

NMHC Member Resource:

Navigating the FCC's New Multiple Tenant Environment Order

BY

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The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific fact circumstances or business situations. For specific legal advice, consult your attorney.

ABOUT NMHC

Based in Washington, DC, NMHC is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Nearly one-third of Americans rent their housing, and almost 15 percent live in an apartment (buildings with 5 or more units). For more information, contact NMHC at 202/974-2300, e-mail the Council at info@nmhc.org, or visit NMHC's Web site at www.nmhc.org

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BACKGROUND

On February 15, 2022, the FCC issued a Report and Order and Declaratory Ruling (the “Order”) in a proceeding that apartment owners have been watching closely for nearly five years. The FCC opened this docket, under the title of “Improving Competitive Broadband Access to Multiple Tenant Environments (“MTEs”),” to examine the terms of agreements between broadband providers and owners of residential, office and retail properties.

NMHC and other real estate industry groups submitted the views of the apartment industry and the broader real estate sector in response to three separate requests for comment from the FCC, in 2017, 2019, and 2021. NMHC members and industry stakeholders provided detailed Declarations and several rounds of survey data to demonstrate the success of the market in deploying superior levels of service to the vast majority of apartments. NMHC representatives also met with FCC staff on numerous occasions.

The Order does four things:

1. **Prohibits Sale and Leaseback Wiring Agreements:** The Order interprets the FCC’s existing cable inside wiring rules and determines that “sale and leaseback” agreements are prohibited under those rules.

2. **Prohibits Graduated Revenue Share Agreements:** The Order adopts new rules that prohibit cable operators and telecommunications providers from entering into new agreements that contain provisions that obligate the provider to pay an apartment owner compensation on a graduated basis, and from enforcing such provisions in existing agreements.

3. **Prohibits Exclusive Revenue Share Agreements:** The Order adopts new rules that prohibit cable operators and telecommunications providers from entering into new agreements that contain provisions that prohibit the property owner from receiving compensation from another provider, and from enforcing such provisions in existing agreements.

4. **Requires Exclusive Marketing Agreement Disclosure:** Finally, the Order adopts new rules that require cable operators and telecommunications providers to disclose the existence of any exclusive marketing agreement to all residents or prospective residents of any apartment property subject to such an agreement.

WHAT TYPES OF PROVIDERS ARE AFFECTED BY THE ORDER?

Not all providers are subject to the new requirements. Providers that offer only broadband services (including VoIP) are not covered at all by the Order and may enter into any kind of agreement with a property owner.

The prohibition on sale and leaseback agreements applies to cable operators and all other multichannel video programming distributors (“MVPDs”), including private cable operators (“PCOs”) and direct broadcast satellite (“DBS”) providers.

The prohibition on graduated compensation, the prohibition on exclusive compensation, and the exclusive marketing disclosure requirement all apply to common carriers (i.e., telecommunications providers), cable operators, and MVPDs other than PCOs and DBS providers.

WHAT TYPES OF PROPERTY OWNERS ARE AFFECTED BY THE ORDER?

The new rules impose no obligations on property owners of any kind because the FCC has no authority to regulate the activities of property owners. Instead, as it did in 2007 when it banned exclusive access agreements, the FCC achieves its goals simply by regulating the actions of communications providers.

The Order states that the new rules apply regardless of the nature of the underlying real estate asset, so that in principle the rules could apply to contracts with owners of residential, commercial office, and retail properties. Nevertheless, the FCC must rely on different authority when regulating common carriers than when it is regulating cable operators and other MVPDs. Therefore, the new rules governing common carriers apply to contracts with “multiunit premise owners.” This includes residential, office, and retail properties. On the other hand, the rules governing cable operators and other MVPDs apply only to contracts with multiple dwelling units.

In any case, as a practical matter, the new requirements apply only to residential properties because the affected contract provisions rarely (if ever) arise in the office or retail context.

SUMMARY OF KEY PROVISIONS OF THE NEW ORDER & RULE

Prohibition of Graduated Revenue Payments

Providers are prohibited from entering into or enforcing contract terms under which the provider pays the property owner compensation on a “graduated basis.” The term “graduated basis” means that the amount paid by the provider increases as the total number of renters adopting the service increases. While such specific terms are void, it appears that the remaining terms of an underlying contract remain enforceable. The language of the new rule refers to “contracts,” rather than to contract “terms” or “provisions,” but the discussion in the text of the Order states that if a revenue sharing arrangement (which would include a graduated revenue arrangement) “is part of a larger contract, the remainder of that contract is unaffected.” Therefore, we think that the FCC intends to invalidate only the graduated payment provision.

The rule does not bar compensation based on the provider’s total revenues, compensation based on the number of units at the property, or payment of a specific dollar amount. The ban applies to both existing and future contracts.

