

JUNE, 2008 TELECOMMUNICATIONS REPORT

Matthew C. Ames & Gerard Lavery Lederer
Miller & Van Eaton, P.L.L.C.

July, 2008

I. EXECUTIVE SUMMARY

June continued the trend of active months in communications issues of interest to CAI members. Briefs were filed with the U.S. Court of Appeals for the District of Columbia Circuit to overturn the FCC ban on exclusive contracts for video service, while Verizon filed a petition for reconsideration at the FCC with respect to the agency's ban on exclusive contracts for voice service.

State legislation remains active on the cable front, and a mandatory access law for telecommunications providers passed the New York State Assembly.

II. FCC PROCEEDINGS REGARDING EXCLUSIVE AGREEMENTS AND BULK SERVICE CONTRACTS FOR VIDEO SERVICE IN MDUS (MB DOCKET 07-51)

A. Ban on Exclusive Video Contracts

The opening briefs in the challenge to the validity of the FCC's ban on the enforcement of "exclusive access clauses" in existing contracts with franchised cable operators were filed on June 6, 2008. Briefing will continue over the summer, with oral argument to be held late in the year.

B. Rulemaking on Private Cable Operators, Exclusive Marketing and Bulk Sales

When the FCC banned exclusive access clauses in MDU-video provider agreements last year, the FCC also issued a "Further Notice of Proposed Rulemaking" asking parties to address:

- Whether private cable operators should be covered by the exclusive ban;
- Whether the FCC should regulate exclusive marketing agreements; and
- Whether contracts for bulk service should be banned or otherwise limited.

There were numerous *ex parte* communications with the FCC in the month of June to address these issues. Five of these meetings were conducted by Miller & Van Eaton on behalf of the Real Access Alliance. These meetings were with the Legal Advisors to Chairman Martin and Commissioners Adelstein, Copps and McDowell, and with the staff of the Media Bureau.

In addition, a group of consumers – most of whom apparently live in condominiums and single-family developments subject to bulk agreements – has been very active at the FCC in urging the agency to regulate bulk agreements.

III. FCC BAN ON EXCLUSIVE VIDEO AGREEMENTS IN COMPETITIVE NETWORKS DOCKET (DOCKETS 99-217, 96-98)

In March, the FCC issued a Report and Order extending to residential buildings the current ban¹ on common carriers entering into exclusive agreements with the owners of commercial office buildings. On June 13, 2008, Verizon filed a petition for reconsideration, asking the FCC to clarify its order banning exclusive agreements for voice service in residential properties. Although Verizon said that it supports the ban, the company complains that the rules proposed are not competitively neutral because they only apply to common carriers. They assert that cable companies and other providers -- especially those using the Internet to provide voice service -- are not covered by the rule. They therefore ask that “in order to ensure fair competition for the ‘triple play’ of services by all providers, the same rules concerning the permissibility of exclusive access arrangements should apply evenly.” (p. 6, n. 8.)

IV. INSIDE WIRING PROCEEDING, CS DOCKET NO. 95-184 & 92-260

In the fall of 2007, the National Cable & Telecommunications Association filed an appeal of the FCC order declaring that cable television wiring located behind sheetrock is deemed inaccessible for purposes of the FCC’s cable inside wiring rules.² Briefs have been filed, but there has been no further activity in this matter. The Court has docketed the case as No. 07-1356.

V. ENFORCEMENT OF OVER-THE-AIR-RECEPTION-DEVICES (“OTARD”) RULES, 47 C.F.R. § 1.400 ET SEQ.

There was another OTARD petition filed in June, a copy of which was forwarded to CAI upon its receipt by Miller & Van Eaton. In this petition, the HOA instituted a preapproval process. That fact, alone, is likely to result in a ruling against the HOA, based on existing FCC precedent. In addition, the HOA is requiring the resident to install an HDTV antenna at a location that the resident says will not give him an adequate signal. It appears that the resident has not given any evidence that he would not be able to get an acceptable signal at the location required by the HOA. The FCC will probably merely take the resident at his word, as the burden of proof is on the association, not the resident. Unless the association can introduce evidence

¹ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-217 (March 21, 2008) (“*MDU Telephone Order*”)

² The order was published in the *Federal Register* on August 30, 2007 (Volume 72, Number 168) at pages 50074-50077.

demonstrating that the resident would be able to get an adequate signal, the FCC will most likely rule against the HOA.

VII. STATE LEGISLATION

A. Cable

On June 21, 2008, Louisiana Governor Jindal signed into law the newest of the state franchising laws. Louisiana's bill is unique in that it does not apply in any major communities, such as New Orleans, Baton Rouge and other "Charter Communities." The bill may be downloaded at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=503057>.

Verizon negotiations with New York City continue forward. It is very likely that the New York City Council will approve something before the summer is over. Because New York State has adopted a mandatory access statute for cable service, CAI might consider alerting its members that they could soon be confronted with the issue of addressing Verizon seeking access to their buildings for video service.

B. Telco Mandatory Access

Legislation to provide mandatory access in favor of phone service providers unanimously passed the New York Assembly in June. New York State has long had mandatory access in favor of cable operators, but telephone providers had not been afforded the same status. A similar bill failed last year in the Senate. The bill would add the following new subsection to existing Section 99 of the Public Service Law:

4. No building owner may discriminate against a telephone company or its ability to provide services to one or more tenants of a multi-tenant. Property that is owned or controlled by the building owner, including discriminatory terms and conditions by which a telephone company gains physical access to the property to place its facilities and provide telecommunications services to the property's tenants. The commission shall have jurisdiction to implement the provisions of this subdivision by appropriate rules and regulations and to adjudicate administratively disputes arising under this subdivision. In no event may the lack of agreement over terms and conditions of access delay the ability of a requesting telecommunications company to obtain access for more than thirty days following an initial request thereof.

The bill would also add the following new subsection to existing Section 228 of the Public Service Law:

4. (a) No provider of multichannel video programming or owners, lessors, managers or persons controlling or managing a residential multiunit building shall

enter into or renew any exclusive marketing agreement with regard to multichannel video programming services.

(b) For purposes of this subdivision, "exclusive marketing agreement" is a contract or other arrangement, other than a bulk sales arrangement, between the owner, lessor, manager or person controlling or managing a residential multiunit building and a multichannel video programming provider in which a multichannel video programming provider is granted preference or exclusive rights with regard to the marketing or offering of services, or access to the premises for purposes thereof.