The Public Utility Commission of Texas (commission) adopts new §26.129 relating to Standards 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 TexReg 3681). This rule is 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-discriminatory treatment of telecommunications utilities by property owners. This new rule is adopted under Project Number 21400.

This rule sets forth procedures whereby, upon a tenant's request, a telecommunications utility 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 independent negotiations between the requesting telecommunications utility and the property owner, and establishes procedures for resolution by the commission in the event an agreement 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.

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. 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 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 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 owner's property to serve a requesting tenant, 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 adopted §26.129 may result in takings of real property. The purpose of the statute and adopted rule is to promote competition in 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 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

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 compensation to the affected property owner for the use of such space on the property.

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

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 the hearing and commented orally upon this rule: Aegis Communications, BOMA, Camden Property Trust (Camden), Crescent Real Estate Equities Limited (Crescent), Equity Office Properties (Equity Office), Gables Residential (Gables), Hines Interests Limited Partnerships (Hines), the Institute of Real Estate Management (IREM), Kucera Management (Kucera), the National Apartment Association (NAA), the National Multi-housing Council Joint Legislative Program (NMCJLP), Smart Buildings Policy Project, SWBT, TAA, Trammell Crow Company (Trammell Crow), Transwestern Commercial Properties Trust (Transwestern), TrizecHahn

Office Properties, Inc., 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 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 property owners and their subsidiary communication providers and the need for all requesting carriers to be treated equally when responding to tenant requests for service.

The commission adopts this rule and rejects claims that the statute is unconstitutional. A 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 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 constitutionality of PURA §§54.259, 54.260, and 54.261.

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 narrow purpose of implementing the legislatively determined good of allowing tenants to choose the provider of their telecommunications services. This rule does not allow 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 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 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.

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

Preamble questions

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

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

AT&T argued that the benefits of this rule are obvious and unquestionable. AT&T asserted that 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 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 explained that this rule will ensure that the property owners are not able to extract unwarranted monopoly levies on the requesting carriers.

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

The CLEC Coalition, asserted that this rule offers clear and substantial benefits to Texas 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 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 delaying negotiations, and by denying access altogether.

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 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 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 high technology communications businesses.

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-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.

The commission finds that the benefits associated with this rule outweigh any costs that 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 wider range of providers through the ability to choose their telecommunications service provider. This choice enhances competition among telecommunications providers, thus 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 "encourage a fully competitive telecommunications marketplace." Adoption of this rule implements this policy.

General comments

At the Public Hearing, Camden asserted that this rule was incomplete because it did not require a 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 property owner's choice in Texas.

The demarcation point is the network point that connects the incumbent local exchange company (ILEC) provider (regulated) or competitive local exchange company (CLEC) provided facility, terminal equipment, apparatus or wiring to a subscriber's 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 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 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 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 §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 (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 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 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 necessary to address the MPOE or demarcation standards in this rule.

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 abide by all building rules as condition of their gaining access to the property.

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

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

The CLEC Coalition stated that the residential multi-family properties had legitimate concerns, not present in the commercial office environment, about accommodating multiple providers, 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 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 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. If the commission finds that the lack of distinction between residential and commercial property in this rule is inhibiting tenants' choices, it may address such issues in future revisions to the rule.

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.

In its reply comments, BBOC stated that AT&T's belief that a privately-negotiated STS 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 nondiscrimination requirement in this rule does not require that access be granted in identical terms as those contained in a negotiated STS agreement.

This rule does not prohibit STS agreements. Moreover, PURA §54.261 states that PURA §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 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 that STS agreements may be considered when evaluating whether the non-discrimination provisions in PURA §54.259 have been violated. Although not publicly filed, the agreements may be relevant when evaluating discriminatory behavior.

Specific comments to rule language

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 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."

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

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

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

In its written comments, AT&T stated that it is unclear why the definition of "property," published as subsection (c)(3), now subsection (c)(2), includes the phrase "single piece of land, or a campus, or a parcel of land" and is not certain as to what buildings would be included or excluded by it. AT&T suggested that the subsection be clarified to prevent disputes regarding

the definition. AT&T offered an alternative definition of "property" which included all buildings under common ownership which are located on a single tract of land or on tracts that are adjoining.

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 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" in the definition.

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 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.

The commission adopts AT&T's definition of "property." The revised definition addresses 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 "property" because such an interest is included in the definition of "tenant" and is inferred by the scope and purpose of this rule.

In the written comments, the Building Owners suggested that the definition of "requesting 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 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).

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

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. 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 original term of 12 months or more and the tenant has occupied the space for more than 12 months."

The CLEC Coalition asserted that if such a limiting provision is included in this rule, the 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 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 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 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.

AT&T explained that while it is aware of the need for a time period to be included in the 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 to request service, even if he had every intention of renewing his lease for another extended 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 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 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.

SWBT asserted that any definition of "tenant" that excludes any persons who are renting or 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 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 an existing and valid lease in the building."

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 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 default with their lease but not subject to a bona fide eviction process.

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

Further, 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 period will be considered in determining the six-month minimum needed to satisfy this rule. However, the requesting tenant and the property owner may agree to extend the six-month minimum lease requirement by including the tenant's option to renew the lease or previous lease terms.

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

In its reply comments, the Building Owners suggested that the commission reject SWBT's 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 apply only to tenant requests for telecommunication services.

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-discriminatory treatment of a telecommunications utility by the property owner upon a *tenant's request* for telecommunications services. This rule does not purport to address any other rights which tenants may have under PURA or any other law.

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 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 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 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 limitation in this rule or the statute. AT&T proposed specific additional language to address this concern.

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 denied because subsection (d)(2) is taken verbatim from the statute.

