

TELCOS HUFF AND PUFF, BUT CAN'T ALWAYS BLOW  
OPEN THE DOORS TO MULTI-TENANT BUILDINGS: IN  
MOST STATES, BUILDING MANAGEMENT CAN KEEP  
UNWANTED TELCOS OUT IN THE COLD

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*This Note examines the conflict between the Telecommunications Act of 1996's goal of opening local telecommunication exchange markets to carriers and the rights of landlords to deny building access to these carriers. If the Federal Communications Commission ("FCC") intends to provide Americans with a choice in telecommunications providers, it needs to address the barriers to building access. Because the number of carriers is increasing, landlords may deny access more frequently, thus stifling competition and denying more tenants their freedom to choose a carrier. Forced building access encompasses both property and antitrust issues, and solutions to the problem need to strike a careful balance between the two. Because the FCC's current rules on building access do not explicitly extend to building owners and managers, the states have been forced to interpret the Act in line with its goal to increase competition with little help from the FCC. This Note illustrates FCC and state policies on this issue and proposes suggestions for creating a national building access policy.*

The Telecommunications Act of 1996 ("the Act") sought to foster competition in the telecommunications industry and to provide choice and competitive pricing to all Americans, in both rural and urban settings.<sup>1</sup> Although the Act has been greatly criticized as "one of the sloppiest laws on the books,"<sup>2</sup> its goal of opening the local exchange carrier market is clear. At a minimum, it is evident that the Act forces cooperation between incumbent local exchange carriers ("ILECs") and competitive telecommunications providers, particularly competitive local

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); H.R. REP. NO. 104-204, at 1 (1996); 47 U.S.C. § 254(b)(3) (2000). The Act repeatedly expresses a commitment to establishing "universal service" which appears to refer to a policy of ensuring consistently competitive and diverse telecommunications service regardless of demographics.

2. Stephen Labaton, *Slew of Supreme Court Cases to Focus on '96 Telecom Law*, N.Y. TIMES, Oct. 1, 2001, at C8.

exchange carriers (“CLECs”).<sup>3</sup> However, in most states, a landlord can deny building access to competitive carriers in a variety of ways, including: establishing service contracts with other providers;<sup>4</sup> placing prohibitions on certain forms of marketing to tenants; creating or perpetuating inadequate building infrastructure to handle multiple facilities-based providers; and implementing discriminatory prerequisites and requirements for access. If the FCC truly intends to provide a choice of telecommunications providers to citizens nationwide, it must address the issue of building access. This Note will establish the existence of conflict between building owners and telecommunications service providers (“telcos”), attempt to explain why few examples of the conflict exist in case or administrative law, describe current FCC and state policies on the issue, and offer suggestions for creating a national building access policy.

### I. THE CONFLICT

Administrative and judicial challenges to the Act have focused heavily on defining compliance requirements for ILECs. As a result, courts and public utility commissions have ruled on access disputes between ILECs and CLECs with considerable frequency. The body of law surrounding landlord-originating access obstacles is significantly less robust than that surrounding ILEC-originating access obstacles.<sup>5</sup> Yet, currently, building owners’ potential power to restrict competitive carrier access to tenants is great. Consider that thirty-three percent of occupied housing units in the United States are leased, and an untold percentage of commercial property is leased.<sup>6</sup> The combined impact of building

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3. For example, ILECs must permit CLECs “access to the poles, ducts, conduits, and rights-of-way” “on rates, terms and conditions that are just, reasonable, and nondiscriminatory.” 47 U.S.C. §§ 251(b)(4), (c)(2)(D) (2002).

4. The FCC banned exclusive service contracts for commercial buildings in 2000, but did not forbid other contractual arrangements that limit tenant choice or exclusive contracts for residential buildings. First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, 22 Communications Reg. (P&F) Appendix B (Oct. 25, 2000), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-00-366A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-366A1.doc) [hereinafter First Report and Order].

5. The reason behind the dearth of case law and regulatory opinions on disputes between landlords and telecommunications providers will be explored herein. In sum, it seems that these battles are rarely published and usually settled. Despite this, the Practicing Law Institute [“PLI”] cites “access issues” as one of five major areas of litigation in the telecommunications industry for the year 2001. Richard R. Patch & Keith Evans-Orville, *Areas of Potential Litigation in Competitive Broadband Markets*, 643 PLI/PAT 397, 427 (2001) [hereinafter Patch & Evans-Orville 2001]. Unfortunately, the PLI does not offer any explanation for identifying “how to ensure access, e.g. to MDU to provide service to tenants in face of obstruction by landlord/overbuilder” as a potential major source of litigation. *Id.* However, the fact that the PLI included this area of law in its handbook does reaffirm the existence of potential disputes on the issue of building access. *Id.*

6. The author was unable to locate a statistic representing the percentage of commercial businesses that lease, rather than own, their place of business. The U.S. Census Bureau has published a Total Housing Inventory of the United States, which reports that of 104,928,000 total occupied housing units in the country, 34,831,000 were renter-occupied and 70,097,000 were owner-occupied in 1999. These numbers illustrate that approximately 33% of occupied residential properties in the

owners restricting competitive carrier access to tenants nationwide could severely limit expansion of the competitive carrier market. Of course, the building management industry adamantly denies that anticompetitive behavior by landlords is a problem of any significant proportion.<sup>7</sup> Indeed it is difficult to find a history of disputes between landlords and competitive carriers over rights to building access. One would presume that if anticompetitive behavior by landlords were rampant, the FCC comments filed by competitive carrier lobbyists would be filled with examples of such conduct. However, the competitive carrier lobbyists were able to cite only a few documented examples.<sup>8</sup> Contrary to the building management industry's simplistic "no smoke, no fire" analysis, other plausible explanations may exist for the lack of litigation between building owners and competitive carriers. Most significantly, the majority of states and the FCC do not currently give *any* telecommunications carrier a specific right to building access. Without a clear legal cause of action, individual CLECs—often start-up enterprises with limited budgets for legal expenses—are probably reluctant to litigate against individual building owners, especially if the access would provide less revenue than litigation costs. The odds of a cost-benefit analysis weighing against litigation are particularly good when small to mid-sized residential or commercial properties, with fewer tenants (and thus less potential revenue) are involved. Forty-three percent of the nation's commercial office space is in small to mid-sized buildings (buildings with 25,000 sq. ft. or less).<sup>9</sup> Seventy-two percent of the nation's multi-unit residential buildings have fewer than 20 units.<sup>10</sup> As more competitors enter the market each year, as they have continuously done since 1994,<sup>11</sup> building owners may deny access to newcomers with

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United States are leased. STATISTICAL ABSTRACT OF THE UNITED STATES, UNITED STATES CENSUS BUREAU § 25, at 718 (2000) (providing a total housing inventory of the United States from 1970–1999), *available at* <http://www.census.gov/prod/www/statistical-abstract-us.html> [hereinafter STATISTICAL ABSTRACT].

7. Press Release, Building Owners and Manufacturers Association, BOMA International Testifies Against Forced Building Access Before Tennessee State Legislature (Aug. 24, 2000), *at* <http://www.boma.org/press/pr082400.htm> [hereinafter BOMA Press Release 2000].

8. See Promotion of Competitive Networks in Local Telecommunications Markets, WT-No. 99-217, Smart Buildings Policy Project, Comments in Response to Petition for Reconsideration (filed Mar. 14, 2001), *available at* <http://www.alts.org/Filings/SBPP/031401CommentsOnReconPetitions.pdf>.