- For future contracts, this prohibition will take effect 30 days after publication of the Order in the Federal Register.
- For contracts that are in existence as of 30 days after publication of the Order in the Federal Register, the ban will take effect 180 days after Federal Register publication.

Prohibition of Exclusive Revenue Share Agreements

Providers are prohibited from entering into or enforcing contract terms that give the provider the exclusive right to receive compensation in return for access to the property. As with graduated payments, any such term in a contract is void, but it appears that the remainder of the agreement remains enforceable.

The ban applies to both existing and future contracts.

- For future contracts, this prohibition will take effect 30 days after publication of the Order in the Federal Register.
- For contracts that are in existence as of 30 days after publication of the Order in the Federal Register, the ban will take effect 180 days after Federal Register publication.

SUMMARY OF KEY PROVISIONS OF THE NEW ORDER & RULE (CONT.)

Prohibition on Sale and Leaseback Wiring Agreements

The Order finds that sale and leaseback arrangements violate 47 C.F.R. § 76.802(j), which prohibits cable operators from interfering with a subscriber's right to use cable home wiring to receive an alternative service, and requires cable operators to take reasonable steps to ensure that alternative providers have access to the cable home wiring.

The Order defines a “sale and leaseback arrangement” as “an arrangement whereby an incumbent provider conveys its inside wiring—typically both home and home run wiring—to a residential MTE owner and then leases it back on an exclusive basis.” The Order expands on and clarifies this definition in several ways:

- The prohibition applies to any “conveyance” of the wiring, rather than a “sale.” In other words, the provider does not have to receive any payment or other consideration for a transaction to fall within the definition.
- The Order excludes from the ban “contracts for the installation of new wiring and related facilities in which the MTE owner (or affiliates(s)) will have the sole ownership interest.” Thus, agreements in which a provider installed or will install wiring on behalf of the owner are not affected.
- The Order also excludes circumstances in which the building owner acquires the cable home run wiring after a subscriber terminates service and declines to purchase the wiring under the current cable inside wiring rules.

As noted above, if a revenue sharing arrangement (which the FCC deems to include sale and leaseback arrangements) is part of a larger contract, the rest of the contract is still enforceable. But that discussion is separate from the discussion of the sale and leaseback ban, so it is not entirely clear whether the Order invalidates only the sale and leaseback terms of a contract, or the entire agreement. Still, we think that the FCC intends that only the sale and leaseback terms are affected. It is also important to note that existing and future contracts that address wiring already owned by the property owner on the effective date of the contract are not affected.

SUMMARY OF KEY PROVISIONS OF THE NEW ORDER & RULE (CONT.)

The ban applies differently to contracts based on when they were entered into:

- The Order states that the FCC will not apply the sale and leaseback prohibition to contracts entered into before June 23, 2017.
- The terms of existing contracts entered into after June 23, 2017, that address the transfer of ownership of existing wiring to the property owner and grant the provider the exclusive right to use the wiring, are void when the Order takes effect. The Order becomes effective 30 days after publication in the Federal Register.
- New construction is not exempt from the Order, but providers and owners are free to structure new deals (including upgrades) so that they comply with the Order, by ensuring that their contracts do not convey ownership of wiring from the provider to the owner.

Requirement to Disclose Exclusive Marketing Agreement

Providers are required to include a statement in all written marketing material that is directed at renters or prospective renters at a property subject to an exclusive marketing agreement. This does not include broader advertising that is directed at the general public. The statement must: (i) disclose the existence of the exclusive marketing right, (ii) include a plain language description of the agreement, and (iii) be clear, conspicuous, and legible. The plain language description must state that the provider has the exclusive right to market to tenants, that the exclusive right does not mean that the provider is the only provider that can serve tenants of the property, and that an alternative provider may be available.

The ban applies to both existing and future contracts.

- For future contracts, this requirement will take effect upon completion of review of the new requirement by the Office of Management and Budget.
- For existing contracts, the requirement will take effect the later of 180 days after Federal Register publication, or completion of review of the new requirement by the Office of Management and Budget.

POSSIBLE FUTURE ACTION

The Order does not ask for further comment on any issue, nor does it indicate that the FCC intends to issue a future order addressing other issues. The Order does say, however, that the FCC will monitor the state of competition, and the FCC has not closed the proceeding. Therefore, the FCC could at some point adopt additional rules governing the terms of contracts between broadband providers and property owners.

NMHC will continue to monitor the proceeding and lead our industry's advocacy in pressing the FCC and other policymakers to avoid imposing new regulations on providers and property owners that will ultimately work against our shared goal of boosting deployment and modernizing our broadband infrastructure.