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CHANGES IN NATIONAL ELECTRIC CODE REQUIRE CHANGES IN BOMA MEMBERS' CONDUCT, LEASES AND ACCESS LICENSE AGREEMENTS

BY GERARD LEDERER

THE CHALLENGE

The wires tenants have left in your raised floors, walls and ceilings, as well as the cables abandoned by carriers in your risers have always been a nuisance. Due to changes in the 2002 edition of the National Electric Code ("NEC"), those same wires may now render your property out of code and jeopardize your property's fire insurance. This paper examines these NEC rules which: (1) make it a violation to have abandoned wires in your building's risers or plenums and (2) mandate the use of specific flame-retardant wiring for such deployments. The paper, while not to be relied upon as legal advice nor creating an attorney-client relationship, suggests a step-by-step process to ensure that your building "meets code" and that the fiscal impact of coming into compliance is borne by the appropriate party.

1. THE NEC PROCESS

The National Fire Protection Association (NFPA), the national association of your local fire inspector and Chief, is the secretariat of the NEC. The NFPA updates the NEC every two to three years to ensure that the electrical code is meeting real world challenges. Many of the national real estate organizations such as the Building Owners and Managers Association, the National Multi-Housing Association and National Association of Home Builders are active in the NEC drafting committees of the NFPA. And while the NEC, itself, does not have the authority of law, almost every jurisdiction in the United States adopts the NEC by reference in its building and fire codes. Bottom line: you need to be aware of and endeavor to comply with the NEC to the best of your ability.

While the rules mandating the use of specific fire safe cable types and banning abandoned wires in risers and plenums were adopted in late 2002, the debate has been ongoing for years. The new rules in a great many ways are a compromise between those who wanted to ban any wires not in metal raceways for fear that such wires promote the spread of fires and those that felt such deployments were perfectly safe.

2. THE TREATMENT OF PLENUM WIRING

The 2002 edition of the NEC is amended in at least nine locations to explicitly permit the deployment of specific types of wires (telephone, fiber, cable, fire alarm, power – see table below) in risers and plenums without the requirement of a metal raceway or conduit. Each such section also provides language to the effect that: "Abandoned cables shall not be permitted to remain unless contained in metal raceways."

Abandoned wires are defined almost uniformly as "Installed (type of service provided – see list below) cable that is not terminated at both ends at a connector or other equipment and not identified for future use with a tag."

3. WIRES COVERED BY RULE

The below identified articles in the NEC permits the plenum installations of the following types of wires, so long as it is an identified fire-safe cable and the cable is not "abandoned."

ARTICLE	TYPE OF WIRE
640	Audio Speaker Wires
645	Information Technology
725	Power-Limited Circuits

<u>ARTICLE</u>	<u>TYPE OF WIRE</u>
760	Fire Alarm Systems
770	Optical Fiber Cables
800	Communications Circuits
810	Radio, Television or Satellite
820	Coaxial (CATV)
830	Network-Powered Broadband

4. Wires Required

As was referenced above, the NEC not only mandates the removal of wires from plenum areas that are not in use and not tagged for future use, but also mandates the specific type of fire safe cabling for each purpose. If one is interested in knowing what each of those types of wires are they may look to the articles outlined above where the cables are identified. Because this is not intended to be an engineering paper, we raise the issue only so that the reader will understand why it is imperative that certain steps in the response proposal are incorporated, and why you skip such steps at your own peril.



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YOUR RESPONSE

I Conduct a Riser and Plenum Cabling Audit.

Regardless of who installed the cabling within your plenums and risers, the building owner will ultimately be held responsible. Building owners or managers, therefore, need to know the status of abandoned wire before the fire marshal or your insurance adjuster comes calling. Please do not take this threat lightly as there are cabling contractors today looking to market their services to insurance companies and underwriters to determine if properties are in compliance with the new NEC. A national magazine for the cabling industry described the new NEC as the double employment act. "We'll get paid to install the wires and then again to remove them."

The audit of your internal plenum space should not be a case of first impression. Organizations such as BOMA International and the National Apartment Association have long advocated property management professionals conduct telecommunication space audits. If you have conducted such audits then you will be in good shape. Still, this audit will have new questions to be answered. These include:

- Are there wires in the risers or plenums that are not being used?
- If the answer is no, one of two things can be said. Your building is brand new and has never had a tenant turnover or a deal with a failed carrier, or you need a new building engineer, because they did a poor job of looking.
- If the audit comes back that there are wires in the risers or plenums that are not being used, you need to know:
- What type of wires are these abandoned cables, i.e. what service did they provide?

