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FCC to Preempt San Francisco's Article 52 and Review Triple Play Marketing Agreements, Rooftop Leases, and DAS Agreements Between Services Providers and MTEs

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On June 19, 2019, the FCC released a draft Notice of Proposed Rulemaking and Declaratory Order that is on the agenda for Commission consideration at the FCC's July 10, 2019 Open Commission Meeting. The Commission may amend this draft prior to its adoption, but the final version will likely track this draft document.

The draft document focuses on wireline broadband, video and voice services agreements, rooftop leases, and distributed antenna system (DAS) agreements[1] between service providers and developers and owners of multi-tenant environments (MTEs) that the FCC defines "as commercial or residential premises such as apartment buildings, condominium buildings, shopping malls or cooperatives that are occupied by multiple entities."

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The Declaratory Ruling and the discussion on wireline broadband, video and voice service agreements in the Notice of Proposed Rulemaking (NPRM) relate principally to agreements between cable and broadband service providers and developers and owners of apartment buildings a.k.a multiple dwelling units (MDUs). The FCC's apparent concerns with rooftop leases and DAS access agreements apply to all MTEs.

Overview

The draft NPRM poses a series of questions regarding multi-channel video and broadband exclusive marketing agreements and revenue sharing agreements negotiated by MDU owners on the one hand, and cable and broadband service providers on the other. These include the major service providers such as Comcast, Verizon, Charter, and AT&T (among others); regional service providers such as Wave; and services providers focused on off-campus student housing.

In 2010, the FCC found these agreements and bulk service agreements to be in the public interest, yet retained the longstanding rule prohibiting service providers from demanding "exclusive access agreements" with MDUs. Complaints from a handful of companies appear to have prompted a review of several of these policies.

The Declaratory Order preempts San Francisco's Article 52 that authorizes a service provider to deliver service to a requesting resident by accessing in-use inside wiring, regardless of whether the service provider has an access agreement with the MDU owner.

Declaratory Ruling

Unlike the proposals in the draft NPRM, for which the FCC is requesting comments, the Declaratory Ruling will be a final agency decision when adopted by the Commission.

As paraphrased by the FCC, San Francisco's Article 52 prohibits a building owner from " 'interfer[ing] with the right of an occupant to obtain communications services from the communications services provider of the

occupant's choice,' and provides that an owner so interferes by refusing to allow a communications services provider to (1) 'install the facilities and equipment necessary to provide communications services,' or (2) 'use any existing wiring to provide communications services as required by this Article 52.'"

The FCC agreed with most services providers, MDU owners, and trade associations that the San Francisco ordinance should be pre-empted but limited its preemption to "in-use" inside wiring, noting that sharing in-use facilities "reduces investment, slows the deployment of new facilities in MTEs, poses significant technical issues and undermines the quality of communications services." The FCC did not elaborate on how or why competitor access to "unused" inside wiring poses less of a chilling effect on investment or somehow will have a lesser impact on the quality of communications services.

Notice of Proposed Rulemaking

The FCC raises a litany of alleged "anticompetitive" risks posed by exclusive marketing agreements and revenue sharing agreements, responsive to points previously raised by a limited subset of services providers. The FCC characterizes revenue sharing agreements as "consideration from the communications provider in return for giving the provider access to the building and its tenants," either door fees or commissions on revenue, requesting comment on whether these arrangements effectively circumvent the ban on exclusive access arrangements.

Though originally targeted for multi-channel video programming distributors (principally cable companies), the industry practice is that the prohibition against exclusive access agreements extends to voice, video and broadband services. Exclusive access is rarely demanded by services providers or agreed to by developers and owners.

In many newbuilds, MDU developers typically build pathways or add additional conduit to accommodate the inbuilding infrastructure of more than a single service provider, as noted in the FCC's preemption analysis of Article 52. To the extent the FCC is looking to encourage broadband deployment, shared investments by property owners and services providers in inbuilding infrastructure that extend broadband service should be fostered, not discouraged.

Distributed Antenna Systems and Rooftop Access

Another aspect of the NPRM reflects T-Mobile's position that the FCC should review exclusive access provisions in rooftop leases and in-building DAS in MTEs. The NPRM appears to accept without question T-Mobile's allegations that some property owners or 3rd party DAS providers charge "monopoly rents," enter into exclusive access arrangements, or operate outdated DAS facilities incapable of supporting 5G technologies. One of the largest, if not the largest operator of in-door DAS facilities in the United States, is a leading wireless tower owner-operator.

The irony with T-Mobile's arguments is that wireless carriers often decline to participate in neutral-host DAS arrangements in MTEs. In countless conferences and industry forums, representatives of the major wireless carriers emphasize they lack the capital to extend their networks into many buildings and will not do so, even though owners and developers will commit to installing neutral-host DAS facilities.

The draft document emphasizes the FCC's legal authority over wireless infrastructure extends to the rates, terms, and conditions in rooftop leases and DAS agreements. However, the FCC has never exercised this authority over the rates, terms and conditions in leases between the wireless carriers and the major tower companies regarding either freestanding outdoor structures or inbuilding facilities. Yet, now the FCC is inexplicably focusing on the business decisions of MTE developers and owners

As the FCC adopts the Notice of Proposed Rulemaking and Declaratory Ruling, it will announce the dates for filing comments and reply comments in response to the NPRM.

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[1] A DAS is an in-building antenna network designed and deployed to distribute wireless carriers' signals throughout the building.

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