

**Telecommunications:
Satellite Dish Placement,
Inside Wiring and Forced Access**

By Legislative Affairs

Updated July, 2006



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Federal Telecommunications Legislation

The signing of the Telecommunications Act of 1996 was a major milestone in the continuing development of our nation's communications infrastructure. Its intent was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The Act is very broad in its application and addresses emerging national issues such as universal service guarantees to all individuals; deregulation of local telephone and cable television service to promote competition; reforms to regulations which inhibit access to the Information Superhighway; and great access to advanced technologies such as satellite communications.

The commercial real estate industry's concern with the Act and its interpretations is the potential reassignment of property rights due the property owner in favor of telecommunication companies and their equipment. While attempting to guarantee universal access to advanced telecommunications products and services, Congress and the Federal Communications Commission (FCC) needs to be aware of the potential problems and dangers caused by regulations which prevent building owners and managers from managing access to private rights-of-way and to the outsides of their buildings.

Satellite Dishes

The most common over-the-air reception device (OTARD) is the satellite dish antenna. A dish antenna is one meter (39.37") or less in diameter (or any size dish if located in Alaska) and is designed to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite. "Fixed wireless signals" are any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location. Examples include wireless signals used to provide telephone service or high-speed Internet access to a fixed location. The FCC first addressed satellite dishes in an August 1996 Order providing general guidelines and a framework for the use and placement of satellite dishes for various property types: homeowners associations, residential rental units, and commercial buildings.

A property owner or manager must take heed of the guidelines set forth by the Telecommunications Act and subsequent rulings promulgated by the FCC regarding the placement of OTARDs. For example, state and local laws as well as building regulations, private covenants and homeowners' association rules may not restrict the use of OTARDs. Specifically, a rule or regulation is prohibited if it "unreasonably delays or prevents installation, maintenance or use, it "unreasonably increases the cost of installation, maintenance or use and if it prevents reception of an "acceptable quality signal."

In order to restrict installation, maintenance or use of OTARDs, building owners and managers must follow these guidelines:

- Meeting clearly defined safety objectives (must be non-discriminatory, meaning that it applies to other physical objects the size or shape of the dish);
- Protection of property in a historic district that is registered or eligible for the National Register of Historic Places; and
- Undo burden is not placed on an affected antenna user to comply with the aforementioned allowable restrictions.

An example of an acceptable restriction would be a mandated distance between dishes/antennae and power lines.

Homeowners Associations

In August 1998, the FCC clarified its position on the rights of users who intend to install dishes on property types governed by homeowners' associations. The question had been raised as to whether or not the phrase "exclusive use or control" could be extended to areas that while exclusively used by an owner are legally accessible to condominium associations, maintenance personnel, etc. The FCC confirmed that a unit owner has the right to install a dish in areas such as balcony that has been designed to be used only by that unit owner/tenant even if association management or maintenance personnel has access to that areas.

A homeowners association may restrict the placement of satellite dishes if the association has installed a larger dish for the use of all the owners (viewers) of the building. The following rules apply:

- The viewer must be able to receive whichever programming service they prefer.
- The reception must be equal to or better than the reception the viewer would receive with an individually designated dish.
- The costs associated with using the central dish cannot be greater than the cost of an individual dish.
- The decision and/or installation of a central antenna cannot delay the viewer's ability to receive video service.

Residential Rental Units

Tenants on rental properties may install satellite dishes on balconies, porches and other properties with leaseholds. In particular, tenants may do the following:

- Install an antenna inside their unit;
- Install an antenna in exclusive use areas (patios, decks and balcony railings); and,
- Install an antenna on a mast, not more than twelve (12) feet above the roofline

Tenants may not install an antenna on exterior walls or in common areas and they may not drill holes through exterior walls to accommodate any wiring for the antenna.

In response, a building owner or manager has the ability to do the following:

- Enforce clearly defined and legitimate safety restrictions;
- Enforce state and local fire, electrical and building codes
- Require that dishes meet defined specifications
- Require a reasonable security deposit (reasonable being defined as \$100 or less);
- Require indemnification and insurance; and
- Charge more rent for those units facing south.

The Real Access Alliance, made up of commercial real estate industry organizations, filed a petition for review before the U.S. Court of Appeals challenging the FCC's final rule allowing tenants to place satellite dishes on balconies, patios and on masts not more than twelve (12) feet above roofline. In July 2001, the U.S. Court of Appeals ruled that Order 98-273, issued by the FCC, would remain in effect.

