

FCC Takes Steps to Open Access to Multi-Tenant Buildings

By Neil S. Ende
Technology Law Group, Washington, DC

WASHINGTON, D.C. - September 14, 2000 - In the Telecommunications Act of 1996, Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." The focus of the Act's pro-competitive policies was on the introduction of competition into bottleneck local exchange and exchange access telecommunications markets.

Bottlenecks currently exist at several levels of the local telecommunications marketplace. The first and key bottleneck is the local exchange companies continuing market power and control over the facilities required to provide local exchange services. Under the auspices of the Act, the FCC and state authorities are moving, albeit slowly, to reduce this market power and control.

For some time, however, the FCC and state regulatory authorities have also struggled with the bottleneck that exists in the so-called "last hundred feet"; this is, in gaining access from the street to customers, principally in large buildings and building complexes. The FCC has correctly recognized that the bottleneck in the "last hundred feet" is a major impediment to competition in the local exchange. The FCC has also come to believe that both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises.

Thus, in implementing the pro-competitive policies set forth in the Act, the FCC has initiated a number of wide-ranging rulemaking proceedings designed to address these "last hundred feet" issues. The ultimate goal of these proceedings is to ensure that newly competitive providers will have reasonable and nondiscriminatory access to the rights-of-way, buildings, rooftops, and facilities necessary to gain access to customers, particularly those customers located in multiple tenant environments.

The primary legal basis for addressing these access issues is Section 224 of the Act. Section 224 requires the Commission:

to regulate the rates, terms, and conditions for attachments to poles, ducts, conduits, or rights-of-way to ensure that such rates, terms, and conditions are just and reasonable, except where such matters are regulated by a State. The right of access granted under section 224 includes access for facilities used to provide wireless telecommunications services.

In its building access rulemakings, the FCC has tentatively concluded that:

(i) utilities must permit access to rooftop and similar rights-of-way and riser conduit that they "own or control" in multiple tenant environments.

(ii) utilities, including LECs, must provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control.

(iii) utilities, including LECs, must provide cable television systems and telecommunications carriers with access to property that the utility owns which it uses as part of its distribution network.

(iv) utilities, including LECs, must provide cable television systems and telecommunications carriers all rights-of-way owned or controlled by a utility, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used.

(v) where a utility uses its own property in a manner equivalent to that for which it might obtain a right-of-way from a private landowner, the utility should be considered to own or control a right-of-way within the meaning of Section 224 and thus make it available to others on a non-discriminatory basis.

The FCC has sought comments on a number of key issues. These issues include:

(i) the legal and policy issues raised by a possible requirement that building owners who allow any telecommunications carrier access to facilities that they control make comparable access available to other carriers on a nondiscriminatory basis; measure that would preclude building owners from entering into exclusive contracts for providing access to their premises.

(ii) whether the FCC should reconsider its tentative conclusion that Section 224 does not confer a general right of access to utility property but only governs attachments to utility "pole[s], duct[s], conduit[s], or right[s]-of-way."

The issues raised in the building access dockets are both extremely important and controversial. They pit local exchange companies and major building and real estate owners -- who have a substantial financial interest in retaining control over their property and access to the customers on their property -- against competitive providers who need and want access to these assets. The FCC's tentative conclusions reflect a good first step in ensuring customers have access to the services they need, but the fight has just begun! Stay tuned for round-by-round details.

Neil S. Ende is the founder of and a partner in Technology Law Group LLC, a Washington-based telecommunications law firm. He can be reached by phone at +1 202 895 1707 and by e-mail at nende@tlgdc.com