Owners have newfound leverage over competing providers, but mistakes are harder to fix

By Carl E. Kandutsch  Ph.D., J.D.

It is difficult enough for communications professionals to keep up with the rapidly evolving technological and regulatory environments in which broadband providers operate. How is a residential property owner, manager, or developer going to do the same, while investing time and energy into retaining quality tenants?

Just a few years ago, this problem did not exist; because there was essentially no competition among providers. Each provider occupied a monopoly position in its discrete walled garden, and MDU owners simply signed whatever access agreement the telephone or cable television provider offered. The alternative was no service at all, and a proliferation of little satellite dishes all over the property.

The New Digital Landscape

Two things have changed. First, MDU owners in most parts of the country now have the option of choosing among an array of broadband service providers, including private cable operators (PCOs), incumbent local exchange carriers including RBOCs such as Verizon, AT&T (formerly SBC), BellSouth and Qwest, and an array of more-or-less specialized competitive local exchange carriers.

Second, most of these providers are or soon will be capable of delivering a variety of broadband services, including voice telephony, digital video, high-speed Internet access and other services such as security systems, over a single integrated infrastructure. Gone are the days when the property owner needed to choose a specialized monopoly provider for each communications service.

The co-existence of both competitive choice and the reality of “digital convergence” provide an obvious benefit to MDU owners, but this benefit entails a risk. The obvious benefit is that the owner need only allow a single broadband distribution system to be installed in the building in order to provide multiple services to tenants.

The risk is that if the services provided prove to be inadequate, or if the owner becomes dissatisfied for any other reason, the existence of a single installed and integrated infrastructure owned by a single multiple service provider may make it more difficult, practically and legally, for the owner to terminate the provider’s access to the building in favor of a competitor.

The issues discussed in this article tend to arise most frequently, in overbuild situations. The author intends to publish a follow-up article dealing with issues specific to new or “greenfield” installations, especially condominium and planned unit development (PUD) projects, in an upcoming edition of this magazine.

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Broadband providers and their legal teams have invested considerable time, expertise and expense in drafting generic building access agreements that maximize value on behalf of the provider.

Regulatory Uncertainty Surrounding FTTP Services

Unfortunately, there is a high degree of uncertainty surrounding which (if any) legacy FCC regulations apply to broadband services delivered to consumers through FTTP networks. To the extent that FCC rules do not apply, the ROE agreement becomes all the more important in defining the owner’s legal rights and responsibilities.

There are two kinds of FCC regulations designed to preserve competition in MDU environments, namely, the cable inside wiring rules, and the telephony demarcation point rules.

The cable inside wiring rules (found starting at 47 C.F.R. § 76.800) allow an MDU owner to force an incumbent cable television provider to remove, sell or abandon in-building (“home run”) wiring when the incumbent has no ongoing contractual or statutory right to access the building to provide video service to tenants. These rules allow the owner to make the existing wiring available for use by a competing provider and thus facilitate competitive access by PCOs.

The telephony demarcation point rules (found at 47 C.F.R. § 68.105(d)) allow the MDU owner to control the location of the point at which legal responsibility for the on-premises wiring shifts from the telephone company to the building owner. By assuming control over the inside wiring, the owner can make the wiring available to a competitor.

It is unclear, however, whether either of these pro-competitive regulatory schemes applies to FTTP in multi-tenant buildings.

The cable inside wiring rules apply only to “multichannel video programming distributors,” which includes traditional cable operators and other providers of video programming, but does not include “common carrier” wiring or fiber that is used to provide “interactive on-demand services.”

Are MDUs like individual homes? Probably. The FCC’s 2003 Triennial Review Order did relieve incumbent local exchange carrier (ILEC)-installed fiber to the home (FTTH) networks from the common carrier obligations applicable to old-technology local copper loops. Therefore, FTTP wiring in MDUs is probably not a “common carrier facility,” even if that wiring is used by an RBOC (a common carrier) to deliver video programming to MDU residents. Furthermore, the video service being offered by RBOCs such as BellSouth and AT&T (formerly SBC) is characterized by a high degree of interactivity, including video on demand.

For these reasons, it is highly doubtful that the owner of an MDU “wired” with fiber can rely on the FCC’s cable inside wiring rules to bring in an alternative provider if the FTTP service proves inadequate.