Inside Wiring

Inside wiring refers to wiring required for telephone, cable and internet services between the "point of demarcation" and the inside of the property. The point of demarcation is that point at which operational

control or ownership of communications facilities changes from one organizational entity to another. At the demarcation point, a telephone/cable provider is allowed to cut the inside wiring if the owner/tenant does not renew its cable contract. A wire is considered inaccessible to a telephone/cable provider if it is embedded in brick, metal conduit, cinder block or Sheetrock. Sheetrock was added to the list as recently as January 2003. If the wire is inaccessible, the demarcation point is at the next nearest practical place, usually a lock box or junction box.

FCC regulations include several important guidelines:

- Incumbent multi-channel video programming distributors (MVPDs) have thirty (30) days to remove, sell, or abandon home run wiring, after a multiple dwelling unit building (MDU) owner has chosen a new provider, or permits two or more providers to compete on a unit-by-unit basis. Further, it allows building owners first right of refusal to purchase the wiring. If the owner does not wish to purchase the wiring, the MVPD may sell the wiring to the incoming provider.
- Consumers may provide or install their own cable wiring inside their unit, as long as the cable operator's wiring is not substantially altered or harmed.
- Telephone and cable demarcation points are 12" from where the wire enters a subscriber's dwelling.
- The building owner may require the incumbent local exchange carrier (LEC) to move the demarcation point to the minimum point of entry (MPOE) to give competing telephone providers greater access.
- Old telephone/cable providers must cooperate with new telephone/cable providers in order to ensure a smooth transition. A timeframe is set in order to avoid any service interruption.
- These rules apply to franchised cable providers, like Time Warner Cable, Comcast, and Cox Communications as well as private cable operators also known as multi-channel video programming distributors.

Forced Access

Since the passage of the Telecommunications Act of 1996, states have attempted to pass legislation and/or regulations related to telecommunications reform. Since the FCC regulations regarding OTARDs and inside wiring are specific and open to little interpretation, state legislatures and public utility commissions have focused their reform efforts on defining real property rights-of-way pertaining to open access and competition for telecommunication providers. Property owners and managers have diligently fought any measure that grants unimpeded access to their properties in the name of competition. Several industry organizations, including the Institute of Real Estate Management, organized the Real Access Alliance in order to respond to any legislation and regulations introduced that could jeopardize property owners rights.

Forced access refers to the mandatory access granted to telecommunication providers to multi-tenant properties. A forced access requirement (mainly to foster competition) for one provider could mean all providers are allowed access on the same terms and conditions. In January 2001, the FCC came very close to regulating access through the Building Access Order and Notice of Proposed Rulemaking. Its provisions follow:

- Building owners are prohibited from entering into "exclusive contracts" with telecommunication providers for service in commercial buildings (including industrial and retail.) *Residential properties are not included.*
- Contracts may not contain clauses restricting access to other telecommunication providers.

The Real Access Alliance (RAA) developed a model lease agreement for commercial office space. The prototype contract is designed to speed up delivery of telecommunication services to office building tenants. The model lease agreement fulfills a promise made by the RAA to the FCC in 2000. Due to the efforts of the

RAA, the FCC has repeatedly rejected the telecommunication industry's requests for rulings on forced access. The FCC has indicated that it is willing to wait and evaluation the voluntary initiative of the commercial real estate industry before setting forth rules that are unnecessary.

State Activity

The Real Access Alliance (RAA) has also had success in holding off forced access in the states. On several occasions a state legislature or public utilities commission (PUC) has issued legislation or rules to allow forced access upon the request of local telecommunication providers. In the past year, the RAA successfully fought efforts in Arizona, Florida, Massachusetts, Mississippi, New Mexico, and South Carolina.

Despite the successes of IREM and RAA in defeating numerous forced access proposals, Indiana and Rhode Island recently enacted laws in support of telecom providers.

Florida Activity

The Florida State Senate released a report in September, 2005, that concluded "it is recommended that no [mandatory access] legislation be filed at this time." The Real Access Alliance (RAA) made an impact on the Senate's decision.

Legislation had been filed in the past, often seeking to intervene and mandate that the property owner or manager allow access to the multi-tenant property to promote telecommunication competition. Under case law, that cannot be done without providing sufficient compensation—compensation which the telecommunication companies are currently unwilling to pay.

IREM and RAA continue to lobby against forced access in Florida, and have been watching for a possible regulatory effort by the Public Service Commission. Concern stems from the report, which stated "the issue can be addressed, to a large extent, by changes in business practices and by rulemaking at the Public Service Commission."

The RAA predicts the report will jump start a regulatory effort, but one addressing the need to free the Caller of Last Report (COLR) from their obligations when they are denied access, rather than to address mandatory access.