9. The U.S. Census Bureau has published selected characteristics of commercial buildings in the United States, which reports that of 58,772,000 square feet of commercial office space, 25,485,000 square feet were located in buildings with less than 25,000 square feet. STATISTICAL ABSTRACT, *supra* note 6, § 25, at 729. These numbers illustrate that approximately 43% of commercial office space is in small to mid-sized buildings. *Id.* For the purpose of this statistic, the author chose to label buildings with less than 25,000 square feet "small to mid-sized" because such properties fall within the U.S. Census Bureau's three smallest property size categories. *Id.*

10. The U.S. Census Bureau has published housing characteristics of properties in the United States, reporting that of 29,169,000 non-single family housing units, 21,045,000 had fewer than 20 units. STATISTICAL ABSTRACT, *supra* note 6, § 25, at 719. These numbers illustrate that approximately 72% of multi-unit properties in the country have fewer than 20 units. *Id.*

11. Between 1994 and 1998, the number of competitive access providers and competitive local exchange carriers increased sevenfold, from 30 in 1994 to 212 in 1998. STATISTICAL ABSTRACT, *supra* note 6, § 18, at 570.

greater frequency, finding new and legitimate reasons for closing building access. Cramped telephone closets and riser space are more frequently problems in older high-rise buildings,<sup>12</sup> but as new entrants install equipment, over time even new buildings may become over-wired. Using this logic, one might expect to find building access disputes more frequently in areas of the country that tend to have older and larger buildings, particularly in the northeastern states.<sup>13</sup> Indeed, Massachusetts, Connecticut, New Jersey, and New York are northeastern states that have experimented with various open access legislation and regulation.<sup>14</sup> However, the courts have apparently been spared the debate, as case law is uniformly sparse.

Whatever the cause of the dearth of case law on the issue, competitive carriers continue to push the FCC for clarification under the Telecommunications Act of 1996 as to their rights to building access.<sup>15</sup> In its October 2000 Further Notice of Proposed Rulemaking, the Commission sought comments on access issues, including: the current status of the multi-tenant environment (“MTE”) service market; FCC authority to regulate MTE access; circumstances under which benefits of nondiscriminatory access would outweigh its costs; extending its ban on exclusive access contracts to residential buildings and other discriminatory contracts; and use of incumbent cable inside wiring by competitive telecommunications providers.<sup>16</sup> In order to fully understand the arguments on both sides of this issue, it is helpful to have a basic background in the technical infrastructure required to provide telecommunications services to office and apartment buildings.

### A. Technical Background

As the owner of a single-family residence, selecting a new telephone carrier or cable operator is simple. After making a request, a customer

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12. Maureen Fan, *New York: A Telecom Challenge*, at <http://www.smh.com.au/technology/0102/28/news7.html> (Feb. 28, 2001) (on file with author).

13. In the northeastern United States, 37% of residential housing units were built prior to 1939 and the median year of construction for housing units is 1953. STATISTICAL ABSTRACT, *supra* note 6, § 25, at 719. Compare this with the southern and western states, where less than 11% of such units were built prior to 1939, and with the Midwest, where approximately 26% were built prior to 1939. *Id.*

14. New York passed a cable open access law that was later repealed. 103 N.Y. JUR. 2d *Telecommunications* § 193 (1992) (citing N.Y. EXEC. LAW § 828). The state has not since enacted further open access legislation for any sector of the communications industry. Connecticut’s § 16-247 embodies open access policy for the telecommunications sector. CONN. GEN. STAT. § 16-247(l) (West 1999). Massachusetts passed regulations that provide nondiscriminatory access for telecommunications and cable providers. 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, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21 (July 24, 2000), available at <http://www.state.ma.us/dpu/telecom/98-36/final.htm> [hereinafter *Order Promulgating Final Regulations*]. New Jersey originally enacted its open access statute for cable providers in 1972. It is still on the books today. N.J. STAT. ANN. § 48: 5A-49 (West 2001).

15. See First Report and Order, *supra* note 4, at Appendix A.

16. *Id.*, at ¶ 11 n.8.

can typically expect service to be connected in a matter of days. If any physical access to wiring or rooftops is required, homeowners have the legal power to grant the required permission to enter their property.<sup>17</sup> For renters, the process is not so simple. Building access to multi-dwelling units (“MDUs”)—also known as multi-tenant environments (“MTEs”)—is usually restricted by lease terms, covenants, and building management policies. Depending on the type of service requested, the provider might require various levels of access to private property, ranging from simple operations to major rewiring projects.<sup>18</sup> Considering today’s broad range of available telecommunications services (voice, video, data, etc.), the network facilities necessary at the neighborhood level (“last mile technology”) have increased, representing a major hurdle in providing the high-bandwidth services more customers demand.<sup>19</sup> For each building in a given neighborhood, the ILEC has designated a Local Loop Demarcation Point (“LLDP”), which separates the responsibilities of a utility from that of the building owner or customer. Particularly in building access regulations, when the LLDP meets certain criteria (typically, proximity to the property line), it is referred to as the Minimum Point of Presence or Minimum Point of Entry (“MPOE”). At the end of the LLDP, the Intrabuilding Network Cable begins.<sup>20</sup> The rules and proposals discussed later in this Note often deal with the location of the MPOE. In order to eliminate the need for CLECs to piggyback on the existing infrastructure put in place by ILECs, the FCC and industry leaders have begun to advocate CLECs building their own Intrabuilding Network Cable. According to the FCC, as demand increases for these services, the concept of facilities-based competition may present the “greatest long-term benefits to consumers.”<sup>21</sup> Facilities-based competition is a telco business model that lessens dependency on ILEC infrastructure by building duplicative last-mile network elements (often Intrabuilding Network Cable), rather than leasing these elements from the incumbent. Through its various permutations, facilities-based competition ends the ILEC bottleneck and encourages deployment of new technologies.<sup>22</sup> The Building Local Exchange Carrier (“BLEC”), a child of the facilities-based model, was touted by many at the turn of the millennium as the hottest new

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17. The right to permit entrance and, conversely, to exclude entrance, are a few of the rights inherent in property ownership. See JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 422 (3d ed. 1989).

18. Smart Buildings Policy Project, *Get the Facts*, at [http://www.capwiz.com/bco/pages/get\\_the\\_facts/myths.html](http://www.capwiz.com/bco/pages/get_the_facts/myths.html) (last visited Nov. 18, 2003) [hereinafter *Get the Facts*].

19. For a definition of “last mile technology” see SearchNetworking.com, at [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci213568,00.html](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci213568,00.html) (July 31, 2001).

20. BURT BRAVERMAN & ERIK CECIL, BUILDING ACCESS PRIMER 41, available at <http://www.crblaw.com/images/pdf/Building%20Access%20Primer.pdf> (last visited Nov. 18, 2003).

21. First Report and Order, *supra* note 4, at ¶ 6.

22. *Id.*

communications services market.<sup>23</sup> BLECs build their own last-mile network to provide high-speed, high-capacity services to large MTEs, while reducing or eliminating dependency on incumbent network leasing.<sup>24</sup> Because building owners often see BLECs as an amenity,<sup>25</sup> BLEC operators theoretically should be in demand by building owners. Although the market potential for BLECs has yet to be seen, this emerging model, which typically relies on a contractual relationship between the BLEC and the building owner,<sup>26</sup> may be jeopardized by the new FCC regulations prohibiting exclusive service contracts.<sup>27</sup>

Regardless of the type of carrier (CLEC, ILEC, or BLEC), in order to provide service to an MTE customer, a building is outfitted with a network that eventually connects to the central office ("CO"), the location at which all telephones are essentially connected to one another through a process known as switching.<sup>28</sup> The building may connect to the CO and to the outside world through a variety of media, including copper wire, coaxial cable, fiber, hybrid fiber/coax, and various wireless transmission methods.<sup>29</sup> The advantages and disadvantages of each of these media and transmission methods are much too voluminous to broach in this article,<sup>30</sup> but the reader should understand that their various advantages are often what prompt tenants to request a particular carrier (and for that carrier to require building access).

