because definitions are added to Section 364.02, Florida Statutes, and subsections are renumbered accordingly, numerous statutory cross references are amended to reflect the renumbering.

The fiscal impact is indeterminate; however, a preliminary estimate by the PSC indicates that four FTEs will be required to implement the bill.

The bill provides an effective date of October 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The 1995 Florida Telecommunications Act, Chapter 95-403, Laws of Florida, and the 1996 Federal Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, opened local telecommunications markets to competition.

Local exchange telecommunications companies ("LECs") are companies that were certificated by the Public Service Commission to provide local exchange telecommunications services in Florida on, or before, June 30, 1995. s. 364.02(6), F.S.

Alternative local exchange companies ("ALECs") are companies that were certificated by the Public Service Commission to provide local exchange telecommunications services in Florida after July 1, 1995. s. 364.02(1), F.S.

Alternative local exchange companies have argued that multi-tenant environments where a landlord controls access to the tenants/customers in a building are a "bottle-neck monopoly" and represent an obstacle to bringing the advantages of a competitive telecommunications market to those customers.

Building owners are concerned about possible government-authorized intrusion onto their property by ALECs.

The multi-tenant market is attractive because the high density of users means that the cost of providing service is low. Commercial multi-tenant buildings are especially attractive because commercial tenants typically are high volume users of telecommunications services. The multi-tenant issue is complicated because--as a remnant the monopoly local telecommunications market--the LECs typically do not pay for building access. This circumstance makes it difficult for ALECs to compete with LECs and win customers in existing multi-tenant environments.

During the 1998 Regular Legislative Session, the legislature enacted ch. 98-277, Laws of Florida, which charged the Florida Public Service Commission ("PSC") with studying issues associated with the access to tenants issue. The PSC produced a two volume report on the subject totaling approximately 500 pages, and made a presentation on the subject to the Committee on Utilities and Communications. By separate letter, the PSC also provided what amounts to "model" legislation on the subject. HB 1135 is patterned after the PSC's language.

B. EFFECT OF PROPOSED CHANGES:

The bill establishes a Legislative finding that an important public purpose is achieved by providing access to multi-tenant environments, public and private, residential and nonresidential, for telecommunications companies seeking to promote competition and choice in delivering telecommunications services.

Section 364.01(4)(j), F.S. is created to provide that the PSC has exclusive jurisdiction to resolve disputes between telecommunications companies, tenants, and landlords concerning the provision of telecommunications services in multi-tenant environments.

Section 364.02(6), F. S. is created to define "exclusionary contract" to mean an agreement between a landlord and a telecommunications company in which the telecommunications company is given exclusive access to the landlord's property for the purpose of providing telecommunications service.

Section 364.02(8), F.S. is created to define "marketing agreement" to mean any agreement between a landlord or property manager and a telecommunications company in which the telecommunications company provides some form of remuneration to the landlord or property manager for each tenant subscribing to the service of the telecommunications company.

Section 364.02(10), F.S. is created to define "multi-tenant environment" to include any type of structure, ownership interest, and tenancy with multiple owners or tenants *with the following exceptions:*

Condominiums as defined in ch. 718, F.S., or *cooperatives* as defined in ch. 719, F.S., in which the owners have delegated responsibility to specified groups to secure one provider of telecommunications services for all end users;

Homeowners associations as defined in ch. 617, F.S.;

Short term tenancies served by call aggregators as defined by PSC rule. (Typically, call aggregators serve customers in motels, hotels and other short term settings. The term aggregator refers to the practice of aggregating the calls of the various customers and buying volume discounted services from facilities-based providers to serve the customers.);

Tenancies that are less than 12 months in duration---tenant includes any person, corporation, or entity possessing an ownership interest in a condominium or cooperative which is not excluded from the definition of a multi-tenant environment. (Because many leases are written for one year, making the exemption for less than 12 months means that tenants subject to such leases will be included in the requirements of the bill.)

Section 364.341(1), F.S. is created to provide the following standards governing telecommunications carrier access to tenants in multi-tenant environments:

- Access is to be granted on a reasonable, nondiscriminatory and technologically neutral basis.
- Tenants, landlords, and Telecommunications providers are to “make every reasonable effort to negotiate terms and conditions for access.”
- A landlord may charge a telecommunications company or tenant the reasonable and nondiscriminatory costs of installation, removal, or telecommunications equipment or facilities, or other costs of providing service to the tenant.
- The tenant is responsible for obtaining all necessary easements across another tenant’s premises.
- A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.
- A landlord may not deny access to space or conduit previously dedicated to public service if that space or conduit is sufficient to accommodate the facilities needed for access. Such access may be denied by the landlord where space is not sufficient or where the installation would unreasonably interfere with the aesthetics of the building.
- A landlord is prohibited from charging a fee for the privilege of providing telecommunications service to a tenant in a multi-tenant environment.
- The obligations of the carrier of last resort pursuant to s. 364.025, F.S. are not abrogated.

Section 364.341(2), F.S. is created to provide that exclusionary contracts between landlords and telecommunications providers for the provision of telecommunications services in multi-tenant environments are prohibited.

Section 364.341(3), F.S. is created to provide that landlords must disclose to potential tenants the existence of any marketing agreements between telecommunications providers and the landlord.

Section 364.341(4), F.S. is created to provide that the PSC is given exclusive jurisdiction for purposes of resolving disputes arising between telecommunications companies, tenants, and landlords concerning access to tenants for the provision of telecommunications services in multi-tenant environments.

- The following must occur before an action for access may be brought:

--A telecommunications company and tenant must convey the request for service to the landlord.

--If the landlord is unresponsive a written request is to be submitted to the landlord.

