

# **Telecommunications – Forced Access Toolkit**

**Prepared for the Telecommunications Special  
Interest Group  
June 2005**



Building Owners and Managers Association (BOMA) International  
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## **Introduction**

Telecommunications legislation and regulation, at the federal, state, and local levels, must preserve the viability of a free and effective marketplace that respects private property. Forced building entry privileges for telecommunications service providers (TSPs) are unnecessary, unmanageable, and unconstitutional. BOMA International and local BOMA associations are strongly opposed to such initiatives.

In this era of deregulated telecommunications services, some TSPs, rather than marketing their services to building owners and tenants, are seeking government mandates to use others' private property for their own economic benefit. These interests are asking legislators and regulators to ignore the valid concerns of property owners and tenants by mandating forced building entry.

Mandatory access does not aid building tenants and undermines a successfully working marketplace. BOMA members recognize that pleasing occupants by providing a wide array of choice is our best means of retaining those tenants. Currently, 80% of buildings have two or more TSPs providing service and almost 60% offer access to three or more providers. Moreover, building owners and managers are willing to meet tenants' requests for specific providers.

This toolkit provides sample talking points and letters to your state's Public Service/Utility Commission, Governor and Legislature. If you have questions or need additional information, please contact James Cox, Director of State & Local Affairs at (202) 326-6364 or [jcox@boma.org](mailto:jcox@boma.org).

## Sample Talking Points

- Currently, tenant access to cutting edge telecommunications is served by a successfully working marketplace. A competitive telecommunications marketplace is important to our tenants and is, therefore, vital to us.
- 80% of buildings have more than a single TSP providing service and almost 60% offer access to three or more providers.
- The telecommunications sector has suffered from bankruptcies and dishonest executives, not from a lack of access to customers.
- Such forced access regimes compel building owners to assume maintenance, liability and financial responsibility for telecom wiring regardless of owners' objections, space limitations, and safety and security concerns.
- Deny you the ability to bring in an alternative provider by granting them an exclusive right to serve tenants in your building or development, regardless of whether the development is commercial, residential or retail.
- Ban your right to have exclusive contracts with telecommunications providers, or determine what telecommunications companies may access the tenants in your development or office building.
- Ban your ability to require referral or access fees in future contracts based on the number of tenants in your building/development or the percentage of tenants choosing service.

## Sample Public Service/Utility Commission Comments

<Name>

<Company Name>

<Address>

<Telephone Number>

<Date>

Before the <State>  
Public Service/Utility Commission

<Docket No.>

IN RE: <State> Public Service/Utility Commission  
Establishing Rulemaking Proceedings Regarding <Issue>

Comments in Favor/Opposition

### I. Summary

As a real estate owner/developer (or real estate professional), I write to express my strong opposition to the proposed <Issue> as outlined in the <Type of Order> filed <Date> in the above captioned matter. The proposed ban on such agreements will result in a large number of telephone companies gaining access to private property over the objection of the property's owner and undercut the ability of property owners to entice competitive voice, video and data providers to residential developments. The <State> real estate community will be filing comments with the Commission that will provide in detail why the proposed rule should be rejected. I write to share with the Commission my personal beliefs for the proposal's rejection.

### II. Background

<Company Name> is in the commercial real estate business. We <Discussion of number of properties developed, owned and/or managed, sizes, locations, and other relevant information>

My primary objections to the proposed rule are:

- The rule is unnecessary as the competitive marketplace will protect consumers' access to the provider of their choice.
- The proposed rule threatens safety, security and property rights.
- The Public Service/Utility Commission lacks authority over private real estate owners, and therefore, any effort to regulate access to our properties is an overreaching act.

- The proposed rule change will result in an unconstitutional taking of my private property rights.
- The rule is not necessary as the marketplace protects tenants.
- The commercial real estate business is fiercely competitive, and if we did not provide our tenants with access to the latest telecommunications services, our business could not survive.

Modern telecommunications is critically important to our commercial tenants. No business can survive in today's economy without effective and up-to-date telecommunications services. For that reason, we do everything we can to ensure that our tenants receive all the services they desire at a reasonable cost. **<Insert information on any of your buildings that accommodate multiple providers>**

#### IV. The Proposed Rule Threatens Safety, Security and Property Rights

The proposed rule change will not only harm our economic interests, but those of our tenants and the public at large. This is because the rule change would interfere with our ability to effectively manage our properties and provide our tenants with a “quiet enjoyment” of the premises. We cannot meet these responsibilities unless we retain the right to coordinate tenant and telephone company actions within the limited physical space in our buildings dedicated to telecommunications facilities.

