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FCC Proposes New Rules to Govern Communications, Video, and Broadband Services at Multiple Tenant Buildings

The Federal Communications Commission (FCC), in an effort to spur deployment and utilization of broadband service and to encourage broadband competition, is again inserting itself into the business arrangements between commercial and residential real estate developers on the one hand, and providers of telephone, video, and broadband Internet service, on the other hand.

On July 10, 2019, the FCC voted to commence a rulemaking proceeding which will consider important rule changes governing the relations between owners/operators of multiple tenant buildings (including residential buildings such as rental apartments, condos and co-ops, and gated communities, as well as commercial office buildings, office parks, etc.) and telecom/video/broadband providers. This action is the latest in a series of FCC actions taken over the past two decades addressing exclusive building access, exclusive marketing agreements, access to in-building wiring, and bulk service agreements. This rulemaking follows a 2017 notice of inquiry on the same subjects. (See our July 6, 2017, *GT Advisory*, “[FCC Opens Inquiry on Telecom/Broadband Services Exclusivity in Commercial and Residential Multi-Family Environments](#)”). These latest FCC rule proposals should be of profound interest to developers of residential and commercial properties, condominium homeowners’ associations, and owners/managers of rental apartments, and to providers of telecommunications services, multichannel video services (including cable TV providers), and providers of broadband Internet access service.

The FCC's key proposals include the following:

1. Revenue Sharing Arrangements. There are many agreements between telecom/video providers and building owners which provide for compensation from the latter to the former in return for the right to provide service to residents, tenants, etc. Such compensation arrangements may include one-time payments by the providers to the developers for each residential unit within the facility (sometimes called a “door fee”), or may include ongoing sharing of revenues received for such services. Sometimes, the compensation may be non-monetary, for example, when a service provider provides at no charge Wi-Fi to building common areas. Currently, compensation arrangements, whether monetary or non-monetary, are permissible and are not subject to FCC regulation. Now, the FCC is proposing either to require that such payments be disclosed or that they be prohibited altogether.
2. Rooftop Access and DAS Facilities. The FCC long has prohibited agreements which grant one telecom or video provider exclusive access to multitenant buildings. Now it proposes to go further and specifically prohibit exclusive access to building rooftops. Wireless carriers need access to rooftops not only to serve occupants of the building but also to deliver their wireless signals to nearby locations. The FCC also proposes to prohibit exclusive access to Distributed Antenna Systems (DAS). DAS or “small cell” antennas are used to deliver stronger wireless coverage within buildings. Such signal strength is necessary to accommodate 5G networks (the next generation of wireless networks).
3. Exclusive Access to Building Wiring. The FCC proposes to regulate agreements between building owners and service providers which allow for exclusive access by one provider to in-building wiring, including the wiring between individual residences and the so-called demarcation point at a central location within the building but outside an individual residence. In some cases, exclusive access to inside wiring is achieved through sale-and-leaseback arrangements in which the building owner owns the inside wiring but leases the wiring to the service provider who maintains the wiring. In a 2007 decision, the FCC prohibited exclusive **building** access but did not prohibit exclusive access to in-building wiring. Now the FCC is proposing to similarly forbid, or at least, limit, exclusive access to inside wiring.
4. Exclusive Marketing Agreements. In 2007, the FCC held that exclusive marketing agreements are permissible since they provide benefits to consumers. An exclusive marketing agreement grants one service provider the exclusive right to market its services to building residents. This includes such marketing rights as direct solicitations when residents move into the building or residential development and at other times, placement of promotional materials at the building, and even service demonstrations in building lobbies, meeting rooms, and other common areas. Under existing law, no provider may have exclusive access to serve a building, but one provider may obtain (usually for some kind of payment) an exclusive right to market its telephone, video, and broadband services to building residents. Now the FCC is proposing to limit exclusive marketing arrangements or to require disclaimers or disclosures when such arrangements exist.

Significantly, the FCC's rulemaking notice does not propose rule changes regarding bulk service agreements. Under a bulk service arrangement, a single entity (a homeowners' association in the case of a condo, or a building owner in the case of a rental apartment building) buys a combination of telephone, video, and Internet service (or some of those services) at a discounted rate multiplied by the number of units in the building, and then “resells” the service to residents through homeowners' association dues or rent. Bulk service arrangements were determined by the FCC to be permissible in 2007. However, in its 2017 notice of inquiry, the FCC re-opened its consideration of bulk service agreements and invited

comment on whether such agreements may limit opportunities for competition and availability of service alternatives within multi-tenant environments. Based upon the comments received in response to the 2017 inquiry, the FCC has chosen not to propose rules to prohibit, limit, or otherwise regulate bulk service arrangements.

What Happens Next

The July 10 FCC action is, in part, a notice of proposed rulemaking. (It is also a declaratory ruling in which the FCC preempts a San Francisco, CA, ordinance which requires the sharing by competing service providers of in-use inside wiring.). Within a few weeks, the rulemaking notice will be published in the Federal Register. That publication will establish comment dates for interested persons to comment to the FCC on the proposals summarized above and to address the numerous questions asked by the FCC regarding those proposals. These proposals would potentially impede private property rights of building owners. On the other hand, their proponents will assert that the proposals will encourage broadband deployment and adoption and will promote telecom/video/broadband competition.

The FCC proposals also raise important legal issues. For example, the FCC justified its rules governing telecommunications access on Title II of the Communications Act which gives the FCC jurisdiction over telecommunications common carriers. The FCC based its video service access rules on Title VI of the Communications Act which affords the FCC authority to regulate multichannel video services, including cable service. However, the FCC's stated objective in this rulemaking is to stimulate broadband deployment and utilization. Due to a 2017 FCC ruling, broadband Internet access service has been classified as an information service and subject only to Title I of the Communications Act. Therefore, it is neither a telecommunications service nor a cable service and is not subject either to Title II or Title VI of the Communications Act. The FCC will need to develop another legal basis to justify the rules proposed. In fact, the FCC rulemaking notice specifically invites commenters to address the legal basis for the proposed rules.

Interested persons may want to submit comments on these proposals. Greenberg Traurig's [Technology, Media & Telecommunications Practice](#) is available to assist or to answer questions about the proposed rule changes governing telecommunications, video, and broadband service at multitenant environments.

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