

The FCC and Video: Exclusivity in the Crosshairs

The FCC's new exclusive property access agreement regulation alters the regulatory landscape for delivery of multichannel video services in MDUs and centrally managed developments

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Late last fall, the Federal Communications Commission adopted a Report and Order banning all current and future exclusive building access arrangements. This *Exclusive Access Report and Order* applies to franchised cable operators, common carriers, and open video system ("OVS") providers. It was finally published January 7, and the accompanying regulations are due to take effect March 7, barring a court order or some other delay.¹ In addition to banning certain exclusive access arrangements, they:

- Expand the prior regulatory definition of MDU to include most centrally managed real estate developments;
- Identify "building exclusivity" as the specific type of exclusivity banned;
- Clarify the FCC's legal authority to adopt the prohibition (including the reasons its actions do not constitute a Fifth Amendment taking under the US Constitution); and
- Extend application of the ban not only to cable operators, but also to other entities such as wireline video providers and open video system (OVS) providers.

These new rules will have a significant impact on the way service arrangements between video service providers and

property owners are structured in new residential multiple dwelling unit (MDU) and gated community developments.

While there are still creative options available for maximizing penetration and take rates so as to make the construction of the most advanced fiber-

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to-the-home facilities cost-effective, the new FCC rules narrow the range of available property access arrangements. Furthermore, the FCC is not done drafting new regulations in this area. As part of its *Exclusive Access Report and Order*, the FCC also adopted a Further Notice of Proposed Rulemaking (FNPRM) in which it has committed to deciding, within six months, whether to expand the scope of the service providers regulated to include private cable operators (PCOs) and digital broadcast satellite (DBS) providers, as well as whether to ban exclusive marketing and bulk billing arrangements.²

Based on the FCC's stated preference for regulatory "parity" (the idea of regulating all similarly situated service providers in a similar manner), as well

as on the blunt statements of several of the FCC commissioners, the FCC appears to be strongly inclined to expand its regulation of exclusive arrangements.

Given the divergent interests of the parties that will be affected by any such expansion, all affected parties, whether they are franchised cable operators, incumbent local exchange carriers ("incumbent LECs"), PCOs, or DBS providers, will be well advised to follow this and related proceedings closely to ensure that their perspectives are heard by the FCC.³

Affected service providers, particularly smaller ones, cannot assume that other similarly situated parties will protect their individual interests.

A LITTLE HISTORY

The FCC's ban of exclusive building access arrangements did not arise out of the blue. The new regulations stem from complaints that the incumbent LECs have lodged with the FCC over the past two years regarding the exclusive access arrangements entered into by incumbent cable operators.

The incumbent LECs claimed that the cable operators were using exclusive building access arrangements to impede their attempts to construct competing multichannel video service networks in MDUs.

The FCC is particularly receptive to these complaints now because it has

The FCC also says it will decide by summer whether to expand the scope of the service providers regulated to include PCOs and DBS providers, and whether to ban exclusive marketing and bulk billing arrangements.

been engaged for the past few years in an active campaign to remove what it believes to be barriers to facilities-based competitive entry into the multichannel video service market.

In fact, the *Exclusive Access Report and Order* is only the latest in a line of recent new regulations the FCC has adopted as it attempts to use its regulatory authority to foster facilities-based competition. Specifically, after the passage of the Telecommunications Act of 1996, the primary purpose of which was to introduce competition in the market for voice telephony and related services, the FCC entered a period of prolific regulatory activity designed to promote competition in that market.

The FCC furthered this procompetitive mandate by adopting regulations governing, among other things, the sharing of the incumbent local exchange carriers' network elements, and promoting the deployment of competitive telecommunications facilities.

Eventually, after a period of years, the proregulatory momentum in the area of promoting the sharing of the incumbent LEC's network stopped abruptly and began to shift in a deregulatory direction after the federal courts determined that the FCC had exceeded its statutory authority. This led the FCC to ease many of the regulatory obligations that had been placed on the incumbent LECs.

In the end, the FCC was left with a strategy for promoting competition in the voice market that was reliant, more or less, on competitors adopting an overbuild competitive entry strategy. The effectiveness of this strategy is limited by the fact that the margins on voice services alone may not be sufficient to justify the construction of parallel voice networks.

