

2007 Telecommunications Checklist

As a service to real estate professionals and their counsel, since 1998, I have periodically assembled a checklist of action items that such professionals should consider in response to legal and technological developments in the communications area impacting real estate. This paper should not be considered legal advice, nor does it create an attorney-client relationship. Still, what follows is my best thinking on issues and developments of note. In this paper, unless specifically noted, the words tenants and residents are interchangeable. Should you disagree with any conclusion or suggestion, or would simply like to add to the discussion, email glederer@millervaneaton.com. All such comments will be incorporated into future checklists which may be found at [REsources \(http://www.millervaneaton.com/REsources/index.html\)](http://www.millervaneaton.com/REsources/index.html) There are also a number of free downloadable forms and model communications available on the site

1. CONDUCT A 2007 TENANT NEEDS SURVEY.

Real estate professionals can never know too much about tenants' needs, especially their communications and IT needs. The only way to avoid being surprised by a tenant's technology needs is to ask what they need beforehand. As IP enabled services (VoIP, IPTV) and wireless delivery mechanisms (WiFi, WiMax, etc.) gain market acceptance, property professionals need to know their tenants' technology needs now more than ever.

You also need to understand the basics of these services. For instance, while you can dial 911 on all VoIP devices, not all devices have an E-911 feature. E-911 provides the geographical locating information a traditional phone relays to the local emergency operator. VoIP phones will also not typically operate when the electricity is down. You might suggest tenants retain a single traditional landline or cell phone, if for no other reason than to call 911 in the event of an emergency or loss of power.

Additional Insights:

(Visit [REsources](http://www.millervaneaton.com/REsources/index.html) for a tenant survey.)

2. CONDUCT A PHYSICAL AND LEGAL AUDIT OF YOUR TELECOMM SPACE.

A physical and legal audit tells you what telecommunications space you have available in your easements, risers and on your rooftops. It will also tell you who, if anyone, has a preexisting right to those spaces, including providers pursuant to state access laws. Such an audit is especially important if you have any bankrupt providers that have equipment on your property. You should also determine what space you have available to accommodate the wires and equipment of a Telecommunication Service Provider ("TSP") that might like to serve your building/community. The need to be in compliance with the "abandoned" wires rules also supports the need for annual physical audits.

Additional Insights:

(Visit [REsources](http://www.millervaneaton.com/REsources/index.html) for a model survey.)

3. LEARN ABOUT IP ENABLED SERVICES (IPES).

The digitization of voice, video and data transmissions by means of "Internet Protocol" and improvements in technology that permit all three services to be provided over a single wire are changing the face of the communications world. Internet Protocol Enabled

Services (“IPES”) are provided over a high speed connection, typically provided by your local cable or phone company. In some new developments, these services are being offered by private fiber providers that assemble service providers to ride on the host network.

The biggest benefit of IPES to real estate professionals is that they provide the ability to offer choice without the need to run another wire into your building or through your community.

VoIP, or “voice over internet protocol,” is poised to challenge, if not supplant, the local and long distance phone industry. IPTV will increasingly be available from the new AT&T to compete with traditional cable companies in the offering of video entertainment, while Verizon will compete by means of its new fiber to the home (FTTH) deployments.

There are downsides to IPES. Power and emergency identification are just two that we mentioned above. Real estate professionals need to understand the impact the migration from traditional voice to VoIP, or from cable to IPTV, will have on your bottom line or the bottom line of any communications marketing partners you may have. It is not unrealistic to believe that bundled services such as VoIP and IPTV will render separate offering of these services obsolete before 2010.

Finally, real estate professionals should investigate how IPES services might be incorporated into your business operations. (*The FCC has a whole web dedicated to the issue -- <http://www.fcc.gov/voip/>.*

4. UNDERSTAND THE RULES ON “ABANDONED” WIRES. MAKE SURE YOUR TENANTS AND VENDORS COMPLY.

The wires which tenants have left in your raised floors, walls and ceilings, as well as the unused cabling residing in your risers, are no longer merely a nuisance. They may now render your building out of code and jeopardize your fire insurance. Changes in the 2002 and 2005 editions of the National Electric Code (“NEC”) make it a violation either to have abandoned wires in your building’s risers/plenums or to use any wires not specified by the NEC. For a detailed paper on what constitutes an abandoned wire and what are some of the pro-active steps you can take, read [Changes in National Electric Code Affect Leases and Agreements](#) on my web page.

