

February 25, 2002

Business Operations
Joe Arriola, Chief Business Officer

SUBJECT: THAT THE SCHOOL BOARD APPROVES AN INTERNAL PROCESS TO REVIEW JOINT-USE LEASE PROPOSALS FOR THE SITING OF WIRELESS TELECOMMUNICATIONS FACILITIES ON BOARD-OWNED SITES

Background

Since 1996, the School Board of Miami-Dade County (Board) has executed five (5) lease agreements for the siting of wireless telecommunications facilities (facilities) at selected school sites. To facilitate proposals for said agreements, the District's Telecommunications Committee (TC) adopted an initial process that required the school principal to consult with the chairpersons of their respective Parent, Teacher and Student Association (PTSA) and the Educational Excellence School Advisory Council (EESAC). Additionally, the process required parental notification and a recommendation by the principal, based on the response from the notification, as to whether to proceed with the proposed facility.

At the July 11, 2001 meeting, the Board directed the Superintendent to revise and improve the process for reviewing such proposals. The Board's directive stemmed from concern that the latest facility being constructed at Miami Killian Senior High School (Killian) did not provide a vehicle for input from adjacent property owners. Further, several neighbors attended the Board meeting and asked that the facility be relocated to an alternate location. Additionally, following the Board meeting, Miami-Dade County (County) claimed building and zoning jurisdiction over the facility at Killian and issued two (2) Warning – Notice of Code Violations (W-NOCVs) for failure to obtain County zoning and building permit approval. As a result of the W-NOCVs issued by the County, the County's assertion of zoning and building jurisdiction, and neighborhood objection to the facility's location, District staff has been involved in a number of efforts to resolve the pending matters.

Additional Information

In an effort to clarify the extent, if any, of the County's jurisdiction relative to permitting and zoning of facilities on Board-owned sites, a legal opinion was requested from the School Board Attorney's (Board Attorney's) Office on August 8, 2001. On August 9, 2001, District staff and a representative from the Board Attorney's office met with County officials concerning the W-NOCVs. The Board Attorney's legal opinion was received on November 1, 2001 and concluded that facilities on Board-owned sites that are solely educational or jointly used (commercial and educational) are exempt from local zoning and permitting; and that facilities on Board-owned sites that are solely commercial are subject to local zoning and permitting(see Attachment "A"). At the present time, the facility at Killian falls under the latter category.

Formulation Of The Process & Brief Summaries

Based on the legal opinion rendered by the Board Attorney and concerns raised by County staff and neighbors of Killian, the TC held several meetings to formulate a new process. Prior to approval of the process by the TC at its January 14, 2002 meetings, the process was forwarded to County staff for review and input first on December 21, 2001 and again on January 14, 2002. Several meetings were also held with County staff during which they indicated a preference for development of an inter-local agreement to address review and coordination of proposed facilities on Board-owned sites. Because of extenuating circumstances, County staff was unable to provide comments on the proposed inter-local agreement as previously advised.

The process developed and recommended by the TC would apply to future facilities where a joint-use is proposed; the process will not apply to facilities used solely for educational purposes on Board-owned sites. Further, the process is based on the legal opinion rendered by the Board Attorney. If approved by the Board, the process will be supplemented by appropriate forms and checklists, and implemented internally in connection with any such proposals.

The proposed process is described in detail, with a flow chart, as attachments "B" and "C". Brief summaries of the key points to the proposed process are as follows:

- issuance of Requests for Proposals (RFPs), twice a year, for the siting of joint-use wireless telecommunications facilities (facilities) on Board-owned sites, accompanied by a five hundred dollar (\$500.00) non-refundable processing fee, which may be adjusted, from time to time, by the Superintendent of Schools, or his/her designee;
- distribute proposals and seek input on preliminary approvals from the chairpersons of the schools respective Parent, Teacher and Student Association (PTSA), Educational Excellence School Advisory Council (EESAC), student and teacher organizations, and/or any other school based constituencies which the principal may deem appropriate;
- if the service provider receives a preliminary approval and wishes to proceed with the proposal, plans shall be submitted accompanied by a one thousand dollar (\$1,000.00) non-refundable fee, which may be adjusted, from time to time, by the Superintendent of Schools, or his/her designee, per Board-owned site;
- the minimum setback distance from abutting property lines for the proposed facility shall be one hundred and twenty-five percent (125%) of the height of the monopole;
- as part of the internal staff review, the site related information contained within the proposal would be distributed to the planning and zoning department of the local municipality with an option to provide technical comments; and

- once a proposal passes a technical review, the Division will mail notice and invite comments from property owners of record, within 500 feet of the proposed site. This is a key component of the process as it provides a venue for public participation previously not afforded.