In the face of this pro-overbuild policy adjustment, and in light of the fact that the market for voice services has

become less important for driving the construction of competitive networks than the market for multichannel video services, the FCC has more recently set its sights on increasing competition in the market for video services.

Indeed, the FCC has embarked on a period of regulatory activity reminiscent

As published in the Federal Register, the new rules state, in full:

47 CFR §76.2000. Exclusive Access to Multiple Dwelling Units Generally

(a) Prohibition. No cable operator or other provider of [multichannel video programming distributor ("MVPD")] service subject to 47 USC §548⁴ shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. All such exclusivity clauses are null and void.

(b) Definition. For purposes of this rule, MDU shall include a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment); provided however, that MDU shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.⁵

of its earlier efforts with regard to voice services. In the video market, the FCC's primary aim is to ensure that competitive providers can construct duplicate networks to provide video service to all consumers.

This raises some legal hurdles for the FCC because its authority to promote facilities-based competition in the video market through regulation is far less clear under the Cable Act than its authority under the Telecommunications Act of 1996 regarding voice services. As a result, while the FCC's regulatory ambitions have extended further into the details of the multichannel video services market, it has found that it must find creative ways to correspondingly extend its jurisdictional reach to give it the legal authority it needs to pursue its desired regulatory activities in that market. So, while the regulatory pendulum is now swinging with significant momentum in the direction of further regulation of activities that benefit incumbent cable operators' competitors to the detriment of the incumbents, it is likely that at some point soon the courts will step in to check that momentum, just as happened with the regulation of the incumbent local exchange carriers.

The question then will be how the FCC will respond – by pulling back, as in the market for voice services, or by seeking legislative or other fixes to permit it more freedom of action.

THE NEW RULES: BAN ON BUILDING EXCLUSIVITY

On its face, the new regulation appears uncharacteristically short and straightforward. However, this apparent simplicity belies a healthy measure of legal nuance, as there are a number of terms of art whose full meaning is critical to understanding the rule's full scope.

The full impact of the new rules on the industry is further obscured by the wide variety of arrangements in place throughout the country involving MDUs and video services, some of which may be affected by these new rules while other, similar arrangements may not be affected.

Given the number of variables and the significance of the implications, par-

ties to video arrangements in MDUs will need more than a passing read of the rule to determine whether their current or future arrangements fall within its scope. In order to gain a more focused understanding of the boundary of the rule and, specifically, confidence with regard to who and what is regulated, a more detailed parsing of its language is required.

WHICH SERVICE PROVIDERS ARE REGULATED?

The FCC went to lengths to clarify that it does not intend to regulate builders, developers or property owners.⁶ At least not directly. Rather, the FCC's rules affect the other side of MDU arrangements – the service providers. And not all service providers are regulated, only “cable operator[s] or other provider[s] of MVPD service subject to 47 USC §548.”⁷

As discussed below in greater detail, the FCC relies upon Section 628(b) of the Cable Act, which applies only to “cable operators,” for its authority to regulate exclusive MDU arrangements.⁸ Under the Cable Act, “cable operator” is a term of art that specifically excludes providers that do not use the public rights-of-way, that operate as common carriers, and providers that operate “open video systems” (“OVS systems”), among a few others.⁹

Nevertheless, the FCC concluded that the new rules *will* apply to common carriers under Section 628(j) of the Act, and to OVS systems pursuant to Section 653(c)(1)(A).

Section 628(j) states that “Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers.”

Similarly, Section 653(c)(1)(A) provides that “Any provision that applies to a cable operator under... section... 628... of this title shall apply... to any operator of an open video system.”¹⁰

The new regulations stem from complaints that the incumbent LECs have lodged with the FCC over the past two years regarding the exclusive access arrangements entered into by incumbent cable operators.

In this way, the FCC's new exclusive access rules sweep in entities such as AT&T, Verizon, and RCN, imposing the same restrictions on these providers of multichannel video services as it does on franchised cable operators. However, to the extent that a provider is not a cable operator, common carrier or OVS provider, these new rules do not apply. This means that these rules do not reach PCOs that do not operate in the public right-of-way. At least not yet – the FCC has promised that similar regulation of these services may be on the way.¹¹

WHICH PROPERTIES ARE COVERED?