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- What brand and model is the cable?
This many times may be ascertained by the color of the wrap and identification markings.
- Once you learn what type of abandoned cable you have, examine the appropriate NEC section to determine if it is a permitted category. If it is, your engineers, or retained consultants can tag those wires for future use and therefore defeat the status of abandoned.
- If you find that the wires that are not being used are not of a permitted category, then they must be removed. An investigation as to what party deployed the wires might provide a cause of action for the recovery of funds you must expend to remove and disposal of the wires.
- MDU owners and Office Building Owners might also consider pursuing policy changes to hold responsible the carrier that deployed the wiring as under current law cable and telephone carriers are free to abandon the wires in place.

II. Amend Lease/Condo Rules/ Internal Operating Procedures

Building engineers confirm that increasingly occupants (i.e. tenants and colleagues in owner occupied facilities) abandon rather than remove network wiring. In some cases, the occupants abandon numerous generations of network wires, as the need for speed has required deployment of enhanced cabling capable of supporting such speed. Because the NEC no longer permits such wire storage in plenums, building owners and facility managers must institute removal procedures for such wiring or run the risk of bearing all the expense of such removal or worse violating local fire codes and the potential loss of fire insurance.

Leases/Residential Rules with new occupants should be amended to include language such as:

CABLING ADDENDUM

1. The parties to this agreement acknowledge that there are no abandoned wires, as defined by the National Electric Code, within the demised premises at the commencement of the term of this agreement; and
2. Tenant/Occupant agrees that any cabling installed during the tenancy shall meet the requirements of the National applicable fire and safety codes; and
 - Tenant/Occupant agrees: to remove all wiring installed during the tenancy unless excused in writing by the owner (management); or to forfeit such sums from the security deposit or by judgement if insufficient funds exist in the security deposit, for the removal and disposal of any such wires.
 - **Aggressive Option** – Tenant/Occupant shall supplement the security deposit required in this Agreement by fifty cents per linear foot of cabling deployed during the duration of the term of the Agreement. The terms of treatment of such additional funds shall be governed by the terms of the security deposit.

III. Existing Tenants

Leases and/or residential rules of conduct with existing occupants are more complex as you must first find a legal basis for amending the agreement. Most leases provide such options, as they require tenants/occupants to comply with all applicable codes and regulations. A suggested course of action with existing clients might include the following:

1. Review your existing lease to ensure that it mandates that all actions taken by the tenant during the term of the lease

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- will comply with all local codes and standards.
2. Determine when your local or state jurisdiction adopts the 2002 edition of the NEC.
 3. Communicate to the tenant their responsibility to maintain the demised premises code compliant by not deploy any wiring in the plenum that does not meet the cabling categories identified by the NEC and not to abandon any wiring within the demised premises during the term of the tenancy.

IV. Amend Your Access License Agreements

Tenants are not the only parties that install cables within your premises that may trigger NEC review. Telephone companies (both ILECs and CLECs), cable providers, satellite or fixed wireless providers, roof top occupants such as paging and cellular companies, fire and security alarm companies have all at one or other installed their wires in your building. Many of done so pursuant to a negotiated access license agreement, other have accessed your property under tariff or simple need.

If you have employed the “Model Access Agreement” developed by the Real Access Alliance or those contained in the BOMA/NAA teaching text *Wired for Profit* you may have some protection as both required the carrier to comply with all laws and regulations as well as removing wires at the termination of the contract. Neither of those model documents, however, required any kind of escrow to cover the removal of abandoned wires. Even if they had, recovery such sums may be difficult as many of the parties that executed such agreements went bankrupt.

Nonetheless, before executing any new access agreements, ensure that you have the NEC explicitly referenced and investigate

whether you can obtain a bond or letter or credit to cover the expense of removing abandoned wires should the carrier fail to do so.

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Download from the MVE's Telecommunications Toolkit:

- Commercial Real Estate Checklist for TSP Bankruptcies
- Telecommunications Summer Checklist
- Sample Space Audit
- Sample Legal Audit
- Sample Tenant Questionnaire
- Model Telecom License Agreement

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