Depending on the business model of the carrier and the existing building network, a new entrant may require access to a variety of elements on the building premises. In order to provide service to an MTE customer, the carrier might require access to conduit, riser cables,<sup>31</sup>

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23. See e.g., Press Release, New Paradigm Resources Group, Building-Based Local Exchange Carrier Revenues To Reach Nearly \$1 Billion by 2004, Finds New Report from New Paradigm Resources Group (Apr. 16, 2001), available at <http://www.nprg.com/press/releases/041601blecreport.htm> [hereinafter NPRG Press Release] (providing examples of industry news sources touting the potential of the BLEC model); see also Gerry Blackwell, *BLECS: A New CLEC Opportunity*, CLEC-PLANET, at <http://www.isp-planet.com/cplanet/marketing/001113mkt.htm> (last visited Jan. 20, 2003) [hereinafter Blackwell, *CLEC Opportunity*]; Josh Long, *BLECS Cautioned: Know Your Tenants Before Playing with Fiber*, PHONE PLUS, at <http://www.phoneplusmag.com/articles/121whole1.html> (Feb. 2, 2001).

24. Press Release, New Paradigm Resources Group, *supra* note 23 (New Paradigm Resources Group appears to use the term "the first mile" for what is more commonly known as "the last mile.").

25. *Id.*

26. See *id.*

27. See Blackwell, *CLEC Opportunity*, *supra* note 23.

28. INT'L ENGINEERING CONSORTIUM, FUNDAMENTALS OF TELECOMMUNICATIONS: NETWORK, at [http://www.iec.org/online/tutorials/fund\\_telecom/topic02.html](http://www.iec.org/online/tutorials/fund_telecom/topic02.html) (last visited Nov. 10, 2003) [hereinafter NETWORK].

29. INT'L ENG'G CONSORTIUM, FUNDAMENTALS OF TELECOMMUN.: TRANSMISSION MEDIA, at [http://www.iec.org/online/tutorials/fund\\_telecom/topic04.html](http://www.iec.org/online/tutorials/fund_telecom/topic04.html) (last visited Nov. 10, 2003). Note that wireless transmission methods do not necessarily connect to the CO [hereinafter TRANSMISSION MEDIA]. See NETWORK, *supra* note 28.

30. See generally, INT'L ENG'G CONSORTIUM, FUNDAMENTALS OF TELECOMMS.: DEFINITIONS AND OVERVIEW, at [http://www.iec.org/online/tutorials/fund\\_telecom/](http://www.iec.org/online/tutorials/fund_telecom/) (last visited Nov. 18, 2003).

31. Riser cable is the wire that runs from a terminal, usually located in the basement of a building, to the outside of each individual unit. NEB. PUB. SERV. COMM., 2000 Neb. PUC LEXIS 89 (Jan. 26, 2000).

telephone closets, Network Interface Devices, building rooftops,<sup>32</sup> or campus wire.<sup>33</sup> Because each of these elements exists on private property, the building owner generally has the right to exclude others.<sup>34</sup> However, ILECs have traditionally installed and controlled these on-premises networks, and they may continue to exert control in a variety of ways. To lessen dependence on ILECs as gatekeepers, FCC rules require the establishment of a LLDP,<sup>35</sup> thereby allowing premises owners to “assume or assign responsibility for the installation and maintenance of inside wiring, which previously had been managed solely by the [ILECs].”<sup>36</sup> To further lessen competitive carriers’ dependence on ILECs, the FCC has established procedures that allow building owners to request relocation of a building’s LLDP to an MPOE, to which ILECs must permit competitor access.<sup>37</sup>

Rooftop access is another noteworthy issue for many providers, especially those who use wireless technology to bypass ILEC local loops. To connect customers to service, these carriers, which include Teligent, WinStar, AT&T, and WorldCom, must install wireless antennas on building rooftops.<sup>38</sup> Absent local authority or lease provisions to the contrary, state property laws require that a telecommunications provider obtain landlord permission to install facilities on private property.<sup>39</sup> However, despite limited FCC regulation of anticompetitive behaviors by ILECs, no FCC regulations to date prohibit a building owner from restricting access to the network elements discussed above.

### B. The Debate

As a discrete issue, forced building access sits at the intersection of property law and federal restructuring of the telecommunications industry. Supporting and opposing parties have lined up accordingly, with industry giants on both sides of the street. The Smart Buildings Policy Project, a Washington, D.C.-based coalition of major telecommunications players, advocates sweeping regulation by the FCC to ensure open access to MTEs.<sup>40</sup> Its membership includes Alcatel USA,

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32. Smart Buildings Policy Project, *The Solutions*, at [http://www.capwiz.com/bco/pages/the\\_solutions.html](http://www.capwiz.com/bco/pages/the_solutions.html) (last visited Nov. 10, 2003).

33. *Id.* Campus wire runs from the property line to one or more buildings in a MDU property.

34. See CRIBBET & JOHNSON, *supra* note 17, at 422. The right to exclude others from property is one right in the bundle of sticks known as property ownership.

35. First Report and Order, *supra* note 4, ¶ 44.

36. *Id.* at ¶ 38.

37. See *id.* at ¶ 35.

38. *Get the Facts*, *supra* note 18; see also First Report and Order, *supra* note 4, at ¶ 35.

39. First Report and Order, *supra* note 4, at ¶ 6.

40. *Get the Facts*, *supra* note 18. The term “forced access” is used extensively by BOMA and other anti-access groups. See, e.g., Richard D. Baier, *Bush Administration: Friend or Foe?*, available at <http://www.boma.org/comartle/comart0201.htm> (last visited Nov. 10, 2003) [hereinafter Baier]. The term “open access” appears elsewhere. See e.g., Roy Mark, *FCC Approves Open Access Regulations*, at [http://dc.internet.com/news/article.php/2101\\_484041.html](http://dc.internet.com/news/article.php/2101_484041.html) (last visited Nov. 10, 2003). Although

AT&T, Lucent Technologies, Nokia Inc., Siemens, Teligent, Time Warner Telecom, and WorldCom, among others.<sup>41</sup> On the opposite side of the debate, the Building Owners and Managers Association International (“BOMA”), a politically active industry organization of over 18,000 commercial real estate professionals,<sup>42</sup> provides a powerful voice for landlords who oppose the forced access policy. In his testimony before the Tennessee State Legislature, BOMA advocate Bruce Lyman stated, “[t]he marketplace does not need government-mandated access . . . These transactions are negotiated at arm’s length and in a free market environment.”<sup>43</sup> To support his claim that forced access regulation is unnecessary, Lyman cited a study that found that ninety-eight percent of tenants receive a choice of providers.<sup>44</sup> However, this study does not confirm that these consumers are free to select their preferred service provider. Rather, it establishes only that they have a choice between two or more providers. Today, in communities of all sizes, consumers may choose between several telecommunications providers—more than 14 in some major markets—for basic service.<sup>45</sup> Lyman’s definition of “choice” may not include the full panoply of telecommunication services available to consumers and businesses today.

