



MILLER & VANEATON, P.L.L.C.

Cable and Telecommunications Law Attorneys

2004 Telecommunications Checklist

INTRODUCTION

As a service to my private real estate clients and friends, for the past four years, I have assembled a telecommunications checklist. The list is offered to assist building owners and property management professionals to identify and address

telecommunications opportunities and challenges that will likely present themselves in the year to come. This article should not be considered to create an attorney client relationship or offer legal advice. In fact, if you disagree with any claims or suggestions in this article, or would like to add to the discussion, email the author at glederer@millervaneaton.com. All such comments will be incorporated into Checklist updates that are available at Property Professional Telecommunications Toolkit. <http://www.millervaneaton.com/resources/index.html>

1. CONDUCT A TENANT NEEDS SURVEY.

No, you are not reading an old Checklist. The 2004 checklist starts much the same as every checklist before it. You can never know too much about tenant's needs, especially their technology needs. Asking once a year is not too often. With the economy strengthening, companies are reinvesting in their communications and IT infrastructure. New players such as the franchised cable operator and VoIP providers are showing up on your tenants' front door and new technologies such as WiFi and VoIP are gaining market acceptance. The only way that you can avoid being surprised regarding a tenant's needs is to ask. For a suggested survey email glederer@millervaneaton.com.

2. CONDUCT A PHYSICAL AND LEGAL AUDIT OF YOUR TELECOMM SPACE. PAY PARTICULAR ATTENTION TO ABANDONED WIRES

You, or your counsel, should conduct an audit of all existing leases, licenses and other access agreement to see who has a preexisting right to your telecommunications spaces. This is especially important if you have any bankrupt providers that have equipment in your building.

You, or your building engineer, should conduct a physical audit of your plenums and other telecommunications spaces to determine whether you have any abandoned wires. 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](#)

3. 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 or control 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 leases to require the removal of wires or payment of a fee sufficient to cover the removal of such wires. For more details and suggestions read [Changes in National Electric Code Affect Leases and Agreements](#)

4. LEARN ABOUT VoIP.

The 2002 Checklist stated, "...cheap quality Internet telephony has been promised for some time, and may soon be available for commercial application." According to recent FCC filings, VoIP is poised to supplant the \$200 billion local voice industry. For that reason, VoIP is increasingly available from not only technology upstarts like Vonage and Net2Phone, but also from traditional local and long distance phone companies such as Qwest, AT&T, and BellSouth and cable companies such as Cox, Time Warner and Comcast. You need to know about VoIP and if it can assist your operations as well as those of your tenants. (The FCC has a whole web site dedicated to the issue -- <http://www.fcc.gov/voip/>). The bottom line on VoIP is that it can offer tenants, as well as you, a choice of local and long distance phone providers without needing to run another wire into your building. This is especially attractive in those buildings and communities that have not seen the benefit of competition.

5. ENSURE THAT EVERYONE IN YOUR ORGANIZATION UNDERSTANDS THAT AT NO TIME SHOULD AN "EASEMENT" BE GRANTED FOR COMMUNICATIONS NEEDS.

The advent of cable modem services and VoIP has resulted in more cable companies seeking to serve office buildings in addition to their traditional service in MDUs. This presents an issue for some buildings as cable companies have traditionally requested an easement as the legal document governing their access. Regardless of the type of building you own or manage, please ensure that you do not grant an easement to gain access to your buildings.

Unlike a license agreement, which conveys limited business rights for a limited term to the telecommunications service provider, an easement confers a perpetual property right upon the carrier. Armed with such a property right, a TSP will be difficult, if not impossible, to govern. Also, an easement granted in favor of the local Bell company may render space in your building subject to rules governing access to utility spaces.

An access license agreement, such as the model agreement that may be downloaded from the Real Access Alliance's homepage www.realaccess.org, can more than meet the needs of a TSP seeking access.

