



Focus on MDUs:

# Who Owns the Inside Wiring?

Here's the latest on rights of operators and property owners on distribution

By Carl Kandutsch ■ *Esq.*

Federal and state courts over the past few years have issued several important decisions interpreting the FCC's rules governing the disposition of cable "inside wiring" for MDU buildings. The FCC rules<sup>1</sup> are designed to allow MDU owners to gain control over existing inside wiring and to make it available for use by competing video providers.

The court decisions in question are generally favorable to MDU owners and to private cable operators (PCOs). We take this opportunity to summarize the most important points here. Although it is theoretically possible (albeit unlikely) that these decisions could be overturned, we are confident that as of the beginning of 2005, the following constitutes established law:

**State mandatory access laws do not block application of the FCC's rules for the unit-by-unit disposition of cable inside wiring.**

The FCC's inside wiring rules have two main divisions: (1) the *building-by-building* rules<sup>2</sup> allow the MDU owner to force the incumbent franchised cable operator ("MSO") to remove, sell or abandon all existing home run wiring in the building; and (2) the *unit-by-unit* rules<sup>3</sup> allow the MDU owner to force the incumbent MSO to remove,

sell or abandon the home run wires that lead to individual units occupied by residents who have terminated (or will soon terminate) the incumbent's service in favor of a competitor such as a PCO.

***Court decisions in question are generally favorable to MDU owners and the PCO industry.***

The building-by-building rules apply when the incumbent MSO lacks a "legally enforceable right to remain" in the building – principally, when the MSO's right-of-entry agreement ("ROE") expires.

The unit-by-unit rules apply when the incumbent MSO lacks a "legally enforceable right" to maintain individual home run wires – principally, when an individual subscriber terminates the MSO's service and the ROE does not give the MSO an exclusive right to serve the entire building.

Although they vary somewhat from state to state, a typical mandatory access statute gives a franchised cable operator a right, upon a tenant's request and over the MDU owner's objection, to install and maintain wiring in an MDU building for the purpose of providing service to the requesting tenant or tenants. Incumbent MSOs in "man-

datory access" states<sup>4</sup> have argued that the mandatory access statute – to the extent it provides the incumbent franchised MSO with a "legally enforceable right" to install and maintain inside wiring over the MDU owner's objec-

tion – prevents the owner from invoking the FCC rules, including *both* the building-by-building *and* the unit-by-unit rules.

In *Time Warner Entertainment v. Atriums Partners*,<sup>5</sup> a United States District Court in Kansas held that the state's mandatory access statute – providing that a landlord may not interfere with or refuse to allow access or service to a tenant by a franchised cable operator – applied only where an MDU resident actually requested service from Time Warner.

Therefore, the statute did not give the incumbent MSO a "legally enforceable right" to maintain home run wiring leading to residential units not currently subscribing to the MSO's cable service, and the MDU owner could properly invoke the FCC's unit-by-unit rules to make those wires available for use by a competitor.<sup>6</sup>

**Most Right-of-Entry agreements do not block application of the FCC's rules for the unit-by-unit disposition of cable inside wiring.**

In a decision rejecting Time Warner's appeal of the *Atriums* decision, the 10<sup>th</sup> Circuit Court of Appeals focused on the question of whether the incumbent MSO's right-of-entry agreement gave it a "legally enforceable right" to maintain all the home run wiring in the building, including home run wires not currently being used to provide Time Warner cable service to MDU residents.<sup>7</sup>

The ROE agreement provided that Time Warner owned all the inside wiring, and had a right to "install, operate and maintain" all facilities needed to "provide CATV and Pay TV services to tenants in the [Atriums] Project." The Appeals Court held that this language did not provide Time Warner with a "legally enforceable right to maintain" home run wires leading to residents not currently subscribing to Time Warner's cable service, and the MDU owner could thus invoke the FCC's unit-by-unit rules to force the MSO to remove, sell or abandon those home run wires. This ruling is binding law throughout the 10<sup>th</sup> Circuit, which includes the six States of Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah. Remember, however, that the Appeals Court is the second highest court in the nation, and its decision certainly constitutes persuasive legal authority in all other jurisdictions.

**Right-of-Entry agreements signed at a time when there was little or no video competition are contracts of adhesion and ambiguities should be interpreted against the incumbent MSO.**

In interpreting the language of the ROE agreement as described in (the 10<sup>th</sup> Circuit above, the Appeals Court emphasized that public policy considerations demanded that any ambiguities

in the contract be resolved against Time Warner and in favor of the MDU owner. This rule of interpretation was based on three factors:

- First, the incumbent MSO (rather than the MDU owner) drafted the contract.

- Second, because there was essentially no competition for video services when the ROE agreement was signed, the terms of the agreement were not negotiated by parties with roughly equal bargaining power as much as they were presented by the MSO to

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the MDU owner as a “take it or leave it” proposal.

- Third, the ROE affected the public interest as articulated in the FCC’s policy favoring competition in the MDU market, a policy expressed in the FCC’s inside wiring rules.

All of these considerations persuaded the Court that any ambiguities in the ROE agreement should be resolved in a way that favored competition (therefore, application of the FCC’s rules) over the monopolistic practices of the incumbent MSO. It is important for you to note that this rule of interpretation is “generally applicable.” Legally, that means it is not limited to the specific issues addressed in the 10<sup>th</sup> Circuit’s decision. Rather, a court is likely to interpret ROEs to favor competition on any issue where the contract is ambiguous, assuming that the ROE was signed at a time where there was little or no competition for video services in the local MDU market.

