

Competitive Access to Cable Inside Wiring in MDU Buildings

By: Carl E. Kandutsch, Esq.

The owner of a multi-dwelling unit (MDU) building may wonder how he can bring an alternative video provider (a private cable operator or "PCO," for example) into his building to compete for subscribers with the incumbent franchised cable operator. This presents a problem due to the economics of the PCO industry: the capital investment required to install a second set of wires is generally not justified by the anticipated returns from head-to-head competition in a single building. The key to effective competition in the MDU market is allowing competitive providers to utilize (some segments of) existing wiring infrastructure in MDU buildings.

The FCC's rules for the disposition of cable "inside wiring" (47 C.F.R. §§ 800 et. seq.) are designed to achieve this result.¹ The inside wiring rules encompass two procedures by which MDU owners may introduce competition in the MDU market:

The rules for *building-by-building* competition allow a competitive provider to access all the existing "home run" wires² in the building when the incumbent has no current right-of-entry agreement or other legal right (such as that conferred by a state mandatory access law) to provide service to any resident in the building. Ac-

cording to the building-by-building rules, when the incumbent "has no legally enforceable right to remain" in the building³, the MDU owner may force the incumbent to remove, abandon or sell all of the home run wiring to the owner himself, or to a competitive provider. (47 C.F.R. § 804(a).)

The rules for *unit-by-unit* competition allow a competitive provider to access any home run wire leading to the residential unit of a subscriber who chooses the competitor's service over that of the incumbent, when the incumbent lacks an exclusive right to provide service to all residents of the building. The unit-by-unit rules say that if there is at least one subscriber in the

"...the building-by-building rules allow a competitive provider to access all the home run wiring in an MDU building, provided that the incumbent has no right-of-entry agreement or other legal right to serve any subscriber in the building."

building who chooses the service of an alternative provider, such that the incumbent has no "legally enforceable right to maintain any particular home run wire dedicated to a particular unit on the premises,"⁴ the MDU owner may force the incumbent to remove, abandon or sell that particular home run wire to the owner or to an alternative provider. (47 C.F.R. § 804(b).)

right-of-entry agreement to serve all subscribers in the building.

In October 2002, the United States District Court for the Southern District of New York decided *CSC Holdings, Inc. v. Westchester Terrace, et al* (docket no. 01-CIV-8134) in favor of the incumbent cable provider (Cablevision) and against a condominium association that wished to allow a private cable op-



erator (Digitech TV Corp., Inc.) to compete on a unit-by-unit basis for subscribers in a building. Judge McMahon ruled that as long as Cablevision (which had a non-exclusive right-of-entry agreement) served at least one subscriber in the building, the condo association could not invoke the FCC rules for unit-by-unit disposition of home run wiring.

The result of CSC Holdings is this: Suppose that 99 of the 100 residents in your building have terminated their accounts with the incumbent cable operator and expressed their preference for a PCO. If CSC Holdings is correct, you (the building owner) may not invoke the FCC's rules for unit-by-unit competition to allow the PCO to utilize existing home run wiring to provide service to the 99 residents, because one

resident prefers the incumbent.

This conclusion is clearly wrong, as a United States District Court in Kansas pointed out in Time Warner Entertainment v. Atriums Partners, L. P. (docket no. 02-2343-CM) because the unit-by-

incumbent has at least one subscriber, "would render the distinction between § 76.804(a) (building-by-building rule) and

§ 76.804(b) (unit-by-unit rule) essentially meaningless."

"The key to effective competition in the MDU market is allowing competitive providers to utilize (some segments of) existing wiring infrastructure in MDU buildings."

unit rules are designed to allow multiple providers to compete for subscribers within a single MDU building. To conclude, as the court in CSC Holdings held, that the rules do not apply if the

Another significant aspect of Atriums is that it is the first federal court decision to consider the effect of a state mandatory access law on the FCC's inside wiring rules, an important issue

**Alta Sierra
1/2 Horizontal
4/C**



barred application of the FCC's unit-by-unit rules. The Kansas mandatory access law does not give the incumbent cable operator the right to maintain exclusive and perpetual control over the home run wires leading to units occupied by residents who do not choose the incumbent's service. This ruling should apply in other states with mandatory access laws.

What is at stake in the conflict between the two decisions is nothing less (or more) than the viability of the FCC's rules for unit-by-unit competition.

If CSC Holdings is correct, the unit-by-unit rules are completely superfluous because they only apply when the

world. In any event, it is clear that the FCC should have some voice in resolving the conflict. ■

About the Author

Carl Kandutsch, Esq. practices law and consults on issues in telecommunications regulation may be reached at wombat1@adelphia.net.

Footnotes

¹ Readers are invited to contact the author or visit the Independent Multi-Family Communications Council website (<http://www.imcc-online.org/ISSUES/RESOURCE%20Info/IS%20Wire/iw-primer.htm>) with questions about the inside wiring rules generally.

² According to the FCC's definition, a "home run" wire is the segment of in-building cable wiring that begins at the point where it first becomes dedicated to an individual unit (usually the "lock box" or "junction box") and ends at the "demarcation point" twelve inches outside of the residential unit. 47 C.F.R. § 800(d).

³ The incumbent has no "legally enforceable right to remain" in an MDU building when no right-of-entry agreement or mandatory access statute (explained below) gives the incumbent a legal right to maintain wiring infrastructure in MDU building for the purpose of providing video service to any resident.

⁴ The incumbent has no "legally enforceable right to maintain any particular home run wire dedicated to a particular unit on the premises" when the subscriber in that particular unit terminates the incumbent's service and the incumbent has no exclusive right-of-entry agreement with the MDU owner.

⁵ A list of mandatory access states can be found at <http://www.imcc-online.org/states.doc>.

⁶ Kan. Stat. Ann. § 58-2553(a)(5).

"The unit-by-unit rules allow an alternative provider to access any home run wire leading to a subscriber who chooses that alternative, provided that the incumbent does not have an exclusive right-of-entry agreement to serve all subscribers in the building."

that the CSC Holdings court avoided.

Nineteen states have enacted so-called mandatory access laws.⁵ Generally, mandatory access laws give franchised cable operators the right to install cable infrastructure in MDU buildings to serve residents, even if the MDU owner objects. Kansas' mandatory access law is typical: "The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality."⁶ In Atriums, the court rejected Time Warner's argument that this statute

building-by-building rules also apply, i.e., where: (1) there is no state mandatory access law; and (2) the MDU owner's right-of-entry agreement with the incumbent has terminated.

On the other hand, if Atriums is correct (as I believe it is), the unit-by-unit rules apply even in mandatory access states, as long as the incumbent does not have an exclusive right-of-access agreement.

Ultimately, the significance of this conflict depends on whether the unit-by-unit rules are actually useful to MDU owners, DBS providers and private cable operators in the business