For purposes of the new rules, the FCC expanded the definition of MDU to include not only apartment, cooperative, and condominium buildings, but also other “centrally managed real estate developments,” such as gated communities, mobile home parks, and garden apartments, where residents typically remain voluntarily on a long-term basis and exercise significant control over uses of the private dwelling space.¹²

The determining factor with regard to whether a property is an MDU for purposes of these rules appears to be whether the residents remain “for lengthy, indefinite periods of time, each in a dwelling space that is distinctly separate but shares some common spaces requiring central management.”¹³

The FCC decided that “the best result for consumers comes from preserving their ability to play an active role in making an individual choice rather than allowing cable operators using exclusivity clauses to foreclose individual choice.”¹⁴

Consistent with this approach, the FCC's definition of MDU does not in-

clude properties that are characterized by high turnover or transience and other instances where individuals would not be expected to exercise individual choice.

Thus, the FCC's rule expressly excludes time-share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living facilities, and other group quarters characterized by institutional living, high transience or a need for increased security.

WHAT TYPES OF CONTRACT PROVISIONS ARE COVERED?

In the Notice of Proposed Rulemaking (“NPRM”, the document that provided official notice to the public that the FCC had proposed to regulate exclusive MDU access arrangements), the FCC did not define with any specificity the types of arrangements that it was concerned with. In the comments submitted in response to the NPRM, a number of parties pointed out that it was unclear what arrangements the FCC was seeking to regulate.¹⁵

In response, the FCC provided some clarification on this point in its *Exclusive Access Report and Order*. The FCC noted that in its prior decisions it had defined “exclusive contracts” as “contracts that specify that, for a designated term, only a particular [multichannel video programming distributor (“MVPD”)] and no other provider may provide video programming and related services to residents of an MDU.”¹⁶

For present purposes, the FCC decided to use a more focused term – “exclusivity clauses,” while meaning no change in substance.¹⁷ As the FCC explained it:

Exclusivity clauses appear in contracts between MVPDs and MDU owners or other real estate developments. The most exclusionary exclusivity clauses prohibit any other MVPD from

any access whatsoever to the premises of the MDU building or real estate development. These are called “building exclusivity” clauses. Other exclusivity clauses grant only “wire exclusivity,” which allows more MVPDs in a MDU or real estate development but prohibits them from using the existing wires in the MDU or real estate development (which may be owned by the MVPD or by the MDU owner). Still other exclusivity clauses allow other MVPDs into a MDU or real estate development but prohibit the owner from marketing their services. These provide for what is called “marketing exclusivity.”¹⁸

Thus, according to the FCC, there are three general types of exclusivity:

- building exclusivity;
- wire exclusivity; and
- marketing exclusivity.

The FCC decided that the record before it warranted prohibiting only “building exclusivity” clauses at the present time.¹⁹

The other kinds of exclusivity, according to the FCC, “do not absolutely deny new entrants access to MDUs or real estate developments and thus do not cause the harms to consumers that building exclusivity clauses cause” and are therefore not the focus of the present proceeding.²⁰

Nevertheless, the FCC suggested in its *Further Notice of Proposed Rulemaking* that it is interested in regulating these other kinds of exclusivity clauses and invited further comments on whether it should do so.²¹

ABROGATION OF EXISTING CONTRACTS

One of the more controversial aspects of the FCC’s new rules is its decision that they should not only prohibit the execution of new exclusive contracts, but also render existing exclusivity clauses unenforceable.²²

The chief legal concern with this application of the new rules to previously executed contracts is that it may run

afoul of the Fifth Amendment’s Takings Clause, which the United States Supreme Court has ruled forbids the physical taking of property²³ or the interference with “settled investment-backed expectations” contained in contracts.²⁴

The FCC reasoned that its rule did not amount to a physical taking because it does not interfere with vested property rights, stating that its rule “does not require that any new entrant be given access to any MDU.”²⁵

According to the FCC, an MDU owner still retains the rights it has under relevant state law to deny a particular provider the right to provide service to its property.²⁶ Even if the new rules do regulate MDU owners, the FCC determined that it nevertheless has authority under the Cable Act to regulate property access agreements.²⁷ However, it does not appear that the FCC intends for the new rules to directly apply to or abrogate easements, if for no other reason than to avoid the Fifth Amendment Takings problem.²⁸

While there will likely be some dispute (and legal challenges) from property owners regarding whether the new rules effect a physical taking, the FCC’s legal authority in support of the retroactive application of the new rules to general contracts probably creates more of a legal problem for it.