5. AMEND YOUR LEASES & LICENSES TO ADDRESS ABANDONED WIRES IN THE TENANT'S SUITE.

Once you have identified and addressed existing abandoned wires, implement policies that prevent the abandonment of wires in the future. You may choose to employ security deposits or other means to address such concerns. At a minimum, you should amend your lease forms to require the removal of wires or payment of a fee sufficient to cover the removal of such wires. For more details and suggested language for leases, read [Changes in National Electric Code Affect Leases and Agreements](#) which may be downloaded from my web page.

6. KNOW THE DIFFERENCES IN RULES GOVERNING INSIDE CABLE WIRES VERSUS INSIDE TELEPHONE WIRES.

The FCC's rules governing telephone wires (47 C.F. R. § 68.105) and cable wires (47 C.F.R. § 76.804), and the right of building owners to take possession of either, are very different.¹ Cable operators retain greater autonomy over their cable wires than a telecommunication provider retains over its telephone wires. For instance, under the inside telephone wire rules cited above, a building owner has the right to move the demarcation point to the minimum point of entry and may rely upon state law to establish the price at which it may acquire inside telephone wires. Under the rules governing cable wires, a building owner may take steps regarding cable wires only if the owner has reserved that right at the time (s)he entered into the access agreement with the cable operator.

The FCC and the Courts have been very aggressive in reading cable agreements and the cable wire rules to promote access to cable wiring as a means to promote competition in cable. In *CSC Holdings, Inc. v. Westchester Terrace at Crisfield Condominium*, 235 F. Supp. 2d 243 (S.D.N.Y. 2002), the Southern District of New York ruled that the FCC rules apply only when an

¹ See *In re Telecomms. Servs. Inside Wiring; In re Implementation of the Cable Television Consumer Prot. And Competition Act of 1992*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Red. 3659, 3680-3693, ¶¶ 39-67 (1997), modified in part and affirmed in part, First Order on Reconsideration and Second Report and Order, 18 FCC Red. 1342 (2003).

incumbent provider is about to be ejected from a building. Thus, the rules do not apply as long as the cable operator had a right to serve even one tenant in the building in question. A month later, in *Time Warner Entertainment Co., L.P. v. Atriums Partners, L.P.*, 232 F. Supp. 2d 1257 (D. Kan. 2002), aff'd 381 F.3d 1039 (10th Cir. 2004), the court disagreed with the *CSC Holdings* court's conclusion. The *Atriums Partners* court found that the *CSC Holdings* court had failed to recognize the distinction between 47 C.F.R. § 76.804(a), building-by-building disposition of inside wiring, and 47 C.F.R. § 76.804(b), unit-by-unit disposition of inside wiring. It held that Section 76.804(b) presumes that the incumbent cable provider may continue to provide service on a unit-by-unit basis while competitive providers serve other units. Thus, when a subscriber terminates service, the cable operator can be required to abandon, remove, or sell the home run wiring that serves that particular unit at the request of a homeowners' association (or presumably the building owner) even though the cable operator may have legal authority to continue to serve other units. Furthermore, the *Atriums Partners* court held that the Kansas mandatory access statute did not provide a basis for Time Warner to refuse to abandon, remove, or sell the requested home run wiring. See also *CoxCom, Inc. v. Picesne Real Estate Group*, No. Civ. A. PB 02-1537, 2003 WL 22048781 (R. I. Super. Ct. August 21, 2003).

