

## In Reversal, FCC Bans the Use of Exclusivity Clauses for Video Services

In action taken October 31, 2007, the Federal Communications Commission (FCC) unanimously adopted an order banning the use of exclusivity clauses in contracts for the provision of video services to residential properties.

The FCC staff says the text of the order will be released in two to four weeks, possibly sooner. At this point, only the general outlines and key findings of the FCC's actions are known, and that is based only on a FCC [press release](#) and individual Commissioners' statements issued after the October 31 meeting.

CAI will provide additional information as it becomes available. Additionally, with member input, we will review the order to determine how best to respond to the FCC.

### Reversal of Prior Ruling

The October 31 order represents a reversal of an earlier Commission order.<sup>1</sup> That 2003 ruling found little evidence that exclusive contracts stifled competition. The FCC said then that exclusive contracts benefit consumers because they allow community associations and property owners to negotiate for lower rates and service improvements.

### Application of FCC Ban on Exclusivity Clauses

The October 31 order applies to all multiple dwelling unit (MDU) properties, including condominiums, as well as other "centrally-managed real estate developments." Thus, agreements between cable operators and single-family community associations may be affected as well. In this order, the FCC aims to promote the ability of telephone companies to provide competitive video services.

Earlier this year, CAI submitted [comments](#) to the FCC in response to the Commission's March 27, 2007, Notice of Proposed Rulemaking on this subject. CAI opposed FCC regulation for various reasons, arguing that community associations are democratically governed organizations, capable of making their own judgments about the benefits provided by exclusive agreements, such as lower rates and commitments for service upgrades.

The October 31 FCC press release says the order "prohibits the enforcement or

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<sup>1</sup> (Telecommunications Services Inside Wiring, First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, MM Docket No. 92-260, 18 FCC Rcd 1342 (2003)(2003 Inside Wiring Order))

execution of existing exclusivity clauses and the execution of new ones by MVPDs [multi-channel video programming distributors] subject to section 628 of the Communications Act.” Based on the press release and statements from commissioners, this much is clear:

- The order applies to existing and future contracts for all types of residential properties.
- The order applies only to agreements granting exclusive access, and does not apply to exclusive marketing agreements. It also applies only to the specific contract terms granting exclusivity; it does not claim to override entire agreements.
- The order applies only to agreements entered into by “cable operators,” as defined in federal law, and affiliated entities that control cable programming channels. It does not apply to agreements with providers of direct broadcast satellite services, or with so-called “private cable operators,” which provide service without obtaining local cable franchises.

### Future of the FCC Order

At least one commissioner predicted that the FCC could be faced with explaining its reversal in court, saying “To flash cut to a new regulatory regime without a sensible transition period only begs for an appeal that could result in a court throwing out all of our Order, the good with the bad.” Such reversal comes only a short time after the Commission noted in its most recent inside wiring order that introducing additional providers into an existing multiple dwelling unit (“MDU”) building is very disruptive.<sup>2</sup>

The Commission also adopted a Further Notice of Proposed Rulemaking seeking comments on whether the FCC should:

1. Take action to address exclusivity clauses entered into by direct broadcast satellite providers, private cable operators, and other MVPDs, other than cable operators.
2. Prohibit exclusive marketing and bulk billing arrangements.

Finally, the FCC also announced that it will reopen a long-dormant proceeding examining exclusive contracts for voice telephone service, and plans to make a decision in that matter within the next two months.

For more specific information on this recent FCC action, access the FCC [press release](#), or the [FCC Commissioners](#).

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<sup>2</sup> (Telecommunications Services Inside Wiring, Report and Order and Declaratory Ruling, CS Docket No. 95-184, MM Docket No. 92-260, WC Docket No. 01-338, FCC 07-111 (rel.Jun. 8, 2007))