In defense of its decision to nullify portions of existing contracts, the FCC applied the rule announced by the Supreme Court in *Connolly v. Pension Ben. Guaranty Corp.*²⁹ which involves determining: “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.”³⁰

In quick succession, the FCC determined that the new rules do not affect a taking under the three elements of the *Connolly* standard. First, the FCC determined that the new rules will have only a minimal economic impact on the service providers because they will still be able to use their wires and because they can continue to enforce other aspects of their contracts.³¹

The FCC does not, however, address the impact of the rules on property owners, who the FCC claims are not regulated by these rules. With regard to the interference with investment-backed expectations, the FCC reasoned that MDU contracts have been under scrutiny for “over a decade” and therefore all parties to these contracts have been on notice that they may be subject to regulation.³² This reasoning in the *Exclusive Access Report and Order* was the subject of pointed remarks by FCC Commissioner Robert McDowell, who stated that he was “concerned about the legal sustainability of the Order, should it be appealed. My concern is this: after unanimously inviting cable companies and building owners to strike such deals in 2003, the FCC may now be abrogating those exact same agreements immediately rather than waiting for them to expire and without providing a grace period. In some cases, cable companies relied upon our 2003 Order to make arrangements with owners of older buildings to wire them for the first time, or to upgrade them with newer technologies, in exchange for a limited period of time when they could be the exclusive video service provider to allow for recovery of their investments. The record indicates that many buildings may have been upgraded, or brought online for the first time, as a result of this policy.”³³

The telcos say cable operators are using exclusive building access arrangements to impede their attempts to construct competing multichannel video service networks in MDUs.

This, according to Commissioner McDowell, makes it difficult for the FCC to argue that parties were “on notice” that the regulations may change.

Finally, applying the last portion of the *Connolly* test, the FCC noted that the rule promotes an important and legitimate government interest, namely, advancing video competition.³⁴ Yet, according to the FCC, the rule does not go too far so as to affect a taking. This is mainly because the FCC believes it does not directly affect property rights or unregulated property owners.³⁵

While the FCC argues that its new rule does not amount to a regulatory taking, it is unlikely that the affected service providers and property owners are going to take the FCC’s statement as the last word on the matter. Rather, it is a near certainty that this issue will be appealed to federal circuit court to test the FCC’s reasoning and supporting evidence.

FCC’S AUTHORITY UNDER THE CABLE ACT

The FCC claims authority under Section 628 of the Cable Act.

The issue: In addition to the substantial legal questions surrounding whether the FCC’s rules effect a taking under the Fifth Amendment, there is another, perhaps more contentious issue regarding whether the FCC can regulate these agreements under the Cable Act in the manner attempted in the *Exclusive Access Report and Order*.

This is likely to be the bigger issue for the incumbent cable operators because the *Exclusive Access Report and Order* marks the first time that the FCC has interpreted its authority un-

The FCC’s authority to promote facilities-based competition in the video market through regulation is far less clear under the Cable Act than its authority under the Telecommunications Act of 1996.

der Section 628 of the Cable Act as broadly as it does here. If left unchallenged, the FCC’s action could have the effect of expanding its regulatory authority quite broadly to encompass virtually any facet of the cable TV industry that touches upon competitive concerns. To date the FCC has not exercised such authority.

Even cable companies that do not have a strong interest in preserving exclusive access agreements are likely to be very concerned about the jurisdictional precedent that the FCC has set. Putting aside any issues concerning the real estate industry, it is a near certainty that the incumbent cable operators will challenge the FCC’s effort to expand its authority in federal court.

In narrow legal terms, this issue involves the breadth of the authority granted to the FCC under Section 628 of the Cable Act, which the FCC relied upon as the primary source of its authority to adopt the ban on exclusive MDU agreements.³⁶

Section 628 bars cable operators from engaging in “unfair methods of competition or unfair or deceptive acts or practices” that have the purpose or effect of prevent-

ing or significantly hindering competing MVPDs from providing satellite programming to subscribers.³⁷

Historically, this section has almost uniformly been viewed as directed towards MVPD access to *programming*.³⁸ That is, this section was designed to keep cable companies from refusing to sell their programming to other video providers.

