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Bulk Cable: Not an Exclusive Relationship Any Longer

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By Christopher P. Renz, Esq. & Matthew A. Drewes, Esq.

In recent years, virtually every community association has been asked to consider an exclusive bulk cable arrangement, where the association purchases the cable services in "bulk" for all owners, then assesses a portion of the cost to each unit. Some like the option it provides to lock in discounted rates. Others say owners should have the right to choose their own providers. In the industry, smaller providers want to compete with existing cable powerhouses, and phone service providers want access to the cable companies' equipment. Providers who "bundle" cable, telephone and Internet are particularly interested in gaining a toehold. The Federal Communications Commission cited a desire to foster this competition when it passed regulation prohibiting exclusivity clauses in contracts to provide video or telephone services to "Multiple Dwelling Unit" developments ("MDUs").

What It Is

On October 31, 2007, the FCC passed a regulation prohibiting cable and telephone system providers from enforcing "exclusivity clauses" in contracts with MDUs. This means provisions that grant a single provider physical access to the development, or the sole right to provide a particular service, are unenforceable. The regulation does not affect direct broadcast satellite services, like DirecTV. Also, the regulation only invalidates exclusivity clauses; it does not void entire contracts.

When It Happens

The new regulation went into effect on March 7, 2008. It has no expiration date. Controversially, the prohibition is effective as to the enforcement of present exclusivity clauses as well as the execution of new ones.

Who It Affects

The regulation affects apartments, cooperatives, condominiums, and even gated communities and "other centrally managed real estate developments." The FCC intentionally cast a wide net, referring to developments whose residents own or rent distinct dwellings, but who share common spaces. That means residential common interest communities fall squarely within the targeted developments.

While the measure affects community associations, the FCC claims it is not asserting authority over them. It is prohibiting the providers themselves from enforcing exclusivity clauses, versus restraining the conduct of the MDUs.

Why

The regulation is intended to limit the providers' control over wiring. The Communications Act of 1934 authorizes the FCC to pass regulations that combat unfair competition among cable operators. The FCC determined, based on a substantial record, that exclusivity clauses limit competition between cable providers and stifle the deployment of Internet access. The FCC found that new entrants result in lower prices, more channel offerings, and a greater diversity of information. In contrast, it found exclusivity clauses create a significant bar to new entrants to the market, particularly "bundled" services and new services that offer advancements in efficiency such as fiber optic capabilities.

The FCC cited, as a specific example of the harm it wished to prevent, past abuses by certain developers. These developers would collect

a fee for granting exclusive access to the association before turning over control to the unit owners. This locked developments into lengthy exclusive contracts with providers they did not select, while the providers lacked incentive to introduce new technology.

How It Affects Us

In Minnesota, the new rule may still have an impact, even though it duplicates existing state law. For example, Minnesota law requires a cable system operator to make its wiring available to a competitor who seeks permission to do so. Moreover, MDUs have been prohibited from refusing to grant a particular provider access to the development. There had been speculation, however, that efforts by the states to regulate this area would be unenforceable. This rule eliminates that question.

What remains unclear is how to treat the easements granted by some associations to cable providers and what the legal obligations of the parties may be. Those associations who had the foresight to grant only a license are much better equipped to adjust to the new scheme. For those who didn't, a whole new set of issues await those who try to tackle this subject.

For now, though, exclusive relationships in bulk cable are officially a thing of the past.

Questions about membership? Contact our Member Services Department [here](#).

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