FCC Broadband Changes and Time Frames

In December, the FCC announced “proposals” to regulations aimed at refreshing the record on broadband competition and choice in the multifamily and commercial real estate sectors. Less than one month later, those proposals became a reality. Under the revised rules, broadband providers are:

* Blocked from entering into exclusive and graduated revenue sharing agreements;
* Required to disclose the presence of an exclusive marketing arrangement in material distributed to residents or prospective residents; and
* Reminded that sale-and-leaseback arrangements are prohibited under federal code.

However, since the rollout of these revised policies, the FCC came back to the table, admitting that properties and providers will have time to resolve certain contractual issues as many of these contracts can no longer be upheld. To provide building owners and providers with time to resolve the resulting confusion, the FCC has deferred the effectiveness of these constraints on the enforcement of existing contract provisions until 180 days after the Report and Order is published in the Federal Register. During this time, we would expect to see how the providers and building owners establish new practices to adapt to these new rules.

It is suggested that properties promptly identify their agreements that are affected by the bans and disclosure requirements. It is not recommended to put much focus on the exclusive marketing provisions of the contract, as the FCC confirmed that the requirements to disclose exclusive marketing agreements imposes no obligations on the building owner. Instead, properties should focus on exclusive and graduated revenue provisions, and for contracts executed after June 23, 2017, wiring sale-leaseback agreements. Agreements with broadband internet service providers (who do not bundle common carrier or video services) are not subject to the bans. It is further suggested that properties contact their counterparty providers soon so that discussions can be held as these contract issues cannot be unilaterally resolved.

These bans are only on the enforcement by the regulatee of certain provisions. The FCC envisions that the remainder of the contracts containing these provisions will be unaffected, but that may not be the case in many situations. In some cases, the provider may be relieved of its duty to pay the building owner because the provider is barred from enforcing the exclusivity associated with the payment. In other cases, the unenforceability of a provision could go to the heart of the agreement, rendering the whole agreement void or voidable. These are issues of state contract law, and there is considerable variability from state to state in how courts treat such contract issues. There may be an argument under state law that as long as the building owner honors the exclusivity provision, the provider has to make payments it agreed to make for that provision.

There are good arguments that the parties can continue to voluntarily obey these existing exclusivity provisions without violating the FCC rules. The rules place no expressed duty on the building owner to observe these provisions. The rules do not say that the building owner cannot receive the payment for exclusivity and do not say that the provider cannot pay for the exclusivity.

The only prohibition is on the provider “enforcing” the exclusivity. While the FCC has not said what it means to “enforce” one of these provisions, enforcement is generally defined as compelling observance of or compliance with a law, rule, or obligation. Voluntary compliance with a provision, thus would generally not be considered the enforcement of a provision or a violation of the rule.

Generally, the FCC enforces its regulations through consent decrees (which are voluntary) and imposing monetary forfeitures on those who violate its regulations. Forfeiture proceedings under 47 USC 503 cannot proceed against a “non-regulatee” building owner until it has received a citation and it continues the violation after the end of the notice period in the citation. Section 503 contains no language authorizing the FCC to assess a forfeiture against those that aid or abet a rule violation.

In short, building owners appear to be insulated from the requirements of the Report and Order and voluntary compliance with banned provisions appears not to be prohibited by the rules, but it cannot be said how the FCC’s enforcement regime for these bans will roll out or evolve.