

FCC Adopts Rules to Increase Broadband and Cable Competition in Multi-Tenant Environments

In a [Report and Order and Declaratory Ruling](#) (Order) released on February 15, 2022, the Federal Communications Commission (FCC) unanimously adopted new rules intended to give tenants in multi-tenant environments (MTE)—such as apartment buildings, office buildings, and shopping malls—greater choice in selecting broadband and cable service provider services, as well as more transparency about the nature of such providers' business arrangements with MTE owners. The rules prohibit providers of broadband, cable systems, multichannel video programming, and wireless internet for fixed locations from entering into certain revenue sharing agreements with an MTE owner. The new rules also require providers to disclose the existence and nature of exclusive marketing arrangements they may have with MTE owners. Lastly, the FCC clarified that existing rules for cable inside wiring prohibit sale-and-leaseback arrangements between providers and MTE owners. Taken together, these new rules represent a clear statement that the FCC will no longer accept certain preferential business practices between MTE owners and broadband and cable service providers.

Revenue Sharing Agreements

In the Telecommunications Act of 1996, the U.S. Congress directed the FCC to adopt rules to promote competition between telecommunications carriers and prohibit certain unfair practices by covered multichannel video programming distributors (MVPDs). In response, the FCC issued a series of orders in the early to mid-2000s prohibiting agreements between telecommunications providers and MTE owners and between certain MVPDs and MTE owners that grant the provider or MVPD exclusive access and rights to provide service to the MTE. However, in the roughly 20 years since the FCC adopted these prohibitions, industry participants developed certain practices that arguably undermined the goals of the FCC's rules.

Chief among these developments were exclusive revenue sharing agreements and graduated revenue sharing agreements. In an exclusive revenue sharing agreement, the provider offers the MTE owner consideration in return for the provider obtaining access to the building and its tenants and prohibits the MTE owner from accepting similar consideration from any other provider. In a graduated revenue sharing agreement (also known as a "tiered" or "success-based" agreement), a provider pays an MTE owner a greater percentage of revenue as its penetration in the building increases. Under this type of agreement, the greater the number of tenants the provider serves, the more compensation the MTE owner receives on a pro rata basis.

The Order concluded that because exclusive and graduated revenue sharing agreements disincentivize MTE owners from allowing competing providers access to their buildings and tenants, both types of agreements are anticompetitive and constitute de facto exclusive access agreements. As a result, the Order prohibited providers from not only executing new revenue sharing agreements of these types but also enforcing existing revenue sharing agreements of these types on a going-forward basis. For existing agreements with exclusive and graduated revenue sharing terms, compliance with the prohibition on enforcing such terms will be required 180 days after publication of the Order in the Federal Register, whereas for new agreements, the prohibition will take effect 30 days after publication of the Order in the Federal Register.

Exclusive Marketing Arrangements

The FCC's Order also took aim at exclusive marketing arrangements, which allow a provider to gain the exclusive right to market its service to tenants of an MTE, usually in exchange for some form of consideration. Although exclusive access arrangements have been prohibited for decades, whether and to what extent exclusive marketing arrangements were permitted under existing FCC rules was an open question prior to the Order's adoption. Exclusive marketing arrangements can take many forms. For instance, a broadband provider may be given the exclusive right to leave mailers at tenants' doors or to send sales representatives into an MTE. In exclusive marketing arrangements, MTE owners often steer tenants to that provider as the "preferred" service provider. As a consequence of this action, tenants can end up confused about what services are available in the building and are often unaware that they have the ability to choose a different provider.

To address this issue, the Order adopted rules requiring providers to disclose the existence and nature of exclusive marketing arrangements to MTE tenants. Specifically, the disclosure must (1) be included on all written marketing material from the provider directed at tenants or prospective tenants of the affected MTE; (2) identify the existence of the exclusive marketing arrangement and include a plain-language description of the arrangement and what it means (including that such arrangement does not mean that the provider is the only entity that can provide services to the tenants and that service from alternative providers may be available); and (3) be made in a manner that it is clear, conspicuous, and legible. The disclosure requirement will come into force for new exclusive marketing arrangements after the Office of Management and Budget (OMB) completes its review of the requirement pursuant to the Paperwork Reduction Act. As for existing arrangements, the FCC will not enforce compliance with the disclosure requirement until the later of the completion of OMB's review or 180 days after the Order is published in the Federal Register.

Sale-and-Leaseback Agreements

Starting in 1993, the FCC adopted rules governing the disposition of cable wiring owned by an MVPD after service is terminated by a subscriber living in a residential MTE or by a residential MTE owner. Of particular relevance, these "cable inside wiring" rules (1) prohibit providers from using any ownership interests in property located on the subscriber's side of the demarcation point to prevent, impede, or in any way interfere with a subscriber's right to use his or her home wiring to receive an alternative service; and (2) require incumbent providers to take reasonable steps within their control to ensure that alternative service providers have access to the home wiring at the demarcation point. However, the existing cable inside wiring rules were silent as to whether sale-and-leaseback arrangements—which involve an incumbent provider conveying its inside wiring to a residential MTE owner and then leasing it back on an exclusive basis—contravene these requirements.

Based on the text, history, and purpose of the rules, the FCC clarified that its existing rules prohibit sale-and-leaseback arrangements that "frustrate" a subscriber's ability to benefit from the FCC's cable inside wiring rules. The prohibition on sale-and-leaseback arrangements will become effective on the same day that the amendments to the rules concerning revenue sharing agreements and exclusive marketing arrangements become effective.

Takeaways

The FCC's recent actions align with the Commission's overarching efforts to increase broadband and cable access for all Americans, particularly the one-third of Americans living in multi-unit buildings. It is worth noting, however, that the rules adopted in the Order mark a further engagement by the FCC into the commercial

relationships of service providers with MTE building owners. These recent actions demonstrate that the FCC under Chairwoman Jessica Rosenworcel, who was confirmed in December 2021, is more likely to probe the competitive nature of long-followed MTE industry practice.

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