

Client Alert

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FCC Bans Exclusive Arrangements Between Cable Companies and Multiple Dwelling Units or Other Centrally Managed Real Estate Developments

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On November 13, 2007, the Federal Communications Commission (FCC) issued a Report and Order (Order) and Further Notice of Proposed Rulemaking (FNPRM) declaring null and void any "building exclusivity" clauses between cable operators and owners of multiple dwelling units (MDUs) and other centrally managed real estate developments.¹ The prohibition on exclusive access arrangements, which represents a significant shift in FCC policy, was strongly opposed by the cable industry and likely will be appealed.

The FNPRM seeks comment on: (i) whether to expand the ban on exclusivity to additional types of multichannel video programming distributors (MVPDs); and (ii) whether additional types of exclusivity arrangements between MVPDs and MDUs not reached in the Order should be prohibited.² The FCC intends to issue an order resolving these FNPRM issues within six months of publication of the Order and FNPRM in the Federal Register.

Prohibition Represents a Shift in FCC Policy

In its *2003 Inside Wiring Order*,³ the FCC chose to permit the very types of exclusive arrangements between cable providers and MDUs that the FCC's new Order declares null and void. The FCC explained that its about-face is justified by recent developments that were not part of the record in 2003.⁴ In particular, telecommunications carriers have made significant efforts to compete in the video market, and they assert that exclusive access arrangements constitute a barrier to entry. Exclusivity clauses bar competition not only for video services, but, these providers assert, also for the increasingly popular "triple play" of voice, video and broadband Internet access service. Competition, the FCC reasons, will likely result in lower prices, more channels, and greater diversity of information and entertainment. In contrast, exclusivity clauses deny these benefits to consumers, according to the FCC.⁵

The FCC was not persuaded by claims regarding the pro-competitive effects of building exclusivity clauses.⁶ For example, some building owners and cable operators argued that exclusivity

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often is necessary to ensure that a building is wired for service. Similarly, commenters claimed that MDUs can induce MVPDs to bid to provide the best mix of low price, service quality and choice, and facilities improvements in return for building exclusivity.⁷ However, the FCC found that, on balance, MVPD competition for individual residents within the MDU—rather than MVPD competition to exclusively serve the entire MDU—could better achieve those consumer benefits.⁸ The FCC also reasoned that MDU owners could not be counted on to enter exclusivity agreements consistent with the interests of the MDU tenants, either because the MDU owners' interests differed from those of the tenants or because the MDU owner failed to understand the implications of granting building exclusivity.⁹

The Order Applies to Cable Operators

The prohibition on exclusive access provisions applies to cable operators, including telecommunications carriers that provide MVPD service.¹⁰ Private cable operators (PCOs) (also known as Satellite Master Antenna Television (SMATV) providers) and Direct Broadcast Satellite (DBS) providers are not covered by the prohibition.¹¹ The FNPRM seeks comment on whether to impose the exclusivity ban on these and other MVPDs not covered by the Order.¹² The Order also applies only to exclusive *video* services arrangements. Telecommunications services exclusivity arrangements are the subject of a pending rulemaking proceeding.¹³ Recognizing that enforcing an exclusivity ban solely on cable companies might cause competitive distortions, the FCC committed to rule on the enforceability of MDU exclusivity clauses for telecommunications services "within the next two months."¹⁴

FCC Defines "MDU" Broadly for the Purposes of the Exclusivity Ban

The Order defines "MDU" quite broadly for the purposes of this prohibition. The term "MDU" includes not only apartment, cooperatives and condominium buildings, but also "other centrally managed real estate developments," such as gated communities, mobile home parks and garden apartments.¹⁵ The key feature of all of these buildings and developments is that the residents share some common spaces requiring central management. The FCC excluded from the definition of MDU certain types of housing/institutions characterized by short-term residency or institutional living, such as time share units, academic campuses and dormitories, military bases, hotels, prisons and hospitals.¹⁶ The Order does not prohibit exclusivity clauses in those settings.

