



2003 Telecommunications Checklist

By Gerry Lederer ■ *Esq.*

One of the biggest challenges facing property professionals in today's market is meeting tenants' demands for access to redundant and competitive broadband services in an era when bankruptcies have drastically reduced the supply of such providers. While not offered as a "cure-all," the following checklist is offered to assist property owners, management professionals and the interested telecommunications provider in addressing the challenges of 2003.

1. Conduct a 2003 tenant needs survey

You can never inquire too often as to your tenant's needs, especially their technology needs. When was the last time you asked?

For instance, in this era of Homeland security and risks many office tenants have included in their minimum technology requirements access to redundant and complementary pathways, i.e., wired and wireless. Do you know what these requirements are? Don't be surprised if your tenants require access to multiple vendors providing access both wireless and wired connections.

In the residential setting, increasingly tenants want access to broadband or high-speed Internet in addition to the traditional phone and cable services. Are your current provider(s) offering these services? Are there steps you ought to be considering to assist in these plans?

The only way you may avoid being surprised regarding a tenant's needs is to ask.

Email glederer@millervaneaton.com



for model communication vehicles and tenant surveys.

2. Conduct a physical and legal audit of your telecomm space

You, or your counsel, should conduct an audit of all existing leases, licenses and other access agreements 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 engineering staff, should also determine what space you have available to accommodate the wires and equipment of a TSP that might like to serve your building. A model survey is available at www.millervaneaton.com/resources

3. Make sure your building is a "Hot Spot" and amend leases to address RF interference

The hot issue in 2003 is wireless access to the Internet by means of 802.11 technologies, which you will hear called "Wi-Fi" or "Hot Spot" technology. If you want your residential properties, let alone office properties, to stay hot, then you had better be a "Hot Spot."

According to industry research, sales of Wi-Fi networking products grew from \$76 million in 2001 to \$280 million in 2002 and the average price for an access point fell from \$136 to \$87. Projections are that Wi-Fi market penetration will grow by another 125% in 2003.

The technology is simple, you take a hi-speed line (DSL or cable modem

"The hot issue in 2003 is wireless access to the Internet by means of 802.11 technologies, which you will hear called 'Wi-Fi' or 'Hot Spot' technology."

line) and attach send and receive antennae that you can buy at the local electronics store. Everyone within a certain range, with a wireless card in their computer tuned into the antenna, has a high-speed wireless connection to the Internet.

In 2003 there will be a big push by providers to show tenants just how easy it is to connect computing devices to an organization's local area computer network, or to set up temporary wireless networks so long as they stay within about 2,000 feet. Since industry research reveals tenants have up to 40% annual churn of space within the rented suite, such wireless devices will result in significant cost savings with the added plus of flexibility. The result could be an explosion of wireless office applications. That is the good news.

The bad news is that these services will be utilizing 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 7th and 8th floors that have shifted to a "wireless" office, 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 ex-

amine your ability to tune up your property to "Wi-Fi."

4. Ensure that everyone in your organization understands that at no time should an "Easement" be granted to a TSP.

PLEASE DO NOT EXECUTE AN EASEMENT FOR ACCESS TO YOUR BUILDING(S). For 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 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.

TSPs, including cable MSOs, CLECs and Bell companies are submitting easements rather than licenses for access to buildings. 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.

5. Understand the latest FCC decision on Cable Inside Wire.

On January 29, 2003, the Federal Communications Commission (the "FCC") released its long-awaited First Order on Reconsideration and Second Report and Order in CS Docket No 95-184 and MM Docket No. 92-260, FCC 03-9, commonly referred to as the cable inside wire proceeding.

In summary, the FCC:

- "decline[d] to restrict exclusive contracts for the provision of video services

in [multiple dwelling units ('MDUs')," Order at ¶ 4; and

- "decline[d] to ban perpetual contracts for the provision of video services in MDUs or subject such contracts to a fresh look window," Order at ¶ 4.

In addition, the FCC modified its existing rules in two ways that may benefit property owners.