The application of the telephony demarcation point rules to FTTP in multi-tenant environments is no less problematic. For one thing, the concept of a “demarcation point,” and the regulations based on this concept, are designed to address problems that arise in connection with copper loop architecture. FTTP installations are based on an entirely different design with different characteristics. FTTP networks do not involve, for instance, the installation of a network interface device (NID), and it is unclear what physical device or location in an FTTP system might constitute an appropriate demarcation point, assuming that a building owner is willing to assume responsibility for such a sophisticated communications infrastructure.

Second, the demarcation point rules apply to “providers of wireline telecommunications,” that is, telephone companies. While the RBOCs now deploying FTTP to MDUs nationwide are quintessential telecommunications providers, their IP-enabled services either are already or are likely to be categorized as “information” rather than “telecommunications” services by the FCC.

Because it is unclear if and how FCC regulations dealing with competition in multi-tenant buildings apply to FTTP, MDU owners cannot rely on those regulations in determining their rights and obligations with respect to FTTP providers. Those rights and obligations will be based on the language used in building access agreements, making it all the more important for owners to negotiate clear effective terms and conditions in those agreements.

What Owners Should Look for in an ROE

When reviewing a proposed ROE agreement, the MDU owner (together with counsel) should scrutinize the document with the following questions in mind:

What will be installed where, for what purpose, and for how long? And, what can the owner do if things go poorly? What rights does the owner have to terminate the ROE and bring in an alternative provider?

Unfortunately, there is a high degree of uncertainty surrounding which (if any) legacy FCC regulations apply to broadband services delivered to consumers through FTTP networks. To the extent that FCC rules do not apply, the ROE agreement becomes all the more important in defining the owner’s legal rights and responsibilities.
A well-drafted ROE agreement should provide specific answers to each of these questions, and any agreement, understanding or promise that isn’t explicitly incorporated into the formal document should be memorialized in writing.

Moreover, assuming that the agreement itself is clear and unambiguous, prior to signing the document, the owner should be certain that the new ROE is consistent with any existing access agreements, as well as any applicable state and local laws.

What Will be Installed, and Where?

Before signing an ROE agreement, the building owner should be certain that the written agreement specifically identifies the nature of the equipment and wiring to be installed, the location and pathway to which the provider will have access, and the defined services to be provided over that infrastructure. We discuss the first two issues here, and service definitions later in the article.

Depending on the type of provider involved, wiring an MDU property will involve the installation of hybrid fiber/coaxial (HFC) cable, copper or fiber optic cable (FTTP), with associated equipment. In order to avoid confusion and conflict, the ROE agreement should specify the type of infrastructure to be installed.

When the owner chooses a single firm to provide voice, video and data over an integrated infrastructure, it is important to consider the potential consequences, should that provider’s services prove to be inadequate.

This problem is especially significant with respect to FTTP installations. If the FTTP provider’s services are terminated, will tenants lose their telephone, video or Internet services? They will if, incident to the FTTP installation, the provider has removed any existing HFC or copper wiring from the building.

What Kind of Access is Granted in an ROE?

From a legal perspective, most ROE agreements grant the provider either a license or an easement in the owner’s MDU property. There is a difference. The fundamental concept is that an easement conveys a property interest running with the land, whereas licenses are generally personal to the grantee and may be unilaterally revoked at the grantor’s option.

Most service providers prefer an easement because an easement may be enforced against subsequent owners of the property should the building be sold – assuming the purchaser had actual or constructive notice of the existence of the easement, whether by virtue of it being recorded in the registry of deeds or otherwise.

By contrast, a license is in the nature of a personal privilege or permission, and the owner may withdraw that permission at any time. A license may become irrevocable, however, when it is coupled with an interest, such as when the licensee invests substantial money or labor (with the owner’s consent, of course) pursuant to the license. When that is the case, the license may become, for all practical purposes, identical to an easement in the sense that it cannot be unilaterally revoked.

In theory, granting a license rather than an easement provides the property owner with more flexibility, and doesn’t encumber the property to the same degree as an easement, should the

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owner decide to sell the property. In either case, however, the ROE agreement should specify the legal nature of the access granted so that the parties’ legal rights and obligations are clear from the outset.

A related question concerns whether the access (and marketing) rights granted should be exclusive or non-exclusive. While granting a provider non-exclusive rights is obviously preferable from the owner’s perspective, many providers will insist on exclusive rights with regard to one or more services, including an exclusive right to market the service to residents.

