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## FCC 86s ESCs in MDUs

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The FCC recently enacted rules prohibiting the enforcement by cable operators of exclusivity clauses in Exclusive Service Contracts (ESCs) in multiple dwelling units (MDUs) such as apartment buildings, and in other real estate developments. This prohibition applies to *existing* ESCs, as well as to future agreements. In regards to the existing agreements, only the exclusive service provisions of the agreements will be unenforceable, while the remainder of the agreement would remain untouched by this action.

Beyond this general principle, the text of the Order clarified certain details:

- The prohibition only goes to clauses that prohibit access to the premises of the MDU by competitors (“building” exclusivity clauses). In contrast, clauses that grant exclusive use to the incumbent of the existing wires in the MDU (“wire exclusivity”) or prohibit the MDU owner from marketing the services of a competitor (“marketing exclusivity”) are not prohibited at this time. However, the Commission issued a Notice of Proposed Rulemaking (*NPRM*) that does seek comments as to whether exclusive marketing agreements are harmful to competition and should be prohibited.
- The other major issue that was clarified was the scope of the “other real estate developments” covered under the prohibition. We already knew that MDUs included apartment buildings, cooperatives and condominiums. For purposes of this Order, the FCC expanded this definition to include: gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. The FCC explicitly excluded the following from the prohibition: time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places, and other group quarters

characterized by institutional living, high transience and, in some cases, a high need for security.

- The FCC also clarified that to the extent a video provider is not a franchised cable operator, but is a common carrier or “open video system” provider, the prohibition applies to it as well. The Order does not apply the prohibition at this time to satellite operators or so-called “private” cable operators (who take programming down off of a satellite and then re-distribute it throughout an internal MDU network without ever crossing a public right-of-way). However, the *NPRM* seeks comments as to whether these sorts of entities enter into ESCs and whether the prohibition should be expanded to include them.
- While it was no surprise, the FCC explicitly stated that the prohibition on the enforcement of exclusivity clauses does not constitute a form of mandatory access for competitors to MDUs, and does not impose a duty on an MDU owner to allow multiple video providers within its premises. Mandatory access was never proposed here, and the FCC probably could not have justified such an action legally, even if it wanted to do it.

The prohibition on enforcement of building exclusivity clauses *goes into effect 30 days after publication in the Federal Register*, which has not occurred yet.

In its *NPRM*, the Commission seeks comments on the following issues:

- whether the prohibition on MDU exclusivity should be expanded to apply to satellite operators (DirecTV and EchoStar), “private” cable operators (whose facilities do not cross a public street and are therefore not franchised) and so-called “wireless” cable operators; and
- whether the prohibition should be expanded to apply not just to exclusive service agreements, but also to exclusive marketing agreements and bulk service agreements.

The FCC announced that it is endeavoring to take action on the above questions within six months. It also announced that it is likely to ban exclusivity on the provision of *telecommunications* services in MDUs in the next two months. It previously banned exclusive telecom agreements in *commercial* “multiple tenant environments” (MTEs), and its action on residential buildings has long been pending.

In any case, the Commission’s prohibition is far from set in stone. Appeals are expected to be filed by major cable operators and real estate interests. We will keep you informed

on this proceeding, which promises to significantly impact the dynamics of competition in the provision of cable TV and other multichannel video services.