FCC Ruling Prohibits Contracts Granting Exclusive Access

By Attorney Lee Schofield

A large and growing number of Americans make their homes in buildings that contain multiple dwelling units under one roof, whether in an apartment, a cooperative, or a condominium. In the past, when it came to providing cable service to these homes, landlords or association boards would often enter into exclusive (meaning no other cable providers were permitted to offer programming to residents) long-term contracts with a cable provider to provide cable television to a particular residential building or buildings. There were various economic reasons for these contracts, for instance, building owners and cable companies would argue that exclusivity in agreements allowed them to offer reduced rates to residents since property managers could negotiate a volume discount in exchange for guaranteeing a large number of customers for a provider. Cable companies also argued that exclusivity provided an incentive to extend cable network and service into condominiums, cooperatives, apartments, and other residential communities in areas where the initial barriers to service were high.

These exclusive arrangements between residential communities and cable providers are now a thing of the past. In October 2007, the Federal Communications Commission ("FCC"), in a Report and Order and Further Notice of Proposed Rulemaking, banned long-term exclusive contracts to provide cable video to apartment, condominium, and cooperative buildings, as well as to communities of single family homes. The five-member FCC was unanimous in its ruling, and an attempt by multi-housing associations and large cable providers to stall enforcement of the ruling has recently been struck down in the federal court system. The justifications for the ruling are, broadly speaking, that exclusive contracts stifle competition, consumers usually benefit from increased competition, and everyone, regardless of where they live, should have a choice in cable providers. The FCC's ruling applies both to exclusive access and to exclusive marketing provisions in contracts with cable providers. The FCC's ruling has not yet become a federal regulation since, in its order, the FCC called for comment as whether it should take similar action with respect to direct satellite services and private cable operators not using local rights-of-way.

If your community has a contract with a cable provider, this ruling may not terminate the contract; however, it will render certain provisions of the contract (namely the ones that call for an exclusive contract) unenforceable. The full impact of this ruling upon residential community associations is not yet known, and will not be known for some time. One result in the short term

may be that discounted cable service and installation rates will begin to disappear as current cable contracts expire, if those discounts were granted by the cable companies in exchange for exclusivity rights. However, if the ruling succeeds in its stated goal of increasing competition, over the long term the effect upon residents and associations may be positive.

We will continue to work with all of our Association clients in keeping them abreast of any new developments in the law with respect to this FCC order. If your community or association is under contract with a cable or satellite provider, that contract should be reviewed by a qualified legal professional to determine whether or not it contains exclusivity provisions, and, if so, what effect this FCC ruling might have on the contract once it becomes a published federal rule.

If you require professional legal assistance with such contract review, or if you just wish to obtain further related information on this topic, please contact Attorney Lee Schofield *or one of our other attorneys.*