Indiana Law

The Governor of Indiana signed legislation into law in March, 2006, rewriting the state's telecommunications laws and providing for forced access. Office buildings and office parks are subject to forced access; however, apartment buildings, condominiums, and subdivisions are not.

Proponents had promoted the legislation as a telecom rewrite and avoided discussing the forced access provisions in committee. Unfortunately for the real estate industry, no hearings were held on those provisions. If hearings had been held, Indiana IREM chapter leadership would have had the opportunity to testify.

Indiana IREM members are currently watching for an Indiana Utility Regulatory Commission docket to create rules to implement the law as a way to reduce the burden or to create a legitimate space or safety exemption.

Louisiana Legislation

On July 12, 2006, the Governor of Louisiana vetoed HB 699, which would change the cable video service franchise guidelines throughout the state. While the bill does not provide for mandatory access, it includes language in support of real estate management with regard to clarifying access to private property.

House Bill 699, as amended, states nothing contained in it could be construed to grant a cable or video service provider the right to construct facilities on private property without the consent of the property owner. If the applicant (i.e. a cable company) desires to construct or place facilities on private property, the consent of the landowner is required.

The Governor's main reason for vetoing the bill is concern that it could result in significant revenue loss to local governments. The Governor has encouraged proponents and opponents of the bill to work together on a model local ordinance that will create franchise opportunities for all companies.

IREM will continue to monitor legislative proposals in the Louisiana House and Senate during the next legislative session.

North Carolina Utilities Commission Final Order

The North Carolina Utilities Commission (NCUC) issued an order and rule on its inside wire proceeding on January 12, 2006. The order was the third and final order issued, and like the first two, it does not mandate access to private property in favor of telecommunications providers. The Real Access Alliance (RAA) successfully lobbied the NCUC to make the Order more favorable to real estate; however, the Order does not include everything the RAA lobbied for.

The new rule establishes NCUC oversight of any preferred provider contract (PPC) executed by a carrier in North Carolina. The carrier, not the property owner, is the party subject to oversight. A PPC is defined in the rule as "a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers."

The NCUC bans a carrier from agreeing to three terms RAA understands to be common in PPCs. The Order bans:

- Exclusive access agreements (see Appendix C for explanation);
- Exclusive provisioning terms (i.e. PPC cannot require an owner that permits a telephone company access to the development to bar that company from providing services other than phone service); and
- Use of weighted contracts in a PPC unless the carrier elects a new status in North Carolina titled "Electing Provider," which must permit others to use their unbundled local loops and must register the PPC with the NCUC.

As a result of the Order, real estate managers could find carriers using the Order as a means to release themselves from fees owed pursuant to access agreements, claiming that such payments are now barred. The Order does not ban payments in existing or future contracts provided the carrier complies with the NCUC Order. Real estate managers should make certain contracts do not permit a carrier, by their inaction, to be the beneficiary of the ban on weighted contracts in PPCs. Further, future access agreements should clearly state there is an ongoing obligation of the carrier to comply with all NCUC prerequisites for the payment of an access fee in any contract, regardless of whether the terms of the agreements renders it a PPC.

In addition, real estate managers, especially those in the residential sector, may be challenged to make an access agreement attractive enough for a carrier to serve their building and provide an access fee for such access and not run afoul of the new rules.

Real estate managers should consider ways to achieve their goals without entering into a PPC, since the triggering event of the Order is a carrier entering into a PPC. For instance, there is no ban on a real estate professional entering into an exclusive marketing agreement with a provider. An independent agreement need not address access terms at all.

If a real estate manager chooses to enter into a PPC, rather than providing advantageous terms to the initial PPC carrier, the manager might consider developing very high standards and require any second or third carrier seeking access to meet those same standards. Whereas the economies of scale do not favor second and third providers, the high entry cost may serve to ensure consumers have access to cutting edge services, while providing the carrier with the type of marketplace advantage that would serve to justify them serving the manager's property.

Rhode Island Law

Forced access requirements for cable television (CATV) in Rhode Island were expanded to include telephone, telecommunications, and information services after Rhode Island House Bill 7752 became law on July 3, 2006.

Under the new law, tenants “have the freedom and right to select the provider of cable television, telephone, telecommunications, or information service to their living unit, without any restraints, limitations or conditions imposed by a landlord.” Those service providers are entitled to “reasonable access” for maintenance of any equipment installed on the property.

Of concern to IREM is the issue of compensations which is left to arbitration in superior court. Owners and landlords are prohibited from collecting compensation from tenants whose subscription to telecommunication services necessitates the installation and maintenance of equipment on their property.