The Practising Law Institute’s repeated inclusion of “access issues” as one of five major areas of litigation for competitive broadband networks in 2001<sup>46</sup> and 2002<sup>47</sup> is further affirmation of the existence of a building access debate staged largely in industry publications, FCC filings, and public utility commission proceedings. Despite BOMA’s insistence that building access regulation is unnecessary, the issue continues to raise disputes between landlords and competitive carriers. Apparently the problem has also caught the attention of federal and state regulators, who have made a variety of attempts to settle the issue.

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“forced access” might be interpreted to imply less control by the property owner than “open access,” the terms generally imply the similar pro-access policies and are used interchangeably herein.

41. Smart Buildings Policy Project, *Meet the Coalition*, at <http://www.capwiz.com/bco/pages/coalition.html> (last visited Feb. 15, 2002).

42. For further information about BOMA, see <http://www.boma.org/history.htm> (last visited Nov. 10, 2003).

43. BOMA Press Release 2000, *supra* note 7 (discussing the testimony of Bruce Lyman).

44. *Id.*

45. For example, one study shows that 14 CLECs serve the Denver area. Gail Lawyer, *Competition Flocks to Mile High City: Competitors Set Up Camp in Denver*, XCHANGEMAG., at <http://www.x-changemag.com/articles/9a1feat1.html> (Oct. 1999). A much smaller community, Champaign, Illinois, is served by at least two local service providers, SBC and McLeodUSA.

46. Patch & Evans-Orville 2001, *supra* note 5, at 427.

47. Richard R. Patch & Keith Evans-Orville, *Areas of Potential Litigation in Competitive Broadband Markets*, 694 PLL/PAT 493, 529 (2002).

## II. CURRENT POLICY AND REGULATORY CONSIDERATIONS

## A. FCC Policy

Although the FCC has promulgated various rules related to building access, it is important to note that its authority does not explicitly extend to building owners and managers.<sup>48</sup> Therefore, although the Act arguably advocates a pro-access policy, its enforcing agency is powerless to require, explicitly, that building owners allow telecommunication companies to enter their property. That authority, part and parcel of traditional property law, clearly lies with the states. Nonetheless, the FCC has made rules apparently embracing a pro-access policy.

Currently, 47 U.S.C. § 224<sup>49</sup> grants CLECs rights of access to ILEC conduits and rights-of-ways in MTEs, but only to the extent that the ILEC (or other utility) “owns or controls such areas and uses them in the manner of a right-of-way.”<sup>50</sup> Therefore, the current rules make CLECs dependent on ILECs to access desired facilities. If ILECs don’t already have facilities in place where CLECs generally wish to install infrastructure, the ILECs are under no obligation to create infrastructure on which CLECs may piggyback.<sup>51</sup> More importantly, the CLEC has no authority to require MTE owners to allow access, should ILECs deny them access to the physical building and its internal wiring.<sup>52</sup>

Companies offering wireless services face a different set of regulations in the FCC’s Over The Air Reception Devices (“OTARD”) Rules, promulgated under the Act.<sup>53</sup> Rooftops of MTEs are particularly critical for wireless local loop carriers, which must place antennas on carefully selected buildings in order to have clear, uninterrupted transmission away from pedestrian obstacles.<sup>54</sup> The OTARD rules prohibit restrictions impairing the installation or maintenance of fixed wireless antennas, provided that appropriate labels are affixed to the antennas. In addition, a retail customer (including an MTE tenant) must place the antenna on property over which it has exclusive use, and direct or indirect ownership or a leasehold interest.<sup>55</sup> Therefore, a typical MTE tenant could not authorize an antenna to be placed on the MTE rooftop.

In sum, the FCC, perhaps due to its limited authority over property owners, has not promulgated rules that directly address the issue of

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48. BRAVERMAN & CECIL, *supra* note 20, at 16.

49. 47 U.S.C. § 224(f)(1). *See also* BRAVERMAN & CECIL, *supra* note 20, at 26 (interpreting this statute).

50. BRAVERMAN & CECIL, *supra* note 20, at 26.

51. *See id.* at 28.

52. *See id.* at 26.

53. 47 C.F.R. § 1.4000 (2001). These rules are commonly referred to as the OTARD Rules. *See, e.g.*, FCC Fact Sheet: Over-the-Air Reception Devices Rule, at <http://www.fcc.gov/mb/facts/otard.html> (May 2001).

54. BRAVERMAN & CECIL, *supra* note 20, at 30.

55. *Id.* at 31.

building owners denying telco access. However, a minority of states have attempted to address this issue more directly, with varying degrees of success.

### *B. State Policy*

Today's state level open access rules are rooted in the precedents set by building access laws for cable television in the 1970s. These laws, often repealed on unconstitutional takings grounds, illustrate some of the pitfalls the new era of telecommunications building access laws will have to overcome.

In pondering building access issues for today's world of bountiful telecommunications services, the state legislatures, courts, and public utility commissions have found themselves in the awkward position of interpreting the Act with little guidance from the FCC.<sup>56</sup> The rules they have adopted vary greatly in nature and in depth, but each attempts to clarify and expand upon the Act through regulation of building access. Understanding the approaches taken by the statutes that were repealed, in addition to those that survived scrutiny, both in the historical cable television context and in modern multi-sector laws, offers an excellent summary of the arguments on both sides of the debate.

#### *I. New York*

In 1973, New York enacted Executive Law Section 828, providing one of the first forced access laws for the cable industry. Many states followed, but most repealed their laws shortly after. The New York code mandated that "[a] landlord may not interfere with the installation of cable television facilities upon his or her property or premises" except as to require indemnity for any damages caused by the cable facilities and to set reasonable conditions as to safety and appearance of the premises.<sup>57</sup> Prior to the passage of New York's cable open access law, the state's cable service providers obtained authorization from each property owner touching the cable route,<sup>58</sup> a practice to which they presumably returned after the United States Supreme Court declared the law an unenforceable state-sanctioned taking without just compensation in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>59</sup> Of particular interest in the Court's opinion was footnote 19, which commented:

If Section 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the

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56. See Labaton, *supra* note 2, at C8.

57. 103 N.Y. JUR. 2d *Telecommunications* § 193 (1992) (declared unconstitutional in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

58. *Loretto*, 458 U.S. at 423.

59. *Id.* at 426.

installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. . . The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.<sup>60</sup>

Footnote 19 illustrates the fine line on which forced access policy must tread. Aside from just compensation considerations, the difference between a constitutional open access law and an unconstitutional one may be a matter of old-fashioned manners: Even telcos have to knock before entering.

Perhaps still reeling from its defeat in *Loretto*, New York has not enacted open access legislation or regulations for any other telecommunications sector industries. Despite this, the State's CLECs have continued to grow, albeit under uncertain economic conditions. According to a study completed by the New York State Public Service Commission ("PSC") in December 2001, CLECs' combined market share of the local exchange lines in New York rose from two percent in 1997, to twenty-four percent in 2001, while the number of CLECs grew from thirteen in 1997, to fifty-four in 1999, and back down to forty-six in 2001.<sup>61</sup>

## 2. Connecticut

Connecticut's open access statute effectively requires that landlords grant building access to any telecommunications provider at a tenant's request.<sup>62</sup> The statute is limited to multi-tenant buildings with three or more independent tenants, and expressly includes mobile home parks and institutional facilities.<sup>63</sup> Under this code, Connecticut landlords must grant building access<sup>64</sup> to certified telecommunications providers when at least one tenant in an affected building requests such services, provided

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60. *Id.* at 440 n.19.