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

At the Public Hearing, NAA/NMCJLP asserted that subsection (d)(2)(A)(iv), which gives the 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 meaningless unless a specific performance bond of substantive value is placed on the requesting carrier.

The commission rejects NAA/NMCJLP's recommendation as the language in subsection (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 recognizes that PURA §54.260(a)(4) requires the requesting carrier to indemnify the property owner for damage caused by installing, operating, or removing a facility. If a 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 requesting carrier. If a satisfactory resolution is not reached, the property owner may seek resolution under section (i) of this rule.

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 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 subsections (d)(3)(A)(i)-(ii) be deleted as they are redundant with subsection (d)(2) of this rule.

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 parsing the property owner's rights.

The commission adopts the Building Owners' recommendation and incorporates the language to clarify subsection (d)(3)(A). However, the commission rejects the Building 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.

The CLEC Coalition objected to subsection (d)(3)(A)(i), which limits a requesting carrier's 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 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 between the property owner and the requesting carrier. Thus, the CLEC Coalition urged the deletion of subsection (d)(3)(A)(i).

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 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 automatically renews.

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 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 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 continues, without the need for renegotiation, for the term of the requesting tenant's renewal." This modification alleviates the CLEC Coalition's concern that this rule would force a telecommunications service provider to renegotiate its agreement with the property owner each time its existing tenant renewed its lease.

At the Public Hearing, Crescent suggested that this rule specifically require the requesting carrier 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).

The commission declines to incorporate the Building Owners' recommendation because 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 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 property owner to impose certain conditions and limitations on the requesting carrier.

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 language be added that states that the safety requirement is presumptively met by complying with all applicable codes.

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

The commission rejects the CLEC Coalition's recommendation to add language that presumes that the installation of telecommunications equipment is safe if the requesting 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 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 addressed in subsection (g)(2) of this rule.

Subsection (d)(4) prohibits the telecommunications utilities from entering into an exclusive 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

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 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 depriving tenants on those properties their right to choose. SWBT also asserted that the subsection prohibits telecommunications utilities from entering exclusive provider agreements 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 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 concerns.

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. 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 may be permitted. The Building Owners believe this could lead to confusion.

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). However, the commission declines to make the revisions recommended by SWBT as the scope of this rule is the provision of telecommunications services to tenants, not all buyers of telecommunications

services. In addition, the commission adopts the Building Owners' recommendation and deletes the phrase "specific or defined group of" from subsection (d)(4) to alleviate confusion.

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

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

The commission agrees with the Building Owners' recommendation that the request for a tour of the property also be delivered to the persons identified on the tenant's lease. The 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 manager, and to the person identified in the tenant's lease to receive notices.

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 for at least 30 days. Camden, Kucera, and IREM generally agreed that the timelines are too short.

At the Public Hearing, Robert Cottingham stated that the ten-day period to arrange a visit of the 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 possible.

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 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)(1)(B). The Commission also adds subsection (e)(1)(C), which allows the requesting carrier and the property owner to extend the timeline upon agreement.

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.

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.

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

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 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 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 commission's intent is that the clarified language will prevent discriminatory activity and inflated charges.

The Building Owners asserted that technical drawings of the property are highly confidential and 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 technical drawings only after the requesting carrier has signed a confidentiality agreement chosen by the property owner.

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

Subsection (e)(3), notice of intent to install telecommunications equipment, addresses the notice of intent that the requesting carrier will provide the property owner. At the Public Hearing, UDRT was concerned that the 30-day timeline associated with subsection (e)(3) was woefully short. UDRT suggested that the property owner be given a minimum of 90 days to evaluate the requesting carrier's notice of intent. Camden, Kucera, and IREM generally agreed that the timelines are too short.

In its written comments, the Building Owners asserted that the 30 day time frame in subsection (e)(3)(A) conflicts with the 45 days given to negotiate the agreement set forth in section (f). The Building Owners explained that by requiring the notice of intent to be given "not fewer than 30 days before the proposed date of installation" subsection (e)(3)(A) can be viewed as permitting a requesting carrier to gain access to a property before negotiations are completed.

The commission concurs with the Building Owners' concern that the 30-day time frame in subsection (e)(3)(A) conflicts with the negotiation timeframe in section (f). The commission revises section (f) accordingly. In addition, the commission adds subsection (e)(3)(D), which allows the requesting carrier and the property owner to extend the timeline upon agreement.

In its written comments, the Building Owners suggested striking the phrase "on site" from subsection (e)(3)(B). The Building Owner proposed striking the language and making other modifications because not every property has an on-site manager, nor does every lease agreement identify a person for purposes of notice.

The commission does not adopt the Building Owners' recommendation. However, the commission revises subsection (e)(3)(B) to address the Building Owners' concern. The revised subsection requires that the notice of intent be sent to the property's on-site manager or designee, if the property has such a manager, and the person identified in the tenant's lease to receive notices. The commission finds that it is reasonable to expect a property to have, at a minimum, an on-site property manger *or* the identity of the person to receive notices in the tenant's lease.

Subsection (e)(3)(C) lists the information to be contained in the requesting carrier's notice of intent. The Building Owners proposed additional language to the subsection that would enable building owners to evaluate the requesting carrier's effect on the safety and security of the property. The items include the identity of the legal entity requesting entry and its parent, if any; a statement of the requesting carrier's financial net worth; identification of the contractors the requesting carrier plans to use to install the equipment; a list of the safety precautions the requesting carrier requires of its employees and contractors during construction; the length of time the requesting carrier expects its equipment to remain on the property; and the length of time construction is expected to take.

In its reply comments, SWBT argued that the Building Owners' request to add several items to the list that the requesting carrier must include in the notice of intent should be rejected because the Building Owners do not explain why this additional information is necessary for them to evaluate the requesting carrier's effect on the safety and security of the property.