The FCC in 2003 issued an order modifying its existing rules in two ways that may benefit property owners. The Commission found:

- In the event of the sale of "home run wiring" in a Multi Dwelling Unit

(“MDU”), the wiring must be made available to the MDU owner (or a *new* provider selected by the owner) during the 24-hour period before actual service termination by the incumbent. *Id.* ¶ 3. (Home run wiring is the wire that runs from a subscriber’s unit in an MDU to the building’s minimum point of entry. 47 C.F.R. § 76.800(d)).

7. UNDERSTAND SHEETROCK & ACCESSIBILITY.

One of the biggest issues facing developers and managers that seek to introduce a competitive provider into their developments is at what point may they access the existing wiring. The FCC has ruled that you access the wiring at a point it is accessible. The Commission further determined that home run wiring located behind sheet rock is physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring. This conclusion was successfully challenged by the cable industry.

The conclusion was not so much rejected by the D.C. Circuit Court of Appeals in *Nat’l Cable & Telecoms. Ass’n v. FCC*, 89 F. App’t 743 (D.C. Cir 2004)), as much as the court told the FCC that it failed to build a sufficient record to arrive at the conclusion.

In *Telecommunications Services Inside Wiring – Customer Premises Equipment*, CS Docket No. 95-184, FCC 07-111 (rel. June 8, 2007), the FCC reinstated the FCC's original determination. The effect of the order is to subject wiring behind sheetrock to the same FCC regulations as wiring inside individual single family residences and apartment units. Technically, the ruling allows apartment residents to acquire

wiring outside their units, and the FCC seems to think this will help them promote competitive choice. In reality, use by residents is highly unlikely (and would be legally troublesome). The more practical benefit is that apartment building owners and community associations will now be able to obtain access to the same wiring without going through the cumbersome procedures in the FCC's cable home run wiring rule.

The order does not in any way suggest that the FCC has mandated access to buildings.

Visit [REsources](#) for an examination of various courts’ opinions on the application of the “Home Run” wire rules. They have been generally supportive of promoting competitive choice.

8. DO NOT GRANT ACCESS “EASEMENTS” TO TELCO OR CABLE PROVIDERS.

Real estate counsel could best serve their clients in these days of integrated service providers seeking access to their buildings and developments by ensuring that clients understand the differences among a lease, a license, and an easement. Although the author prefers to employ a license, others have made persuasive arguments for a lease.

TSPs, including cable multi-service operators, competitive local exchange carriers, and some Bell companies, are submitting easements rather than licenses for access to buildings. Easements are less desirable for owners than licenses for several reasons. Unlike an access license agreement, which conveys limited business rights to the telecommunications service provider, an easement confers a property right upon the carrier. Armed

with such a property right, a TSP will be difficult, if not impossible, to control. Courts have issued conflicting opinions as to whether a cable operator has a right of access, under section 621(a)(2) of the Communications Act, to easements.

Several courts considering the issue have held that the Cable Act grants cable companies a federal right to use both public and private easements. *Cable TV Fund 14-A, Ltd. v. Prop. Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422, 433-34 (D. Md. 1989); *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425, 428 (Mich. Ct. App. 1990).

However, in 1992, the Eleventh Circuit held that section 621(a)(2) authorizes a franchised cable company's access to easements on private property only when the owner of the property has dedicated the easements for the general use of any utilities. *Cable Holdings of GA., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 610 (11th Cir. 1992). The district Court had ruled that section 621(a)(2) grants cable operators the right to access any easements, even those granted by the property owner to a particular entity. The Eleventh Circuit ruled that such an interpretation would make section 621 unconstitutional, as it would require a property owner to grant access without providing just compensation. The court applied a different interpretation of section 621(a)(2) as permitting a franchised cable operator to access private easements only when the owner has dedicated the easement to general utility use. *Id.* at 610. See also *Media Gen. Cable, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993).

The *Cable Holdings* case also stands for the proposition that granting

an easement in favor of the ILEC may render space in the client's building accessible utility space. See *Cable Holdings* at 608-609. The 9th Circuit has taken a different interpretation that section 621 of the Cable Act does not grant a provider the right to co-use private easements. *Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871 (9th Cir. 2001).