61. N.Y. SERV. COMM'N., ANALYSIS OF LOCAL EXCHANGE COMPETITION IN N.Y. STATE: EXECUTIVE SUMMARY (2002), at <http://www.dps.state.ny.us/telecom/e-summary.htm> (on file with author).

62. CONN. GEN. STAT. § 16-247(l)(c)(1) (1999).

63. *Id.* This is significant because the legislature has expressly left tenants in single-family rental homes and duplex units without rights under the statute.

64. Landlords are permitted the right to be present during wiring installation, and may approve or deny the telecommunication provider's preference for wiring location. *Id.* at § 16-247(l)(c). Various searches of the Connecticut Department of Public Utility Control's docket database of final decisions show no cases citing § 16-247(l). See DPUC Final Decision Library, at <http://www.dpuc.state.ct.us/finaldec.html> (last visited Nov. 18, 2003) (documents found in such searches are not service provider and building owner disputes, but are largely administrative documents citing the provision). Similarly, the case does not appear to be cited in any published state or federal court decisions.

that the telecommunications company assumes wiring costs and indemnifies the landlord for any damages caused by wiring. The law explicitly limits its mandate to requests for wiring,<sup>65</sup> leaving wireless providers without remedy. Additionally, the State prohibits “any agreement” between a telecommunications provider and the building owner, manager, or lessee that would “have the effect, directly or indirectly, of diminishing or interfering with existing rights of any tenant . . . to use or avail himself of the services of other certified telecommunications providers.”<sup>66</sup>

### 3. Massachusetts

Citing the states of Ohio, Texas, Nebraska, and Connecticut as trailblazers of non-discriminatory building access legislation,<sup>67</sup> the Massachusetts Department of Telecommunications and Energy, asserting jurisdiction over building owners, enacted a short-lived building access rule in 2000.<sup>68</sup> The rule granted providers of telecommunications and cable services “nondiscriminatory access to any pole, duct, conduit, or right-of-way” except for “valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown.”<sup>69</sup> The regulations also create a rebuttable presumption against the validity of exclusive provider contracts created after the adoption of the regulations.<sup>70</sup> The rules were based on the theory that landowners, by exerting control over rights-of-way critical to various services, constituted “utilities” under state law.<sup>71</sup> BOMA swiftly challenged Massachusetts’ building access rules, winning a judgment in July 2001, which declared the rules an unconstitutional taking of property without just compensation.<sup>72</sup> The Department of Telecommunications and Energy teamed with the Smart Buildings Policy Project to appeal the decision, but the Supreme Judicial Court of Massachusetts also found that defining “utility” to include landowners

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65. “An owner of an occupied building shall permit *wiring* to provide telecommunications service. . . .” CONN. GEN. STAT. § 16-247(1)(c) (1999) (emphasis added).

66. *Id.* at § 16-247(1)(e).

67. *Order Promulgating Final Regulations*, *supra* note 14, at \*18.

68. BRAVERMAN & CECIL, *supra* note 20, at 62.

69. MASS. REGS. CODE tit. 220, § 45.03(1) (2000), available at <http://www.state.ma.us/dpu/telecom/98-36/regs.htm> (enacted July 24, 2000). This section requires nondiscriminatory access by a “utility,” a defined term which includes any “person, firm, corporation . . . that owns or controls or shares ownership or control of poles . . .” *Id.* at § 45.02. The DPU clarifies that this includes MDU owners in its order enacting 220 CMR 45.00. See *Order Promulgating Final Regulations*, *supra* note 14, at Part V.

70. MASS. REGS. CODE tit. 220, § 45.03(1) (2000), available at <http://www.state.ma.us/dpu/telecom/98-36/regs.htm> (enacted July 24, 2000).

71. BRAVERMAN & CECIL, *supra* note 20, at 62.

72. *Greater Boston Real Estate v. Mass. Dep’t. Telecomm. & Energy*, No. 00-4909, 2001 WL 880845, at \*9 (Mass. App. Ct. July 25, 2001), available at <http://www.state.ma.us/dpu/cm/220-045-049.htm>.

went beyond the authority of the Department.<sup>73</sup> BOMA cites this decision as a major victory against “forced telecom access.”<sup>74</sup>

#### 4. Florida

After a brief foray into legislatively mandated open access for cable television, Florida declared its original open access law unconstitutional in 1986.<sup>75</sup> The statute gave tenants the right not to “unreasonably be denied access” to cable television providers.<sup>76</sup> Under the code, landlords were afforded relatively wide latitude in denying access under a series of factors, including whether the landlord installed a means of obtaining a comparable signal, and whether more than one provider serviced tenants at the time of the request.<sup>77</sup> Relying on *Loretto*,<sup>78</sup> the Florida Supreme Court found the open access law, section 88.66 of the Florida Statutes, to be “facially unconstitutional because [it] require[d] a taking of property without due process of law.”<sup>79</sup> However, had the Florida legislature included a compensation provision and a finding that cable television served a “public purpose” under the Florida Constitution, the statute might have withstood scrutiny.<sup>80</sup> This speculation is somewhat weakened by the possibility that the Florida court might conclude, as Michigan’s high court did, that the public purposes advanced by cable television are not compelling enough to justify the taking.<sup>81</sup>

#### 5. Nebraska

After hearing at least one CLEC complaint against incumbent US West Communications, the Nebraska Public Service Commission determined the State needed “a general overall policy regarding access to MDUs.”<sup>82</sup> Relying on what it deemed the “intent” of the Telecommunications Act of 1996 to “open up the telecommunications market to competition,”<sup>83</sup> the Commission found that “residents of

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73. *Greater Boston Real Estate v. Dep’t. Telecomm. & Energy*, 779 N.E.2d 127, 133 (Mass. 2002).

74. Press Release, BOMA, Massachusetts Court Voids Enforcement of Forced Telecommunications Access Regulation (Dec. 4, 2002), at <http://www.boma.org/press/pr120402a.htm> [hereinafter BOMA Press Release 2002].

75. *Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assoc., Ltd.*, 493 So. 2d 417, 420 (Fla. 1986).

76. 34 FLA. JUR. 2d, *Landlord and Tenant* § 79 n. 35 (2000) (citing FLA. STAT. ANN. § 83.66 (2002), *repealed by* 1991 Fla. Laws ch. 91-223, § 4 (repealed 1991)).

77. FLA. STAT. ANN. § 83.66 (2002), *repealed by* 1991 Fla. Laws ch. 91-223, § 4 (repealed 1991).

78. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

79. *Storer Cable T.V.*, 493 So. 2d at 418.

80. *Id.* at 420.

81. *City of Lansing v. Edward Rose Realty*, 502 N.W.2d 638, 643 (Mich. 1993).

82. Commission Investigation to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling Units (MDUs) in Nebraska by Competitive Local Exchange Telecommunications Providers, No. C-1818/PI-23, 1999 Neb. PUC LEXIS 38 at \*1 (Mar. 2, 1999) [hereinafter MDU Residential Access].

83. *Id.* at \*6.

MDUs have generally been unable to reap the benefits of this industry transformation.”<sup>84</sup> In response, the Commission created a mechanism to control MDU access through network elements owned or controlled by incumbents. Although facially this may seem to be yet another regulation concerning interconnection requirements between ILECs and CLECs, the enacting order suggests the intent of the Commission was to “require *building owners and* incumbent telephone companies to give tenants access to the telecommunications carrier of their choice.”<sup>85</sup> This approach differs from other states, like Texas and Massachusetts, which primarily control building access by regulating property owners, rather than ILECs.