In its reply comments, the CLEC Coalition suggested that the list of items proposed by the Building Owners would be best addressed during negotiations because much of it is based on the space the requesting carrier will be able to access, if any.

The commission rejects the Building Owners' recommendation and concurs with SWBT's rationale that the Building Owners do not explain why this additional information is necessary to evaluate the requesting carrier's effect on the safety and security of the property. The

commission also agrees with the CLEC Coalition to the extent that the list of items proposed by the Building Owners is addressed during negotiations.

Subsection (e)(3)(C)(i) requires the requesting carrier to identify the requesting tenant in its notice of intent. In its written comments, SWBT stated that this could enable the property owner to attempt to dissuade the requesting tenant from utilizing the services of the requesting carrier. SWBT suggests that this subsection be amended to state that the property owner shall not use the identity of the requesting tenant for any marketing purposes or that the property owner shall not interfere with the tenant's right to choose its telecommunications services provider. In the alternative, SWBT suggested that the requirement be eliminated altogether and instead require the requesting carrier to provide an affidavit to property owner stating that the requesting carrier has received a tenant request for service requiring the installation of telecommunications equipment.

In the reply comments, the Building Owners urge the commission to reject SWBT's proposal to modify this subsection to preclude property owners from talking to the requesting tenant about telecommunications service providers.

The commission does not adopt SWBT's recommendation to amend subsection (e)(3)(C)(i) to prohibit the property owner from using the identity of the requesting tenant for any marketing purposes or that the property owner shall not interfere with the tenant's right to choose its telecommunications services provider. The commission believes that precluding property owners from talking to the requesting tenant about service providers could potentially violate the

rights of both the requesting tenant and the property owner. The commission will rely on the cooperation of the property owners in not interfering with the tenant's right to choose their telecommunications services provider.

At the Public Hearing, SWCTA also suggested that the word "engineering" be deleted from subsection (e)(3)(C)(v). SWCTA believed that it should be left to the requesting carrier's discretion when "engineering" drawings are necessary.

The commission rejects SWCTA's recommendation to delete the word "engineering" from subsection (e)(3)(C)(v). As a matter of practice, technical drawings are generally approved by a certified engineer.

AT&T expressed concern with subsection (e)(3)(C)(v) which requires the requesting carrier to include the proposed location, space requirement, proposed engineering drawings, and other specifications of the telecommunications equipment in the notice of intent. AT&T explained that in many cases a tour of the property may be needed so that the requesting carrier can fairly propose a location; this same concern applies to the requesting carrier's ability to evaluate the type of equipment needed and to develop associated engineering drawings. Thus, AT&T asserted that the problem with this rule is that if the requesting carrier doesn't proffer the information required by subsection (e)(3)(C), then the property owner could argue that the notice of intent is insufficient and, therefore, that the notice process has not begun. The CLEC Coalition agreed with AT&T in its reply comments.

The CLEC Coalition asserted that requiring requesting carriers to have technical plans drawn up before beginning negotiations with the property owner would create unnecessary expense and result in lengthening the negotiation process. The CLEC Coalition explained that because the requesting carrier will not be able to produce detailed engineering drawings until after the property tour and receipt of drawings, it is not possible to send notice of intent concurrently with a request for a building tour. The CLEC Coalition suggested that subsection (e)(3)(C)(v) be revised accordingly. The CLEC Coalition reiterated its position in its reply comments.

The language in subsection (e)(1)(A) states that the request for a tour may be received *prior to or concurrently* with the requesting carrier's notice of intent. Therefore, the requesting carrier may request a tour of the property prior to submitting a notice of intent. The commission does not believe that subsection (e)(3)(C)(v) necessitates modification to alleviate the concerns of AT&T and the CLEC Coalition.

SWCTA suggested adding a clause (viii) to subsection (e)(3)(C) which would state: "if a dispute is filed for resolution at the Commission, the Commission may proceed with resolution if all of the items required herein were not provided if the Commission concludes that items were not applicable."

The commission does not find SWCTA's recommended clause necessary as the commission has the authority to proceed with dispute resolution regardless of the items included, or not included, in the requesting carrier's notice of intent.

Subsection (f) requires the property owner and the requesting carrier to 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 within 45 days. TAA supported the extension of the period of negotiation to at least 90 days before either party could file for resolution with the commission.

At the Public Hearing, UDRT concurred with TAA and supported the extension of the negotiation period to 90 days. Camden generally agreed. In its written comments, the Building Owners objected to the 45-day limit for negotiations, believing that 120 days is the minimum required to negotiate an agreement.

At the Public Hearing, Robert Cottingham suggested that the negotiation period be shortened to 30 days. In its written comments, the CLEC Coalition suggested reducing the negotiating period to 30 days and providing the engineering drawings during the negotiating period rather than prior to the beginning of negotiations.

The commission revises section (f) to require the requesting carrier and the property owner to negotiate for 30, rather than 45, calendar days following the property owner's receipt of the requesting carrier's notice of intent. This revision alleviates the Building Owners' concern that the 30-day time frame in subsection (e)(3)(A) conflicts with the negotiation timeframe in section (f). As revised, this rule requires the property owner and the requesting carrier to negotiate during the 30 calendar days prior to the proposed installation date. The commission finds that

the revised timeframe is a reasonable balance between the concerns of the property owners, the requesting carriers, and the requesting tenants waiting for service.

Section (g) outlines the parameters for installation of the requesting carrier's telecommunications equipment. The section allows the property owners to deny access to the building when there is inadequate space or safety concerns. In the publication preamble, the commission solicited comment as to whether this proposed rule provides the property owners with adequate measures to address the property's security, safety, liability and other concerns specified in PURA §54.260(a)(1)-(5).

AT&T asserted that this rule provides the property owners with adequate measures to address security, safety, liability and other concerns specified in PURA §54.260(a)(1)-(5).

