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Telecom Providers Get Increased Access

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Recent state and federal regulatory developments have significantly affected the degree of control that certain types of property owners may exert over the provision of telecommunications services to their properties. Last October, the Texas Public Utility Commission adopted rules requiring that owners of multitenant properties (primarily office buildings and apartment complexes) provide nondiscriminatory right of access to any provider whose service has been required by a tenant. At about the same time, the Federal Communications Commission (FCC), while stopping short of a mandatory access requirement, acted to prohibit providers from entering into exclusive contracts to serve commercial properties.

These actions were prompted by a desire to promote competition in the formerly monopolistic local exchange telecommunications market. In 1995, the Texas Legislature passed legislation intended to deregulate the local exchange market, and in 1996 Congress adopted the Federal Telecommunications Act (FTA), which had the same intended effect and which preempted many aspects of The Texas Legislation. The goal of both initiatives was to establish a framework for competition in the market for local service and to encourage that competition to be "facilities based," by infrastructure rather than relying on access to that of the incumbent provider.

In 1995 Texas legislation included the adoption of SS54.259-261 of the Public Utility Regulatory Act (now the Texas Utilities Code). Those sections generally provide that if a tenant of a multitenant commercial or residential property requests service from a certified telecommunications provider, the property owner must allow that provider to access its property to install equipment and serve that tenant. Access must be granted on terms and conditions that don't discriminate among providers or discourage a tenant from freely selecting a provider.

The rules adopted last fall implement these statutory requirements and generally require that, absent legitimate safety concerns or space constraints, a property owner must provide a competitive provider access to its property. The rules set forth detailed procedures for securing access, resolving access disputes and determining the reasonableness of compensation paid to property owners. The rulemaking proceeding featured a spirited battle between property owners (seeking to protect rights to control access to their property) and competitive providers (seeking access to potentially lucrative commercial and residential customers).

Access Agreements

While the FTA didn't contain any specific corollary to the PURA provisions enacted in Texas, the general thrust of the FTA was to facilitate local competition. For that

reason, the FCC also engaged in rulemaking to consider property-access issues, it pitted many of the same interests against each other as had squared off in the Texas rulemaking. Ultimately, the FCC declined, for now, to adopt a mandatory access requirement, but it has prohibited providers from entering into exclusive contracts to be the sole provider of services to multitenant commercial properties.

The FCC reserved the right to consider a nondiscriminatory access requirement in the future, as well as an extension of its ban on exclusive contracts to service apartment complexes. The FCC also made certain utility-controlled areas on private property are subject to expanded access rights and provided for a relocation (at property owner's request) of the "point of demarcation"-the point at which ownership (and repair and maintenance obligations) of telecommunications wiring located on and in multitenant property passes from the provider to the property owner.

Texas is one of the four states that adopted a mandatory access requirement. The others are Nebraska, Connecticut and Massachusetts. Each has approached the issue somewhat differently, although with the same goal in mind: facilitating competitive provider access to multitenant properties.

In each of these states and at the FCC, one of the fundamental concerns has been whether mandatory access results in a taking of private property. While there is hardly a consensus on this issue, the general response has been that because property owners are compensated for access to their property, any taking of property is accompanied by reasonable compensation and is therefore permissible. A challenge to the Nebraska statute as an alleged taking - *Nebraska Public Service Commission v. Aliant Midwest*, 619 N.W.2d 809 (Neb.2000)- was remanded by the state's Supreme Court to determine whether the method of compensation (in that instance to the incumbent provider whose network was made available to competitive providers) was reasonable. Any future legal challenges to these state or federal rules likely will feature a takings claim as part of the attack.

The evolution of these various rules has made the negotiation and drafting of telecommunications access agreements an important service for property owners and competitive telecommunications service providers.

Issues that typically receive considerable attention are term, indemnification, compensation, tenant waivers (in favor of landlords), scope of authorized services, non-interference clauses and insurance requirements. This area continues to evolve, and practitioners should consider the possibility of further action by the state, the FCC or the courts.