The Commission ruled that an ILEC must, upon the request of a CLEC or MDU property owner, establish a minimum point of entry (“MPOE”) “at the MDU property line or at a location mutually agreeable to all parties.”<sup>86</sup> However, the order also provided that a CLEC may also access the property through any other “technically feasible point of entry.”<sup>87</sup> The requesting party is required to pay full costs for the MPOE move. Any CLEC that makes use of an MPOE within three years of its creation is also required to pay a fee based on the number of CLECs accessing the MPOE. Additionally, CLECs must each pay a fee of twenty-five percent of the value of the loop between the demarcation point and the MPOE, and a pro-rata aggregate fee of twenty five percent of the value of the campus wire.<sup>88</sup> US West appealed the Commission’s order, largely on the issue of its proposed mechanism for determining the cost of the campus wire.<sup>89</sup> Nebraska’s rule, predating the FCC order to the same effect,<sup>90</sup> appears to be based on an open access policy,<sup>91</sup> but does not explicitly foreclose the possibility that landlords may exert restrictive controls on carriers’ building access, despite the establishment of an MPOE.

In addition, the Nebraska order prohibits “[e]xclusionary contracts and marketing agreements between telecommunications companies and landlords” as against public policy.<sup>92</sup> Exclusionary contracts include any

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84. *Id.*

85. *Id.* (emphasis added).

86. *Id.* at \*7.

87. *Id.*

88. *Id.* at \*8.

89. See *In re Commission Investigation to Examine the Potential Noncompliance with Commission Orders*, No. C-2534/PI 50, 2001 Neb. PUC LEXIS 100 (May 23, 2001). The Commission’s 1999 order, amended by its clarification in 2000, sought to set price guidelines for campus wire in US West’s territories, but left non-US West territories to negotiate such rates independently or through commission arbitrators. *In re Commission Seeking to Determine Statewide Costs to Establish Rates for Campus Wire at Multiple Dwelling Units*, No. C-2199/PI-35, 2000 Neb. PUC LEXIS 88, \*5 (Aug. 8, 2000).

90. See *First Report and Order*, *supra* note 4, at ¶ 55.

91. “A statewide policy regarding CLEC access to residential MDUs is necessary to protect the rights of MDU residents.” *MDU Residential Access*, *supra* note 82, at \*6.

92. *Id.* at \*9.

contract that is a “barrier to entry,” including, among others, exclusive marketing agreements that have such a discriminatory effect.<sup>93</sup>

#### 6. Texas

Texas is a true standout in MDU access regulation. Since October 2000, Texas MDU owners must generally grant competitive carriers access at any tenant’s request.<sup>94</sup> The rule clearly establishes an open access policy, much to the chagrin of many building management industry representatives.<sup>95</sup>

Upon a tenant request, the requesting carrier has the right to install telecommunications equipment on the property . . . without interference from the property owner . . . at terms, conditions, and compensation rates which are non-discriminatory.<sup>96</sup>

In effect, the regulation also takes away a landlord’s ability to create exclusive service contracts with providers, which would undoubtedly constitute “interference from the property owner.”<sup>97</sup> However, Texas building owners still have a few limited defenses under the regulation. The most significant of these is the right to demonstrate a space constraint prohibiting additional carriers.<sup>98</sup> The Commission gives no specific criteria for certifying a space constraint as legitimate, but only that such constraints may occur in a “space and/or conduit to accommodate the requesting carrier’s request for space.”<sup>99</sup> Practically speaking, this defense will apply best to older buildings, ill-suited to handle a modern utility infrastructure. Space limitations theoretically exist anywhere, but old high-rise buildings often suffer from years of heavy utility build-up in already tight telephone closets and riser space.<sup>100</sup> This problem is particularly acute in cities with older high-rises,<sup>101</sup> which bear the remains of telephone technology evolution.<sup>102</sup> However, Texas, with its relatively new and sprawling cities, is not as likely to suffer from the common utility build-up of the older Northeastern cities.<sup>103</sup> Texas

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93. BRAVERMAN & CECIL, *supra* note 20, at 57.

94. Regulation of Telecomm. Serv., 25 Tex. Reg. 3681, 3682–83 (proposed Apr. 28, 2000) (adopted by the Public Utility Commission of Texas, effective Oct. 10, 2000).

95. Baier, *supra* note 40.

96. 25 Tex. Reg. at 3683 (publishing P.U.C. Sust. R. § 26.129).

97. *Id.*

98. *Id.*

99. *Id.* at 3684.

100. Fan, *supra* note 12.

101. *Id.*

102. See generally, The Evolution of Telephone Cable, at <http://64.90.169.191/applications/telecomm/evolution.html> (last visited Dec. 14, 2003).

103. Texas was admitted to statehood in 1845 as the twenty-eighth state in the Union. Knight Ridder/Tribune Information Services, *A Short Course in U.S. History: The Making of the United States of America*, at <http://www.bjmr.com/usa/seven.htm> (1993). At this point, states in the Eastern and Midwestern United States had undergone more than seventy years of development. Indeed, until the mid-1820’s, Texas was solely the “wilderness” home to many nomadic Native American tribes. Knight Ridder/Tribune Information Services, *A Short Course in U.S. History: The Making of the United States*

building owners may also impose conditions on property access to protect the “safety, security, appearance, and condition of the property” and the “safety and convenience of other persons.”<sup>104</sup> Building owners may establish safety concerns by specifying the specific safety hazard, citing any applicable codes, and allowing the requesting carrier to inspect the property.<sup>105</sup> Apparently, no decisions citing the space limitations or safety defenses have been published.

Texas deals squarely with the obvious takings issue. Requesting carriers and property owners are required to negotiate for a minimum of forty-five days to reach mutually acceptable compensation for property owners’ losses.<sup>106</sup> This compensation may require a tenant or carrier to bear the entire cost of “installing, operating, or removing telecommunications equipment,” and for any property damage caused thereby.<sup>107</sup> Property owners may also minimize their losses by imposing conditions on the amount of time a carrier may have to complete the installation.<sup>108</sup> To address additional concerns, the Commission conducted a Takings Impact Assessment<sup>109</sup> that concluded:

The [Texas] Legislature has stated that it is the policy of this state to “encourage a fully competitive telecommunications marketplace,” and the proposed rule seeks to accomplish that goal. Any takings that may result from this proposed action are not unconstitutional takings because compensation is contemplated under the proposed rule.<sup>110</sup>

The commission made its decision over strong opposition from BOMA and individual, concerned building owners, who presented constitutional challenges in written comments and in public hearing testimony.<sup>111</sup> In rejecting their claims of unconstitutionality, the Commission stated that “[c]ourts, not the commission, must resolve any challenge to . . . constitutionality.”<sup>112</sup> Again, BOMA quickly rose to challenge the building access legislation. However, BOMA faced quite a different outcome in Texas than it did in Massachusetts. In January 2002, BOMA challenged the constitutionality of the Texas building access code, arguing it was an unconstitutional taking of property

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*of America*, at <http://www.bjmjr.com/usa/thirteen.htm> (1993). See also *Texas Pioneer Trails*, at <http://www.brenhamtx.org/history/trails.htm> (last visited Nov. 18, 2003) (noting that Texas was largely undeveloped, at least in terms of roadways, until at least the mid 1800’s).