9. LEARN THE FCC'S "OTARD" RULES AND THAT THEY APPLY TO MORE THAN JUST SATELLITE VIDEO SERVICES.

The secret of wireless communications is that they are anything but wireless. The installation of the telecomm and power wires required to support wireless devices are a real challenge to real estate professionals that will only become more acute in the future.

The challenges will come in the form of legal and physical limitations. The law is developing before our very eyes at the FCC and in state courts on these issues. Unlike its treatment of inside cable wires, the FCC has not been friendly to property owners in this area.

Since May 25, 2001, the FCC has limited governmental and non-governmental restrictions on a consumer's ability to install an antenna for transmitting or receiving fixed wireless signals, or receiving multi-channel video programming signals. The FCC's rules, cited as 47 C.F.R. § 1.4000, have come to be known as the Over the Air Reception Devices rules or "OTARD" rules.

In order to garner the FCC's protection, an OTARD must be:

1. Not more than one meter (39.37") in diameter;

2. Installed in an area for which the consumer has a property interest (a valid lease suffices); and
3. Installed in a site under the exclusive control of the consumer, i.e., it can not be a common area such as the roof or exterior wall of a multiple dwelling unit or office building.

The FCC and the Courts have reviewed matters involving the OTARD rules no less than ten times. Visit [REsources](#) for a collection of the decisions. Courts have tended to find for the real estate interest while the FCC has tended to find for the OTARD user.

The FCC does provide two safe harbors for banning or limiting the deployment of an otherwise legal OTARD device: safety and historic preservation purposes. From the OTARD matters that have been litigated at the FCC, these safe harbors are ports that have not easily been reached. See, e.g., *In re Victor Frankfurt*, 16 FCC Red. 2875 (2001).

Most recently, the FCC extended OTARD protections to Part 15 devices such as WiFi or WiMax devices in its *MassPort* decision (ET Docket No. 05-247, released 11/1/2006).

10. DEALING WITH DEAD ZONES: IN-BUILDING WIRELESS STILL NOT WORTH REAL ESTATE'S INVESTMENT, BUT IN-BUILDING BOOSTERS FOR FIRST RESPONDERS MAY MAKE SENSE AND MAY BE REQUIRED BY LAW.

The radio signals that make cell phones, PDAs and public safety radios work are greatly reduced when passing through organic barriers (such as a tunnel or a mountain) and inorganic dense construction materials (think building walls). The result of this

reduction in signal strength is that parts of your buildings are dead zones to wireless communications.

One fix for these dead zones is an "in-building" wireless or "signal booster" network that serves to create a mini cell tower within your building to counter any reductions in signal strength.

In the past, I have taken a controversial position that investing in such systems based upon the likelihood of financial reward was not a good investment for the real estate owner. Furthermore, should you invest in such a system, demand that it be a neutral host system that provides access to all carriers. I stand by both of those recommendations and believe history has proved my position to be correct.

The issue of in-building boosters to assist first responders is a very different question.

A major finding of the 911 Commission was that the first responders in the Twin Towers could not hear one another because of the lack of signal coverage in the high rises. The Twin Towers are not alone in lacking signal coverage. This will be increasingly become an issue for real estate professionals at the local level.

Some local governments, following the lead of the 911 Commission, are adopting in-building signal strength standards (see chart at the link below for examples). The challenge to the real estate industry will be to ensure that the ordinances or code changes enhance public safety communications networks and not vendors' bottom lines. As one vendor's web page taunts, "[P]rivate building owners naturally resist, so local codes and ordinances have become the vehicle to...: mandate deployments of signal

boosters.”

www.RFSolutions.com/fcc.htm.

This same vendor estimates that "the relative costs of implementing a signal boosters system for building is between \$0.15 and \$0.30 per square foot," or, in their words, "less than the cost of trash pick up."