The provisions made for compensation from the service providers themselves include strict guidelines and restrictions:

After receiving notice from a service provider that they intend to install equipment on their property, owners and landlords are given 20 days to inform the provider if any payments more than the “nominal amount” of \$1.00 are required. The service provider then has 30 days to accept the owner's request, after which the landlord can bring action in superior court to collect.

Before HB 7752 became law it was amended making some concessions to the interests of property owners and managers. Specifically, service providers who affix facilities to the dwelling of a tenant must:

- Do so at no cost to the landlord.
- Indemnify landlords for damages arising from installation and operation.
- Not interfere with the safety, functioning, appearance, or use of the dwelling.
- Not interfere with the rules and regulations of the owner dealing with the day-to-day operations of the property.
- Present and review with the owner, prior to installation, all plans and specifications.
- Abide by reasonable installation requests by the owner.
- Upon request of owner, provide certification of insurance covering all employees and equipment.

However, the issue of cost and interference is subject to court action; and the statute does not provide any recourse for an owner who does not approve of the plans and specifications presented by the provider.

APPENDIX A: Questions Property Owners/Managers Should Ask Regarding State Telecomm Regulation and Legislation

Does the legislation or public utility commission rule/order speak at all on the access rights that telecom companies have to private rights-of-way?

Any legislation or rule that defines what an accessible right-of-way is should not include private rights-of-way in that definition.

Does the legislation or rule/order specifically mandate forced access to buildings by telecom providers?

In certain cases, a state may choose to provide very specific language regarding access to private property, rather than leaving the job to the public utility commission.

Does the legislation or rule/order provide property owners and managers the ability to negotiate with telecom companies when discussing access to buildings?

Does the legislation or rule prohibit exclusive contracts between building owners and telecommunication service providers?

APPENDIX B: FAQ Over-the-Air Reception Device Rule

If I live in a condominium or an apartment building, does this rule apply to me?

The rule applies to antenna users who live in a multiple dwelling unit building, such as a condominium or apartment building, if the antenna user has an exclusive use area in which to install the antenna. “Exclusive use” means an area of the property that only you, and person you permit, may enter and use to the exclusion of other residents. For example, your condominium or apartment may include a balcony, terrace, deck or patio that only you can use, and the rule applies to these areas. The rule does not apply to common areas, such as the roof, the hallways, the walkways or the exterior walls of a condominium or apartment building. Restrictions on antennas installed in these common areas are not covered by the Federal Communication Commission’s rule. For example, the rule would not apply to prohibit restrictions that prevent drilling through the exterior wall of a condominium or rental unit.

Does the rule apply to condominiums or apartment buildings if the antenna is installed so that it hangs over or protrudes beyond the balcony railing or patio wall?

No. The rule does not prohibit restriction on antennas installed beyond the balcony or patio of a condominium or apartment unit if such installation is in, on, or over a common area. An antenna that extends out beyond the balcony or patio is usually considered to be in a common area that is not within the scope of the rule. Therefore, the rule does not apply to a condominium or rental apartment unit unless the antenna is installed wholly within the exclusive use area, such as the balcony or patio.

If I live in a condominium, cooperative, or other type of residence where certain areas have been designated as “common,” do these rules apply to me?

The rules apply to residents of these types of buildings, but the rules do not permit you to install an antenna on a common area, such as a walkway, hallway, community garden, exterior wall or the roof. However, you may install the antenna wholly within a balcony, deck, patio, or other area where you have exclusive use.

Drilling through an exterior wall, e.g. to run cable from the patio into the unit, is generally not within the protection of the rule because the exterior wall is generally a common element. You may wish to check with your retailer or installer for advice on how to install the antenna without drilling a hole. Alternatively, your landlord or association may grant permission for you to drill such a hole. The Commission’s rules generally do not cover installations if you drill through a common element.

If my association, building management, landlord, or property owner provides a central antenna, may I install an individual antenna?

Generally, the availability of a central antenna may allow the association, landlord, property owners, or other management entity to restrict the installation by individuals of antennas otherwise protected by the rule. Restrictions based on the availability of a central antenna will generally be permissible provided that: (1) the person receives the particular video programming or fixed wireless service that the person desires and could receive with an individual antenna covered under the rule (e.g., the person would be entitled to receive service from a specific provider, not simply a provider selected by the association); (2) the signal quality of transmission to and from the person’s home using the central antenna is as good as, or better than, the quality the person could receive or transmit with an individual antenna covered by the rule; (3) the costs associated with the use of the central antenna are not greater than the costs of installation, maintenance and use of an individual antenna covered under the rule; and (4) the requirement to use the central antenna instead of an

individual antenna does not unreasonably delay the viewer's ability to receive video programming or fixed wireless services.