Their rationale is that it does not make business sense to invest in wiring a property merely for the right to compete against one or more other providers for subscribers in a single building or complex. The issue becomes more acute, however, if the owner chooses a single provider to provide multiple services, especially if the provider’s right of access is in the nature of an easement that encumbers the property in the event of a sale.

In negotiating an ROE agreement, exclusivity should be viewed as one axis in a spectrum of access rights to be granted to the provider; other axes are the length of the agreement, the number of services (and corresponding marketing rights) to be provided, and the nature of the access, whether easement or license. All can be negotiated. The more services (voice, video, data, etc.) are subject to the agreement, the greater the risk to the owner in giving a single provider exclusive access and marketing rights, over an extended time term.

Allowing a single firm the right to monopolize communications services deprives the owner of the flexibility needed to compete for tenants in a rapidly evolving consumer market.

Access for How Long?
Just as an effective ROE agreement should be limited in space and scope, so it should be limited in time. Owners should avoid access agreements that either specify perpetual terms or leave the term indefinite. A perpetual term agreement purports to remain in effect “in perpetuity” (or similar language), while an indefinite term agreement either fails to identify a specific term, or purports to remain in effect as long as the provider provides service, is authorized to do business, and so on.

Perpetual and indefinite term contracts are generally against public policy and for that reason may be unenforceable under state law; they should be avoided for that basis alone.

More to the point, however, owners should realize that broadband communications exists in a rapidly changing technological and business environment, and a choice that may seem ideal today may turn out to be woefully inadequate tomorrow.

Therefore, building owners should reserve the option of terminating or renegotiating service and access agreements after a reasonable time has passed. One

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way to measure a "reasonable time" would be the period required for the provider to recoup its investment in the building.

A provider wanting a long-term ROE agreement may be satisfied with a limited contract that provides a mechanism for renewal at the end of the term. However, owners should avoid automatic renewal clauses, particularly where there is no provision explicitly giving the owner the right not to renew, because such clauses forfeit the owner's ability to re-negotiate the agreement in changed circumstances.

In the arena of advanced communications, you need flexibility to accommodate consumer demand. A renewal clause should require the party seeking extension to provide advance written notice of its intention, so that the other party has an opportunity to make an informed decision based on consideration of the alternatives.

Likewise, owners should not sign any access agreement that does not provide for termination of the agreement if the owner/provider relationship turns sour. A contract that does not allow for termination (or non-renewal) isn't much better than a perpetual term contract.

Termination clauses can be either unilateral (no cause) or tied to specific ("for cause") default conditions, such as breach of the agreement by the provider. Clearly, a property owner would like to have the power to terminate a provider's access agreement at any time, for any reason, but few providers are likely to agree to such unilateral termination authority.

On the other hand, no provider should object to a contractual provision allowing the building owner to terminate the agreement if the provider's services fall below specified levels of quality, performance or price. The owner should have the power to terminate the provider's access if the provider fails to provide a competitive product.

It is crucial that such performance standards be definite and measurable in order that compliance or lack of compliance may be determined with some certainty. At a bare minimum, the provider should be required to provide services that equal or exceed (in terms of specifically identified criteria such as price, channel offerings, data speed, and so forth) those of similarly situated providers of the same or similar services.

A building owner contemplating an FTTP installation should carefully review any existing cable and telephony agreements to ensure that the new installation does not violate the terms of any existing agreement, or preclude the owner from bringing in new providers in the future.

The IP Revolution

The phenomenon of communications "convergence" is based on the use of Internet Protocol (IP), which transforms discrete communications services, such as voice and video, into mere data applications that can seamlessly operate over a single distribution system. The fact that these separate (from the end-user's perspective) services no longer require discrete physical networks means that the once-clear boundaries between the services are eroding – bits are just bits, a fungible commodity.

For that reason, it is important that an ROE agreement, particularly one involving FTTP, clearly define the services to be provided, in a way that does not create confusion and conflict. Such confusion and conflict can arise with respect to services that are already being provided in an MDU building, services that might be provided in the future, and with regard to legacy laws and regulations.