104. 25 Tex. Reg. at 3683.

105. *Id.* at 3684.

106. *Id.*

107. *Id.* at 3683. (The fact that a landlord can impose such compensation requirements on tenants or on carriers is interesting, but would likely not have much of a deterrent effect on tenants if carriers reimbursed such expenses.)

108. *Id.*

109. The Takings Impact Assessment is available from the Central Records Department of the Public Utility Commission of Texas by referencing Project Number 21400. It is also available at <http://www.puc.state.tx.us>.

110. Takings Impact Assessment, Project No. 21400, 3 (Tex. Pub. Util. Comm’n.).

111. 4 PUB. UTIL. REP., No Docket No., slip op. (Tex. Pub. Util. Comm’n, Sept. 19, 2000).

112. *Id.*

without just compensation, as it had argued in Massachusetts.<sup>113</sup> The Texas state district court declared the access law facially constitutional and denied declaratory judgment for BOMA.<sup>114</sup>

### 7. California

The California Public Utilities Commission (“PUC”) requires California ILECs to establish one MPOE as close as practical to the property line for MTEs built or extensively remodeled after August 8, 1993.<sup>115</sup> In addition, ILECs must permit CLECs access to vacant space in their existing conduit and facilities up to the MPOE in commercial buildings.<sup>116</sup> The combination of these rules should minimize an MTE owner’s ability or incentive to limit CLEC access, at least in newer commercial buildings. Although California has refused to include building owners in its definition of “utility” to subject them to its rules restricting anticompetitive behavior,<sup>117</sup> it has expressed an intention to apply its rules broadly to prevent building owners from unfairly discriminating against CLECs.<sup>118</sup> California has provided detailed procedures for defining “just compensation” for takings of property by telcos and a procedure for building owners filing complaints regarding such takings.<sup>119</sup> BOMA petitioned the PUC to reconsider its building access rules on grounds that they constitute a taking of property without just compensation.<sup>120</sup> BOMA’s request was rejected by the PUC, which argued that under *Loretto* no taking had occurred because:

(1) the PUC’s rules applied where the property owner had already granted access to another [telco], and (2) the PUC did not set rates that building owners could charge for occupation of their property, but instead merely provided that any such rates be applied by building owners on a nondiscriminatory basis to all carriers.<sup>121</sup>

The effectiveness of California’s rules in limiting building owners’ discriminatory behavior has yet to be assessed.

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113. BRAVERMAN & CECIL, *supra* note 20, at 63.

114. *Id.* See also Linda Haugsted, *Texas Building Owners Cry Foul*, MULTICHANNEL NEWS, at [http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc\\_id=65426&display=breaking](http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc_id=65426&display=breaking) News (last visited Feb. 15, 2002) (on file with University of Illinois Journal of Law, Technology & Policy).

115. *Application of Pacific Bell, A Corporation, For Authority To Increase Certain Intrastate Rates And Charges To Telephone Service Furnished Within the State of California; and Related Matters*, Decision No. 92-01-023, 1992 Cal. PUC LEXIS 23, at \*20; 43 CAL. P. U. 2d 115 (Jan. 10, 1992); see also BRAVERMAN & CECIL, *supra* note 20, at 40.

116. Order Modifying Decision 98-10-058 and Denying Rehearing, 2000 Cal. PUC LEXIS 228, at 17 (Mar. 16, 2000); see also BRAVERMAN & CECIL, *supra* note 20, at 40.

117. *State of California Dep’t Transp. v. Crow Winthrop Dev. Ltd. P’ship*, Opinion on Motion to Dismiss, 2001 Cal. PUC LEXIS 512 (Aug. 23, 2001); see also BRAVERMAN & CECIL, *supra* note 20, at 38–39.

118. BRAVERMAN & CECIL, *supra* note 20, at 44.

119. *Id.* at 47.

120. *Id.* at 65.

121. *Id.*

## 8. Ohio

In 1994, the Public Utilities Commission of Ohio (“PUCO”) issued an order asserting that “[n]o person owning, leasing, controlling or managing a multi-tenant building shall forbid or unreasonably restrict any occupant, tenant, lessee or such building from receiving telecommunications services from any provider of its choice, which is duly certified by [PUCO].”<sup>122</sup> No reported PUCO decisions have addressed disputes between CLECs and building owners regarding this order.<sup>123</sup> Although it might be interpreted to be one of the broadest access restrictions on the books, it is probably not being enforced as such. If Ohio’s rule were being enforced with vigor, BOMA surely would have acted against it, as it had in other states.

### C. Exclusive Contracts

To various extents, the states discussed above also ban exclusive provider contracts between building owners and telecommunications companies. These include Texas,<sup>124</sup> Nebraska,<sup>125</sup> Massachusetts,<sup>126</sup> Connecticut,<sup>127</sup> California,<sup>128</sup> Ohio,<sup>129</sup> and New York.<sup>130</sup> In 2000, the FCC placed a ban on exclusive contracts, but limited it, for the meantime, to commercial buildings.<sup>131</sup> Banning exclusive contracts has the potential to eliminate anticompetitive practices by building owners should the pertinent regulatory authority enforce them broadly. However, lobbying efforts from the real estate industry make such broad enforcement policies unlikely. For example, the FCC order instituting the ban

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122. *Investigation Into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, No. 86-927-TP-COI, 1994 Ohio PUC LEXIS 778, at \*20–21 (Sept. 29, 1994).

123. BRAVERMAN & CECIL, *supra* note 20, at 61.

124. “A telecommunications utility shall not enter into an agreement, contract, pact, understanding, or other like arrangement with the property owner to be the sole or exclusive provider of telecommunications services to a specific or defined group of actual or prospective tenants on the property.” 25 Tex. Reg. at 3681, 3683.

125. “Exclusionary contracts and marketing agreements between telecommunications companies and landlords are anti-competitive and are against public policy.” In the Matter of the Commission, On its Own Motion, to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling Units (MDUs) in Nebraska by Competitive Local Exchange Telecommunications Providers, No. C-1878/PI-23, 1999 Neb. PUC LEXIS 38, at \*9 (Mar. 2, 1999). Therefore, the commission believes, “with [an exception for condominiums, cooperatives, and homeowners’ associations operated through a democratic process], that all such contracts and agreements should be prohibited.” *Id.*

126. Massachusetts creates a rebuttable presumption against exclusive contracts as being “more likely than not anti-competitive.” Mass. DTE 98-36-A, slip op. at \*30 (July 1, 2001).

127. CONN. GEN. STAT. § 16-247(l) (2001).

128. *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, 1998 WL 1109255, slip op. at \*48 (Cal. P.U.C. Oct. 22, 1998).

129. *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, No. 95-845-TP-COI, 1996 OHIO P.U.C LEXIS 361, App. A, Part XII.A.3, at \*287 (June 12, 1996).

130. New York prohibits exclusive contracts between landlords and cable television providers. 103 N.Y. JUR. 2D *Telecommunications* § 193 (1992).

