

FCC Set to Examine Exclusive Video Service Contracts in MDUs

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On March 27, 2007, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (“Notice”) in a new docket addressing exclusive and long term contracts for the provision of video services to residential multiple dwelling units (MDUs), *i.e.*, apartment buildings, and other real estate developments.¹ The Notice seeks comment on: (1) whether these MDU contracts are harming the competitive marketplace for video services in multi-tenant environments; (2) whether the Commission has authority to promulgate rules in this area; and (3) if so, whether Commission action is warranted. The Notice tentatively concludes that “the Commission has authority to regulate exclusive contracts for the provision of video service to MDUs or other real estate developments where [it] finds that such contracts may impede competition and impair deployment of those services.”

The FCC last addressed the issue of MDU exclusive video service contracts in 2003 in its Inside Wiring Report and Order, at which time it concluded that the record did not demonstrate that exclusive contracts were hampering competition in the MDU market. At that time, the Commission concluded that exclusive contracts could either be pro-competitive or anti-competitive, depending on the circumstances. Some commented in that proceeding that exclusive agreements would be pro-competitive because they enhance a provider’s ability to recover its investment costs. Others commented that exclusive agreements would thwart competition by denying competitive access. Based on the record in 2003, the FCC declined to impose limits on exclusive contracts.²

The FCC opened the current Notice in response to comments filed in the [Franchise Reform Order](#) rulemaking suggesting that exclusive agreements between MDUs and incumbent providers serve as a potential barrier to video service competition. Significantly, in the current Notice, the FCC seeks to reach beyond the scope of the issues addressed in its 2003 Inside Wiring Order to include not just MDUs, but other residential developments. This would arguably include gated communities, which comprise a significant portion of the residential marketplace in some states, such as Florida. Similarly, the FCC has extended its inquiry beyond exclusive agreements to include “perpetual” or long-term agreements that are not “exclusive” but that allow the incumbent to remain on the premises and maintain its inside wiring, which some new entrants claim makes it difficult to compete.

Among the specific questions asked by the FCC are:

- How often new entrants are confronted with exclusive access agreements and whether such agreements are becoming more or less prevalent;

- Whether the competitive multichannel video landscape has changed since 2003;
- Whether perpetual contracts for the provision of video services – i.e., contracts of a long duration, such as life of franchise contracts, are prevalent in the MDU marketplace;
- What the risks and costs of providing service to MDUs are and the prices and services offered to customers under exclusive contracts; and
- Whether exclusive contracts should only be limited where a provider possesses “market power” and how market power should be defined.

The Commission also seeks comment on whether it has jurisdiction to prohibit exclusive MDU video service contracts, and if so, whether that jurisdiction extends to existing as well as future contracts. As in its past proceedings regarding competitive access, the Commission cites to its general jurisdictional authority under Sections 1, 4, and 303 of the Communications Act. For the first time, however, the Commission suggests that it has jurisdiction to regulate exclusive video service arrangements in MDUs and other real estate developments pursuant to Sections 628(b) and 706 of the Communications Act. Congress enacted Section 628 to prevent cable operators and other MVPDs from engaging in unfair or deceptive practices in their negotiations with video programming suppliers – *not* with real property owners. Similarly Section 706 is a broad directive to the Commission to encourage the “deployment of... advanced telecommunications capability to all Americans” that does not appear to encompass the provision of competitive video service in MDUs. It will be interesting to see if these assertions of jurisdiction are sustained.

At the same time it addresses exclusive agreements in the video context, the Commission indicates that it may also address the issue in the context of the provision of telecommunications services to residential consumers. In its 2000 Competitive Networks Order, the FCC prohibited the enforcement of exclusive contracts in multi-tenant environments (MTEs) for the provision of *commercial* telecommunications service – largely because no one had advocated support for exclusives in that context. While the Competitive Networks Order had also raised the issue of exclusive agreements in the context of residential MTEs, that issue had not been finally addressed. Accordingly, in this new Notice, the Commission indicates that it will issue another public notice seeking comments on whether to extend this prohibition to the provision of telecommunications to residential MTEs in order to “refresh” the record in the Competitive Networks FNPRM. The Commission also notes that in another on-going proceeding³ the Commission is considering issues related to the scope of a competitor’s right to access an incumbent LEC’s inside wiring in multiunit premises for the purposes of offering competitive telephone service.

Comments on this Notice are due June 18, 2007 with Reply Comments due July 18, 2007. Davis Wright Tremaine has expertise and counseled clients on these and related issues. If you would like additional information or assistance with these matters, or information regarding the submission of comments in this proceeding, please contact us.

Footnotes

¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, MB Dkt. No. 07-51, FCC 07-32 (Mar. 27, 2007).

² *Telecommunications Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCCR 1342, 1369 (2003).

³ See *Cox's Petition for a Declaratory Ruling For Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier's Inside Wiring Subloop*, WC Docket No. 01-338 (filed Oct. 27, 2004).

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