May the association, landlord, building management or property owner restrict the installation of an individual antenna because a central antenna will be available in the future?

It is not the intent of the Commission to deter or unreasonably delay the installation of individual antennas because a central antenna may become available. However, persons could be required to remove individual antennas once a central antenna is available if the cost of removal is paid by the landlord or association and the user is reimbursed for the value of the antenna. Further, an individual who wants video programming or fixed wireless services other than what is available through the central antenna should not be unreasonably delayed in obtaining the desired programming or services either through modifications to the central antenna, installation of an additional central antenna, or by using an individual antenna.

I live in a town home community. Am I covered by the FCC rule?

Yes. If you own the whole townhouse, including the walls and the roof and the land under the building, then the rule applies just as it does for single family home, and you may be able to put the antenna on the roof, the exterior wall, the backyard or any other place that is part of what you own. If the townhouse is a condominium, then the rule applies as it does for any other type of condominium, which means it applies only where you have an exclusive use area. If it is a condominium townhouse, you probably cannot use the roof, the chimney, or the exterior walls unless the condominium association gives you permission. You may want to check your ownership documents to determine what areas are owned by you or are reserved for your exclusive use.

I live in a condominium with a balcony, but I cannot receive a signal from the satellite because my balcony faces north. Can I use the roof?

No. The roof of a condominium is generally a common area, not an area reserved for an individual's exclusive use. If the roof is a common area, you may not use it unless the condominium association gives you permission. The condominium is not obligated to provide a place for you to install an antenna if you do not have an exclusive use area.

I live in a mobile home that I own but it is located in a park where I rent the lot. Am I covered by the FCC rule?

Yes, the rule applies if you install the antenna anywhere on the mobile or manufactured home that is owned by you. The rule also applies to antennas installed on the lot or pad that you rent, as well as to other areas that are under your exclusive use and control. However, the rule does not apply if you want to install the antenna in a common area or other area outside of what you rent.

APPENDIX C: Real Access Alliance FAQ on FCC Building Access Order

What is an exclusive contract?

An exclusive contract is any oral or written contract that explicitly or effectively restricts a building owner or its agent from providing access to a telecommunications service provider other than the provider that holds the current contract, the “exclusive contract”. An exclusive contract includes not only a contract that gives the contracting provider the sole right to serve a building, but also may include a contract with a competitive provider that could permit access to that party and the ILEC, by deny access to any other competition.

What is affected by the ban on exclusive contracts?

The prospective ban on exclusive contracts affects only commercial buildings. The FCC defines commercial buildings as “any multiunit premises that are predominantly used for non-residential purposes, including for-profit, non-profit, and governmental uses.” Retail and industrial properties are included within the definition of “commercial buildings”, but residential buildings and hotels are not included.

What does the ban on exclusive contracts mean?

The ban means that telecom provider may not enter into a contract with an owner of an office, retail, industrial or other commercial building for that provider to be the sole provider of telecommunications services to that building, or to be the only alternative to the ILEC in that building.

What about existing written contracts?

The FCC Order does not limit the ability to abide by the terms of an existing written contract for the term of the contract.

APPENDIX D: Telecommunication Talking Points for CPMs

Use the following talking points to underscore the commercial real estate industry's position on this issue:

- The commercial real estate industry is opposed to any rule that would allow private individuals or companies to have unobstructed access to private rights-of-way.
- Unrestricted access to buildings is an infringement upon private property rights. While the commercial real estate industry supports competition among telecommunication service providers, it cannot support “unrestricted access” to real property as a means to that end. Government interference in this case amounts to a “taking” without just compensation as well as the possible reduction in property value due to unlimited installation of satellite dishes and increased safety and security problems.
- Unrestricted access to real property by any number of telecommunication companies disrupts and undermines the property owner or managers ability to responsibly manage complex building systems as well as ensure service reliability, tenant safety and safety code compliance.
- Unrestricted access to inside wiring unfairly burdens property owners and managers with much, if not all, of the costs and liability associated with such access. Existing properties have limited space available for installation and maintenance of telecommunications systems and unrestricted access forces owners to incur costs for expansion and renovation of riser cable space.
- A property owner or manager is uniquely qualified to coordinate the conflicting needs of multiple tenants/residents and their service providers.

Reference

IREM Statements of Policy

Telecommunications Reform and Deregulation

<http://www.irem.org/sec1ins.cfm?sec=publicpolicy&con=professionalism.cfm&par=#Tel>

Sources for Telecommunication Information

Federal Communications Commission

<http://www.fcc.gov/mb/>