Certain "Exclusive" Arrangements Continue to Be Permitted, But Are the Subject of the FNPRM

The FCC's Order prohibits only what the FCC terms "the most exclusionary exclusivity clauses," which "prohibit any other MVPD from any access whatsoever to the premises of the MDU building or real estate development."¹⁷ The FCC expressly recognized as beyond the scope of the Order: (i) "wire exclusivity" clauses, which are not a complete ban on access to the MDU by other MVPDs, but prohibit them from using existing wires; (ii) "marketing exclusivity" clauses, which prohibit the MDU owner from marketing the services of another MVPD; and (iii) "bulk billing arrangements," pursuant to which residents may receive a discounted bulk billing rate, but may be required to continue to pay that bulk billing rate even if the resident chooses to take service from (and pay the subscription

fee of) a different MVPD.¹⁸ The FCC asks for comment on these three types of arrangements in the FNPRM.¹⁹ In addition, while the Order prohibits exclusive access clauses in contracts, nothing in the Order requires MDU owners to allow new MVPDs to access the MDU.²⁰

Order Likely to be Appealed

It is expected that the cable industry and possibly others will appeal the FCC's Order. The Order is likely to be challenged on at least two grounds: (1) the FCC's legal authority to prohibit exclusivity clauses; and (2) the FCC's legal authority to abrogate those clauses in current contracts.

The FCC primarily relied on its authority under Section 628(b) of the Communications Act. Section 628(b) prohibits "unfair" practices that "hinder . . . any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."²¹ Opponents of the prohibition argued that Section 628 prohibits only exclusive *programming* contracts between cable operators and vertically integrated programming providers, to ensure that MVPDs have access to programming. The FCC's reliance on Section 628 to limit MVPDs' ability to contract with MDUs arguably is outside the scope of the statute. Notably, the FCC does not rely solely on Section 628(b), but seeks to bolster its statutory authority by referring to its "ancillary" power to regulate cable operators under Titles I and III of the Communications Act.²²

Second, the FCC may have overstepped its legal authority by abrogating existing contracts. Related to that, those appealing the Order might claim that the prohibition on exclusivity constitutes a regulatory taking. The Order counters this concern by asserting that the public has long been on notice that exclusivity clauses were under scrutiny, and might be found unlawful.²³ In his

separate statement, Commissioner McDowell voiced his concerns regarding abrogating current contracts as follows: "My concern is this: after unanimously inviting cable companies and building owners to strike such [exclusive] deals in [the 2003 *Inside Wiring Order*], the FCC may now be abrogating those exact same agreements immediately rather than waiting for them to expire and without providing a grace period."²⁴ Commissioner McDowell also recognized that arguments that the FCC's action constitutes a regulatory taking "may also have merit."²⁵

Endnotes

¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 07-51, FCC 07-189 (rel. Nov. 13, 2007) (*Order*).

² *Id.* ¶¶ 61-66.

³ *Telecommunications Services Inside Wiring: Cable Television Consumer Protection & Competition Act of 1992*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (*2003 Inside Wiring Order*).

⁴ *See, e.g., Order* at ¶¶ 13-16.

⁵ *Id.* ¶¶ 13-15, 17-23.

⁶ *Id.* ¶ 28 ("We reject arguments that exclusivity clauses mostly work to the benefit of MDU owners and residents.").

⁷ *See id.* ¶¶ 24-25.

⁸ *Id.* ¶ 26.

⁹ *Id.* ¶ 28.

¹⁰ *Id.* ¶ 1.

¹¹ *Id.* ¶ 32.

¹² *Id.* ¶¶ 61-62.

¹³ *See Promotion of Competitive Networks in Local Telecommunications Markets*, First Report & Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 (2000).

¹⁴ *Order* at ¶ 36 n.109.

¹⁵ *Id.* ¶ 7.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 1 n.2.

¹⁸ *Id.*

¹⁹ *Id.* ¶¶ 63-65.

²⁰ *Id.* ¶ 37.

²¹ 47 U.S.C. § 548(b).

²² *Order* at ¶ 52.

²³ *Id.* ¶ 58.

²⁴ *Id.* (Statement of Commissioner Robert M. McDowell, Concurring).

²⁵ *Id.*

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