RECOMMENDED:

That The School Board authorize the Superintendent or his designee to:

1. implement the proposed process in connection with proposals from service providers for the siting of joint-use wireless telecommunications facilities on Board-owned sites; and
2. develop any necessary internal tools, including but not limited to forms and checklists, to facilitate implementation of the proposed process.

KAC:lh

MEMORANDUM

October 30, 2001

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TO: Ms. Suzanne A. Marshall, Chief Facilities Officer (Construction)
Facilities Planning & Construction

VIA: Mr. Merrett R. Stierheim, Superintendent of Schools

FROM: Attorney's Office

SUBJECT: REQUEST FOR LEGAL OPINION FOR THE SITING OF WIRELESS
TELECOMMUNICATIONS FACILITIES ON SCHOOL SITES

Your request reads as follows:

Please review the issue of installing and/or constructing wireless telecommunications facilities on school sites and advise as to whether the siting of such facilities is exempt from local zoning and permitting. The opinion should include, but not be limited to, whether the wireless telecommunications facility will be used solely for commercial use and whether the commercial carrier and the Board will jointly use the wireless telecommunications facility.

Since your request for legal opinion incorporates several issues that you wish addressed, we have revised your request in order to discuss each separately.

In this regard, your request presents the following questions:

1. Whether the siting of such facilities (wireless telecommunications facilities on school sites for educational purposes) is exempt from local permitting and zoning?
2. Would the fact that the commercial carrier and the Board will jointly use the wireless telecommunications facility be a determinative factor on whether the School Board is exempt from local permitting and zoning?
3. Would the fact that the wireless telecommunications facility is used solely for a commercial purpose be a determinative factor on whether the School Board is exempt from local permitting and zoning?

This office will address the above inquiries in the order presented. However, prior to addressing each specific question raised by your request, for purposes of clarity, the following general discussion of these issues is included herein.

In your request you advise that counsel for the telecommunications company has cited to

the case of *The City of Boca Raton, Florida v. The School Board of Palm Beach County*, 764 So.2d 923 (Fla. 4th DCA 2000) as controlling authority in this area of the law. We have reviewed the case cited in your memorandum and although we believe that it serves as persuasive authority, it is a starting point and is not the definitive authority with regard to the questions you have raised. Nonetheless, it is anticipated that the following analysis of the cited case will provide answers to the questions you have posed.

The Fourth District's opinion in the *City of Boca Raton* case, held that, under the facts of that case, "the telecommunications towers were authorized under § 235.193(8)(b), Florida Statutes (1999)." This case was the result of an appeal of two consolidated lower court cases. The cases originated from hearings held before the Code Enforcement Board of the City of Boca Raton (hereinafter "CEB"). The CEB found the School Board of Palm Beach County in violation of local zoning ordinances at two of its schools due to the height of two telecommunications towers situated on school board property. The City argued, and the CEB agreed, that the School Board was required to obtain a "conditional use permit" before erecting towers that were higher than fifty feet on School Board property.

The CEB's decision was subsequently appealed to the Circuit Court which later overturned the CEB's decision. In its ruling, the Circuit Court found that the School Board was exempt from local zoning ordinances pursuant to the "plain language" of §§ 235.26 and 235.40, Fla.Stat. (2000). In partially affirming the Circuit Court's decision, the Fourth District Court of Appeal refused to find that school board's are exempt from local zoning ordinances. Rather, the Fourth District Court of Appeal limited its opinion and held that under the facts of the case before it, § 235.193, Fla.Stat. (2000), allowed the School Board to erect telecommunications towers at the two schools in question.

With this in mind, the questions you have raised are answered as followed:

Question # 1: Whether the siting of such facilities (wireless telecommunications facilities on school sites for educational purposes) is exempt from local permitting and zoning?