Many buildings, for example, are already served by a cable operator and a telephone company, providing cable and voice service respectively. These providers often have exclusive service agreements in place with the building owner. A building owner contemplating an FTTP installation should carefully review any existing cable and telephony agreements to ensure that the new installation does not violate the terms of any existing agreement, or preclude the owner from bringing in new providers in the future.

Suppose the owner has an ongoing agreement with a franchised or private cable operator under which the cable operator is the exclusive provider of cable video services to residents. Signing a new agreement with an FTTP provider for the provision of "digital communications" or "Internet" services may create a conflict with the existing cable television agreement, when the FTTP provider begins offering its video service to MDU residents.

While Verizon or AT&T may consider their video offerings to be "digital communications" or an "Internet service" rather than cable television, the cable company claims an exclusive right to provide video throughout the building. Thus, allowing the FTTP installation could expose the owner to legal liability for breach of the exclusive cable agreement.

Similar conflicts may arise with regard to the marketing of services, for the same reasons. An owner who has granted the cable provider an exclusive right to market its service to residents may unwittingly create a conflict if he or she grants an RBOC a right, exclusive or not, to market its FTTP products to the same residents.

Permitting the RBOC to market its video product, regardless of how it is described, will likely conflict with the incumbent cable operator’s (or PCO’s) exclusive marketing right. This sort of confusion is enhanced by the FCC’s failure so far to classify IP-based services such as interactive digital television and VoIP for regulatory purposes. As described above, Verizon and AT&T do not describe their video service as “cable television,” but the incumbent cable company or PCO certainly doesn’t see it that way!

The best way to avoid this sort of conflict is to agree on specific definitions of the services to be provided such that
there is no overlap between the new services and those provided by an incumbent. Then, limit any marketing rights to the services actually being provided.

**State Laws**

Another potential conflict involves the application of state laws. Some nineteen states (and various municipalities in other states as well) have enacted so-called “mandatory access” laws that prohibit MDU owners from blocking the franchised cable operator’s access to MDU residents. In jurisdictions with mandatory access laws, exclusive access agreements between MDU owners and cable service providers (such as PCOs) may not be enforced, insofar as such agreements would bar access by the franchised cable operator.

What does it mean? Depending on the precise language of the contract, an MDU owner’s exclusive access agreement with an FTTP provider may be unenforceable in a mandatory access jurisdiction, to the extent that the exclusivity provision would block the franchised cable operator’s right to install infrastructure needed to deliver cable service to MDU residents.

Therefore, before signing an exclusive access agreement for FTTP, owners are advised to check with counsel regarding the existence of any mandatory access laws in the pertinent local jurisdiction. Another category of state laws involve a variety of prohibitions or restrictions on MDU access agreements with telecommunications providers that explicitly or implicitly erect obstacles to competitive access by other telecommunications providers to MDU residents.

These state laws are related to the FCC’s Competitive Networks Order, which was issued in 2000. This order:

- Barred discriminatory or exclusive contracts between telecommunications providers and owners of commercial multi-tenant buildings (MTEs).
- Prohibited contractual and regulatory restrictions on end users’ ability to install fixed wireless and other antennas in commercial and residential multi-tenant buildings.
- Required electric utilities and ILECs to allow non-discriminatory access to conduit within MTEs to the extent that such access is consistent with state law.

Encouraged by the FCC’s action, several states, either through their legislatures or their public utility commissions, have enacted laws prohibiting discriminatory building access agreements with Verizon and AT&T do not describe their video service as “cable television,” but the incumbent cable company or PCO certainly doesn’t see it that way!

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A RBOC provider of FTTP communications services to MDU residents qualifies as a “public utility” and therefore exclusive access agreements between MDU owners and FTTP providers are prohibited in California.

telecommunications providers in the residential (MDU) context.

It is difficult to generalize about these non-discrimination laws because states have taken different approaches to the issue of telecommunications competition in multi-tenant buildings. In California, for example, “a public utility may not enter into any exclusive access agreement with the owner … of … a property or premises served by the public utility … that would limit the right of any other public utility to provide service to a tenant or other occupant of the property or premises.”77

A “public utility” is anyone (except a publicly owned public utility) who “owns or controls … support structures or rights of way used or useful, in whole or in part, for wire communications.”