The Building Owners argued that this rule is woefully inadequate as it forces the property owner to accept the requesting carrier onto the property, but does not permit the property owner to impose building specific obligations regarding security, safety, and liability issues.

The CLEC Coalition contended that this rule contains significantly more safeguards for the property owners than required by statute. The CLEC Coalition provided a listing of the specific provisions addressing safety, liability and other property owner concerns. The list includes subsections (c)(8), (d)(2), (d)(3)(B), (e)(3)(B), (e)(3)(C), (g)(2), (h)(3), (h)(4), and (i)(3)(B)(iii).

TAA argued that the parameters for installation of telecommunications equipment should be amended to allow the property owner to deny access or compel the requesting carrier serving the property to remove telecommunications equipment if the requesting carrier refused to comply with reasonable conditions. TAA contended that the section should be amended to give the property owner greater ability to deny requests due to a lack of space and to allow the property owner to deny access when installation by the requesting carrier would lessen the structural integrity of any product, such as fire-rated building materials, below the manufacturer's specification.

The commission finds that this rule as proposed offers adequate measures to address the property's security, safety, liability and other concerns specified in PURA §54.260(a)(1)-(5). As such, the commission rejects TAA's argument and finds that its concerns are fully addressed in subsection (d)(2)(A), which allows the property owner to impose certain conditions and limitations on the requesting carrier and subsection (d)(3)(B), which requires the requesting carrier to comply with all applicable federal, state, and local codes and standards.

At the Public Hearing, Gables expressed concern that subsection (g) did not give the property owner any recourse in the instance that the requesting carrier did not agree to the reasonable conditions placed on it by the property owner, and as a result, negatively impacted the curb appeal of the property. Gables spoke generally and did not suggest specific language to be added to this rule.

The commission acknowledges Gables' concern regarding the curb appeal of its property; however, the commission finds that imposing any further restrictions are beyond those contemplated in PURA.

In addition, Gables argued that this rule should allow the property owners to deny access to the property if the requesting carrier has a financial default or is financially unstable.

The commission rejects Gables recommendation because the statute implemented by this rule, PURA §§54.259, 54.260, and 54.261, does not consider the requesting carrier's financial status when granting the right to access a property in order to provide telecommunications service to a requesting tenant. This rule provides two reasons for the immediate denial of access, inadequate space and safety concerns. If a property owner is concerned with the financial stability of the requesting carrier, it may seek resolution of the issue under subsection (i) of this rule. In addition, the commission notes that all requesting carriers are certificated telecommunications utilities whose financial statements are filed with the commission and have been reviewed prior to certification.

In its written comments, the Building Owners proposed that the following language be added to the end of section (g): "provided that the requesting carrier offers to reasonably compensate the property owner and agrees to the provisions of the property owner's standard form of telecommunications license or lease."

In its reply comments, the CLEC Coalition stated that adding the Building Owners suggested provision would give the property owner the absolute right to inflict any manner of unreasonable terms on the requesting carrier. Therefore, the CLEC Coalition asserted the Building Owners recommendation should be rejected.

The commission does not adopt the Building Owners' recommendation. The commission encourages parties to negotiate with equal bargaining power. Inserting the Building Owners' recommended language in subsection (g) could discriminate against the requesting carriers and may give the property owners more bargaining power.

The Building Owners also explained that the property owners must be free to evaluate requests for access in light of available space, which should include an owner's reasonable expectation to reserve space to accommodate late-arriving competitors and future innovations. The Building Owners proposed the following language be added to section (g): "The following shall not be considered available when determining the adequacy of available space: space reserved for prospective tenants with whom the Property Owner is negotiating a lease, space reserved pursuant to already executed agreements with telecommunications providers, or space reserved for expansion of existing electrical, HVAC, plumbing, security or other building operating systems."

The commission acknowledges that the property owner may have legitimate reasons to reserve space on the property. However, the commission finds that each property is unique and it would be difficult to determine a generic reasonable amount of space to be reserved. Therefore, the

commission rejects the Building Owners' recommendation to give the property owners a blanket approval to reserve space on the property. Based on similar experiences with incumbent local exchange carrier physical collocation, the commission believes that such an approval could lead to discriminatory practices. The commission recommends that the parties agree to an amount of space to be reserved when negotiating an agreement. Should the parties be unable to agree upon a reasonable amount of space to reserve, the issue can be resolved though the dispute resolution processes under subsection (i) of this rule.

TAA asserted that the property owners should have at least 30 days to evaluate a request to determine whether adequate space exists or if the request may compromise the safety of the property and/or persons on the property. The Building Owners asserted that the ten-day timeframe allowed for the demonstration of inadequate space in subsection (g)(1)(B)(ii) is too short and that a 15 day timeframe would be more workable.

The commission revises the timelines in subsections (g)(1)(A), (g)(1)(B)(ii), and (g)(1)(B)(iii) to reflect ten business, rather than calendar, days. The commission finds that these changes help alleviate TAA's concern that the timeline allowed to evaluate the request for access and the Building Owners' concern that the timeframe allowed for the demonstration of inadequate space is inadequate. In addition, these revisions are 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 these revisions to subsection (g)(1).

The Building Owners suggested that subsection (g)(1)(B)(iii) be clarified that if the requesting carrier fails to dispute the property owner's assessment that a space limitation exists within ten days, the requesting carrier is deemed to have withdrawn its notice of intent. The Building Owners proposed language stating this clarification.

In its reply comments, the CLEC Coalition stated that such limits were unprecedented and unnecessary.

