



July 2017

FCC Opens Inquiry on Telecom/Broadband Services Exclusivity in Commercial and Residential Multi-Family Environments

Agreements between owners of commercial and residential buildings and providers of telecommunications and multichannel television services (cable TV and satellite TV) have long been subjects of controversy, particularly when such agreements prohibit or limit opportunities for commercial tenants or residents of multifamily properties (such as condos, rental apartments, and gated communities) to obtain services from other providers. Those concerns have grown with the advent of broadband service which provides for high speed access to the Internet. As a result of these concerns, on June 23, 2017, the Federal Communications Commission (FCC) opened an inquiry into the current state of broadband competition in commercial and residential multiple tenant environments (MTEs). MTEs include commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, and cooperatives occupied by multiple entities.

The FCC has established rules prohibiting such building exclusivity agreements applicable to telecommunications common carriers (*e.g.*, telephone companies) and cable operators. Those rules have been sustained by reviewing courts, are in effect, and today largely preclude exclusive access by telecom companies and cable operators to such buildings. However, the FCC remains concerned about limitations on consumer choice MTEs, particularly with regard to broadband service. In its notice of inquiry, the FCC has requested public comment on numerous issues regarding such exclusivity agreements and their impact on consumer choice. If and when the FCC adopts additional rules governing such agreements, it is likely that those changes will affect business transactions between real estate developers, condo associations, as well as commercial and residential occupants of MTEs on the one hand, and telecom, cable, and broadband providers on the other.

When a governmental department or agency issues a notice of inquiry, it is not proposing to adopt rules. Rather, it is seeking information as to whether there are problems which might warrant rules. Depending on how the FCC views the record established in response to the inquiry notice, it may then issue a notice of proposed rulemaking in which it proposes new or revised rules. The fact that the FCC is sufficiently concerned about broadband consumer choice in commercial and residential MTEs indicates that there is a possibility of further regulation of such business arrangements.

In the inquiry notice, the FCC asks about exclusive marketing agreements and bulk billing agreements. Exclusive marketing agreements between building owners and service providers afford the providers (telecom companies, cable operators, etc.) the exclusive right to engage in certain on-premises marketing activities. Those activities may include, for example, welcome letters from the providers, promotional information about providers on building websites; displays in common areas such as building lobbies, meeting rooms, etc.; sponsoring events on the premises; and the right to deliver promotional materials to individual units. Bulk service agreements (a common practice in the cable TV industry) typically involve a single entity such as a condo association being the bulk “customer” which is then charged a discounted price for a combination of phone, cable and Internet service multiplied by the number of units in the MTE. All MTE residents or tenants then are charged for the service through their condo association dues or rental fees and are, in effect, forced to pay for the service even if they also obtain service from another provider. In 2010, the FCC determined that exclusive access and bulk billing arrangements provide benefits to consumers and are permissible. The fact that the FCC is inviting comment once again on those practices indicates that the FCC may be willing to limit or prohibit such practices in the future.

The FCC notice also asks about exclusive wiring agreements, specifically whether incumbent providers must make their in-premises wires available to competitors when consumers no longer purchase the incumbent’s services. Also, the FCC asks about revenue arrangements between MTE owners and service providers. For example, many agreements commit the service provider to compensating the MTE owner for each residential unit to which the provider has access – a practice commonly called a “door fee.” The FCC asks a series of questions about such arrangements. Finally, the FCC asks whether state or local laws and regulations may be inhibiting broadband deployment and competition within MTEs.

Initial comments on the FCC notice of inquiry are due **July 24**; reply comments are due **August 22**. Owners and operators of commercial MTEs, including commercial office buildings and shopping malls as well as owners of residential MTEs such as residential apartments, condominiums, and co-ops may be affected by the FCC’s findings. Such entities may wish to share their views with the FCC.

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