**An incumbent MSO may not block application of the FCC’s inside wiring rules by claiming its intention to use the existing home run wiring for video or other services in the future.**

Some incumbent MSOs have sought to prevent MDU owners from invoking the FCC’s inside wiring rules by claiming that they intend to use the existing but “dormant” home run wiring to provide video or other services to subscribers in the future.

This intention, they claim, gives the MSO a “legally enforceable right” to maintain the wiring infrastructure such that the MDU owner cannot use the FCC’s inside wiring rules to make the wiring available for use by a competitor.

In early 2003, IMCC sent a Request for Declaratory Ruling urging the FCC to explicitly reject this claim,<sup>8</sup> and now the Appeals Court in *Time Warner v. Everest* appears to have rejected the MSO’s argument. As discussed above,

the Court held that Time Warner’s ROE agreement gave it a right to control only the home run wiring actually being used to provide Time Warner cable service to MDU residents. The MSO could not block competitive access to *all* the existing wiring (via the FCC’s rules) based on the possibility that it *might* be used in the future to provide Time Warner services.

MDU owners seeking to invoke the FCC’s inside wiring rules should not be deterred by the incumbent MSO’s assertion that it intends to use the existing wiring to serve subscribers in the future.

**An incumbent MSO that fails to make the required “remove, sell or abandon” election within ninety days after receiving notice of the MDU owner’s invocation of the FCC’s inside wiring rules has thereby abandoned the home run wiring to the MDU owner.**

In 2003, a Rhode Island Superior Court issued an important decision dealing with a variety of issues relating to cable inside wiring in MDU buildings. See *Coxcom v. Picerne Real Estate Group*, 2003 WL 22048781 (R.I. Super 2003).<sup>9</sup> One important issue addressed by the Court was the effect of the incumbent MSO’s failure to make the FCC-mandated “remove, sell or abandon” election within ninety days after receiving the MDU owner’s initial notice under the FCC’s inside wiring rules.<sup>10</sup>

In the Rhode Island case, the MSO responded to the MDU owner’s initial notice by insisting that various right-of-entry agreements blocked applica-

tion of the FCC rules in the first instance. Because Cox did not make the required election (to sell, abandon or remove) before the deadline, the Court held that by failing to cooperate, Cox had abandoned the wiring to the MDU owner, thus losing its option of selling or removing the wiring.

This means that an incumbent MSO takes a big risk if it chooses to dispute the applicability of the FCC’s rules after receiving the MDU owner’s initial notice. Specifically, such a dispute does not stop the clock on the FCC’s deadlines from ticking, and if the MSO has not made the required election within the ninety-day period, it will have lost the option of removing or selling the wiring pursuant to the rules.

While the five points described above, having been endorsed by state or federal courts, may be viewed as established law, we do not imply that the points are uncontroversial or above challenge.

The reader should bear in mind the fact that mandatory access statutes and ROE agreements differ in specific cases, and reliance on the five points outlined above is no substitute for consulting legal counsel when appropriate. ♦

<sup>1</sup> Found at 47 C.F.R. § 76.800 *et. seq.*

<sup>2</sup> The *building-by-building* rules are found at 47 C.F.R. § 76.804(a).

<sup>3</sup> The *unit-by-unit* rules are found at 47 C.F.R. § 76.804(b).

<sup>4</sup> State “mandatory access” laws generally provide that an MDU owner may not prohibit a franchised cable operator from installing and maintaining in-building wiring needed to provide service to residents who request the service. Such laws are anti-competitive

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in effect because, among other reasons, they block application of the FCC's "building-by-building" inside wiring rules. According to the Independent Multi-Family Communications Council (<http://www.imcc-online.org/states.doc>), the following states have mandatory access laws: Connecticut, Delaware, Florida (condominiums only), Illinois, Kansas, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Rhode Island, Virginia, West Virginia, Wisconsin and the District of Columbia. This list is subject to change, and readers should check their local laws to remain current.

<sup>5</sup> 232 F.Supp. 2d 1257 (D. Kan. 2002)

<sup>6</sup> IMCC has asked the FCC to endorse this interpretation by means of a Request for Declaratory Ruling published at [www.imcc-online.org/ISSUES/FCCFilings/declar-ltrs-4-03/dr3.doc](http://www.imcc-online.org/ISSUES/FCCFilings/declar-ltrs-4-03/dr3.doc).

<sup>7</sup> *Time Warner Entertainment v. Everest Midwest Licensee*, 381 F.3d 1039 (10<sup>th</sup> Cir. 2004).

<sup>8</sup> <http://www.imcc-online.org/ISSUES/FCC%20Filings/declar-ltrs-4-03/dr2.doc>.

<sup>9</sup> Although the *Coxcom* decision is binding law only in the State of Rhode Island, we believe that the Court's rulings are persuasive and legally correct, and therefore unlikely to be overruled in Rhode Island or repudiated in any

other jurisdiction nationally.

<sup>10</sup> The rules require that within ninety days after receiving notice that the MDU owner is invoking the FCC's inside wiring rules either on a building-by-building or a unit-by-unit basis, the incumbent MSO must elect to remove, sell or abandon the home run wiring. 47 C.F.R. § 76.804(a)(3) and (b)(4) provides, "If the incumbent fails to comply with any of the deadlines established herein, it shall be deemed to have elected to abandon its home run wiring at the end of the 90-day notice period."

### About The Author

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