In this Order, the FCC adopted a much more expansive reading of the provision, concluding that Section 628 also applies to MVPD access to *consumers*.³⁹ Under the FCC’s new interpretation, Section 628(b) could conceivably be used as a source of authority to regulate virtually any aspect of the delivery of cable services to consumers that the FCC determines are unfair or deceptive and have the effect of impairing or hindering the provision of cable services to consumers.

According to the FCC, exclusivity clauses that prohibit access to MDUs are an “unfair method of competition or unfair act or practice” because they can be used to impede new entrants from providing video and other services to tenants in MDUs and thus have the clear effect of preventing an MVPD from providing satellite programming

to subscribers in contravention of “the plain language of Section 628(b).”⁴⁰

Although the FCC acknowledged that much of the legislative history of Section 628 focuses on preventing cable operators from restricting access to programming, it observed that Congress’s primary goals

The FCC has embarked on a period of regulatory activity reminiscent of its earlier efforts with regard to voice services. In the video market, the FCC’s primary aim is to ensure that competitive providers can construct duplicate networks to provide video service to all consumers.

While the FCC's regulatory ambitions have extended further into the details of the multichannel video services market, it has found that it must find creative ways to correspondingly extend its jurisdictional reach to give it the legal authority it needs to pursue its desired regulatory activities in that market.

in enacting this provision were to foster competition among MVPDs and to enhance consumer choice.⁴¹

As such, the FCC concluded that problems of unreasonable cable industry practices merely *include* restrictions on the availability of programming and that Congress clearly intended for the FCC to respond to other types of behavior as appropriate to “encourage arrangements which promote the development of new technologies providing facilities-based competition to cable.”⁴²

The FCC cited in its initial order adopting the program access rules to support this proposition. In that decision, the FCC stated that “although the types of conduct more specifically referenced in the statute... appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.”⁴³

Consistent with this reasoning, the FCC concluded that “the better reading” of the statute is that “any practices that unfairly deny MVPDs the ability to provide [satellite] programming to consumers are prohibited.”⁴⁴ The FCC further noted that the title of Section 628(c)(2), “Minimum Contents of Regulations,” indicates that any rules promulgated by the Commission pursuant to Section 628(b) must, at a minimum, cover the types of conduct constituting unlawful and discriminatory denial of access to programming described in Section 628(c)(2), but that the Commission’s authority under Section 628(b) is actually much broader.⁴⁵

OTHER SOURCES OF AUTHORITY

In addition to its reliance upon Section 628 of the Cable Act, the FCC also stated that it could rely on other sources of authority to regulate exclusive access agreements. Specifically, the FCC found that its ruling is consistent both with Section 706 of the Telecommunications Act of 1996,⁴⁶ which directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans by adopting measures that promote competition and remove barriers to infrastructure investment, as well as with the general goals of the 1992 Cable Act and the 1934 Act to promote competition and consumer choice and the broad availability of communications services nationwide.

However, as the FCC itself has in the past recognized, Section 706 is not an independent grant of jurisdictional authority. Rather, this section envisions inquiries into the deployment of advanced services and directs the FCC to improve market conditions for broadband deployment. As the FCC has stated:

In light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that Section 706 does not constitute an independent grant of authority. Rather, the better interpretation of Section 706 is that it directs us to use, among other authority, our forbearance authority under Section 10(a) to encourage the deployment of advanced facilities.⁴⁷

Accordingly, it is unlikely that the FCC has the independent authority to undertake whatever measure it wants just to implement the goals of Section 706.

Instead, it must have some other independent statutory source of authority to advance the objectives of Section 706.

Similarly, courts have found that the other sources of authority advanced by the FCC, namely Sections 4(i), 201(b) and 303(r)⁴⁸ confer a general “ancillary jurisdiction” to act where other sources of jurisdiction exist, but do not themselves confer jurisdiction upon the FCC where the source of regulation is not otherwise present in the FCC’s organic statute.⁴⁹

Thus, if a reviewing court does not agree with the FCC that it has authority to regulate exclusive access agreements pursuant to Section 628 of the Cable Act, the FCC is going to have a much harder time convincing the court that it otherwise has ancillary jurisdiction to regulate.

FUTURE REGULATION OF PCOS, DBS PROVIDERS AND OTHERS

In its *Exclusive Access Report and Order*, the FCC noted at several intervals that while the rules it adopted only apply to cable service providers, common carriers and OVS providers that are subject to Section 628 of the Cable Act, it expressly held open the possibility that it would extend its regulations to other MVPDs, such as PCOs and DBS providers.