The answer to your question is in the affirmative. This answer is based upon current state law; specifically §§ 235.193 (8)(b), 235.26(1)(a) and 235.40, Fla.Stat (2000), and the decision rendered by the court in the *City of Boca Raton* case. Section 235 193 (8)(b). provides in pertinent part that

Existing schools shall be considered consistent with the applicable local government comprehensive plan adopted under part II of chapter 163. The collocation of a new proposed public educational facility, or the expansion of an existing public educational facility is not inconsistent with the local comprehensive plan, if the site is consistent with the comprehensive plan's future land use policies and categories in which public schools are identified as allowable uses, and levels of service adopted by the local government for any facilities affected by the proposed location for the new facility are maintained. If a board submits an application to expand an existing school

site, the local governing body may impose reasonable development standards and conditions on the expansion only, and in a manner consistent with s. 235.34(1). Standards and conditions may not be imposed which conflict with those established in this chapter or the State Uniform Building Code, unless mutually agreed. **Local government review or approval is not required for:**

(a) The placement of temporary or portable classroom facilities; or

(b) ***Proposed renovation or construction on existing school sites, with the exception of construction that changes the primary use of a facility, includes stadiums, or results in a greater than 5 percent increase in student capacity, except as mutually agreed.*** (Emphasis supplied)

Likewise, section 235.26(1)(a) provides that:

. . . . (A) All public educational and ancillary plants constructed by a district school board. . . . must conform to the State Uniform Building Code for Public Educational Facilities Construction, and such plants are exempt from all other state, county, district, municipal, or local building codes, interpretations, building permits, and assessments of fees for building permits, ordinances, road closures, and impact fees, and service availability fees . . .

In addition, section 235.40 provides in pertinent part:

(1) A board may acquire, by purchase, by permanent easement, or gift, suitable lands and other facilities, either within or without the boundaries of the district, for use in providing educational radio or television transmitting sites and may erect such buildings, antennas, transmission equipment, towers, or other structures as are necessary to accomplish the purpose of this section.

Based upon the authority granted school district's by the above-cited statutes, a school district would not be required to comply with local zoning and permitting should it decide to construct a wireless telecommunications facility for educational purposes on its property.

Question # 2. Would the fact that the commercial carrier and the Board will jointly use the wireless telecommunications facility be a determinative factor on whether the School Board is exempt from local permitting and zoning?

Since the wireless telecommunications facility under the scenario outlined by your question would still serve an educational purpose, the answer to question number 2 is also in the affirmative. This conclusion is also supported by the plain meaning of the statutes

previously cited herein in answer to question #1 above.

Question # 3. Would the fact that the wireless telecommunications facility is used solely for a commercial purpose be a determinative factor on whether the School Board is exempt from local permitting and zoning?

We are of the opinion that a wireless telecommunications facility constructed on school district property and used solely for a commercial purpose will most likely not be exempt from local permitting and zoning. The statutes and case law referenced above indicate that public educational and ancillary facilities constructed by the School Board are exempt from local building codes, permits and ordinances.

However, the authority granted school districts in constructing facilities on their property without the necessity of complying with local permitting and zoning ordinances comes clothed with an implied limitation. It is important to note that the two telecommunications towers involved in the *City of Boca Raton* case were both described as having been constructed for an educational use rather than for a commercial purpose, even though they were being used for both an educational and a commercial purpose.

Furthermore, when the case was argued on appeal, the School Board of Palm Beach County, did not argue, in their appellate briefs to the Court, that these towers were built for purely commercial purposes. Instead, the School Board presented evidence to the Court that showed both towers had an educational purpose. One of the towers was being used to transmit instructional television programs to the school, while the other was being used to mount a light for the athletic field. We believe it unlikely that the Court would have made the same decision if the facts had indicated that the towers were constructed purely for a commercial purpose.

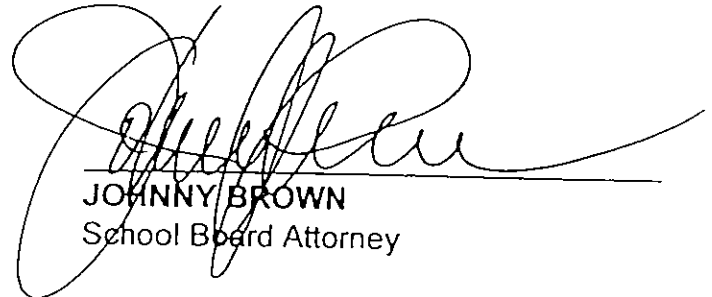
Moreover, in light of the very limited ruling expressed in the *City of Boca Raton* case, we believe it would be unlikely that other courts would view this case as precedent for the proposition that § 235.193(8)(b) allows school districts the unfettered right to build telecommunication towers on their property for purely commercial purposes, without the necessity that they comply with local zoning ordinances.

