

## Telecommunications Alert: D.C. Circuit Upholds FCC's Expansive Reading of Its Authority To Ban Exclusive Cable Contracts with MDUs

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The U.S. Court of Appeals for the D.C. Circuit, in an opinion authored by Judge David Tatel and issued earlier this week, upheld a 2007 FCC order barring cable operators from entering into exclusive contracts with owners of apartment buildings, condominiums, and other multiple dwelling units (MDUs).<sup>1</sup> The court's three-judge panel disagreed with contentions of the National Cable & Telecommunications Association (NCTA) and certain national real estate associations that the FCC had (1) applied Section 628(b) of the Communications Act too broadly and (2) failed to adequately explain its change of position from a 2003 order allowing exclusive contracts in MDUs. The court also held that applying the exclusivity prohibition to MDU contracts entered into prior to the date of the FCC's order was not unlawfully retroactive.

The D.C. Circuit's affirmation of the FCC's expansive reading of its authority under Section 628(b) of the Communications Act may set the stage for the FCC to use that provision to address other competitive issues affecting cable operators.

### The FCC's 2007 MDU Order

Observing that "approximately 30 percent of Americans live in MDUs, and their numbers are growing," the FCC found in its 2007 MDU Order that contracts granting one cable operator exclusive access to an MDU for the provision of video services harmed competition and were therefore prohibited by the Communications Act.<sup>2</sup> The FCC relied on Section 628(b) of that Act, which prohibits "unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor [MVPD] from providing satellite cable programming...to consumers."<sup>3</sup>

### NCTA's Challenge

NCTA argued that Section 628(b) had previously been applied only to practices of cable operators that prevent access to cable programming by competitive MVPDs, and not to practices involving cable's provision of video service to end users. The structure of the statute and its legislative history made clear that the scope of Section 628(b) was limited to conduct affecting competing MVPDs' access to cable programming. NCTA contended that the application of the statute to promote retail service competition in MDUs exceeded the Commission's authority.

NCTA also argued that the FCC had failed to adequately explain why it would no longer hold to the position it had announced in 2003 allowing exclusive cable contracts with MDUs. While administrative agencies are not prohibited from changing positions, courts generally require that the rationale for such changes be fully explained.

### Plain Language of Section 628(b) Found To Cover FCC Actions

Acknowledging that the legislative history and prior application of Section 628(b) showed Congressional intent to expand competition for cable programming, not cable service, Judge Tatel found that the plain language of the statute was broad enough to encompass the FCC's prohibition, holding that "[w]hat the Commission forbade lies within the literal terms of section 628(b)'s proscription." The legislative history did not support reading the statute's scope more narrowly than its plain language. In addition, while several provisions of Section 628 clearly address competing MVPDs' access to cable programming, these are described in the statute as "minimum contents of regulations" and suggest that Congress intended the FCC's implementing regulations to "cover a broader field."

## Inconsistent 2003 Order Held To Be Based on Inadequate Record for Action at That Time

Judge Tatel found the FCC's change from the position it articulated in its 2003 order was not a reason for reversal, since the prior order did not offer a reasoned basis for allowing exclusive MDU contracts, but instead simply noted that the FCC lacked an adequate record to impose such a prohibition. In the FCC's 2007 MDU order, Judge Tatel explained, the FCC extensively reviewed a refreshed record and explained new circumstances – primarily the rise of cable's "triple play" package of video, voice and Internet services as a competitive weapon – that led the FCC to decide that exclusive MDU contracts are inimical to competition for video services.

## Relative Benefits and Burdens of Applying Rules to Existing Contracts Adequately Weighed by FCC

The argument that the FCC's order represented retroactive rulemaking because it prohibited existing, as well as future, exclusive contracts was dismissed by Judge Tatel's explanation that existing exclusive contracts were prohibited only as to their future effects and enforcement. The FCC had not "rendered past actions illegal or otherwise sanctionable."

Judge Tatel also rejected arguments that, by affecting existing contracts, the FCC had upset prior expectations of both cable operators and MDU owners. He observed that legitimate expectations were left largely undisturbed because the lawfulness of cable's exclusive MDU contracts had been under active scrutiny by the FCC for more than a decade.

## Future Implications

Some of cable's telephone-company competitors seeking video customers in MDUs, such as AT&T and Verizon, have suggested that the court's affirmation of the FCC's expansive reading of Section 628(b) may prompt the agency to use that provision to address a wide variety of competitive issues in the cable programming marketplace. For example, competing MVPDs may contend that the court's broad interpretation of Section 628(b) provides a basis for extending the program access provisions of the Cable Act – which currently apply only to satellite-delivered programming – to terrestrially-delivered programming services. Just two days after the D.C. Circuit's MDU order was issued, Verizon filed a letter with the FCC saying that the court's decision on MDU contracts "confirms that the Commission has a solid statutory basis to address other unfair or anticompetitive practices of cable incumbents..., including their refusal to provide access to 'must have' regional sports programming."<sup>4</sup>

The D.C. Circuit panel did, however, indicate that there might be limits to the FCC's power under Section 628(b). The court observed that if the statute replaced the term "satellite cable programming" with "Spanish-language programming," it might be problematic for the FCC to forbid exclusivity contracts by reasoning that if competitors cannot serve a building they cannot provide Telemundo. Acknowledging the possibility that the statute could be applied in ways that created an overbreadth problem, the court declined to find such a problem in this instance.

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There is no indication yet whether NCTA or other appellants will ask for an *en banc* hearing at the D.C. Circuit or ask the Supreme Court to review the decision. Moreover, there is as yet no indication when the FCC might act on a parallel rulemaking it has opened on exclusive MDU video contracts with DBS companies like DIRECTV and DISH Network.

Please contact your Mintz Levin telecommunications attorney, or any attorneys listed in this Alert for additional information as we continue to follow these issues.

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### Endnotes

<sup>1</sup> *Nat'l Cable & Telecomm'ns Assoc. v. FCC*, No. 08-1016 (D.C. Cir. May 26, 2009).

<sup>2</sup> Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22, FCC Rcd. 20235, ¶ 1 (2007) ("*FCC MDU Order*").

<sup>3</sup> 47 U.S.C. § 628(b). Section 628(c) authorizes the FCC to adopt regulations to enforce Section 628(b). 47 U.S.C. § 628(c).

<sup>4</sup> Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Michael J. Copps, Acting Chairman, FCC (May 28, 2009) (on file in the FCC Electronic Comment Filing System).

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