

FCC Ban on Cable Operators Enforcement of Exclusivity Clauses:
Effect on Associations
February 2008 Update

by
Eliot G. Schencker
Michael C. Kim & Associates

On November 13, 2007, the FCC released its Report and Order and Further Notice of Proposed Rulemaking, confirming its October, 2007 announcement that the agency would ban the enforcement of exclusivity clauses¹ in existing video service contracts.

Under the Order, certain video service providers² are prevented from enforcing exclusivity provisions found in contracts with Multiple Dwelling Units.³ The Order applies to both existing and future contracts. The prohibition on enforcing exclusivity agreements applies to the provision of video programming services⁴ only, and is not contingent on whether the services are provided alone or as part of a bundled contract with other services.

It was initially expected that the implementation of this Order would begin in February of 2008; however, the FCC's decision has been challenged by industry groups which will likely delay the implementation by several months. In January of 2008, a lawsuit was filed in the United States District Court of Appeals for the District of Columbia by the National Multi-Family Housing Council and the National Apartment Association. The industry groups argue that the agency lacks the authority to under current law to regulate contracts between video service providers and community organizations.

The FCC decision may have little practical impact on existing contracts. If an association has an exclusive contract, its service provider may no longer enforce that provision of the contract, but this does not necessarily void the entire contract. Associations will need to check their contract to see if it contains a severability clause

¹ An exclusivity clause is a term within a contract which gives a provider, usually a cable company, the exclusive right of access or the exclusive right to provide video service in a community.

² The order applies to entities which are subject to Section 628 of the Communications Act of 1934 (47 U.S.C. Section 548), which statute applies to cable operators, telephone common carriers and open video system operators. Providers of Direct Broadcast Satellite services and "private cable operators," which are companies that provide video service without using local rights-of-way, are not covered by the statute or by the new FCC order.

³ Multiple Dwelling Units, for purposes of the FCC Order, include any multiple dwelling unit building (ex. Apartment building, condominium building or cooperative) and other centrally managed residential real estate development (Such as a gated community, mobile home park or garden apartment). The term does not include time share units, academic campuses & dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.

⁴ Video Programming means programming provided by or generally considered comparable to programming provided by a television broadcast station and is the service most commonly provided by a cable operator.

providing that the remainder of the contract is valid even if there is a change in regulations or federal law which causes a portion of the contract to be nullified. In that situation, the contract would remain valid, even if the exclusivity clause is not valid. Of course, if no such severability clause is in the contract, then the association may be able to seek additional service providers for the services.

While the Order does not apply to telephone or internet services, the FCC Order does seek comment on whether in the future the Commission should prohibit exclusive marketing and billing arrangements (also known as bulk service agreements⁵) as well as whether additional classes of providers should be subject to the Order.

It remains to be seen how the FCC Order will impact associations and its effect can only be determined if and when its rulings are implemented.

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⁵ Under bulk agreements, an association can negotiate on behalf of all its residents and presumably use the leverage of their number to obtain more competitive rates for services which generally results in more favorable rates for association residents.