To this end, the FCC included in its Order, a “Further Notice of Proposed Rulemaking,” which requests comments on whether it should extend its regulations to other providers and other arrangements.⁵⁰ The FCC committed to completing this inquiry within six months.⁵¹

Specifically, the FCC is seeking input on whether it should regulate other providers that were left out of the present Order, such as PCOs, DBS providers and other providers of MVPD services.⁵² The FCC seeks facts on the use of exclusive access agreements by these providers.

While the regulatory pendulum is now swinging with significant momentum in the direction of further regulation of activities that benefit incumbent cable operators' competitors to the detriment of the incumbents, it is likely that at some point soon the courts will step in to check that momentum, just as happened with the regulation of the incumbent local exchange carriers.

If the FCC determines that the use of exclusive access arrangements by these other providers is harmful to consumers, the FCC asks what kinds of remedies it should impose and what is its authority to impose them.⁵³ While the FCC is seeking factual input on these issues and ostensibly has not yet made any decision, it has already tipped its hand that it believes it needs to regulate these other providers.

For example, there are numerous references to regulatory "parity" in the *Exclusive Access Report and Order* and the associated statements of the Commissioners.⁵⁴ These are shorthand for the general FCC policy of treating providers of like services similarly, regardless of the method of service delivery. So where, as here, the FCC is imposing regulations on one set of service providers (franchised cable providers, common carriers, and OVS providers), it generally will try to find a way to treat similarly situated providers, such as PCOs and DBS providers, in the same manner.

Indeed, even more to the point, Commissioner Copps stated that he was:

particularly concerned about the potential of tipping the playing field in favor of particular services or particular competitors. Markets can move quickly in response to regulatory changes, and it may be that some MVPDs not covered by today's decision will attempt to fill the vacuum by

marketing themselves as the only exclusive game in town. Happily we will be addressing these competitive parity issues in the next six months. In the meantime, I would caution any MVPDs seeking to take advantage of this regulatory lag time that they do so at their own risk. I agree with several public interest commenters in this record who argued, "the Commission should apply the policy of access with an equal

plete action on all this, the better off consumers will be."⁵⁵

Let there be no misinterpretation: If Commissioner Copps has his way, these new rules will be extended to all MVPDs, including PCOs and DBS providers. As it currently stands, it appears that he may have the votes to achieve this end.

Commissioner Adelstein indicated in his statement in support of the *Exclusive Access Report and Order* that it should "be our policy objective to promote fair competition throughout the communications landscape."⁵⁶

Similarly, Commissioner Tate also stated that "In the interest of regulatory parity, it is essential that we seek to apply our rules consistently across all platforms in a timely manner."⁵⁷

While these comments are not binding on future action, they give as clear an indication as possible that at least these three commissioners are in favor of regulating PCOs, DBS, and other MVPDs. Whether the FCC has the jurisdictional authority to do so is a different matter. In fact, it is likely that this question (or the desire to avoid it) is what prevented the FCC from extending its regulations to these providers in the *Exclusive Access Report and Order*.

EXCLUSIVE MARKETING AND BULK BILLING

In the *Further Notice of Proposed Rule-making* the FCC is also going to determine whether to regulate exclusive mar-

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and impartial hand." In this regard, I'm pleased that my colleagues have agreed to conclude within the next two months the open proceeding examining the permissibility of exclusive contracts for telecommunications services in residential MDUs. I am also pleased that we will be looking at expanding the multi-channel video service providers (MVPDs) covered by the rule we adopt today. The sooner we com-

keting and bulk service agreements.⁵⁸ Exclusive marketing arrangements are those whereby a property owner agrees to only permit one provider to market services during the sales or lease process or, even anywhere directly on the premises.

Bulk billing arrangements are those that allow MDU owners, or groups of tenants, unit owners, or homeowner associations to obtain a bulk rate for video services as a group. These arrangements often involve the MDU receiving a bulk discount and receiving a single bill for all of the services rendered, which in turn may be paid by end users as part of a homeowners association fee, rental fee, or even as part of the purchase price of the property.