Additionally, we are doubtful that a court would find that the legislature intended to give school districts such broad discretion as regards matters dealing with the permitting and zoning of commercial facilities; no such intent has been gleaned from the legislative histories of the statutes or case law in question. Therefore, we are of the opinion that such a broad interpretation of the statutes would lead to seemingly untenable applications of a school district's authority in this regard.

For instance, if such an unrestricted interpretation of the previously cited statutes, especially § 235.193(8)(b) were acceptable, a school district could conceivably decide to build or allow construction, for purely commercial purposes, a restaurant, or other commercial establishments without complying with local zoning and permitting. This

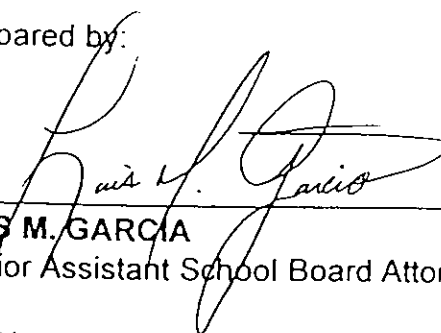
interpretation we believe would serve to encroach upon, and conflict with, local governmental entities' zoning authority, as authorized by the legislature. Overall, we conclude that the aforementioned statutes, together with the court's ruling in the *City of Boca Raton* case, suggest that in order for a school district to be exempt from local zoning ordinances when erecting telecommunications towers on its property, the towers must serve more than a purely commercial purpose.

While a court may well decide that a school district may construct wireless telecommunications facilities on its property without the blessing of the local zoning board, in those instances where a wireless telecommunications tower is being constructed solely for commercial purposes (i.e., the facility has no educational purpose, except for the fact that the School Board is receiving a monetary benefit), we think it prudent to recommend that the School Board require the wireless telecommunications carrier to comply with local zoning and permitting in its installation and construction of such facilities on Board owned property. Such procedure, we believe would be consistent with current case law and is a rational interpretation of the meaning of § 235.193(8)(b), Fla.Stat. (2000).



JOHNNY BROWN
School Board Attorney

Prepared by:



LUIS M. GARCIA
Senior Assistant School Board Attorney

LMG/nc

cc: Mr. Merrett R. Stierheim
Mr. Delio G. Diaz
Ms. Ana Rijo-Conde
Mr. Fernando Albuerne
Mr. Keith Carswell ✓

**PROCESS FOR THE SITING OF JOINT-USE WIRELESS
TELECOMMUNICATIONS FACILITIES ON BOARD-OWNED SITES**

1. The School Board of Miami-Dade County (Board) issues request for proposals (RFP's), twice a year, for the siting of joint-use wireless telecommunications facilities (facilities) on Board-owned sites.
2. Initial response to the RFP shall include:
 - a. letter of interest to the Division of Governmental Affairs and Land Use Policy and Acquisition (Division) indicating the site(s) the service provider is interested in developing;
 - b. a completed application for each Board-owned site on a Division approved form;
 - c. description of the proposed facility which will include, but not be limited to, antenna and supporting equipment with, if applicable, a minimum of two (2) future co-locators;
 - d. type of service to be provided by the facility;
 - e. photo of a similar facility; and,
 - f. a five hundred dollar (\$500.00) non-refundable processing fee, which may be adjusted, from time to time, by the Superintendent of Schools, or his/her designee.
3. For each proposed school site, the Division will send a memo to the principal and their respective region superintendent, requesting conceptual approval or declination of the proposed facility. The memo will include, as an attachment, a description of the proposed facility and photo of a similar facility. Through the memo, the principal will be advised that he/she is under no obligation to agree to the placement of the facility nor to negotiate with the service provider any issues on behalf of the Board. Further, the principal will be advised of established procedures concerning revenue distribution.
4. For each non-school site, the Division will send a memo to the site director (director) and their immediate supervisor, requesting conceptual approval or declination of the proposed facility. The memo will include, as an attachment, a description of the proposed facility and photo of a similar facility. Through the memo, the director will be advised that he/she is under no obligation to agree to the placement of the facility nor to negotiate with the service provider any issues on behalf of the Board. Further, the director will be advised of established procedures concerning revenue distribution.
5. Prior to conceptual approval for a proposed school site, the principal shall distribute information on the proposal and seek input from the chairpersons of his/her respective

Parent, Teacher and Student Association (PTSA), Educational Excellence School Advisory Council (EESAC), student and teacher organizations, and/or any other school based constituencies which the principal may deem appropriate.