1) In the event of the sale of "home run wiring" in a multiple 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 prior to actual service termination by the incumbent. Order at ¶ 3.

2) Home run wiring located behind sheet rock is deemed physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring. Id.

This last change makes it easier for competing providers to obtain access to wiring inside individual units without causing damage to a building. For a detailed analysis of the order contact glederer@millervaneaton.com.

6. Stay current with the courts' interpretation of Inside Cable Wire Rules

Two United States District Courts issued opinions in late 2002 on when the "home-run" wires are available to a second provider or the building owner under the FCC's Home Run Wiring Regulations, 47 C.F.R. §§ 76.804(a) and (b). In *CSC Holdings, Inc., v. Westchester Terrace at Crisfield Condominium, et al.*, No. 01-8134 (S.D.N.Y. Oct 21, 2002), the Southern District of New York ruled that the FCC's rules do not apply so long as the



cable operator had a right to serve even one tenant in building in question..

A month later, in *Time Warner Entertainment Co., L.P. v. Atrium Partners, L.P.*, No. 02-2343-CM (D.Kan. Nov. 26, 2002) the Kansas District court disagreed with the New York court conclusion. The Kansas Court found that the New York 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. The Atrium court held that § 76.804(b) presumes that the incum-

bent cable provider may continue to provide service on a unit-by-unit basis while other units are served by competitive providers. 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 home owners association (or presumably building owner) even though the cable operator may have legal authority to continue to serve other units. Furthermore, the Atrium Partners court held that the Kansas mandatory access statute did not provide a basis for Time Warner to refuse abandon, remove, or

sell the requested home run wiring.

The Atrium matter has been appealed to the 10th Circuit Court of Appeals. Real estate and PCO forces should unit to provide amicus support for what is a very pro-competition decision that is consistent with FCC rules.

7. Amend your lease to address residual wires in the tenant's suite.

Discussions with building engineers reveal that increasingly tenants are leaving behind network wiring within the vacated premises. Buildings are then faced with a decision to simply leave the

"Ensure that everyone in your organization understands that at no time should an easement be granted to a TSP"

wires in the ceiling or pay someone to have the wires removed. Why is such a predicament acceptable to landlords? How would you handle a tenant that vacated the premises and left desks there? This problem is exacerbated in that there is little, if any, salvage value as most tenants will not use a previous tenant's wires as their installers and IT professions prefer to use their own.

While security deposits have traditionally been utilized to address abandoned materials in a suite, some landlords have been reticent to employ the fund to pay for removal of wiring because it was not addressed in the lease or the wiring was not discovered as an issue until too late. This defect should be cured in 2003. You can do so by proactively addressing wiring removal in leases and by ensuring that your telecommunications audit of the building reveals where such excess wires exist.

8. Caveat: Mandatory Access is alive and funded by newer, bigger and richer advocates

Despite the bankruptcies of leading proponents of mandatory access such

as Teligent and Winstar, 2003 will see serious efforts to establish mandatory access at the federal and state levels. What makes 2003 scarier than the past in that the new mandatory access effort will be led by the RBOC, and the local phone service subsidiaries of the cable and long distance companies. In recent filings with the Federal government, Telecommunications giants such as WorldCom, BellSouth and RCN have asserted limiting the rights of building owners to manage their telecommunications space. In Utah, Qwest, backed by numerous cable and long distance affiliates are seeking a new definition of "essential facilities" including facilities within a building. Finally, one should not forget that it is Time Warner that is prosecuting the case in Texas against Texas BOMA.

The lawyers at Miller & Van Eaton and the Real Access Alliance have attempted to position ourselves to identify and characterize these threats. Please respond promptly and aggressively should the Real Access Alliance call upon you. If you are aware of a threat, please share it with glederer@millervaneaton.com. ■

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. 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 updates on this article, which will be available at www.millervaneaton.com/Resources.

Miller & Van Eaton, P.L.L.C. is a law firm that offers specialized services in telecommunications. Real estate 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, and other telecommunications entities.