--If the landlord fails to timely respond, if access is denied, or if reasonable and nondiscriminatory terms for access can not be reached, the telecommunications company and the tenant may file a petition with the PSC for review.

- In reviewing disputes related to access, the PSC is to apply standards established in s. 364.341(1).

Section 364.341(5), F.S. is created to authorize the PSC to adopt rules to implement the bill.

Section 364.341(6), F.S. is created to provide that a landlord is prohibited from requiring a local exchange telecommunications company to compensate the landlord under this section, if the company provides service to tenants as the carrier of last resort and another telecommunications company is not providing telecommunications services to tenants.

Because definitions are added to s. 364.02, F.S. and subsections are renumbered accordingly, numerous statutory cross references are amended to reflect the renumbering.

The bill is to take effect on October 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

The PSC is given rulemaking authority to implement the provisions of the new section.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The PSC is charged with resolving disputes between telecommunications companies and private property owners.

- (3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?
No.
- b. Does the bill require or authorize an increase in any fees?
No.
- c. Does the bill reduce total taxes, both rates and revenues?
No.
- d. Does the bill reduce total fees, both rates and revenues?
No.
- e. Does the bill authorize any fee or tax increase by any local government?
No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?
No.
- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?
No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?
No. The bill regulates the affairs of private property owners.
- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?
Yes. The bill prohibits property owners from denying telecommunications providers access to their property according to specified criteria.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:
 - (1) Who evaluates the family's needs?
N/A
 - (2) Who makes the decisions?
N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 364.01, 364.02, 364.341, 196.012, 199.183, 212.08, 290.007, 350.0605, 364.602, 489.103, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate

2. Recurring Effects:

Indeterminate

3. Long Run Effects Other Than Normal Growth:

Indeterminate

4. Total Revenues and Expenditures:

Indeterminate

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Indeterminate

2. Direct Private Sector Benefits:

Indeterminate

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate

D. FISCAL COMMENTS:

In a preliminary estimate, the PSC indicates that implementation of the bill will require four additional FTEs.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The Building Owners and Managers Association International ("BOMA") and other organizations representing real estate interests oppose this legislation. BOMA questions whether the PSC study of the access to tenants issue was fair to property owners and notes that no substantiated problem with access to tenants was identified by the PSC.

The ALECs and BOMA disagree sharply about the constitutionality of the bill. In very general terms, the discussion has been framed as follows:

BOMA has raised constitutional arguments against mandatory access, and statutory compensation schemes. Relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and subsequent cases addressing property issues, it is BOMA's position that mandatory access constitutes a *taking* and that such a taking is permissible only when there is a true *public purpose* and affected property owners receive *just compensation*.

With respect to *public purpose*, BOMA relies on *National R.R. Passenger Corp. V. Boston & Maine Corp.*, 503 U.S. 407,422 (1992), and asserts that "any taking designed to allow one group of private parties [ALECs] to obtain the use of property belonging to another group of private parties at rates lower than those normally negotiated in the free market is not for a 'public purpose.'" Pointing to the large number of certificated telecommunications companies in Florida, BOMA asserts that the actions of building owners are not impeding the growth of competition and thus, forced access is not rationally related to the public purpose of promoting competition.

With respect to *just compensation*, BOMA relies on *Monongahela Navigation Co. v U.S.*, 148 U.S. 312 (1893) which addresses how just compensation is to be determined. The Building Owners and Managers Association concludes that "[a]ny effort to establish guidelines or standards for determining compensation by statute or regulation is . . . constitutionally suspect, because the property owner is entitled to the 'true value' of the property, and preexisting standards may ignore factors needed to determine the true value."

The Building Owners and Managers Association contends that the decision in *Gulf Power v. United States of America*, 998 F. Supp. 1386 (N.D. Fla. 1998), relied on by the ALECs, is still under appeal and is a flawed decision.

The ALECs assert that when the *Loretto* case, relied on by BOMA, was remanded, the New York Court of Appeals determined that the constitutional defect in the statute could be removed by authorizing the State Commission on Cable Television to establish reasonable compensation subject to judicial review. See *Loretto v. Teleprompter Manhattan CATV*, 459 N.Y.S.2d 743 (Ct. App. 1983). The ALECs observe that this approach was mirrored in *Gulf Power* wherein the United States District Court for Northern Florida addressed a nondiscriminatory access provision of the federal Pole Attachment Act, and found that an initial determination of just compensation is not required to be made by the judiciary as opposed to an administrative agency (in that case, the Federal Communications Commission). Thus, the ALECs conclude that "a mandatory access standard which provides an administrative tribunal for determination of compensation issues, subject to judicial review, is constitutionally sound.

With respect to *public purpose*, BOMA sometimes has relied on *City of Lansing v. Edward Rose Realty*, 502 NW2d 638 (Mich. 1993) for the proposition that the provision of choice in cable television is not a "public good" within the meaning of the 5th Amendment. However, the ALECs observe that, in *City of Lansing*, the Michigan Supreme Court determined that "public purpose" can be supplied by the Legislature. The ALECs contend that such a public purpose is already contained in ch.364, F.S. which contains a finding and legislative intent that the competitive provision of telecommunications including local service, is in the public interest. See s. 364.02(3), F.S. The ALECs note that HB 1135 expands on that concept by specifically encompassing access to customers in multi-tenant environments.

The ALECs also note that access legislation in Texas has not been challenged in court by property owners based on constitutional arguments.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

STORAGE NAME: h1135.uco

DATE: March 31, 1999

PAGE 9

VII. SIGNATURES:

COMMITTEE ON UTILITIES AND COMMUNICATIONS:

Prepared by:

Staff Director:

Charles Murphy

Patrick L. "Booter" Imhof