

Firm Advisory

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**FCC BANS EXCLUSIVE SERVICE CONTRACTS WITH
RESIDENTIAL BUILDING OWNERS**

On March 21, 2008, the FCC released an order banning exclusive access contracts for the provision of telecommunications services to residential multiple tenant environments (“MTEs”). The order follows the FCC’s November 2007 decision banning such arrangements for the provision of cable video services to MTEs.¹ In both of these decisions, the FCC found that exclusivity clauses are harmful to competition and quality of service, and resolved to prohibit both the enforcement of existing clauses and the execution of new ones. In short, the new rules provide:

- Cable and telecommunications service providers are retroactively and prospectively banned from using exclusive access clauses in service contracts with MTE owners.
 - MTEs generally include buildings with two or more residential housing units and other centrally managed real estate developments.
 - MTEs do not include housing quarters characterized by high transience or institutional living, such as hotels, academic campuses, time share units, and nursing homes.
- Existing service contracts are not abrogated; rather, the exclusivity clauses are unenforceable, and all other provisions are left intact.
- A property owner is not prohibited from negotiating bulk discounts or exclusive marketing arrangements with service providers.
- A property owner retains the right under relevant state law to deny a particular provider access to his or her property.

¹ The November 2007 order referred “multiple dwelling units” rather than “multiple tenant environments.” The inconsistent terminology appears to have no significance.

A. *Why the FCC is Acting Now*

Through its investigation, the FCC found that nearly 30% of Americans live in MTEs. At the same time, the FCC found that exclusive access agreements between cable companies and MTE owners are widespread, and that these agreements bar competitive entry, hinder broadband deployment, and insulate incumbent providers from the need to improve their service. The FCC therefore determined that prohibiting these agreements was necessary to increase choice and foster competition for consumers residing in MTEs.

B. *What the Order Means for Service Providers*

Cable and telecommunications service providers can no longer rely on contractual provisions making them the exclusive provider for an MTE. This result is beneficial for cable and telecommunications competitors, as they will now have access to end-users that were previously covered by exclusivity arrangements.

Further, the FCC's decision does not apply to competitive video services or non-telecommunications services. Thus, at least for now, competitive video providers – such as Telcos offering IPTV services – and non-telecommunications service providers – such as VoIP providers – are not expressly prohibited from entering exclusive access arrangements with MTE owners. However, the FCC is considering whether similar rules should apply to competitive service providers.

C. *What the Order Means for Property Owners*

Due to the widespread use of exclusivity clauses, the FCC's ban will have a significant impact on service provider contracts with MTE owners. While other provisions of these contracts are not directly affected, service providers may have the right to terminate certain agreements depending on each contract's specific provisions.

On the other hand, arrangements that do not restrict provider access, such as bulk discounts and exclusive marketing agreements, are left untouched. For example, an exclusive marketing agreement may require the MTE owner to provide certain marketing documents to new tenants upon the signing of a lease. These agreements are often coupled with revenue-sharing agreements, under which the MTE owner is paid a certain percentage of revenues generated from selling the marketed services to residents. Other creative arrangements may also be permissible so long as competitor access to the MTE is not categorically restricted.

If you would like further information regarding these issues please contact any of the following attorneys:

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