A RBOC provider of FTTP communications services to MDU residents qualifies as a “public utility” and therefore exclusive access agreements between MDU owners and FTTP providers are prohibited in California. The breadth of this provision – which prohibits contracts that by design or effect “limit” competitive MDU access – might well bar not only exclusive access contracts, but also exclusive marketing agreements, especially if the agreement provided financial incentives for the owner to limit other carriers’ access to tenants.

More or less similar non-discrimination rules have been either enacted or are being considered in Connecticut,8 Texas,9 Nebraska,10 Ohio,11 Massachusetts,12 North Carolina,13 Florida,14 Mississippi15 and South Carolina.16

As with cable television mandatory access laws, MDU owners should consult with counsel regarding state laws or regulations that may affect how a building access agreement should be structured – especially when an FTTP installation is involved.

The bottom line is that an MDU building access agreement should specifically define the services being offered such that the building owner is allowing use of her or his property for the provision of just those services the owner desires and no others.

Likewise, marketing rights should be tied to the specifically defined services being offered, rather than being vague or general. If the owner wants telephone and Internet access service from an FTTP provider, there is no reason to grant that provider general marketing rights, or to use vague terms such as “Internet service.” If “Internet service” is construed to include video service, the owner may be unable to find a PCO willing to wire the building for video without a corresponding and exclusive right to market the PCO’s video service.

Conclusion

After a failure to give careful consideration to how the services are defined in the operative documents – a subject to which providers’ counsel has surely devoted considerable time – the owner may discover that he or she has unnecessarily forfeited the kind of flexibility needed to meet consumer demand in a rapidly changing technological environment.

Furthermore, a failure to agree on the definition of the services to be offered can easily lead to unanticipated legal conflicts down the road, including both conflicts with other broadband providers and conflicts with state legal and regulatory requirements.

As advanced communications capability comes to be seen more and more as an essential utility rather than as a desirable luxury, a building manager’s ability to offer that capability will become an increasingly important weapon in the fight to attract and retain quality tenants.

With a wide variety of providers offering products that are increasingly seen as indispensable, it is all the more crucial that MDU owners structure their building access agreements in ways that maximize value in the longer term, lest their buildings become monopoly bottlenecks benefiting the incumbent carrier and no one else.

After making an informed choice or choices among broadband providers, flexibility – meaning, the reservation of options – should be the goal; the telecom boom and bust of the 1990s demonstrates the folly of placing all of one’s eggs in a single basket in an unpredictable environment.

In broadband, today’s headline news is likely to become tomorrow’s fish wrapper. By insisting on precise contractual language that defines and limits the provider’s rights and obligations, MDU owners can minimize the likelihood of unnecessarily and unwittingly giving up options, such as the option of replacing the incumbent or bringing in a second competitive provider, that may prove indispensable in the future.

As advanced communications capability comes to be seen more and more as an essential utility rather than as a desirable luxury, a building manager’s ability to offer that capability will become an increasingly important weapon in the fight to attract and retain quality tenants.

About the Author

Carl Kandutsch is a former FCC attorney and currently a consultant to PCOs and MDU managers; he invites those with comments, questions or consulting inquiries to contact him at ckandutsch@adelphia.net or 207-659-6247.
References
2 There are several possible locations for the demarcation point in a typical FTTP MDU architecture. When a single-family-unit Optical Network Terminal or “SFU ONT” is deployed (at each residential unit), the demarcation point can be located at the owner’s IDC blocks or splitters found in the centralized structure wiring cabinet. When MDU ONTs – which serve multiple residential units – are used, the demarcation point would be located at the owner’s IDC blocks or connectors in the corresponding building communications room or intermediate distribution frame.
3 47 C.F.R. § 68.100.
4 It seems likely that in the coming year, the FCC will classify both interactive television and VoIP as unregulated “information services,” as opposed to a “cable service” or a “telecommunications service.”
5 The IMCC website provides a list of state mandatory access laws at http://www.imcc-online.org/ISSUES/RESOURCEInfo/MandatoryAccess/states.htm.
9 16 TAC § 26.129.
11 Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, 1996 Ohio PUC LEXIS 361 (June 12, 1996).
12 Order Establishing Complaint and Enforcement Procedures to Ensure that Telecommunications Carriers and Cable System Operators have Non-Discriminatory Access to Utility Poles, Ducts, Conduits and Rights of Way and to Enhance Consumer Access to Telecommunications Services, 2000 Mass. PUC LEXIS 21 (July 24, 2000); 220 CMR § 45.03.