Alternatively, the CLEC Coalition argued that the requirement that the requesting carrier seek commission resolution in ten days is an unprecedented statute of limitations and is an unwarranted denial of the requesting carrier's and the requesting tenant's rights. Therefore, the CLEC Coalition requested that the ten-day limitations period be deleted from this rule and that the language in the subsection simply state that if the requesting carrier disputes the property owner's assertion, that the requesting carrier may pursue a commission resolution pursuant to subsection (i) of this rule.

The commission does not adopt the Building Owners' recommendation. This rule is currently written to require the requesting carrier to request a demonstration or to dispute the property owner's assertion that there is inadequate space to install telecommunications equipment by requesting resolution under subsection (i) of this rule. Therefore, if the requesting carrier does not respond to the property owner's denial, the request will no longer be pursued. The commission finds that the ten-day limitation is necessary to avoid unreasonable delays, and does not delete the provision as suggested by the CLEC Coalition.

Subsection (g)(2) addresses safety concerns on the property in which the requesting carrier is seeking access. In its written comments, the Building Owners asserted that the property owner must have the final say as to whether installation of telecommunications equipment would compromise the safety of the property since it bears the ultimate legal and financial risk. The Building Owners also argued that the ten-day timeframe in subsection (g)(2)(A) is too short. The Building Owners believe that 30 days is more reasonable. TAA asserted that the property owners should have at least 30 days to evaluate a request to determine whether adequate space exists or if the request may compromise the safety of the property and/or persons on the property.

The commission does not find that modifications are necessary to address the Building Owners' concern that the property owner must have the final say as to whether installation of the requesting carrier's telecommunications equipment would compromise the safety of the property since the property owner bears the ultimate legal and financial risk. This rule gives the property owner the ability to deny the requesting carrier's access to the property if there is a legitimate safety concern.

The commission revises the timelines in subsection (g)(2) to reflect ten business, rather than calendar, days. The commission also revises subsections (g)(2)(A), (g)(2)(B)(ii), and (g)(2)(B)(iii) accordingly. The commission finds that these changes help alleviate the Building Owners' concern that the timeframes are too short. These revisions are 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 revisions to subsection (g)(2).

The CLEC Coalition requested that the word "unreasonable" in subsections (g)(2)(A) and (B), be replaced with the word "unavoidable."

The Building Owners suggested that the word "unreasonable" be deleted from subsection (g)(2)(B), as there is no need to limit the type of safety hazards that can be considered sufficient to deny access because of "unreasonable" safety hazards.

The commission rejects the proposals of both the CLEC Coalition and the Building Owners and therefore does not make the suggested changes to subsection (g)(2)(B). The commission finds that "unreasonable" establishes a balance between safety hazards that may be minor and easily correctable, and those that are insurmountable.

The Building Owners suggested that subsection (g)(2)(B)(iii) be clarified that if the requesting carrier fails to dispute the property owner's assessment that a space limitation exists within ten days, the carrier is deemed to have withdrawn its notice of intent. The Building Owners proposed language stating the clarification.

In response, the CLEC Coalition argued that the requirement that the requesting carrier seek commission resolution in ten days in subsection (g)(2)(B)(iii) is an unprecedented statute of limitations and is an unwarranted denial of the requesting carrier's and the requesting tenant's

rights. Therefore, the CLEC Coalition requested that the ten-day limitation period be deleted from this rule. In its reply comments, the CLEC Coalition stated that such limits were unnecessary.

The commission does not adopt the Building Owners' recommendation. This rule is currently written to require the requesting carrier to request a demonstration or to dispute the property owner's assertion that there is a safety concern by requesting resolution under subsection (i) of this rule. Therefore, if the requesting carrier does not respond to the property owner's denial, the request will no longer be pursued. The commission finds that the ten-day limitation is necessary to avoid unreasonable delays, and does not delete the provision as suggested by the CLEC Coalition.

Subsection (h) delineates the parameters for determining reasonable compensation payable to the property owner by the requesting carrier in exchange for access to the property. At the Public Hearing, Crescent suggested that this rule specifically recognize that it creates a taking under state law and that reasonable compensation would include fair market value based on highest and best use.

The commission believes that subsection (h) provides a guide for the property owner and the requesting carrier when negotiating reasonable compensation. The subsection does not exclude parties from presenting fair market value evidence during negotiations. Likewise, should a reasonable compensation dispute be brought to the commission under subsection (i) of this rule, parties are not excluded from presenting fair market value evidence. Moreover, subsections

(i)(3)(B)(iii)(VI) and (VII) state that the commission may consider the market value of the space or similar space.

Subsection (h)(3) addresses the removal of the requesting carrier's telecommunications equipment after the requesting tenant has left the property. TAA agreed with the language in subsection (h)(3), but suggested that it be clarified so that the property owner may compel the removal of the telecommunications equipment, unless parties agree otherwise. At the Public Hearing, TAA suggested that this rule prohibit the term of the contract between the requesting carrier and the property owner to exceed the remaining term of the requesting tenant's lease.

The commission finds that the property owner's ability to compel the removal of the requesting carrier's telecommunications equipment should be agreed upon in the contract between the requesting carrier and the property owner. The commission also finds that TAA's concern regarding the term of the contract is addressed in subsection (d)(3)(A)(i) of this rule which states that the requesting carrier may install telecommunications equipment on the property for a period of time no longer than the remaining term of the requesting tenant's lease. Therefore, the commission does not modify subsection (h)(3).

Subsection (h)(4) addresses the amount of a security deposit that the property owner may require from the requesting carrier. TAA suggested that the subsection be amended to ensure that the deposit or other mutually agreeable financial guarantee from either the requesting carrier or the requesting tenant is sufficient to cover the cost of removing the telecommunications equipment. At the Public Hearing, TAA further recommended that the security deposit not receive interest,

as suggested in SWBT's written comments, but instead, be handled either according to the contract between the property owner and the requesting carrier, or according to Chapter 92 of the Property Code.

