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**CABLE CONTRACTS
IN APARTMENTS
AND MDUs**

**FCC BAN ON EXCLUSIVE
CABLE CONTRACTS**

**FROM
FEDERAL COURT RULING
AND
FCC REPORT**

I. INTRODUCTION

1. Exclusivity Agreements between cable companies and owners of apartment buildings and other multi-unit developments have an anti-competitive effect on the cable market; the Federal Communications Commission has **banned** such contracts.

2. The Commission believes that these deals—which involve a cable company exchanging a valuable service like wiring a building for the exclusive right to provide service to the residents—may be regulated under **section 628 of the Communications Act** as cable company practices that significantly impair the ability of their competitors to deliver programming to consumers.

3. The Commission thus forbade cable operators not only from entering into new exclusivity contracts, but also from enforcing old ones.

II. FEDERAL COURT UPHOLDS FCC BAN ON EXCLUSIVE CABLE DEALS

4. The United States Court of Appeals for the District of Columbia decided to back consumers by, unanimously upholding a Federal Communications Commission Order **banning exclusive cable video contracts** in apartment buildings and other multiple dwelling units (MDUs).

5. About four months after its decision on MDUs, the agency **extended the exclusivity ban to ISPs as well**. "There is no reason that consumers living in apartment buildings should be locked into one service provider," FCC Chair Kevin Martin declared shortly after the move. "Competition is ultimately the best protector of the consumer's interest."

6. The FCC banned carriers from entering into exclusive contracts to provide telecommunications services in residential apartment buildings, and prohibited enforcement of existing contracts that contain exclusivity provisions. The Appeals Court along with the Commission found that these **exclusive agreements** between carriers and building owners hurt consumers and harm competition, with little evidence of countervailing benefits.

7. Moreover, exclusive contracts have blocked access by consumers to competitive and popular "triple-play" offerings of voice, video and broadband. **Opening the door to competitive telecommunications services will help provide consumers with increased access to and choice of such providers.**

III. FCC FINDINGS AND REPORT

8. FCC findings show a large and growing number of Americans live in MDUs and a significant number of those MDUs are subject to exclusivity clauses. The beneficiaries of most of those clauses are incumbent cable operators.

9. Although Commission rules ensure that many residents of MDUs and other real estate developments may receive satellite-based video service, exclusivity clauses protect cable operators from competition in MDUs from new entrants into the MVPD (multichannel video programming distributor) business.

10. The Commission found that chiefly incumbent **local exchange carriers** (“LECs”) and other wire-based MVPDs that bring satellite cable and satellite broadcast programming to their subscribers are left out.

11. The Commission also found that the entry of incumbent LECs into the MVPD business has led incumbent cable operators to increase their use of exclusivity clauses in order to bar or deter the new entrants.

12. The FCC Rulings are reached primarily by authority under Section 628 of the Communications Act of 1934. That Section, in brief, makes it unlawful for cable operators to engage in certain unfair acts and methods of competition.

13. Specifically, **Section 628(b)** prohibits cable operators from engaging in unfair practices that have the purpose or effect of hindering significantly or preventing their competitors from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. Such video programming is made for broadcast or cable systems and is delivered by satellite to MVPDs, who in turn deliver it to their subscribers. This programming comprises the substantial majority of programming carried by MVPDs.

IV. HARMS CAUSED BY EXCLUSIVITY CLAUSES

14. By far the greatest harm that exclusivity clauses cause residents of MDUs is that they deny those residents another choice of MVPD service and thus deny them the benefits of increased competition.

15. Congress and the Commission have repeatedly found, and few parties dispute, that entry by LECs and other providers of wire-based video service into

various segments of the multichannel video marketplace will produce major benefits for consumers.

16. A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources. The most recent Cable Price Survey Reports show that the presence of a second wire-based MVPD competitor clearly holds prices down more effectively than is the case where DBS is the only alternative.

17. The fact that an incumbent cable operator may face competitive pressures on its pricing in a franchise area surrounding or adjacent to a MDU does not mean that the residents of a MDU served by the same cable operator will reap the benefits of such competition, including the option to choose among competitive providers, some of which may provide a reduced-priced bundled package.

18. This is particularly true when incumbent cable operators and MDU owners sign contracts before a competitive provider enters the market, a practice that the records indicate is quite common. Within the MDU, the incumbent, protected by its exclusivity clause from any competition it may face outside the MDU's boundaries, would have no incentive to hold down its prices within the MDU. The MDU's residents would also be denied the benefits of taking service from the new entrant, with potentially lower rates and better features than the incumbent's.

19. In addition, a new provider of MVPD services such as a LEC is likely to bring into a MDU some satellite-delivered cable programming that the incumbent beneficiary of the exclusivity clause does not. Absent the new entrant, the MDU's residents who favor that programming will be denied the programming of their choice.

20. This denial will fall disproportionately on minorities and low-income families (and on programmers specializing in programming oriented to those groups), and all residents will be denied increased competition in programming among MVPD providers. The FCC has agreed with Consumers Union that they should ensure that the "no segment of the population is denied the benefits of video competition."

21. LEC entry is also likely to result in increased deployment of fiber to American homes at lower cost per residence, and a new competitor offering the "triple play" bundle of video, voice, and Internet access service. An exclusivity clause in a MDU's agreement with a MVPD denies all these benefits to the MDU's residents.

22. Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas. More important, exclusivity clauses deny consumers in a part of the market the benefits that could flow to them, and exclusivity clauses confer few, if any, benefits on those consumers.

23. These harms to consumers are greater than they were several years ago, when new entry by LECs had not begun on a large scale, the recent increase in fiber construction had not yet materialized, and the popularity of the triple play was unproven.

V. Conclusion

24. The FCC and the United States Court of Appeals have concluded that exclusivity clauses cause significant harm to competition and consumers. Further, it has been concluded that although exclusivity clauses may in certain cases be beneficial, at least in the short term, to consumers, the harms of exclusivity clauses outweigh their benefits.

25. The evidence described in the preceding paragraphs demonstrates that exclusivity clauses, especially when used in current market conditions by incumbent cable operators, are a barrier to new entry into the multichannel video marketplace and the provision of triple play offerings. Such exclusivity clauses inhibit competition in these markets and slow the deployment of broadband facilities.

26. In doing so, exclusivity clauses deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content, as well as access to **alternative providers of broadband facilities** and the triple play of communications services their facilities support.

27. These harms to consumers are traceable to the incumbent cable operators' practice, increased recently, of using exclusivity clauses, sometimes in fine print and without adequate notice to MDU owners, to forestall competition, particularly when new competitors are about to enter the market. The FCC and the Courts do not wish to deny MDU residents these benefits based on incumbents' alleged need to be shielded from additional competition, or to subject them to something resembling the exclusive franchises of an earlier era.

Submitted By: **Fiber Stream LLC**

See: **Exhibit 1** (US Court of Appeals No. 08-1016 decided May 26, 2009)