

FC C Rule A gainst Exclusive Cable Provider Access in C IC s Upheld by Federal Appeals Court

by Matthew A. Drewes, Esq.; and Christopher P. Renz, Esq., Thomsen Nybeck

For years, common interest communities had been approached by cable providers regarding “bulk” cable arrangements in which the CIC would obtain discounted cable rates for its members, and in exchange, the CIC would grant the cable provider the exclusive right to service the building. In most instances, the CIC would then assess a portion of the cost to each unit. In March of 2008, the FCC brought a close to these arrangements when its order went into effect prohibiting cable and telephone system providers from enforcing “exclusivity clauses” in contracts with “Multiple Dwelling Unit” developments (“MDUs”).¹ In May of 2009, the FCC prohibition was upheld by a Federal Court of Appeals despite ardent opposition by cable operators and apartment building owners.²

What Is Prohibited?

The order from the FCC prohibits cable and telephone providers from enforcing

exclusivity clauses, which includes any provisions that are already in place (or were even in place before the order) and any future contracts to be entered into between MDUs and providers. In other words, any term of a contract between an association and a telephone or cable provider which grants a single provider physical access to the development, or the sole right to provide the service, can not be enforced.

The FCC order does not prohibit associations from buying in bulk, it just doesn’t allow part of that arrangement to be exclusive in terms of a right to physical access to the building or in providing programming service.

Does It A ffect Your A ssociation?

The sweep of the language used by the FCC, “Multiple Dwelling Unit,” makes it fairly certain that the prohibition on exclusivity arrangements applies to your association. MDUs include apartments,



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cooperatives, condominiums, homeowner associations, gated communities and “other centrally managed real estate developments.” One of the reasons provided by the FCC for the prohibition is its finding that approximately 30% of Americans live in one form of an MDU.³

The effect on your association is difficult to predict because the sales agencies representing cable providers often act as though they are immune to these authorities. The FCC regulation, first passed in October 2007 (though not effective until March 2008), has not stopped many providers or their sales representatives from continuing to offer discounted rates and/or one-time payments to associations who grant an exclusive easement and/or sign an exclusive service agreement. Prior to the passage of this regulation, Minnesota state law already addressed some of the same concerns by requiring cable system operators to make their wiring available to a competitor who seeks access.⁴ The FCC regulation and subsequent court decision, however, should now remove any doubt that may have existed about the state law’s enforceability.

Why Is The FCC Interested?

One of the powers of the FCC, which was granted as early as the 1934 Communications Act, is to combat unfair competition among cable operators. After a great deal of study, and based on a significant amount

Exclusive Access continued on page 7



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Water Conservation Rate Structures: The New Law's Goals, Faults, and Effect on CICs



LUPKES

by Matthew Lupkes, CCAM, Property/Maintenance Coordinator,
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If water costs in Minnesota were to increase \$2 per 1,000 gallons, most people would not be too concerned. That's because they either do not consciously know their water consumption, or they would simply assume it's just another expense passed on to the end consumer. However, if the billing structure were to change in a way that singles out multifamily housing, businesses, and industries, more of a notice may be taken. Recently passed legislature is going to do just that.

The 2008 Minnesota Legislature passed a law requiring Water Conservation Rate Structures for all water suppliers in the metro by January 2010, and all other suppliers by January 2013. What this means is that the billing rate for water suppliers will vary based off of the amount of water used and the time of usage. Essentially, those who use more water will pay more per 1,000 gallons.

This billing structure is becoming prevalent all over the country as water demand con-

tinues to increase year after year. The goal of such a structure is to encourage those high usage entities such as business, industrial, and multifamily to be mindful and proactive in conservation methods. More specifically, Minnesota Statute 103G.291 describes a "conservation rate structure" as a type of rate structure that encourages conservation via "block rates, seasonal rates, time of use rates, individualized goal rates, or excess use rates."

Conservation Rate continued on page 9

EXCLUSIVE ACCESS *continued from page 5*

of data, the FCC determined that exclusivity clauses limit competition between cable providers and stifle deployment of Internet access.

The FCC determined that when there is a greater number of new entrants into the cable provider market, the results are: lower prices, greater channel offerings, and better diversity of information. The FCC found that exclusivity arrangements raise prices, limit access to certain programming, and delay deployment of fiber optic and broadband technologies.

The FCC was particularly concerned about the provision of "triple play" services where phone, internet, and cable could be provided in a single offering. The FCC wanted to ensure that there was healthy competition in providing those services, and found that the marketability of a bundled service offering would be suppressed if a cable provider already had exclusive rights to provide the television component of the bundled service package.

Also of concern to the FCC was its finding that in many MDUs, such as associations, the original developer would enter into an exclusivity arrangement for which

the developer (not the association) would receive a fee. The developer would then turn over the association to its members with this restrictive exclusive cable arrangement, while keeping the money.

Why Did the Court Get Involved?

A group of trade associations representing cable operators and apartment building owners brought a lawsuit claiming that the FCC had exceeded the powers it had been granted and claiming that the FCC had violated other federal acts. However, the Court disagreed with the challenging trade associations and found that this regulation falls within the powers of the FCC. It also found that the FCC's order was the result of a substantial amount of research and was based on a sufficiently detailed and convincing amount of data.

So What Now?

Now that a Federal Circuit Court has upheld the regulation, it appears that it is here to stay unless the underlying law is changed by Congress. MDUs, including homeowner associations, should proceed with the understanding that exclusivity arrangements with cable providers are

not enforceable in their current contracts, nor will they be enforceable in future contracts with those providers. ■

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Endnotes

¹ *Exclusive Service Contracts for Provision Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 F.C.C.R., 20, 235, 20, 255 (2007)

² *National Cable & Telecommunications Association v. Federal Communications Commission*, 567 F.3d 659 (D.C. Cir. 2009).

³ 20 F.C.C.R. at 20, 235 ¶ 1.

⁴ Minn. Stat. §§ 238.23, Subd. 1 and 238.24, Subd. 10

⁵ Matt Drewes and Chris Renz are shareholders with the Bloomington, Minnesota law firm of Thomsen Nybeck and each have extensive experience in the areas of homeowner association law. For more information on Thomsen Nybeck's association law practice, please visit www.tn-law.com.

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