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FCC Further Restricts Exclusivity of Communications Providers in Multitenant Environments

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I. Overview

The Federal Communications Commission (FCC) recently released its long-awaited order adopting new rules prohibiting certain business arrangements between telecom and cable providers and owners of multiple tenant environments (MTEs). The FCC, under the authority of the 1992 Cable Act and 1996 Telecommunications Act, has long prohibited exclusive access agreements between providers and MTE owners, and also regulates unused inside wiring in MTEs to ensure incumbent video providers do not block competitive video providers from providing service in MTEs. In its Report and Order GN Docket No. 17-142 (Order), the FCC adopts the following rules to cover additional business practices:

1. A prohibition on revenue sharing agreements between telecom or cable providers and MTE owners, which either give the incumbent provider the exclusive rights to revenue share or a graduated basis above all other providers;

2. A requirement to disclose the existence of exclusive marketing arrangements with MTE owners in simple, easy-to-understand language;

3. A declaratory ruling clarifying that 47 C.F.R. § 76.802 regarding cable inside wiring prohibited so-called “sale-and-leaseback” arrangements, which effectively deny access to alternative providers.

This Order directly affects (1) telecommunications carriers (whether serving residential or commercial MTEs) and (2) cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors (collectively, multichannel video programming distributors (MVPDs)) serving residential areas. The FCC’s Order does not reach broadband-only providers, and the sale-and-leaseback rules only affect MVPDs already affected by the inside wiring rules. MTE owners also are affected by virtue of being the counterparty to the types of agreements covered by the rules. Notably, the revenue sharing restriction applies to any deals between providers and MTE owners regardless of the date of execution, but the sale-and-leaseback ban tentatively applies only to deals executed in 2017 or later.

II. The Order

In 2019, the FCC sought comment via a Notice of Proposed Rulemaking (NPRM) about whether the following business practices block consumer choice in MTEs, and whether the FCC should ban or otherwise regulate these practices: (1) revenue sharing agreements where providers compensate MTE owners with a portion of a provider's revenue generated by the building's subscribers; (2) sale-and-leaseback deals between providers and MTE owners, which effectively become exclusive wiring arrangements by virtue of giving a provider an exclusive lease in wiring owned by an MTE (but originally conveyed to the MTE by the provider); and (3) exclusive marketing arrangements between MTE owners and MVPDs, which the FCC declined to prohibit in a 2010 decision.[1] The FCC indicated concern that these practices have the same kind of negative effect on consumer choice as banned exclusive access agreements and inside wiring practices.

In the Order, the FCC concluded that these new practices do potentially hinder competition contrary to federal law. The FCC took strong action on revenue sharing agreements and sale-and-leaseback deals for inside wiring, as well as a softer disclose-only approach for exclusive marketing agreements.

1. Two Categories of Revenue Sharing Agreements Prohibited

The Order adopts rules prohibiting providers from entering into two types of revenue-sharing agreements with MTE owners:

1. Exclusive revenue-sharing agreements with an MTE Owner where a provider pays an MTE owner in exchange for access to the MTE and prohibits the MTE owner from agreeing to a similar agreement with other providers.[2]

2. Graduated revenue-sharing agreements with an MTE owner, where a provider pays an MTE owner a greater percentage of revenue as its penetration in the building increases.[3]

The FCC's primary rationale for prohibiting these types of agreements is that they are clearly anti-competitive and amount to a de facto exclusive access agreement that the FCC already prohibits.[4] The prohibitions apply to both future and existing agreements.[5] Affected providers will have 180 days after the publication of this Order in the *Federal Register* to finalize the removal of any such arrangements in existing agreements with MTEs.[6]

2. Providers Must Disclose Exclusive Marketing Arrangements

Another rule established in the Order will require providers to disclose the existence of exclusive marketing arrangements with MTE owners on all written marketing material directed at tenants or prospective tenants of an affected MTE. The provider must explain in clear, conspicuous, legible, and visible language that the provider has the right to exclusively market its communications services to tenants in the MTE; that such a right does not suggest that the provider is the only entity that can provide communications services to tenants in the MTE; and alternative providers are available.[7] The FCC declined to prohibit exclusive marketing agreements entirely, but will continue to monitor the impact of exclusive marketing arrangement on competition.[8]

3. Declaratory Ruling Clarifying That 47 C.F.R. § 76.802(j) Prohibits Sale-and-Leaseback Arrangements

The FCC's cable inside wiring rules exist to ensure subscribers can quickly and easily use the pre-existing wires in their homes to connect to an alternative video programming service.[9] Prior to this Order, Section 76.802(j) of the FCC's rules required existing MVPDs to take certain reasonable steps to allow customers to switch providers despite using the prior provider's wiring, and prohibited existing providers from using owned wiring as a means to block customers from switching providers. But some MVPDs began to build out in MTEs, sell the wiring to the MTE owner, and have the MTE owner lease back the wiring to the provider on an exclusive basis.[10] Many commenters took the position that this deal structure seeks to circumvent Section 76.802(j) by placing ownership of the wires in the MTE, which is not regulated by the FCC. The FCC agreed, and it ruled that such sale-and-leaseback agreements violate 47 C.F.R. § 76.802(j) despite placing ownership of the wiring in MTEs. However, the FCC declined to prohibit sale-and-leaseback agreements between providers and commercial MTE's.[11] Also, the FCC indicated it will primarily examine sale-and-leaseback arrangements finalized in 2017 or later, though this enforcement guidance is likely subject to change.[12]

III. Conclusion

Telecom carriers and MVPDs should review existing agreements with MTE owners to determine whether any such agreements contain any of the practices regulated by this Order. As the only entity in the provider-MTE relationship regulated by the FCC, the provider likely bears the onus to make any necessary changes to existing MTE deals within the 180-day timeline ordered by the FCC. Providers may want other favorable terms to make up for lost commercial benefits under these new rules, which MTE owners may not want to give. MTE owners may consult the severability clause of the applicable deal to determine whether this change in the law requires renegotiation or simply alters the deal without any other changes. If negotiations look to take longer than 180 days after the rules become effective, providers may need to seek waivers from the FCC. Providers will likely need to create new processes to ensure future MTE deals and marketing programs comply with the new rules given that the rules governing prospective deals and programs may take effect as soon as 30 days after these rules are published in the *Federal Register*.

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[1] Order at ¶¶ 6–7.

[2] Order at ¶ 16.

[3] *Id.*

[4] Order at ¶¶ 21, 24.

[5] Order at ¶ 27.

[6] Order at ¶ 32.

[7] Order at ¶ 33.

[8] Order at ¶ 37.

[9] Order at ¶ 48.

[10] Order at ¶ 52.

[11] Order at ¶ 54.

[12] Order at ¶ 60.

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