6. If the proposed facility is declined for either a school or non-school site, written notice will be forwarded to the Division within ten (10) business days from receipt of the initial memo. Upon receipt of the written notice, the Division will provide written notice to the service provider within ten (10) business days and the process ends.
7. If the proposed facility receives preliminary approval for either a school or non-school site, the principal/director shall forward written notice to the Division within ten (10) business days from receipt of the initial memo. Upon receipt of the written notice, the Division will provide written notice to the service provider within ten (10) business days, in writing, of the preliminary approval.
8. Once notified of the preliminary approval, the service provider will provide written notice to the Division, within ten (10) business days from the pre-approval date, as to whether it wishes to proceed with the proposal. Failure to provide written notice to the Division within the prescribed timeframe may end consideration of the proposal by Board staff.
9. Should the service provider wish to proceed with the proposal, a written request for approval of any and all required tests shall be forwarded to the Division. The request shall include mutually convenient testing date(s), time(s) and location(s) approved by the principal/director. The request shall also include the scope of work to be performed and provide a copy of the service provider's liability insurance relative to conducting any and all required tests.
10. The Division will forward the service provider's liability insurance to the Office of Risk and Benefits Management (Office) for review and approval. Should the Office find the insurance policy inadequate, the service provider will be given ten (10) business days to take corrective action. Should the Office find the insurance acceptable, the service provider will be allowed to conduct any and all required tests as scheduled with the principal/director.
11. Upon completion of any and all required tests, the service provider will notify the Division, within ten (10) business days from the final approved testing date, of their desire to discontinue or proceed with the proposal. Failure to provide written notice to the Division within the prescribed timeframe may end consideration of the proposal by Board staff.
12. If the service provider wishes to withdraw the proposal, the process ends.
13. If the service provider wishes to proceed with the proposal, a one thousand dollar (\$1,000.00) non-refundable fee, per Board-owned site, shall be submitted within fifteen (15) business days of notice to the Division. The application fee will cover the administrative cost of processing and reviewing the proposal and may be adjusted, from time to time, by the Superintendent of Schools, or his/her designee. Additionally, twenty (20) sets of the following items shall be submitted as part of the proposal along with the application fee:
 - a. a site and landscape plan (plan), to scale, showing the location of the proposed facility, a minimum of two (2) future co-locators, related equipment, distance to property lines, any required easements and adjacent land uses;

- b. the minimum setback distance from abutting property lines for the proposed facility shall be one hundred and twenty-five percent (125%) of the height of the monopole;
 - c. an elevation, to scale, of the proposed facility, including all dimensions and special attributes;
 - d. should a standard monopole be proposed, a letter and technical analysis explaining why a different option is not feasible;
 - e. certification by an engineering firm as to the projected wind-load capacity of the monopole with and without all proposed antennas;
 - f. certification by an engineering firm that the proposed facility is in compliance with the Florida Building Code and all other applicable local, state and federal building codes, regulations and safety standards as amended from time to time;
 - g. type of service to be provided by the service provider(s), output power, and telecommunications frequency(-ies) to be used, including the equipment, manufacturer, software versions and etcetera;
 - h. copy of a contract with an independent firm that will validate and certify, on a semi-annual basis, the type of service being provided by the facility, telecommunications frequency(-ies) used, including the equipment manufacturer, software versions and etcetera;
 - i. copy of the service provider's commercial general liability insurance showing a minimum coverage, in the aggregate, of two million dollars (\$2,000,000);
 - j. a radial survey of all properties within 500 feet of the proposed Board-owned site measured from the property lines;
 - k. a certified mailing list of property owners of record, within 500 feet of the proposed Board-owned site measured from the property lines and reflected on the Miami-Dade County Property Appraiser's tax roll as updated from time to time; and,
 - l. proposed monetary and non-monetary compensation to the Board.
14. The site related information contained within the proposal package would be distributed by the Division to departments, divisions and offices that will conduct technical reviews. The technical reviews will include, but not be limited to, applicable building codes, regulations and safety standards. The technical reviews will be conducted by the following: Design and Construction; Division of Energy, Communications and Fiscal Management; Department of Risk and Benefits Management; Department of Facilities Compliance; Department of Safety, Environment and Hazard Management; Office of Information Technology; and, Division of Media Programs (WLRN). As deemed appropriate, the Superintendent of Schools, or his/her designee, may add or delete reviewers.
15. Additionally, the site related information contained within the proposal would be distributed to the planning and zoning department of the local municipality. The planning and zoning department of the local municipality will have the option of providing technical comments within fifteen (15) business days from receipt of said information.