131. First Report and Order, *supra* note 4.

appears to rely on an *ex parte* filing by Real Access Alliance, a lobbying group composed of real estate giants such as BOMA, as the basis for distinguishing between commercial and residential buildings.<sup>132</sup> Despite this, the Commission's arguments justifying the ban appear to apply to both residential and commercial buildings. Still, the Commission chose to delay applying the ban to residential buildings until it received further comments on the issue.<sup>133</sup> The FCC claims to base its distinction between residential and commercial buildings on an estimated fourfold differential of revenue potential between residential and commercial real estate, making it difficult for competitive carriers to justify an investment in facilities-based equipment without being ensured some guarantee of long-term service.<sup>134</sup> In support of its ban on exclusive service contracts for commercial buildings, the order states that as "vertically-related firms," building owners and telecommunications providers "inefficiently deter or foreclose entry to a market and thus harm consumers" when they form long-term or exclusive contracts.<sup>135</sup> Although the Commission recognizes that both ILECs and CLECs could use exclusive contracts to their individual advantages,<sup>136</sup> the end result would "restrict competitive access and consumer choice."<sup>137</sup> However, at least one commentator has presented arguments that exclusive contracts may actually stimulate industry competition by allowing competitive carriers to partner with building owners through incentive-based agreements in exchange for the exclusive service of building tenants.<sup>138</sup>

It will be the cruelest of ironies if the FCC's decision to bar all exclusive contracts—regardless of the duration of the contract, the market power of the participants, or their effect on consumers—is the straw that breaks the back of many a CLEC camel. CLECs may fail, in part, because they could not use short-term and investment-protecting exclusive contracts to wrest commercial MTEs away from ILECs.<sup>139</sup>

Contracts banned by the FCC order include: contracts for exclusive service by one provider; contracts for service by two or more providers, to the exclusion of all others; contracts limiting access to providers of particular technology; contracts that make access so difficult that they effectively deny access; and any oral contracts to the same effect.<sup>140</sup> However, the Commission stopped short of prohibiting other forms of

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132. *Id.*, at ¶ 26. For full membership composition of the Real Access Alliance, see Real Access Alliance, *About the Alliance*, at <http://www.realaccess.org/about.htm> (last visited Nov. 18, 2003).

133. First Report and Order, *supra* note 4, at ¶ 27.

134. *Id.* at ¶ 22.

135. *Id.*

136. *Id.* at ¶ 26.

137. *Id.*

138. Christopher K. Sandberg, *Controlling Access to Commercial Users by Telecommunications Providers – The FCC's Failure to Separate the Market*, 27 WM. MITCHELL L. REV. 2239, 2242 (2001).

139. *Id.* at 2253.

140. First Report and Order, *supra* note 4, at ¶ 31.

exclusive access to tenants, such as exclusive marketing contracts or landlord bonuses to subscribing tenants, but sought comments on these topics for future rulemaking.<sup>141</sup> To effectively provide the benefits of a competitive telecommunications service market to all tenants, exclusive contract bans will have to address not only the agreements described in the FCC order, but also patterns of building owner behaviors which result in the shutting out of competitive carriers. Plainly stated, just because they didn't shake on the deal doesn't mean they didn't agree with a wink and a nod.

### III. PROPOSALS FOR FUTURE POLICY CONSIDERATIONS

Considering the current limbo of FCC policy, the vague but pro-competition intent of the Act, and the history of state-sponsored open access measures, creating a bill impervious to constitutional scrutiny and industry objection is no simple task. An impenetrable policy would have to address the various methods by which a landlord can deny building access to competitive carriers without encroaching on the owner's property rights. Provisions might include an extension of the current ban on exclusive provider contracts<sup>142</sup> to include residential properties and to prohibit profit-sharing agreements between building owners and service providers, restrictions on building policies that limit marketing contact with tenants, standards for updating outmoded building infrastructure that might serve as an excuse to limit provider access, and restrictions on prerequisites a property owner might create for building access.

Putting aside the potential federalism issues, and assuming for argument's sake that FCC policy will be to offer the full spectrum of telecommunications services and providers to tenants and landowners alike, a comprehensive set of federal regulations should identify a universal public purpose paramount to individual property rights, provide just compensation to property owners, and dictate control and ownership of network elements in the "last mile." By adequately addressing each of these issues, a cross-industry set of open building access regulations might survive judicial scrutiny.

#### *A. Public Purpose*

Because the installation of network elements inherently invades the property rights of private owners, a sufficient public purpose is required to support state eminent domain over property owners.<sup>143</sup> In order to uphold cross-industry regulation, the chosen public purpose (or purposes) would have to address an issue relevant to cable television,

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141. *Id.* at ¶ 25.

142. *Id.* at Appendix B.

143. *City of Lansing v. Edward Rose Realty*, 502 N.W.2d 638, 645 (Mich. 1993).

local exchange service, wireless carriers, and other services that might potentially be included. New Jersey successfully upheld its cable open access policy based on a public purpose of preventing price gouging by landlords.<sup>144</sup> Although avoidance of price gouging might be effective in upholding standards for compensation to building owners and for prohibitions on extracting access fees from requesting tenants and providers, it seems a weak basis for requiring tenant choice. At least one state court has held that while universal service is a stated fundamental purpose of the Act,<sup>145</sup> it is not, in essence, a “public purpose” unless providing universal service is shown to advance something greater.<sup>146</sup> Additionally, the primary beneficiary of a public purpose must be the *public*, not a private entity.<sup>147</sup> With this in mind, it is unlikely that the promotion of telecommunications competition would suffice as a legitimate public purpose because its focus is market economics, not the needs of individuals. Yet, at the roots of deregulation lie a few essential rationales that may suffice, such as fostering new technology through competition, and consumers’ preference to choose the private companies that might serve them. Together these rationales—fostering technological advances, allowing consumer choice, and avoidance of price gouging—support a comprehensive cross-industry package of building access regulation. They apply equally to the various telecommunications services available today, and have been used successfully to support the deregulation of the telephone industry.<sup>148</sup>

### *B. Just Compensation*

Because cable and wiring installations are often deemed a taking of private property,<sup>149</sup> an open access policy must provide just compensation for the property owner.<sup>150</sup> The factors considered in determining just compensation are beyond the scope of this work. However, the FCC might look to the Texas statute as one possible model.

### *C. Control and Ownership Issues*

In *Loretto*, the Court noted that had New York’s cable access law vested ownership of the network elements in the landlord, the case might have presented “a different question . . . since . . . [o]wnership would give the landlord rights to the placement, manner, use, and possibly the

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144. *Princeton Cablevision, Inc. v. Union Valley Corp.*, 478 A.2d 1234, 1239 (N.J. Super. Ct. Ch. Div. 1983).

145. *See* Telecommunications Act of 1996, 47 U.S.C. § 254(b)(3) (2000).

146. *Edward Rose Realty, Inc.*, 502 N.W.2d at 645.

147. *Id.* at 646.

148. *See* JEFFREY HARRISON ET. AL., *REGULATION AND DEREGULATION: CASES AND MATERIALS* 54 (1997).

149. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982).

150. *Id.* at 441.

disposition of the installation.”<sup>151</sup> An open access law that vests such rights in property owners, as many have recently advocated, might pose a stronger case in the face of real estate industry opposition.

#### IV. CONCLUSION

Despite the lack of case law describing building access disputes between building owners and telcos, regulatory and industry attention to the subject confirms the existence of a serious conflict. Like many issues in technology law today, the debate on building access is interdisciplinary, requiring a careful balancing of antitrust and property rights issues. As the states struggle under the current confused state of regulation, the FCC could offer much needed guidance by implementing, as it intends,<sup>152</sup> comprehensive building access regulations within the scope of its authority. Such regulations must address the issues of public purpose, just compensation, and network element ownership in light of these historical precedents and industry concerns. However, whether the FCC’s purpose is to open MTEs to all players across the diverse telecommunications industry is yet to be seen.

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151. *Id.* at 440 n.19.

152. First Report and Order, *supra* note 4, at Appendix B.