In the written comments, the Building Owners suggested that subsection (h)(4) be revised to provide for security deposits not to exceed the sum of three months of fees or rents, plus a reasonable estimation of the cost to remove the requesting carrier's equipment if necessary. The Building Owners believed that the required security deposit, as proposed in subsection (h)(4), is a mere token and provides "no security" to the property owner.

In its reply comments, SWBT disagreed with the Building Owners' proposal for rewriting the security deposit requirement to require each requesting carrier to pay a security deposit not to exceed three months of fees, a reasonable estimate of the cost of removal, and a reasonable estimate of the cost to restore the property to its original condition. SWBT believed that this revision would give the property owner too much bargaining power and unfettered discretion to charge exorbitant security deposits. For the same reason, SWBT also disagreed with TAA's proposal of requiring a security deposit that is "sufficient to cover the cost of removing the equipment."

In its reply comments, the CLEC Coalition strongly objected to the Building Owners' suggestion that the security deposit not only consist of three months' rent, but also include sufficient funds to cover the cost of removing the telecommunications equipment. The CLEC Coalition argued that requiring an enormous capital outlay would deter competition.

At the Public Hearing, NAA/NMCJLP suggested that subsection (h)(4) be revised to make it absolutely clear that if the requesting tenant leaves a unit, the property owner gains immediate control over the unit and the wiring of the equipment.

The commission modifies subsection (h)(4) to allow the property owner and the requesting carrier more flexibility when determining the amount of the security deposit. The modified subsection allows parties to agree upon an amount other than one month of fees or rents. With respect to NAA/NMCJLP's suggestion, the commission does not believe it is necessary to add any further language to clarify that the property owner controls access to its rental units and the inside wiring associated with such units; the commission assumes this to be standard real estate practice.

Subsection (i) outlines the alternatives available to the property owner and the requesting carrier when a negotiated agreement cannot be reached. Subsection (i)(1) allows the requesting carrier and the property owner to seek alternative dispute resolution (ADR) rather than seeking commission resolution of a dispute. In the publication preamble, the commission solicited comment as to whether it would be appropriate to adopt a section that allows parties to opt-in to ADR, and if so, what procedures should the commission adopt for referral to mediation or arbitration.

AT&T supported the use of ADR processes, but noted that ADR processes cannot be made the exclusive means of resolution of disputes and parties must ultimately be given the opportunity to

use contested case procedures. AT&T suggested that this rule direct parties that initiate a dispute at the commission and wish to participate in non-binding arbitration or mediation to make that request in their filing and deliver it to the other party who must then oppose the request within ten days or the dispute will be automatically referred to the requested ADR by the commission, using an established list of mediators and arbitrators. Further, AT&T suggested that this rule provide that the administrative law judge (ALJ) name an impartial third party within an additional reasonable time period unless the parties notify the ALJ that they have agreed upon one.

The Building Owners strongly objected to any form of mandatory ADR. The Building Owners asserted that all disputes were matters of contract and belonged in the courthouse.

The CLEC Coalition and SWBT agreed that ADR should be undertaken only if both parties agreed. SWBT disagrees, however, with AT&T's suggestion that ADR arbitration decisions be non-binding.

In its written comments, SWBT suggested that the phrase "controversy or claim under this subsection" be changed to "controversy or claim arising under this section" since the provision applies to any controversy or claim arising under any part of this entire rule. Further, SWBT suggested that this rule require the consent of both the requesting carrier and the property owner before a dispute can be submitted to ADR. The CLEC Coalition and the Building Owners agreed in their reply comments.

The commission concludes that the ADR provisions in this rule are discretionary and included as a means to efficiently resolve disputes without the need for commission involvement. With respect to the issue of whether the arbitration is binding, the parties should look to the Texas Arbitration Act, which provides that arbitration shall be non-binding unless the parties agree otherwise. *See* Texas Civil Practice and Remedies Code §154.027.

The commission agrees with SWBT's rationale and incorporates SWBT's recommendation to change the phrase "controversy or claim under this subsection" to "controversy or claim arising under this section." The commission notes that the intent of subsection (i)(1) was that both parties agree before a dispute is submitted to ADR. The commission revises subsection (i)(1) to clarify the intent.

Subsection (i)(2) describes the conditions necessary in order for the requesting carrier or the property owner to file a petition for commission resolution when a negotiated agreement cannot be reached between the parties. In its written comments, the Building Owners suggested that the phrase "or other disputed issues" be deleted because all issues other than compensation, space, and safety, are contractual issues that are not addressed in this rule and should be left to the parties.

In its reply comments, the CLEC Coalition noted that the statute expressly includes the terms of access in its ambit and that the commission should not abdicate its rights to resolve such issues.

The commission rejects the Building Owners' recommendation to eliminate the commission's ability to resolve disputes other than those related to reasonable compensation or installation of the requesting carrier's telecommunications equipment. The commission clearly has authority to resolve such issues as PURA §54.259(c) and §54.260(b) state "notwithstanding any other law, the commission has the jurisdiction to enforce this section."

The commission revises subsection (i)(2) in order to make it consistent with the timeframe revisions to section (f) of this rule.

Subsection (i)(3)(B) outlines the information to be provided to the commission should the property owner or the requesting carrier request the commission to resolve a dispute regarding reasonable compensation. AT&T stressed that the focus of the commission should be to ensure that no discrimination exists, given the unequal bargaining power between the property owners and the requesting carriers, rather than merely to establish a "reasonable rate."

The commission does not concur with AT&T's rationale. The commission's involvement in reasonable compensation dispute resolutions should be limited to determining the appropriate amount of compensation for the specific circumstances before the commission. The commission cannot expand the scope of the dispute resolution process to determine the equality of bargaining power between the requesting carrier and the property owner during the negotiation process. The commission believes that the mechanism in place in this rule to determine reasonable compensation does not create discrimination.