6. RECOGNIZE THAT FAILURE TO ENFORCE OTARD RULES COULD WAIVE SUCH RULES

An electronic search reveals that there were two at least two cases published in 2003 that addressed "Over the Air Receptacle Devices (OTARDs) which are governed by , 47 C.F.R. § 1.400 *et seq* .*Urban Horizons Tax Credit Fund v. Zarick* 195 Misc.2d 779, 761 N.Y.S.2d 795 (April 28, 2003) ("Urban Horizons") and *Kingsbridge Associates, LLC v. Martinez* N.Y.L.J., 1/22/03, p. 20, col. 6 (Civ.Ct. Bx Co.) ("Martinez")

Both cases come from New York City and address satellite dishes installed on window brackets or window security gates. In both cases, the Courts found that the exterior installation was not protected under OTARD, as the areas were not under the exclusive control of the tenant. In the Urban Horizons case, however, the landlord did not prevail as the Court found that waiting four years to enforce the ban despite having actual notice of the violation constituted a waiver of the lease term.

In 2003 and early 2004, the leading OTARD matters before the FCC have not concerned satellite dishes but rather HDTV antennas. Installation of an HDTV, or for that matter a regular antennae, may be covered by the OTARD rules. The FCC has not finished its work on these proceedings, but be warned that failure to enforce your rules could result in their being waived.

7. YOUR AUTHORITY TO MANAGE INSIDE WIRES AND WHO DEPLOYS SUCH WIRES REMAINS UNDER CONSTANT ATTACK.

Despite the bankruptcies of leading proponents of mandatory access, the issue has not gone away. With recent judicial set backs in Texas, the issue may come back to life. Additionally, local incumbents such as BellSouth and Qwest are looking to exploit their status as the carrier of last resort to demand special status in buildings under state law.

Forced access threats and the rules governing existing inside wires are at risk as much as ever despite what appears to be a very quiet legislative and

regulatory environment. The Texas Supreme Court twice refused to hear an appeal of the mandatory access case in Texas. The National Cable and Telecommunications Association has filed an appeal in the U.S. Court of Appeals for the District of Columbia claiming that building owners should have to cut open walls to access wires rather than use the cable operators' wires (*Nat'l Cable and Telecomms. Ass'n v. FCC*, appeal docketed, No. 03-1140 (D.C. Cir. May 20, 2003)).

The NCTA appeal is not the only "inside wire" litigation at the U.S. Court of Appeals level. Oral argument will be heard in March in the 10th Circuit in *Time Warner Entertainment Co., L.P. v. Atrium Partners, L.P.*, No. 02-2343-CM (D.Kan. Nov. 26, 2002). The *Atrium Partners* case concerns the proper application of the FCC's Cable Home Run Wiring Rules. The federal district court for the District of Kansas held that the FCC's rules created a distinction between treatment of wiring under 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. The court held that § 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 a particular unit at the request of an HOA. The Court found that such rights exist for the HOA even if the cable operator retains the legal authority to maintain other wiring on the property in order to continue to serve other units.

The *Atrium Partners* court expressly disagreed with an earlier decision issued by the federal court for the Southern District of New York, *CSC Holdings, Inc., v. Westchester Terrace at Crisfield Condominium, et al.*, No. 01-8134 (S.D.N.Y. Oct 21, 2002), which we believe was wrongly decided. The New York decision did not recognize any distinction in the FCC's rules between building-by-building disposition and unit-by-unit disposition of inside wiring, and ruled that the FCC's rules did not apply so long as the cable operator had a right to serve even one tenant in building in question.

At the FCC, there is a BellSouth's request that the Commission refrain from enforcing its interconnection rules in "New-Build Multi-Premises Developments." Eliminating interconnection requirements on ILECs would likely hinder the ability of MDU owners to bring in competitive DSL providers where the wiring in newly constructed development projects has been installed by the ILEC.

