

# How New FCC Rule Will Improve Telecom Options for Tenants

By **John Reardon and Emily Edwards** (September 22, 2022)

On Sept. 26, millions of Americans who live in apartment buildings or work in office complexes will gain newfound access to competitive telecommunications services, thanks to a new Federal Communications Commission rule that takes effect on that date.

This new FCC rule prohibits many of the existing, exclusive agreements between traditional telecommunications services providers and landlords or building owners of multitenant environment facilities, such as apartments and offices. Below is a description of the wide-ranging impact of this important new regulation.



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## **FCC's New MTE Rules Improve Competition and Broadband Access**

### ***Providers Subject to the Rules***

On Feb. 15, the FCC **adopted new rules** that aim to increase competition among telecommunications providers so that millions of Americans living or working in a multitenant environment, or MTE, such as apartments, condominiums, office buildings, shopping malls and other multiunit buildings have access to better service at competitive rates. Those rules take effect Sept. 26.



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The FCC's new rules prohibit certain types of exclusive agreements between telecommunications voice and video providers, on the one hand, and owners or landlords of commercial and residential MTEs, on the other hand.

In particular, the rules apply to communications services provided by telecommunications carriers in both commercial and residential MTEs, and video programming providers, or MVPDs, in residential MTEs.[1]

MVPDs include cable TV companies, satellite TV providers and common carriers that provide video programming.[2]

The FCC made clear that the rules do not apply to broadband-only providers. However, the rules do not address whether providers classified as telecommunications carriers or MVPDs — but who offer broadband-only service in an MTE, rather than voice and video programming services — will be subject to the rules.

The rules are focused on promoting competition for voice and video services to tenants of commercial and residential MTE buildings, not broadband service.

Additionally, a 2015 FCC ruling classified broadband as an information service, not a communication service.[3] Thus, for purposes of the MTE order, the commission looks at broadband-only service not as a communication service but as an information service.

Under this rationale, it appears providers who offer broadband-only service are outside the scope of the new MTE rules for failing to fall under the communication service definition. This is a gray area in the rules, so it is best for voice and video providers that provide

broadband-only service in a particular building to avoid exclusive agreements.

Industry trade groups agree with this assessment; for example, after the FCC issued its MTE rules this past February, the National Apartment Association stated that "agreements you have with broadband internet service providers (who do not bundle common carrier or video services) are not subject to the bans." [4]

### ***Exclusive Revenue Sharing and Tiered, or Graduated, Revenue Sharing Agreements***

The new rules prohibit providers from entering exclusive revenue sharing agreements and tiered, or graduated, revenue sharing agreements with managers or landlords of commercial and residential MTEs.

An exclusive revenue sharing agreement is an agreement whereby "the building owner receives consideration from the communications provider in return for giving the provider access to the building and its tenants." [5]

In a graduated revenue sharing agreement, the MTE owner receives greater compensation for each tenant that the provider serves. This gives the MTE owner a financial incentive to exclude competitors and maximize the subscribers in the building for the incumbent provider.

MTE tenants that work or live in a building where these agreements exist are limited because they cannot access better services at lower prices from alternative providers. The FCC found these agreements are de facto exclusive access agreements, which have been banned for 20 years for being anti-competitive and against public policy. [6]

The new FCC rules will prohibit providers from enforcing existing exclusive and graduated revenue sharing agreements beginning Sept. 26. The rules also prohibit the execution of future exclusive and graduated revenue sharing agreements. These rules will promote consumer choice and help alleviate the anti-competitive effects that these agreements have caused.

### ***Exclusive Marketing Arrangements***

Additionally, the new rules impose requirements on providers who have exclusive marketing arrangements with MTE owners. An exclusive marketing arrangement gives the service provider the "exclusive right to certain means of marketing its service to tenants of the MTE." [7]

Only the provider under the arrangement can distribute marketing materials in the MTE, and MTE owners often inform tenants that the provider under the arrangement is preferred. This creates confusion among tenants that live or work in MTEs about the availability of alternative providers.

This new rule should help tenants understand their options because it requires providers to disclose the existence of the exclusive marketing arrangement. All marketing materials, including electronic and print materials, that are directed at tenants or prospective tenants, must include the disclosure in clear and simple language.

The disclosure must state "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 that service from an alternative provider may be available." [8]

### ***Sale-and-Leaseback Arrangements***

The commission also clarified that existing rules regarding cable inside wiring under Section 76.802(j) prohibits sale-and-leaseback arrangements and applies only to cable companies and other MVPDs. [9]

This section:

- Prohibits providers from using any ownership interests they may have 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
- Requires incumbent providers to take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point. [10]

A sale-and-leaseback arrangement is 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.

Incumbent providers who participate in these arrangements are circumventing their duty to take "reasonable steps within their control to ensure that an alternative service provider has access to home wiring at the demarcation point" following a voluntary termination. [11]

These arrangements give the incumbent provider an unfair advantage and block competitive access to alternative providers.

### **Conclusion**

It is clear that the FCC is attempting to promote competition among voice and video providers for the benefit of MTE tenants. By focusing on the widespread use of exclusive agreements between landlords, on the one hand, and cable TV and/or telecommunication providers, on the other hand, the FCC hopes to open the marketplace for residential and business office broadband services.

With millions of Americans living or working in MTE buildings, competitive access to the inside wires within those buildings is more important than ever. Agreements that restrict such competitive access are increasingly viewed as against public policy by the FCC.

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[1] FCC, Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No. 17-142, 17182 (Feb. 15, 2022), file:///C:/Users/WDCEAE1/Downloads/FCC-22-12A1%20(4).pdf.

[2] 47 U.S.C. § 548 (g).

[3] Declaratory Ruling, Report and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (Jan. 4, 2018), <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

[4] National Apartment Association, Industry Update: FCC Takes New, Adversarial Position on Commercial Partnership Regulations (March 16, 2022) <https://www.naahq.org/industry-update-fcc-takes-new-adversarial-position-commercial-partnership-regulations>.

[5] FCC, *supra* note 1, at 17184.

[6] *Id.* at 17185.

[7] *Id.* at 17187.

[8] *Id.*

[9] Anne Veigle, FCC Adopts Rules to Give Tenants in Apartments and Office Buildings More Transparency, Competition and Choice for Broadband Service (Feb. 15, 2022), file:///C:/Users/WDCEAE1/Downloads/DOC-380316A1%20(1).pdf.

[10] 47 C.F.R. § 76.802 (j).

[11] See 47 C.F.R. § 76.802 (a)(2), (j).