On the face of their statements, it appears that both Commissioners Copps and Adelstein are in favor of regulating these services. Commissioner Adelstein stated that he would have preferred to ban exclusive marketing arrangements as part of the present order.⁵⁹ He also stated that "Bulk billing arrangements are a more sophisticated and, perhaps, insidious form of exclusive agreements."⁶⁰

While the Commissioners appeared less convinced that bulk billing arrangements need to be regulated than they are of exclusive marketing, clearly the regulation of both of these types of arrangements is a real possibility. Again, this is subject to overcoming jurisdictional, and in the case of exclusive marketing, Constitutional First Amendment concerns.

Comments in response to the Further Notice of Proposed Rulemaking are due 30 days after publication of the Order in the Federal Register, so the comment date is February 6. Reply Comments are due 30 days after that, or March 7, 2008.

The Commission has committed to issue a decision relating to the

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Further Notice of Proposed Rulemaking within six months.⁶¹ The Commission also noted that it has a pending proceeding regarding the permissibility of exclusive contracts for telecommunications services in MDUs and that it intends to resolve that proceeding by mid-January, as this magazine goes to press.⁶²

CONCLUSION

The FCC's ban of exclusive building access arrangements represents a victory for the incumbent LECs, a setback for larger incumbent cable operators, and potentially a large business challenge for many smaller competitive entrants that rely on such arrangements as a means of market entry.

The FCC was apparently willing to write off any potential procompetitive benefits of these arrangements in order to foster direct facilities-based competition between the large incumbent LECs and the incumbent cable operators.⁶³

It is likely that representatives of both the real estate and franchised cable industries will pose legitimate legal challenges to the FCC's *Exclusive Access Report and Order*. While there is no cer-

tainty of success, these challenges do create significant uncertainty with regard to the longevity of the FCC's exclusive access rules. At the same time, the FCC will likely continue to investigate whether to expand its regulations of exclusive access arrangements in the first two quarters of 2008. **BBP**

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REFERENCES

- ¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 73 Fed. Reg. 1080 (Jan. 7, 2008).
- ² The FCC is also, as of this writing, in the final states of adopting new rules that may have the effect of banning exclusive access arrangements for telecommunications services (as opposed to video services discussed here) in residential multiple tenant buildings and developments. See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, CC Doc. Nos. 96-98, 88-57, 15 FCC Rcd. 22983 (2000);

The FCC went to great lengths to clarify that it does not intend to regulate builders, developers or property owners – at least not directly.

The FCC expanded the definition of MDU to include not only apartment, cooperative, and condominium buildings, but also other "centrally managed real estate developments," such as gated communities, mobile home parks, and garden apartments, but not hotels, dorms, or hospitals.

Parties Asked to Refresh Record

Regarding Promotion of Competitive Networks in Local Telecommunications Markets, Public Notice, WT Doc. Nos. 99-217, 96-98, DA 07-1485 (March 28, 2007).

³ *Id.*

⁴ Note that Section 628 of the federal Cable Act was codified at 47 U.S.C. § 548, so a reference to Section 548 of the US Code is synonymous to references to Section 628 of the Cable Act, which contains the same language.

⁵ *Exclusive Access Report and Order* at Appendix D.

⁶ *Exclusive Access Report and Order* at ¶ 60.

⁷ 47 CFR §76.2000 (a), see note 2 *infra*.

⁸ See, e.g., *Exclusive Access Report and Order* at ¶¶ 40-46.

⁹ 47 U.S.C. §§ 602(7); see also 47 U.S.C. §§ 602(5)-(7) (defining cable operator, cable service, and cable system).

¹⁰ 47 U.S.C. § 653(c)(1)(A).

¹¹ See *Exclusive Access Report and Order* at ¶ 61; see also discussion *infra*.

¹² *Exclusive Access Report and Order* at ¶¶ 7.

¹³ *Id.*

¹⁴ *Id.* at ¶ 28.

¹⁵ See, e.g., AT&T Comments at 11; Real Access Alliance ("RAA") Comments at 8-11, 13; Comcast Comments at 19-20; Community Ass'n's Inst. ("CAI") Comments at 3; Embarq Comments at 1 n.1; Qwest Comments at iii; Verizon Comments at 7 n.4.

¹⁶ *Exclusive Access Report and Order* at ¶ 1, n. 2 (quoting *Telecommunications Services Inside Wiring, First Order on Reconsideration & Second Report & Order* ("2003 Inside Wiring Order"), 18 FCC Rcd 1342, 1364 ¶59 (2003), *rev'd in part on other grounds*, *NCTA v. FCC*, 89 Fed. Appx. 743 (DC Cir 2004); citing *Telecommunications Services Inside Wiring, Report & Order & Second Further Notice of Proposed Rulemaking* ("1997 Inside Wiring Order"), 13 FCC Rcd 3659, 3748-53, ¶¶191-203 (1997)).