In the publication preamble, the commission solicited comment on 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).

SWBT argued that while the Texas Supreme Court has not yet interpreted the phrase "compensation that is reasonable," the Court's other decisions are instructive. SWBT cited takings law (eminent domain/condemnation); compensation for property taken is just and reasonable when it reflects the "market value" of the property taken; and "market value" is determined by considering a willing buyer and seller. Thus, SWBT argued that the standards and factors in this proposed rule comply with Texas Supreme Court precedent, but can be improved upon by replacing the seven factors of (i)(3)(B)(iii)(III) with a simple statement that reasonable compensation will be determined in a manner consistent with all laws and case law regarding eminent domain. SWBT also suggested replacing the word "value" in (i)(3)(B)(iii)(III) and "market rate" in (i)(3)(B)(iii)(VI), (VII) with the term "market value" per Tex. Govt. Code Ann. §2007.002(3), and insert a definition for "market value" in subsection (c).

SWBT stated that given that all parties agreed on the applicable case law surrounding the determination of adequate compensation, and given the commissioners' remarks at the April 12, 2000, open meeting, the commission should delete proposed subsections (i)(3)(B)(iii)(I)-(VII) and modify subsection (i)(3)(B)(iii) to read that the commission will make the reasonable compensation determination in a manner consistent with the law applicable in eminent domain proceedings. Furthermore, SWBT explained that eminent domain law makes it perfectly clear that proposed subsection (i)(3)(B)(iii)(III) must be considered when determining reasonable

compensation; thus, this subsection should not be deleted unless the commission chooses to adopt SWBT's proposed language.

The CLEC Coalition noted that takings law uses the concept of "market value" to determine constitutionally just or adequate compensation. However, the CLEC Coalition asserted that the "market value" concept does not work well for determining the price the requesting carrier should pay to a property owner for space in the property owner's building because the requesting carriers require access to specific buildings at specific times and the requesting carriers cannot simply walk up the street to the next building if access terms and conditions are unreasonable. The CLEC Coalition explained that because the property owners have monopoly power, the requesting carriers do not fit the definition of a willing buyer under no compulsion to buy that is used in the "market value" concept. The CLEC Coalition proposes that this rule adopt the measure of the square foot rental value of the property that the property owner could command if the space were simply leased as office space. Moreover, the CLEC Coalition believes that the requesting carriers should not be charged for riser or conduit space because the property owners are generally compensated for this space through their tenants' leases.

The Building Owners cited several cases, including *United States v. 564.54 Acres of Land,* 441 U.S. 506, 511 (1979*); City of Pearland v. Alexander, Westgate, Ltd. v. State of Texas,* 843 S.W.2d 448, 456 (Tex. 1992); *Texas Alarm and Signal Assoc. v. Public Utility Commission,* 603 S.W.2d 766, 722 (Tex. 1980); *Pearland v. Alexander,* 483 S.W.2d 244, 247 (Tex. 1972); and *AT&T Communications of the Southwest v. Public Utility Commission,* 906 S.W.2d 209, 214 n. 7 (Tex. App.–Austin 1995, writ denied).

In addition, the Building Owners explained that in determining adequate compensation due to the property owners for the taking of property, the commission should not adopt the SWBT proposal. Furthermore, the Building Owners suggested that the commission reject the CLEC Coalition's proposal that compensation should be determined either as if there were no competition for the desired space, or based upon the price paid for entrance by the incumbent local exchange company (ILEC) or tenants of office space. The Building Owners asserted that the CLEC Coalition failed to acknowledge that there is competition among telecommunications providers seeking access to the property to serve tenants, and that competition determines the market rate. Therefore, the Building Owners argued that the commission should reject the CLEC Coalition's argument that the proper proxy for the rental of space for telecommunications equipment is the square foot rental value the property owner could command if the space were offered as office space or the price paid in the past by ILECs. The Building Owners asserted that there has been no valid evidence presented of excessive fees charged by property owners. Finally, the Building Owners requested that subsections (i)(3)(B)(iii)(III) and (IV) be deleted. The Building Owners asserted that the provisions were dependent upon property values and could require the property owner to conduct an appraisal of the property.

In its reply comments, the CLEC Coalition noted that this rule states that the commission *may* consider such factors, not *must* consider such factors. Therefore, these provisions should not be deleted.

Worldcom suggested that subsection (i)(3)(b)(iii)(VI) be deleted. Worldcom argued that the market rate might be inflated by agreements that the property owner executed prior to the implementation of this rule with affiliates of the property owner. Worldcom also requested a policy statement from the commission stating that the property owners must await approval of this rule or follow the requirements of this published proposed rule before proceeding with any eviction proceedings or other actions that fall within the scope of this proposed rule. Worldcom provided the following substitute language: "the market rate for similar space used for installation of telecommunications equipment in a similar property, *excluding space used by affiliates of the property owner and recognizing that the market rate may be inflated by the property owner's prior exclusive control of the property."*

In its reply comments, the CLEC Coalition agreed with Worldcom's comments.

In its reply comments, the Building Owners asserted that there was no need to amend or delete subsection (i)(3)(b)(iii)(VI).

As discussed previously, the commission makes no determination as to whether this rule or the PURA sections upon which they are based results in a taking. Accordingly, the factors enumerated in this rule are based on a reasonable interpretation of what may constitute compensation that is reasonable and nondiscriminatory pursuant to PURA §54.260. Furthermore, the factors set forth in this rule are not exclusive and may be modified based on the specific circumstances arising in a particular case. Case law relating to eminent domain proceedings is not dispositive in determining reasonable compensation under this rule.