Unlike most building codes, the "in-building booster" ordinances or building specifications that are being adopted today mandate the requirement on all eligible buildings, not just new construction or major renovations. The code of the City of Burbank, Ca. is cited as the very first signal booster requirement. It provides:

...[N]o person shall maintain, own, erect, or construct, any building or structure or any part thereof, or cause the same to be done which fails to support adequate radio coverage for City emergency service workers, including but not limited to firefighters and police officers.

No definitive list of communities that have adopted such ordinances exists to my knowledge, but I have seen a list of no less than 40 communities and the list appears to be growing.

11. KNOW WHERE MANDATORY ACCESS RULES STAND IN YOUR STATE AND THE IMPACT FRANCHISE RELIEF FOR TELCOS MIGHT PLAY.

Despite the bankruptcies of leading proponents of mandatory access, the issue has not gone away. There are efforts ongoing in the Congress, at the FCC and in state legislatures to mandate access to buildings.

As of today, only Texas, Rhode Island and Indiana have imposed mandatory access in favor of *telephone*

companies to office buildings and MDUs. There are, however, 18 states and the District of Columbia² where some form of "mandatory access" rules are in place in favor of the local *franchised cable* operator.

It remains unknown whether the mandatory access rights currently enjoyed by franchised cable operators will be extended to telephone companies if Congress or an individual state adopts Telco franchise-free legislation. In part, that answer will depend on whether the state statute requires the entity be franchised by the local government as is the case in Pennsylvania.³

There is also the practical question of whether the entity, be it a cable or phone company, is limited in a mandatory access case to provide only cable service. For instance, if a telephone company is granted access to provide cable in a building over the

²The jurisdictions and the cite to their laws are: Connecticut (Conn. Gen. Stat. § 16-333a)(1975), Delaware (26 Del. C. § 613)(1983) (only if utility easements also exist), District of Columbia (D.C. Code § 43-1844.1)(1981), Florida (Fla. Stat. § 718.1232)(1982)(condos only), Illinois (55 ILCS 5/5-1096)(1993), Iowa (Iowa Code § 477/1) (1977), Kansas (K.S.A. § 58-2553)(1983), Maine (14 M.R.S.A. §6041)(1987), Massachusetts (Mass. Ann. Laws ch. 166A, § 22)(1995), Minnesota (Minn. Stat. § 238.23)(1983), Nevada (Nev. Rev. Stat. Ann. § 711.255)(1987), New Jersey (N.J. Stat. § 48:5A-49)(1982), New York (NY Pub Ser § 228)(1995), Ohio (ORC Ann 4931.04) (1998); Pennsylvania (68 P.S. § 250.503-B)(1993), Rhode Island (R. I. Gen. Laws, § 39-19-10)(1993), Virginia (Va. Code Ann. § 55.248, 13:2)(1997), West Virginia (W. Va. Code § 5-18A-1)(1995), and Wisconsin (Wis. Stat. § 66.0421)(2001).

³ See PA Stat. 68 §250.501-B(5), which defines "operator" as "the operator of a CATV system holding a franchise granted by the municipality or municipalities in which multiple dwelling premises to be served [are] located."

owner's objection, can the owner legally prevent the telephone company from offering phone service? A second legal question is whether the property owner has breached an exclusive contract with an existing provider if the owner provides providing access to the telephone company as required by law.

Visit [REsources](#) for updates on where things might stand in your state.

12 STAY ABREAST OF DEVELOPMENTS IMPACTING YOUR ABILITY TO EXECUTE EXCLUSIVE CONTRACTS

Despite having banned exclusive contracts between office building owners and common carriers,⁴ the FCC has not extended the prohibition to residential properties. (Editors note: The FCC is poised to address the issue at an opening meeting on October 31, 2007.) The Commission has on more than one occasion declared that exclusive agreements in the residential setting can be pro-competitive.⁵ However, the Commission is currently examining where and when a real estate owner might enter into exclusive contracts.

Speculation is that exclusives contracts could be banned in an October, 2007

⁴ See FCC Order No. 00-366, In the matter of Promotion of Competitive Networks, First Report and Order, WT Docket No. 99-217 (rel. Oct. 25, 2000). The rule reads:

No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises. 47 C.F.R. § 64.2500.