¹⁷ *Id.*

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Exclusive Access*

Report and Order at ¶¶ 61-66.

²² *Exclusive Access Report and Order* at ¶35.

²³ *Loretto v. Teleprompter Manhattan City Corp.*, 548 U.S. 419 (1982).

²⁴ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

²⁵ *Exclusive Access Report and Order* at ¶¶ 37, 56.

²⁶ *Exclusive Access Order* at ¶ 37.

²⁷ *Id.* at ¶ 59.

²⁸ *Id.* at ¶ 37; see also *Id.* at ¶ 55.

²⁹ 475 U.S. 211, 224-225 (1986).

³⁰ *Exclusive Access Order* at ¶ 56 (citing *Connolly*).

³¹ *Id.* at ¶ 57.

³² *Id.* at ¶ 58. And anyway, according to the FCC, these contracts are anticompetitive and do not warrant immunity from regulation.

³³ FCC *Exclusive Access Order*, Statement of Robert M. McDowell, Concurring.

³⁴ *Id.* at ¶ 59.

³⁵ See *id.* at ¶¶ 37, 60.

³⁶ *Id.* at ¶¶ 40-51.

³⁷ 47 U.S.C. § 548(b).

³⁸ See e.g., 138 Cong. Rec. H6487, H6533 (July 23, 1992) ("[t]he Tauzin Amendment, very simply put, requires the [cable industry] to stop refusing to sell its products to other distributors of television programs").

³⁹ *Exclusive Access Order* at ¶ 44.

⁴⁰ *Id.* at ¶ 43.

⁴¹ *Id.* at ¶¶ 45-46.

⁴² *Id.* at ¶ 45 (quoting H.R.

Conf. Rep. 102-862 at 92 (1992) (Conf. Rep.), as reprinted in 1992 USCCAN 1231, 1275).

⁴³ *Id.* at ¶ 49 (quoting *Section 628 Report & Order*, 8 FCC Rcd at 3373-3374, ¶¶40-41).

⁴⁴ *Id.* at ¶ 44.

⁴⁵ *Id.* at ¶ 48.

⁴⁶ Codified at 47 U.S.C. § 157.

⁴⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, 13 FCC Rcd. 24012, 24044-8 (1998).

⁴⁸ *Exclusive Access Order* at ¶ 60.

⁴⁹ See, e.g., *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *GTE Services Corp. v. FCC*, 474 F.2d 724, 735-36 (2nd Cir. 1973) (FCC cannot regulate data processing services provided by regulated entities); *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (FCC cannot regulate consumer electronic products that can be used for receipt of communications when those devices are not used for that purpose).

⁵⁰ *Exclusive Access Order* at ¶¶ 2, 61-65.

⁵¹ *Id.* at ¶ 66.

⁵² *Id.* at ¶ 61.

⁵³ *Id.* at ¶ 62.

⁵⁴ See, e.g., *id.* at ¶ 2, fn 109; Statement of Commissioner Michael J. Copps; Statement of Commissioner Deborah Taylor Tate; Statement of Jonathan S. Adelstein (should be our policy objective to promote fair competition throughout the communications landscape).

⁵⁵ *Id.* at Statement of Commissioner Michael J. Copps (citation omitted).

⁵⁶ *Id.* at Statement of Jonathan S. Adelstein.

⁵⁷ *Id.* at Statement of Commissioner Deborah Taylor Tate.

⁵⁸ *Id.* at 63.

⁵⁹ *Id.* at Statement of Jonathan S. Adelstein.

⁶⁰ *Id.*

⁶¹ *Id.* at ¶ 66.

⁶² As noted in footnote 2, *infra*, in this parallel proceeding the FCC is considering expanding the scope of its current ban on exclusive arrangements involving telecommunications service providers serving business customers in MDUs, to include retail customers.

⁶³ See *Exclusive Access Report and Order* at ¶¶ 26, 28.

One of the more controversial aspects of the FCC's new rules is its decision that they should not only prohibit the execution of new exclusive contracts, but also render existing exclusivity clauses unenforceable.