Accordingly, the commission declines to delete any part of (i)(3)(B)(iii). The commission agrees with the CLEC Coalition that the factors listed are not all inclusive and *may*, not *must*, be considered by the commission. Therefore, the subsection does not require the property owner to conduct an appraisal of the property. Additionally, the commission reminds the CLEC Coalition that it may consider the market rate for space used by affiliates of the property owner when determining reasonable compensation.

The Building Owners requested that the commission make clear that if the presence of the telecommunications carrier or other amenity enhances the value of the property, then the property owners will be permitted to increase tenant rents to profit from those increased amenities.

The commission declines to make such a determination as this rule does not address the relationship between the property owner and the tenant, rather, it addresses the relationship between the property owner and the requesting carrier.

Subsection (i)(3)(C) outlines the filing requirements associated with a petition for commission resolution of a dispute involving issues other than compensation, space, and safety. The Building Owners requested that subsection (i)(3)(C) be deleted because it exceeds the scope of the commission's authority.

Consistent with subsection (i)(2), the commission rejects the Building Owners' recommendation to eliminate the commission's ability to resolve disputes other than those related to reasonable compensation or installation of the requesting carrier's telecommunications equipment. The commission clearly has authority to resolve such issues as PURA §54.259(c) and §54.260(b) state "notwithstanding any other law, the commission has the jurisdiction to enforce this section."

The Building Owners suggested a new subsection (i)(3) that would allow the property owner to request that the commission deny the requesting carrier's right to install if the property owner has not denied access due to a space or safety constraint and if the requesting carrier has not diligently pursued negotiations.

The commission rejects the Buildings Owners' recommendation to create a new subsection that would deny the requesting carrier's right to install telecommunications equipment. The commission recommends that the property owner resolve such a dispute, if the described circumstances arise in practice, under subsection (i) of this rule.

Subsection (i)(4) outlines the procedures to be followed should the property owner or the requesting carrier request the commission to resolve a dispute. At the Public Hearing, NAA/NMCJLP argued that the subsection should include a timeframe for resolution, rather than just an assertion that a resolution will be reached.

The commission expects the cooperation of the parties in order to resolve disputes in an expedited manner. The varying facts and uncertainties in each case could cause delay. The commission declines to associate a timeline with dispute resolution at this time.

Subsection (i)(4)(C) states that the commission may grant interim relief to the requesting party. At the public hearing, BOMA asserted that the subsection was lacking as it did not require the requesting carrier to provide the property owner compensation, or at a minimum, a bond to secure any additional amounts the court may award upon final resolution.

The commission traditionally supports the opportunity for interim relief; however, the commission is not persuaded by BOMA's argument and makes no changes to subsection (i)(4)(C). Requiring requesting carriers to post a bond may result in a barrier to entry. The commission recognizes that PURA §54.260(a)(4) and (5) require the requesting carrier to indemnify the property owner for damage, and the requesting carrier or tenant to bear the entire cost of installing, operating, or removing a facility. If a property owner is concerned that the entire cost will not be borne by the requesting carrier or tenant, the property owner should negotiate contract terms with the requesting carrier. If a satisfactory resolution is not reached, the property owner may seek resolution under subsection (i) of this rule.

Section (j) states that administrative penalties shall apply to this rule. The CLEC Coalition supported the inclusion of this section.

The commission modifies section (j) to clarify that administrative penalties resulting from a violation of this rule may be applicable to property owners, property managers, or telecommunications utilities.

All comments, including any not specifically referenced herein, were fully considered by the commission. The commission has made other minor modifications to clarify its intent, *i.e.*, cite corrections.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also adopts this section 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: Public Utility Regulatory Act §§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 54.261 regarding 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 PURA;

(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 property for the purposes of containing and protecting cable.

(2) **Property** – A building or buildings that are under common ownership and which are located on a single tract of land or tracts of land that are adjoining or would be in the absence of streets or other public rights-of-ways.

(3) **Property owner** – The owner of the property or its authorized representative(s).

(4) **Requesting carrier** – A telecommunications utility seeking access to space on the property for the purpose of providing telecommunications services to one or more tenants who have requested such services.

(5) **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.

(6) **Telecommunications equipment** – The equipment installed or used by the requesting carrier to provide telecommunications services to a requesting tenant.

(7) **Tenant** – Any occupant of a building or buildings on the property under the terms of a lease with the property owner which has a 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 in order to provide telecommunications services to the requesting tenant:

(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. Should the requesting tenant's lease renew, the agreement between the requesting carrier and the property owner automatically continues, without the need for renegotiation, for the term of the requesting tenant's renewal;

(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 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 to the property's on-site manager, or designee, and to the person identified in the tenant's lease to receive notices.

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

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

(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, within ten business days of the property owner's receipt of the requesting carrier's written request. The requesting carrier will bear the reasonable actual cost of providing the requested drawings.

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

(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, or designee, and to the person identified in the tenant's lease to receive notices.

(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).

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

(f) **Requirement to negotiate for 30 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 30 calendar days of the property owner's receipt of the requesting carrier's notice of intent, either party may file for resolution 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 business 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 business 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 business days to dispute the property owner's assertion that a space limitation exists by pursuing 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 business 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 business 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 business days to dispute the property owner's assertion that a safety hazard exists by pursuing 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. The requesting carrier and property owner may agree, in writing, to a security deposit of a differing amount than prescribed by this subsection.

(i) **Failure to reach negotiated agreement.**

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

(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 30 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 whether by a property owner, property manager, or telecommunications utility.

This agency hereby certifies that this rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.129 relating to Standards for Access to Provide Telecommunications Services at Tenant Request is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 19th DAY OF SEPTEMBER 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

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Chairman Pat Wood, III

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Commissioner Judy Walsh

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Commissioner Brett A. Perlman