8. PROACTIVELY ENSURE THAT YOUR TENANTS HAVE REDUNDANT ACCESS (WIRED AND WIRELESS) TO THE NEAREST TELEPHONE CENTRAL OFFICE AND MARKET THAT AS A BUILDING ASSET.

The prospect of being offline for the time it might take to reconstruct a wired infrastructure resulting from something as simple as a backhoe cut, to something as unforeseen as an earthquake or terrorist act, is something that corporate America can no longer tolerate. Corporate and government headquarters,

recognizing the state of the world, are quickly mandating that all offices be served by redundant, independent and viable networks.

Can your building meet these new requirements? If you have a federal or state government tenants, they may soon, if they have not already, require such dual access or be forced to move. Do not wait for the ultimatum to be delivered. Ensure your building has redundancy now.

9. USE 2004 TO PREPARE FOR THE ANTICIPATED "DO NOT FAX" RULES AND ENSURE THAT YOUR EMAILS COMPLY WITH THE CAN SPAM LAW.

Fax regulations currently stipulate that unsolicited commercial faxes can be transmitted only in cases where an "established business relationship" ("EBR") exists between the sender and the recipient. The FCC issued draconian fax rules last summer that eliminated the "EBR" exception and required a written authorization and made the requirement effective almost immediately. Bowing to public pressures, the FCC stayed the rules until Jan. 1, 2005, but retained the new standard of requiring that you have a signed written consent from each recipient before transmission of any commercial fax. We would suggest that you use 2004 to collect those forms from you tenants.

You should also make yourself aware of Public Law No: 108-187, The "Can Spam Act." Like the "Do Not Fax" rules, the Can Spam Act creates penalties for the use of the Internet to transmit unsolicited commercial electronic mail, i.e. spam.

10. HAVE YOU AMENDED YOUR LEASES TO ADDRESS WIRELESS INTERFERENCE? ARE YOU A "HOT SPOT?"

Wireless access to the Internet by means of a 802.11 technologies, ("WiFi" or "Hot Spot") is a new tenant demand and may longer even be viewed as a tenant amenity. If you want your residential properties, let alone office properties, to stay hot, then you had better be a "Hot Spot." WiFi technology is simple, you take a hi-speed line (DSL or cable modem line) and attach devices that permit the broadband service to be sent and received. Such devices can be purchased at the local electronics store. Everyone within a certain range, with a wireless card in his or her computer tuned into the antenna, has a high-speed wireless connection to the Internet.

The bad news with WiFi is that the service is provided over what is known as "unlicensed" spectrum. The public is free to use instruments that operate within the unlicensed frequency range, but they have no recourse against another user of the spectrum for interference, thus the term unlicensed. Common uses in this "Wild West" of spectrum (i.e. no law west of the Pecos' megahertz) are wireless remote controls, walkie-talkies, garage door openers, cordless phones and baby monitors.

Before you are forced to referee a battle between tenants on the 7 and 8th floors that have shifted to a "wireless" office or apartment, you should insert simple lease language, which addresses the issue of interference. This language can be easily crafted and should be included in any lease you sign moving forward. And before you lose a tenant to another

"Hot" property, you ought to examine your ability to tune up your property to "WiFi." But before you deploy your own WiFi network, talk with counsel as real estate owners have been found to be liable for unauthorized uses of WiFi in their buildings and advocates state that it is only a matter of time before an owner finds themselves addressing liability issues for someone that "hacks" into a WiFi system.

About the Firm:

Miller & Van Eaton, P.L.L.C. is a law firm that offers specialized services in telecommunications. Clients rely on Miller & Van Eaton for counsel and legal representation on a wide range of business and regulatory matters that relate to every communications industry: cable television, broadcasting, telephony, wireless communications, and other telecommunications entities.



About the Author: Gerry Lederer of Miller & Van Eaton 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. [(202) 785-0600 or glederer@millervaneaton.com].