⁵ See, e.g., FCC Order No. 97-376, In the Matter of Telecommunications Inside Wiring, Report and Order et. al, CS Docket No. 96-184, MM Docket No 92-260, rel. October 17, 1997.

order (See dockets 99-217, 96-98, 95-184 & 92-260).⁶

13. UNDERSTAND COLR AND COMPENSATION RULES.

Prior to the Telecommunications Act of 1996, carriers of last resort often enjoyed exclusive local franchises, such that building owners and developers faced with the practical necessity of providing telecom services to their tenants had no option but to grant access to the incumbent carrier. In some states, building owners operated under the threat, if not the actual exercise, of eminent domain powers by existing telecommunications carriers to obtain access. Therefore, while a tradition, it is incorrect to treat existing carriers as invited guests. In fact, using Carrier of Last Resort ("COLR") as a means to open a building owner's property to the carriers would compound potential Fifth Amendment issues.

A new issue is being debated in Florida where the COLR is stating that not only are they entitled to access developments, but are entitled to provide any service, regulated or unregulated, to the property. Should a property owner have the temerity to tell the COLR that it is limited to provide regulated services, the COLR is threatening not to provide services.

⁶ As recently as February 1, 2007, FCC Chairman Martin stated: "We will continue to take steps to remove regulatory impediments to the entry of new service providers into the video market by, for instance, **ensuring that consumers living in apartment buildings are not denied a choice of cable operators**" (Emphasis added). Testimony Prepared for Full Senate Commerce Committee Hearing on Accessing the Communications Marketplace: A View From the FCC delivered by Chairman Martin is available at www.fcc.gov.

On March 13, 2007 the Florida Public Service Commission rejected these arguments in two important petitions.

1. *BellSouth Petition for COLR Relief (Nocatee Development)* – Limiting COLR to voice service in a development where competitor has been granted exclusive video and data rights does not rise to level of good cause for COLR relief, but may require developers/homeowners to make contributions in aid of construction.
2. *Embarq Petition for COLR Relief (Treviso Bay)* – Limiting COLR to voice service in a development where competitor has been granted exclusive video and data rights, and homeowners dues are used to pay for those services, does not rise to the level of a good cause waiver.

13. MAKE SURE CLIENTS UNDERSTAND BANKRUPTCY LAW AND THE LIMITATIONS ON SELF HELP.

TSPs once flooded with cash are now cash-poor or broke. Real estate counsel must assist property professionals to protect their constituents in the event of a TSP business failure: the building owner, the tenants, and the property professionals themselves. The plan of attack must ensure that:

- The building owner is protected from potential losses in revenue as well as from liens placed against the building by the subcontractors of the TSP;
- The tenants are protected from the loss of telecommunications services; and

- The property professionals are protected from themselves as they seek to engage in self-help.

Some suggestions on how such a plan may address these needs:

- Draft access agreements that require a letter of credit and also establish a priority position for abandoned property. Language might require in the event of the abandonment of telecommunications service facilities, the building owner may order the TSP to promptly remove the facilities from the building and restore the building to its prior condition or may declare the ownership of such facilities to have been abandoned and forfeited to the building.
- Police the title of the building to see if the TSP's subcontractors have registered mechanic's liens against the building.
- A TSP will likely continue to pay its rent. But if a TSP fails to make payment either before or after filing for bankruptcy, depending on the exact language used in the letter of credit, the building owner may be able to recover any unpaid license fees and other debts from the letter of credit.

About the Firm: Miller & Van Eaton, P.L.L.C. offers specialized services in communications law. Real estate clients rely upon Miller & Van Eaton for counsel and legal representation on a wide range of business and regulatory matters that relate to every communications industry.

About the Author: Gerry Lederer is one of the nation's leading voices on the integration of telecommunications technology into traditional workspace.

Lederer has authored numerous texts on tenant needs and telecommunications. Most of his research and writing was done as BOMA International's Research and Advocacy Division head.