16. If the proposal fails a technical review, the Division will forward comments to the service provider. The service provider will have ten (10) business days from the date of the written review to advise the Division, in writing, as to whether it wishes to withdraw or proceed with the proposal. Failure by the service provider to provide written notice within the prescribed timeframe may end consideration of the proposal by Board staff.
17. If the service provider wishes to withdraw the proposal, the process ends.
18. If the service provider wishes to resubmit a proposal that failed a technical review, twenty (20) sets of the modified proposal shall be submitted to the Division within (10) business days from the service provider's notice to the Division of its intention to proceed.
19. Upon receipt of the modified proposal, the Division will resubmit the site information for a technical review. Proposals requiring more than two (2) technical reviews will incur an additional reviewing fee of five hundred dollars (\$500).
20. Once a proposal passes a technical review, the Division will provide written notice to the service provider with a copy to the principal/director and their immediate supervisor. Additionally, the Division will mail notice of the proposed facility to property owners of record, within 500 feet of the proposed site measured from the property lines and reflected on the Miami-Dade County Property Appraiser's tax roll, as updated from time to time. The notice will contain general information on the proposed facility including its proposed location on the site and request written comments within ten (10) business days from date of the notice. The cost of the notice will be borne by the service provider.
21. Upon receipt of any and all comments, the Division will submit said comments to the principal/director and their immediate supervisor for review. The Division will also convene a meeting of the telecommunications committee (TC) for direction on the proposal. The meeting agenda will include, but not be limited to, the proposal submitted by the service provider and comments received through the community mailing. The principal/director and his/her immediate supervisor will be notified of the meeting and requested to attend.
22. Based on community input and comments from the principal/director and his/her immediate supervisor, the TC may vote to discontinue the process. Should the TC vote to discontinue the process, the Division will provide written notice to the service provider and property owners who provided written comments.
23. Based on community input and comments from the principal/director and his/her immediate supervisor, the TC may vote to either hold a community meeting at the site to discuss the proposed facility OR commence the negotiation process.
24. Should the TC vote to hold a community meeting, the Division will notify the community of the date, time and location of the meeting. The notice to the community shall occur a minimum of ten (10) business days prior to the scheduled meeting date. The cost of the notice will be borne by the service provider. Following the meeting, the Division will present issues and/or concerns raised during the meeting to the TC for consideration and direction.
25. Based on the input and comments received from all relevant parties, including the community, principal/director and/or his/her immediate supervisor, the TC may vote to end the process. Should the TC vote to end the process, the Division will provide written notice

to the service provider and to the property owners who provided written or oral comments at the meeting.

26. Based on the input and comments received from all relevant parties, including the community, principal/director and/or his/her immediate supervisor, the TC may vote to commence negotiations. Should the TC vote to commence negotiations, the TC will establish negotiating parameters and the Division will negotiate on behalf of the TC.
27. If negotiations are unsuccessful, any counter offers will be submitted to the TC for review and direction.
28. If negotiations are successful, the proposed compensation and lease agreement will be submitted to the Board for consideration.
29. If the Board declines the proposed compensation and lease agreement, the Division will provide written notice to the service provider within five (5) business days and the process ends.
30. If the Board accepts the proposed compensation and lease agreement, the Division will provide written notice to the service provider within five (5) business days and the lease agreement will be signed shortly thereafter.

PROCESS FOR THE SITING OF JOINT-USE WIRELESS TELECOMMUNICATIONS FACILITIES ON BOARD-OWNED SITES