Real estate developers and owners have always been concerned about the security of their buildings and tenants. Following September 11, 2001, this concern has been elevated. The proposed rule undermines the heightened security required in buildings as it provides for access to any multi-tenant building in favor of any telephone company employee without requiring identification, bonding or regulation of conduct.

Beyond the threat of intentional damage to our buildings, there is the threat of negligent or inadvertent personal or physical damages resulting from Telco employee actions. Given the public's justified concerns about personal safety, we simply cannot allow service personnel to go anywhere they please in our buildings without our knowledge.

Finally, we are responsible for compliance with local safety and building codes, and we are the front line in their enforcement. We cannot ensure compliance with such requirements if we do not have control over who does what work in our buildings, or when and where they do it. Limiting our control in this area will unfairly increase our exposure to liability and adversely affect public safety.

#### V. The Rule Results in an Unconstitutional Taking

The Fifth Amendment of the U.S. Constitution prohibits the government from "taking" private property for a public purpose without just compensation. Adoption of the proposed rule, by granting access to our properties over our objections as documented by executed agreements with the provider of our choice would result in a "taking" of private property without just compensation. The Supreme Court in *Loretto v. Teleprompter*

*Manhattan CATV Corp.* 458 U.S. 420 (1982), struck down a similar rule to the instant proposal as a *per se* taking.

VII. Conclusion

The proposed rule is unnecessary, an overreaching by the <State> Public Service/Utility Commission, as well as resulting in an unconstitutional taking. On behalf of my company and my tenants, we urge the commission to reject the proposed rule or in the alternative to hold hearings to craft a rule that provides real protections for real estate owners and tenants. Thank you for your attention to our concerns.

Sincerely,

<Your Name>

<Title>

<Company Name>

## Sample Letter to Legislature/Governor

<Date>

The Honorable <Governor's/Legislator's Name>  
<Governor, State of XXXX> or <State Senate/House of Representatives>  
<Address>

Re: <Bill Number>

Dear <Governor/Senator/Representative>:

On behalf of <Company Name>, please accept this letter as notification of our opposition to <Bill Number>. The bill amends <State Statute or Legislative Act> through unreasonable provisions allowing for telecommunications action to commercial private property. By failing to recognize a property owner's right to a fair rent and not adequately addressing building safety and security issues, this legislation is dangerous to building occupants and to real estate development.

Telecommunications legislation and regulation at the federal, state and local levels must preserve the viability of a free and effective marketplace that respects private property. In our considered opinion, forced building access privileges for telecommunications service providers are unnecessary, unmanageable and unconstitutional.

In this time of deregulated telecommunications services, some service providers, rather than marketing their services to building owners and tenants, are seeking government mandates to use others' private property for their economic benefit. These interests are asking legislators and regulators to ignore the valid concerns of property owners and tenants by mandating forced building access. This is the main thrust of House Bill 281.

Government mandated access will hamper the development of a robust marketplace for competitive telecommunications services. While a marketplace that offers choice in telecommunications service providers is important to our tenants, it is vital to our members. For an office building to remain competitive, it must offer not only a wide array of telecommunications services and technologies, but also a number of choices in service providers. If we do not provide our tenants with access to the latest services, they will go elsewhere.

The federal government and over thirty states have debated the issue of mandatory access and not a single state has adopted the type of proposal outlined in <Bill Number>. A similar regulation was enacted in Massachusetts but voided, first, by a trial court opinion stating it was unconstitutional and, later, by a state Supreme Court finding that the regulation was beyond the scope of the department's authority.

The state of Texas provides for mandatory access, but limits such access to a company certified by the state's Public Utility Commission as a qualified entity. Texas also provides the real estate owner with the right to deny entry to a certified carrier for safety or space limitation reasons. No such protections are afforded <State>'s real estate owners.

We are confident that with your leadership, <State> will continue to foster a marketplace designed to provide tenants with access to competitive service providers and protect our property rights.

Sincerely,

<Your Name>

<Title>

<Company Name>